

New Beginnings

A Way Forward for Transitional Justice in South Sudan

Conference Report
and Analysis

February 2016



Kingdom of the Netherlands

Foreword

While the notion of transitional justice has received universal recognition each country has its own unique context and needs to determine its own path to transition. South Sudan is no exception to this rule.

In conformity with international legal standards and obligations, home-grown solutions to the conflict which has ravaged the country require that everyone show commitment to the restoration of peace and stability. Peace is not the responsibility of leaders alone. It is a collective effort and everybody should join hands for the sake of peace and national reconciliation. All communities need to come together to place peace above hatred and come to terms – however hard they may be – with what has happened during the conflict. Rather than looking for a solution from outside, South Sudan has an opportunity to find its own solution with which it can be proud of and present as an example to others.

While the peace agreement signed in 2015 laid down the foundation for a transitional justice process in Chapter 5 of the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCISS), the details of its implementation need to be defined. Global best practice envisages a people-driven and victim-centred transitional justice process that recognizes the aspirations of the citizens of South Sudan in securing lasting peace and reconciliation. This is anchored in the need to provide the greatest voice to survivors and ensure that local communities both feel and perceive that justice has been achieved.

Having in place the rule of law and human rights is crucial to the attainment of sustainable peace, as well as realizing the vision now set forth in the Sustainable Development Goals. Transitional justice embraces political, social and economic transformation in order to solidify South Sudan as a peaceful, prosperous and democratic nation. Achieving this will require large-scale reforms of the justice and security sectors. It is therefore important that the process of transition embraces the revitalization of the rule of law.

Accordingly UNDP is pleased to play its role by facilitating a broad-based dialogue of South Sudanese in order that they can offer up suggestions and define home-grown solutions for consideration by the people and leadership of South Sudan on how this may be done.

Earlier in 2016 UNDP convened a national conference on transitional justice to support such dialogue on transitional justice and creating pathways for citizens' voices. This report, which I am pleased to share with you, gives a voice to the people of South Sudan to express their views and opinions. I hope that the space for dialogue and awareness of transitional justice in South Sudan can be expanded. The report provides cutting edge analysis of transitional justice, uniquely tailored to the South Sudanese context. It provides a roadmap for the implementation of the peace agreement and, I hope you will agree, is truly an indispensable guide for policy-makers and practitioners of transitional justice in South Sudan.



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About the South Sudan Law Society (SSLS)

The South Sudan Law Society (SSLS) is a civil society organization based in Juba. Its mission is to strive for justice in society, respect for human rights and rule of law in South Sudan. The SSLS manages projects in a number of areas, including legal aid, community paralegal training, human rights awareness-raising and capacity-building for legal professionals, traditional authorities and government institutions.

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The observations and analysis contained in this report reflect those of the conference and workshop participants and do not necessarily represent the views of UNDP or the project donor.





About the Transitional Justice Working Group (TJWG)

The Transitional Justice Working Group (TJWG) is a coalition of civil society organisations, transitional justice experts, and representatives of women's groups and faith-based organisations. Having previously worked together as a loose coalition, the group was formed in 2015 as a platform to support implementation of the peace agreement and provide interface between national and international transitional justice stakeholders and official transitional justice processes. The TJWG seeks to advance transitional justice through various activities, including citizen consultations, advocacy at the national, regional and international levels, and monitoring, documentation and reporting of human rights violations and abuses.

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About the United Nations Development Programme (UNDP)

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Executive Summary

From 10-12 November 2015, the South Sudan Law Society (SSLS), the Transitional Justice Working Group (TJWG), and the United Nations Development Programme (UNDP) held a conference entitled, *New Beginnings: The Role of truth, justice, reconciliation and healing in promoting sustainable peace in South Sudan*. The purpose of the conference was to bring together a group of key stakeholders to brainstorm a way forward for the implementation of Chapter V of the Agreement on the Resolution of the Conflict in South Sudan (ARCISS), which addresses issues of “Transitional Justice, Accountability, Reconciliation and Healing.” The SSLS convened a follow-up workshop in Nairobi on 4 February 2016 to share the conference outcomes with groups in the diaspora and obtain their input on the way forward for transitional justice in South Sudan.

Background

In December 2013, just two years after its secession from Sudan, the Republic of South Sudan descended into a brutal and intractable conflict. Although the warring parties and other stakeholders signed an *Agreement to Resolve the Crisis in South Sudan* (ARCISS) in August 2015, as of this writing, the prospects for peace remain in the balance. The warring parties have not yet established the Transitional Government of National Unity (TGoNU) that is meant to spearhead the post-conflict stabilization and reform agenda over the course of a 30-month transitional period, and there are worrying signs that the conflict is spreading to previously stable parts of the country, such as Western Equatoria State.¹

Chapter V of the ARCISS, entitled, “Transitional Justice, Accountability, Reconciliation and Healing,” is structured around three institutions: a Commission for Truth, Reconciliation and Healing (CTRH), a Hybrid Court for South Sudan (HCSS) and a Compensation and Reparations Authority (CRA). The CTRH will be responsible for investigating, documenting and reporting on human rights abuses over a predetermined time period in order to address the legacy of conflicts, promote peace, national reconciliation and healing. The HCSS is a court that will be established to bring cases against individuals responsible for international crimes committed since 15 December 2013. The CRA is a body that is to be established to provide compensation and reparations to people who lost property or were victims of abuses as a result of the conflict.

Given the difficulty of implementing an ambitious transitional justice agenda in a country that grapples with chronic instability and political turmoil, the TGoNU will need the robust support of both national partners, including faith-based institutions and civil society, and international partners if it is to deliver on the promises of Chapter V. Developing consensus on a roadmap to guide the efforts of the various actors involved as they seek to establish and operationalize the three institutions will be vital to the success of the transitional justice program.



Conference Outcomes

The first part of the conference was devoted to a series of panel discussions to set the context, orient participants on relevant provisions of the ARCISS, discuss comparative experiences from other countries, and look beyond the provisions of the ARCISS to what is needed to establish a comprehensive program for transitional justice in South Sudan. In the second part of the conference, participants divided out into groups to discuss the transitional justice agenda in greater detail. Four groups were formed to discuss the HCSS, CTRH, CRA and complementary initiatives that could foster a more holistic approach. The subsections below summarize the main conference outcomes.

Draft Principles

The following draft principles were developed to provide a common reference point for the development of a comprehensive program for transitional justice moving forward.

- ▶ **Principle 1:** South Sudanese-owned and driven – Time and resources must be invested into civic engagement and public consultation activities to inform the design of institutions and public outreach must continue throughout the life of the various bodies that are to be formed.
- ▶ **Principle 2:** Independent and impartial – Freedom from political interference and bias is critical to the success of the transitional justice program. Any perception of ‘victor’s justice’ or of a bias in favour of any particular group would undermine the credibility of the program and alienate segments of the population.
- ▶ **Principle 3:** Credible and transparent – By providing timely and accurate information to people and incorporating their feedback into decision-making processes, the transitional justice program can better reflect local priorities and help people to overcome the silence, denial and hostility that accompany periods of large-scale human rights abuses. Adherence to international standards can further reinforce the credibility of the process.
- ▶ **Principle 4:** Inclusive – In order to make a meaningful contribution to state and citizenship-building efforts, it is important that the transitional justice program be designed and implemented in an inclusive and representative manner that does not exclude segments of society.



- **Principle 5:** Holistic – Transitional justice programs do not lend themselves to a ‘one-size-fits-all’ approach and there is a need to pursue multiple objectives and activities simultaneously, including criminal justice, truth-seeking, reparations and institutional reforms.
- **Principle 6:** Integrated – Integrating justice and reconciliation into the post-conflict stabilization and reconstruction agenda would allow South Sudan to take full advantage of the transitional moment to foster more meaningful and sustainable reforms. An integrated transitional justice program would coordinate closely with other transitional processes, such as constitutional development, security sector reform and return and resettlement activities.
- **Principle 7:** Maximize legacy – Since transitional justice processes are temporary in nature, it is important that their contribution to political and institutional transformation in the medium- to long-term is paid sufficient attention from the start.

Commission for Truth, Reconciliation and Healing (CTRH)

- **Objectives of the CTRH** – The objectives of the CTRH should be clearly articulated in its implementing legislation. In framing the objectives and other aspects of the truth commission mandate, the drafters of the legislation should be careful to avoid cutting-and-pasting from truth commission statutes in other countries. For example, when Kenya established its Truth, Justice and Reconciliation Commission (TJRC) in the aftermath of the post-election violence of 2007-08, it largely copied from the Promotion of National Unity and Reconciliation Act that South Africa used to establish its Truth and Reconciliation Commission. Since the TJRC legislation was not adequately tailored to the context in Kenya, it was cumbersome to implement. In addition to tailoring the legislation to the context in South Sudan, policy-makers should also devote attention to how the CTRH will relate to other transitional justice processes, both in a substantive sense, such as what role if any the CTRH will play in efforts to hold accountable perpetrators of international crimes, as well as with regard to sequence and timing of institutional activities.
- **Substantive Mandate** – In developing the substantive mandate of the CTRH, it is important not to be overly broad or too narrow. Given the scale and complexity of past and current conflicts in South Sudan, the CTRH will need to address a range of both civil and political rights and economic, social and cultural rights if it is to develop a complete understanding of South Sudan’s conflicts. However, an overly broad mandate would create too much work for the institution and dilute its impact. There was no clear consensus among conference participants regarding a specific formulation of the



mandate and additional research would be required to determine the range of options.

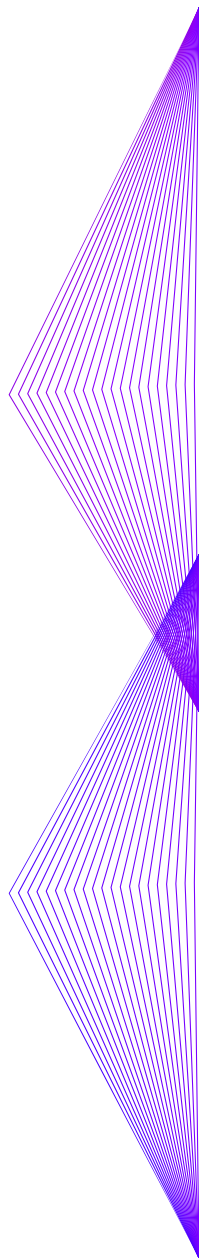
- ▶ **Time Period of Review** – As a central goal of the CTRH is to establish some consensus on the basic facts and circumstances of large-scale human rights violations, the CTRH should ideally examine time periods for which there is a lack of information, contested narratives and where there are clear links between unresolved historical grievances and current conflicts. Language in the ARCISS suggesting a time period of July 2005 to August 2015 should be scrutinized and subject to public opinion to determine if it is sufficiently flexible to allow for inquiries into contested events from the 22-year civil war (1983-2005), and whether it creates overlap with the mandate of the HCSS, which is looking into international crimes that have been committed between December 2013 and the end of the transitional period. No clear consensus emerged from conference participants about a specific time period for review, but participants discussed a range of innovative approaches, such as the framing of a more limited temporal mandate that allows for targeted inquiries into specific episodes in the past that predate the mandate and are seen to be particularly contentious.
- ▶ **Timeframe for Operations** – There was a clear consensus among participants that the 21-month timeframe for the CTRH to complete its activities as provided for in the ARCISS was not feasible. Most participants supported a 3-5 year timeframe for the institution. The CTRH could also consider sequencing its activities such that it focus on the truth-seeking effort and producing its report in the first 2-3 years with the idea that the reconciliation and healing component of its work would continue thereafter. This was the approach that Canada used in a TRC that was recently formed to examine malpractices in associated with Canada's residential school system for aboriginal children. The Canadian TRC finished the truth-seeking phase of its work in December 2015, after which it handed over responsibility for promoting reconciliation to a National Centre for Truth and Reconciliation.²
- ▶ **Selection and Appointment of Commissioners** – In the South Sudanese context, presidential appointments of caretaker governors and the leadership of independent commissions has generated perceptions of political accommodation and bias, undermining public trust in institutions. It is therefore important that a thorough and transparent process for selection and appointment be established to ensure that candidates for the various positions in the CTRH are

independent and properly vetted beforehand. Such a process can help to avoid the situation that Kenya's Truth, Justice and Reconciliation Commission (TJRC) faced when its chairperson was implicated in a number of episodes of human rights abuse that fell under the TJRC's mandate. When the chairperson refused to step down, it damaged the relationship between civil society and the TJRC and saddled the TJRC with lengthy legal battles. The selection and appointment procedures should also ensure gender parity. The provisions of the ARCISS ensuring gender parity among commissioners provide a starting point, but they should be expanded upon to cover staffing decisions at all levels of the institution.

- ▶ **Role of Customary Mechanisms** – Customary institutions in South Sudan are far more accessible geographically, culturally and in terms of cost than statutory institutions and could play an important role in extending the CTRH's reach to rural parts of the country. Traditional authorities also have extensive on-the-ground knowledge about the facts and circumstances of conflict, including the nature of and extent of damage done, materially or psychologically, which could provide a rich source of data for the truth-seeking effort.

One possible approach could be for the CTRH to refer certain cases that it comes across to customary courts for the determination of compensation and to facilitate reconciliation. Another approach could be for the CTRH to divide its work into a series of branches that are conducted alongside an all-inclusive national truth-seeking effort. One branch could be instituted at the level of traditional leaders and their communities, a second branch could be instituted among the military, armed militias and other security sector actors, and a third branch could be created for decision-makers in the major political parties, such as SPLM, SPLM-IO, Former Political Detainees and other political parties. Dividing work in this manner could help overcome challenges associated with the vast territory of South Sudan, its limited infrastructure and the wide diversity of its legal cultures.

- ▶ **Psychosocial Support and Social Healing** – Given the intensity and length of the conflicts that South Sudan has experienced, social healing will necessarily be a long-term effort. As part of its healing mandate, the CTRH should assess existing support mechanisms, such as those found at the family or clan level, or within religious, customary or non-customary institutions, to ensure that they are reinforced and supported whenever



possible. The CTRH will also have to account for the fact that the meaning of reconciliation and forgiveness varies across religious and cultural contexts. In Muslim communities, for example, the family of a murder victim is typically given a choice between punishing the convicted perpetrator with compensation or death and pardoning or forgiving the perpetrator. In order to accommodate diverse perspectives on what is needed for reconciliation and forgiveness, it is important that the CTRH adopts a flexible approach.

- **Civic Engagement** – There was a consensus among conference participants that the one month of consultations required by the ARCISS prior to enacting the CTRH legislation is insufficient to conduct the type of widespread consultations that are required, particularly in light of the low levels of awareness about transitional justice in South Sudan. Broad civic engagement will be necessary to ensure that South Sudanese understand and support the institution and that its institutional design and program of activities reflect local priorities.

The various civil society coalitions that have been formed in the wake of the December 2013 crisis, including the civil society-led Transitional Justice Working Group (TJWG), can provide a useful coordinating function, in this regard. Under the TJWG, civil society organizations interested in making a contribution to the CTRH or other transitional justice initiatives can come together and develop a common platform from which to act. This entails the development of advocacy strategies, communication protocols and common messaging, in addition to specifying the internal structure of the working groups.

Hybrid Court for South Sudan (HCSS)

- **Method of Establishment** – The ARCISS places the sole responsibility for developing the framework for the HCSS with the African Union (AU). The TGoNU would then be expected to enact legislation to formalize the AU framework into national law in South Sudan.³ Although the ARCISS is largely silent on the role of the TGoNU in designing the HCSS, the AU should nonetheless engage the TGoNU and other national actors in South Sudan in the development of the HCSS framework from the outset. As it will take at least a year and possibly longer for the HCSS to fully establish itself after the necessary agreements and legislation are in place, it is vital that work on the design and establishment of the court begin immediately

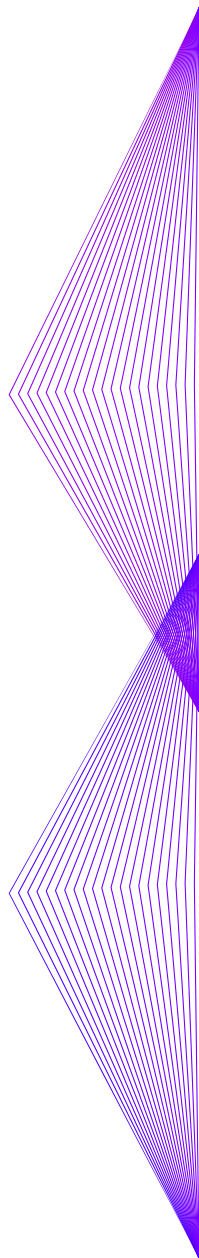


and that particular attention is paid how it will leave a legacy in South Sudan's judicial infrastructure and capacity.

- ▶ **Caseload** – An important strategic question for the HCSS concerns the number of people that it would seek to try. At one end of the spectrum for internationalized courts is the Extraordinary Chambers in Senegal, which is focusing its work on crimes allegedly committed by just one man, former Chadian president Hissène Habré. The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), on the other hand, were able to bring cases against 160 and 90 people respectively. Other courts that have been formed generally fall somewhere in between. The Special Court for Sierra Leone (SCSL), for example, indicted a total of 13 people, and since starting its work in 2005, the War Crimes Chamber in the State Court of Bosnia has completed over 200 cases.

Ultimately, the question of how many individuals to prosecute is one that the office of the prosecutor will determine based on the available budget, timeline as well as other considerations. Nonetheless, the general sentiment among conference participants was that the HCSS should try high-level perpetrators, the statutory system should try the mid-level perpetrators and the customary system could deal with certain types of lower-level crimes. While no specific number was put forward during the conference, most participants thought the HCSS should target anywhere from a dozen to several dozen individuals.

- ▶ **Jurisdictional Issues** – The HCSS is mandated to investigate and prosecute individuals responsible for the core international crimes, namely crimes against humanity, war crimes, genocide and other serious crimes under international law. Conference participants also discussed the possibility of addressing instances of grand corruption at the HCSS.
- ▶ **Investigation Unit** – Conference participants supported the idea of forming an investigative unit as a precursor to the HCSS. The investigative unit would be given an official mandate and would start work immediately compiling intelligence and evidence for the HCSS. The investigative unit could also be framed as a hybrid initiative itself, bringing together South Sudanese and other African investigators and prosecutors to test how the hybrid model might work in practice in the South Sudanese context.



- ▶ **Location** – The choice for the seat of the HCSS would have far-reaching implications for how the institution functions and its impact on the local context. Much of the argument in favour of hybrid courts over more internationalized mechanisms such as the International Criminal Court (ICC) is the legacy that hybrid courts can have for the situation country. However, the security context of post-conflict states sometimes does not allow for courts to be situated locally. The Special Tribunal for Lebanon, for example, was based in The Hague, largely due to the risk of terrorism and insecurity in Lebanon. The Iraqi High Tribunal, on the other hand, was based in Baghdad to try Saddam Hussein and other members of the Ba'ath party, but tragedy struck in 2006 when an investigating judge with the tribunal was shot and killed.

Participants at the Juba conference and Nairobi workshop were divided over whether the HCSS should be based in South Sudan or elsewhere. Those who supported the idea of situating the court in South Sudan emphasized the advantages it would offer in terms of access evidence and witnesses, and sending a signal to the population that the state is committed to combating impunity. Those who were opposed to the idea cited the prevailing insecurity and the likelihood that accused persons and their supporters would find it easier to undermine the work of a court based in South Sudan. Other possibilities that could be considered could be to begin trials in a foreign country and transition them to South Sudan when the environment is more conducive, or to hold less politically sensitive trials in South Sudan and more politically sensitive trials elsewhere. The SCSL followed this latter approach by holding the bulk of its trials in Freetown but transferring the trial of Charles Taylor to The Hague.

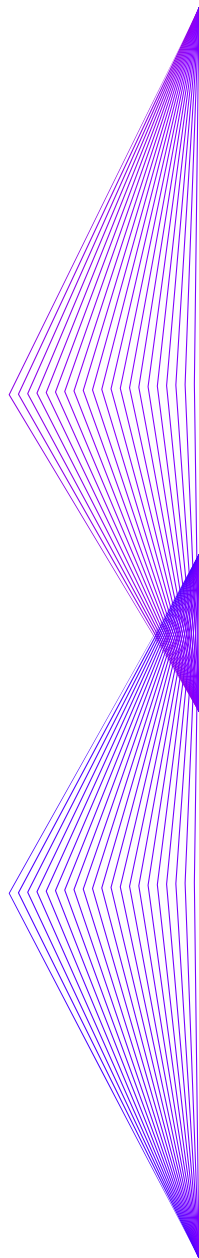
- ▶ **Selection and Appointment of Judges and Staff** – The independence, impartiality and credibility of the HCSS are centrally important to its success. To a certain extent, these issues are already addressed in the ARCISS. For example, the ARCISS stipulates that a majority of judges will be from African countries other than South Sudan and places most key decisions about the institution in the hands of a third-party in the form of the AU. Nonetheless, additional steps may be required to ensure the process is free from political interference at the national, regional or international levels, such as examining the possible approaches to selection and appointment at the AU level and ensuring that it is sufficiently credible, independent and transparent.

- ▶ **Transitioning to Permanent Institution** – In order to maximize its legacy in South Sudan, the HCSS could be designed to transition into a permanent court within the South Sudanese judiciary. Under this approach, the HCSS would start as an internationalized hybrid tribunal established outside of the national judiciary and over time, the international participation would phase out and the institution would become a permanent international crimes court within the hierarchy of the national judiciary. A similar approach was used for the War Crimes Chamber in Bosnia and Herzegovina, which started as hybrid tribunal but phased out international participation over time.

- ▶ **Witness Protection** – Ensuring the support, safety and security of witnesses is a major issue and challenge for all international crimes courts. The HCSS will have to ensure confidentiality of witnesses and communicate a credible threat of severe legal consequences for proven cases of interference with witnesses. South Sudan has little to no existing framework for witness protection and much of the infrastructure would have to be established for the first time. This is an essential area for which UN assistance should be utilized. The UN has extensive experience with the development and implementation of witness protection and support programs as part of the ICTY, ICTR and the SCSL.

- ▶ **Relationship to Customary Justice Mechanisms** – Conference participants considered several possible options for coordinating legal trials with the work of customary courts. Some participants felt that customary courts could be endowed with jurisdiction to hear cases of international crimes in cases involving victims and perpetrators who are from the same community, though other participants thought customary institutions lacked the capacity, independence and authority to try international crimes. Other possible areas of coordination include the determination of punishments and remedies. For example, statutory courts or the HCSS could refer disputes about reparations or compensation to the relevant customary law courts, or ask traditional authorities to oversee ceremonies for post-trial reconciliation of parties.

If a role is provided for customary institutions in the transitional justice program, a key procedural question concerns whether and how to formalize that role. After the 1994 genocide in Rwanda, for example, the Rwandan government enacted a law formalizing traditional dispute mechanisms called *Gacaca* courts and giving them authority to try genocide cases. However, the formalization of customary institutions



proved problematic, because the formalization process undermined the flexibility of the institutions and reduced principles that in practice had been negotiated on a case-by-case basis to specific rules. One lesson that can be drawn for the South Sudanese context concerns the difficulty of formalizing customary processes through legislation, particularly given the diversity of customs in South Sudan. Another approach could be to allow customary and statutory processes to proceed in parallel without forcing the customary mechanisms into an artificial formalization process.

- ▶ **Coordination and Sequencing** – If not well coordinated, the simultaneous conduct of multiple transitional justice processes can generate confusion and competition among the institutions. In Sierra Leone, for example, tensions arose between the Truth and Reconciliation Commission (TRC) and the SCSL when the TRC sought testimony from an individual who was in the custody of the SCSL. In order to avoid such a situation in South Sudan, careful thought must be given to coordinating mechanisms among the three institutions provided for in the ARCISS and other national processes. Once established, the leadership of the various institutions should also exercise discipline to ensure they do not encroach on each other's work.
- ▶ **Funding** – Hybrid courts involve considerable costs. The cases are complex and their credibility hinges on a range of procedures being put in place for witness protection and protection of the rights of the accused. At the same time, they are able to deliver benefits that go far beyond the particular cases tried. While both the AU and the TGoNU should be expected to contribute towards the court, they do not have the resources to fund it completely and fundraising will need to be conducted with the United Nations (UN) and bilateral partners.

Compensation and Reparations Authority (CRA)

- ▶ **Sequencing and Individual vs. Collective Reparations** – While it might be tempting to push ahead with all of the various transitional justice initiatives simultaneously, there is good reason to stagger parts of the reparations program, particularly that of individual reparations, such that they are informed by the activities of the other transitional justice institutions. The CRA and CTRH might therefore consider prioritizing collective and symbolic forms of reparations from the outset while compiling the information and institutional capacity to conduct individual reparations.



Collective reparations could be provided in a variety of forms. For example, the TGoNU could start by reinstating the employment and providing compensation in terms of back pay for individuals who lost their jobs as a result of the conflict. Investments into reconstruction and the reestablishment of livelihoods, especially in the agrarian sector, could also help to provide an economic foundation from which people could begin to rebuild their lives. However, care must be taken to avoid conflating the state's duty to repair the general damage to infrastructure caused by the war with reparations that are targeted specifically to survivors of human rights violations.

- ▶ **Memorialization** – Memorialization initiatives (or symbolic reparations) can also serve an important role in acknowledging the state's failure in its duty to protect its citizens from human rights violations. As a first step, policy-makers should take stock of what is already being done with regard to memorialization in South Sudan and how these efforts can be best supported such that they inform the national agenda. It is also important for the leadership of the warring factions to admit responsibility for what the conflict has done to the country and to seek people's forgiveness. Apologies that President Salva Kiir has delivered on behalf of the SPLM for the December 2013 crisis and that then Vice-President Riek Machar delivered for his role in the Bor Massacre were important moments, but they must be followed-up with action to ensure that victim populations take them seriously.⁴
- ▶ **Eligibility** – Given the successive protracted conflicts in South Sudan, virtually the entire population would qualify as victims of conflict and it is not possible to provide individual reparations to everyone. Practically speaking, the CRA and CTRH will need to establish some form of limitation on eligibility for individual reparations. The challenge in doing so is to maximize the extent to which victims can benefit and ensure that groups do not feel singled out or neglected due to arbitrary eligibility criteria.
- ▶ **Gender Sensitivity** – Gender sensitivity should be factored into all aspects of the design and implementation of the reparations program. Conference participants felt that gender parity (i.e. at least 50 percent representation) should be observed in the staffing at all levels of the CRA. In addition, given the scale of sexual and gender-based violence (SGBV) in the current conflict and the lack of attention that this issue has received from public authorities over the years, special attention should be devoted to reparations for survivors of SGBV.
- ▶ **Role of Customary Mechanisms** – As intermediaries between communities and the government, traditional authorities have a wealth of information about the circumstances of people in their



communities, which could be used to supplement information compiled about the victim population through the truth-seeking effort and criminal investigations. The reparations program should also coordinate its activities with compensation provided through customary mechanisms, such as: the customary practice of paying 'bloodwealth' in the form of cattle from the perpetrator to the family of the deceased in cases of homicide.

- ▶ **Funding** – Securing adequate funding is among the more difficult challenges of reparations initiatives. Although as a power sharing government, the TGoNU is likely to face a huge demand for resources, it must nonetheless develop a plan for how it will provide reparations to survivors of conflict-related abuses in a timely manner. Conference participants recommended that a portion of the national budget be set aside for reparations and that additional funds be sought from external donors to supplement this contribution from government. If the funds lost to corruption over the years could be repatriated to South Sudan, another option could be to use a portion of those funds to cover reparations payments to victims of the conflict.

Conclusion

Chapter V of the ARCISS presents a unique opportunity for South Sudan. The resurgence of conflict in December 2013 has clearly demonstrated the importance of addressing legacies of past human rights violations and widespread impunity to achieve sustainable peace. By taking advantage of the momentum of the transitional period, South Sudan can break with past peace processes that have failed to address contentious issues relating to justice and reconciliation only to have them resurface in dangerous and unpredictable ways. The success of any transitional justice program will hinge on the ability of the TGoNU and its international partners to create an enabling environment for the public discussion of contentious topics such as people's experiences with human rights abuse. Coordination between national and international actors will be critical to ensure that transitional justice efforts are streamlined and mutually reinforcing so as to avoid a myriad of stand-alone projects being implemented without an overarching strategy.

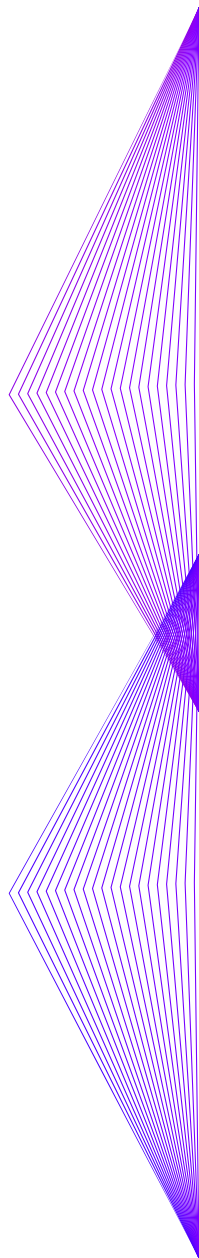
Introduction

From 10-12 November 2015, the South Sudan Law Society (SSLS), the Transitional Justice Working Group (TJWG), and the United Nations Development Programme (UNDP) held a conference entitled, *New Beginnings: The role of truth, justice, reconciliation and healing in promoting sustainable peace in South Sudan*. The purpose of the conference was to bring together a group of key stakeholders to brainstorm a way forward for the implementation of Chapter V of the Agreement on the Resolution of the Conflict in South Sudan (ARCISS), which addresses issues of “Transitional Justice, Accountability, Reconciliation and Healing.” One hundred fourteen (114) people (39 female and 75 male) participated in the three-day event, including representatives of the Government of the Republic of South Sudan (GRSS), human rights advocates, academics, religious leaders, activists, representatives of international non-governmental organizations, United Nations (UN) agencies and bilateral donors.

The conference was co-moderated by Dr. Alfred Lokuji, a South Sudanese scholar of political science with an intimate understanding of the challenges of justice and reconciliation in the South Sudanese context, and Priscilla Hayner, author of *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* and an expert on justice in the context of peace processes. An additional 16 South Sudanese and international experts provided insights into specific aspects of the transitional justice program in South Sudan and how other conflict-affected countries have dealt with impunity and the legacies of violence (see panellists in Annex III and Annex IV). On 4 February 2016, the SSLS conducted a follow-up workshop with stakeholders in Nairobi to obtain input from populations in the diaspora and members of the Sudan People’s Liberation Movement-in-Opposition (SPLM-IO). Thirty-three people (9 women and 34 male) participated in the Nairobi workshop, helping to validate and provide new perspectives on the conference outcomes.

The *New Beginnings* conference in Juba and the follow-up event in Nairobi are among the first efforts to discuss issues of transitional justice on a national stage in South Sudan. As South Sudanese are being exposed to these issues for the first time, there is an urgent need to invest into civic engagement activities to raise citizen awareness of what these issues entail and to solicit input into the design of programs and activities. The establishment of a conducive environment to publicly discuss these issues is therefore of primary importance, and the extent to which the yet to be established Transitional Government of National Unity (TGoNU) can initiate a genuine national dialogue on these and other issues will be a key factor in the success or failure of the ARCISS.

The conference and workshop discussed a wide range of matters relating to transitional justice in South Sudan. Although participants approached their task with a high degree of professionalism and focus, the deliberations only scratched the surface of the many matters that will need to be deliberated on moving forward. In that sense, the events provided an opportunity to identify the most pressing questions and determine where particularly contentious issues lie, but broader public consultations will be required to ensure that



the transitional justice agenda is designed in accordance with South Sudanese needs and aspirations. This limitation notwithstanding, the enthusiasm that participants demonstrated made apparent that South Sudan is fast moving beyond the point of asking whether the country should seek to tackle the ghosts of the past and combat impunity to asking how it should be done. It is hoped that the observations in this report can help to inform those efforts.

This report is structured in two parts. After a brief overview of the current context and a summary of relevant provisions of the ARCISS, Part One summarizes the five panel discussions that comprised the first part of the Juba conference. The panel discussions provided an overview of the transitional justice program as envisaged in the ARCISS and presented comparative experiences from other countries that have dealt with similar issues. A second subsection lists seven draft principles that are meant to serve as a reference point for actors working on these issues in South Sudan. Part Two provides more concrete observations and decision points that emerged from group work on the specific institutions proposed in the ARCISS and other complementary initiatives that participants thought should be incorporated into the program moving forward. The concluding remarks offer closing thoughts on the development of a South Sudanese-owned and driven process of transitional justice.

Background

In December 2013, just two years after its secession from Sudan, the Republic of South Sudan descended into a brutal and intractable conflict. To date, the conflict has displaced approximately 2.2 million people, including 1.66 million internally displaced persons (IDPs) and another 645,992 refugees that have fled to other countries.⁵ More than 4.5 million people face severe food insecurity, including 250,000 severely malnourished children.⁶ The conflict was triggered by a political dispute among the leadership of the ruling Sudan People's Liberation Movement (SPLM) party, but the intensity of the violence points to a number of underlying problems, including the militarization of politics, endemic corruption, widespread impunity and the legacies of decades of conflict.

In August 2015, the two warring parties — the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement-in-Opposition (SPLM-IO) — and other stakeholders signed the *Agreement on the Resolution of the Conflict in the Republic of South Sudan* (ARCISS). The ARCISS aims to stop the fighting and secure a long-term political settlement, but as of this writing, prospects for lasting peace remain in the balance. Fighting persists in parts of Greater Upper Nile region and there are troubling signs that the conflict is spreading to previously stable parts of the country, such as Western and Central Equatoria.

The ARCISS is based on a power-sharing model. The signatories to the agreement pledged to form a Transitional Government of National Unity (TGoNU) that will be responsible for implementing an ambitious post-conflict stabilization and reform program. Over the course of the 30-month transitional period, the TGoNU is expected to secure a permanent ceasefire, establish law and order, ensure humanitarian support for conflict-affected populations, facilitate the return or resettlement of displaced populations, organize national elections, develop a new constitution and enact comprehensive reforms across a range of governance sectors. In addition, the ARCISS requires the TGoNU to initiate a comprehensive program for transitional justice.

Chapter V of the agreement, entitled, "Transitional Justice, Accountability, Reconciliation and Healing," is structured around three institutions: a Commission for Truth, Reconciliation and Healing (CTRH), a Hybrid Court for South Sudan (HCSS) and a Compensation and Reparations Authority (CRA). The CTRH is responsible for investigating, documenting and reporting on human rights abuses over a predetermined time period in order to "spearhead efforts to address the legacy of conflicts, promote peace, national reconciliation and healing."⁷ Key elements of the CTRH include the following:

- ▶ **Composition** – The TGoNU Executive (comprised of leaders from the two warring factions), in consultation with the African Union (AU) and United Nations (UN), is to select and appoint seven commissioners, including four South Sudanese nationals and three from other African states.⁸ The chairperson is to be South Sudanese and at least three of the



commissioners (two of the South Sudanese and one of the Africans) must be female.

- **Time period for review** – Ch. V, Art. 2.2.2.2 of the ARCISS suggests that the CTRH's time period for review would be limited to human rights violations and abuses committed from 2005 to August 2015. If interpreted strictly, this time period would exclude human rights abuses committed during the 22-year (1983-2005) civil war in Sudan. Such a limited time period would seem to be problematic in that many of the most deeply felt grievances among communities in South Sudan may be traced to atrocities committed during the civil war.
- **Time period for operations** – According to the timeline set out in the ARCISS, the legislation establishing the CTRH is to be enacted six months from the establishment of the TGoNU, leaving very little time to engage the public in a process of selecting commissioners. Ch. V, Art. 2.1.3 of the ARCISS requires the Ministry of Justice and Constitutional Affairs, in collaboration with civil society and other stakeholders, to conduct public consultations of not less than one-month's duration before the legislation is adopted. The ARCISS also requires the CTRH to submit its final report three months before the end of the 30-month transitional period, which would give the institution a maximum of 21 months to do its work. This is exceedingly short when compared to lifespans of truth commissions in other contexts. For example, the South African Truth and Reconciliation Commission (TRC) was established by law in 1995 and released its report in 1998, and the Truth and Reconciliation Commission of Liberia spanned a timeframe of three years and four months from February 2006 to June 2009.

The HCSS is a court that will be established to bring cases against "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."⁹ Key attributes of the HCSS include the following:

- **Composition** – The HCSS is to be comprised of a combination of South Sudanese and African (non-South Sudanese) judges, lawyers and administrative staff. According to the ARCISS, the majority of judges in the HCSS will come from other African countries.¹⁰
- **Role of AU** – The ARCISS places all major decisions regarding the design and staffing of the institution with the AU Commission.
- **Jurisdiction** – The HCSS is to have primacy over the national judiciary, meaning that it will be empowered to assert jurisdiction over cases whether or not investigations and prosecutions are being conducted in South Sudanese courts.



- ▶ **Timeline for establishment** – Timelines for the creation of the HCSS that had been proposed in a near-final version of the agreement. According to that version, a memorandum of understanding (MOU) between the AU, UN and the TGoNU was to be finalized in the first six months of the transitional period, followed by national legislation in the first nine months. The final version removed the timelines from the main text but retained them in an annex, generating ambiguity as to whether the original timeline and method of establishment still apply. Irrespective of the ambiguity regarding the timeline, the main text of the ARCISS requires national-level legislation to be enacted for the HCSS, in addition to whatever agreements may be required with the AU or other intergovernmental organizations.

The CRA is a body that is to be established to provide compensation and reparations to people who lost property or were victims of abuses as a result of the conflict. The CRA is responsible for administering a Compensation and Reparations Fund (CRF) to “provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods in accordance with a well-established criteria [sic] by the TGoNU.”¹¹ Among the key attributes of the CRA are the following:

- ▶ **Composition** – The TGoNU is responsible for appointing the executive director of the CRA and the institution would be governed by an executive body comprised of representatives from the various parties in the TGoNU, in addition to representatives of CSOs, women’s groups, religious leaders, the business community and traditional authorities.
- ▶ **Timeline for establishment** – The ARCISS stipulates that the CRA should be established by legislation within six months of the formation of the TGoNU.
- ▶ **Relationship to the CTRH** – According to the ARCISS, the CRA “shall receive applications of victims including natural and legal persons from CTRH.”¹² The CTRH is also mandated to make recommendations on how to develop a reparations program for South Sudan.

Given the difficulty of implementing such an ambitious transitional justice agenda in a country that grapples with chronic instability and political turmoil, the TGoNU will need the robust support of both national partners, including faith-based institutions and civil society, and international partners if it is to deliver on the promises of Chapter V of the ARCISS. Developing consensus on a roadmap to guide the efforts of the various actors involved as they seek to establish and operationalize the three institutions will be vital to the success of the transitional justice program. The *New Beginnings* conference represents an early effort to develop such a consensus.





PART ONE
Summary of Conference
Proceedings

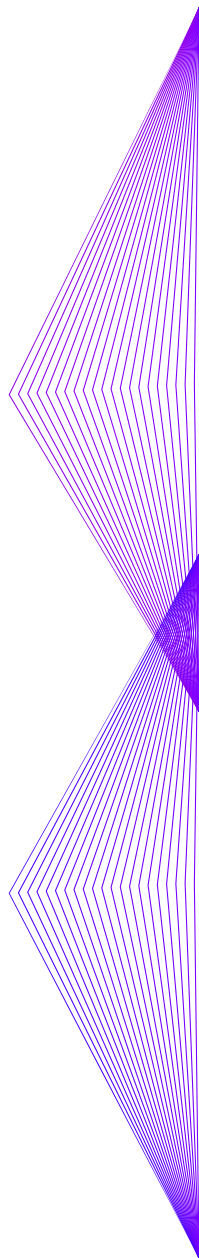
The first part of the conference was devoted to a series of panel discussions to set the context, orient participants on relevant provisions of the ARCISS, discuss comparative experiences from other countries, and think beyond the provisions of the ARCISS to what is needed to establish a comprehensive program of transitional justice in South Sudan. The subsections below summarize the five panel discussions and present a series of draft principles that are meant to provide a common reference point for actors working on these issues.

1.1 Panel Discussions

Panel 1: Transitional Justice in the South Sudanese Context

The first panel set the context by providing an overview of relevant regional and international initiatives. Beny Gideon, member of the civil society delegation to the Intergovernmental Authority for Development (IGAD) peace talks and member of the SSLs, provided an overview of Chapter V of the ARCISS. As discussed in the Background section above, Chapter V commits the two warring parties to the establishment of three institutions — the Commission on Truth, Reconciliation and Healing (CTRH), the Hybrid Court for South Sudan (HCSS) and the Compensation and Reparations Authority (CRA) — to spearhead efforts to address the legacy of past human rights abuses and widespread impunity in South Sudan. The provision for a comprehensive program of transitional justice marks a break with past peace processes in South Sudan, which have tended to use implicit or explicit amnesties and political rewards as incentives to entice potential spoilers into the fold. Indeed, the commitment to justice and accountability in Chapter V of the ARCISS, particularly the provision for a specific accountability mechanism to bring cases against those responsible for crimes committed during the conflict, is rare in peace agreements more broadly.

Amanya Joseph, Executive Director of the Human Rights Documentation Organization (HURIDO), and Coordinator of the Transitional Justice Working Group, shared his observations on the recently released report of the African Union Commission of Inquiry on South Sudan (AUCISS).¹³ In December 2013, just weeks after the conflict broke out, the AU announced its intent to establish a commission of inquiry to “investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities.”¹⁴ In March 2014, the AU appointed five prominent African political figures and academics as commissioners. The chairperson of the AUCISS, former Nigerian president, Olusegun Obasanjo, presented the AUCISS report at a meeting of AU Peace and Security Council (AUPSC) in January 2015, but the report was not made publicly available until October 2015. The report provides detailed findings and recommendations across four areas — healing, reconciliation, accountability and institutional reforms — and found evidence of crimes against humanity and war crimes committed by both sides in the conflict.¹⁵



David Deng, Research Director for the SSLs, summarized key findings from several recent surveys that the SSLs has conducted on South Sudanese perceptions of and experiences with truth, justice, reconciliation and healing. Survey findings demonstrate the scale of the mental health crisis in South Sudan, with 41 percent of survey respondents exhibiting symptoms consistent with a diagnosis of post-traumatic stress disorder (PTSD). Deng also presented data demonstrating the harm that the conflict is inflicting on inter-communal relationships, particularly in areas directly exposed to large-scale violence since December 2013. Survey findings confirm widespread interest in and demand for various processes of truth, justice, reconciliation and healing, including criminal prosecutions, truth-seeking, reparations, memorialization, institutional reform and reconciliation initiatives.¹⁶

Lastly, His Eminence, Daniel Deng Bul, Archbishop of the Catholic Church in South Sudan, provided an overview of the work of the Committee on National Healing, Peace and Reconciliation (CNHPR). Established by presidential decree in 2013, the CNHPR has launched an extensive reconciliation and healing effort that aims to reach populations all over the country. The CNHPR seeks to conduct consultations from the payam, county and state levels and to use the information compiled over the course of that process to develop a national agenda for peace, reconciliation and healing. The initial plan was to complete this process within a three-year timeframe from 2013-16, but the eruption of conflict in 2013 has set those plans back. According to the ARCISS, the CNHPR and a related initiative called the National Platform for Peace and Reconciliation (NPPR) are required to “transfer all of their files, records and documentation to the CTRH within fifteen (15) days since CTRH has become operational.”¹⁷ The Archbishop said the CNHPR would comply with this provision, and that the CNHPR would then continue to implement its reconciliation and healing program as planned.

Panel 2: Truth Commissions

The second panel went into more detail about the proposed CTRH and offered insights from truth commissions in other contexts. Priscilla Hayner, expert on justice in peace processes and author of *Unspeakable Truths*, framed truth commissions as one approach among many that other countries have used to confront legacies of past human rights abuses. Truth-seeking focuses more on victims than perpetrators, and should be seen as an opportunity for people who have survived human rights abuses to come forward and share their experiences so that the state and society can better understand the crimes that have been committed. Hayner expressed some concern with various aspects of the CTRH mandate as provided for in the ARCISS, most notably: the short time period for the CTRH to be enacted may not allow sufficient time for consultation; the 21-month time period for the CTRH to conduct its work is far too short; and the selection and appointment process for commissioners is vague.

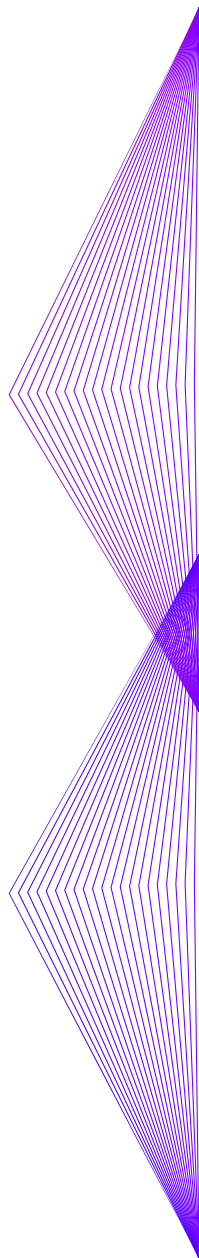
Njonjo Mue, transitional justice expert and Senior Advisor to a Kenyan civil society coalition Kenyans for Peace with Truth and Justice (KPTJ), shared observations about the Truth, Justice and Reconciliation Commission (TJRC) that the Kenyan government formed in the wake of the post-election violence of 2007. Although the TJRC managed to compile more



than 42,000 victim testimonies, more than any other truth commission ever established, there were a number of shortcomings in the process that may be relevant to the South Sudanese situation:

- ▶ First, the lack of a transitional moment and the fact that the same elites that were responsible for the violence remained in power meant that the political will to use the truth-seeking process as a means of promoting broader social transformation was limited.
- ▶ Second, regarding the coordination of truth-seeking and accountability efforts, a perception arose that the government was trying to use the TJRC process to whitewash crimes when the government tried to expand the TJRC mandate to cover cases that were being investigated at the International Criminal Court (ICC).
- ▶ Third, the legislation for the TJRC was not properly prepared and ended up copying and pasting from the Promotion of National Unity and Reconciliation Act that established the South African Truth and Reconciliation Commission. Since the TJRC legislation was not adequately tailored to the context in Kenya, it was cumbersome to implement. In addition, the subject matter and temporal mandate was too broad for quality truth-seeking.
- ▶ Fourth, the appointment of commissioners was shrouded in secrecy and did not allow for proper vetting of candidates. This led to the appointment of a chairperson who was later found to have been implicated in past human rights abuses. The controversy with the chairperson tainted the TJRC's relationship with civil society, depriving it of critical support, expertise and public ownership.
- ▶ Fifth, the TJRC was perceived to have too close of a relationship with government, which undermined public trust in the institution. Public trust was further undermined when the government tried to change aspects of the TJRC report that it did not agree with.
- ▶ Sixth, the TJRC struggled with funding from the outset, though it managed to spend about \$15 million USD over its lifespan. To its credit, the Kenyan government funded 90 percent of the budget.
- ▶ Lastly, on a positive note, the TJRC adopted special procedures for women, children and people with disabilities to participate. The institution also achieved gender parity at both the commissioner and staff levels.

Father James Oyet, Secretary of the South Sudan Council of Churches (SSCC), offered his observations about peace and reconciliation in the South Sudanese context.



Oyet supported the idea of establishing a truth and reconciliation commission but stressed that it would face a daunting task due to prevailing insecurity and a pervasive fear in society resulting from many decades of human rights abuses. Oyet noted the strength that South Sudanese draw from their religious and traditional values and saw these as resources to draw on in approaching the truth-seeking process. In order to be effective, the truth-seeking process must reach people at the grassroots and adopt messages of peace. "If you go and twist their arms," Oyet said, "people will run away." The high levels of trauma among populations in South Sudan are another factor that must be borne in mind. By taking steps to alleviate people's pain, South Sudanese can create a more conducive atmosphere for reconciliation efforts.

Ferdinand von Hapsburg, an expert on peacebuilding and reconciliation with many years' experience in South Sudan, spoke about his experiences working with various peace and reconciliation initiatives at both the national and local level. Hapsburg noted that most South Sudanese have been exposed to multiple conflicts over the course of their lives. In many respects, "South Sudan is a land of victims and survivors," von Hapsburg said, and all South Sudanese have a story to tell. People will approach truth-seeking with different objectives; some will try to politicize the process in order to achieve short-term political gains, while others will see it as an opportunity to heal old wounds. Hapsburg also noted how donors' priorities often do not coincide with those of the people, and how flexibility on the part of donors is necessary to ensure that the peace and reconciliation program is tailored to local needs.

Panel 3: Hybrid Courts

The third panel discussed the proposed HCSS and panellists offered a range of observations about the weaknesses and strengths of international criminal justice as seen in other contexts. Ken Scott, a senior international prosecutor, started his presentation with reference to the Nuremberg trials, which represented the first ever application of individual responsibility for international crimes in the wake of World War II. In the 1990s, international criminal law took another step forward with the establishment of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in the aftermath of the conflict in the former Yugoslavia and the Rwandan genocide. The ICC then followed in 2002 as the first permanent court to address international crimes.

More recently, hybrid courts have gained prominence because they often operate closer to the places where crimes occurred, enable greater participation by affected populations and can help to build capacity among local justice actors. Hybrid courts typically involve a mixture of national and international judges, prosecutors, defence attorneys and staff and may also apply a mixture of national and international law. There are many examples to draw from, including: the Special Court for Sierra Leone (SCSL), the Special Panels for Serious Crimes in East Timor, the Iraqi High Tribunal, the Special Tribunal for Lebanon, the Regulation 64 Panels in Kosovo, the Special War Crimes Chamber in the State Court of Bosnia and Herzegovina, and the Extraordinary African Chambers in Senegal, among others.

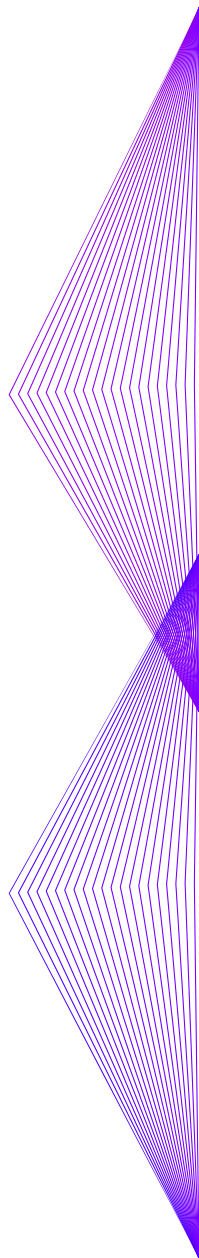


Dr. Geri Raimondo Legge, Judge in the Greater Equatoria Court of Appeals, offered a series of recommendations on how to proceed with the HCSS. Dr. Geri noted that the Ministry of Justice had already tabled an international crimes bill in the Legislative Assembly that would incorporate crimes against humanity, war crimes and genocide into the Penal Code.¹⁸ If enacted into law, the international crimes bill would enable the national judiciary to begin addressing international crimes alongside any prosecutions that arise in the HCSS.¹⁹ According to Dr. Geri, concurrent jurisdiction would help to catalyse progressive reforms in the national judiciary while also reducing the burden on and cost of the HCSS.²⁰

Logan Hambrick, an international criminal lawyer, provided some observations from her experience as defence counsel for several high profile accused persons in both the SCSL and the ICC. Hambrick stressed how international standards for ensuring the rights of the accused would be indispensable to the credibility of the HCSS. For example, it is important that prosecutors of the HCSS do not rely too heavily on secondary documentation, such as the report of the AUCISS. According to Hambrick, there is a tendency in many international tribunals to rely heavily on secondary documentation, due to the inherent difficulty of evidence collection in countries emerging from periods of large-scale human rights abuse. Ensuring the integrity of witnesses will be another major consideration for the HCSS. The court will need to take steps to ensure witness safety and security, while also being aware of the incentives that witnesses sometimes have to participate in the process and how that can shape their testimonies.

Lastly, Hambrick discussed the unique risks that political interests pose to international tribunals. Given the nature of the offenses and the status of the people being tried, international tribunals are invariably subject to extreme political pressure by both national and international actors. South Sudanese should expect similar conditions surrounding the work of the HCSS. The provision of the ARCISS that stipulates that people who are indicted or convicted by the court would be barred from political office heightens the risk that the HCSS could be used as a political proxy.²¹ The HCSS leadership must therefore carefully guard against the perception that political interests influence the court's decisions.

In the plenary discussion, conference participants raised a number of questions about the HCSS's power to enforce its decisions on political and military figures in South Sudan, given that the individuals who are likely to be charged before the court have armed constituencies supporting them. Panellists acknowledged that enforcement would be a challenge, but stressed that it had been done in other conflict-affected countries, including the Former Yugoslavia, and that the HCSS would rely in large part of the support of actors at both the national and international level. The question of whether the HCSS could apply the death penalty was also raised, though there quickly emerged a consensus that applying the death penalty in these circumstances would be inappropriate and not in accordance with international standards regarding humane treatment of convicted persons.



Panel 4: Reparations

The fourth panel discussed the Compensation and Reparations Authority (CRA) provided for in Chapter V of the ARCISS. Dr. Christina Jones-Pauly, comparative law expert, referred back to the reparations program that was initiated in Germany after both World War I and II and explained that the reparations have been a common feature of the history of war for centuries. In fact, according to the United Nations Security Council (UNSC), the right to reparations for damage resulting from war is a human right. This has legal implications for reparation processes; damages resulting from war need to be distinguished from damages due to other causes, and persons or groups dissatisfied with reparations awards must be informed of their rights of appeal to regional or international mechanisms.

There is also ample experience with reparations in South Sudan. As Dr. Jones-Pauly noted, the Sudan People's Liberation Movement (SPLM) policy of 'taking towns to the people', in which the SPLM said it would prioritize rural development as a means of compensating people for the losses they suffered in supporting the liberation struggle, could be seen as a form of reparations. In addition, reparations for harm done during conflict are used extensively in the customary practices of the peoples of South Sudan. For example, in the event of a homicide, many customary laws require the perpetrator or the perpetrator's family to pay a predetermined number of cattle to the family of the deceased to compensate them for their loss. Although this practice is somewhat more difficult in the context of large-scale conflict where people are killed indiscriminately and it is often not possible to identify who did what, there are numerous examples of communities compensating one another collectively for losses incurred during conflict. South Sudan should seek to draw on this rich practice in developing its program for transitional justice.

Taban Kiston, member of SSLS, explained how the reparations program needed to be victim-centred in order for the state to acknowledge that it had violated its duty to respect, protect and fulfill the rights of its people. The state should also acknowledge at the outset that it is not possible to fully repair harms of the conflict and carefully communicate the process to the people to avoid unduly raising expectations. Kiston stressed the importance of a holistic approach that did not place too much emphasis on any one mechanism, but rather created an environment conducive to many different initiatives by various state and non-state actors. In order to participate effectively, victims would have to be informed about their rights and should be encouraged to form lobby and advocacy groups in order to have their interests better protected. Attention should also be paid to ensuring that the process does not discriminate against minority groups or vulnerable populations.

Sultan Wilson Rikito Peni, Zande Paramount Chief of Yambio County, described the toll that the conflict had taken on the people and infrastructure of South Sudan and the importance of reparations as a means of helping people to recover and recommence their lives. Sultan Wilson also explained why he thought traditional authorities should play a central role in the reparations program. Since they are well acquainted with their communities, traditional authorities would be well placed to assess reparation claims and manage disputes or misunderstandings that result from the process.



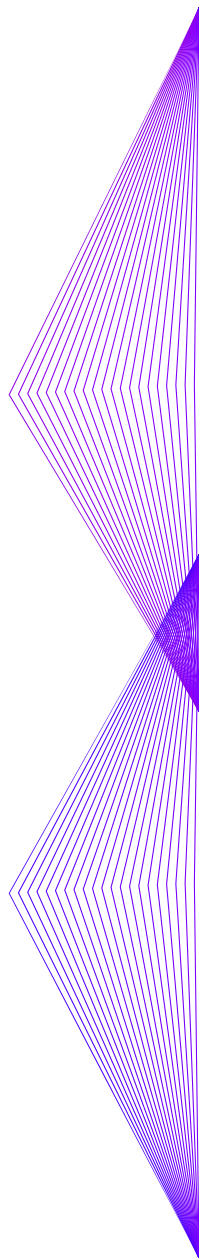
In the plenary discussion, a series of questions revolved around the funding of the reparations program, as there is a perception that the Government of South Sudan has exhausted most of its resources funding the war effort. Another line of commentary and questions concerned the timeframe for the reparations program. Would the program seek to compensate only those who have been harmed by the national conflict that erupted in December 2013? What about incidents that predated the December 2013 crisis, such as a series of incidents in Wau in 2012 where numerous people were killed during street protests, or even those who were harmed in previous conflicts?

Panel 5: Towards a Holistic Approach

The fifth panel considered how South Sudan could design a more comprehensive approach beyond the specific provisions of the ARCISS. Dr. Kasaija Phillip Apuuli, Professor of Political Science at Makerere University, discussed the role of customary justice mechanisms in transitional justice processes with reference to the *Gacaca* courts in Rwanda. As Dr. Apuuli explained, *Gacaca* is a traditional method of dispute resolution. After the genocide, the new Rwandan government policy was to punish those who were responsible for the genocide. Since the formal justice system could only deal with a small number of accused persons, the government decided to adapt the *Gacaca* mechanism in order to expand the reach of justice processes. Although the *Gacaca* process was successful in that it helped address many cases that would otherwise have gone without sanction and contributed to the development of a coherent national narrative about the genocide, it has been criticized for a failure to protect accused persons due process rights (for example, by not providing legal representation to accused persons), and for the omission of crimes committed by members of the ruling Rwandan Patriotic Front (RPF) party.

Daud Gideon, co-founder of the Remembering the Ones We've Lost website, described the efforts that he and a small group of volunteers made to create a website to list the names of people killed or missing as a result of conflict in South Sudan over the past sixty years. The website, <http://rememberingoneswelost.com>, includes a form for online submissions and has already compiled more than 4,000 names. The organizers of the Naming initiative have plans to upscale the effort so as to compile a more complete list of people who were killed or are missing as a result of past conflicts. They also held vigils on 15 December 2014 and 2015 to commemorate the anniversaries of the conflict, in which they read aloud the lists of names.

Gideon went on to explain how memorialization initiatives have a long history in South Sudan. One example can be seen in the naming of neighbourhoods in Juba to acknowledge painful moments of the country's past. The neighbourhood Rajal Maafi (meaning 'no man' in Juba Arabic), for example, was named to remember the men who were killed in that area during the 22-year civil war (1983-2005) and the neighbourhood of Atlabara (meaning 'come outside' in Juba Arabic) was an acknowledgement of people who would be called out of their homes by members of the Sudan Armed Forces (SAF) only to suffer forced disappearance or death. To date, the Government of South Sudan has done little or nothing to support memorialization efforts such as these.



Njonjo Mue discussed the role that civil society played in Kenya in pressuring the conflicting parties to embrace peace and justice through coalitions such as Kenyans for Peace with Truth and Justice (KPTJ) and Concerned Citizens for Peace (CCP). These groups were able to bring additional attention to the longer-term reforms that were needed to address the underlying causes of the post-election violence. KPTJ was particularly effective in stressing the importance of accountability and amplifying the voice of victims in the response to the violence. KPTJ also performed a valuable role in terms of networking among national, regional and international organizations. Though the South Sudanese context differs from Kenya in many key respects, civil society could seek to carve out a similar space and seek to provide independent oversight and technical input on the various issues on the reform agenda laid out in the ARCISS.

Lastly, Dr. Christina Jones-Pauly's presentation focused on the importance of involving customary law, traditional authority leaders and communities in the transitional justice program. Dr. Jones-Pauly observed that customary institutions provide important services that often resonate more with South Sudanese conceptions of justice than the statutory system. The involvement of customary institutions can also help to reduce the exorbitant costs associated with Western-styled justice, which relies heavily on expensive prosecutors and lawyers. For example, whereas in the statutory system, the accused person is meant to stay silent until the complainant can prove his or her guilt, the customary system encourages the accused person to tell the whole truth of what they did. Especially important is the truth about the motivation and circumstances under which the offending action occurred, which is used to determine whether the sentence ought to be mitigated or not.

Another important feature of customary law is its use of ritual to reconcile conflicting parties. Trials in customary courts seek to settle a dispute by first determining legal liability under the customary law followed by issuing judgment and pronouncing sentence. Only after the legal process has ended may the process of reconciliation take place so as to soothe bad feelings or resentment between the litigating parties. This contrasts with practice in statutory courts where the court is not concerned with whether or not the disputing parties reconcile upon the conclusion of legal proceedings.

Lastly, customary institutions are more flexible than statutory courts in that they allow for adaptations to accommodate changing circumstances in society. For example, in the Monyomiji rotational age-set system of Eastern Equatoria, when a new age-set comes into power it issues its own set of laws in consultation with other community members, thereby enabling innovation in legal practice. Proponents of transitional justice in South Sudan should try to understand the complexity of customary legal systems, how they adapt to changing circumstances, and where they correspond to and diverge from international standards of human rights, rather than dismissing valuable practices simply because they are unfamiliar.



1.2 Draft Principles

The following draft principles were developed in a plenary discussion held on day 3 of the Juba conference and presented to participants in the Nairobi workshop. They are intended to provide a common reference point for the development of a comprehensive program for transitional justice moving forward. As public consultations begin in earnest, a broader range of stakeholders will be invited to refine and expand on the draft principles.

Principle 1: South Sudanese-owned and driven

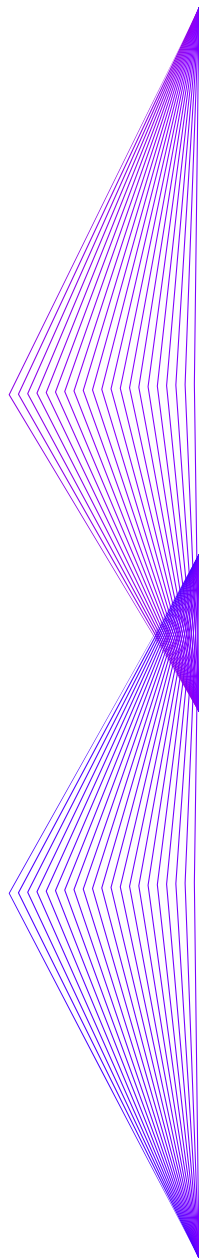
In order to be successful, the transitional justice program must be owned and driven by South Sudanese and tailored to the context. Time and resources must be invested into civic engagement and public consultation activities to inform the design of institutions and public outreach must continue throughout the life of the various bodies that are to be formed. While international support is needed to ensure that the process meets and surpasses certain minimum standards, international priorities should be secondary to those of the South Sudanese people. Ultimately, the question of local ownership to a large extent depends on whether the state is able to create a conducive environment for public discussion of potentially contentious issues relating to past periods of violence and problems associated with impunity. This requires the political leadership to embrace the transitional justice program, ensure that the process is inclusive and not overly politicized, and commit to using it as a means of promoting broader social, political and economic transformation.

Principle 2: Independent and impartial

Given the highly politicized context in South Sudan and the high levels of distrust among the political leadership and at the community-level, the independence and impartiality of the transitional justice program will be of utmost importance. Any perception of 'victor's justice' or of a bias in favour of any particular group would undermine the credibility of the program and alienate segments of the population. To a certain extent, this independence and impartiality is incorporated into the design of institutions in the peace agreement. For example, the direct international participation in the HCSS and the CTRH is meant to help insulate the institutions from political interference. However, additional safeguards are required, particularly with regard to the selection and appointment of the members to the various bodies.

Principle 3: Credible and transparent

A major objective of the transitional justice program is for the elites controlling the state to demonstrate their commitment to building a culture of respect for human rights and rule of law, thereby helping to establish society's trust in the state. The credibility of the transitional justice program is directly linked to transparency; by involving people in the process and ensuring that it reflects local priorities, the transitional justice program can



help people to overcome the silence, denial and hostility that accompany periods of large-scale human rights abuses.

Principle 4: Inclusive

South Sudanese have been exposed to a wide range of overlapping conflict situations, both ongoing and historical. The current conflict has had a disproportionate impact on the peoples of the Greater Upper Nile region, but past conflicts have had greater impacts on other parts of the country. Many different types of conflict also coincide in South Sudan, whether violence associated with cattle-raiding, revenge killings, conflict between pastoralist communities and those who follow a sedentary agriculturalist lifestyle, other types of conflict over land and natural resources, or politically motivated conflict, such as what the country has been grappling with since December 2013.

While all South Sudanese in one way or another are victims and survivors of conflict, different segments of the populations have been impacted in different ways at different times. In order to make a meaningful contribution to state and citizenship-building efforts, it is therefore important that the transitional justice program be framed in an inclusive and representative manner that does not exclude segments of society. In addition to ensuring inclusivity of ethnic communities and geographic constituencies, the program should make special provision for the participation of women, youth, minority groups, people with disabilities, the urban and rural poor, and other vulnerable populations. It is also important to engage people at the state and local level so as to avoid the perception that the transitional justice effort is focused on the political and economic elite in Juba.

Principle 5: Holistic

Transitional justice programs do not lend themselves to a 'one-size-fits-all' approach and there is a need to pursue multiple objectives and activities simultaneously. Often, countries make the mistake of focusing exclusively on criminal justice mechanisms, or viewing truth-seeking as an alternative to other accountability mechanisms. A better approach is to focus on creating an environment that enables a broad range of interventions by various state and non-state actors, without overly emphasizing one mechanism over another. Adopting a holistic approach is all the more important in the South Sudanese context where many different types of conflict coexist and peoples of South Sudan have been exposed to different impacts, whether geographically, temporally or socio-economically.

Principle 6: Integrated

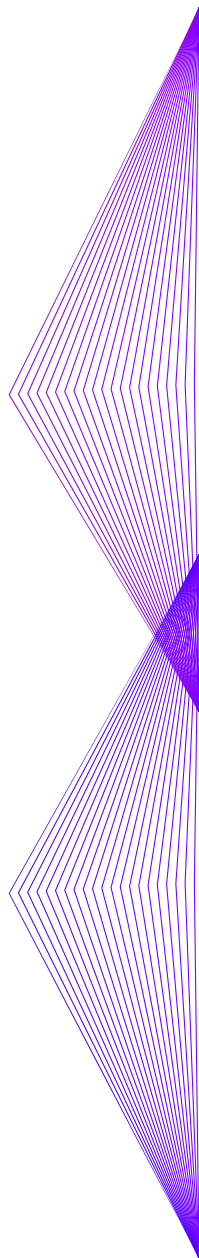
Chapter V of the ARCISS does not stand in isolation and is intimately linked with other aspects of the post-conflict stabilization and reconstruction agenda. Attention must therefore be devoted to how the transitional justice processes outlined in Chapter V can be coordinated with other aspects of the agreement, such as the constitutional development process or security sector reform. For example, a vetting process in the military to identify individuals who are responsible for human rights abuses and remove them from duty could



help to establish a more professional and accountable army. Or, as noted in the description of the reparations panel above, the SPLM policy of ‘taking towns to the people’ could be framed as a form of reparations for people in rural areas who have borne much of the cost of South Sudan’s struggle for independence. Integrating justice and reconciliation into the post-conflict stabilization and reconstruction agenda would allow South Sudan to take full advantage of the transitional moment to foster more meaningful and sustainable reforms.

Principle 7: Maximize legacy

Transitional justice processes are temporary in nature; they make use of the momentum that accompanies a country’s transition from conflict or periods of authoritarian rule to tackle particularly contentious issues that would otherwise go unaddressed. Since they are temporary in nature, it is important that their contribution to political and institutional transformation in the medium- to long-term is paid sufficient attention from the start. It is only by ensuring that institutions are designed in such a way that they reinforce existing justice and reconciliation processes and mechanisms, that full advantage can be taken of the resources that are invested into the transitional justice effort to entrench institutional guarantees of non-recurrence.





PART TWO

Observations on Chapter V
of the ARCISS

In the second part of the conference, participants divided out into groups to discuss the transitional justice agenda in greater detail. Four groups were formed to discuss the HCSS, CTRH, CRA and complementary initiatives that could foster a more holistic approach. The groups reported back on the last day of the conference and the moderators then facilitated a plenary discussion to flesh out and vet the recommendations that emerged from the group work. After consolidating a draft report from the Juba conference, the organizers shared key outcomes with stakeholders based in Nairobi during the follow-up workshop in February 2016. The subsections below summarize the main observations and conclusions that emerged from discussions in the two events.

2.1 Commission for Truth, Reconciliation and Healing (CTRH)

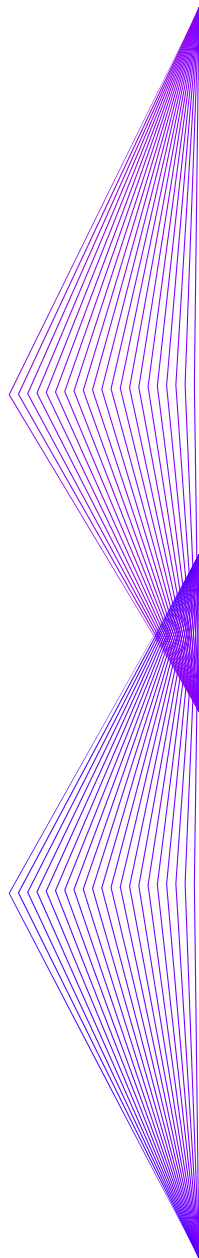
Objectives of the CTRH

The foundation of any truth commission mandate is investigations; truth commissions investigate human rights abuses, breaches of rule of law and excessive abuses of power, in addition to the facts, circumstances and causes of conflicts, in order to formulate a plan for how a country can come to terms with a particularly violent episode in its past. In the case of the CTRH, the ARCISS also places the promotion of reconciliation and healing at the core of its mandate. These objectives should be clearly articulated in the legislation for the CTRH. In framing the objectives and other aspects of the truth commission mandate, the drafters of the legislation should be careful to avoid cutting-and-pasting from truth commission statutes in other countries. As discussed in Section 1.1 in relation to the Kenyan experience, if the legislation is not well tailored to the context it will be difficult to implement.

Another issue that should be considered in developing the CTRH mandate is how the institution will relate to efforts to promote criminal justice. For example, should the CTRH be empowered to forward cases to the HCSS or national courts with a recommendation to prosecute or is it preferable to have the CTRH focus exclusively on truth-seeking? While the CTRH's investigations would likely uncover a wealth of information that could inform investigations into international and national crimes, it could affect people's willingness to engage with the institution and the political support that it receives if the CTRH is known to be working with criminal justice institutions. Determining an appropriate approach to issues such as these requires extensive consultation with stakeholders to ensure that the CTRH's objectives are in line with South Sudanese priorities.

Substantive Mandate

Broadly speaking, truth commissions tend to focus on serious and large-scale human rights violations. However, given the large number of human rights violations provided for in international human rights treaties, truth commissions must prioritize certain human rights that are deemed to be of particular concern in order to ensure that the substantive mandate



of the truth commission is not overly broad. The Kenyan TJRC, for example, included an extended list of violations and was not able to cover them all in depth.

While it is important not to be overly broad, too narrow of a focus can also be problematic. Given the scale and complexity of past and current conflicts in South Sudan, the CTRH will need to address a range of both civil and political rights and economic, social and cultural rights if it is to develop a complete understanding of South Sudan's conflicts. Addressing the structural causes of violence and social inequality are essential to developing an informed program to guarantee non-recurrence of human rights violence. For example, the role that misuse of and competition over oil revenue plays in driving conflict is critical to developing a plan to prevent the recurrence of violence and should be included in the CTRH's substantive mandate. Similarly, examining who exactly benefits from arms flows into South Sudan can help to shed light on the inner workings of the war economy and thereby inform plans for more progressive economic development. Whatever human rights violations the CTRH is tasked with investigating, they should be clearly articulated in the legislation establishing the institution so as to give specific direction to the CTRH about where to place its attention.

Time Period of Review

A preliminary question for the design of the CTRH concerns the time period that it will be tasked to review. As a central goal of the CTRH is to establish some consensus on the basic facts and circumstances of large-scale human rights violations, the CTRH should ideally examine time periods for which there is a lack of information, contested narratives and where there are clear links between unresolved historical grievances and current conflicts. The difficulty in the South Sudanese context is that the country has lived through a series of lengthy civil wars and to examine them all would present an impossible task for the CTRH. While the decision will ultimately have to balance a number of trade-offs, the designers of the CTRH should take the following considerations into mind:

- **Inclusivity** – Most if not all South Sudanese have suffered from war and large-scale human rights abuses at some point in their lives, but different groups have been impacted at different times and in different manners. It is therefore important that the CTRH examine a time period that is large enough to cover abuses committed against a maximum number of groups so as not to make people feel left out of the process.
- **Feasibility** – One major factor that has undermined the work of truth commissions in other contexts is the adoption of too long of a time period for review. While it might be tempting to go all the way back to the start of the first Sudanese civil war in 1955, such an expansive mandate would present a nearly impossible task for the CTRH. Other significant historical milestones include the establishment of the first regional government in southern Sudan in 1972, the start of the second Sudanese civil war in 1983, the signing of Comprehensive Peace Agreement (PCA) in 2005 and independence in 2011.



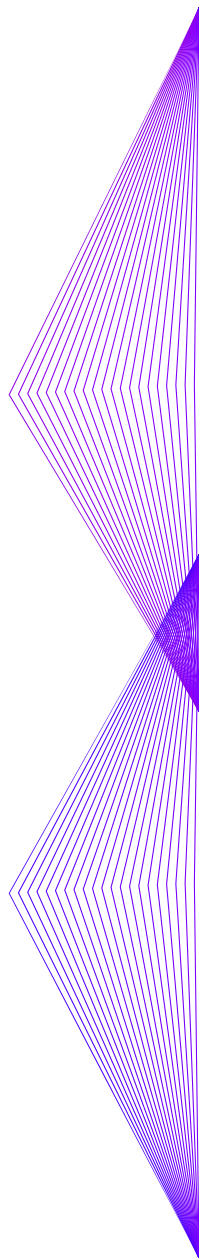
- ▶ **State responsibility** – Truth commissions provide an opportunity for political and military leaders to reflect on their own responsibility for human rights abuses and violations. From this perspective, 2005 might make a logical starting date for the CTRH's inquiries since the regionally autonomous Government of Southern Sudan was established in 2005 and prior to that the state apparatus in southern Sudan was under the control of the government in Khartoum. However, the SPLM/A and other armed groups in southern Sudan also performed functions of a civilian administration for much of the 22-year civil war, which could justify investigations into abuses committed during the war. In addition, while state power may have been centred in Khartoum during the war, there were many southern Sudanese who worked in government in southern Sudan and were directly implicated in human rights violations that took place.

No clear consensus emerged from conference participants about a time period for review and there is need for additional consultations and technical input to weigh the different options. Consideration should also be paid to new and innovative approaches, such as allowing for targeted inquiries into specific episodes in the past that are seen to be particularly contentious. For example, if a time period for review extending to the start of the civil war in 1983 is considered too expansive, the core time period could extend from the establishment of the Government of Southern Sudan in 2005 to some agreed cut-off date and the CTRH could be tasked to also examine specific incidents that predate that mandate, such as atrocities committed around the time of the 'split' in the SPLA in the early to mid-1990s or human rights violations that accompanied the start of the armed struggle in southern Sudan in the early 1980s.

Timeframe for Operations

Ch. V, Art. 2.2.4 of the ARCISS states that the final report of the CTRH shall be due three months before the end of the transitional period. Given that the legislation establishing the CTRH is to be enacted within six months of the establishment of the TGoNU, this leaves 21 months for the CTRH to complete its activities. There was a clear consensus among conference participants that this timeframe is not feasible. Truth commission in other contexts typically operate on a 2-3 year timeframe with the possibility of extension, in addition to at least six months after the establishment of the commission to hire staff, develop operational procedures and get the institution established. In the South Sudanese context, one can expect a truth commission to need additional time given the logistical difficulties of operating in South Sudan and the need to engage widely with populations in rural areas.

Despite the explicit 21-month timeframe provided for in the ARCISS, Art. 2.2.1 suggests that the CTRH will be given some discretion to review the cut-off timeframes for its operations. The designers of the CTRH should take advantage of this flexibility to expand the timeframe of operations for the CTRH. At the very least, the CTRH should aim to be fully established



and operational during the transitional period such that it can continue its work under the elected government that is to be established upon the end of the transitional period.

In terms of overall timeframe, some conference participants suggested a 10-year timeframe, though most felt that was too long and would unduly delay the CTRH report and undermine its relevance to the post-conflict situation. Most participants supported a 3-5 year timeframe for the institution. The CTRH could also consider sequencing its activities such that it focus on the truth-seeking effort and producing its report in the first 2-3 years with the idea that the reconciliation and healing component of its work would continue thereafter. This approach was used in a truth commission formed to examine abuses committed against indigenous peoples in Canada, which concluded its work in 2015. The Canadian commission used its first two years to develop its report and the next three years was devoted to reconciliation activities. Under such an approach, the CTRH report could then be used to inform the institution's subsequent reconciliation and healing activities.

Selection and Appointment of Commissioners

The credibility of commissioners is a key factor accounting for the success or failure of truth commissions. In the case of Kenya, the appointment of a chairperson to the TJRC who was himself implicated in serious human rights abuses brought into question the legitimacy of the institution and damaged its relationship with civil society. The TJRC never quite recovered from this problem. In the South Sudanese context, presidential appointments of caretaker governors and the leadership of independent institutions has generated perceptions of political accommodation and bias, undermining public trust in institutions. It is therefore important that a thorough and transparent process for selection and appointment be established to ensure that candidates for the various positions in the CTRH are independent and properly vetted beforehand. The process should not be unduly rushed, and there should be a chance for public input or reaction once the finalists are identified. Publicly advertising the positions and recruitment processes can also help to inform people about the process and avoid perceptions of political bias.

Another critical factor to consider in the selection and appointment procedure is gender balance and inclusivity. As noted in the Background section above, the ARCISS requires at least three of the seven commissioners to be female. Gender parity should also be ensured in staffing at all levels of the CTRH. Having women working on the CTRH can help women, whether they are victims or perpetrators, feel more comfortable coming forward to provide information. Similar considerations should apply to people with disabilities and vulnerable populations.

Role of Customary Mechanisms

The relationship between the CTRH and customary institutions is a complex issue but one that potentially offers unique advantages in the South Sudanese context. Potential difficulties arise from the diversity of customary systems in South Sudan, the manner in which political and military actors have instrumentalised customary institutions

throughout South Sudan's history, and certain customary laws that discriminate against women and girls. However, customary institutions are far more accessible geographically, culturally and in terms of cost than statutory institutions and could play an important role in extending the CTRH's reach to rural parts of the country. Traditional authorities also have extensive on-the-ground knowledge about the facts and circumstances of conflict, including the nature of and extent of damage done, materially or psychologically. This information could provide a rich source of data for the truth-seeking effort.

One possible approach discussed during the conference was for the CTRH to refer certain cases that it comes across to customary courts for the determination of compensation and to facilitate reconciliation. Under customary law, reconciliation typically takes place after a trial determining both liability and sentencing. After the trial, the traditional authority facilitates a post-trial ceremony to help the conflicting parties overcome any lingering hard feelings. In addition to the customary post-trial reconciliation, some communities have specific rituals and ceremonies outside of the customary legal process for cleansing combatants when they return to civilian life. Both processes may prove to be useful to the CTRH in its efforts to promote reconciliation.

Another approach put forward by a conference participant is for the CTRH to divide its work into a series of branches that are conducted alongside an all-inclusive national truth-seeking effort. One branch could be instituted at the level of traditional leaders and their communities in the form of a forum inclusive of all peoples and/or clans in a particular state. A second branch could be instituted among the military, armed militias and other security sector actors. A third branch could be created for decision-makers in the major political parties, such as SPLM, SPLM-IO, Former Political Detainees and other political parties. The CTRH would then be responsible for overseeing the other branches of the truth-seeking effort by monitoring the quality of their work, coordinating activities, serving as an ombudsman for any complaints of participants in the process and ensuring the timely submission of interim and final reports. Dividing work in this manner could help overcome challenges associated with the vast territory of South Sudan, its limited infrastructure and the wide diversity of its legal cultures. It would also enable more effective crosschecking of information and more speedy delivery of reparations or compensation at the community level.



Psychosocial Support and Social Healing

In addition to the physical harm that conflict does to people's bodies and their property, it also has a devastating impact on their mental health. Countries emerging from protracted conflict are confronted mental health crises that are on an order of magnitude larger than what is found in more stable contexts. Furthermore, studies in South Sudan and elsewhere have shown that people who suffer from post-traumatic stress disorder (PTSD) tend to have less positive beliefs in a communal or interdependent view of the future, are less willing to forgive or reconcile with those who have harmed them, and display a greater retributive sentiment.²² Addressing the mental health impacts of conflict would thus go a long way towards creating an environment that is more conducive to truth, justice and reconciliation

by increasing opportunities for forgiveness and reconciliation. Providing relief to traumatized populations could also reduce retributive sentiments and help to manage expectations of what criminal prosecution can deliver in a context of widespread human rights abuses.

Given the intensity and length of the conflicts that South Sudan has experienced, social healing will necessarily be a long-term effort. The CTRH can bring a national profile to this effort and ensure that additional resources are devoted to psychosocial support and trauma counselling for affected populations. As part of its healing mandate, the CTRH should assess existing support mechanisms, such as those found at the family or clan level, or within religious, customary or non-customary institutions, to ensure that they are reinforced and supported whenever possible. Social funds could also be established to provide healing facilities for community-based groups in need of those services. Another approach that was tried in Peru could be to create a special team of psychologists and traditional healers who can identify particularly grave cases of socio-psychological damage and pursue more targeted interventions.

As mentioned above, it might make sense for the CTRH to clearly delineate between its truth-seeking function, on the one hand, and its reconciliation and healing functions, on the other, such that the outcome of the former feeds into the latter. Sequencing truth and reconciliation/healing could also help to reduce the inherent tensions between reminding people of the terrible things that they have done to one another and facilitating forgiveness and reconciliation. The CTRH will also have to account for the fact that the meaning of reconciliation and forgiveness varies across religious and cultural contexts. In Muslim communities, for example, the family of a murder victim is typically given a choice between punishing the convicted perpetrator with compensation or death and pardoning or forgiving the perpetrator. In order to accommodate diverse perspectives on what is needed for reconciliation and forgiveness, it is important that the CTRH adopt a flexible approach.

Civic Engagement

A concerted civic engagement effort will be critical to ensure that the CTRH is appropriately tailored to the context. This is the first opportunity for South Sudanese to engage with a truth-seeking process and people will need to be informed about what it entails. According to the ARCISS, the Ministry of Justice and Constitutional Affairs, in coordination with civil society and other stakeholders, is required to conduct public consultations not less than one month prior to the establishment of the CTRH. However, as noted in the Background section above, this time period is insufficient to conduct the type of widespread consultations that are required, particularly in light of the low levels of awareness about transitional justice in South Sudan. For example, a recent study by the SSSL and UNDP found that 76 percent of the 1,525 people surveyed did not know what a truth commission is.²⁴ If levels of awareness are not improved substantially, it will be very easy for people who feel threatened by the CTRH to politicize the institution and promote messages that undermine its work.



A number of conference participants were also concerned with the Ministry of Justice and Constitutional Affairs' role in leading the consultative process and thought that the South Sudan Human Rights Commission (SSHRC) should play a more prominent role. As an independent commission with the mandate of promoting human rights in South Sudan, the SSHRC may be better positioned to conduct consultations that are free from real or perceived political bias than the Ministry of Justice. Given the short timeframe for the establishment of the CTRH,²³ public consultations should start immediately and be coordinated with the legislative drafting process to ensure that the legislation establishing the CTRH takes into consideration the views of a diverse cross-section of the public.

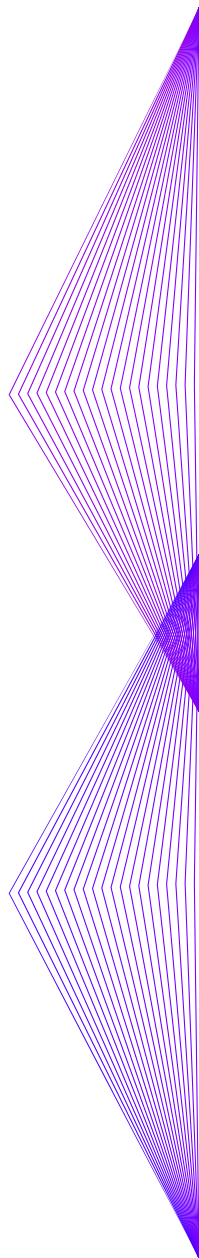
Public outreach will be necessary throughout the life of the CTRH. The CTRH will need to conduct continuous awareness-raising activities and information campaigns to ensure that people are familiar with the institution and how it operates. The CTRH could also consider holding public hearings and coordinating its activities with various forms of multimedia, particularly radio, television and print media, in order to keep people informed about the process. Given the manner in which public space has been steadily constricting in South Sudan, the TGoNU would have to take steps to ensure that security personnel do not interfere in the conduct of hearings were they to take place. Indeed, ensuring the protection of victims and perpetrators more broadly who submit testimonies to the CTRH will be a critical issue of concern, given the widespread insecurity and prevalent culture of revenge in many parts of the country. If people do not feel as though they can safely submit their testimonies, they will not participate in the process.

Role of Civil Society

Civil society actors will play a key role in supporting the work of the CTRH and providing technical input on its design. In order to make an effective contribution, civil society organizations must organize themselves and establish a solid relationship with affected populations throughout the country. The various civil society coalitions that have been formed in the wake of the December 2013 crisis, including the civil society-led Transitional Justice Working Group (TJWG), provide a useful coordinating function, in this regard. Under the TJWG, civil society organizations interested in making a contribution to the CTRH or other transitional justice initiatives can come together and develop a common platform from which to act. This entails the development of advocacy strategies, communication protocols and common messaging, in addition to specifying the internal structure of the working groups. At the time of writing, the TJWG is in the process of developing a strategy that will guide their work.

Funding

Truth commission budgets typically range anywhere from a couple million to tens of millions of dollars. Liberia's Truth and Reconciliation Commission, for example, cost about \$7.5 million for three years (or one percent of the national budget), whereas the South



African Truth and Reconciliation Commission had an annual budget of \$18 million.²⁵ In most cases, the government concerned provides most of the funding and this is supplemented through contributions from international organizations or bilateral partners. The Kenyan government, for example, funded an impressive 90 percent of the budget for the TJRC. For the CTRH, the TGoNU and its international partners should aim to ensure that funding for the entire lifespan of the initiative, including a year to wind down operations after the mandate has concluded, is provided upfront. This can help to avoid the perception that access to funds is being used to influence the work of the institution.

2.2 Hybrid Court for South Sudan (HCSS)

Method of Establishment

The ARCISS places the sole responsibility for developing the framework for the HCSS with the AU. According to Ch. V, Art. 1.1, the TGoNU would then be expected to enact legislation to formalize the AU framework into national law in South Sudan. Although the ARCISS is largely silent on the role of the TGoNU in designing the HCSS, the AU should nonetheless engage the TGoNU and other national actors in South Sudan in the development of the HCSS framework from the outset. Constructive dialogue with South Sudanese could help to forestall any effort by opponents of the HCSS to characterize it as a foreign-imposed institution, in addition to fostering the type of collaboration with South Sudanese authorities that can help to facilitate investigations and arrests.

Ideally, the HCSS would be established through some form of written agreement between the AU and the TGoNU that would provide a basis for the relationships among the various regional and national actors involved. There is also scope to include the UN in any such agreement, as Art. 1.5 of the ARCISS commits the TGoNU to seek the assistance of the UN in relation to the transitional justice mechanisms outlined in Chapter V. Including the UN in the agreement would enable the AU and the TGoNU to draw on the UN's accumulated expertise in the creation and operation of international and hybrid courts. While a multilateral agreement between the AU, UN and TGoNU may be ideal, it should be noted that the ARCISS does not require the TGoNU to be involved in the establishment of the HCSS and any such agreement should not be interpreted as a prerequisite to the establishment of the court.

As noted in the Background section above, there is some ambiguity in the ARCISS about the timeframe and modality for the establishment of the HCSS. A six-month deadline for the TGoNU and AUC to enter into an agreement about the court and a nine-month deadline for the enactment of national legislation were removed from a near final version of the ARCISS but retained in an annex in the final signed copy, generating uncertainty as to what timeframe the signatories to the agreement intend.



Further complications arise from the fact that nobody is specifically tasked with developing legislation for the HCSS. The ARCISS places responsibility for drafting amendments necessary to incorporate the ARCISS into the Transitional Constitution and other existing legislation with the National Constitutional Amendment Committee (NCAC). As the NCAC is to be established upon formation of the TGoNU and to exist for a period of 12 months, to the extent that the NCAC would be responsible for drafting the legislation for the court, the implication would be that the HCSS would have to be established within the 12-month lifespan of the NCAC. However, it is not clear whether the signatories to the agreement intended for the NCAC to have responsibility for drafting the legislation for the three Ch. V institutions or whether that task would fall to another institution in the TGoNU, such as the Ministry of Justice and Constitutional Affairs or the Transitional National Legislative Assembly.

This ambiguity notwithstanding, as it will take at least a year and possibly longer for the HCSS to fully establish itself after the necessary agreements and legislation are in place, it is vital that work on the design and establishment of the court begins immediately given the amount of work and thought involved in establishing a hybrid court. Since the NCAC and the TGoNU are likely to have a huge workload and Chapter V of the agreement may not be the first priority, civil society and other non-state actors should work with government institutions to develop draft legislation that can be used to jumpstart the process.

An important issue to consider in developing the framework for the HCSS is whether it would be situated within or outside of the South Sudanese judiciary. While the ARCISS stipulates that the HCSS shall be “independent and distinct” from South Sudanese courts, it does not definitively say whether it will be entirely outside of the national judiciary.²⁶ There was a clear consensus among conference participants that the HCSS should be situated outside of the judiciary so as to ensure its independence. As discussed further below, the HCSS could over time be incorporated into the national judiciary if it is to transition into a permanent international crimes chamber in the South Sudanese courts.

Caseload

An important strategic question for the HCSS concerns the number of people that it would seek to try. At one end of the spectrum for internationalized courts is the Extraordinary Chambers in Senegal, which is focusing its work on crimes allegedly committed by just one man, former Chadian president Hissène Habré. The ICTY and ICTR, on the other hand, were able to bring cases against 160 and 90 people respectively. Other courts that have been formed generally fall somewhere in between. The SCSL, for example, indicted a total of 13 people, and since starting its work in 2005, the War Crimes Chamber in the State Court of Bosnia has completed over 200 cases. The number of cases that the HCSS would seek to bring would have fundamental implications for both the design and the anticipated cost of the institution.

Ultimately, the question of how many individuals to prosecute is one that the office of the prosecutor will determine based on the available budget, timeline and other considerations



and the number of cases would not be addressed in the HCSS mandate. Nonetheless, it is helpful to think through some of the options ahead of time to better understand what to expect from the institution. The general sentiment among conference participants was that the HCSS should try high-level perpetrators, the statutory system should try the mid-level perpetrators and the customary system could deal with certain types of lower-level crimes.

While no specific number was put forward during the conference, most participants thought the HCSS should target anywhere from a dozen to several dozen individuals. Prosecuting less than five individuals is unlikely to be sufficient given the manner in which impunity has penetrated all levels of society in South Sudan. Such a low number of cases would also limit options for prosecutors, who might prefer to start with less senior perpetrators in order to build more solid cases against senior perpetrators. The maximum number of perpetrators that the HCSS can try will be determined by time and cost factors, but given the weakness of the national judiciary and the challenges that South Sudanese courts would face in even trying mid-level offenders, the more cases that could be brought in the HCSS, the better.

In addition to prosecutions in the HCSS, cases should be brought in the national judiciary to broaden the reach of accountability measures beyond the more senior actors. Conference participants noted that an international crimes bill had been tabled at parliament that would incorporate crimes against humanity, war crimes and genocide into the penal code. The legislative assembly had also enacted a Geneva Conventions Act in 2012 that made war crimes justiciable in the national system, although the law is not yet being applied.

One question that would have to be addressed from the outset is whether the international crimes bill would be given retroactive effect. While this raises the issue of non-retroactivity of criminal laws under common law principles, there is precedent stipulating that international ad hoc tribunals are not barred from prosecuting individuals for international crimes simply because such crimes were not criminalized at the national level when committed.²⁷ The investigation and prosecution of international crimes in the national judiciary could also be facilitated by the creation of an international crimes division in the High Court as is the case in Uganda. It should also be noted that the prosecution of mid-level offenders in the national system remains aspirational, as the existing justice system does not currently have the capacity to do this in accordance with international standards.

Regarding the role of customary institutions, some conference participants expressed concern about the ability of customary courts to address crimes committed by the military. The armed might of the military as well as a perception among elites that they are above customary justice complicates efforts to hold political and military actors accountable in customary systems, though there are significant examples of customary law courts trying lower ranking military personnel. Another complicating factor concerns the nature of the conflict, in that it involves people from vastly different customary law traditions and a scale of violence that customary courts are not accustomed to handling.²⁸ The role of customary courts must therefore be approached on a case-by-case basis that takes into consideration the conflict dynamics of specific locations and the existing capacities of customary



institutions in those locations. Customary rules of conflict of laws should also be explored to determine how different customary systems treat disputes when more than one community or clan is involved.

Jurisdictional Issues

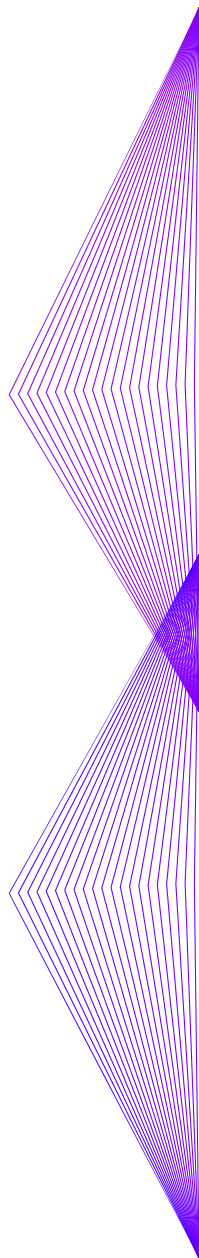
The HCSS is mandated to investigate and prosecute individuals responsible for the core international crimes, namely crimes against humanity, war crimes, genocide and other serious crimes under international law. The hybrid nature of the court would also enable it to examine serious crimes arising under relevant South Sudanese laws, such as acts of violence that do not rise to the level of international crimes or destruction of property and land.

One question that arose during the Juba conference was whether the HCSS should look into economic crimes, in particular instances of grand corruption that have occurred since December 2013. While economic crimes directly associated with the conflict, such as pillage, would clearly fall in the jurisdiction of the court, there was some disagreement among conference participants about whether the court should be empowered to address issues of corruption that were not as directly linked to on-going conflict.

Those who favoured the idea pointed out that widespread corruption is among the factors that contributed to the conflict and that since the HCSS is able to examine certain crimes under domestic law, it could theoretically be authorized to prosecute individuals involved with corruption. Additional support for addressing corruption can be found in Art. 3.5.2 of the ARCISS, which states that the HCSS may, upon conviction, order the return of any proceeds and assets acquired illegally or by criminal action to the rightful owner or to the state of South Sudan. Such a provision requires the strong support of international partners to trace and locate illegally acquired assets around the world.

Conference participants who were opposed to the idea of including corruption among the crimes that the HCSS would address maintained that other institutions, such as the Anti-Corruption Commission, were better positioned to handle such matters and that the HCSS would have its hands full with the international crimes. In order to make an informed decision on whether or not to include corruption within the HCSS mandate, the AU should make sure to address this issue in its consultations with stakeholders in South Sudan.

Another jurisdictional issue concerns the types of entities that have standing to bring cases and against whom cases might be brought. One participant suggested that individuals and legal persons be permitted to bring their own suits before the HCSS apart from the prosecutor. Alternatively, victims or families of people who were killed or disappeared during the conflict could be permitted to bring auxiliary suits and submit petitions for reparations or compensation before the HCSS as part of the prosecutorial proceedings. Another participant suggested that communities with documented evidence have legal standing to file specific charges against one or a group of perpetrators.



With respect to the types of accused persons that can be tried in front of the HCSS, the language of the ARCISS limits it to cases of individual perpetrators. This is somewhat atypical in the African context, since group rights often enjoy special status under customary law and even in regional instruments such as the African Charter for Human and Peoples' Rights (ACHPR). In order to remedy this shortcoming, the HCSS's rules of procedure may be able to supplement the ARCISS by specifying under what circumstances groups or legal persons may be investigated and prosecuted. Another option could be for the rules to allow for the referral of cases involving group offences to customary or statutory courts in South Sudan.

Investigation Unit

The effectiveness of the HCSS will rest in large part on its ability to conduct thorough investigations. Evidence of the atrocities that have been committed is fast disappearing or being destroyed and it is vital that investigation efforts begin immediately to capture what evidence remains. One suggestion that was put forward by conference participants was to form an investigative unit as a precursor to the HCSS. Such investigative units have been formed in relation to international tribunals in other context, including in relation to a proposed hybrid court in Central African Republic (CAR). The investigative unit would be given an official mandate and would start work immediately compiling intelligence and evidence for the HCSS. The provision of an official mandate would be an important means of ensuring the independence of the unit's work, given the sensitivity of the cases that are likely to be investigated.

The investigative unit could also be framed as a hybrid initiative itself, bringing together South Sudanese and other African investigators and prosecutors to test how the hybrid model might work in practice in the South Sudanese context. In addition, if a mentoring component were included in its mandate, the investigative unit could be used to develop a pool of talent that could then be harnessed to work with the HCSS, once established. The AUCISS report and other human rights reports could provide a useful starting point for these investigations, but ultimately the HCSS will have to compile more detailed information that speaks towards the specific facts being presented in court and relies on actual witnesses rather than second-hand reports.

Location

The choice for the seat of the HCSS would have far-reaching implications for how the institution functions and its impact on the local context. Much of the argument in favour of hybrid courts over more internationalized mechanisms such as the ICC, ICTY or ICTR is the legacy that hybrid courts can have for the situation country. Basing the court in the country concerned makes hybrid courts more meaningful to local populations and maximizes benefits for national justice systems. In addition, holding trials in a country emerging from conflict signals to society that the state is committed to combating impunity and ensuring rule of law.

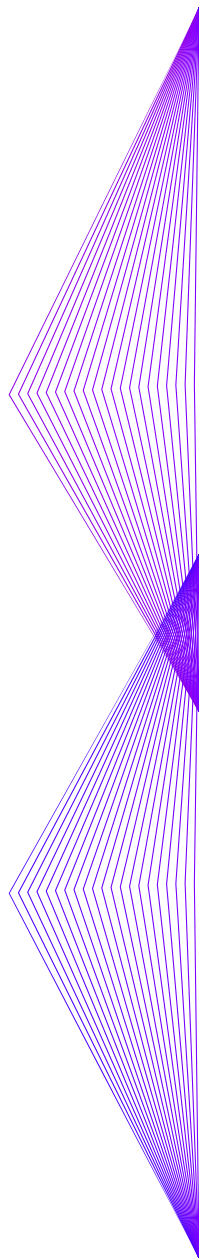


International tribunals also make an important contribution to the historical record by detailed accounts of a particularly troubling point in a country's history. The ICTR, for example, is currently in negotiation with Rwanda about where the archives from its work will be situated. Whereas some supporters of the court would like to keep the archives in Arusha, Tanzania where the court was based, the government of Rwanda considers the archives to be Rwanda's national heritage and maintains that the archives should be located in Rwanda so as to be accessible to Rwandese who want to learn about their history.²⁹ As a newly independent nation, the contribution that the HCSS would have to the historical record and the development of South Sudanese narratives of the December 2013 crisis is uniquely important. Locating the HCSS in South Sudan could arguably maximize this contribution.

While situating the court as close as possible to affected populations is ideal, the security context of post-conflict states sometimes does not allow for courts to be located in the situation country. This is fundamentally a question of security, though the availability of infrastructure and facilities may also factor into the decision. The Special Tribunal for Lebanon, for example, was based in The Hague, largely due to the risk of terrorism and insecurity in Lebanon. The Iraqi High Tribunal, which was based in Baghdad to try Saddam Hussein and other members of the Ba'ath party, provides an example of a court established amidst serious security risks. Tragedy struck in 2006 when an investigating judge with the tribunal was shot and killed. Another option in addition to situating the HCSS entirely within or outside of South Sudan could be to hold the more politically sensitive trials outside of the country but to do the bulk of the work in South Sudan. This was the approach followed by the SCSL, which was based in Freetown but held the trial of Charles Taylor in The Hague.

Conference participants were divided over whether the HCSS should be based in South Sudan or elsewhere. Those who supported the idea of situating the court in South Sudan emphasized the advantages it would offer in terms of access evidence and witnesses, and how it could send a signal to the population that the state is committed to combating impunity. Basing the court in South Sudan could also reduce the cost of transporting court personnel back and forth between a foreign country and South Sudan. If the court were to be situated in South Sudan, while the capital city of Juba could be considered as one possible location, other locations ought to be considered as well to mitigate the potential for the HCSS to exacerbate feelings of marginalization in other parts of the country.

Opposition to the idea of basing the HCSS in Juba was particularly pronounced at the Nairobi workshop, where participants cited the prevailing insecurity and the likelihood that accused persons and their supporters would find it easier to undermine the work of a court based in South Sudan as reasons for situating the court outside the country. The lack of facilities is also a major consideration in that the court premises and detention facilities would have to be constructed from the ground up at considerable cost. A compromise position between the two could be to hold some trials or hearings in South Sudan and some in another country, or to start proceedings in another country and move them to



South Sudan when the security situation permits. The premises of the Mechanism for International Criminal Tribunals (MICT) in Arusha, Tanzania would provide an attractive alternate location, in this regard.

Selection and Appointment of Judges and Staff

The independence, impartiality and credibility of the HCSS are centrally important to its success. To a certain extent, these issues are already addressed in the ARCISS. For example, the ARCISS stipulates that a majority of judges will be from African countries other than South Sudan and places most key decisions about the institution in the hands of a third-party in the form of the AU. The ARCISS places responsibility for selecting and appointing judges with the Chairperson of the AU Commission and the Secretary-General of the UN.³⁰ The ARCISS also stipulates that judges, prosecutors, investigators, defence counsel and the registrar must be “persons of high moral character, impartiality and integrity, and should demonstrate expertise in criminal law and international law, including international humanitarian and human rights law.”³¹ Practical experience in trying complex criminal cases should be an additional criterion considered in appointments of judges. Experience has shown that judges who have such experience can be important to effective proceedings because cases involving serious crimes are often highly sensitive and involve complex fact patterns and large amounts of evidence.

Transitioning to Permanent Institution

One way in which the HCSS could maximize its legacy in South Sudan would be for it to transition into a permanent court within the South Sudanese judiciary. Under this approach, the HCSS would start as an internationalized hybrid tribunal established outside of the national judiciary and over time, the international participation would phase out and the institution would become a permanent international crimes court within the hierarchy of the national judiciary. A similar approach was used for the War Crimes Chamber in Bosnia and Herzegovina. Many participants in both the Juba conference and Nairobi workshop favoured this approach as a middle ground between a court that is entirely situated within South Sudan or entirely situated outside the country. Transitioning into a permanent court in South Sudan could also help to maximize the HCSS’s legacy in South Sudan.

Witness Protection

Ensuring the support, safety and security of witnesses is a major issue and challenge for all international crimes courts, and will be all the more difficult in the South Sudanese context given the absence of witness protection services and prevailing insecurity. Witnesses will not testify if their security is not properly addressed. The HCSS should ensure confidentiality of witnesses and communicate a credible threat of severe legal consequences for proven cases of interference with witnesses. The HCSS should also consider the psychological needs of victims and witnesses by making provision for psychosocial support services. South Sudan has little to no existing framework for witness protection and much of the infrastructure would have to be established for the first time. This is an essential area for which UN assistance should be utilized. The UN has extensive experience with the development and implementation of witness protection and support programs as part of the ICTY, ICTR and the SCSL.



Defendant Rights

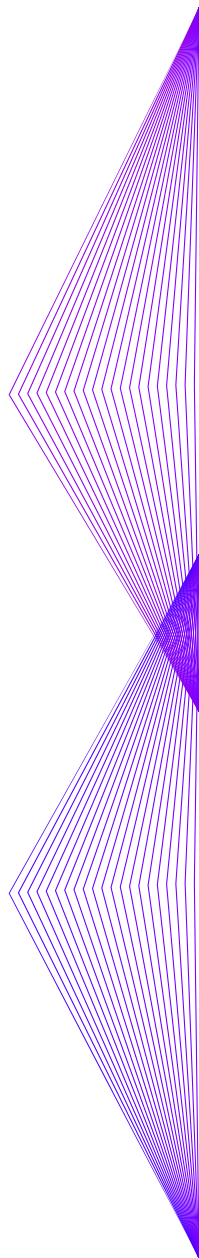
One criticism that was sometimes levelled against international criminal law early on in the development of the field was that tribunals assumed the guilt of accused persons from the start and the process did not afford sufficient protection to defendant rights. While international criminal justice has come a long way since the Nuremberg trials in the wake of World War II, in which there was no right to appeal, some observers still question whether evidentiary rules and procedural safeguards adequately protect defendant rights. The ARCISS (Ch. V, Art. 3.4.2) makes cursory reference to the rights of the accused, but in developing the HCSS framework, it will be important for the AU to provide more details on the rights of suspects and accused persons. Defendant rights should include the full range of rights under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and the HCSS rules of procedure should be designed to ensure that the HCSS adheres to these international standards in practice. This is another area where lessons learned from other international and hybrid courts can provide insights.

The ARCISS restricts the choice of defence counsel made available by the court to those coming from the African continent, though it concedes that the defendant would have the freedom to choose her or his own private defence counsel from any continent. The ARCISS does not address the inherent discrimination that would arise when one defendant has more resources than another to hire private defence counsel.

Capacity Building

Given the human resource constraints of justice sector institutions in South Sudan, investments must be made into capacity building activities to ensure a supply of qualified national staff for the HCSS. Since investigations need to start as soon as possible, capacity building activities must be conducted simultaneously with the investigations and the establishment of the HCSS. The investigative unit described above could have the added benefit of merging outcome-oriented investigations and capacity building activities into a single initiative.

One strategic question that would have to be addressed at the outset is how to identify the most suitable candidates to participate in capacity building activities. In ideal circumstances, the TGoNU would conduct systematic trainings across justice sector institutions and thereby identify promising candidates in whom to invest resources in a more strategic manner. However, given the time constraints and the need to proceed on multiple fronts simultaneously, such an approach might not be optimal in terms of cost and efficiency. Another approach could be to shortlist promising candidates from the outset and to focus efforts on building their capacity and vetting them for participation in the hybrid investigative unit and the HCSS. Training opportunities should also be publicly advertised to minimize perceptions of bias and to help identify potential candidates.



Relationship to Customary Justice Mechanisms

Customary justice mechanisms offer a number of advantages in terms of expanding access to justice for conflict-related crimes. Since they rely on a common sense understanding of the law rather than formal statutes or regulations, and since customary justice is a collective practice, usually aimed at achieving consensus, customary justice mechanisms provide an accessible form of justice that can involve entire communities.³² The informality of customary law, its oral basis and the lack of procedural or evidentiary norms facilitate the direct involvement of participants. Proceedings are rapid and generally devoted to issues of fact. The emphasis that customary law places on restorative rather than retributive justice also makes it well suited to promoting reconciliation. The challenge for South Sudan is to adapt the various customary justice mechanisms as they exist in different communities to the current conflict situation.

Conference participants considered several possible options for coordinating legal trials with the work of customary courts. Some participants felt that customary courts could be endowed with jurisdiction to hear cases of international crimes in cases involving victims and perpetrators who are from the same community. While adjudicating international crimes in customary courts might raise some of the due process concerns associated with the *Gacaca* process in Rwanda, it would at the same time extend the reach of justice far beyond what is possible in the statutory system or in the HCSS.

Adjudicating these cases in customary courts becomes more difficult in cross-community disputes, when different customary laws apply and in which the customary court may not have as much control over the non-local party. In such circumstances, one option could be to establish 'hybrid' customary law courts on which three or four traditional authorities from the communities concerned sit alongside a magistrate trained in statutory law. This would enable the application of customary laws from various communities, as well as the potentially greater enforcement capacity of the magistrate.

Other possible areas of coordination include the determination of punishments and remedies. For example, statutory courts or the HCSS could refer disputes about reparations or compensation to the relevant customary law courts, or ask traditional authorities to oversee ceremonies for post-trial reconciliation of parties. Statutory courts or the HCSS could even request the relevant community and its traditional authorities to set sentences for convicted persons and justify reasons for any mitigation. If a formal collaboration between statutory and customary courts proves overly problematic, statutory courts or the HCSS could simply seek information from traditional authorities in the presence of their communities about the kinds of compensation or reparations permitted under customary law and seek to apply those rules in the HCSS and statutory courts.

If a role is provided for customary institutions in the transitional justice program, a key procedural question concerns whether and how to formalize that role. In Rwanda, for example, a law was enacted formalizing the *Gacaca* courts. However, the formalization of customary institutions proved problematic, because the formalization process undermined

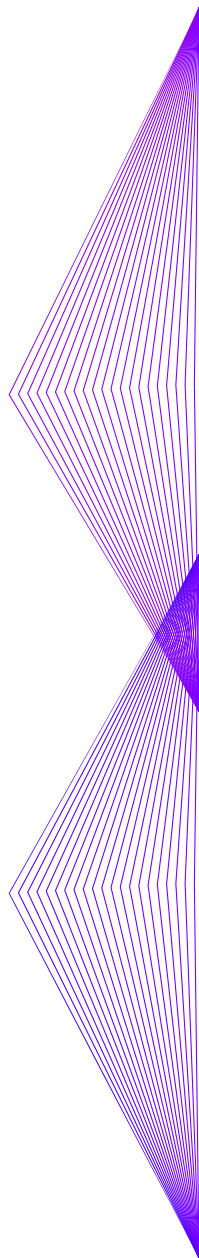
the flexibility of the institutions and reduced principles that in practice had been negotiated on a case-by-case basis to specific rules. One lesson that can be drawn for the South Sudanese context concerns the difficulty of formalizing customary processes through legislation, particularly given the diversity of customs in South Sudan. Another approach could be to allow customary and statutory processes to proceed in parallel without forcing the customary mechanisms into an artificial formalization process.

In determining a way forward, policy-makers should conduct extensive consultations with traditional leaders as to the type of crimes they might be able to deal with. Given the diversity of legal traditions and the different ways in which successive conflicts have affected customary institutions, there is likely to be a great deal of variation in how different communities envisage the role of customary institutions in the transitional justice program. Policy-makers should also seek to understand the safeguards that customary laws already offer to defendants in terms of their right to be heard, to present witnesses and forensic evidence and to plead for a mitigated sentence in found guilty, in determining a suitable role for customary institutions.

Victim Participation

Whether and how victims would participate in court proceedings is another issue that would need to be considered moving forward. The debate about victim participation on the international level pits those who favour a common law approach in which victims have a right to information and support and can be called on to provide evidence but do not play an independent role in court proceedings against those who favour a civil law approach in which victims may directly participate as independent parties, such a private prosecutor or auxiliary prosecutor. While the common law approach allows for more streamlined trials because court actions are limited to arguments by the prosecution and defence only, the civil law approach arguably maximizes the restorative potential of trials by ensuring that victims' interests are better addressed. Nonetheless, a growing victims' rights movement around the world has led to statutes even in common law countries to confer broad rights on victims in criminal cases. Whether such rights are broadly or narrowly interpreted depends on the interpretation of the courts.

The model that is adopted for the HCSS ought to be the one most favourable to victims, including protection against long delays in trials or decisions about whether to prosecute, the right of victims to institute their own proceedings for restitution for physical or mental harm, and the provision of psychosocial support. South Sudanese courts typically require the presence of a complainant in order for charges to be brought against an accused person. In this sense, the national system in South Sudan might favour a more victim-centred approach consistent with that of civil law jurisdictions. The various cultures of South Sudan also value participation of all affected persons in court cases, hence provisions in the procedural rules of the HCSS would resonate culturally and tend to support greater South Sudanese ownership. Any rules governing victims' participation at the HCSS should take into account the UN General Assembly's 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. Victim participation should also be carefully considered to ensure that it does not conflict with victim participation in other transitional justice institutions.

Coordination and Sequencing

Conference participants felt that the HCSS should be established simultaneously with the other justice and reconciliation institutions provided for in the ARCISS. If not well coordinated, the simultaneous conduct of multiple transitional justice processes can generate confusion and competition among the institutions. In Sierra Leone, for example, tensions arose between the Truth and Reconciliation Commission (TRC) and the SCSL when the TRC sought testimony from an individual who was in the custody of the SCSL.

There is also a risk that the truth-seeking effort could contaminate evidence that it is to be brought before the courts. If, for example, a victim provides one story in the CTRH but changes that story however slightly in his or her testimony in the HCSS, lawyers could use the inconsistency to bring into question the veracity of the testimony.

In addition, the simultaneous conduct of multiple transitional justice processes affects the calculations of individuals seeking to engage with them. For example, it may be more difficult to convince people to testify before the CTRH if they think that testimonies can be used before them in the HCSS. Moreover, if the CTRH is going to provide information to the HCSS or statutory courts, should perpetrators testifying in front of the CTRH be provided with legal counsel?

In order to avoid a situation in which the various institutions are working at cross-purposes, careful thought must be given to coordinating mechanisms among the three institutions provided for in the ARCISS and other national processes. Once established, the leadership of the various institutions should also exercise discipline to ensure they do not encroach on each other's work.

Outreach

Experience from other contexts has shown that making information about international tribunals publicly available and conducting targeted outreach to populations most affected by the crimes are essential to tribunals' success. Local populations have limited understanding of criminal processes and the HCSS could generate confusion and suspicion if not properly introduced. A well-planned outreach effort would also help to fend off attempts to politicize or spread misinformation about the institution. Institutional resources should be devoted to outreach at all stages of the process.

Funding

Hybrid courts involve considerable costs. The cases are complex and their credibility hinges on a range of procedures being put in place for witness protection and protection of the



rights of the accused. At the same time, they are able to deliver benefits that go far beyond the particular cases tried. While both the AU and the TGoNU should be expected to contribute towards the court, they do not have the resources to fund it completely and fundraising will need to be conducted with the UN and bilateral partners. The US government and the EU have announced that they would be willing to provide financial support for the court, which is an important sign of international support for the institution. These initial pledges notwithstanding, it will be important that a budget be developed and that a donor's conference be convened to ensure adequate levels of funding.

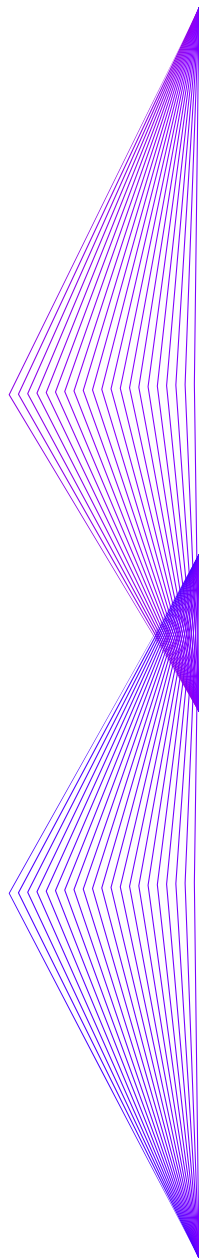
2.3 Compensation and Reparations Authority (CRA)

Sequencing and Individual versus Collective Reparations

The sequencing of the work of the CRA relative to the other institutions of Chapter V is a key issue of concern. The ARCISS appears to envisage the three institutions running simultaneously, as the CRA is supposed to receive applications from the CTRH. However, a key component of the mandate of the CTRH is to provide recommendations on the structuring of the reparations program. This component of the CTRH mandate would make most sense if the CRA were to be established after the CTRH report was completed. Of course, the risk of such an approach is that the delay in paying reparations will raise suspicions and distrust.

While it might be tempting to push ahead with all of the various transitional justice initiatives simultaneously, there is good reason to stagger parts of the reparations program, particularly that of individual reparations, such that they are informed by the activities of the other transitional justice institutions. Even in the most developed states, individual reparations programs are notoriously difficult to implement. In a bureaucratically underdeveloped and severely conflict-affected country like South Sudan, it is difficult to envision an individual reparations program proceeding successfully. The sheer number of victims would quickly overload the process, and the complexity of the conflict dynamics in South Sudan would make it difficult to distinguish injury due to war from injury due to circumstances other than war. The CRA and CTRH might therefore consider prioritizing collective and symbolic forms of reparations from the outset while compiling the information and institutional capacity to conduct individual reparations. Otherwise, the emphasis could be placed on blanket reparations for communities while treating individual reparation as exceptional.

Collective reparations could be provided in a variety of forms. For example, the TGoNU could start by reinstating the employment and providing compensation in terms of back pay for individuals who lost their jobs as a result of the conflict. Investments into reconstruction and the reestablishment of livelihoods, especially in the agrarian sector, could also help to provide an economic foundation from which people could begin to rebuild their lives. However, care must be taken to avoid conflating the state's duty to repair



the general damage to infrastructure caused by the war with reparations that are targeted specifically to survivors of human rights violations.

Memorialization

Memorialization initiatives (or symbolic reparations) can also serve an important role in acknowledging the state's failure in its duty to protect its citizens from human rights violations. The establishment of a national day of remembrance for those who were killed or missing as a result of current and past conflicts, the construction of a national war museum that is designed to teach people of the costs of conflict and help to guarantee that it does not recur, and the renaming of buildings and streets with messages of peace and reconciliation could help to re-establish trust between state and society. Perhaps most important in the short-term would be for the leadership of the warring factions to admit responsibility for what the conflict has done to the country and to seek people's forgiveness. Apologies that President Salva Kiir has delivered on behalf of the SPLM for the December 2013 crisis and that then Vice-President Riek Machar delivered for his role in the Bor Massacre were important moments, but they must be followed-up with action to ensure that victim populations take them seriously.³³

As a first step, proponents of the transitional justice program should take stock of what is already being done with regard to memorialization in South Sudan and how these efforts can be best supported. One example that was presented in the conference was the Remembering the Ones We've Lost website, which seeks to compile the names of people killed or missing as a result of conflict in South Sudan.³⁴ There are also numerous grassroots initiatives that communities throughout the country have conducted to honour those killed in past conflicts. These initiatives should be catalogued and supported such that they inform the national agenda. The CTRH report could make further recommendations about specific forms of symbolic reparations in its final report.

In addition, the TGoNU should ensure that memorialization initiatives feature more prominently in state policy. One possibility that could be considered could be to take places where atrocities have been committed — such as the notorious 'White House', where in the 1990s, representatives of the central government in Khartoum disappeared hundreds of people during a crackdown on suspected SPLA sympathizers in Juba — and convert them into museums or public spaces where people could come to learn about South Sudan's experiences with human rights abuses and ensure that they do not recur. Conference participants also discussed the possibility of establishing a national board to stimulate ideas and help to identify potential memorial sites.

Eligibility

The ARCISS does not clearly identify which victims would be eligible for compensation from the CRA. On the surface, the ARCISS appears to suggest that applicants for reparations will be drawn from those who have testified before the CTRH.³⁵ The CTRH is also permitted to

make recommendations on reparations guidelines to the CRA. Whether the applicants would also have had to participate in reconciliation and healing activities to qualify for reparations unclear. If so, then reparations appear to be a kind of incentive to participate in the truth-seeking process.

Otherwise, given the successive protracted conflicts in South Sudan, virtually the entire population would qualify as victims of conflict and it is not possible to provide individual reparations to everyone. Practically speaking, the CRA and CTRH will need to establish some form of limitation on eligibility for individual reparations. The challenge in doing so is to maximize the extent to which victims can benefit and ensure that groups do not feel singled out or neglected due to arbitrary eligibility criteria.

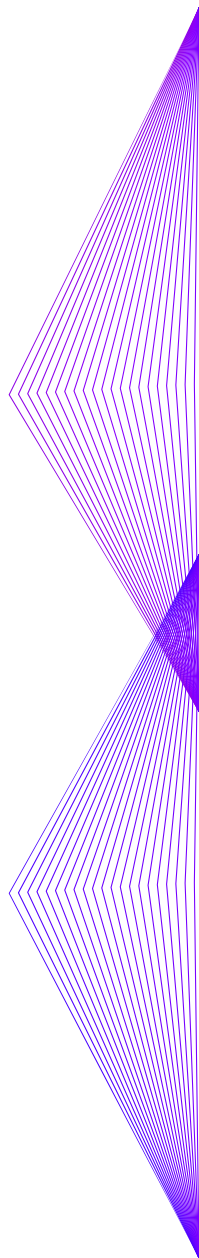
One key question in this regard concerns the timeframe when the abuse would have to have occurred in order for an applicant to qualify for reparations. Conference participants proposed a 10-year timeframe going back to the establishment of the regionally autonomous Government of Southern Sudan after the signing of the CPA in 2005. Additional information about the size of victim population and the types of harms that people suffered during different time periods could help to determine whether a 10-year timeframe is appropriate. Another possibility could be to provide reparations for specific episodes in the past, though again, any such program would have to be carefully designed to avoid engendering resentment among groups that may feel left out. In providing individual reparations, the CRA and CTRH could issue bi-annual public lists of individuals found eligible to receive compensation and reparations in order to build trust in the fairness of the process.

Selection and Appointment Procedures

As with the other institutions, conference participants highlighted the importance of a transparent procedure and public vetting for the appointment of the executive positions in the CRA. Victims groups should also be represented on the executive body to help ensure that it is responsive to the needs of those most directly affected by the conflict.

Gender Sensitivity

Gender sensitivity should be factored into all aspects of the design and implementation of the reparations program. Conference participants felt that gender parity (i.e. at least 50 percent representation) should be observed in the staffing at all levels of the CRA. The reparations program should also take into account the different ways in which conflict affects men and women when making provision for reparations. Moreover, given the scale of sexual and gender-based violence in the current conflict and the lack of attention that this issue has received from public authorities over the years, special attention should be devoted to reparations for survivors of SGBV.



Role of Customary Mechanisms

The ARCISS envisages a role for traditional authorities in providing input on the development of remedial processes and mechanisms, including the provision of reparations and compensation. According to Ch. V, Art. 2.1.5, in determining such remedial processes and mechanisms, “the CTRH shall draw on existing traditional practices, processes, and mechanisms, where appropriate.” Conference participants supported the inclusion of traditional authorities in the reparations effort. As intermediaries between communities and the government, traditional authorities have a wealth of information about the circumstances of people in their communities, which could be used to supplement information compiled about the victim population through the truth-seeking effort and criminal investigations. The reparations program should also coordinate its activities with compensation provided through customary mechanisms, such as: the customary practice of paying ‘bloodwealth’ in the form of cattle from the perpetrator to the family of the deceased in cases of homicide; or in cases of theft, the return of the objects taken or their equivalent in terms of money, in kind or cattle.

Funding

Securing adequate funding is among the more difficult challenges of reparations initiatives. With only a few exceptions, reparations programs in other contexts are almost always funded by the state in which the conflict occurred. Given the huge amount of resources that went into funding the war effort, the funds that will be needed to pay for a large power sharing government, and the many demands that will be made of the government during the transitional period, it is difficult to envision the TGoNU committing a large amount of resources to the reparations program in the short-term. These constraints notwithstanding, the TGoNU must develop a plan for how it will provide reparations to survivors of conflict-related abuses in a timely manner. Conference participants recommended that seven percent of the national budget be set aside for reparations and that additional funds be sought from external donors to supplement this contribution from government. If the funds lost to corruption over the years could be repatriated to South Sudan, another option could be to use a portion of those funds to cover reparations payments to victims of the conflict. Donors could also be requested to support in specific development-oriented reparations.

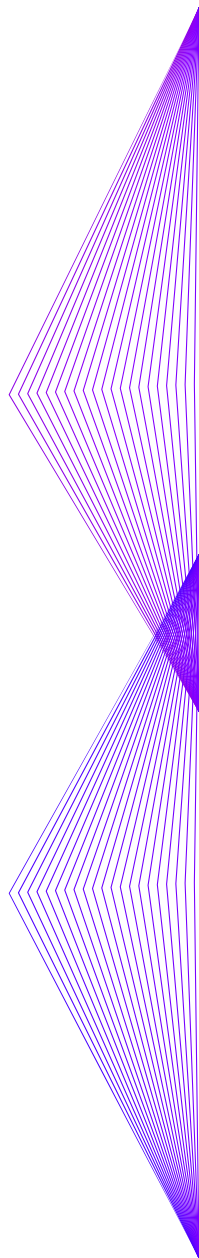
Conclusion

Chapter V of the ARCISS presents a unique opportunity for South Sudan. The resurgence of conflict in December 2013 has clearly demonstrated the importance of addressing legacies of past human rights violations and widespread impunity to achieve sustainable peace. By taking advantage of the momentum of the transitional period, South Sudan can break with past peace processes that have failed to address contentious issues relating to justice and reconciliation only to have them resurface in dangerous and unpredictable ways. The success of any transitional justice program will hinge on the ability of the TGoNU and its international partners to create an enabling environment for the public discussion of contentious topics such as people's experiences with human rights abuse. Coordination between national and international actors will be critical to ensure that transitional justice efforts are streamlined and mutually reinforcing so as to avoid a myriad of stand-alone projects being implemented without an overarching strategy.

The challenges inherent in this undertaking in the South Sudanese context should not be underestimated. The three institutions proposed in the ARCISS — the HCSS, CTRH and CRA — each require a considerable amount of institutional capacity, a government that is willing and able to guarantee the safety and security of citizen-led dialogue on politically loaded conversations about issues of truth and accountability, and a citizenry that trusts its public institutions enough to engage in such a process. Adding to the complexity of the undertaking, the timelines stipulated in the ARCISS in some cases are exceedingly short in light of the lingering insecurity and the logistical difficulty of operation in South Sudan.

Perhaps a more immediate threat to genuine truth, justice and reconciliation concerns a potential lack of political will to address these contentious issues in a period of flux when political and military leaders will be looking to consolidate support among their allies, many of whom are implicated in human rights abuses. The lack of a clear transitional moment may also present challenges. The TGoNU will be comprised of many of the same individuals who have been leading the country for the past 10 years and it is likely that people responsible for abuses will be serving in senior positions in the government and military. Other contexts have shown that processes of transitional justice are most successful in countries where the political establishment views it as an opportunity to break with the past and usher the country into a new political dispensation. Such transformational change is more difficult in circumstances where there is continuity in the political and military leadership.

These concerns about feasibility and political will notwithstanding, opportunities such as those presented by the ARCISS are rare and unfortunately cannot be scheduled to arise at our convenience. Experience has shown in other contexts that it can take a long time, sometimes generations, for a country to come to terms with an extended period of conflict or authoritarian rule, and the process must start somewhere. As these issues are being addressed for the first time in South Sudan, resources should be devoted to cultivating demand for truth, justice and reconciliation among populations in South Sudan, ensuring



that survivors' voices are amplified in the process, and designing institutions that are tailored to the needs and aspirations of the South Sudanese people.

In tandem with the broader civil engagement and public consultation effort, proponents of transitional justice should initiate a number of complementary efforts to ensure that maximum use is made of the transitional period to push the agenda forward. There is need for technical work to assess existing human and financial resources and determine where gaps would arise for the various proposed institutions, take stock of different models that have been used in other contexts and consider what is most appropriate for South Sudan, and develop the laws and policies that will be necessary to implement the program.

Certain steps can also be taken to prepare the ground for three national-level institutions. For example, the AU and its international partners could establish a hybrid investigative unit with an official mandate to begin compiling evidence of international crimes while building national capacity to participate effectively in the HCSS. The provision of psychosocial support and trauma healing (including identifying and providing support for existing coping mechanisms at the family level, or among religious or customary institutions) for survivors of human rights violations can help to build confidence among victims and ensure greater and more effective participation in the truth-seeking effort.

Civil society will have a key role to play in this process moving forward. There is an urgent need for advocacy to inform the decisions that are being made about these issues at all levels in South Sudan, regionally and internationally. Building interest in and demand for truth, justice and reconciliation at these various levels can help to ensure a South Sudanese-owned and driven process that leaves a lasting legacy on the national context. Civil society can play a significant role in enhancing civic engagement in transitional justice processes and ensuring a victim-centred approach. Civil society actors can also contribute by moving ahead with monitoring, documentation and research on the human rights impacts of conflict. These documentation efforts could help to advance our collective understanding of the context while also giving civil society additional valuable information that could be leveraged in civil society's advocacy efforts.

South Sudan is among the most complex and difficult environments in which to proceed with a transitional justice effort. Proponents of the program must be flexible and able to take advantage of opportunities as they arise, while remaining cognizant of the longer-term objectives. South Sudanese society operates at its own pace, and judging by the slow progress thus far in implementing the ARCISS, the implementation of Chapter V is likely to be an uphill battle. However, with commitment and sober decision-making, proponents of the transitional justice program have a unique opportunity to make a lasting contribution to long-term peace and prosperity in South Sudan.



ANNEXES

Annex I – Draft Roadmap for Transitional Justice in South Sudan

Objectives	Problem Statement	Milestones	Responsibility	Timing
Representatives of the TGoNU take ownership over the justice and reconciliation program.	There is widespread lack of knowledge about what justice and reconciliation entails in the South Sudanese context and a lack of commitment among key political actors for the process.	Conduct advocacy with representatives of government to ensure their support. Advocacy targets should be identified during the strategy sessions.	<ul style="list-style-type: none"> ▶ Civil society 	Starting in the first three months and ongoing thereafter.
Citizens in South Sudan understand and provide input on plans for promoting truth, justice, reconciliation and healing in South Sudan.	Citizens do not understand the provisions of the ARCISS and have not been consulted to obtain their views on the justice and reconciliation program.	Widespread civic engagement activities, including public consultations in all states.	<ul style="list-style-type: none"> ▶ RSS Ministry of Justice ▶ SSHRC ▶ Civil society ▶ Faith-based institutions ▶ Customary law institutions 	Starting in the first three months and continuing throughout the transitional period.
The TGoNU puts in place a strong legal and regulatory framework to structure the justice and reconciliation program moving forward.	The ARCISS envisages legislation for the CTRH, HCSS and CRA to be enacted in a very short timeframe and the general policy framework for justice and reconciliation is weak or non-existent.	Conduct research to identify different institutional models that are available and develop draft legislation text that could inform efforts to develop the necessary legislation.	<ul style="list-style-type: none"> ▶ NCAC and RSS Ministry of Justice, with support from civil society, especially legal professionals and academics 	Completed within the first three months of the transitional period.
		Advocacy among key stakeholders (especially RSS Ministry of Justice, NLA, AU and UN) to promote specific institutional designs and legislative language.	<ul style="list-style-type: none"> ▶ Civil society 	Starting three months into the transitional period, after the technical experts have developed the various options, and continuing until legislation is adopted.

Table continued next page...

Annex I – Draft Roadmap for Transitional Justice in South Sudan

Objectives	Problem Statement	Milestones	Responsibility	Timing
Efforts to promote truth, justice, reconciliation and healing leave a lasting legacy in justice and security sector institutions in South Sudan.	South Sudan has little experience with justice and reconciliation programming and there is a danger that transitional initiatives could be one-off activities with little lasting impact.	Support efforts to enact international crimes legislation and develop international crimes chamber in the high court.	<ul style="list-style-type: none"> ▶ Civil society 	Starting immediately and ongoing for the entire transitional period and thereafter.
		Begin building support for specific policy prescriptions for transitional justice and national reconciliation.	<ul style="list-style-type: none"> ▶ Civil society 	Starting immediately and ongoing for the entire transitional period and thereafter.
Space is provided for existing institutions and initiatives in the justice and reconciliation program.	There are numerous gaps for justice and reconciliation in existing statutory and customary systems and to the extent that work is being done, it is done in an uncoordinated manner.	Justice actors in the judiciary, police and prisons, and reconciliation actors in institutions such as the SSCC, the CNHPR and the NPPR conduct regular meetings to better coordinate their activities.	<ul style="list-style-type: none"> ▶ RSS Ministry of Justice ▶ Judiciary ▶ Police ▶ Prisons ▶ Military justice ▶ SSHRC ▶ CNHPR ▶ NPPR ▶ Peace Commission 	Starting within the first year of the transitional period and continuing thereafter.
		Engagement with customary justice and reconciliation mechanisms and traditional authorities.	<ul style="list-style-type: none"> ▶ Civil society ▶ Traditional authorities 	Within the first six months of the transitional period.
		Mapping of existing memorialization efforts and development and identification of potential areas for new memorials.	<ul style="list-style-type: none"> ▶ Civil society ▶ Traditional authorities ▶ Ministry of Culture, Youth and Sports 	



Annex I – Draft Roadmap for Transitional Justice in South Sudan

Objectives	Problem Statement	Milestones	Responsibility	Timing
Civil society makes effective contribution to efforts to promote justice and reconciliation.	Civil society organizations are deeply politicized by the conflict and lack expertise in issues of justice and reconciliation.	Strategic planning session for members of the Transitional Justice Working Group	▶ Civil society	Within the first three months of the transitional period.
		Exposure visits for civil society representatives	▶ Civil society	Within the first year of the transitional period.
		Technical support/advice for the TJWG	▶ Civil society	Consultant hired within the first three months of the transitional period and support provided for one year.
Commission for Truth, Reconciliation and Healing (CTRH) is established and begins its work.	South Sudan lacks a national-level body to spearhead truth-seeking efforts. Without strong backing from national, regional and international actors, the CTRH could fall victim to the politicization and institutional failure that has characterized other efforts to promote national reconciliation and healing.	Extensive consultations are conducted to inform the development of the CTRH legislation.	▶ Ministry of Justice ▶ SSHRC ▶ Civil society	Within the first six months of the transitional period.
		CTRH legislation is enacted.	▶ Transitional Legislative Assembly	Within the first six months of the transitional period.
		CTRH commissioners are nominated, selected and appointed through a fully transparent and participatory process.	▶ Transitional Executive ▶ AU ▶ UN	Within the first year of the transitional period.
		CTRH hires staff and establishes institution.	▶ CTRH	Within the first year of the transitional period.
		CTRH begins its investigations.	▶ CTRH	In the second year of the transitional period.
		CTRH begins reconciliation and healing activities.	▶ CTRH	In the second year of the transitional period.



Annex I – Draft Roadmap for Transitional Justice in South Sudan

Objectives	Problem Statement	Milestones	Responsibility	Timing
Hybrid Court of South Sudan (HCSS) is established and begins its work.	Despite extensive periods of war and large-scale human rights abuses, South Sudan has not successfully brought cases against any senior political and military figures for international crimes.	AU adopts a framework for the HCSS in consultation with national stakeholders, the UN and bilateral partners.	<ul style="list-style-type: none"> ➤ AU ➤ TGoNU Executive ➤ Ministry of Justice ➤ Judiciary ➤ Police ➤ Prisons ➤ Civil society ➤ UN ➤ Bilateral partners 	With the first six months of the transitional period.
		Interim president of the HCSS is appointed.	<ul style="list-style-type: none"> ➤ AU ➤ UN 	Within the first six months of the transitional period.
		Investigation unit established with formal mandate as precursor to the HCSS.	<ul style="list-style-type: none"> ➤ AU ➤ UN ➤ TGoNU Executive 	Within the first six months of the transitional period.
		AU framework is enacted into national law in South Sudan.	<ul style="list-style-type: none"> ➤ AU ➤ waTransitional Legislative Assembly 	Within the first year of the transitional period.
		Judges and prosecutor of the HCSS are nominated, selected and appointed.	<ul style="list-style-type: none"> ➤ AU ➤ UN 	In the second year of the transitional period.
		HCSS is staffed by a highly qualified group of African and South Sudanese professionals.	<ul style="list-style-type: none"> ➤ HCSS 	In the second year of the transitional period.
		HCSS begins its first case.	<ul style="list-style-type: none"> ➤ HCSS 	Before the end of the transitional period.



Annex I – Draft Roadmap for Transitional Justice in South Sudan

Objectives	Problem Statement	Milestones	Responsibility	Timing
Compensation and Reparations Authority (CRA) is established and begins its work.	South Sudanese society has been sorely impacted from current and past conflicts and without assistance from the state, it will be very difficult for people to resume their lives and assume their full rights as South Sudanese citizens.	Legislation establishing CRA is enacted.	▶ Transitional Legislative Assembly	Within the first six months of the transitional period.
		CRA executive body is nominated, selected and appointed through transparent and participatory process.	▶ TGoNU Executive	Within the first year of the transitional period.
		CRA begins its work by focusing on various forms of collective reparations.	▶ CRA	In the second year of the transitional period.
		CRA begins issuing individual reparations and compensation.	▶ CRA	After the publication of the CTRH report.
CTRH, HCSS and CRA conduct their work in a credible, meaningful and efficient manner.	Prevailing insecurity, political tension and the logistical difficulty of operating in South Sudan will present serious obstacles to the transitional justice program.	CTRH receives testimonies and holds hearings across the country while pursuing its reconciliation and healing activities.	▶ CTRH ▶ HCSS ▶ CRA	Throughout the remainder of the transitional period and into the post-transitional period.
		HCSS continues to hear cases involving international crimes.	▶ HCSS	Throughout the remainder of the transitional period and into the post-transitional period.
		CRA begins its work by focusing on collective forms of reparations.	▶ CRA	Throughout the remainder of the transitional period and into the post-transitional period.



Annex I – Draft Roadmap for Transitional Justice in South Sudan

Objectives	Problem Statement	Milestones	Responsibility	Timing
CTRH, HCSS and CRA conclude their activities.	Successful completion of the work of the Ch. V institutions is just the start. Establishing a culture of respect for human rights and rule of law in South Sudan will be an intergenerational responsibility.	CTRH report is published.	▶ CTRH	Under the elected government formed upon conclusion of the transitional period.
		CTRH reconciliation and healing activities continue.	▶ CTRH	Under the elected government formed upon conclusion of the transitional period.
		HCSS completes its cases and transitions into a permanent court to maximize its legacy in South Sudan.	▶ HCSS ▶ JoSS	Under the elected government formed upon conclusion of the transitional period.
		CRA begins individual reparations program.	▶ CRA	Under the elected government formed upon conclusion of the transitional period.



Annex II – Chapter V of the ARCISS

CHAPTER V. TRANSITIONAL JUSTICE, ACCOUNTABILITY, RECONCILIATION AND HEALING

1. Agreed Principles for Transitional Justice

1.1 Upon inception, the TGoNU shall initiate legislation for the establishment of the following transitional justice institutions:

1.1.1 The Commission for Truth, Reconciliation and Healing (CTRH);

1.1.2 An independent hybrid judicial body, to be known as the Hybrid Court for South Sudan (HCSS).

1.1.3 Compensation and Reparation Authority (CRA)

1.2 The legislation referred to in Article 1.1. shall clearly define the mandate and jurisdiction of the three institutions including but not limited to their establishment and funding, actors, and defined processes for public participation in the selection of their respective members.

1.3 Following their establishment, the CTRH, HCSS and CRA shall independently promote the common objective of facilitating truth, reconciliation and healing, compensation and reparation in South Sudan.

1.4 The TGoNU shall fully support and facilitate the operations of the CTRH and cooperate with the HCSS.

1.5 The TGoNU commits to fully cooperate and seek the assistance of the African Union, the United Nations and the African Commission on Human and People's Rights to design, to implement and to facilitate the work of the agreed transitional justice mechanisms provided for in this Agreement.

2. Commission for Truth, Reconciliation and Healing (CTRH)

2.1 Establishment of the Commission for Truth, Reconciliation and Healing (CTRH)

2.1.1 The TGoNU shall establish the CTRH as a critical part of the peace building process in South Sudan, to spearhead efforts to address the legacy of conflicts, promote peace, national reconciliation and healing.

2.1.2 The CTRH shall be established by legislation, which shall be promulgated not later than six (6) months after the formation of the TGoNU and commence its activities not later than a month thereafter. Such legislation shall, among others, outline



mechanisms and methods for enabling the CTRH to discharge its duties and responsibilities.

2.1.3 The Ministry of Justice and Constitutional Affairs of the TGoNU, in collaboration with other stakeholders and the civil society, shall conduct public consultations for a period not less than one (1) month prior to the establishment of the CTRH, to inform the design of the legislation referred to in Chapter IV, Article (1.1). This notwithstanding, such consultations shall ensure that the experiences of women, men, girls and boys are sufficiently documented and the findings of such consultations incorporated in the resultant legislation.

2.1.4 The existing Committee for National Healing, Peace and Reconciliation (CNHPR) and the National Platform for Peace and Reconciliation shall transfer all of their files, records and documentation to the CTRH within fifteen (15) days since CTRH has become operational.

2.1.5 The CTRH shall recommend processes and mechanisms for the full enjoyment by victims of the right to remedy, including by suggesting measures for reparations and compensation. In the determination of such remedial processes and mechanisms, the CTRH shall draw on existing traditional practices, processes, and mechanisms, where appropriate.

2.2 Mandate and Functions of the CTRH:

2.2.1 Without prejudice to the administration of and access to justice, the CTRH shall inquire into all aspects of human rights violations and abuses, breaches of the rule of law and excessive abuses of power, committed against all persons in South Sudan by State, non- State actors, and or their agents and allies. In particular, the CTRH shall inquire into the circumstances, surrounding the aforementioned and any other connected or incidental matters. Such inquiry shall investigate, document and report on the course and cause conflict and identify or review cut-off timeframes for the operations of the CTRH, as may be determined by legislation, this Agreement or both. In that regard, the CTRH shall recommend processes for the full enjoyment by victims of the right to remedy, including by suggesting measures for reparations and compensation.

2.2.2 Without prejudice to its Mandate, the Functions of the CTRH are to:

2.2.2.1 adopt, in the implementation of its mandate, best practices for promoting truth, reconciliation and healing from Africa and elsewhere;

2.2.2.2 establish an accurate and impartial historical record of human rights violations, breaches of the rule of law and excessive abuses of power, committed by State and non-state actors from the date of signing of this Agreement to July 2005;



- 2.2.2.3 receive applications from alleged victims, identify and determine their right to remedy;
 - 2.2.2.4 identify perpetrators of violations and crimes proscribed in this agreement;
 - 2.2.2.5 recommend guidelines, to be endorsed by the TNA, for determining type and size of compensation and reparation for victims;
 - 2.2.2.6 record the experiences of victims, including but not limited to women and girls;
 - 2.2.2.7 investigate the causes of conflicts and their circumstances and make recommendations regarding possible ways of preventing recurrence;
 - 2.2.2.8 develop detailed recommendations for legal and institutional reforms to ensure non-repetition of human rights abuses and violations, breaches of the rule of law and excessive use of power;
 - 2.2.2.9 lead efforts to facilitate local and national reconciliation and healing.
 - 2.2.2.10 where appropriate, supervise proceeding of traditional dispute resolution, reconciliation, and healing mechanisms. In this regard, and without to traditional justice mechanisms, develop standard operating procedures for the functioning of the latter, in accordance with the principles of natural justice.
 - 2.2.2.11 establish a secretariat that shall function as the administrative arm of the Commission and prepare guidelines and procedures for its proper functioning.
- 2.2.3 The CTRH shall issue quarterly progress reports updating the TGoNU on its progress in meeting its objectives. The CTRH shall make sustained efforts to publicly and regularly inform and involve the people of South Sudan in all of its tasks and activities and be responsible for carrying out public education, awareness-raising and civic engagement activities to inform the public, in particular with youth and women, about the Commission's work, and solicit continuous feedback.
- 2.2.4 The CTRH shall issue a final, public report at the conclusion of its mandate three months before the end of the Transition that shall include the observations and findings of its documentation activities and its recommendations for peace, reconciliation and healing in South Sudan.



2.3 Personnel and Appointment Procedures:

- 2.3.1 Commissioners, investigators and staff of the CTRH shall be persons of high moral character, impartiality and integrity. They shall be independent in the performance of their functions and shall not accept or seek instructions from any third party.
- 2.3.2 The CTRH shall be composed of seven (7) Commissioners, four (4) of whom shall be South Sudanese nationals, including two (2) women. The remaining three (3) Commissioners shall be from other African countries, of whom at least one (1) shall be a woman. The CTRH shall be chaired by a South Sudanese national, deputised by a non- South Sudanese national;
- 2.3.3 The Executive of the TGoNU shall nominate the four Commissioners of South Sudanese nationality and present to the Transitional National Assembly solely on the basis of the selection of the TGoNU, AUC and UN for endorsement. Furthermore, the Executive of the TGoNU, in consultation with the Chairperson of the African Union Commission and the Secretary-General of the United Nations, shall nominate the three (3) from other African countries and present to the TNA for endorsement.
- 2.3.4 In order for the CTRH to execute its mandate, the Commission shall have the power to subpoena persons, documents and other materials deemed necessary for the purpose of discharging its responsibilities.

2.4 Rights of Victims and Witnesses

- 2.4.1 The CTRH shall implement measures to protect victims and witnesses, in particular, youth, women and children. Such protection measures shall include, but shall not be limited to the conduct of in camera proceedings and the protection of the identity of a victim or witness.

3. Hybrid Court for South Sudan (HCSS)

3.1 Establishment of the Hybrid Court for South Sudan (HCSS)

- 3.1.1 There shall be established an independent hybrid judicial court, the Hybrid Court for South Sudan (HCSS). The Court shall be established by the African Union Commission to 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.
- 3.1.2 The terms establishing the HCSS shall conform to the terms of this Agreement and the AUC shall provide broad guidelines relating to including the location of the HCSS, its infrastructure, funding mechanisms, enforcement mechanism, the



applicable jurisprudence, number and composition of judges, privileges and immunities of Court personnel or any other related matters.

3.1.3 The Chairperson of the Commission of the AU shall decide the seat of the HCSS.

3.2. Jurisdiction Mandate and Supremacy

3.2.1 The HCSS shall have jurisdiction with respect to the following crimes:

3.2.1.1 Genocide;

3.2.1.2 Crimes Against Humanity;

3.2.1.3 War Crimes

3.2.1.4 Other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence.

3.2.2 The HCSS shall be independent and distinct from the national judiciary in its operations, and shall carry out its own investigations: The HCSS shall have primacy over any national courts of RSS.

3.3 Personnel and Appointment Procedures

3.3.1 Judges, prosecutors, investigators and defense counsel and the registrar of the HCSS shall be persons of high moral character, impartiality and integrity, and should demonstrate expertise in criminal law and international law, including international humanitarian and human rights law.

3.3.2 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. The judges of the HCSS shall elect a president of the court from amongst their members.

3.3.3 Prosecutors and defense counsel 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 defense counsel in addition to, or in place of, the duty personnel of the HCSS.

3.3.4 The registrar of the HCSS shall be appointed from African states other than the Republic of South Sudan.

3.3.5 Judges, prosecutors, defense counsel and the registrar shall be selected and appointed by the Chairperson of the African Union Commission and the Secretary-



General of the United Nations. The same selection and appointment processes shall apply to South Sudanese judges and judges from other African states.

3.3.6 The prosecutors and defense counsel shall 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.

3.4 Rights of Victims and Witnesses

3.4.1 The HCSS shall implement measures to protect victims and witnesses in line with applicable international laws, standards and practices.

3.4.2 The rights of the accused shall be respected in accordance to applicable laws, standards and practices.

3.5 Criminal Responsibility, Convictions and Penalties

3.5.1 A person who planned, instigated, ordered, committed, aided and abetted, conspired or participated in a joint criminal enterprise in the planning, preparation or execution of a crime referred to in Chapter V, Article 3.2.1. of this Agreement shall be individually responsible for the crime.

3.5.2 The HCSS may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the state of South Sudan.

3.5.3 While all judgments of the court shall be consistent with the accepted International Human Rights Law, International Humanitarian Law and International Criminal Law, the HCSS shall also award appropriate remedies to victims, including but not limited to reparations and compensation.

3.5.4 The HCSS shall not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties.

3.5.5 No one shall be exempt from criminal responsibility on account of their official capacity as a government official, an elected official or by claiming superior orders.

3.5.6 The HCSS shall leave a permanent legacy in the State of South Sudan Upon completion of its HCSS Mandate.

3.6. Use of Findings, Documentation and Evidence

3.6.1 In carrying out its investigations, the HCSS may use the report of the African Union Commission of Inquiry (COI) on South Sudan and draw on other existing documents, reports, and materials, including but not limited to those in the



possession of the African Union, or any other entities and sources, for use as the Prosecutor deems necessary for his or her investigations and/or prosecution of those alleged to have committed serious human rights violations or abuses, war crimes, or crimes against humanity. Such documents, reports and materials shall be used in accordance with applicable international conventions, standards and practices.

4. Compensation and Reparation Authority (CRA)

4.1 The TGoNU, in recognition of the destructive impact of the Conflict to the citizens of South Sudan, shall establish within six (6) months of the signing of this Agreement a Compensation and Reparation Fund, CRF and Compensation and Reparation Authority, CRA to administer the CRF.

4.2 The CRA:

- a) Shall be run by an executive body to be chaired by an executive Director appointed by TGoNU.
- b) Shall be composed of an Executive body that shall include but not limited to:
 - i. The parties in TGoNU
 - ii. Representatives of CSOs, Women's bloc, Faith-based leaders, Business Community and Traditional leaders;
- c) The criteria for the selection of the members of the Executive body and the Executive Director of the CRA shall be established by law.
- d) The CRA shall provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods in accordance with a well-established criteria by the TGoNU.
- e) The CRA shall manage the Compensation and Reparation Fund, the utilization of which should be guided by a law enacted by the Parliament.
- f) The CRA shall receive applications of victims including natural and legal persons from CTRH, and make the necessary compensation and reparation as provided in Chapter V Article 2.2.2.5.;

4.3 The TGoNU shall establish transparent mechanisms to control the proper use of these funds for the intended purpose.

4. [sic] Ineligibility for Participation in the TGoNU or Successor Governments

Individuals indicted or convicted by the HCSS shall not be eligible for participation in the TGoNU, or in its successor government(s) for a period of time determined by law, or, if already participating in the TGoNU, or in its successor government(s), they shall lose their position in government. If proven innocent, individuals indicted shall be entitled for compensation as shall be determined by law.



Annex III – Agenda for Juba Conference

10 November 2015 >> Day 1

Time	Activity	Presenters
8:30am to 8:45am	Registration	—
8:45am to 9:00am	Opening prayer	
9:00am to 10:00am	Welcoming remarks	Issa Muzamil, Secretary-General, SSLS Rowland Cole, Chief Technical Advisor MoJ and JoSS, UNDP Hon. Jeremiah Swaka, Undersecretary, RSS Ministry of Justice Dr. Alfred Lokuji, Deputy Vice Chancellor, Juba University
	Purpose of the conference, Ground rules, Present and endorse the agenda, Brief question and answer session	Priscilla Hayner, Author of Unspeakable Truths and Advisor on Transitional Justice
10:00am to 11:00am	<u>Panel 1</u> – Transitional justice and national reconciliation in the South Sudanese context <u>Moderator</u> : Dr. Alfred Lokuji <u>Description</u> – Presentations to set the context, including an overview of how transitional justice and national reconciliation have been addressed in the ARCISS, relevant initiatives at the national or international level, and South Sudanese perceptions of truth, justice, reconciliation and healing.	Archbishop Daniel Deng Bul, Chairperson, CNHPR Beny Gideon, Representative of Civil Society Delegation to the IGAD Mediation and Member of SSLS Amanya Joseph, Executive Director, HURIDO David Deng, Research Director, SSLS
11:00am to 11:30am	TEA BREAK	
11:30am to 12:15pm	Panel 1 (cont'd)	—
12:15pm to 12:30pm	<u>Presentation</u> – ARCISS: Reflections on Synergies	Frederick Mugisha, Economics Advisor, UNDP



Annex III – Agenda for Juba Conference

10 November 2015 >> Day 1

Time	Activity	Presenters
12:30pm to 1:30pm	LUNCH	
1:30am to 3:00pm	<p><u>Panel 2</u> – Truth and Reconciliation Commissions</p> <p><u>Moderator:</u> Dr. Alfred Lokuji</p> <p><u>Description</u> – Presentations on how truth commissions in other countries have been designed and lessons South Sudan could extract from these experiences.</p>	<p>Priscilla Hayner, Author of Unspeakable Truths and Advisor on Transitional Justice</p> <p>Fr. James Oyet, South Sudan Council of Churches (SSCC)</p> <p>Njonjo Mue, Senior Advisor, Kenyans for Peace, Truth and Justice (KPTJ)</p> <p>Ferdinand von Hapsburg, Adviser on peace and reconciliation in South Sudan</p>
3:00pm to 3:30pm	TEA BREAK	
3:30pm to 5:00pm	<p><u>Panel 3</u> – Hybrid courts</p> <p><u>Moderator:</u> Priscilla Hayner</p> <p><u>Description</u> – Presentations on how hybrid courts in other countries have been designed and lessons South Sudan could extract from these experiences.</p>	<p>Logan Hambrick, International Criminal Lawyer</p> <p>Dr. Geri Raimondo Legge, South Sudanese judge</p> <p>Ken Scott, Special Prosecutor at Special Tribunal for Lebanon</p>
5:00pm to 5:15pm	Review of the day, Tomorrow's agenda	Priscilla Hayner, Author of Unspeakable Truths and Advisor on Transitional Justice



Annex III – Agenda for Juba Conference

11 November 2015 >> Day 2

Time	Activity	Facilitator
8:30am to 9:00am	Summarize Day 1, Questions from Day 1, Overview of the agenda for Day 2	David Deng, Research Director, SSLS
9:00am to 10:30am	<p>Panel 4 – Reparations</p> <p>Moderator: Dr. Alfred Lokuji</p> <p>Description – Presentations on how reparations programs in other countries have been designed and lessons South Sudan could extract from these experiences.</p>	<p>Sultan Wilson Peni, Paramount Chief of Yambio County</p> <p>Taban Kiston, SSLS</p> <p>Dr. Christina Jones-Pauly, DPhil, DJur, Consultant Comparative Law</p>
10:30am to 11:00am	TEA BREAK	
11:00am to 12:30pm	<p>Panel 5 – Towards a holistic approach</p> <p>Description – Presentations on how the justice and reconciliation mechanisms in the ARCISS can be coordinated with other processes, such as customary justice and reconciliation mechanisms, memorialization initiatives, and prosecutions in national courts.</p>	<p>Dr. Kasaija Phillip Apuuli, Professor of Political Science at Makerere University</p> <p>Dr. Christina Jones-Pauly, DPhil, DJur, Consultant Comparative Law</p> <p>Daud Gideon, Co-Founder of Remembering the Ones We Lost Website</p> <p>Njonjo Mue, Senior Advisor, Kenyans for Peace, Truth and Justice (KPTJ)</p>
12:30pm to 1:30pm	LUNCH	
1:30pm to 4:30pm	<p>Group work (by thematic area)</p> <ul style="list-style-type: none"> ➤ Group 1: Designing the CTHR ➤ Group 2: Designing the HCSS ➤ Group 3: Designing the CRA ➤ Group 4: Towards a holistic approach 	Facilitators
4:30pm to 5:00pm	Review of the day, Tomorrow's agenda	Dr. Alfred Lokuji, Deputy Vice Chancellor, Juba University



Annex III – Agenda for Juba Conference

12 November 2015 >> Day 3

Time	Activity	Facilitator
8:30am to 9:00am	Summarize Day 2, Questions from Day 2, Overview of the agenda for Day 3	David Deng, Research Director, SSLS
9:00am to 10:30am	Report back from group work	Rapporteurs
10:30am to 11:00am	TEA BREAK	
11:00am to 12:30pm	Group work (by sector) <ul style="list-style-type: none"> ▶ Group 1: Government ▶ Group 2: State/local gov't and traditional authorities ▶ Group 3: Faith-based institutions ▶ Group 4: Civil society, NGOs, academia 	Dr. Kasaija Phillip Apuuli, Professor of Political Science at Makerere University Dr. Christina Jones-Pauly, DPhil, DJur, Consultant Comparative Law Daud Gideon, Co-Founder of Remembering the Ones We Lost Website Njonjo Mue, Senior Advisor, Kenyans for Peace, Truth and Justice (KPTJ)
12:30pm to 1:30pm	LUNCH	
1:30pm to 4:30pm	Group work (by thematic area) <ul style="list-style-type: none"> ▶ Group 1: Designing the CTHR ▶ Group 2: Designing the HCSS ▶ Group 3: Designing the CRA ▶ Group 4: Towards a holistic approach 	Facilitators
4:30pm to 5:00pm	Concluding remarks	Issa Muzamil, Secretary-General, SSLS Balász Horváth, Country Director, UNDP Martijn Beerthuisen, First Secretary Political Affairs, Security and Rule of Law, Embassy of the Kingdom of The Netherlands in South Sudan



Annex IV – Agenda for Nairobi Workshop

4 February 2016

Time	Activity	Facilitator
8:30am to 9:00am	Registration	
9:00am to 9:05am	Opening prayer	
9:05am to 9:15am	Introductions	
9:15am to 9:30am	Welcoming remarks	John Clement Kuc, Chairperson of SSLS, Founder of African Centre for Transitional Justice (ACT-J)
9:30am to 10:30am	Overview of Ch. V and summary of main findings from SSLS research on transitional justice in South Sudan	David Deng, Research Director, SSLS
10:30am to 11:00am	TEA	
11:00am to 1:00pm	Panel Discussion: Transitional justice mechanisms in other contexts and the lessons for South Sudan Moderator: David Deng, Research Director, SSLS	Betty Kaari Murungi, Formerly Deputy Chairperson of Truth, Justice and Reconciliation Commission (TJRC) in Kenya Shamila Unnikrishnan, Legal Officer, United Nations Dispute Tribunal, Formerly Legal Officer with ICTR and ECCC
1:00pm to 2:00pm	LUNCH	
2:00pm to 3:00pm	Plenary discussion: The way forward, Observations on the report of the Juba Conference	David Deng, Research Director, SSLS
3:00pm to 3:30pm	Closing remarks	John Clement Kuc, Chairperson of SSLS, Founder of ACT-J
3:30pm to 4:00pm	TEA	



Endnotes

- 1 United Nations Panel of Experts on South Sudan, *Final report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2206* (2015) (Jan. 2016), available at <http://www.gurtong.net/LinkClick.aspx?fileticket=FtVdyndwYPs%3D&tabid=124>.
- 2 Truth and Reconciliation Commission (TRC) of Canada website, available at <http://www.trc.ca/websites/trcinstitution/index.php?p=905>.
- 3 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCISS), Article 1.1 (August 2015).
- 4 Sudan Tribune, *Kiir apologizes for the December 2013 war* (7 Jan. 2016) available at <http://www.sudantribune.com/spip.php?article57630>; Sudan Tribune, *Machar has apologized to Dinka Bor community – army official* (10 Aug. 2011), available at <http://www.sudantribune.com/spip.php?article39795>.
- 5 United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), *South Sudan Humanitarian Bulletin* (1 Dec. 2015), available at South Sudan, http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_SouthSudan_humanitarian_bulletin_1Dec2015.pdf.
- 6 United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) website, <http://www.unocha.org/south-sudan/>.
- 7 ARCISS, Ch. V, Art. 2.1.1.
- 8 *Id.*, Art. 2.3.3.
- 9 For discussion of hybrid courts in South Sudan, see Human Rights Watch, *Ending the Era of Injustice in South Sudan* (10 Dec. 2014), available at <https://www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans>; David K. Deng, *Special Court for Serious Crimes (SCSC), A proposal for justice and accountability in South Sudan*, SSSL (May 2014), available at <http://www.cmi.no/file/2760-SSSL-SCSC-Proposal-for-a-Hybrid-Court.pdf>.
- 10 ARCISS, Ch. V, Art. 3.3.2.
- 11 *Id.*, Art. 4.2(d).
- 12 *Id.*, Art. 4.2(f).
- 13 African Union Commission of Inquiry on South Sudan (AUCISS), *Final Report* (15 Oct. 2014), available at <http://www.peaceau.org/uploads/auciss.final.report.pdf>.
- 14 African Union Peace and Security Council (AUPSC), *Communiqué, 411th Meeting at the Level of Heads of State and Government, PSC/AHG/COMM.1 (CDXI) Rev.1* (30 Dec. 2013), available at <http://www.peaceau.org/uploads/psc-com-411-south-sudan-30-12-2013.pdf>.
- 15 African Union Commission of Inquiry on South Sudan (AUCISS), *Final Report* (15 Oct. 2014), available at <http://www.peaceau.org/uploads/auciss.final.report.pdf>.
- 16 David K. Deng et al., *Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan*, South Sudan Law Society (SSLS), United Nations Development Programme (UNDP) (Jun. 2015), available at <http://www.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20.pdf>; David Deng, Matthew Pritchard and Manasi Sharma, *A War Within: Perceptions of Truth, Justice, Reconciliation and Healing in Malakal POC*, South Sudan Law Society (SSLS) (Dec. 2015), available at https://radiotamazuj.org/sites/default/files/SSLS_A_War_Within_Dec_2015_.pdf.
- 17 ARCISS, Ch. V, Art. 2.1.4.
- 18 South Sudan enacted a Geneva Conventions Act in 2012 that domesticated war crimes into the national legal framework, although the legislation has not yet been used in practice.
- 19 For more on the international crimes bill, see *Joint Open Letter to National Legislative Assembly on the Penal Code (Amendment) Bill* (2016) (Feb. 2016), available at <https://www.amnesty.org/en/latest/news/2016/01/un-must-act-on-call-for-south-sudan-arms-embargo/>.



Endnotes

20 Contrary to Judge Geri's recommendation, the ARCISS (Ch. V, Art. 3.2.2) stipulates that the HCSS would have primacy over national courts, meaning that it could assert jurisdiction over national courts irrespective of whether they had already launched investigations or prosecutions.

21 ARCISS, Ch. V, Art. 4.

22 See *Search for a New Beginning*, *supra* note 16; *A War Within*, *supra* note 16.

23 ARCISS, Ch. V, Art. 2.1.3.

24 See *Search for a New Beginning*, *supra* note 16.

25 Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed.) (2011) (see chart summarizing funding for past truth commissions at the back of the book).

26 ARCISS, Ch. V, Art. 3.2.2.

27 The Court of Justice of the Economic Community of West African States held in 2010 (Judgment No. ECW/CCJ/JUD/06/10, 18 November 2010) that Senegal cannot use a retroactive penal law to try Hissène Habré for allegedly committing, from 1982 to 1990, torture and crimes against humanity in Chad. An ad hoc tribunal instead could try Habré on the basis of general principles of law common to the community of nations.

28 Nonetheless it can be argued that the customary law systems could handle cases of massive numbers in which individual victims do not have to be identified as found in the judgment of *The Prosecutor v Jean Mpambara*, Case No. ICTR-01-05-T, 2006, footnote 10, at p. 4, citing the Appeals Chamber.

29 Mark Kersten, *The Rwanda Tribunal Closes – But Controversy is Brewing Over Its Archives*, Justice Hub (17 Dec. 2015), available at <https://justicehub.org/article/rwanda-tribunal-closes-controversy-brewing-over-its-archives>.

30 ARCISS, Ch. V, Art. 3.3.5.

31 *Id.*, Art. 3.3.1.

32 Richard Vogler, *A World View of Criminal Justice*, Aldershot: Ashgate, 2005, p. 197.

33 Sudan Tribune, *supra* note 4.

34 Remembering the Ones We've Lost website, available at <http://rememberingoneswelost.com>.

35 ARCISS, Ch. V, Art. 4.2(f).



