



LOOKING FOR JUSTICE

RECOMMENDATIONS FOR THE ESTABLISHMENT OF
THE HYBRID COURT FOR SOUTH SUDAN

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First published in October, 2016
by Amnesty International Ltd
Peter Benenson House, 1 Easton Street
London WC1X 0DW, UK

Index: AFR 65/4742/2016
Original language: English

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EXECUTIVE SUMMARY

Amnesty International and FIDH, as well as South Sudanese civil society, the African Union (AU) and the international community have repeatedly called for accountability for crimes under international law and human rights violations and abuses committed during South Sudan's ongoing non-international armed conflict.

The August 2015 Agreement on the Resolution of the Crisis in the Republic of South Sudan (ARCSS) provided for the establishment of a Hybrid Court for South Sudan (HCSS) with a mandate to investigate and prosecute individuals bearing criminal responsibility for violations of international law and/or applicable South Sudanese law committed from 15 December 2013 through the end of the transitional period. Given the weaknesses and lack of independence of the domestic judicial system, the current lack of International Criminal Court (ICC) jurisdiction over the crimes committed, and the importance of local ownership over any accountability proceedings, the proposed hybrid court represents the most viable option for achieving justice in trials that meet international standards. The establishment of the HCSS could contribute to holding perpetrators of past crimes to account; building public confidence in the peace process; strengthening the South Sudanese justice system; and bringing an end to the pervasive culture of impunity.

In this briefing paper, Amnesty International and FIDH present key recommendations on the structure and institutional framework of the HCSS, in order to ensure that the court effectively achieves accountability, meets international fair trial standards, has national legitimacy, and incorporates the best practices of other hybrid and *ad hoc* tribunals.

The AU and the South Sudan government must engage with and consult relevant stakeholders, including members of civil society as they proceed to determine the statute, rules of procedure, seat, functions and personnel of the new court. To ensure the timely preservation of evidence critical to successful prosecutions, establishing and activating the investigative branch must be a priority.

The accessibility, legitimacy and legacy of the court should be overarching goals. As a general principle, trials should take place as close to the location where the crimes were committed as possible. While potential security risks to staff, witnesses, accused persons and victims may not allow for the court to be based within South Sudan, at least initially, the HCSS statute should allow flexibility to reassess the security determination and conduct site visits, hear witness testimony or hold proceedings in South Sudan if and when feasible. Regardless of where the court is located, it must have an effective and properly funded outreach programme to ensure that its proceedings can be followed within South Sudan. It is critical that South Sudanese should participate in the court as judges and staff, as this will enable capacity building and knowledge transfer and will contribute to enhancing the legitimacy of the court. A long-term, stable and secure method of funding, not based on voluntary contributions, must also be established at the outset for the operation of the HCSS.

The rights and security of both victims and defendants must be ensured. The HCSS should take necessary measures to protect victims and witnesses from threats or retaliation, including by establishing an independent Witness and Victims' Protection Unit. Measures should also be taken to ensure that victims can participate in the proceedings. The court should uphold the rights of the accused, including by prohibiting double jeopardy and by guaranteeing the right to effective counsel through the establishment of an independent Defence office.

To effectively achieve accountability, the court must allow prosecutions under all modes of liability for crimes under international law, including command or superior responsibility. Immunities, amnesties and pardons must not prevent prosecution for crimes under the court's jurisdiction. The death penalty should also be excluded as a possible penalty.

In addition to providing for the establishment of the hybrid court, the ARCSS also requires the establishment of a Compensation and Reparations Authority (CRA) and a Commission on Truth, Reconciliation and Healing (CTRH), both important to ensuring holistic transitional justice. The HCSS should coordinate with, and complement these other transitional justice mechanisms.

Cycles of violence in South Sudan have been fuelled by impunity. As the African Union Commission of Inquiry on South Sudan (AUCISS) noted in its final report, accountability is central to building sustainable peace. The July 2016 resurgence of violence in South Sudan, and the additional killings, rapes and looting that has accompanied it should provide additional impetus for setting up the court.

The AU has recently demonstrated that, with the necessary commitment, it has the capacity to establish accountability mechanism such as the Extraordinary African Chambers (EAC). The EAC recently convicted Hissène Habré for crimes under international law committed in Chad from 1982 to 1990 and sentenced him to life imprisonment. The AU must build on this experience and take concrete steps towards the establishment of the HCSS without further delay.

THE CASE FOR ESTABLISHING THE HCSS

NON-INTERNATIONAL ARMED CONFLICT

In December 2013, growing political tension between President Salva Kiir and Riek Machar, Vice President from 2005 until his dismissal by Kiir in July 2013, mushroomed into a brutal non-international armed conflict.¹ Fighting started in Juba where government forces engaged in targeted killings, and soon spread to other parts of the country. Security forces across the country split—with some maintaining allegiance to the government and others defecting to support the armed opposition under Riek Machar, which came to be known as the Sudan People's Liberation Movement/Army-In Opposition (SPLM/A-IO).

In the context of the ongoing non-international armed conflict, government and opposition forces and their associated armed militia and youth have committed serious violations of international humanitarian law and other serious human rights violations and abuses, including deliberately killing civilians including children, women and elderly people, abducting women and girls; committing acts of sexual violence, including rape; ravaging hospitals and schools; destroying and looting civilian property; attacking humanitarian personnel and assets; recruiting child soldiers; and killing captured soldiers and other fighters placed *hors de combat*. Warring parties have also obstructed humanitarian assistance, including medical and food supplies, preventing this assistance from reaching civilian populations displaced by the conflict.² These acts amount to war crimes and some may constitute crimes against humanity.³

The conflict has had a devastating impact on civilians. Thousands of people have been killed and entire towns and villages are in ruins. Approximately 2.5 million South Sudanese have fled their homes since the outbreak of fighting, with some 1.6 million internally displaced and over another 1 million people living in neighbouring countries as refugees. An estimated 4.8 million people are food insecure.⁴

¹ President Kiir removed Riek Machar as Vice President in July 2013. In February 2016, Kiir issued a presidential decree reappointing Machar as Vice President, in accordance with the August 2015 ARCSS. On 26 July, after Riek Machar fled Juba following fighting between opposition and government forces, President Kiir appointed Taban Deng Gai as First Vice President.

² Ibid. For additional documentation of human rights and humanitarian law abuses, see Amnesty International, *South Sudan: Escalation of violence points to failed regional and international action*, 21 May 2015, available at www.amnesty.org/en/press-releases/2015/05/south-sudan-escalation-of-violence-points-to-failed-regional-and-international-action/; United Nations Mission in the Republic of South Sudan (UNMISS), *The State of Human Rights in the Protracted Conflict in South Sudan*, December 2015, available at [http://unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/Human%20Rights%20Update%20Report%20of%204%20December%202015%20\(final\).pdf](http://unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/Human%20Rights%20Update%20Report%20of%204%20December%202015%20(final).pdf); Human Rights Watch, *They Burned it All: Destruction of Villages, Killings and Sexual Violence in Unity State*, South Sudan, July 2015, available at <https://www.hrw.org/report/2015/07/22/they-burned-it-all/destruction-villages-killings-and-sexual-violence-unity-state>; Final Report of the AUCISS.

³ Amnesty International, *Nowhere Safe: Civilians under Attack in South Sudan*, May 2014 (Index: AFR 65/003/2014), available at <https://www.amnesty.org/en/documents/AFR65/003/2014/en/>.

⁴ United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), *Humanitarian Bulletin: South Sudan*, 8 August 2016, available at https://gallery.mailchimp.com/f2c222dd83de60ecbebe45951/files/160808_OCHA_SouthSudan_humanitarian_bulletin_11.pdf; United Nations High Commissioner for Refugees (UNHCR), *Refugees Fleeing South Sudan pass One Million Mark*, 16 September 2016, available at: <http://www.unhcr.org/news/latest/2016/9/57d94/refugees-fleeing-south-sudan-pass-million-mark.html>.

PEACE, IN NAME ONLY

In August 2015, following almost two years of on-and-off peace negotiations mediated by IGAD, parties to the conflict and other stakeholders signed the ARCSS.⁵ The agreement provided for the formation of a Transitional Government of National Unity (TGoNU) and for national elections to be held after two and a half years. It also envisaged broad security sector reform, transitional justice, and a constitutional development process.⁶

Between August 2015 and July 2016, implementation of the ARCSS encountered numerous hurdles and was generally slow. Riek Machar returned to Juba in April 2016 and was sworn in as First Vice President of the TGoNU on 26 April. Ministers of the TGoNU also took oaths of office the following week. Outstanding disagreements between the government and the opposition, however, continuously delayed implementation of several aspects of the ARCSS.⁷

Violence in parts of the country also continued, as well as attacks against civilians, from December 2015 to June 2016, despite the permanent ceasefire orders issued by President Kiir and Riek Machar after the ARCSS was signed.⁸

In early July 2016, a series of violent clashes between government and opposition forces in Juba heightened tensions and led to a deadly shootout on 8 July between bodyguards of Kiir and Machar outside the Presidential Palace, where the two were meeting. On 10 and 11 July, Juba was rocked by fighting during which armed forces, particularly government soldiers, committed human rights and humanitarian law violations and abuses including targeted killings, indiscriminate attacks, sexual violence, attacks targeting humanitarian personnel, and looting of civilian property and humanitarian assets.

The fighting in Juba forced Riek Machar and many of the remaining SPLA-IO to flee southwards, where they evaded active pursuit by government forces over the next month. Meanwhile Kiir dismissed Machar as First Vice-President and replaced him on 25 July with another opposition politician, Taban Deng Gai, a move rejected and denounced by Machar. Several other opposition politicians who opted to leave Juba were also replaced. The international community eventually accepted the new government and continue to press for it to resume implementation of the ARCSS.

While Juba has remained stable since July, the fighting there triggered a resurgence of violence in other parts of the country, particularly in the southern Equatoria region.⁹ At the end of September, the SPLM/A-IO

⁵ Signatories to the ARCSS include: 1) The Parties (the Government of South Sudan, the Sudan People's Liberation Movement/Army-In Opposition (SPLM/A-IO), the former detainees and the political parties); 2) Stakeholders (civil society, faith based leaders, women's bloc and eminent personalities); 3) Adherents; 4) The Guarantors (Intergovernmental Authority on Development (IGAD) Heads of State and Government, the African Union, the IGAD-led Mediation, and international partners).

⁶ ARCSS, available at southsudan.igad.int/index.php/91-demo-contents/news/299-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south-sudan. Riek Machar, leader of the SPLM/A-IO, signed the agreement on 17 August 2015 while President Salva Kiir signed the agreement on 26 August 2015.

⁷ These include the formation of a transitional legislative assembly, the cantonment of opposition forces, and the establishment of Joint Integrated Police Units. For an account of failures to implement the peace agreement between August 2015 and January 2016, see *Report of the Chairperson of the Joint Monitoring and Evaluation Commission (JMEC) for the Agreement on the Resolution of the Conflict in the Republic of South Sudan to the AU PSC*, 29 January 2016, available at <http://jmecsouthsudan.org/uploads/AUPSCreport.pdf>

⁸ For accounts of fighting following the signing of the peace agreement, see UNMISS, *The State of Human Rights in the Protracted Conflict in South Sudan*, December 2015; Final report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2206 (2015), January 2016, UN Document: S/2016/70, available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/70. For accounts of fighting and attacks against civilians in different areas of South Sudan during this period see Amnesty International, *"We Are Still Running": War Crimes in Leer, South Sudan*, July 2016 (Index: AFR 65/4486/2016), available at <https://www.amnesty.org/en/documents/af65/4486/2016/en/>; Center for Civilians in Conflict, *A Refuge in Flames: The February 17-18 Violence in Malakal PoC*, 2016, available at http://civiliansinconflict.org/uploads/files/publications/CIVIC_-_Malakal_Report_-_April_2016.pdf; Human Rights Watch, *South Sudan: Army Abuses Spread West*, 6 March 2016, available at <https://www.hrw.org/news/2016/03/06/south-sudan-army-abuses-spread-west>; UNOCHA, *South Sudan Humanitarian Bulletin*, 28 March 2016, available at https://gallery.mailchimp.com/f2c222dd83de60ecbebe45951/files/20160328_OCHA_SouthSudan_humanitarian_bulletin.pdf. The fighting erupted following President Kiir's appointment of Baba Medan Konyi as governor of the recently created Boma state, replacing David Yau as leader of the area. See Sudan Tribune, *South Sudan President Summons Boma Governor over Clashes*, 28 February 2016, available at: <http://www.sudantribune.com/spip.php?article58158>; Human Rights Watch, *South Sudan: Civilians Killed, Tortured in Western Region: Provide Justice for Army Abuses in Western Regions*, 24 May 2016, available at: <https://www.hrw.org/news/2016/05/24/south-sudan-civilians-killed-tortured-western-region>; Security Council Press Statement on Fighting in Wau, South Sudan, 1 July 2016, available at: <http://www.un.org/press/en/2016/sc12431.doc.htm>.

⁹ See for example, OCHA, *Humanitarian Bulletin*, 5 October 2016, available at: <http://reliefweb.int/report/south-sudan/south-sudan-humanitarian-bulletin-issue-15-5-october-2016>

issued a statement saying their forces would “wage a popular armed resistance” against the current government, confirming likelihood of continued violence in the country.¹⁰

THE ACCOUNTABILITY GAP

A CULTURE OF IMPUNITY

“...South[ern] Sudan has experienced numerous episodes of violations of human rights. However...lack of capacity as well as an official policy that privileged peace and stability...have resulted in a seemingly entrenched culture of impunity...”

African Union Commission of Inquiry on South Sudan (AUCISS)¹¹

As noted by many, including the AUCISS above, cycles of violence in Southern Sudan have been fuelled by decades of impunity. Those responsible for crimes perpetrated during the north-south civil wars (1956-1973 and 1983-2005) never faced prosecution. The peace agreements concluded between warring parties – in particular the 2005 Comprehensive Peace Agreement, sealed under the auspices of IGAD – have been silent on the need for justice for victims of serious crimes. Between 2005 and 2013, there was little accountability for massacres, abductions, sexual violence, including rape, and looting perpetrated in the context of inter-communal violence and fighting between government forces and armed insurgent militias and such acts were never effectively deterred. The existing culture of impunity has thus contributed to the serious human rights violations committed since the outbreak of the conflict in December 2013.

There have also been no investigations or accountability for crimes committed during the armed conflict that began in 2013. Following the July fighting in Juba, the government announced the formation of a General Court Martial to try SPLA soldiers accused of committing crimes against civilians. On 23 September, the court martial reportedly sentenced 77 soldiers convicted of offences including murder, theft, rape and looting. One man was sentenced to death by firing squad.¹² The use of military courts to try cases of human rights violations, and in particular, crimes under international law committed against civilians, is not generally considered as best practice. Furthermore, under South Sudanese law, trials for crimes against civilians should be held in civilian courts.¹³ The Juba Court Martial is only the latest example of the flawed overtures at accountability made by the government.

Moreover, the government has also on occasion announced that it would grant blanket amnesties. For example, in February 2015, President Kiir issued an order granting amnesty to all those “waging war against the state”, with no limitations with respect to crimes against humanity, war crimes or genocide.¹⁴

¹⁰ “South Sudan rebel chief urges armed resistance to Juba govt,” AP, 24 September 2016.

¹¹ Final report of the AUCISS, 14 October 2014, para. 991.

¹² “Military Court Condemns Soldier to Death,” Eye Radio, 23 September 2016, available at: <http://www.eyeradio.org/military-court-condemns-soldier-death/>.

¹³ Sudan People’s Liberation Army (SPLA) Act, 2009, section 37(4).

¹⁴ Office of the United Nations High Commission for Human Rights (OHCHR), *Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: detailed findings*, A/HRC/31/CRP.6, 10 March 2016, para. 366.

SOUTH SUDAN'S WEAK JUSTICE SYSTEM

The evidence indicates that South Sudan's justice system is currently not capable of trying those suspected of responsibility for crimes under international law committed in the country since December 2013. Research conducted in South Sudan by FIDH¹⁵ and the AUCISS's final report,¹⁶ have outlined the myriad deficiencies in the South Sudanese justice system.

South Sudan's judicial system is under-funded, under-staffed and vulnerable to political interference. Although the principle of separation of powers is provided for in South Sudan's Constitution and legislation, in practice a culture of judicial independence has yet to develop in the country. The judiciary is centralized in administration in Juba under the President of the Supreme Court,¹⁷ and the President of the Government of South Sudan is authorized to make all judicial appointments.¹⁸

The outbreak of conflict in 2013 cut short progress towards judicial reforms and instead deepened the challenges faced by the criminal justice system.¹⁹ Qualified personnel and infrastructure are extremely limited. Training for judges, attorneys, prosecutors and police has been hampered by the government and international community's focus on the political and humanitarian crisis, which has left reform of the legal system on the back burner. South Sudanese citizens interviewed by Amnesty International and FIDH lack confidence in magistrates and the legal system as a whole. Many interlocutors perceived judges and other judicial officials as biased and corrupt.²⁰ The AUCISS also underlined threats to the independence of the judiciary, as well as other weaknesses in the judicial system, in its report.²¹

THE ICC CURRENTLY HAS NO JURISDICTION

The ICC currently has no jurisdiction to investigate and prosecute perpetrators of atrocities committed in South Sudan since the outbreak of the violence in December 2013. South Sudan is not a State party to the Rome Statute establishing the ICC. The ICC could have jurisdiction over crimes committed in South Sudan if national authorities accepted its jurisdiction through lodging a declaration with the Registrar, as provided for in Article 12(3) of the Rome Statute, or if the situation in South Sudan was referred to the ICC Prosecutor by the United Nations (UN) Security Council. South Sudan has not expressed any intention to accept ICC jurisdiction through an Article 12(3) declaration. It is unlikely that the UN Security Council will refer the case to the ICC, particularly given the provision for the establishment of the HCSS in the ARCSS, and the lack of political willingness within the UN Security Council to be seen as contradicting this process.

For the same reasons, it is also unlikely that the UN Security Council would consider establishing a so-called *ad hoc* tribunal pursuant to Chapter VII of the UN Charter.

There is therefore a need for a different accountability mechanism to address these crimes.

HCSS: CURRENTLY THE MOST VIABLE OPTION FOR EFFECTIVE ACCOUNTABILITY

Victims of grave human rights violations committed during the recent conflict have the right to justice, truth and full reparation. Justice can only be fully achieved if the perpetrators of those crimes are brought to

¹⁵ FIDH, *South Sudan: "We fear the worst" – Breaking the cycle of violence and impunity to prevent chaos*, 1 December 2014, available at https://www.fidh.org/IMG/pdf/report_south_sudan_final_english.pdf.

¹⁶ Final report of the AUCISS, paras 1077 to 1091.

¹⁷ Judiciary Act 2008, Sections 29-32.

¹⁸ Judiciary Act 2008, Sections 20-27. Appointment of judges to the Supreme Court is also subject to approval by a two-thirds majority of all members of the Assembly. Judiciary Act 2008, Section 22.

¹⁹ FIDH, *South Sudan: "We fear the worst" – Breaking the cycle of violence and impunity to prevent chaos*, p. 20 outlining various programmes for reform to the judicial system, with the assistance of international partners such as UNMISS, which were curtailed after the outbreak of the conflict.

²⁰ FIDH, *South Sudan: "We fear the worst" – Breaking the cycle of violence and impunity to prevent chaos*, p. 22.

²¹ Final report of the AUCISS, para. 271.

justice and held accountable before a fair and effective judicial mechanism which allows victims to participate and have their voices heard.

The establishment of an accountability mechanism to effectively address the serious violations of international humanitarian law and other serious violations and abuses of international human rights law perpetrated since the outbreak of the conflict in December 2013 is also critical for the achievement of sustainable peace. The AUCISS also emphasized the centrality of accountability to building peace in South Sudan and recommended the establishment of a hybrid judicial mechanism to bring those responsible for human rights violations to account.²² A June 2015 survey by the South Sudan Law Society, in partnership with the United Nations Development Programme (UNDP), also showed that South Sudanese overwhelmingly support holding alleged perpetrators of human rights abuses accountable through criminal justice processes.²³

The HCSS, as envisaged by the peace agreement, is to be established by the African Union Commission (AUC), and will investigate and prosecute “individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period.”²⁴

Given the weakness of South Sudan’s justice system and the current absence 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, the HCSS represents for now the best alternative for providing accountability for the crimes committed during the recent conflict.

In light of the cycle of violence and impunity that has fuelled the current situation, successful reform of the country’s justice and security sectors is crucial. By prosecuting and trying all those responsible for grave human rights violations, irrespective of their status and rank, the HCSS may initiate the establishment of an effective, independent and impartial judiciary and build public confidence in the national justice system increasing demand for accountability.

It has sometimes been suggested, particularly in the South Sudanese context, that peace and justice should be sequenced and that there cannot be justice if there are no pre-conditions of security and stability necessary to ensure that the justice system can function.²⁵ Peace and justice, however, should go hand in hand, and justice processes can and should advance at the same time as peace processes.²⁶ Experience suggests that it is possible to pursue successful investigations and prosecutions at the same time as peace processes are ongoing.²⁷ It is therefore important that the HCSS be established immediately, and any calls for peace at the expense of justice, or attempts by the parties to retreat from their commitment under the ARCSS to the establishment of the HCSS should not be heeded.²⁸

This briefing paper presents key recommendations on the structure and institutional framework of the court to allow the HCSS to effectively achieve these goals, in light of international standards guaranteeing fair trial rights and best practices from other hybrid and *ad hoc* tribunals.

²² Final report of the AUCISS, para. 1148: “[...] the Commission recommends an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account. Such a mechanism should include South Sudanese judges and lawyers.”

²³ South Sudan Law Society, *Search for a New Beginning : Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan*, June 2015, available at: <http://www.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf>

²⁴ The ARCSS provides for a TGoNU that will be responsible for implementing a reform agenda over the course of a 30-month “transitional period”.

²⁵ See discussion in Final report of the AUCISS, para. 893.

²⁶ See Amnesty International, *Accountability in South Sudan Cannot Wait for Peace – but could foster it*, 9 July 2015, available at: <https://www.amnesty.org/en/latest/news/2015/07/op-ed-accountability-in-south-sudan-cannot-wait-for-peace>; FIDH, *Justice and Reconciliation Will Serve the Peace Process in South Sudan*, 17 December 2014, available at: <https://www.fidh.org/en/region/Africa/south-sudan/16665-justice-and-reconciliation-will-serve-the-peace-process-in-south-sudan>.

²⁷ See *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and Secretary General, Analytical Study on human rights and transitional justice*, UN Doc. A/HRC12/18, 6 August 2009, para. 55.

²⁸ On 8 June 2016, an op-ed published in the *New York Times*, and attributed to President Kiir and then First Vice President Machar, called upon the international community to forgo support for the establishment of the HCSS in favour of a mediated peace, truth and reconciliation process. The op-ed is available at: http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?_r=0. The op-ed called for the establishment of a TRC, with possible amnesties for those appearing before it, in lieu of the HCSS. See <http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html>. Machar’s press office later denied that he had co-authored the op-ed.

LEARNING FROM OTHER HYBRID JUSTICE MECHANISMS

In recent years, hybrid mechanisms have increasingly been used or proposed, including within transitional justice processes. While there is no uniform definition of a hybrid tribunal, a ‘hybrid’ (or ‘internationalised’) court generally has mixed composition and jurisdiction over both national and international crimes, blending both national and international law, personnel and funding, and usually operating within the jurisdiction where the crimes occurred. Hybrid courts are usually established to investigate and prosecute crimes under international law in states which have gone through conflict or crisis and where numerous such crimes have been committed. These courts are often established where a state’s domestic justice system lacks the necessary infrastructure, human resources, legal framework, or independence, leaving it unable to meet fair trial standards or confront the complexities and political sensitivities of prosecutions.

Hybrid courts may be established in many different forms. Some may form part of the national justice system, but have international personnel, such as the proposed Special Criminal Court in the Central African Republic (CAR), the proposed Specialized Mixed Chambers in the Democratic Republic of Congo (DRC) or the EAC in Senegal. Others are created as a result of an agreement between the UN and the national authorities such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL). Some may not be established in the exact location where crimes were committed but in a neighbouring country, such as the EAC which was established in Senegal to prosecute crimes committed in Chad.

Hybrid courts are seen to offer certain advantages in comparison to *ad hoc* tribunals such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), which were established by the UN Security Council. While achieving many milestones in international criminal justice, the *ad hoc* tribunals were costly, and resulted in lengthy trials taking place in locations far from where the crimes had occurred. There has also been a lack of political willingness within the UN Security Council to establish more such *ad hoc* tribunals under Chapter VII of the UN Charter. Hybrid courts, however, present an alternative in which trials can take place closer to the location where crimes were committed. This could allow for easier participation by witnesses and victims, and for those affected by the conflict to follow court proceedings more easily, and may also foster increased understanding by the court’s international personnel of the cultural and historical context of the country, therefore enhancing the court’s overall legitimacy. Trials before hybrid courts may also be less costly and lengthy, and such courts may also provide the opportunity for capacity building and skills transfer between international and national personnel to assist in strengthening the domestic justice system.

Several hybrid courts have been established in recent years, including in Sierra Leone, Cambodia, Timor-Leste and Kosovo, with mixed success. The experiences and lessons of these tribunals are of value in

designing and establishing new hybrid courts, such as the HCSS. Highlighted below are a few examples of the hybrid courts which have been established or proposed in Sierra Leone, Cambodia, CAR, Senegal/Chad, and the DRC, with an emphasis on the successes and good practices of each of these mechanisms, as well as challenges faced and lessons learned.

EXAMPLES OF PROPOSED OR ESTABLISHED HYBRID TRIBUNALS

SPECIAL COURT FOR SIERRA LEONE

The SCSL was established by an agreement between the UN and the Government of Sierra Leone in 2000, and became operational in 2003. It was mandated to try those “bearing the greatest responsibility” for crimes committed in Sierra Leone after 30 November 1996.²⁹ Crimes within the statute included crimes against humanity, war crimes, other serious violations of international humanitarian law, and specific violations of Sierra Leonean law (although there were ultimately no indictments for crimes under Sierra Leonean law).³⁰ The maximum sentence possible was “imprisonment for a specified number of years”.³¹ Judges were nominated by the UN and by the Government of Sierra Leone.³² While some key roles were allocated to Sierra Leoneans, including the position of Deputy Prosecutor,³³ the SCSL has been criticized for not involving sufficient Sierra Leonean staff in the court. In addition, rather than nominating only Sierra Leonean judges, which was what had been foreseen, the Government of Sierra Leone also nominated international judges (such as Geoffrey Robertson to the Appeals Chamber).

The seat of the court was in Freetown, Sierra Leone, and all trials took place there except for the Charles Taylor trial which was moved to The Hague for security reasons. The SCSL had a successful outreach programme, broadcasted the trial proceedings on the radio, and conducted outreach activities throughout Sierra Leone and Liberia.

The SCSL established a Defence office headed by a Principal Defender. The Defence office was located within the Registry, and was the first Defence office at a hybrid tribunal set up to assist defence teams. There was also a Victims and Witnesses unit within the Registry. However, victims could not actively participate in the proceedings and were not allowed to request reparations, mainly because the SCSL was based primarily on a common law system. The SCSL was entirely dependent on voluntary funding, which led to many situations where it appeared that it would cease to continue operating and had to rely on funds from the UN to cover the shortfall. This led to considerable uncertainty regarding the continuity of the court and staff tenure, including of judges. A Truth and Reconciliation Commission (TRC) was also established after the conflict - these mechanisms were meant to be complementary and the TRC did feed the SCSL with some information. However, there were tensions which arose between the SCSL and the TRC when the TRC sought testimony from one of the accused persons before the SCSL, which the court refused to allow.

During the course of its operations, the SCSL tried accused persons from three different armed groups involved in the conflict – the Civil Defense Forces (CDF), the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), as well as former President of Liberia Charles Taylor. Nine persons were convicted and sentenced to terms of imprisonment ranging from 15 to 52 years. Sentences of the eight RUF, CDF and AFRC prisoners convicted in Freetown are being carried out at Rwanda's Mpanga Prison due to security concerns and because it meets international standards. The SCSL was the first international tribunal to try and convict persons for the use of child soldiers (AFRC trial),³⁴ for forced

²⁹ Statute of SCSL, Article 1(1).

³⁰ Statute of SCSL, Articles 2-5.

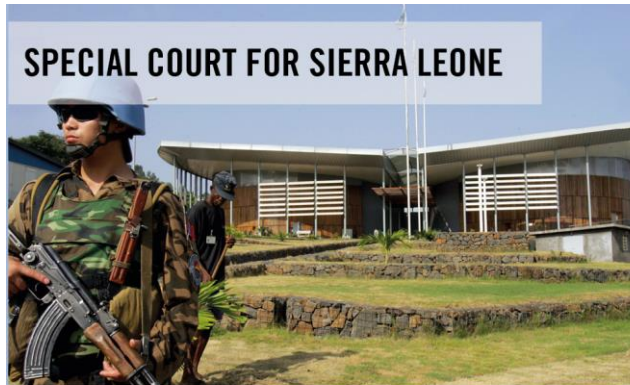
³¹ Statute of SCSL, Article 19(1).

³² Statute of SCSL, Article 12, providing for the Government of Sierra Leone and the UN to each nominate a certain number of judges to each Chamber.

³³ Statute of SCSL, Article 15(4) (Deputy Prosecutor must be Sierra Leonean).

³⁴ *Prosecutor v. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu*, [2007] SCSL-2004-16-T (Trial Chamber), Judgment, 20 June 2007.²⁸²⁸

marriage (as an “other inhumane act”) as a crime against humanity under Article 2(i) of the Statute (RUF trial), and for attacks directed against UN peacekeepers (RUF trial).³⁵ In 2013, it completed its functions and transferred outstanding work to a residual mechanism.³⁶



Freetown, SIERRA LEONE: A soldier of the United Nations mission to Sierra Leone stands guard 31 March 2006 in front the Special Court for Sierra Leone in Freetown, where former Liberian President Charles Taylor, extradited from Nigeria to Monrovia 29 March 2006, has been indicted for crimes committed during the civil war that ravaged his country from 1991 to 2001, killing up to 200,000 people. © ISSOUF SANOGO/AFP/Getty Images

FACTS & FIGURES

- Established by an agreement between the UN and the Government of Sierra Leone, became operational in 2003.
- Mandated to try “those bearing the greatest responsibility” for crimes committed in Sierra Leone after 1996, including crimes under Sierra Leonean and international law.
- Located in Freetown where all trials were held except the trial of Charles Taylor which took place in The Hague.
- National and international judges (nominated by government and the UN respectively) and staff members.
- Nine people were convicted and sentenced to prison terms ranging from 15 to 52 years.
- Completed its functions and transferred to a residual mechanism in 2013.

SUCCESSES & GOOD PRACTICES

- Accessible as located within country where crimes took place but had flexibility to hold trials elsewhere for security reasons.
- Some key roles, such as that of Deputy Prosecutor, allocated to Sierra Leonean nationals.
- First Defence office established at a hybrid tribunal to support defence teams. The office maintained a list of qualified counsel, undertook legal research to assist defence teams and administered the legal aid programme.
- Successful outreach programme, broadcasted the trial proceedings on the radio, and conducted outreach activities throughout Sierra Leone and Liberia.
- Establishment of victim and witness protection unit, and transfer of capacity for witness and victim protection to national police.

CHALLENGES & LESSONS LEARNED

- Insufficient national staff and judges resulted in limited skills and capacity transfer and limited local ownership.
- Funding through voluntary contributions resulted in considerable insecurity regarding the continuity of the court, as well as for personnel, including judges.
- While there was some complementarity and exchange of information with the TRC, also established after the conflict, the absence of a clear agreement led to tension between the two bodies.
- No provision for victims’ participation in proceedings or for reparations.
- The Defence Office was under the Registry rather than an independent organ of the court.

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

The ECCC was established to try senior members of the Khmer Rouge regime for serious violations of Cambodian criminal law, international humanitarian law and custom, and international conventions recognized by Cambodia that took place between 1975 and 1979,³⁷ including crimes against humanity and genocide.

The ECCC is governed by a 2003 UN-Cambodian agreement outlining a “framework for cooperation”³⁸ and a subsequent 2004 domestic law establishing the Court.³⁹ The Agreement set up a two-tiered system of Extraordinary Chambers created through Cambodian law and integrated into the existing judiciary: a pre-Trial Chamber and a Trial Chamber (composed of five judges, including two international judges) and a Supreme Court Chamber (composed of seven judges, including three international judges) acting as a final court of appeal.

³⁵ *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* [2009] SCSL-04-15-T (Trial Chamber), Judgment, 2 March 2009. The Appeals Chamber of the SCSL recognised the crime of forced marriage as an “other inhumane act” for the purpose of determining a crime against humanity in February 2008 for the first time (*Prosecutor v. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu* [2008] SCSL-2004-16-A (Appeals Chamber) 22 February 2008, 105 and see 181-203) but declined to convict the accused on those charges. More on this and legal implications: http://www.redcross.org.au/files/2010_Forced_Marriage_Sierra_Leone.pdf.

³⁶ See <http://www.rscsl.org>.

³⁷ Article 1 of the *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, June 6, 2003, available at: <http://www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecution>. (Agreement between the UN and the Government of Cambodia)

³⁸ Agreement between the UN and the Government of Cambodia.

³⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006 (Law Establishing ECCC), article 1, available at: <http://www.eccc.gov.kh/en/document/legal/law-on-eccc>.

Compared to other existing hybrid mechanisms, the ECCC has several distinctive features, including its domestic character. The ECCC has a majority of national judges as well as both international and national co-prosecutors, co-investigating judges and co-lawyers for defense and victims. The inclusion of both national and international personnel has offered opportunities for matching complementary skills and expertise and fostering greater national ownership of the judicial process.

The ECCC also includes distinctive civil law features. First, with the creation of an Office of the Co-investigating Judges that supersedes party-driven investigations. Second, with the establishment of an innovative scheme that enables victims to participate as civil parties in the proceedings, independently from the Office of the Co-prosecutors, and to receive collective reparations ordered by the Court.

The ECCC is entirely dependent on voluntary funding, which led to similar challenges to those faced by the SCSL. It was set up just outside of Cambodia's capital, Phnom Penh, which has enabled many Cambodians to visit the Court and attend hearings contributing to the accessibility of the judicial process. The ECCC also has a strong outreach programme, which brings many people from villages throughout Cambodia to watch the proceedings.

One of the ECCC's shortcomings is its limited jurisdiction both in time and scope, preventing the Court from investigating crimes committed before and after the fall of the regime, or from prosecuting suspected perpetrators other than a few senior leaders. Allegations of corruption, and flawed proceedings, as well as attempts of political interference in the extended cases 003 and 004, have also been identified as concerns by many analysts of ECCC proceedings.⁴⁰ Another shortcoming is that the ECCC can only grant "collective and moral" reparations, in the form of "already designed and funded reparation projects" when the accused are presumably indigent.⁴¹ In the absence of any other reparation mechanism in Cambodia for crimes committed under the Khmer Rouge administration, this meant that only victims constituted as civil parties before the ECCC could receive reparations, and even those would only be granted reparations in the form of projects for which funding had already been secured. These reparations would therefore be granted based on donors' priorities rather than on the needs of victims.

The Court has completed its first case against Kaing Guek Eav alias Duch, the former head of the secret prison at Tuol Sleng (Case 001),⁴² in which he was convicted and sentenced to life imprisonment. In another trial, former deputy secretary of the Communist Party of Kampuchea, Nuon Chea, and former president of the presidium, Khieu Samphan (Case 002/1), were convicted of crimes against humanity and sentenced to life imprisonment in 2013. The ECCC announced that an appeals judgment in Case 002/01 will be rendered on 23 November 2016. A second trial against Chea and Samphan (case 002/2) on a separate set of charges is currently ongoing. Proceedings are still ongoing in Cases 003 against Meas Muth and 004 against Im Chaem, Yim Tith and Ao An.

⁴⁰ See Amnesty International Annual report 2012 on Cambodia: "The Co-Investigating Judges announced the closure of Case 003 in April, apparently without having undertaken full investigations. Case 004 remained with the Co-Investigating Judges. In October, the Pre-Trial Chamber rejected an appeal by a victim to be recognized as a civil party in Cases 003 and 004. The two international judges who supported the appeal revealed that there had been several errors, including alleged manipulation of documents, which denied the rights of both victims and suspects. The international Co-Investigating Judge resigned a few days before these findings were made public, citing political interference. His replacement by Reserve Judge Laurent Kasper-Ansermet was delayed after the Cambodian government failed to agree to the appointment".

⁴¹ Internal Rule 23 *quinquies* (1) and (3).

⁴² ECCC, *Judgment*, Case against Kaing Guek Eav alias Duch, 26 July 2010, E188, available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf; and ECCC, *Appeal Judgement*, Case against Kaing Guek Eav alias Duch, 3 February 2012, F28, available at: <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>.



Civil party at former Security Prison S-21 now Tuol Sleng Genocide Museum, in Phnom Penh, Cambodia, on the eve of the verdict in Case 002/01 delivered by the Extraordinary Chambers in the Courts of Cambodia on 7 August 2014. © FIDH

FACTS & FIGURES

- Established by an agreement between the UN and the Government of Cambodia in 2003 and a subsequent 2004 domestic law.
- Mandated to try senior Khmer Rouge leaders and those most responsible for crimes under Cambodian and international law committed between 1975 and 1979.
- Located in Phnom Penh.
- National and international judges (with majority of national judges) and staff (including Co-Prosecutors, Co-Registrars).
- Three persons have so far been convicted and sentenced (Duch, Nuon Chea and Khieu Samphan) in two trials (Case 001, Case 002/01), and a third trial is ongoing (Case 002/02). Investigations targeting other suspects are ongoing (Cases 003 and 004).

SUCCESSES & GOOD PRACTICES

- Accessible as located within country where crimes took place.
- Defence Support Section that maintained a list of qualified counsel, undertook legal research to assist defence teams and administered legal aid programme.
- Outreach programme which brought people from all parts of Cambodia to view the proceedings.
- Participation of over 5000 civil parties in the proceedings.
- Key roles allocated to Cambodian nationals and transfer of capacity from international to national staff.
- First hybrid court to allow civil party participation and award reparations.

CHALLENGES & LESSONS LEARNED

- Allegations of corruption and political interference undermined court's independence, despite structure designed to avoid this.
- Voluntary contribution model of funding resulted in considerable insecurity regarding the continuity of the court, as well as for personnel.
- Lengthy proceedings, in particular following the court's decision that Case 002 (against the main former Khmer rouge leaders) should be severed into separate trials, each addressing a different section of the indictment. Only case 001 is final.
- Shortcomings with the reparations process as the court meant that only collective and moral reparations, in the form of already designed and funded reparation projects, submitted by the civil parties themselves, could be awarded.

EXTRAORDINARY AFRICAN CHAMBERS - SENEGAL

Established on 22 August 2012 by an agreement between the AU and the Senegalese authorities, the EAC was created within the Senegalese court system.⁴³ It is composed of four levels: an Extraordinary African Investigative Chamber within the Dakar Regional Court, an Extraordinary African Indicting Chamber at the Dakar Court of Appeal, an Extraordinary African Trial Chamber at the Dakar Court of Appeal and an Extraordinary African Appeals Chamber at the Dakar Court of Appeal.⁴⁴ This hybrid tribunal has a similar domestic character to the ECCC and it also includes a strong civil law component, inspired both by the ECCC and the Senegalese system, and allows for victims' participation as civil parties.

The Investigative Chamber and the Indicting Chamber include only Senegalese judges and deputies.⁴⁵ However, the Trial Chamber and the Appeal Chamber⁴⁶ each comprise two Senegalese judges, two Senegalese deputy judges and a Presiding Judge who is a national of another AU member state.⁴⁷ Finally, the Prosecutor-General and his two deputies are of Senegalese nationality.⁴⁸

The EAC is competent to prosecute and judge the main perpetrators of crimes and serious violations of international law, international custom and international conventions ratified by Chad, committed on Chadian territory between 7 June 1982 and 1 December 1990, including crimes of genocide, crimes against humanity, war crimes and torture.⁴⁹ Under Article 16 of the Statute, when a situation is not covered by the Statute of the EAC, Senegalese law applies.

⁴³ Statute of EAC, Article 2.

⁴⁴ Statute of EAC, Article 2.

⁴⁵ Statute of EAC, Article 11.

⁴⁶ Statute of EAC, Article 11.

⁴⁷ Statute of EAC, Article 11.

⁴⁸ Statute of EAC, Article 12.

⁴⁹ Statute of EAC, Articles 4 to 8.

On 2 July 2013, Hissène Habré was indicted by the EAC for crimes against humanity, war crimes and torture, allegedly committed while he was president of Chad.⁵⁰

On 30 May 2016, he was found guilty of the crimes of torture, war crimes and crimes against humanity, including for rape and sexual slavery, and sentenced to life imprisonment. He was also found guilty, as a direct perpetrator, of multiple rapes against one of the civil parties heard during the trial.⁵¹ Appeal proceedings in the case are ongoing.

The Statute of the EAC also provides for the possibility of reparations for civil parties, as well as for the establishment of a trust fund. On 29 July 2016, the EAC granted the civil party victims of rape and sexual violence in the Habré case 20 million FCFA each (33,880 USD), the civil party victims of arbitrary detention, torture, prisoners of war and survivors in the case 15 million FCFA each (25,410 USD) and the indirect victims 10 million FCFA each (16,935 USD). The EAC rejected the civil parties' request for collective reparations.⁵²

The establishment of the EAC and the trial of Habré were remarkable as they resulted from a 25 year-long fight campaign by the victims and civil society organizations. It was also the first time that such an accountability process was led by the AU.



Civil parties, their lawyers and supporting NGOs walking towards the Extraordinary African Chambers in Senegal on the day of the verdict against Hissène Habré delivered in Dakar on 30 May 2016. © FIDH

FACTS & FIGURES

- Established in 2012 by an agreement between the AU and the Government of Senegal.
- Mandated to try those most responsible for crimes committed in Chad between 1982 and 1990, although only Hissène Habré tried.
- Located in Dakar, Senegal, where Hissène Habré was residing.
- Senegalese and international judges (with majority Senegalese), Senegalese staff.
- Hissène Habré convicted on 30 May 2016 and sentenced to life imprisonment, reparations awarded in the form of compensation to direct and indirect victims on 29 July 2016. Appeal proceedings ongoing.

SUCCESSES & GOOD PRACTICES

- Accessible as located in neighbouring country to where the crimes took place.
- Participation of over 4000 civil parties.
- Quick and cost-efficient trial compared to other tribunals.
- First such mechanism established by the AU.
- Habré was convicted of the crimes of torture, war crimes and crimes against humanity, including for rape and sexual slavery. He was also found guilty, as a direct perpetrator, of multiple rapes against one of the civil parties heard during the trial, although sexual violence was not contemplated in the initial charges brought against him.
- Kick-started domestic trial in Chad of 20 Habré-era agents who were convicted in March 2015. Reparations awarded to more than 7000 victims, but not yet implemented.

CHALLENGES & LESSONS LEARNED

- Long and convoluted path to the establishment of the EAC, as the result of a 25-year long campaign by victims and civil society organizations to bring Habré to justice.
- No clear guidelines regarding reparations process.
- Lack of funding for the establishment of the Trust Fund provided for in the statute to compensate victims, and lack of clarity concerning the use of Hissène Habré's seized assets, limited to a building and two bank accounts.
- Only one trial resulted in only partial accountability for crimes under international law committed in Chad between 1982 and 1990.
- Several instances of non-cooperation by Chad.

⁵⁰ Order for partial dismissal, indictment and referral to the Trial Chamber of the EAC, 13 February 2015.

⁵¹ *Ministere Public c. Hissène Habré, Jugement*, 30 May 2016, available at <http://www.chambresafriaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/642-document-jugement-rendu-par-la-chambre-d-assises.html> ("Habré Judgment"). See Human Rights Watch, *Hissène Habré*, available at: <https://www.hrw.org/tag/hissene-habre>. See also Amnesty International, *Landmark Decision Brings Justice for Tens of Thousands of Victims*, 30 May 2016, available at: <https://www.amnesty.org/en/latest/news/2016/05/hissene-habre-verdict-landmark-decision-brings-justice-for-tens-of-thousands-of-victims/>; and FIDH, *Hissène Habré convicted of International Crimes: A Historic Verdict for Victims*, 3 June 2016, available at: <https://www.fidh.org/en/region/Africa/chad/hissene-habre-convicted-of-international-crimes-a-historic-verdict>.

⁵² *Habré Judgment*, pp. 574-594. See also Amnesty International, *Chad: Victims in the Case against Hissène Habré awarded reparation*, 29 July 2016, available at: <https://www.amnesty.org/en/latest/news/2016/07/chad-victims-in-the-case-against-hissene-habre-awarded-reparation/>.

SPECIAL CRIMINAL COURT - CENTRAL AFRICAN REPUBLIC

In April 2015, the National Transition Council in the CAR adopted a law establishing a 'Special Criminal Court', which is to operate as a hybrid mechanism composed of national and international judges within the domestic judiciary and with the support of the UN. It will have the mandate to investigate gross violations of human rights and international humanitarian law committed in CAR since 1 January 2003. The law provides that the court will have a five-year, renewable mandate. It was promulgated on June 3, 2015 by then interim President Catherine Samba-Panza.⁵³

The Special Court for CAR will have a majority of national judges - the bench will be comprised of 27 judges, 14 from the CAR and 13 from other states,⁵⁴ reflective of the fact that the Special Criminal Court is meant to be a national institution within the CAR courts. It was also seen as important to include national judges to ensure skills transfer to and capacity building of the national judiciary. In order to address concerns about salary discrepancies between the national and international judiciary, the international judges will be seconded by their respective countries and therefore will receive salaries set by and paid for by their home jurisdictions. The appointment of the Special Prosecutor and commencement of the investigative phase will be undertaken before the establishment of the rest of the court to ensure that investigations and preservation of evidence takes place as soon as possible.

The ICC has already begun investigating crimes allegedly committed in the CAR since 2012. Considering, however, both the limited scope of ICC investigations likely leading to an extremely small number of prosecutions, as well as the lack of capacity of domestic courts, the creation of the Special Criminal Court has been welcomed as an effective mean of ending impunity after decades of conflict and egregious human rights violations. As such a hybrid entity will ensure greater ownership of justice processes, closer proximity to victims and contribute to building domestic judicial capacity while preventing political interference and partiality, the Special Criminal Court is considered by key actors on the ground to be the mechanism best suited for achieving accountability, and to contribute to peace and national reconciliation processes in CAR.

Since the promulgation of the law on the Special Criminal Court in June 2015, the transitional government has recently taken some steps towards the establishment of the court, including allocating a building, adopting necessary national decrees for appointing personnel, and establishing a committee to select national magistrates. A project document between the United Nations Multidimensional Integrated Stabilization Mission in the CAR (MINUSCA), UNDP and the national authorities for the first phases of the court was signed on 26 August 2016. However, sustained political will from the national authorities as well as the full support of the international community will be critical within the next months and years to make the Court a reality and allow it to complete its mandate.⁵⁵

⁵³ Présidence de la République Centrafricaine (2015), Loi organique N° 15.003 portant création, organisation et fonctionnement de la Coup Pénale Spéciale ("Loi Organique"), 3 June 2015.

⁵⁴ Loi Organique, Articles 11-14.

⁵⁵ See Human Rights Watch, Amnesty International, FIDH and others, *Central African Republic: Make Justice a priority*, 21 April 2016, available at: <https://www.hrw.org/news/2016/04/21/central-african-republic-make-justice-priority>.



Members of anti-Balaka militia, participating in burning down a mosque and looting property nearby in PK 26 area, north of Bangui, 23 January 2014. © Amnesty International

SPECIAL CRIMINAL COURT - CENTRAL AFRICAN REPUBLIC

FACTS & FIGURES

- A 2014 Memorandum of Understanding (MOU) between the Government of CAR and the UN, and a 2015 domestic law provide for the Special Court to be established within the courts of CAR.
- Mandated to try perpetrators of grave human rights violations and violations of international humanitarian law committed in CAR between 2003 and 2015.
- Will be located in Bangui.
- International and national judges, with a majority of national judges, and various international staff positions (i.e. Special Prosecutor). International judges to be seconded by their home countries.
- First hybrid court to operate in country where the ICC is also conducting investigations.
- In preparatory phases, it is expected that the Special Prosecutor will be appointed by end of 2016.

SUCCESSES & GOOD PRACTICES

- Theoretically, accessible as located in country where crimes were committed (but concerns regarding security and witness and victims' protection).
- Located within national court system with a majority of judges from CAR which might foster capacity, skills transfer, and national ownership.
- Provides for the participation of victims into the proceedings and witness protection mechanisms.
- Seconding of international judges by their home countries to help mitigate concerns of national judges that international judges would be compensated at a much higher level than national judges.
- Prioritization of the court's investigative branch before establishment of other organs.
- Funding court in phases, possible transfer to domestic courts if insufficient funding.

CHALLENGES & LESSONS LEARNED

- Potential difficulties in securing long-term funding.
- National magistrates have limited expertise in international criminal law.
- Uncertain political commitment towards court.

PROPOSED SPECIALIZED MIXED CHAMBERS - DEMOCRATIC REPUBLIC OF CONGO

There have been various proposals for “specialized mixed chambers” in DRC’s courts with a mandate specifically to address crimes committed between 1993 and 2002. While there have been successful domestic prosecutions in the military courts of war crimes and crimes against humanity committed after 2002, there has been complete immunity for crimes committed before 2002. The majority of those who perpetrated the most serious international crimes since the beginning of the conflict in 1993 have not been held accountable. Extensive discussions took place in 2011 which led to a draft law establishing a Special Mixed Court to try those responsible for genocide, war crimes and crimes against humanity committed in DRC since 1990, being presented before the Senate in August 2011. It was eventually rejected.⁵⁶ In a 2013 speech before both chambers of Parliament, President Kabila expressed support for the establishment of specialized chambers within the DRC justice system to try these crimes.⁵⁷ The Ministry of Justice prepared new legislation to establish the mixed chambers which was presented to Parliament on 6 May 2014.⁵⁸

The proposed specialized chambers were to consist of special sections within the Courts of Appeal in Kinshasa, Goma and Lubumbashi, which were to contain both international and national staff (including both military and civilian members of the judiciary), with the international staff to be gradually phased out.⁵⁹ The Chambers were to have retroactive jurisdiction to try crimes against humanity, genocide and war crimes

⁵⁶ For an analysis of the draft law of August 2011, please read FIDH-ASADHO-GL-LE position paper of August 2011, available at: <https://www.fidh.org/fr/regions/afrique/rdc/RDC-Les-senateurs-torpillent-le>.

⁵⁷ Discours de Joseph Kabila devant le congrès, 23 October 2013, available at: Afrikarabia: <http://webcache.googleusercontent.com/search?q=cache:2cSyw3YGaAUJ:afrikarabia.com/wordpress/wp-content/uploads/2014/01/Discours-J.-Kabila-Congre%25CC%2580s-Concertations-23102013.doc+%&cd=1&hl=fr&ct=clnk&gl=fr&client=ubuntu>.

⁵⁸ Projet de Loi Modifiant et Complétant la Loi Organique No 13/011-B du 11 Avril 2013 portant Organisation, Fonctionnement et Compétence des Juridictions de l’Ordre Judiciaire en Matière de Répression des Crimes de Génocide, Des Crimes contre L’Humanité et Des Crimes de Guerre, 6 May 2014. (“Projet de Loi – DRC”).

⁵⁹ Projet de Loi – DRC, revised Article 91.1, 91.5, 91.6, 91.7 of the Loi Organique No. 13/011-B.

committed since 1993.⁶⁰ The draft legislation also included extensive provisions on witness and victim protection including the establishment of a witness and victim protection unit.⁶¹ The aim of the specialized mixed chambers was to deal with capacity limitations within the national judicial system in investigating and prosecuting international crimes, to promote the independence of the proceedings by the presence of international personnel, and to transfer jurisdiction over these crimes to civilian courts. As the military justice system has dealt almost exclusively with international crimes in DRC and there is a lack of capacity within the civilian justice system, the specialized chambers were also designed to enable skills transfer from military to civil magistrates.

However, the draft legislation was rejected by Parliament in May 2014 on the basis of a technicality, and although a revised version was supposed to be submitted by the Ministry of Justice to Parliament, this has not yet occurred. The lack of substantive discussion of the draft law's underlying content and rationale and the hostility of Members of the National Assembly where it was introduced pointed to the unease still prevailing within DRC's political class (comprised largely of persons from political movements whom armed wing fought in DRC's conflict) about a broad retrospective look into crimes committed since the onset of DRC's conflict in 1993. In addition, concerns were repeatedly expressed about the presence of international personnel on the basis of sovereignty, and the likely differences in salary between international and national staff.



Nyabiondo, Maitsi territory, North Kivu province. Scene of mass killings and other abuses against the civilian population in December 2004. © Amnesty International

FACTS & FIGURES

- Various proposals for the establishment of “specialized mixed chambers” in the appeal courts of DRC with a mandate to address crimes committed between 1993 and 2002.
- Proposed to be located in the Courts of Appeal of Goma, Lubumbashi and Kinshasa.
- International and national judges – with majority of national judges, and various international staff positions (i.e. Special Prosecutor).
- To include both military and civilian judges from DRC.
- Most recent draft law was rejected by Parliament on a technicality in 2014 so specialized chambers not established.

POTENTIAL SUCCESSES & GOOD PRACTICES

- Would have been accessible, as located in country where crimes were committed.
- Location within national court system, with majority of judges from DRC, which would have helped to enable capacity and skills transfer and create national ownership.
- Aim was also the transfer of expertise in the trial of crimes under international law from military to civilian judges.

CHALLENGES & LESSONS LEARNED

- Lack of political will for its establishment.
- Opposition by national authorities because international personnel would be paid more than national personnel, as well as due to concerns about sovereignty.
- As a result of the failure to establish these chambers, there is no accountability mechanism for crimes committed from 1993 to 2002 in DRC.

⁶⁰ Projet de Loi – DRC, revised Article 91.2 of the Loi Organique No. 13/011-B.

⁶¹ Projet de Loi – DRC, revised Article 91.12 of the Loi Organique No. 13/011-B.

MAKING THE RIGHT CHOICES: PROPOSALS FOR A JUST, FAIR AND EFFECTIVE HCSS

1. ESTABLISH THE HCSS EXPEDITIOUSLY AND IN CONSULTATION WITH RELEVANT STAKEHOLDERS INCLUDING CIVIL SOCIETY

On 26 September 2015, the AU PSC agreed to the establishment of the HCSS and requested the Chairperson of the AUC “to take all necessary steps towards the establishment of the HCSS, including providing broad guidelines relating to the location of the HCSS, its infrastructure, funding and enforcement mechanisms, the applicable jurisprudence, the number and composition of judges, privileges and immunities of Court personnel and any other related matters.”⁶² Since then, however, little progress has been made towards the establishment of the court, and the AU has not publicly stated what steps it is taking to move the process forward. The UN has indicated its willingness to provide technical assistance to the AUC in establishing the framework for the court.

Regardless of the status of implementing the ARCSS, the AUC should proceed with the court’s expeditious establishment. In his January 2016 report to the AU PSC, the Chair of the Joint Monitoring and Evaluation Commission (JMEC), Festus Mogae, stated that delays in implementing other elements of the peace agreement should not delay establishment of the court. He called for the AUC to “ensure that the HCSS is established without further delay, in order to ensure the aspirations for justice and accountability contained in the Agreement are realized.”⁶³ In September 2016, the PSC Council further stressed “the need to hold those who committed atrocities accountable in order to end and prevent impunity in future”.⁶⁴

The ARCSS places responsibility for developing a framework for the HCSS and its establishment with the AUC.⁶⁵ The agreement also provides that the TGoNU should pass any legislation necessary for its

⁶² Communique of 547th meeting of the Peace and Security Council, 26 September 2015.

⁶³ *Report of the Chairperson of the Joint Monitoring and Evaluation Commission (JMEC) for the Agreement on the Resolution of the Conflict in the Republic of South Sudan to the AU PSC*, 29 January 2016, available at <http://jmecsouthsudan.org/uploads/AUPSCreport.pdf>.

⁶⁴ Communique of the 626th meeting of the Peace and Security Council, 19 September 2016.

⁶⁵ ARCSS, Chapter V, 3.1.2.

establishment.⁶⁶ Practically speaking, as the court's establishment will require commitments from both the AU and South Sudan, it is likely that some kind of MOU or bilateral treaty agreement will be necessary.

It is critical that the AU and South Sudan engage with relevant actors in the country, including civil society, as they proceed to determine the statute, rules of procedure, seat, functions and personnel of the new court in order to contribute to the legitimacy of the court as well as to ensure local ownership.

2. PRIORITIZE ESTABLISHING THE INVESTIGATIVE BRANCH TO ENSURE PRESERVATION OF EVIDENCE

Since the start of South Sudan's conflict, crimes under international law have been documented by various organizations, including South Sudanese civil society. However, these efforts have not been exhaustive, and evidence may not have been collected in an appropriate manner to lay the groundwork for future criminal prosecutions. With time, evidence degrades and memories fade.

The AU should thus prioritize establishing the HCSS's investigative branch (and other aspects essential to such investigation, including witness protection). Currently, for example, the European Union's Special Investigative Task Force is conducting investigations and preserving evidence, which the Kosovo Tribunal will be able to use when it is up and running. At the Special Criminal Court for CAR, the appointment of the Special Prosecutor and commencement of the investigative phase will be undertaken before the establishment of the rest of the court to ensure that investigations and preservation of evidence takes place as soon as possible. The human rights division of MINUSCA, in collaboration with UNDP, is also undertaking a mapping of all crimes committed that would fall within the mandate of the court with the aim of passing this information to the Special Prosecutor, once appointed. A similar model could be considered for the HCSS.

The documentation of crimes of sexual violence under international law should be based on existing basic standards and best practices such as those outlined in the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.⁶⁷ This would ensure that documentation respects the "do no harm" principle by mitigating risks, and protects and empowers survivors. Following these best practices will also help preserve the integrity of the evidence.

In addition, the AUC should facilitate the collection and eventual transfer of documentation and relevant information from already existing regional and international mechanisms such as the UNMISS, the UN Panel of Experts on South Sudan, the AUCISS, the Ceasefire and Transitional Security Arrangements Monitoring Mechanism (CTSAMM) and civil society organizations.

Civil society efforts to document crimes under international law should also be strengthened by regional and international support.

3. GIVE DUE CONSIDERATION TO THE RISKS AND BENEFITS OF LOCATING THE COURT WITHIN SOUTH SUDAN

The ARCSS provides that "the Chairperson of the Commission of the AU shall decide the seat of the HCSS."⁶⁸ When deciding where to locate the court, the Commission must weigh the benefits of a base in South Sudan with a number of potential risks. Having the court located in South Sudan would increase its visibility and impact, would allow South Sudanese to attend and follow court proceedings more easily, would

⁶⁶ ARCSS, Chapter V, 1.1.2.

⁶⁷ *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, June 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf.

⁶⁸ ARCSS, Chapter V, 3.1.3.

result in an increased understanding of the cultural context of the country by the court's other African personnel, and would enhance the court's legitimacy within the country.

The primary concern with basing the court in South Sudan in the current context is the potential security risks to staff, witnesses, accused persons, victims and those supporting and/or legally representing them. Violence has persisted in parts of the country and there is a high level of insecurity within Juba. The peace agreement provided for a power-sharing formula and did not include any provision for vetting, meaning that individuals on both sides allegedly responsible for crimes under international law remain in positions of power where they could intimidate, harass, threaten and otherwise manipulate court processes. It is likely that the issuing of indictments and the commencement of trials would increase security risks for all involved in the court processes.

If the decision is made to locate the court outside of South Sudan, the court should be based within the region to facilitate the participation of witnesses, victims and interested South Sudanese in the proceedings. However, the state must be carefully chosen, in light of regional socio-political dynamics, and in order to ensure the confidence of the population regarding the selected state's support for the proceedings. The court should also develop a well-designed outreach programme to ensure that its proceedings can be followed within South Sudan.⁶⁹ The HCSS should also have the flexibility to conduct site visits, hear witness testimony or hold parts of trials in South Sudan. The ICC, for example, considered holding opening statements for the Bosco Ntaganda trial in the DRC, but ultimately decided not to for security reasons.⁷⁰ The court should also have the flexibility to relocate proceedings to South Sudan, should the security situation allow, on the basis of requests from the parties.

4. INCLUDE SOUTH SUDANESE JUDGES AND STAFF

The ARCSS provides that “a majority of judges on all panels, whether trial or appellate, shall be composed of judges from African states other than the Republic of South Sudan.”⁷¹ The AUC should work to include South Sudanese judges in the HCSS, while taking specific measures to guard against potential threats, both real and perceived, to the impartiality and independence of the court that this might entail. The AUCISS has in fact recommended that the HCSS include both South Sudanese judges and staff.⁷²

There are compelling reasons for including national judges in the HCSS. Experience suggests that including both national judges and international judges in hybrid or *ad hoc* courts⁷³ may enhance the domestic legitimacy of the court. As the mandate of the HCSS includes the investigation and prosecution of crimes under applicable South Sudanese laws, it is critical that there are South Sudanese judges on the court to assist with interpreting and applying these laws.⁷⁴ The appointment of South Sudanese judges may also increase the judiciary's contextual, cultural and historical understanding of cases.

Finally, the inclusion of national judges has the potential to lead to capacity-building and knowledge transfer both from non-South Sudanese judges to South Sudanese and vice versa, as has been the case with the SCSL, ECCC and Special Tribunal for Lebanon (STL). The ARCSS provides that the “HCSS shall leave a permanent legacy in the State of South Sudan upon completion of its HCSS Mandate.”⁷⁵ One of the ways in which this can be achieved is by the inclusion of national judges to strengthen domestic judicial capacity.

⁶⁹ Such a successful outreach programme was undertaken by the SCSL when the Charles Taylor case was relocated to The Hague for security reasons. See p. 28 of this report.

⁷⁰ *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Bosco Ntaganda*, Decision on the Recommendation of the Presidency on holding part of the trial in the State concerned, No. ICC-01/04-02/06 15 June 2015.

⁷¹ ARCSS, Chapter V, Article 3.3.2.

⁷² Final Report of the AUCISS, para. 1148.

⁷³ Such as the SCSL, ECCC and the STL.

⁷⁴ At other hybrid tribunals such as the SCSL, ECCC and the STL, where the courts were mandated to investigate and prosecute crimes under domestic law in Sierra Leone, Cambodia and Lebanon respectively (See Statute of STL, Article 2; Statute of SCSL, Article 5), the statutes establishing these courts provided for the possibility that national judges could be part of the bench. Statute of SCSL, Article 12, providing for the Government of Sierra Leone to nominate a certain number of judges to each Chamber; Statute of STL, Article 8, providing for a specified number of Lebanese judges in each Chamber; Law Establishing ECCC, Article 9 new, providing for a specified number of Cambodian judges in each Chamber. The STL, for example, has explicitly indicated, that it is important to have Lebanese judges, as they may be better placed to interpret Lebanese law and transfer this knowledge to the international judges. See: <http://www.specialtribunalforlebanon.org/en/about-the-stl> (Video: *Why it is Important to Have Lebanese judges in the Chambers of the STL?*).

⁷⁵ ARCSS, Chapter V, Article 3.5.6.

Concerns about real or perceived bias, or lack of independence, on the part of South Sudanese judges, given the ethnic dimensions of the conflict, can be addressed by ensuring that South Sudanese judges on the court represent different geographical areas and ethnic communities, and that adequate disciplinary mechanisms are put in place. Ensuring that South Sudanese judges appointed to the court have the necessary expertise and capacity is critical. The applicant pool should not be restricted to individuals currently serving in South Sudan's judiciary, but should include South Sudanese living and working in the diaspora. The AUC should also ensure that appointed South Sudanese and non-South Sudanese judges undertake appropriate training in international criminal law and practice, international humanitarian law and international human rights law, with emphasis on specific issues, including, but not limited to gender-based violence, violence against children and victims' rights.⁷⁶

The ARCSS provides that prosecutors and duty defence counsel of the HCSS, as well as the registrar, shall be personnel from African states other than the Republic of South Sudan.⁷⁷ It is unfortunate that this seemingly precludes the participation of South Sudanese nationals in many of the key functions of the court. In developing the statute and rules of procedure for the court, South Sudan and the AUC should consider putting in place a process to train South Sudanese staff in these offices over a period of time so that they can eventually take over these senior positions.

Similar considerations apply as in the case of judges – the appointment of national staff members helps contribute to the legal analysis of crimes under South Sudanese law, provides a better understanding of the culture and historical underpinnings of the conflict, and allows for the opportunity for skills transfer and development of South Sudanese legal professionals. For these reasons, most hybrid tribunals, including the STL, SCSL, ECCC and Special Court for CAR, have provided for national staff members, including in key roles.⁷⁸

Although not clearly drafted, Article 3.3.3 of the ARCSS does appear to allow that, as part of the right to choose their own counsel, accused persons may select South Sudanese counsel.⁷⁹

The ARCSS also allows for the possibility that prosecutors and defence counsel can be assisted by such South Sudanese and African staff of other nationalities as may be required to perform the functions assigned to them effectively and efficiently.⁸⁰ The HCSS should ensure the participation of South Sudanese in these capacities and advertise the positions widely in South Sudan. This would go some way towards overcoming the problem of the lack of participation of South Sudanese in key roles in the court, and contribute to knowledge transfer and development of South Sudanese legal professionals.

Further, while Article 3.3.1 of the ARCSS mentions "investigators", the ARCSS does not specify whether these should be South Sudanese or non-South Sudanese. The AUC should ensure the participation of both South Sudanese and non-South Sudanese as investigators. Investigators should undertake appropriate training in international criminal and human rights law, including on sexual and gender-based violence. South Sudanese investigators should represent different geographical areas and ethnic communities.

While the ARCSS clearly stipulates that judges, prosecutors, defence counsel and the registrar shall be appointed by the AUC, it does not state who will appoint South Sudanese and non-Sudanese staff to assist prosecutors or defence counsel or as investigators.⁸¹ These roles should also be appointed by the AUC to ensure staff are appropriately vetted to ensure that they do not compromise witness and victim protection.

⁷⁶ For example, all judges at the ECCC received specific training about Cambodian and international law and procedure relevant to the ECCC. See: <http://www.eccc.gov.kh/en/faq/how-were-judges-appointed>.

⁷⁷ ARCSS, Chapter V, Article 3.3.3 and 3.3.4.

⁷⁸ Statute of STL, Article 11(4) (Deputy Prosecutor must be Lebanese), Statute of SCSL, Article 15(4) (Deputy Prosecutor must be Sierra Leonean), Law Establishing ECCC, Article 16 (Co-Prosecutor must be Cambodian), Article 23(2) (Co-Investigating Judge must be Cambodian), Article 30 (Director of Office of Administration must be Cambodian); Loi Organique, Article 15 (Registrar must be from CAR), Article 18 (Deputy Prosecutor must be from CAR). One of criticisms of the SCSL, in fact, was that while there were Sierra Leoneans as judges and Deputy Prosecutor, there was insufficient participation of other Sierra Leonean staff in the Office of the Prosecutor, at defence counsel and within the office of the Registrar.

⁷⁹ Article 3.3.3 provides that "Prosecutors and defence counsels [sic] of the HCSS shall be composed of personnel from African states other than the Republic of South Sudan, notwithstanding the right of defendants to select their own defence counsel in addition to, or in place of, the duty personnel of the HCSS". ARCSS, Chapter V, Article 3.3.3. See p. 28 of this report.

⁸⁰ ARCSS, Chapter V, 3.3.6. See p. 28 of this report.

⁸¹ While Article 3.3.5 of the ARCSS clearly stipulates that judges, prosecutors, defence counsel and the registrar shall be appointed by the AUC, Article 3.3.6 does not state who will appoint South Sudanese and non-Sudanese staff to assist prosecutors or defence counsel. There is also no provision specifying who will appoint investigators.

The AUC should develop a clear selection process for judges and other staff members of the HCSS that is independent, transparent, and merit-based.

The HCSS should be structured with a separate Office of the Prosecutor, Registry and Chambers, all staffed adequately to fulfil their respective functions. The HCSS should also include an independent Victims and Witnesses Unit, and an Outreach Unit that should be funded via the regular budget of the court. The HCSS should also consider establishing a Defence Office as an independent organ of the court, as well as a Victims' Unit.⁸²

5. ENSURE THE APPLICABLE LAW AND MODES OF LIABILITY ARE DEFINED IN ACCORDANCE WITH INTERNATIONAL LAW AND INCLUDE COMMAND RESPONSIBILITY

The HCSS is mandated to investigate and prosecute individuals responsible for crimes against humanity, war crimes, genocide and other serious crimes under international law and other relevant laws of the Republic of South Sudan including gender based crimes and sexual violence.⁸³ The HCSS statute and any other laws and rules applied by the HCSS must be in defined accordance with international law and compliant with international human rights law. All crimes under international law and modes of liability should be defined in accordance with definitions in international law. National laws that are not strictly in accordance with international law and compliant with international human rights law should not apply or the relevant laws should be reformed so that they comply with these standards.

While the ARCSS provides for individual responsibility for planning, instigating, commission, aiding and abetting and ordering, as well as participation in a joint criminal enterprise, there is no explicit provision for command or superior responsibility as a mode of liability. Under this mode of liability, commanders and superiors may be held responsible for crimes committed by subordinates under their effective control, if they knew or had reason to know that the perpetrators were committing or about to commit the crimes, and did not take all reasonable and necessary measures within their power to prevent the commission of the crime or if such crimes were committed, to punish the perpetrator.⁸⁴ This mode of liability, defined in accordance with strict definitions in international law, should be included in the relevant legislation in order to ensure that the full range of liability recognized under international law is covered.⁸⁵

6. ENSURE THE TEMPORAL JURISDICTION ALLOWS FOR PROSECUTION OF ONGOING CRIMES

In line with the ARCSS, the HCSS should have jurisdiction over all of the listed crimes committed - from 15 December 2013 through the end of the Transitional Period⁸⁶ - ensuring that it has the mandate to try crimes committed during the July 2016 violence in Juba, as well as ongoing crimes. The recent call of IGAD and the AU Peace and Security Council (PSC) for “an urgent in-depth independent investigation by the AU on the fighting that took place in Juba to identify those responsible with a view of ensuring they are held responsible for their criminal acts” highlights the need for the court to be able to prosecute crimes committed in July

⁸² See pp. 28, 30 of this report.

⁸³ ARCSS, Chapter V, Article 3.2.1.

⁸⁴ It should be noted that in the Rome Statute, the mental element for this mode of liability differs for military commanders and civilian superiors. See Article 28 - the mental element for military commanders or persons effectively acting as military commanders is that “they knew or owing to the circumstances at time, should have known” Article 28(a), and the mental element for non-military superiors is that they “knew or consciously disregarded information which clearly indicated” Article 28(b).

⁸⁵ This mode of liability is not explicitly listed in the modes of liability in the ARCSS. However, an expansive interpretation of Article 3.1.1 of the ARCSS on individuals bearing the responsibility for violations of international law, Article 3.2.1 on jurisdiction and Article 3.5.3 on judgments of the court being consistent with accepted international human rights law, international humanitarian law, and international criminal law, supports the inclusion of command responsibility as a mode of liability when the HCSS's statute is drafted.

⁸⁶ ARCSS, Chapter V, Article 3.1.1.

2016.⁸⁷ The inclusion of an expansive temporal jurisdiction is particularly important as the ability of the court to investigate ongoing crimes under international law could also help to immediately deter future violations.

7. EXCLUDE THE DEATH PENALTY AS A POSSIBLE PENALTY

The ARCSS does not provide any specifications about the applicable penalties and does not rule out the death penalty as a potential sentence. South Sudan retains the death penalty in its domestic laws. The death penalty violates the right to life and is the ultimate cruel, inhuman and degrading punishment. No other hybrid or *ad hoc* tribunal, nor the ICC, has included the death penalty, but have instead provided for a maximum sentence of life imprisonment (ICTY, ICTR, ECCC, STL, and Special Court for CAR) or imprisonment for a certain number of years (SCSL).⁸⁸ Further, the inclusion of the death penalty would preclude UN support to the HCSS, as the UN is obliged to “neither establish nor provide assistance to any tribunal that allows for capital punishment”.⁸⁹

The AUC should ensure that the death penalty is excluded as a possible sentence for any of the crimes that fall within the mandate of the court.

The ARCSS does not provide any specific guidance on where the sentences of those convicted by the HCSS will be served. The HCSS must ensure that the conditions of detention of accused detained awaiting trial and those serving sentences post-conviction, whether in South Sudan or in other states with which the HCSS concludes sentencing enforcement agreements, comply with international standards.

8. IMMUNITIES, AMNESTIES OR PARDONS MUST NOT PREVENT PROSECUTION FOR CRIMES UNDER THE HCSS’ JURISDICTION

The ARCSS provides that the “HCSS shall not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties.”⁹⁰ While the wording could be clearer, this appears to rule out the application of any prior amnesties as a bar to prosecution before the court, in accordance with international standards which bar amnesties for crimes under international law such as war crimes, crimes against humanity and genocide.⁹¹ This provision may be particularly relevant in light of the amnesties that have previously been granted by the government, including as recently as February 2015.⁹² Additionally, this provision also appears to prohibit pre and/or post-conviction pardons, again in conformity with international standards which prohibit pardons for crimes against humanity, war crimes and genocide.⁹³ However, these prohibitions should be spelled out more clearly in the HCSS statute.

The ARCSS also provides that “no one should be exempted from criminal responsibility on account of their official capacity as a government official [or] an elected official”.⁹⁴ The HCSS therefore appears to conform with international standards, which recognize that there can be no immunities for heads of state or other

⁸⁷ *Communique of the Second IGAD Plus Extraordinary Summit on the Situation in South Sudan*, 5 August 2016; *Communique of the 616th meeting of the Peace and Security Council*, 11 August 2016. See also the *Communique of the 626th meeting of the Peace and Security Council*, 19 September 2016.

⁸⁸ Statute of ICTY, Article 24(1); Statute of ICTR, Article 23(1); Statute of STL, Article 24(1); Law Establishing ECCC, Article 38; Loi Organique, Article 59; Statute of SCSL, Article 19(1).

⁸⁹ Guidance Note of the Secretary-General: United Nations approach to Transitional Justice, March 2010, p. 4.

⁹⁰ ARCSS, Article 3.5.4.

⁹¹ See analysis in Amnesty International, *International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity* (Index: IOR 40/1227/2015), 2015 (“Recommendations to ILC on Draft Convention on Crimes against Humanity”), pp. 15-23.

⁹² See pp. 8, 25-26 of this report.

⁹³ In relation to pre-conviction pardons, see analysis in Amnesty International, *Recommendations to ILC on Draft Convention on Crimes against Humanity*, pp. 21-23. In relation to post-conviction pardons, see i.e. in the context of torture, *Kepa Urra Guridi v. Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002 (2005), para.6(6), holding that post-conviction pardons are not compatible with the CAT as they have the practical effect of allowing torture to go unpunished and encouraging its repetition.

⁹⁴ ARCSS, Article 3.5.5.

senior state officials before international tribunals.⁹⁵ It would, however, have been clearer if the HCSS had explicitly indicated that heads of state were not subject to immunities.

The ARCSS also appears to conform to international standards by providing that the crimes under the jurisdiction of the court are not subject to any statute of limitations.

The AUC must ensure that the statute reflects what is provided in the ARCSS with respect to amnesties, immunities, pardons and the lack of a statute of limitations for the crimes under the jurisdiction of the court. With respect to immunities, the statute should specifically provide that this includes no immunity for serving heads of state.

9. INCLUDE A PROVISION PROVIDING THAT A PERSON CANNOT BE TRIED MORE THAN ONCE FOR THE SAME OFFENCE

The ARCSS does not include a provision on the established norm of *non bis in idem*, according to which a person cannot be tried or punished more than once for the same crime. This provision is contained within all of the major international human rights treaties, and is crucial to ensuring that the principle of finality and the fair trial rights of the accused are respected. In accordance with international standards, the AUC should ensure that such a provision is included in the statute of the HCSS. However, the AUC also needs to ensure that persons who have been tried by national courts may still be tried by the HCSS if the national proceedings were not independent or impartial or were designed to shield the accused from justice.⁹⁶

10. ALLOW FOR VICTIMS' PARTICIPATION AND THE AWARD OF REPARATION

The ARCSS does not specifically provide for victims' participation in the proceedings, although it does indicate that the HRSS shall "award appropriate remedies to victims, including but not limited to reparations and compensation".⁹⁷

Common law justice systems, like South Sudan's, traditionally do not provide any role for victims in proceedings beyond being called as witnesses. Civil law systems generally provide for participation of victims in criminal proceedings, including as civil parties, and make orders for convicted persons to provide reparation to victims. Some internationalized courts in civil law countries, including the ECCC in Cambodia and the EAC in Senegal, have also provided for this. The ICC, which is a mixture of common and civil law systems, also provides for participation, as well as providing for legal representation for victims and reparation orders. A number of common law jurisdictions have also taken steps in recent decades to expand the role of victims in criminal proceedings to make the process more meaningful and to better meet victims' needs, in line with international standards.⁹⁸

Meaningful victims' participation, including opportunities to participate in proceedings, be duly represented, and present their views and concerns, is often critical for the justice process to be effective, as has been recognized in the preamble to the Basic Principles on the Right to a Remedy, which provides that "in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith

⁹⁵ Both the two *ad hoc* tribunals (ICTY and ICTR) and the ICC, as well as the ECCC and Special Court for CAR, contain similar provisions. See ICTY Statute, Article 7(2), ICTR Statute, Article 6(2), Rome Statute, Article 27(1), Law Establishing ECCC, Article 29, Loi Organique, Article 56.

⁹⁶ See i.e. ICTR Statute, Article 9 and ICTY Statute, Article 10(2)(b), which provide that a person who has been tried before a national court may still be tried by the ICTR/ICTY if "the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted".

⁹⁷ ARCSS, Chapter V, Article 3.5.3.

⁹⁸ See, in particular, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the UN General Assembly on 29 November 1985, A/RES/40/34.

with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law”.⁹⁹

Measures should be adopted that permit victims to participate in proceedings and to present their views and concerns at all appropriate stages of the proceedings, consistent with the rights of the accused. Expert advice and assistance to identify the most effective procedures, including from common law countries that have expanded the roles of victims in criminal proceedings, should be sought. The AUC should consider establishing a Victims Unit, which would handle the process of collecting, screening and selecting victims' participation and reparation requests, in addition to the specific unit on protection. It should also consider establishing an independent victims counsels' office (allowing victims the right to choose their counsel, and to be granted legal aid), if victims' participation is to be an integral part of the HCSS process.

Provisions should also be adopted enabling the court to order full reparation measures, under the forms of compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition, principles well established and recognized under international law.¹⁰⁰ In addition to providing for specific reparation proceedings, it should be established, as soon as possible, how reparation orders will be funded and implemented, particularly in cases in which the convicted person is indigent.

11. ENSURE A ROBUST WITNESS AND VICTIM PROTECTION PROGRAM

The ARCSS provides that the HCSS “shall implement measures to protect victims and witnesses in line with applicable international laws, standards and practices”.¹⁰¹

The HCSS should be expressly mandated to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the HCSS should have regard to all relevant factors, including age, gender, health, and nature of the crime, in particular, but not limited to, where the crime involves sexual or gender-based violence or violence against children. Procedural rules in criminal cases concerning sexual and gender-based violence should be brought in line with international best practices, including safeguards that guarantee that testimony of survivors does not need to be corroborated, that victims are shielded from irrelevant and inappropriate questions concerning prior or subsequent sexual history, which can constitute secondary victimisation, and that in camera hearings and other methods such as video-link can be used to hear the testimony of survivors. These measures shall not be prejudicial to, or inconsistent with, the rights of the accused to a fair and impartial trial.

An independent victims and witnesses unit should be established to: (1) provide effective protection to victim and witnesses who are at risk due to their engagement with the mechanism and others who are at risk due to testimony given by such witnesses; (2) provide training and advice to all staff on dealing with victims without causing any further harm; and (3) provide effective support, including psycho-social assistance, to witnesses giving testimony.

The unit must be independent of any security or law enforcement body that could be the subject of investigation under the mechanism and independent of the prosecution and the defence. The unit should include both South Sudanese and non-South Sudanese staff. Recognizing that no effective national mechanism exists, non-South Sudanese staff with substantial expertise in witness protection and support should be appointed at senior levels to establish effective systems and procedures. National staff will be equally important to ensure that the national context and challenges of providing protection are understood and addressed.

Other aspects of the HCSS that might have an impact on witness protection should also be considered at the outset. If, as recommended, the HCSS prioritizes the establishment of the investigative branch of the

⁹⁹ Preamble to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in Resolution 60/147 of 16 December 2005, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (Basic Principles of Right to a Remedy and Reparation).

¹⁰⁰ See *Basic Principles on Right to a Remedy and Reparation*, Articles 19-23.

¹⁰¹ ARCSS, Chapter V, Article 3.4.1.

tribunal, protection mechanisms must be put in place to protect victims and witnesses during this phase. As discussed further below, in deciding where to locate the archive of the HCSS, due consideration should be given to issues relating to the protection of witnesses and victims.¹⁰²

12. ESTABLISH AN EFFECTIVE AND PROPERLY FUNDED OUTREACH UNIT

Local ownership is crucial for the successful establishment of the HCSS. Hybrid approaches require investment from the national government, regional and international intergovernmental organizations, NGOs, victim organizations, the media, and legal communities. They are then more likely to bolster national interest in the trials and ensure proximity with the victims. To make this a reality, outreach must be an integral part of the HCSS's mission, in particular in case the court is located outside South Sudan.

Outreach – the two-way communication between the mechanism and affected communities, and more broadly, the South Sudanese population – is also essential to ensure that justice is seen to be done and that South Sudanese fully understand the findings and decisions of the mechanism. It helps correct inevitable misinformation, counter political attacks against the work of the court and ensure the engagement and confidence of victims and affected communities. Outreach will also contribute to developing a sense of public ownership of the legal proceedings. Although some hybrid courts have funded outreach through voluntary funds separate from the core budget of the courts, this has proved ineffective and has undermined outreach efforts in some cases. Outreach is increasingly recognized as a core function of international, hybrid and national criminal courts addressing human rights violations, which must be funded in the same manner as other core parts of the system.

A properly funded outreach unit should be established to conduct a comprehensive outreach program informing South Sudanese about the justice efforts of the HCSS and developments in investigations and cases from the beginning and at all stages of the process. It should be tailored to ensure effective communication with all communities, including using a range of media and translation into local languages. Special strategies should be developed to ensure communication with marginalized groups, including women and survivors of sexual violence. The Prosecutor and other appropriate officials of the mechanism should be actively engaged in the outreach programme and conduct, as appropriate, extensive and coordinated outreach to victims and affected communities from the beginning of their work to inform them of their mandates and to understand their demands for justice and other needs. Consideration should be given to broadcasting or streaming trials translated into local languages.

Good practices should be drawn from the examples of other hybrid tribunals with successful outreach programmes, such as the SCSL. If the trials are held outside of South Sudan, particular attention should be paid to outreach efforts in this context.¹⁰³

13. GUARANTEE RIGHTS OF ACCUSED, INCLUDING THROUGH ESTABLISHMENT OF AN INDEPENDENT DEFENCE OFFICE

The ARCSS provides that “the rights of the accused shall be respected in accordance to applicable laws, standards and practices”.¹⁰⁴ Those accused of crimes must be granted all of the fair trial rights guaranteed by international legal standards. The statute of the HCSS should explicitly recognize that the rights of the accused must be respected, through applying international human rights law and express provisions in South Sudanese law that contain these rights. Accused must have the right to due process, including the

¹⁰² See p. 31 of this report.

¹⁰³ Such a successful outreach programme was undertaken by the SCSL when the Charles Taylor case was relocated to The Hague for security reasons. See p. 12 of this report.

¹⁰⁴ ARCSS, Chapter V, Article 3.4.2.

right to be presumed innocent until and unless they are proven guilty beyond a reasonable doubt, according to law in criminal proceedings which comply with international law and standards.

To ensure that suspects are able to exercise their right to choose their counsel fully, they should be able to select South Sudanese or non-South Sudanese counsel, as seems to be provided for by Article 3.3.3. of the ARCSS.¹⁰⁵ Both duty counsel and counsel chosen by the accused should be highly qualified with substantial experience of defending suspects in complex criminal cases, and preferably with experience and knowledge in international criminal law, international humanitarian law and international human rights law. If counsel selected lacks such experience and knowledge, they should be provided with training and expert support throughout the proceedings from co-counsel or staff within the defence team and through the defence office. The required qualifications for counsel should be clearly articulated by the HCSS and counsel should be vetted to ensure that they meet these qualifications before being appointed. The Defence office should also maintain a list of qualified South Sudanese and non-South Sudanese counsel.

The HCSS should also establish a legal aid programme with adequate resources to ensure that suspects and accused have an opportunity equal to that of the prosecutor to conduct a defence. Legal aid must be sufficient to conduct potentially complex proceedings, including allowing for the defence to conduct its own investigations.

The HCSS should also consider establishing the Defence Office as an independent organ of the court,¹⁰⁶ to maintain a list of qualified counsel, to administer legal aid and to provide expert legal and other support to defence teams.

14. ENSURE FULL COOPERATION FROM NATIONAL AUTHORITIES

In order to achieve its mandate, South Sudanese authorities should fully cooperate in allowing the HCSS to gather information, examine places or sites, execute search and seizures, secure necessary records and documents, ensure the security of the mechanism and the safety of its staff, arrest of suspects, subpoena of witnesses, and other forms of assistance needed, including for witness protection.

The ARCSS provides that the HCSS shall be independent and distinct from the national judiciary in its operations. The ARCSS indicates that the HCSS will have priority over domestic prosecutions. Consequently, cases pending before national courts should be referred to the HCSS upon its request.

15. ENSURE COORDINATION WITH OTHER TRANSITIONAL JUSTICE MECHANISMS PROVIDED FOR IN THE ARCSS

The ARCSS sets out several important transitional justice mechanisms including, in addition to the HCSS, a reparations authority and a CTRH. Coordination among these mechanisms and complementarity in their actions is key to their success.¹⁰⁷ As this report focuses primarily on the HCSS, it does not provide specific

¹⁰⁵ Also see p. 22 of this report.

¹⁰⁶ The SCSL included an Office of the Principal Defender. The ICC also has an Office of the Public Defender. However, these were not independent organs of the court, but were located within the Registry. The STL is the only tribunal which includes the Defence Office as a separate and independent organ of the court (Article 13, Statute of STL). This is also being proposed for the expanded African Court of Justice and Human Rights (see *Statute of the African Court of Justice and Human Rights (as amended)*, Article 22C(1) and (2), which in Article 22C(7) goes even further to propose that the Principal Defender should have the same status as the Prosecutor. It has often been suggested that defence rights, and in particular the equality of arms, can only be adequately ensured by having a Defence office as an independent organ of the court.

¹⁰⁷ *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, 14 October 2014, A/69/518, para 48. Available at: <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/AnnualReports.aspx>.

recommendations regarding the establishment and structure of the reparations authority and the CTRH, but instead considers the interaction between these different mechanisms.

Prosecutions mainly deal with the role of the accused and most often, in common law systems, the official role of victims is limited to providing witness testimony in judicial proceedings. As discussed more fully above,¹⁰⁸ however, the HCSS should adopt appropriate measures that permit victims to participate in proceedings, be duly represented and to present their views and concerns at all appropriate stages of the proceedings and consistent with the rights of the accused. It is also important that the HCSS is established in conjunction with other transitional justice mechanisms that can take into account victims' specific needs, in parallel to guaranteeing victims' participation in the judicial process itself.

In particular, assistance or non-judicial reparations programs put in place outside of the judiciary can have a larger scope than judicial proceedings, benefiting a larger number of victims and addressing various types of harm suffered through a multi-dimensional approach. The 2005 Basic Principles adopted by the UN General Assembly establish that reparations can take the form of restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.¹⁰⁹ These five categories of reparations are complementary and may not be most efficiently implemented through a purely judicial mechanism. Instead, an institution benefiting from staff with specialized expertise such as the reparations' authority envisaged by the ARCSS is best placed. However, it must nonetheless work in coordination with the HCSS, which also has the ability to grant reparations.¹¹⁰ The mechanism must also be sufficiently funded if it is to succeed.

In the same way, a TRC can address larger patterns of abuse in order to offer a more complete accounting of the causes and consequences of the conflict, not being limited by the scope of judicial investigations. In some instances, it has also proved useful in allowing people to recount their experiences and in allowing victims to learn about specific events or the fate of their relatives. A TRC may serve both the purpose of establishing a more complete and accurate picture of the conflict and enabling victims' access to the truth. Information gathered within a truth commission can also be useful to the judicial process, reinforcing the idea of complementarity between these truth, justice and reparation mechanisms.

However, the AUC and South Sudan should carefully consider what modalities should be put in place with respect to interactions between the HCSS and the CTRH, also to be established under the ARCSS. The ARCSS currently leaves the relationship between these two institutions open.¹¹¹ The AUC and South Sudan should contemplate the conclusion of "advance agreements on certain practical issues (including information sharing, exhumations, access to detainees, joint communications, resolving of disputes by independent third parties and outreach events)".¹¹² The HCSS should be established at the same time as, or prior to, the CTRH, and calls for reconciliation at the expense of justice, or any retreat from the parties' commitments under the ARCSS to the establishment of the HCSS in favour of only a TRC, should not be heeded.¹¹³

16. PUT IN PLACE A LONG-TERM, STABLE AND SECURE METHOD OF FUNDING

Most hybrid courts established to date have encountered serious funding challenges, in many cases originating from an early decision to fund the courts either wholly or partly through voluntary contributions from the international community. Lack of voluntary contributions has threatened the work and undermined the stability of these courts. Funding for the SCSL, for example, was based on voluntary donations, and led to considerable insecurity regarding continuity of the court, as well as for personnel, including judges. Lack of financial security for judges can be an important factor contributing to corruption and lack of independence.

¹⁰⁸ See p. 26 of this report.

¹⁰⁹ *Basic Principles on Right to a Remedy and Reparation*, Articles 19-23.

¹¹⁰ HCSS, Article 3.5.3.

¹¹¹ In Sierra Leone, for example, tensions arose between the SCSL and the TRC which was also established after the conflict, particularly when the TRC sought testimony from one of the accused persons before the SCSL, which the court refused to allow.

¹¹² OHCHR, *Rule of Law Tools, Prosecution Initiatives*, p. 10, available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>

¹¹³ See footnote 28.

The ARCSS says nothing about the funding mechanism for the HCSS. Providing the court with sufficient resources from the start is essential for the effective functioning of the court. The AU must agree in advance on a long-term, stable and secure method of financing and must commit to providing the court with adequate funding. While both the AU and South Sudan should contribute towards the court, which in the case of South Sudan, may help foster their ownership of the institution, support from the UN and bilateral partners will likely be necessary. In terms of funding mechanisms, voluntary contributions should only be considered as a last resort and if used, potential donors should be encouraged to make multi-year commitments. If possible, the budget, including the costs of non-South Sudanese officials and staff, should be funded through the regular budget of the AU, with assistance from the UN and/or bilateral donors as required.

The AUC should be mandated to prepare an annual budget for the HCSS in consultation with the Office of the Prosecution, the Defence Office, the chambers and other parts of the court. Special donor conferences could be organized before the formal establishment of the HCSS to ensure funding of the proposed budget.

17. ENSURE THE HCSS BENEFITS THE NATIONAL JUDICIAL SYSTEM AND LEAVES A SUBSTANTIAL LEGACY

The ARCSS provides that the “HCSS shall leave a permanent legacy in the State of South Sudan upon completion of its HCSS Mandate.”¹¹⁴

A large part of this legacy consists of strengthening the South Sudanese justice system. A central aim of the HCSS must be to develop the knowledge, experience and skills of South Sudanese officials and staff in order to build their capacity to take over the roles performed by non-South Sudanese staff and to apply them in the broader legal system. The HCSS should ensure coherent professional training both for Sudanese and non-South Sudanese personnel that will encourage legacy, professional development and skill transfers. As discussed above, it is also critical that South Sudanese judges and staff be included in the structure of the court, in order to strengthen domestic judicial capacity.¹¹⁵

Contributions to the national judicial system may also come in the form of physical infrastructure, facilities, databases, equipment or in initiating reforms of criminal law and procedure. More broadly still, the court may contribute to establishing a historical record, and the archives of the mechanism must also be retained as a permanent record of the crimes and the justice effort, as well as to ensure that national courts can apply the precedents set by the mechanism. However, in deciding where to locate the archive, due consideration should be given to issues relating to the protection of witnesses and victims whose confidential information is contained within the archive. Clarity on where confidential information, which may put witnesses and victims at risk, will be stored would be beneficial at the outset of the establishment of the tribunal.¹¹⁶

Issues relating to the legacy of the tribunal should be considered when the HCSS is established, rather than in the final phases of the court’s operations.

¹¹⁴ ARCSS, Chapter V, Article 3.5.6.

¹¹⁵ See p. 22 of this report.

¹¹⁶ In the case of the ICTR, the issue of archives became particularly contentious when the Rwandan government sought to have the archives transferred to Rwanda. See Mark Kesten, “The Rwanda Tribunal Closes, but Controversy is Brewing Over its Archives”, *Justice Hub*, 17 December 2015, available at: <https://justicehub.org/article/rwanda-tribunal-closes-controversy-brewing-over-its-archives>.

THE WAY FORWARD: RECOMMENDATIONS

TO THE AFRICAN UNION COMMISSION AND SOUTH SUDANESE AUTHORITIES

- Establish the HCSS expeditiously, including drafting the statute and the rules of procedure and evidence, and in consultation with all relevant stakeholders including civil society;
- Prioritize the establishment of the investigative branch of the HCSS to ensure the preservation of evidence;
- Ensure that documentation of crimes of sexual violence under international law is based on existing and recognized international standards, including the basic standards and best practices gathered in 2014 in the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict;
- Give due consideration to the risks and benefits of locating the court within or outside South Sudan. While security concerns may at present preclude locating the court in South Sudan, give due consideration to relocating the HCSS or some parts of proceedings to South Sudan in the future, should security improve;
- Ensure the development of a clear selection process for judges and other staff members of the HCSS that is independent, transparent, and merit-based;
- Ensure that the HCSS includes South Sudanese judges while taking specific measures to guard against potential threats to the impartiality and independence of the court that this might entail, including ensuring that South Sudanese judges on the court represent different geographical areas and ethnic communities, and that adequate disciplinary measures are put in place;
- Ensure that South Sudanese and non-South Sudanese judges undertake appropriate training in international criminal law and practice, international humanitarian law and international human rights law, with specific emphasis on gender-based violence, violence against children, and victims' rights;
- Put in place a process to train South Sudanese staff in the Registry, Prosecution, and Defence Office over a period of time so that they can eventually take over these senior roles, and ensure the participation of South Sudanese staff in the offices of the Prosecution (including as investigators), Registry and Defence Counsel;
- Ensure that the applicable substantive and procedural law and modes of liability are defined in accordance with international law and that all rules and laws comply with international human rights law;
- Ensure that all modes of liability recognized under international criminal law are included before the HCSS, including command/superior responsibility;

- Ensure that the temporal jurisdiction of the tribunal allows for the prosecution of ongoing crimes;
- Ensure that the death penalty is excluded as a possible penalty for any of the crimes that fall within the mandate of the HCSS;
- Ensure that the conditions of detention of accused detained pending trial or serving sentences post-conviction comply with international standards;
- Ensure that immunities, amnesties or pardons do not bar prosecutions for crimes under the HCSS' jurisdiction;
- Ensure that a provision ensuring *non bis in idem*, according to which a person cannot be tried or punished more than once for the same crime, is included in the statute;
- Ensure that appropriate measures are adopted, including the creation of a Victims' Office, that permit victims to participate in proceedings before the HCSS and to be duly represented, consistent with the rights of the accused;
- Ensure that the HCSS is expressly mandated to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, including the establishment of an independent victim and witness protection unit;
- Ensure that an outreach unit is established and properly funded, which should develop and conduct a comprehensive outreach program to inform South Sudanese about the activities of the HCSS and developments in investigations and cases from the beginning and at all stages of the process;
- Ensure that those accused of crimes before the HCSS are guaranteed all of the fair trial rights in accordance with international legal standards;
- Ensure that defence counsel are highly qualified and have the requisite experience, and establish a legal aid programme;
- Ensure the establishment of an independent Defence Office headed by a Principal Defender to maintain a list of qualified counsel, provide support to Defence teams and administer the legal aid programme;
- Ensure that the HCSS coordinates with and complements the other transitional justice mechanisms provided for in the ARCSS including the Compensation and Reparations Authority and the CTRH.
- Ensure that a long-term, stable and secure method of funding, not based on voluntary contributions, is established at the outset for the operation of the HCSS;
- Ensure that issues of legacy are considered and incorporated into the relevant instruments at the outset of the establishment of the HCSS.

TO THE SOUTH SUDANESE AUTHORITIES

- Fully cooperate with the HCSS in gathering information, examination of places or sites, execution of search and seizures, provision of records and documents, ensuring the security of the mechanism and the safety of its staff, arrest of suspects, subpoena of witnesses, appropriate aspects of witness protection and other forms of assistance;
- Make any necessary revision to national criminal legislation to ensure that it conforms with international standards.


TO THE UNITED NATIONS AND INTERNATIONAL DONORS

- Make any necessary technical assistance for the establishment of the HCSS available to the AUC and South Sudan;
- Provide financial support to the HCSS;
- Ensure that UNMISS continues to document ongoing serious violations of international humanitarian law and other serious human rights violations and abuses, with a view to transferring such documentation to the HCSS when established.

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LOOKING FOR JUSTICE

RECOMMENDATIONS FOR THE ESTABLISHMENT OF THE HYBRID COURT FOR SOUTH SUDAN

Amnesty International and FIDH, as well as South Sudanese civil society, the African Union (AU) and the international community have repeatedly called for accountability for crimes under international law and human rights violations and abuses committed during South Sudan's ongoing non-international armed conflict.

The August 2015 Agreement on the Resolution of the Crisis in the Republic of South Sudan provided for the establishment of a Hybrid Court for South Sudan with a mandate to investigate and prosecute individuals bearing criminal responsibility for violations of international law and/or applicable South Sudanese law committed from 15 December 2013 through the end of the transitional period. Given the weaknesses and lack of independence of the domestic judicial system, the current lack of International Criminal Court jurisdiction over the crimes committed, and the importance of local ownership over any accountability proceedings, the proposed hybrid court represents the most viable option for achieving justice in South Sudan.

In this briefing paper, Amnesty International and FIDH present key recommendations on the structure and institutional framework of the HCSS, in order to ensure that the court effectively achieves accountability, meets international fair trial standards, has national legitimacy, and incorporates the best practices of other hybrid and ad hoc tribunals.

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