

Land and reparative justice in South Sudan

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Land, reparations and transitional justice are linked in South Sudan. The African Union's 2014 inquiry saw land grabbing as among the accumulated grievances and called for land reform as part of transitional justice processes. Yet the 2018 peace agreement doesn't address land in its transitional justice framework. This report discusses citizen's views on the issue and recommends that land be addressed as part of the post-war reconstruction of South Sudan.

Key findings

- ▶ Land conflict is linked to the 1997–2007 liberation period and was exacerbated by the 2013 and 2016 civil wars.
- ▶ Contradictory land laws and unclear land policy led to violence between communities.
- ▶ Land grabbing by generals is considered a dividend of the liberation struggle. The militarisation and politicisation of land has increased land grabbing by creating private chieftaincies linked to politicians and the military.
- ▶ Women are disproportionately affected by land grabbing, especially in customary systems in which inheritance rights are limited.
- ▶ 87% of respondents believed the Compensation and Reparations Authority (CRA) could provide redress to conflict-related violations, including those related to land.
- ▶ There is a preference for restitution and not compensation, especially where land grabbers are known.
- ▶ 70% of respondents prefer communal rather than individual compensation for lost property.
- ▶ Despite the declining authority of traditional leaders on land matters, 93% of respondents approved of customary land dispute resolution in the current situation.
- ▶ Land regulations often erode the power of the people, privileging land management by government. This has resulted in mismanagement of land, multiple title deeds, land registration disputes and false documents.

Recommendations

The Transitional Government of National Unity:

- ▶ Place land grabbing within the transitional justice framework while adhering to Revitalised Agreement on the Resolution of the Conflict in South Sudan.
- ▶ Conduct an inquiry on land and its impact on the peace process, aiming to design legislation for the CRA.
- ▶ Design a reparations programme in consultation with local and international actors, taking into account citizens' preferences on reparations.
- ▶ Ensure an independent and transparent recruitment process for commissioners, based on public vetting and the exclusion of those perceived to have perpetrated human rights violations, including to do with land.
- ▶ Expedite the adoption of the land policy and review of land management provisions in the Land Act of 2009, the Local Government Act of 2009 and the Transitional Constitution of 2011.

- ▶ Define the land-management roles of the community, local government, state and the national government, clarifying institutional roles and determining whether the registry remains with the judiciary or is moved to the land ministry.
- ▶ Formalise the customary process as a separate yet legitimate part of the land review process.

African Union:

- ▶ African Commission on Human and People's Rights must provide timely technical guidance on the formation of the Commission for Truth, Reconciliation and Healing and the CRA.

International community:

- ▶ Capacitate local civil society to work with the government to advance transitional justice.
- ▶ Provide financial and other resources for the CRA to ensure its independence and effectiveness.

Introduction

The relationships between land, reparations and transitional justice have not been fully explored in many countries undergoing transition from war to peace.¹ In South Sudan, the debates about these important components of development, economic growth, peacebuilding and reconciliation has been unclear, both in terms of the country's institutional and legal frameworks regulating land use and in the Revitalised Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) that formally introduced transitional justice as an essential precondition for sustainable peace in the country.²

Discrepancies arise from the pre-independence realities of the land management system that persisted in South Sudan as an independent country, and are compounded by the failure to recognise land-related conflicts as an integral part of the forms of transitional justice described in the 2015 and 2018 peace agreements.³

Both agreements fail to provide an explicit framework for addressing land in the chapter on transitional

justice so recognising land as a transitional justice issue remains important. First, the rights of internally displaced persons (IDPs) to return, relocate and/or settle where they are must be addressed. The notion that individual rights to land should be tied to people's ethnicity has amplified ethnically biased land conflicts, and this must be addressed as part of the transitional justice process. Second, the 2014 report of the African Union Commission of Inquiry on South Sudan⁴ (AUCISS) highlighted land grabbing as being among the accumulated grievances that must be addressed.⁵

Before the AUCISS report, the government of South Sudan had already initiated a process aimed at establishing national consensus on a land policy. For example, public consultation was conducted to solicit the views of civil society, traditional leaders, researchers and scholars.⁶ This process, however, was seen as insufficiently inclusive and transparent, though it has provided substantive sources of information that were central in the preliminary drafting of the policy, including the question of the extent to which customary land processes would apply.

Map 1: South Sudan



In 2013, the South Sudan cabinet adopted the draft land policy paving way for a parliamentary review.⁷ In 2014, the policy was presented to the then National Legislative Assembly (NLA) for deliberation and adoption, but could not gain traction. Similarly, in 2019, the parliament revisited the land policy development process, but the land ministry asked that the document be recalled for further consideration.⁸

The R-ARCSS calls for an in-depth national debate to review the current national policy and the Land Act of 2009,⁹ whereas the draft land policy provides an opportunity to develop a context-specific regulatory framework that recognises the issues of post-war land-related conflicts, security of property rights and the extension of statutory protection for land held under the customary land tenure arrangement.¹⁰

Structure of the report

This report provides a coherent account of the historical, legal and practical realities of land, reparations and transitional justice in South Sudan. The first section describes the methodology and the demographic distribution of the respondents. A detailed statistical account of the respondents is provided in a table format. The nexus between land, reparations and transitional justice is then described, helping the reader to make sense of the interrelationship between the three areas.

The second section of the report analyses the findings according to the different themes that emerge. The report summarises respondents' perceptions of the root causes of land conflict, pre- and post-2013 land-related issues and driving factors such as the militarisation and politicisation of land and the emerging legal and institutional threats to the resolution of conflict over land. The next section looks at how land is presented in the 2018 R-ARCSS and how the Compensation and Reparations Authority (CRA) is seen as a tool to address land conflict. Finally, the conclusions of the report are presented.

Methodology

This research grows out of a previous study conducted by the Institute for Security Studies (ISS), in 2019, on citizens' perceptions of transitional justice processes in South Sudan,¹¹ in particular the respondents'

perception of the relationship between land and the broader transitional justice process as enshrined in the 2018 R-ARCSS. Seventy-eight percent of those who participated in the previous study preferred land-related disputes to be resolved through the proposed transitional justice processes. This research aims to understand whether unresolved land conflicts could in fact be resolved by these transitional justice mechanisms.

The research was conducted by ISS in collaboration with a local researcher during the months of July to September 2020. Two data-collection methods were adopted: Key Informant Interviews (KIIs) and Focus Group Discussions (FGDs). They covered five locations in South Sudan: Juba, Yei, Yambio, Wau and Magwi. A total of 74 (44 male and 30 female) respondents were interviewed as key informants, and 188 (96 male and 92 female) participated in the FGDs.

It is important to note that this research was conducted during a public health emergency – that of the COVID-19 pandemic – and the related restrictions shaped the data collection process. For example, the researcher had to adapt to new health realities, including the use of masks and social distancing measures during the FGDs and ensuring that part of the KII process was conducted remotely. A detailed demographic analysis of the respondents is provided below.

The research asked whether land conflicts could be resolved by transitional justice mechanisms

In selecting the five locations, the researcher considered factors such as the relevance of the locations to the topic of study, the presence of IDPs, evidence of land-related conflicts, ethnic diversity and logistical as well as security considerations. Although these locations may not reflect the full diversity of the people of South Sudan, the researcher was nonetheless able to get detailed findings from people in those areas. Each of the locations had specifically applicable data-collection tools, which included a questionnaire translated into the dominant local language.

The scope of the study was mostly confined to respondents' experiences since the independence of

South Sudan in 2011. Because of the historical roots of the situation today, and by the complementary mandates of the Commission for Truth, Reconciliation and Healing (CTRH) and the CRA,¹² the research also had to consider concerns related to land and reparations that might have occurred before independence.

Respondents' demographics

Several factors were considered in determining the kind of interviewees required for this research. Apart from factors such as security, accessibility and ethnic diversity, the researcher also considered age and gender representation.

As can be seen in Table 1 below, the lowest age was 18 years and the highest was 74, with an average of 46 year. Of the 74 KIs, 40% were women and 60% male, whereas in the FGDs 53.6% were male and 46.4% female. Different categories of people participated in the KIs and FGDs, notably teachers, lawyers, members of civil society, medical professionals, traditional leaders, religious leaders, women and youth, as shown in Table 2.

The researchers also spoke to people with different levels of education, the greatest number being in possession of secondary school certificates, followed by university graduates, intermediate school, tertiary institutions and

Table 1: Socio-demographic characteristics of the key informant interviewees

Key variables		Frequency (N=74)	Percentage (100%)
Age (in years)	18 – 29	13	17
	30 – 39	23	31
	40 – 49	16	21
	50 – 59	17	22
	Over 60	7	9
Gender	Male	45	60
	Female	30	40
Highest education levels	No formal education	4	5
	Primary school leavers	3	4
	Intermediate school leavers	15	20
	Secondary school graduates	18	24
	Tertiary College graduates	13	17
	University graduates	17	23
	University graduates (post-graduates)	5	7
Occupations	Students and youth	3	5
	Technical professionals (teachers, engineers, lawyers, mechanics, doctors, health workers, etc.)	28	37
	Civil servants (MPs, government, NGOs, etc.)	18	24
	Members of civil society (activists, ordinary citizens, etc.)	21	28
	Clergy (pastors and other church leaders)	5	7

Table 2: Socio-demographic characteristics of the FGDs respondents

Location	Number of FGDs	Total % (FGDs)	Overall (%)	No of males	Male (%)	No of females	Female (%)
Juba	5	44	23	25	26	19	21
Magwi	4	30	16	13	14	17	18
Yei	6	45	24	22	23	23	25
Yambio	5	43	23	23	24	20	22
Wau	4	26	14	13	14	13	14
TOTAL	24	188	100	96	100	92	100

finally citizens, some of whom have not received formal education. Before the research was written up, the preliminary findings were subjected to validation from range of participants in order to crosscheck facts and correlate information gathered in the five locations.

Overview of South Sudan's land tenure system

South Sudan's land tenure system is the product of a long history of accumulated grievances and deep-seated political contestations that emerged during the liberation struggle with Sudan.¹³ Under Sudan's land administration system, the regulation of land was mostly centralised and directly managed as the property of the state.

This version of land authority led to the misappropriation of land in Southern Sudan, leading to massive displacement and untold suffering of civilians, especially in the oil-producing states of Upper Nile and Unity.¹⁴ This displacement was a driver of the pursuit by the Sudan People's Liberation Movement (SPLM) of alternative forms of land tenure in the Sudan. The negotiation of the wealth-sharing protocol of the 2005 CPA gave the SPLM the opportunity to assert its commitment to changing the land tenure system, at least in the south of the country.

The CPA provided a sharp contrast to the way land had been managed in Sudan, and offered a way to show how it would be regulated in Southern Sudan from that point on. For example, the parties agreed that the regulation of land tenure, usage and exercise of rights would be a concurrent competency exercised at the appropriate level of government.¹⁵ This provision gave Southern Sudan,

then an autonomous region, the opportunity to adopt a new land tenure system, one which would ultimately be retained by the independent South Sudan.

Although it was codified in the transitional constitution of South Sudan, the notion that land belongs to the community could be seen as primarily a negotiating tactic used by the SPLM to win favour with marginalised communities.

Legal framework on land tenure

The framework for the regulation of land tenure in South Sudan is provided in Article 170 (1) of the 2011 Transitional Constitution of the Republic of South Sudan, built in part on the Land Act and the Local Government Act (both 2009). These laws legislate a land tenure system encompassing public land, community and private land.¹⁶ For instance, the transitional constitution (as amended) states that 'the regulation of land tenure, usage and exercise of rights thereon shall be governed by this Constitution and the Law'.¹⁷ Yet the implementation of the Land and Local Government Acts continues to present legal and practical dilemmas, as described in this study.

First, it should be noted that the Transitional Constitution espouses the continuity of all laws enacted prior to the independence of South Sudan in 2011.¹⁸ The land laws thus derive from the interim constitution that was part of the Comprehensive Peace Agreement (CPA) of 2005 and, subsequently, from the Transitional Constitution of South Sudan. Second, in practical terms, the circumstances in which the laws were first enacted were

substantially different from the new realities facing South Sudan as an independent state.¹⁹

Among the legal issues that emerged in this context are the appointment of sub-national land management structures, the duplication and poor segregation of powers between national and sub-national levels of the government, and the existence of clauses that do not conform to the 2011 constitutional provisions.²⁰ In essence, South Sudan continues to apply retrospective legal frameworks in the application of both the land Act and the Local Government Act.

The same laws, however, recognise the incorporation of customary laws and practices in the land tenure legal framework of South Sudan.²¹ This constituted an acknowledgement that customary law has an important role in governing land ownership today, as it had before the independence of South Sudan.²²

The government's recognition of traditional practices to do with land tenure may be seen as a form of reparation that recognises the sacrifices made during the liberation wars, permitting some degree of self-determination. At the same time, customary land tenure and government control overlap to cause some confusion: the constitution of South Sudan states that all land is owned by the people, yet simultaneously empowers government to regulate land use.²³

Customary law is important in governing land ownership today, as it was before independence

The interpretation of this provision often erodes the power of customary land processes, giving dominance to the government. Thus there is some ambiguity about what a customary land tenure system would actually entail, and raises questions about who has the ultimate power to decide on matters of land. The constitution and the Land Act of 2009 empower all appropriate levels of government to regulate the ownership and usage of land, including land held or acquired by any level of government and community land (traditionally or historically held or used by local communities), as well as private land owned by any person and/or investment land under leasehold.

As land becomes increasingly lucrative in many urban and rural settings in South Sudan, this land administration has created multiple layers of bureaucracy that favours the interests of corrupt government officials. If the land is being associated with subterranean and other natural resources such as petroleum, gas and solid minerals, the ownership of such land automatically shifts to the government.²⁴

Land and reparations in the R-ARCSS

The links between land and post-war reparations are not explicit in the R-ARCSS. These issues are presented as separate components of the peace agreement. For example, Chapter IV of the agreement sees land as a component of reform and emphasises the need to initiate an in-depth national debate that would lead to a review of current national land policy and the 2009 Land Act.

The agreement acknowledges that South Sudan's legal framework on land requires reform.²⁵ It also highlights, among other issues, the problem of land-grabbing, the absence of an independent land registry, and the need to empower the South Sudan Land Commission (SSLC) at the various levels of government. The commission is mandated to handle the arbitration of land issues and to receive the claims of those seeking land restitution at both national and subnational levels.²⁶

Chapter V of the R-ARCSS, on the other hand, broadly provides for transitional justice, accountability, reconciliation and healing in the post-war context, with the Compensation and Reparations Authority (CRA) conceived as a complementary mechanism to the Commission for Truth, Reconciliation and Healing (CTRH) and, to a lesser extent, the Hybrid Court for South Sudan (HCSS). The CTRH receives applications for compensation and makes recommendations to the CRA on compensation and reparation.²⁷

Compensation in the form of material and financial support is to be made to citizens whose property was destroyed during the conflict,²⁸ but this provision does not say whether compensation is due for land lost to land-grabbing during the conflict. Furthermore, the peace agreement fails to clarify whether the problem of land tenure is a conflict-related human-rights issue or the product of accumulated historical injustices. The 22 years of conflict preceding the agreement left a host of land

problems to be dealt with, and the more recent conflict in the area has superimposed a new set of problems on top of the old ones.

Indeed, in a 2019 study of citizens' perceptions of transitional justice processes in South Sudan,²⁹ 78% of respondents expressed the view that if land-related problems are not resolved under the current transitional justice processes, they could trigger renewed violence between and within communities. Given this perception, it would be important to establish a transitional justice process that recognises and works collaboratively with existing government institutions.

This study is intended to interrogate the relationship between land, reparations and transitional justice, but also to look further and to interrogate why citizens' concern with the resolution of land-related conflict seems to focus, now, on the provisions of Chapter V of the peace agreement rather than on the existing institutions meant to deal with land.

Nexus between land, reparations and transitional justice

'Ownership claims and control over land and property have played a defining role during Sudan's five-decade civil war that eventually led to South Sudan's independence on 9 July 2011.³⁰ Land-related disputes were a dominant feature of the conflict leading up to South Sudan's secession, and they continue to bedevil the independent South Sudan.

Recurring outbreaks of violence have resulted in the displacement of nearly two million people, now scattered across South Sudan as IDPs and across the region as refugees. Displacement of people as a result of conflict fuels insecurity, because those who are displaced have lost tenure of the land they used to live on. Without a clear land policy, hostilities between and within communities are likely to continue and even worsen.

Although the 2018 peace agreement still holds, its conditions are often violated, and ethnic and communal violence continues. The Commission on Human Rights in South Sudan recently noted the escalation of violence in six out of the ten states comprising that country: Central Equatoria, Jonglei, Lakes, Unity, Western Bahr el-Ghazel, and Warrap.³¹

The United Nations' Mission in South Sudan reported 575 incidents of subnational violence in the period from January to July 2020, an increase of 300% compared to the same period of the preceding year.³² This escalation in violence has resulted in the deaths of hundreds of civilians and the displacement of about 80 000 people in 2020 alone.³³ Despite the peace agreement, insecurity and instability in various regions in South Sudan continue.

If land problems aren't solved by the transitional justice process, they could trigger more violence

The violence is attributed chiefly to ethnic and communal strife, but the extent to which unresolved land disputes drive inter- and intra-communal violence has been only minimally investigated. Land-related disputes are becoming more frequent in major towns such as Yei, Juba and Nimule, but there is no clear understanding of the need for land reform or the links between land issues and increasing levels of violence. A common perception of respondents in the study is that land conflicts are the results of ethnic divisions exacerbated by the 2013 and 2016 civil wars. They are seen as a direct result of the dominance of certain ethnic groups in government and thus those groups' monopolisation of land tenure in South Sudan. In this, the dynamics of the civil wars are still playing out.

The present fragile peace, as constructed by local, regional and international actors, could easily collapse if there is no concerted effort to address the land and ownership issues that lie at the root of the conflict. What seems to be isolated disputes over land-grabbing and misallocation in areas such as Yei or Juba could quickly turn into a new civil conflict. The only way to resolve this and preempt renewed conflict over land would be to use transitional justice tools to address unresolved land disputes.

Placing land grabs within the frame of a broader transitional justice framework is a crucial step towards bolstering R-ARCSS and preventing the recurrence of violence in South Sudan. Ultimately, the responsibility lies with the government to help its citizens with land issues,

and to help displaced persons return home or, alternately, find suitable land on which they may be able to resettle.

Perceptions of the root causes of land issues

The most common problems to do with land in South Sudan are land grabbing, the displacement and relocation of IDPs, land misallocation and corruption, in the wider context of scarcity and increasing struggles over resources. The next section aims to uncover and analyse the root causes of land issues as perceived by respondents during key informant interviews and focus group discussions. There is no single definition of what constitutes land issues, but they are understood to encompass the factors given in Table 3 below.

Respondents see land conflict as a misunderstanding or disagreement between individuals, groups of people or tribes as a result of land grabbing. For the purposes of this research, land grabbing is understood to mean the control of land through ownership, lease or concession through illegal means.³⁴

IDPs fleeing conflict and thus searching for secure settlement constitute the group believed most frequently to have resettled on previously owned or occupied land. Similarly, land belonging to displaced populations is systematically seized by participants in the conflict. In some instances, host communities lay the blame for this on individuals masquerading as IDPs, whereas their motives for this settlement are seen as the need to grab and sell land to military actors. In these cases, land ownership details are altered to justify the subsequent sale.

Yet displaced people and returnees are not the only actors capable of land grabbing. Senior government

officials and military generals have been implicated in such practices too.³⁵ In these cases, the generals exert their authority to dispossess individuals and/or communities of their land,³⁶ and fear of reprisals lead to the displaced people or returnees selling the grabbed land to other military actors to avoid possible retaliation from powerful government officials or other military actors.

The extent to which IDPs are both party to and victims of land grabbing in South Sudan raises serious questions about the relocation of IDPs to their places of origin and their reoccupation of the land they used previously. The resettlement of IDPs is a key part of the transitional government's attempt to secure the wellbeing and safety of IDPs once they leave the Protection of Civilian (PoC) sites where they have sheltered.³⁷ Whether IDPs can return to their land, resettle elsewhere, or be integrated into their current locations are questions that add another layer to these issues of land and conflict.

Multiple land titles and illegal IDP settlements mean 'land belongs to those who occupy it'

Land misallocation and flawed land administration practices have often led to multiple, conflicting land titles; this has exacerbated disputes. The issuing of multiple land titles by authorities leads to power struggles over who can keep or occupy land between different title holders. The existence of multiple land titles and the illegal settlement of IDPs means that the idea that 'land belongs to the community' has become 'land belongs to those who occupy it'.

Table 3: Root causes of land issues in South Sudan

S/N	Factors as perceived by respondents	Frequency	Weighted %
1	Land grabbing	45	28%
2	Population growth and economic transitions	37	23%
3	Poor land use combined with increase in livestock	44	27%
4	Competition between and among agriculturalists and pastoralists	22	12%
5	Others: untrained land officials, government selling community land	16	10%

Land conflict also arises when migrating pastoralists, over a period of time, claim ownership of land. This appears to indicate that land grabbing is more common in urban than rural areas, though cases of land conflict between pastoralists and farmers has recently escalated because of insecurity and flood-induced migration. Farmers have accused pastoral communities of deliberately destroying farming livelihoods by grazing their animals on farmland and contaminating water points. Some farmers have even urged the government to remove pastoralists from land they appear to own.³⁸ Pastoralists counter this narrative by blaming their migration on natural disasters such as floods and, to some extent, on insecurity and dwindling grazing land.³⁹

Land is often taken by the government and given to companies without compensating the owners

There is also a perception that some land is undeveloped because there is an inability to develop it, which provides a justification for the new occupation of the land. Land left unoccupied and idle for longer than five years may be seized regardless of whether the owner is internally displaced or in a refugee camp. This can mean that the most capable developer takes ownership. Yet this form of apparent land grabbing ignores the fact that virtually all the land in the region is already owned, even if only under customary law in which provision is made for one or more seasonal migrating communities to make use of it.⁴⁰

The incidents mentioned above explain land disputes at the individual level, but the state has also been accused of unlawful land practices. Individuals and communities can lose their land under the pretext of government projects such as the building of schools, public parks, hospitals and the like, yet this land is often awarded to military generals and other high-ranking officials, and land taken by the government and awarded to companies is often done without compensation being awarded to the genuine owner. This is contrary to the provisions of the Land Act and the transitional constitution.⁴¹ If individual or communal land is grabbed in the absence of the owners, there is very seldom any compensation.

The practice of land grabbing has had various effects on respondents and their communities, including increased lawlessness (leading to revenge killings), complete or partial loss of livelihoods, mental incapacitation and increased health risks, as well as family disintegration. The consequences are stark: often families have to relocate to less productive land, and/or find other sources of income. Women are especially vulnerable in this respect, and are disproportionately affected by unlawful land grabbing, especially women who have been widowed or abandoned in the conflict. Unmitigated gender inequalities in South Sudan mean that these women are left to rear children and run households with only limited access to and ownership of land.

Whereas the 2011 Transitional Constitution affirms women's rights to own land under statutory law, the customary process makes it difficult for women to have access to or dispute land claims in the absence of a male relative.⁴² Furthermore, as previous research has shown, women face serious challenges in land-registration processes, because officials are often unwilling to assist women.⁴³ This gendered dimension in the access to land is another reason that an independent, well-resourced and comprehensive inquiry is badly needed.

Land problems before and after 2013

As mentioned, the problems of land acquisition in South Sudan predate its secession; in fact, these problems span the pre- and post-conflict era. As early as the 1970s, Sudan's Unregistered Land Act (ULA) declared all unregistered land, whether occupied or unoccupied, to be state property.⁴⁴ This allowed the state to dispossess local communities of their land, resulting in forced evictions, displacement, loss of livelihoods and the migration of thousands of people to Khartoum and parts of what is now South Sudan.⁴⁵ Such displacement fuelled the conflict in the south, galvanising support for the SPLM/A, which already opposed northern laws. Before secession and the CPA, conflict in Southern Sudan was linked to discriminatory land allocation processes, which helped to drive the liberation struggle.

Since the CPA and the secession of the south, land issues continue to generate conflict. A common perception of the majority of respondents in the research is that land conflict is a result of ethnic divisions

exacerbated by the 2013 and 2016 wars. They assert that land grabbing often takes place during or in close proximity to conflict. This assertion appears to be common among returnees and IDPs, who reported that loss of land and property became more widespread in the 1990s, the period when towns such as Nimule, Yambio and Yei were liberated by the Sudan People's Liberation Movement/Army.

The practice of land and property grabbing became common in the 1997–2007 period, as well as later, in 2013 and 2016, when there were eruptions of armed conflict. In 2013, particularly, violence engulfed South Sudan and led to the displacement of thousands of South Sudanese citizens. The close link between land grabbing and violent conflict explains the claims to land by some military generals and senior government officials to land. Land grabbing was considered a dividend of the liberation struggle, resulting in the militarisation of land disputes, as well as the dominance of political appointees in decision-making processes on land issues.

Militarisation of land and politicisation of chieftaincy

The militarisation of land issues appears to be a common and increasing trend in South Sudan. Militarisation occurs when chiefs, who are given authority under the customary system to act on land disputes, are accorded military training and ranks, provided with bodyguards, and directly enrolled on the government payroll. Hence the institution of chieftaincy is politicised and militarised, with frequent appointments of chiefs by political and military leaders advancing their own interests by bypassing the community and making decisions unilaterally on land-related disputes.

In some places in and around Juba, political appointments have led to chieftaincies with no prior knowledge or connection to the area

Chiefs who are appointed rather than hereditary have been accused of land misappropriation, in conflict with their customary duty to safeguard communal inheritance and land ownership rights. The resultant erosion of public trust has undermined customary land administration processes. In certain areas within and around Juba, political appointments have led to chieftaincies with no prior knowledge or connection to the area,⁴⁶ to the detriment of local communities.

At a time of ongoing conflict and the resurgence of violence, many South Sudanese people rely on customary land administration processes. But relying solely on local chiefs to administer land processes can reinforce ethnic cleavages as more dominant groups take control. 'In customary systems, access to land is closely tied to kinship and family relations, so individuals and groups from outside can be restricted from settling on community land.'⁴⁷ Thus there is a priority to formalise the customary



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process, as separate yet recognised, with its own checks and balances.

Emerging legal and institutional threats in land use

South Sudan's land conflict plays out in relation to an unclear legal framework, under-resourced institutions and a vague land tenure system. 'Since the beginning of the current conflict,' one commentary asserts, 'the lack of clarity around the official mandates to survey, distribute and allocate land has increased exponentially, in particular as these activities bring important revenues to a war-ravaged country.'⁴⁸

Respondents perceive government institutions at various levels as complicit and that they have failed to consult communities when allocating land for development projects. They see these institutions as grabbing community land for public use,⁴⁹ going against established customary rules, according to which not even landlords act on land matters without consulting elders in the community. Moreover, on other occasions and across many communities, senior and well-connected officials have been able to disregard court directives to vacate illegally occupied land.

Another challenge is defining and designating personal, communal and public land. The question of who actually owns the land highlights the tensions between varying perceptions: land is viewed as communal property but also, opposing this, as belonging to the state.⁵⁰ This disconnect between customary and statutory authorities adds another dimension to the conflict.

The 2009 Land Act, under Article 7.1, states that 'All land in Southern Sudan is owned by the people of Southern Sudan and its usage shall be regulated by the Government', but the Act does not clearly outline the roles and responsibilities of the land administration institutions at all levels of government. This confusion has been exacerbated by two separate and competing processes for land registration and allocation at the national level, as well as at the local community level, as explained in detail below.⁵¹

Lack of documentation to prove ownership

'In 2014,' according to the World Bank, 'an estimated 50 percent of the overall urban population of South Sudan resided on unregistered land.'⁵² More than half a decade

later, the lack of documentation and a standardised registration process and the issuance of multiple title deeds has created huge gaps in South Sudan's land tenure system. The 2009 Land Act requires land in urban areas to be demarcated and registered, but there is no standard method of land allocation in the rural areas.

To assess the extent of these gaps in the land tenure system, the respondents were asked whether they had any documents to prove ownership of the land they occupy and use. Respondents asserted that ancestral lands are mostly guided by customary practices, not formal requirements for land registration. Markers such as planted trees, graveyards and ancestral buildings can serve in the absence of land titles. It is worth noting that the absence of land titles may not necessarily mean transfer of ownership to someone who does have such documents. The second most common form of ownership is leasing out individual plots; this is especially common in urban settings, where the leasing is the responsibility of national or local authorities.

There are, essentially, two different processes for land registration. There is a government-led registration process that is mostly restricted to urban areas and encompasses title deeds and the leasing of property from the local or national authorities, and there is an almost subsidiary community-led registration process.

A manual registration process means that many title deeds can exist for the same property

Respondents were asked what their reaction would be if someone else claimed ownership of the land that they claim. Ninety-five percent asserted that they believe there are safeguards and mechanisms to verify the authenticity of land and property ownership. Cross-checking of the dates of registration in the general ledger for land registration determines to whom the land was first allocated. But this is not effective if the rightful owners have made use of the communal registration process and not the government registration process.

Thus several issues arise. First not all those who used the government-led registration process and have title deeds are indeed the rightful owners. The costs of

registering land may deter some indigent individuals from using this system, which further exacerbates inequalities. Second, because South Sudan has a manual registration process, multiple title deeds can exist for the same property. Even when registration does occur, the lack of a digitised system can lead to the duplication of title deeds, which in turn means that those with the most influence or power maintain possession of the land.

Some of the respondents would prefer a reformed judiciary to tackle land disputes. Others prefer to keep their documents until the threat of eviction has decreased. They say that, for land not formally registered, the chiefs and the community members can be used as witnesses to ascertain the correct ownership. At the same time, the community-led registration process suffers from a lack of oversight mechanisms, making it prone to corruption. Both these processes need standardised, clear guidance on their operations, so that South Sudanese citizens are fully informed and the system is less susceptible to abuses by those with power and influence.

2018 peace agreement and Chapter V institutions

The land-conflict nexus is evident throughout South Sudan's history, from long before the secession and independence. It is vital that land disputes be resolved within the current frameworks of the Land Act and the peace agreement. The present R-ARCSS provides for revision of the current policies administering land and calls for government assistance in mediating conflict disputes. Provision 4.8.2 of the agreement gives the Transitional Government of National Unity the responsibility to expedite these measures:

- Within twelve (12) months of the Transitional Period, initiate an in-depth national debate to review the current national land policy and the Land Act, 2009 in order to achieve consensus over land tenure, use, management and address issues of land grabbing, other malpractices involving land, carry out necessary reforms, undertake mapping, and to maximize economic utilization of land in South Sudan;
- Within eighteen (18) months of the Transitional Period, establish an independent registry of Lands at all levels of government for issuance of title deeds.

- Empower the Land Commissions at different levels of Government to develop and interpret legislation regarding land issues and to reflect customary laws and practices, local heritage and institutional trends;
- Assist in the mediation of conflicts arising from land.⁵³

The relationship of land and reparation was not explicit in the R-ARCSS, although both issues were presented as components of the peace agreement. Chapter IV recognises the need to review and reform the land tenure process, taking into account the provisions above, Chapter V elucidates the transitional justice mechanisms but does not explicitly mention land in this context.

Land problems are not only a result of the liberation struggle but also constitute human rights violations

Under the mandate and functions of the CTRH, the provision states: 'Without prejudice to the administration of and access to justice, the CTRH shall inquire into all aspects of human rights violations and abuses, breaches of the law and excessive abuses of power, committed against all persons in South Sudan by State, non-State actors, and or their agents and allies.'⁵⁴ Although it does so indirectly, this provision reads into and mandates the commission to look into land conflict and disputes. Therefore, while conducting the national review process to review land policy and in setting up the CTRH and CRA, land issues must be recognised not only as a by-product of the liberation struggle but as human rights violations that require rectification.

The study conducted by the Institute for Security Studies in September 2019 established a link between land and the proposed Compensation and Reparation Authority (CRA) of the R-ARCSS. Eighty-seven percent of the respondents in this study believed that the compensation and reparations programmes, once active, could provide redress to those who had suffered human rights violations, including those related to land and property.

The respondents also conceived the CRA as a complementary mechanism to the existing customary land dispute resolutions. Indeed, 93% acknowledged the role of customary land tenure management but

saw the power of the traditional leaders declining as a result of the politicisation and militarisation of land issues in South Sudan. Most importantly, factors such as urbanisation and the search for grazing land has aggravated the misappropriation of land, leading to an increase in the number of cases of land grabbing and the enforced displacement of the rightful owners.⁵⁵ The CRA is therefore envisioned as a land-mediating mechanism restricted to urban areas and a counter to the existential threat brought by the untouchable military generals and their political accomplices.

The R-ARCSS mandates the CRA, upon its establishment, to provide financial and material support to citizens whose property was destroyed during the conflict and help them to rebuild their livelihoods in accordance with a well-established criterion by the Transitional Government of National Unity (TGoNU).⁵⁶ Several questions have been asked as to what the CRA mandate entailed and whether or not such compensation should include redress and the restoration of land grabbed before and during the 2013 conflict.

CRA as a tool to address land issues

First, it is important to note that South Sudan does not have a history of formal reparation programmes, despite the evidence of accumulated grievances dating back to the 21 years of liberation struggle with Sudan, as well as grievances compounded by human rights violations documented since the 2013 conflict.⁵⁷ The CPA of 2005 barely considered reparations, though it did provide for comprehensive national reconciliation and healing.⁵⁸ This process was not implemented by the then government of Southern Sudan, which feared that it would cause old grievances to resurface and possibly endanger the unity of the South Sudanese people as they prepared for the January 2011 referendum.⁵⁹

It was the 2015 ARCSS that provided the means to enhance transitional justice: for the first time, the CRA was formally incorporated as one of the three transitional justice mechanisms, which aimed to provide financial and non-financial redress to citizens whose property had been destroyed during the conflict.⁶⁰ Regrettably, and despite being upheld by the 2018 R-ARCSS, none of these mechanisms have become active (at least by the time of this study).⁶¹

Ninety-three percent of the interviewees believed the accumulated grievances to do with land should be central in defining the mandate of the CRA, and that they should be acknowledged as a prerequisite for reconciliation and healing. This affirmation is tied to increasing resentment about the failure of government and the customary authorities to compensate for land losses, as provided for by the law.⁶² Their inability to confront the problems of enforced land grabs and the political co-option of some traditional leaders, who struggle to remain resolute in the face of corruption and fear of reprisal, are also factors.

The CRA should adopt customary land resolution practices and structures for working with chiefs

Recent evidence suggests an increase in the use of military power to violate existing land management norms by means of land grabbing, enforced evictions and the killing of lawful occupants.⁶³ Cases of deliberate attempts to undermine court rulings, through the intimidation of judicial officials who register land and officiate land cases, have also been recorded.⁶⁴ The use of force to undermine established land management structures has led citizens to support the CRA as an alternative to providing redress.

Interestingly, citizens express the expectation that, when it resolves land issues, the CRA should adopt existing customary land resolution practices and should build strong grassroots structures for collaboration with local chiefs. They believe that evidence of land grabs and other human rights violations could be more easily established, and compensation provided, at the local level rather than when the process is entrusted to central government alone.

Past experiences have created mistrust in the government's handling of reparations initiatives. For instance, the African Union Commission of Inquiry on South Sudan (AUCISS) cited several conflicts, including the 1991 Bor massacre, as example of conflicts that have been swept under the carpet and are seen to have a bearing on inter-communal conflicts in the country.⁶⁵ Similarly, the failure by

post-independent South Sudan to set in motion a scheme to compensate victims of the 1992 Juba massacre justifies the call for the establishment of a comprehensive reparations programme.⁶⁶

It is important to note, however, that whereas respondents felt the CRA should identify potential victims for reparations and compensation, the peace agreement itself mandates the CTRH to undertake this role.⁶⁷ There is clearly a need to provide citizens with a detailed understanding of the roles of the CTRH and the CRA, to lessen contradictions and to ensure that the two mechanisms coincide, as well as reaching out to the widest range of victims affected by the conflict.⁶⁸

The respondents wanted to see a victim-centered compensation and reparation scheme, but suspected possible government interference in the work of the CRA. The agreement mandates the inclusion of civil society, women and faith-based, youth and business groups as members of the CRA. Yet the provision that empowers the R-ARCSS to appoint CRA staff and manage the Compensation and Reparations Fund (CRF) has been viewed as susceptible to manipulation in that individuals and parties accused of complicity in land-related violations could be appointed.⁶⁹

The study established that interviewees want to see an independent and transparent recruitment process based on public vetting and the exclusion of those perceived to have perpetrated human rights violations, including those to do with land.

The government should take lead in financing reparations, respondents believed. But institutions such as the African Commission on Human and Peoples' Rights (ACHPR), the African Union (AU) and international partners should provide technical expertise to help South Sudanese design a context-specific reparations programme to meet the expectations of victims of the conflict.⁷⁰

This is a reminder that many post-conflict countries, including post-apartheid South Africa, have experienced challenges in designing and implementing reparations programmes.⁷¹ Engaging a wide range of actors such as government, international human rights organizations and civil society in shaping such programmes will be a key part of establishing meaningful reparations for South Sudan.

It is noteworthy that the expectation that there be compensation for victims of land abuses is not necessarily seen as linked to other conflict-related human rights violations. For example, the peace agreement compelled the CRA to provide financial and material support to citizens whose property was destroyed by the conflict to help them rebuild their livelihoods.

Yet the respondents do not believe that land-related claims should be handled in the same manner. They felt, too, that cases should not be limited to those of the post-2013 conflict, in that land grabs were seen as part of an orchestrated scheme traceable to the period preceding the liberation of most towns in South Sudan.

When asked how victims should be compensated for their losses during the conflict, 90% of the interviewees said that, because the perpetrators of land grabbing are well known to their victims, the CRA should collaboratively work with existing law-enforcement institutions to solicit apologies from the land grabbers and ensure restitution. In other words, land redress is perceived as the return of the land to the rightful owners, although there are often difficulties in determining the rightful owner.

70% of respondents said they preferred communal rather than individual reparations

Compensation is only accepted in circumstances where land is expropriated for government projects such as schools, hospitals or road constructions. Asked what form of reparation best suits South Sudan, 70% of the respondents recommended communal reparations, 20% preferred individual reparations and the remaining 10% opted for both communal and individual reparations.

Those who recommended communal reparations believed that the large number of victims in South Sudan meant that individual reparations would not be feasible. Moreover, they felt, communal reparations could reduce the risk of corruption because most communal reparations schemes support physical structures such as schools and hospitals. The motivation for individual reparations is, by contrast, that losses may be tangibly quantified and easily ascertained. Finally, those seeking

both forms of compensation believed the ultimate objective of reparations should be to achieve restoration, and that ultimately the CRA should take account of the victims' preferences.

Conclusion

There is wide ranging support for the idea that land conflict be viewed as a human rights violation worthy of a reparation mandate. Parties to the peace agreement need to frame land grabbing and land-related conflict as among the transitional justice tools provided for in the R-ARCSS. A missed opportunity to include land as a reparation issue could well be counterproductive in the long run, posing the threat of a resurgence of violence.

Overall, there is a need to establish a comprehensive transitional justice process that secures land and in turn livelihoods for all South Sudanese people. The effects of land grabbing on local communities and vulnerable groups such as IDPs and women is evident. Similarly, the militarisation and politicisation of land have resulted in and further exacerbated inequalities that could derail the process of building a prosperous, peaceful and stable country.

The legal and institutional authorities responsible for surveying, allocating and registering land should be reviewed and strengthened. The approval of land policy should be expedited. Local and regional actors should be consulted to ensure that the policy is specifically related to South Sudan's turbulent history. The discrepancies between the customary process and the statutory requirements for land registration must be addressed,

and a civic education process be implemented to address the challenges and benefits of each approach.

Furthermore, the transitional government of national unity should take advantage of the R-ARCSS and conduct more consultations on both the land review process and the design of the CRA. This will ensure that a broad range of perspectives is considered and understood, including citizens' preference for communal as opposed to individual reparations. This consultative process could also help to explain why restitution as opposed to compensation is the preferred outcome at this stage, and what the realities and complexities of implementing this are.

A missed opportunity to include land as a reparation issue could derail peacebuilding efforts

In conclusion, the recommendations take into account the role and responsibility of all parties to the peace agreement and the need for a holistic, comprehensive and expedited transitional justice process in South Sudan. Aligned to the draft land policy, the CRA and CTRH, in collaboration with national authorities such as the Land Commission and the land ministry, should provide an opportunity to develop a context-specific regulatory framework that recognizes the issues of post-war land-related conflicts and secures property rights for the most vulnerable in South Sudan.

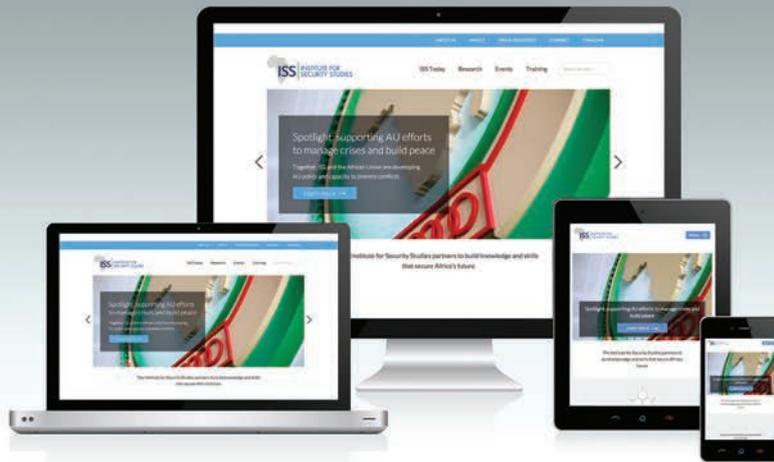
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