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Breaking the Cycle. Conditional Amnesty in Sudan?

The war that has plagued Sudan since April 2023 has been marked by significant violations of human rights and international humanitarian law. Civilians are bearing the brunt of the violence. Consequently, calls for accountability and justice are high on the agenda of Sudanese civil society.

In the past, conflicts in Sudan have either ended with a blanked amnesty for the perpetrators of crimes, however, or initial commitments to transitional justice have not been implemented. At the same time, the current war underlines the deep costs of this impunity. Because armed actors responsible for mass atrocities already two decades ago were not held accountable, they have been able to consolidate their power. This then led to the rivalry in the security sector at the heart of the current conflict.

This brief argues for a way to overcome the seeming dichotomy between blanket amnesty and criminal accountability. Using examples from South Africa, Uganda and Sierra Leone, it shows how conditional amnesty provisions can prove effective in ensuring peace and justice. It argues that conditional amnesty does not need to prevent all prosecutions. A hybrid court with national and international elements can play an important role in this regard.

Sudan has one of the highest rates of amnesty use. Almost every single peace deal in Sudan has granted blanket, unconditional amnesty. Advocates of accountability and justice for Sudan, particularly for international crimes carried out since April 2023, may be tempted to frame the debate around amnesty simply as "amnesty versus no amnesty." But there is considerable diversity in designing amnesties: namely between unconditional blanket amnesties and conditional, individual amnesties. While it may not be possible to avoid amnesties to end the current conflict, it is indeed possible to avoid a blanket, unconditional amnesty.

Conditional amnesty provides that amnesty is granted to individual applicants that meet certain conditions. This often involves perpetrators individually applying through a formal process. A conditional amnesty process that publicly names applicants and what they have done is a form of accountability and diminishes future impunity. Blanket amnesty is all encompassing: collective immunity is granted without conditions. No one is named and no one needs to

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come forward. In sharp contrast, there is no accountability with blanket amnesties: they ensure "that those who have qualified for the amnesty and what they have done remains shrouded in mystery."[1] Blanket amnesty is likely to promote impunity.

Conditional amnesties can rarely be completely dispensed with, especially in large-scale conflicts such as Sudan's, where the number of perpetrators is unimaginable and stability requires a peace agreement that both parties to the conflict agree to sign and implement. On the international level, some peace agreements that grant conditional amnesty exclude granting amnesty to international crimes.

This was the case in Columbia where conditional amnesty was granted as part of the 2016 peace agreement between the country's largest rebel group, the Revolutionary Armed Forces of Columbia (FARC) and the government. Conditional amnesty in Columbia, as established in the final peace agreement and national legislation, explicitly excludes amnesty for international crimes and gender-based violence.[2] Amnesty was extended for political and related crimes, such as rebellion, mutiny, the "lawful killing of enemy combatants" and the illegal possession of weapons.[3]

However, there are cases where conditional amnesty has been granted even for international crimes. This was the case in South Africa. Conditional amnesties are often designed and implemented in parallel with other transitional justice processes – specifically, truth telling and prosecutions. Comparative studies have found that countries that use a combination of amnesties and prosecutions are more likely to have lasting, sustainable peace, stability[4] and better democratic practices than in states where either amnesties or trials are used on their own.[5]

It is possible to simultaneously offer conditional, individual amnesty and to pursue the prosecution of individuals in court, in parallel with peace processes, depending on the design of conditional amnesty. Despite the ongoing conflict – or perhaps as a result of it – Sudanese civil society and political parties seeking accountability and justice should consider the design of conditional amnesty that is linked to truth telling and the establishment of a hybrid court because, as will be demonstrated in this paper, establishing a hybrid court in East Africa is the most valid option to pursue prosecutions for the worst crimes committed since April 2023.

Conditional amnesty could be one carrot to encourage the leaders of the main belligerent sides, the Sudanese Armed Forces (SAF) and the Rapid Support Forces (RSF), to stop the violence. If designed appropriately, amnesty conditioned on truth telling can also contribute to accountability and ending impunity in Sudan.

Amnesty and International Law

Critics of amnesty denounce it as violating international law, particularly since the development of international criminal law and international human rights laws. However, there are no international conventions or clearly defined international laws explicitly prohibiting granting amnesty.[6] Its opponents further criticize it as violating the duty to prosecute international crimes – namely genocide, war crimes and crimes against humanity - prescribed by international conventions such as the Geneva Conventions and Additional Protocol I. However, proponents of conditional amnesty maintain that the duty to prosecute under these conventions applies only to breaches committed during international armed conflicts and that the majority of contemporary wars are internal wars.[7]

Moreover, the Second Protocol of the Geneva Conventions prescribes that, at the end of non-international armed conflicts, "the broadest possible amnesty" should be granted to individuals who have participated in the conflict.[8] Accordingly, peace deals concluding internal armed conflicts have often granted amnesty. But it is necessary to distinguish between general and conditional amnesties when assessing the compatibility of amnesty under international law. The Belfast Guidelines on Amnesty and Accountability, developed by an expert group of independent, interdisciplinary scholars and practitioners from various world regions with experience of dealing with gross human rights violations, find that conditional amnesty is more likely to comply with international law.[9]

Linking Truth Telling to Conditional Amnesty and Traditional Reconciliation: The Cases of South Africa and Uganda

Conditional amnesty has increasingly been granted in exchange for truth telling. In fact, "the right to the truth is now recognized in international law."[10] In considering the design of conditional amnesty, Sudanese need to consider whether promising amnesty to individuals in exchange for the truth benefits accountability more than attempting to prosecuting everyone involved in violence. This does not mean that conditional amnesty means that perpetrators are immune from prosecution forever. The efficacy of conditional amnesty is dependent on prosecutions of some perpetrators – but the reality is that in the wake of mass atrocity, prosecuting most or even many perpetrators is nearly impossible.[11] Transitional justice experts maintain that in cases of mass violence, punishment of all perpetrators is often "legally, politically and practically impossible."[12]

South Africa was the first country to condition amnesty in exchange for truth. South Africa's Truth and Reconciliation Commission (TRC) was empowered to grant amnesty to individuals in exchange for full disclosure of their crimes. Controversially, this included amnesty for serious human

rights violations. Families of prominent apartheid activists killed launched a legal challenge to the granting of amnesty for these crimes. But the Constitutional Court upheld amnesty as consistent with the Interim Constitution, and noted that "without this procedure there would be no incentive at all for perpetrators to admit the truth."[13] Applicants had to complete an individual application form and provide information, including the act for which amnesty was being sought, the political objective that was being pursued in committing the act or offence, their victims and whether the act was committed in execution of an order or with implied or express authority.[14] This highly individualized process marked a sharp departure from blanket forms of amnesty that preceded it around the world.

Public hearings were held for applicants who had committed gross human rights violations. These public hearings were televised. The names of individuals who had received amnesty were published in the Government Gazette, along with information to identify the act or offence for which amnesty had been granted. Unlike blanket amnesties which expect collective forgetting, if designed appropriately, conditional amnesties ensure it is public knowledge about who has applied for what, which is in itself a form of accountability.[15]

Although the South African amnesty process created incentives for perpetrators to reveal the truth, there were notable gaps in the nature of the truth provided. Specifically, there were very few applications relating to torture or sexual violence.[16] There are numerous other shortcomings from South Africa's amnesty process which will not be addressed here. Suffice it to say that despite these shortcomings, it is widely argued that South Africa's conditional amnesty process obtained more truth than would have been possible without the offer of amnesty. It resulted in information on gross human rights violations being revealed and in disappearances being resolved.[17]

Since South Africa, a diverse range of countries have granted conditional amnesty in exchange for truth including Liberia, Columbia and Uganda. It is critical that survivors and affected communities play a meaningful role in designing conditional amnesty. This not only increases the legitimacy of amnesty within communities affected by violence but may also pave the way for grounding accountability and reconciliation in local culture and social norms.

Uganda offers an example where conditional amnesty incorporated the concerns of communities most affected by violence and traditional customs complemented amnesty to manage reconciliation at community levels, even against a background of serious offences. For two decades, northern Uganda was ravaged by conflict between the national government and rebel groups, specifically the Lord's Resistance Army (LRA). This conflict was characterized by international crimes and gender-based violence. The LRA, founded by Joseph Kony, was responsible for killing, maiming and raping civilians and abducting thousands of children and forcing them to fight. The Ugandan government was also accused of recruiting children for its armed forces.[18] Religious and cultural leaders in northern Uganda, one of the worst affected-regions by LRA violence, particularly within the Acholi community, spearheaded the initiative to grant amnesty.[19] There was widespread support for amnesty amongst civil society, local communities and victims in northern Uganda for two main reasons: first, the court system was not seen as a valid option because "almost everyone had committed crimes" and secondly, because many LRA members were victims themselves, having been abducted as children.[20]

The context in Uganda for conditional amnesty is similar to the current situation in Sudan: first, like Uganda, the two main parties and the militias supporting them have committed crimes. Secondly, recruitment and use of children by the main belligerent parties, particularly the RSF, has been massive and widespread, although there are no precise figures.[21] They are under the age of 18 – whether they were recruited and willing joined or forced to join is irrelevant: by definition they are victims.

Another similarity is the widespread lack of confidence amongst Sudanese in the national judicial system and its ability to bring to justice without bias those involved in crimes. The decimation of the Sudanese judicial system will be discussed in greater detail below; suffice it to conclude that the main belligerent parties in the current conflict are both committing crimes and child soldiers are involved. Given the scale of mass violence, combined with the lack of legitimacy in the national courts which will make prosecutions near impossible, individual amnesty conditioned on truth telling could at the very least break the cycle of impunity in Sudan.

It is possible to underpin conditional amnesty processes with traditional customs to foster reconciliation and accountability within communities. This was the case in Uganda. Uganda's 2000 Amnesty Act appears to extend to international crimes: although it is not explicitly stipulated, this can be inferred since no crimes were explicitly excluded from amnesty. To receive amnesty, individuals needed to take personal responsibility for participating in conflict. Combatants could apply for amnesty by reporting to recognized officials, including the army or police, a chief, a member of the Executive Committee of a local government unit, a magistrate or a religious leader within a locality, and surrendering their weapons.[22]

Underpinning amnesty granted by the state were traditional justice and reconciliation practices. Traditional chiefs (rwodi), perceived as highly legitimate and credible amongst the wider population, were key to traditional justice processes. Within the Acholi community it is common practice for traditional chiefs to resolve disputes and offences, including homicide, through reconciliation. The unique contribution of traditional chiefs in Uganda was through their mediation of the reconciliation process, mato oput,

which "many Acholi believe can bring true healing in a way that a formal justice system cannot."[23] The mato oput ceremony requires participation by perpetrators, victims or their families. The perpetrator publicly acknowledges wrongdoing and offers compensation to the victims or their families before all participants share a symbolic drink.

Sudan's history and societal structures reveal a rich tradition of involving Sufi and tribal leaders in resolving conflicts and supporting conditional amnesty processes. These leaders have long played a crucial role in mediating disputes, fostering reconciliation, and promoting peace through culturally ingrained practices. For instance, during tribal or political disputes, Sufi leaders have effectively encouraged conflicting parties to pursue reconciliation and conditional amnesty, drawing on Islamic teachings that emphasize forgiveness and unity. However, post-conflict challenges may limit their effectiveness. Conflicts rooted in broader political or economic grievances can surpass the influence of Sufi and tribal leaders.

Additionally, perceptions of bias or alignment with specific factions may undermine their neutrality in the eyes of some groups. To address these challenges, empowering these leaders with institutional support and integrating their efforts into formal transitional justice frameworks can significantly amplify their impact. This approach connects their community-driven initiatives to broader measures, such as reparations and accountability for serious crimes. Sufi and tribal leaders can play a pivotal role in conditional amnesty frameworks by facilitating community dialogue, promoting forgiveness, and ensuring adherence to agreed-upon conditions, such as reparations or public apologies. Moreover, they can contribute to restorative justice efforts, particularly by aiding the reintegration of former combatants—especially child soldiers or low-level offenders—into their communities. Their culturally resonant methods make them valuable allies in building sustainable peace in Sudan.

Pursuing Prosecutions and Conditional Amnesty

Prosecutions and conditional amnesty can and have co-existed, as demonstrated by an example from South Africa. Eugene Alexander de Kock was a notorious apartheid-era assassin and commanding officer of a covert police unit that kidnapped, tortured and murdered anti-apartheid activists. De Kock admitted to more than 100 acts of torture, extortion and murder during the South African Truth and Reconciliation Commission.[24] The TRC granted De Kock amnesty for most offences – including the 1982 bombing of the ANC's London offices - but was convicted on 89 charges and sentenced to 212 years in jail. The reasoning was that these crimes were not politically motivated- his unit had gone rogue, using torture and murdering anti-apartheid activists on its own, without government knowledge.[25] Thus, despite participating in the TRC and receiving amnesty, it was possible to prosecute De Kock.

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Even if conditional amnesty granted by the state provides immunity from prosecution, it is possible to pursue prosecutions in other countries according to the principle of universal jurisdiction. Universal jurisdiction is based on the principle that certain crimes are so serious that they constitute crimes against the international community as a whole. Under universal jurisdiction, any national judge may prosecute, arrest, try or extradite the perpetrators of serious international crimes contained in the relevant international conventions or established by international custom, regardless of the nationality of the perpetrators, the nationality of the victims or the place where the crimes were committed.

The Special Court for Sierra Leone reaffirmed this in 2004: "A state cannot prevent another state from exercising its jurisdiction to prosecute a criminal on the pretext that the latter benefits from amnesty…It is unrealistic to consider the granting of amnesty by a State as being universally accepted, when it comes to international crimes where competency is universal. A State may not dispatch a crime into oblivion if it is a crime against international law, for other States may have the right to remember it."[26]

There are serious challenges to pursuing criminal prosecutions in Sudan for all those involved in the mass violence since April 2023. The following highlights these challenges before arguing why a hybrid court is the most feasible option to prosecute wrong doers and can co-exist with conditional amnesty.

Options for Judicial Prosecution: Why a Hybrid Court is the Most Viable Option for Sudan

Pursuing criminal justice for perpetrators of mass violence in Sudan will be next to impossible. In Rwanda it would have taken hundreds of years to judge the 130,000 people considered to have taken part in the 1994 genocide –consequently, it was decided that courts would prosecute only those perceived as the most important would be brought in front of national courts or the International Criminal Tribunal for Rwanda.[27] But neither of these options – bringing perpetrators in front of national courts or the International Criminal Court – are realistic options for Sudan.

Sudan does not have a functioning criminal justice system, making it nearly impossible to put perpetrators on trial under the national system. Sudan's judicial system has not been independent for decades after it was decimated by the Bashir regime. Most serving judges were appointed during Bashir's 30-year rule, highlighting the lack of judicial independence during that period. This era was marked by the politicization of judicial institutions, which were used as tools to consolidate political power, significantly eroding

public trust in the judiciary. The regime systematically monopolized judicial appointments, favouring members of the Islamic Movement and recently the National Congress Party under the guise of its "empowerment" policy, further entrenching political and ideological control over the judiciary. Sudan's judiciary needs to be transformed and it cannot be overhauled overnight.

Additionally, competing financial commitments are major obstacles to adequate prosecutions. The high cost of investigations and trials places a heavy financial burden on a country emerging from a war where the widescale human rights violations are unimaginable. There may be thousands of witnesses, victims and/or perpetrators, making in-depth investigations, evidence collection and witness protection even more costly. Amnesty conditioned to truth telling is less costly and reveals the facts around atrocities committed. Finally, trials could take years to complete, potentially igniting political and social divisions and undermining peace.

Another challenge of prosecuting international crimes and/or gross human rights violations in Sudan's judiciary is the country's inadequate legal framework which is incompatible with international norms. Sudanese law does not cover commanders and superiors in terms of criminal responsibility. Command responsibility is a principle of international criminal law under which commanders or superiors are responsible for serious crimes committed by their subordinates, for crimes they knew or should have known about, and for those they failed to take measures to prevent or punish.

Further undermining the viability of accountability in Sudan's judicial system is its bias: it is unlikely to treat the RSF and SAF equally. While there have been many trials and sentences, including the death penalty for individuals belonging to or suspected of belonging to the RSF, there has not been a single case against a member of the Sudanese Armed Forces or forces fighting with them.

Finally, survivors and groups who have experienced serious violations of international law and/or gross human rights violations are unlikely to perceive Sudan's judiciary as legitimate as a result of the polarization along ethnic, tribal and geographic divisions inflamed by the current conflict. The war has fuelled perceptions amongst many Sudanese that the mere fact that a person hails from a certain region, tribe or ethnic group is proof that he or she is a member of SAF or the RSF. Many victims and groups who have experienced serious violations of international law and/or gross human rights violations will have little trust that members of the Sudanese judiciary will set aside their ethnic, tribal or regional associations to rule neutrally and independently.

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Pursuing prosecutions at the ICC for crimes committed across Sudan since April 2023 is not a viable option. Firstly, the ICC has no jurisdiction to investigate and prosecute atrocities committed in Sudan for violence committed since April 2023, with the exception of Darfur. Secondly, the ICC only has jurisdiction within states that have ratified the Rome Statute, which established the ICC. Sudan is not a State Party to the Rome Statute. The ICC could have jurisdiction over crimes committed in Sudan if national authorities accept its jurisdiction by submitting a declaration to the Registrar of the Court, or if the UN Security Council refers the situation in Sudan to the ICC Prosecutor.

Sudan has not indicated its intention to accept the ICC's jurisdiction through a declaration, and the UN Security Council is unlikely to refer the case to the ICC. For the same reasons, it is unlikely that the UN Security Council would consider establishing a so-called Special Court under Chapter VII of the UN Charter. Finally, in situations of mass violence such as Sudan, prosecutions at the ICC are unlikely to completely satisfy all victims' expectations of acknowledgement of their suffering.

Given the weakness of the Sudanese judicial system and the current lack of ICC jurisdiction, as well as the complexity and political sensitivity of assessing individual criminal responsibility in the context of ongoing large-scale human rights violations, another accountability mechanism is needed to address these crimes. Hybrid tribunals, combined with amnesty conditioned on truth telling, are currently the best alternative for ensuring accountability for crimes committed during the current war.

While there is no standard definition of a hybrid court, a "hybrid" or "internationalized" court generally has a mixed composition and jurisdiction over both domestic and international crimes. It blends both national and international law, personnel and funding, and usually operates within the jurisdiction where the crimes occurred. Hybrid tribunals for the investigation and prosecution of international crimes are usually established in countries that have experienced conflict or crisis and where many of these crimes have been committed. These tribunals are often established when a country's domestic justice system lacks the necessary infrastructure, human resources, legal framework or independence to meet fair trial standards or to deal with the complexities and political sensitivities of prosecutions.

Hybrid courts can take many different forms, and some may be part of the national judiciary but staffed by international personnel, such as the proposed Special Criminal Court in the Central African Republic, the proposed Specialized Hybrid Chambers in the Democratic Republic of the Congo, or the Extraordinary African Chambers in Senegal. Others are the result of an agreement between the UN and national authorities, such as the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone. Some may be established not in the actual place where the crimes were committed, but in a neighbouring

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country, such as the Extraordinary African Chambers established in Senegal to prosecute crimes committed in Chad.

Locating the court in Sudan would, of course, the ideal situation, as it allows for greater participation than if it were located outside of Sudan. But if the war continues, or if the security situation deteriorates after a fragile peace agreement, it will likely threaten the ability of victims, witnesses, defense lawyers, and even court staff to attend, let alone participate in the trials that will take place; so it is inevitable that the location will be in a country outside of Sudan.

A suitable option, for example, for a hybrid court is Tanzania or Arusha specifically. In order to mitigate this location challenge, there should be flexibility in planning for the establishment of the hybrid court to suit the political and security circumstances by assessing whether trials inside Sudan are feasible or should be postponed or located outside Sudan. This consideration may also be relevant for a particular trial in Sudan, as opposed to moving the entire court out of Sudan.

Thus, implementing conditional amnesty does not necessarily grant a get-out-of-jail card for perpetrators of international crimes and gross human rights violations. Prosecutions can be pursued for those most responsible – while also encouraging individual responsibility and truth telling through conditional amnesty. In the case of Sudan, a hybrid court and threat of prosecution is necessary for there to be an incentive for offenders to apply for conditional amnesty. Without some form of pressure, there is little incentive for offenders to apply for amnesty conditioned on truth telling. The threat of prosecution needs to coexist with conditional amnesty in Sudan to break the cycle of impunity.

The Role of Survivors and Civil Society

As the conflict grinds on, raising awareness amongst Sudanese stakeholders around these transitional justice measures - the difference between conditional and general amnesty, linking conditional amnesty to truth telling, the contours of a future truth commission and viable options for prosecutions - constitutes a crucial pursuit of justice and accountability without having to wait for a political transition to take place or for the war to end. These are matters that only the Sudanese people should decide through a truly participatory process, with victim/survivor groups and civil societies central to any consultative process. The survivors and families of victims of communities that experienced gross human rights violations and Sudan's civil society are critical in any discussions around the design and implementation of these transitional justice measures.

Awareness raising and consultations should be taking place in order for key stakeholders – the survivors and families of victims in communities that experienced international crimes and gross human rights violations since April 2023 – to be empowered to effectively contribute to the design and implementation of these measures.

Sudan's civil society can play a key role in awareness raising and leading discussions around these issues. Besides awareness raising, Sudan's civil society is critical for documentation of atrocities. All transitional justice mechanisms require documentation but good quality documentation is fundamental. Although Sudanese civil societies groups are involved in documentation, they require far more financial support and technical training than they have received thus far.

Recommendations:

To the International Community:

→ Support broadly participatory consultations and discussions around options for conditional amnesty linked to truth telling and prosecutions. There appears to be a dearth of knowledge amongst the wider Sudanese population regarding the difference between conditional and blanket amnesty. Despite the ongoing conflict, the international community can and should provide immediate support to survivors of war-affected communities and civil society regarding the potential design choices around conditional amnesty and truth telling. Every second the war drags on, violations in Sudan are taking place. There cannot be a wait and see policy to transitional justice measures – options need to be discussed now so that decisions can be implemented when the violence halts. Crucially, victims and affected communities need to be consulted in discussions around designing conditional amnesty. Support should include raising awareness of the ways in which other countries have dealt with these issues, including the types of conditions, how accountability may be achieved through amnesty conditioned on truth telling, and the design of truth telling bodies – so that Sudanese can decide for themselves what are suitable and realistic options. This could take place through meetings, discussions and debates lead by Sudanese civil society. While political parties should have knowledge about design options for conditional amnesty, they are not best suited to lead these discussions – not only it is too politically risky for them, there is the risk of elites instrumentalizing victims and communities affected by violence for political gain.

→ The international community can provide financial support to launch a broadly participatory process amongst Sudanese stakeholders – survivors of war-affected communities, survivors of sexual violence, civil society and political parties – around the design of conditional amnesty. The Belfast Guidelines on Amnesty and Accountability could provide a starting point to discuss how to

design conditional amnesty that contributes to accountability. These guidelines are highly useful for those seeking to make decisions on amnesties and accountability, given that they explain the legal status of amnesties within the framework of the multiple legal obligations of states; offer suggestions how amnesties and complementary measures, including truth telling, can be designed to support accountability; and recommend approaches encouraging public participation around amnesty discussions.

→ Provide technical training and capacity building to Sudanese civil society to document violations. There are already efforts within civil society to document violations, including war crimes. More support is needed; and documenting these violations can foster accountability.

To Sudanese Stakeholders:

→ Consider institutionalizing the role of Sufi and tribal leaders in transitional justice processes. To maximize the effectiveness of conditional amnesty processes in Sudan, it is possible to leverage the culturally embedded roles of Sufi and tribal leaders by providing them with institutional support and linking their efforts to formal transitional justice frameworks. This will enable them to mediate disputes, foster reconciliation, and promote restorative justice more effectively, while addressing potential challenges such as perceptions of bias or limited scope of influence.

→ Increase clarity on international and domestic law in relation to justice obligations to those involved directly or indirectly in peace talks. Those involved in peace talks for Sudan need to have a full understanding regarding the Sudanese state's obligations in relation to international human rights treaties, in basic and clear language. Legal information must be presented in a manner accessible to non-experts and sets out options available and highlight potential results various options may produce. At the Sierra Leone peace talks, the interpretation of international human rights treaties was limited and even inaccurate – which apparently led the international participants to support blanket amnesty for international crimes with little or no opposition.[28]

→ Raise awareness about the weakness of Sudan's domestic judiciary and discuss alternatives, including a hybrid court under the African Union. This includes raising awareness with survivors, families of survivors, civil society and political parties about universal jurisdiction and the possibility of trying those suspected of committing international crimes in any country that accepts universal jurisdiction, even if suspects have been pardoned in Sudan under a peace agreement.

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