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Access to Justice for All

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Special Court for Serious Crimes (SCSC): A Proposal for Justice and Accountability in South Sudan

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Introduction

Since 15 December 2013, South Sudan has been engulfed in a brutal civil war. Tens of thousands of people have been killed, more than a million internally displaced, and some 360,000 forced to flee to neighboring countries. The state capitals of Bor, Bentiu and Malakal have been subject to widespread destruction and looting. Entire neighborhoods in Juba are deserted, as their occupants have fled to seek refuge in United Nations (UN) compounds. In a mere six months, the benefits of nine years of relative peace and two-and-a-half years of independence have been squandered.

Peace talks mediated by the Intergovernmental Authority for Development (IGAD) have done little to contain the violence. A cessation of hostilities agreement signed on 23 January, a

recommitment to this signed on 5 May, and a 9 May “agreement to resolve the crisis” were all violated within days of being signed.¹ The monitoring and verification mechanism (MVM) provided for in the 23 January agreement did not begin work until mid-April, and since then, no public information has been released about its activities. Plans are in place to deploy an IGAD force to protect civilians and support the MVM, but there is no indication of when the force will actually be deployed.

Though the peace talks have not succeeded in stopping the violence, some modest gains have been made. In the 9 May agreement, for the first time, the parties committed themselves to an inclusive peace process and to discussions of transitional administrative arrangements. According to the agreement:

“[The parties] Agree to ensure the inclusion of all South Sudanese stakeholders in the peace process, and the negotiation of a transitional government of national unity, in order to ensure broad ownership of the agreed outcomes; stakeholders include: the two direct negotiators (the GRSS and the SPLM/A in Opposition), and others such as the SPLM leaders (former detainees), political parties, civil society, and faith-based leaders.”²

As the talks are broadened to include additional actors and as systems for monitoring the ceasefire become operational, it is hoped that the fighting will subside to allow room for the parties to discuss political solutions to the crisis. Any such solutions must necessarily address the fundamental governance problems that have plagued South Sudan since the establishment of the regional administration in 2005. Unless the Government of South Sudan and the Sudan People’s Liberation Movement (SPLM)-in-Opposition are able to put in place a credible plan to improve the delivery of public goods and services, stop widespread corruption, build a culture of respect for human rights, enable civic participation on matters of public interest, and eliminate the culture of impunity that pervades the military and political class, the country will continue to be susceptible to the type of violence that we have seen in recent months.

This paper is the first in a series of working papers developed by the South Sudan Law Society (SSLS) to stimulate thought on issues of truth, justice and reconciliation in South Sudan’s peace process. This paper proposes the establishment of a hybrid court, called the Special Court for Serious Crimes (SCSC), to prosecute individuals responsible for grave violations of international human rights and humanitarian law that have been committed in South Sudan since December 2013. As this working paper argues, the explicit provision for justice and accountability in the peace talks and any agreement that is derived thereof is necessary to deter acts of aggression by the negotiating parties, discourage cycles of revenge attacks, defuse the extreme tension that exists among communities, and support the development of a sustainable peace.

Why is it important to address justice and accountability in the peace process?

Successive peace processes in South Sudan, including the IGAD-led mediations that culminated in the signing of the Comprehensive Peace Agreement (CPA) in 2005 and negotiations with the numerous rebel movements that arose during the six-year interim period (2005-11), have repeatedly failed to hold perpetrators of serious abuses accountable for their actions. Peace talks in South Sudan are typically initiated with explicit or implicit amnesties and the promise of political and military appointments for belligerent parties. Perpetrators of serious crimes are thus rewarded for acts of violence, irrespective of the toll that they have taken on innocent civilians. While this approach may facilitate the negotiation of agreements among a small group of high-

level actors, it gives rise to perverse incentives, in that political and military leaders are encouraged to wreak havoc in the hope that they will be personally rewarded for their actions in the context of a peace process.

Peace processes based solely political accommodation also fail to address the hatred and resentment that permeates relations among communities in conflict. When victims of human rights abuses see the people that have harmed them not only going free without sanction, but also being rewarded for their violent conduct, the rifts among groups deepen and longstanding tensions are further entrenched. In this respect, the escalating cycles of revenge killings that characterize inter-communal and politically motivated conflicts in South Sudan can be seen as a direct consequence of the pervasive culture of impunity in the country. People do not have confidence in the state to provide justice, so they take matters into their own hands and attack opposing groups to deter violent acts against their own communities and to seek retribution against those that have wronged them. Since impunity is the norm, individuals that engage in revenge killings can be confident that they will not be punished for their crimes.³

Addressing issues of justice and accountability in the context of a peace process can serve to delegitimize such conduct and contribute to political stabilization by helping to defuse inter-communal tensions. Although trials cannot take place until there is at least a minimum degree of political stability, when they ultimately do take place, fair and balanced criminal prosecutions can help to promote healing and reconciliation by establishing the truth about events and limiting the potential for revisionist histories. Individualizing guilt for those most responsible for atrocities can help to avoid collective responsibility being placed on entire communities. By coordinating such efforts with other truth, justice and reconciliation initiatives and broader justice sector reforms, criminal prosecutions of those responsible for international crimes send an important signal to the population that the government is making a genuine effort to combat impunity and build a culture of respect for human rights, thereby reinforcing state legitimacy and setting the stage for a renewed commitment to the social contract.

What is the Special Court for Serious Crimes (SCSC)?

The Special Court for Serious Crimes (SCSC) would be a hybrid court established in South Sudan or a nearby country to try cases against individuals suspected of serious crimes under international and South Sudanese law. National and international personnel, including judges, prosecutors, investigators, defense attorneys and administrative staff, would work side-by-side, conducting investigations and trials in accordance with international standards.

Over the last two decades, hybrid courts have been established to address the legacy of large-scale conflicts in a number of countries. Examples include the Special Court for Sierra Leone (SCSL), the Regulation 64 panels in Kosovo, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels for Serious Crimes (SPSC) in East Timor, the Special Tribunal for Lebanon (STL), the Extraordinary African Chambers (EAC) in the courts of Senegal, the War Crimes Chamber (WCC) in Bosnia and Herzegovina, the Iraqi High Tribunal (IHT), and the Specialized Mixed Chambers (SMC) in the Democratic Republic of Congo (DRC). Each one of these hybrid courts is unique and each has had varying levels of success in achieving its objectives.

The idea of establishing a hybrid court to adjudicate international crimes in South Sudan was first proposed by members of South Sudanese civil society, just weeks after the violence broke out.⁴ The proposal was then taken up by non-governmental organizations (NGOs) in the United States (US) in their advocacy with the US government.⁵ In March 2014, as a result of this

advocacy, more than 50 members of the US Congress, including the co-chairs of the Congressional Caucus on Sudan and South Sudan, wrote to Secretary of State John Kerry to ask for the US government to support the establishment of a hybrid court in South Sudan. The letter stated:

“[W]e encourage the Office of Global Criminal Justice and Bureau of Democracy, Human Rights and Labor to work with the Government of South Sudan to consider the establishment of an independent hybrid or mixed special court with both international and domestic representation for South Sudan. Doing so would help hold perpetrators of grave human rights abuses accountable, while respecting South Sudanese sovereign legal authority and building indigenous capacity in the judiciary sector.”⁶

When the United Nations Mission in South Sudan (UNMISS) published a human rights report in May 2014, a proposal for a hybrid court was among its recommendations.⁷ Shortly thereafter, upon his return from a visit to South Sudan, UN Secretary-General Ban Ki-moon included the recommendation for a hybrid court in a briefing to the UN Security Council in New York.⁸ Most recently, in May 2014, the African Union (AU) Commission of Inquiry, a body tasked by the AU 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,” said in a press statement that it was “leaning” towards a recommendation to establish a hybrid court in the event that its investigations disclosed evidence of international crimes.⁹

Why a hybrid court?

Hybrid courts first arose around the turn of the millennium as a way for post-conflict countries to prosecute international crimes while avoiding the exorbitant cost and lack of local participation that characterized efforts by ad hoc international tribunals, such as the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Unlike hybrid courts, the ICTY and ICTR were located in the Netherlands and Tanzania, not in the affected countries, limiting both local participation in the trials and their significance for affected populations. They applied international law only, limiting the positive influence that the cases would have on domestic jurisprudence in Yugoslavia and Rwanda. They were also run by international personnel, which limited opportunities for knowledge transfers to the domestic legal workforce.

After the International Criminal Court (ICC) was established in 2002 as the preferred international institution to prosecute international crimes, ad hoc tribunals such as the ICTY and the ICTR lost much of their appeal. Hybrid courts arose as a more desirable alternative due to their lower cost and local ownership. Since they are established with the support of the state where the atrocities took place, hybrid courts are seen as a way for conflict-affected states to meet their international obligations without encroaching on the jurisdiction of the ICC. The ICC operates on the principle of complementarity, meaning that a case is only admissible before the ICC if a country is unable or unwilling to carry out genuine investigations and prosecutions.¹⁰ Hybrid courts thus fill an important gap by providing states that lack the capacity to prosecute international crimes with a viable means to do so in accordance with international standards.

A hybrid court such as the Special Court for Serious Crimes (SCSC) could help South Sudan to overcome capacity constraints and conduct trials that meet international standards. South Sudan’s underdeveloped justice system struggles to deal with even commonplace crimes. Problems of extended pretrial detention, chronic underfunding, inexperienced investigatory and prosecutorial

staff, shortages of defense attorneys, lack of legal aid, lack of witness protection services, corruption, torture, lack of security for judges and lawyers, limited geographical reach, overcrowded detention facilities, and dilapidated infrastructure severely restrict access to justice in the country.¹¹ Without international support, the justice system would be unable to investigate and prosecute the serious international crimes that have been perpetrated in this conflict.

If properly designed, staffed and resourced, a hybrid court would be better positioned to dispense justice in accordance with international standards. International standards require credible, fair and impartial investigations, prosecutions and trials; recognition and respect for the rights of both victims and accused persons, with particular attention to groups most affected by the conflict, including children, women, minorities and displaced persons; and the appropriate penalties that reflect the gravity of the crime.¹² In addition to helping the court meet international standards, international backing and the involvement of international staff could also help to overcome political obstacles that could present an insurmountable barrier to purely national trials.

Second, adjudicating these crimes in a hybrid court could stimulate much-needed reforms in the justice sector. If properly designed and if sufficient attention is devoted to maximizing the court's legacy, a hybrid court could help generate renewed commitment to justice and accountability in South Sudan. National judges, prosecutors, lawyers, investigators and administrative staff could be equipped with skills that could improve the functioning of justice system. The legislative reforms needed to establish the hybrid court and the court's judicial opinions could also help to develop domestic law in South Sudan so that it is better able to handle legal issues relating to large-scale conflict independently and without international assistance.

Third, a hybrid court could allow for a more flexible application of international and domestic law than trials in national courts. Since South Sudan has not ratified or domesticated many of human rights treaties that proscribe the minimum standards by which states must treat their citizens, judges adjudicating international crimes in purely national courts might find it difficult to apply rules of procedure and determine applicable punishments in a consistent manner. A hybrid court could overcome many of these problems by directly applying international criminal law and referring to the persuasive authority of cases from international and hybrid tribunals in other countries.

Fourth, a hybrid court could begin to alleviate some of the tensions among communities in South Sudan and promote healing and reconciliation. One has to be realistic about the extent to which the prosecution of a handful of people in an internationally backed court can overcome decades of identity-based politics and historical inequities, but impartial and balanced prosecutions could be one part of a broader process that helps to set the stage for a more inclusive and impartial approach to governance.

Finally, a hybrid court could help to build public confidence in the justice system and promote greater civic engagement on matters of justice and accountability. The involvement of a wide range of actors in the discussion from the very start would be critical to ensure that the broader public is aware of the court and its objectives and that the court receives the political support that it would need.

Policy Considerations

There are two main conditions that must be met for a hybrid court to be a viable option: one, the country in question must have a minimum degree of capacity in the justice sector to allow for the

adequate staffing of the court; and two, there must be sufficient government cooperation to allow the court to conduct its activities without undue political interference.

As to the question of capacity, an assessment of the human resources of the judiciary, department of public prosecution, legal defense services and investigatory services could be undertaken to determine where gaps exist and how a hybrid initiative could be designed to maximize positive impacts. Individuals with appropriate qualifications and experience in the diaspora could be recruited to supplement existing human resources in South Sudan. To the extent that the necessary capacity is found to be lacking, international participation could be increased to make up for the shortfall.

The more difficult question concerns government ownership over the initiative. To a certain extent, government support can be encouraged through its participation in the design of the court and manner in which the court's mandate is formalized. Genuine support, however, will depend in large part on the transitional arrangements that are agreed upon in the ongoing peace negotiations and whether there is political will to engage in high profile and sensitive prosecutions. The subsections below outline additional policy considerations.

Method of Establishment

The manner in which the SCSC is established would have implications for how it is perceived by stakeholders in South Sudan and its ability to secure government support and ownership. A first question concerns whether the hybrid court is established within the South Sudanese judiciary or whether it functions independently from the national justice system. The EAC in Senegal, the SPSC in East Timor, the Regulation 64 panels in Kosovo, and the WCC in Bosnia and Herzegovina are established as institutions within the national judiciary. These may be established as either temporary or permanent institutions. The WCC, for example, was established in the criminal division of the State Court of Bosnia, and international participation phases out over time leaving the institution to remain.

States will often enact legislation to provide a legal foundation for the hybrid court and to clarify its relationship with other justice sector institutions. This can present additional political risks, in that even if the executive agrees to the hybrid court in the context of a peace agreement or treaty, the parliament may fail to enact the legislation. Indeed, the failure of the Kenyan parliament to agree on the legislation for a hybrid tribunal to prosecute international crimes associated with the post-election violence of 2007 is what prompted the ICC to become seized of the matter.

Hybrid courts that are independent of the national judiciary may be established in any number of ways. Most commonly, they are established through agreements between the government in question and an intergovernmental institution, such as the UN or the AU. The SCSL and the ECCC, for example, were established through agreements with the UN, and the EAC in Senegal was established through an agreement with the AU. In situations in which a state has completely collapsed due to conflict, the relevant UN administration may establish the court as part of its mandate. The SPSC in East Timor and the Regulation 64 panels in Kosovo were established in this manner. In rare circumstances, the Security Council (UNSC) may establish a hybrid court through its Chapter VII powers, as it did when it established the Special Tribunal for Lebanon (STL).¹³

In the South Sudanese context, it might make most sense to follow the model used by the EAC in Senegal. The EAC was established both through an agreement between the AU and the government of Senegal and through domestic legislation in Senegal. The agreement with the AU

assures the EAC of international support that is vital to its success, while the legislation gives it a strong legal foundation in the national system.

South Sudan could follow a similar approach in establishing the SCSC. The government could start by entering into an agreement with both the AU and the UN, as the UN already has a longstanding presence in South Sudan and the AU has been intimately involved with efforts to promote accountability through the Commission of Inquiry that it established in March 2014. Legislation could then be enacted to situate the court in the South Sudanese judiciary. This legislation would need to amend South Sudanese law to allow foreign nationals to serve as judges in South Sudan, detail the selection process for judges, prosecutors and other staff, lay out the structure of the court, including the process for appeals, and define international crimes and applicable sanctions, among other features of the court.

Personal Jurisdiction

In order to make its work manageable, the SCSC's jurisdiction would need to be limited to crimes committed by a certain class of persons. Some hybrid courts, including the SCSL, the Extraordinary African Chambers (EAC) in Senegal and the Extraordinary Chambers in the Courts of Cambodia (ECCC), have jurisdiction over the individuals who bear the "greatest responsibility" for international crimes committed within the stipulated time period. By targeting individuals with command responsibility over criminal acts, the court could maximize both the symbolic effect of the trials as well as their deterrent and retributive effects. In most hybrid courts, prosecuting those who bear greatest responsibility usually translates into prosecutions against anywhere from one or two individuals to a maximum of 12 to 15.

Other courts have jurisdiction over anyone responsible for international crimes. The War Crimes Chamber (WCC) in Bosnia and Herzegovina, for example, is designed as complementary initiative to allow for justice to be extended beyond those individuals tried by the ICTY. Since starting its work in 2005, the WCC has completed over 200 cases involving serious violations of international law.

Given the scale of the conflict in South Sudan and number of people implicated in serious violations of international human rights and humanitarian law, the priority should be to investigate and prosecute those who bear greatest responsibility, and the mandate of the hybrid court should be defined accordingly. From there, one can explore complementary prosecutions in the national justice system to reach lower-level offenders. Customary courts may also provide opportunities for extending prosecutions to the local level, at least in so far as they involve compensation awards and other alternative punishments. Any such efforts would need to be carefully coordinated with the work of the hybrid court and steps would need to be taken to ensure that investigations, prosecutions, trials and punishments in national forums adhere to international standards.

Subject Matter Jurisdiction

In terms of subject matter jurisdiction, the SCSC would have jurisdiction over the international crimes of genocide, war crimes and crimes against humanity. This would account for many of the serious crimes committed by all sides in the current conflict, including extrajudicial executions, targeting of individuals on the basis of ethnic identity, widespread and indiscriminate attacks on civilians, rape and sexual violence, abductions or forced marriages, disappearances, conscription or enlisting of children into armed forces, and torture. Definitions of these crimes could be taken

directly from the Rome Statute or another authoritative source of international criminal law and should be included in the agreement or statute establishing the court.

The hybrid court would also have to decide how to address crimes committed by child soldiers. The SCSL, for example, allowed for the prosecution of children, but restricted sentences in the event of a conviction to alternative measures such as community service, supervision, counseling and correctional training. In managing cases involving minors, the hybrid court should draw from both international human rights norms and South Sudanese law. South Sudan's 2008 Child Act would be a useful source of law, in this regard. The Child Act was drafted in order to implement the UN Convention on the Rights of the Child and includes a number of progressive provisions on child rights. By applying the Child Act in conjunction with international law on child rights, the hybrid court could help to encourage respect for child rights in the context of criminal trials.

In addition to serious violations of international human rights and humanitarian law, the hybrid court would be able to prosecute violations of South Sudanese criminal law. This would enable the court to adjudicate crimes relating to the destruction or theft of property, murders, and other violent acts that may not rise to the level of international crimes. The court would also be able to require the payment of blood compensation, a remedy under South Sudanese law that allows the families of deceased murder victims to accept compensation in the form of cattle or other livestock from the perpetrator or the perpetrator's family in exchange for a mitigated prison sentence.¹⁴ Judges would have to determine if such remedies can be provided in accordance with the requirements of international law, but flexible approaches such as these are a natural outgrowth of hybrid justice and should be capitalized upon whenever possible.

Temporal Jurisdiction

The jurisdiction of the SCSC would also need to be limited to a certain time period. While it may be tempting to give the court jurisdiction over crimes committed in the context of inter-communal and politically motivated violence since 2005 or even for crimes committed during the 22-year north-south civil war, such an expansive jurisdiction would quickly become unmanageable. The court should therefore restrict its jurisdiction to crimes committed since the outbreak of the current conflict on 15 December 2013.

Applicable Punishments

International law requires punishments for international crimes to be commensurate with the gravity of the crime. In most circumstances, this translates into a lengthy prison sentence. Although South Sudanese law allows for individuals convicted of murder to be put to death by hanging, existing international and hybrid tribunals do not apply the death penalty, in accordance with UN's position against capital punishment. Any treaty or statute for a hybrid court in South Sudan should therefore state that the death penalty is not an available form punishment.

South Sudan would also have to determine where convicted persons would serve their prison sentences. Prisons in South Sudan do not meet international standards and to sentence people to prison terms in South Sudanese prisons would be inconsistent with the hybrid court's duty to apply appropriate punishments.¹⁵ When Rwanda was confronted with this problem in relation to housing people convicted at the ICTR, it responded by building a prison that meets international standards in Rwanda so that people convicted at the ICTR could serve out their prison sentences in a Rwandese prison. South Sudan could follow suit and build a prison that meets international standards somewhere in South Sudan. Alternatively, individuals convicted by the hybrid tribunal

could serve their sentence outside of South Sudan. Individuals convicted by the SCSL, for example, are currently serving their sentences in Rwanda.

Victim Participation

The hybrid court should make provisions for victim participation in proceedings and the rights of victims in the context of criminal trials. Unlike trials in the ICTR, which did not allow victims to participate in their personal capacity or to receive compensation or reparation for harms suffered, a hybrid court could allow victims and other interested parties to make submissions to the court and pursue various forms of compensation. A hybrid court could also establish a victim's fund to provide reparations to victims who are not able to participate in proceedings. Victim participation would thereby help the court to fulfill victims' right to a remedy and promote a form of justice that is more meaningful to survivors of atrocities.

In a country as divided as South Sudan, victim participation must be carefully designed to avoid further entrenching ethnic divisions. Since the violence has largely broken down along ethnic lines, there are wide divergences among different communities as to how they perceive the level of their relative suffering. No matter how balanced trials are, they may be perceived as biased by one side or another. Certain constituencies may also consider the architects of the violence to be heroes, while demonizing political and military leaders on the other side. Making sure that prosecutions are balanced as possible can help to limit their divisive potential among victims' groups.

Location, Witness Protection and Security

Ideally, hybrid courts should be based in the conflict-affected state. This enables the participation of affected populations, simplifies evidence collection and witness identification, and increases the positive impacts on the national justice system. Whether or not it would be feasible to establish the SCSC in South Sudan would depend on how the conflict progresses and the nature of the transitional administration that is put in place. If the situation becomes sufficiently stable, the SCSC should be established in Juba. However, if the safety of witnesses, judges and lawyers cannot be guaranteed, the designers of the initiative could explore the possibility of situating the court in a nearby country, such as Kenya or Rwanda. Alternatively, trials that are particularly sensitive could be held in a nearby country while other trials could be held in South Sudan.

Evidence from hybrid courts in other countries suggests that international involvement, and the heightened profile that comes with it, can serve as an incentive for witnesses to come forward and can help to discourage attempts to intimidate or threaten witnesses. However, international participation alone would not be enough to guarantee witness safety. In order to comply with international standards, a system would need to be developed for pre-trial and post-trial risk assessments for every witness, the provision of protective measures, including safe transportation and accommodation during trials, post-trial follow-up and threat monitoring, and access to trauma counseling.¹⁶ The court may also need to arrange witness relocations, including international relocations for the most at-risk witnesses. Longer-term protection strategies could include the establishment of a witness protection agency and legislation formalizing the state's witness protection program.

Funding

One of the fundamental factors determining the success or failure of hybrid courts is the issue of funding. As noted above, hybrid tribunals are much less expensive than ad hoc tribunals.

However, if sufficient levels of funding are not assured, it can undermine the smooth functioning of the court, and in some circumstances, may even force it to unduly delay trials in violation of defendant and victim rights. It is therefore necessary to carefully think through the court's funding structure from the outset.

Typically, hybrid courts are funded through a combination of contributions from external donors and from the national budget of the state in question. By allocating a certain percentage of funds to the initiative, the government of South Sudan could demonstrate its intent to combat the culture of impunity and promote the respect for human rights. Contributions from UN and AU member states, NGOs and private donors would also be required. Although the UN Secretary General has expressed a clear preference for assessed contributions from UN member states to fund hybrid courts, in practice, most hybrids are funded by voluntary contributions.¹⁷ Lessons from other contexts show that judicial interventions such as hybrid courts are invariably more expensive than initially predicted. The agreement establishing the court should therefore allow for grants from the UN regular budget to ensure that the court does not languish due to a shortage of funds.

Relationship to Other Transitional Justice Initiatives

As noted in the introduction, a small number of criminal prosecutions in an internationally supported court would be insufficient to address the legacies of hatred and trauma that South Sudan's conflict will leave in its wake. In order to promote genuine healing, South Sudan would need to pursue a number of complementary truth, justice and reconciliation initiatives. The AU Commission of Inquiry and the National Platform for Peace and Reconciliation (NPPR) may provide insights in designing such complementary initiatives.¹⁸

Whatever approach is adopted to address the broader issues of truth and reconciliation, it should be carefully coordinated with the activities of the hybrid court so as to minimize or avoid conflicts. For example, if South Sudan decides to establish a truth commission to build an objective and impartial narrative of events and document the experiences of perpetrators and victims, the truth commission would need to take into account the potential for overlap with the the hybrid court in terms of investigations and witnesses. Perpetrators may be reluctant to appear before the truth commission out of fear that their statements will be used against them in criminal trials. Conversely, courts may try to force the truth commission to relinquish information about criminal activity in contravention of the truth commission's duty to maintain the confidentiality of people that appear before it. Careful thought given to sequencing and the coordination of these initiatives can help to limit these sorts of conflicts.

Legacy

As international personnel would only be serving in South Sudan for a limited period of time, thought should be given from the outset to maximizing the legacy of the SCSC.¹⁹ A common criticism of hybrid courts, including the SCSL and the WCC, is that they have not taken full advantage of international participation due to insufficient planning. South Sudan should not make a similar mistake.

There are a number of practical steps that should be taken to maximize the hybrid court's legacy. South Sudanese should serve in senior positions in all investigative, prosecutorial and judicial departments, efforts should be made to bring charges under national law, South Sudanese law should be amended to incorporate international crimes and respect international standards, and the court should pursue strategic partnerships with legal associations such as the South Sudan Bar

Association (SSBA) and the South Sudan Law Society (SSLS). Close cooperation should be encouraged between national and international staff by recruiting international staff that have experience with capacity-building, pairing international and national judges and prosecutors, using knowledge transfer as a criterion to evaluate staff performance, and holding regular meetings to encourage a collegial atmosphere.²⁰ The various departments involved should also develop operating procedures and other internal governance instruments that will guide the institution after international participation is phased out. Such initiatives should be formally incorporated into hybrid court's mandate and operational policies, and should be ensured of adequate funding at the start.

Residual Issues

Residual issues would also need to be considered from the outset, including such matters as the supervision of lengthy prison sentences, the review of convictions due to new evidence or changing circumstances, and the provision of ongoing witness protection services. South Sudan might consider adopting a model similar to that used in the WCC in Bosnia and Herzegovina, where international participation is phased out over time and the institution remains. Exit strategies such as this must remain flexible, however, to accommodate any unforeseen delays that arise over the course of trials. Rather than setting a specific time period upon which the international participation would phase out, it might be preferable to tie the scaling down of international personnel to specific benchmarks. Relevant benchmarks could include the number of cases tried to a final verdict, the degree to which the political climate favors accountability, and the development and implementation of prosecutorial and judicial strategies and policies.²¹

Outreach Strategy

The government and intergovernmental organizations involved in the court should develop an outreach strategy to generate awareness of and support for the court. The SCSL's outreach and communications programs, which included the dissemination of video and audio summaries of proceedings and town hall meetings across the country, could provide a useful model. Outreach activities should also take into consideration the likelihood that public perceptions of the hybrid court may change over time. As prosecutions proceed, they could become politicized and perceptions of bias could become more pronounced. The outreach plan should anticipate changes such as these and have strategies in place to address them. For example, the court could work proactively to inform the public about key decisions and the adoption of important policies in order to counter any attempts to politicize its activities.

Alternative Responses

One may also need to consider what to do if the government of South Sudan fails to move ahead with a mechanism to secure justice and accountability for international crimes. One option would be to include a provision in the peace agreement that would automatically refer the matter to the ICC. South Sudan is not a party to the Rome Statute and for the ICC to become involved would require either a referral from the UNSC under Article 13 of the Rome Statute or the expressed consent of the government of South Sudan. An ICC referral could also be an option if the government of South Sudan proceeded with the hybrid court initiative but failed to satisfy its international obligations, either because the proceedings sought to shield the accused person, there was an unjustified delay, or the proceedings were not conducted independently or impartially in a manner consistent with an attempt to deliver justice.²²

Recommendations

The issue of justice and accountability raises a dilemma in the context of peace negotiations; the mediators need to secure the agreement of belligerent parties and their commitment to abide by the terms of the agreement, but political and military leaders may be reluctant to submit themselves and their supporters to the scrutiny of criminal investigations and trials. While addressing these issues inevitably introduces additional complications to an already complex mediation process, failure to do so risks condemning South Sudan and her people to a future of perpetual conflict. At a minimum, the mediators should make clear to the parties that amnesties for serious international crimes are against international law and unacceptable in a conflict that has involved so many egregious crimes. But a rejection of amnesties is not enough. To set the stage for sustainable peace, the parties must commit to an accountability mechanism that will allow for justice to be served in a balanced and impartial manner in accordance with international standards. Towards this end, the SSLS recommends the following:

1. **Include language in a peace agreement providing for justice and accountability** – Any peace agreement that results from the IGAD-led peace talks in Addis Ababa should include a stand-alone section that addresses justice and accountability for international crimes committed since 15 December 2013. The amount of detail required in the peace agreement would be a matter to be discussed in the context of negotiations among the parties, but it should include a commitment to establish a hybrid court tasked to bring cases against those that have greatest responsibility for violations of international human rights and humanitarian law committed during the conflict.
2. **Prohibit amnesties for international crimes** – While amnesties may be permissible for political rebellion and lesser crimes under South Sudanese law, amnesties for war crimes, crimes against humanity and other gross violations of human rights violate international law. IGAD should require the parties to explicitly acknowledge that amnesties for serious international crimes will not be permitted. The parties should also pledge to refrain from pursuing such amnesties through national processes in South Sudan.
3. **Conduct civic engagement activities to educate people on the hybrid court's objectives and activities** – National and international civil society organizations (CSOs) should conduct civic engagement activities to raise awareness about the treatment of international crimes under international law and the ways in which a hybrid court could help South Sudan to satisfy its international obligations and promote healing, truth and reconciliation among local populations. If the parties adopt the SCSC proposal, CSOs should to conduct additional activities to educate people about the SCSC's structure and objectives. Once the court is operational, it should also conduct its own independent outreach activities. These activities should be streamlined into the court's core funding.
4. **Assess national capacity to administer a hybrid court** – The UN or AU should commission human resource experts to conduct an assessment of the capacity of the South Sudanese judiciary, department of public prosecution, legal aid services, private lawyers, police and prisons. The assessment should identify capacity gaps and provide recommendations for how a hybrid court could maximize knowledge transfers and other positive spillovers into the national justice system. This exercise should be thorough but rapid, given that other activities will be influenced by its findings.
5. **Ratify and domesticate regional and international treaties** – The government of South Sudan should move quickly to ratify the core human rights treaties that proscribe

the minimum standards by which states may treat their citizens and to deposit the instruments of ratification with the relevant intergovernmental institutions. The government should also ratify the Rome Statute demonstrate its commitment to combating international crimes and establishing a culture of respect for human rights. The government should also enact an International Crimes Act to domesticate substantive and procedural law regarding international crimes into South Sudanese law.

¹ Intergovernmental Authority on Development (IGAD), Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army (in Opposition) (SPLM/A in Opposition) (Jan. 23, 2014), *available at* http://www.sudantribune.com/IMG/pdf/signed_agreement_cessation_of_hostilities_.pdf; IGAD, Recommitment on Humanitarian Matters in the Cessation of Hostilities Agreement Between the GRSS and the SPLM/A in Opposition) (May 5, 2014), *available at* <http://cewarn.org/attachments/article/252/Recommittment%20to%20Humanitarian%20Matters%20of%20COH,%20205%20May'2014.pdf>; IGAD, Agreement to Resolve the Crisis in South Sudan, Addis Ababa (May 9, 2014) [hereinafter IGAD, May 9 Agreement], *available at* http://www.sudantribune.com/IMG/pdf/agreement_to_resolve_the_crisis_in_south_sudan.pdf.

² IGAD, May 9 Agreement, *supra* note 1.

³ For discussion of the positive impact of human rights prosecutions on democratic transitions, see KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (Mar. 2012).

⁴ David Deng and Elizabeth Deng, *South Sudan Talks Must Make Provision for Justice and Reconciliation*, AFRICAN ARGUMENTS, Jan. 8, 2014, *available at* <http://africanarguments.org/2014/01/08/an-integrated-response-to-justice-and-reconciliation-in-south-sudan-by-david-deng-and-elizabeth-deng/>.

⁵ JOHN PRENDERGAST, "PEACE MUST COME SOON", A FIELD DISPATCH FROM SOUTH SUDAN, THE ENOUGH PROJECT (Feb. 19, 2014), *available at* <http://www.enoughproject.org/files/South-Sudan-Dispatch-Peace-Must-Come-Soon.pdf>.

⁶ Letter from Members of U.S. Congress to John Kerry, Mar. 20, 2014, *available at* <http://lee.house.gov/sites/lee.house.gov/files/South%20Sudan%20letter%20to%20Kerry-%20March%2020.pdf>.

⁷ According to UNMISS: "The national measures announced by the Government do not meet the minimum requirements of accountability demanded by international human rights law... UNMISS would therefore recommend that the national process be complemented by international assistance through a special or hybrid court... By working side by side with South Sudanese institutions and experts, the confidence and the capacity of national institutions would be enhanced and real accountability could be achieved." UNITED NATIONS MISSION IN SOUTH SUDAN (UNMISS), CONFLICT IN SOUTH SUDAN: A HUMAN RIGHTS REPORT (May 8, 2014), *available at* <http://unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf>.

⁸ Eye Radio, *Ki-moon Recommends a Hybrid Court to Tackle Rights Violations in RSS*, May 13, 2014, *available at* <http://eyeradio.org/ki-moon-recommends-establishment-special-court-tackle-rights-violations-rss/>.

⁹ Press Release, African Union (AU) Commission of Inquiry, The AU Commission of Inquiry on South Sudan Undertakes Consultations in Nairobi (May 15, 2014), *available at* <http://www.au.int/en/content/commission-inquiry-south-sudan-undertakes-consultations-nairobi>.

¹⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (Jul. 1, 2002), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹¹ HUMAN RIGHTS WATCH (HRW), PRISON IS NOT FOR ME: ARBITRARY DETENTION IN SOUTH SUDAN (Jun. 21, 2012), *available at* <http://www.hrw.org/reports/2012/06/21/prison-not-me>; INTERNATIONAL COMMISSION OF JURISTS (ICJ), SOUTH SUDAN: AN INDEPENDENT JUDICIARY IN AN INDEPENDENT STATE? (DEC. 2013), *available at* http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/SOUTH-SUDAN-CIJL-REPORT-elec-versionFsmallpdf.com_.pdf; DAVID K. DENG, CHALLENGES OF ACCOUNTABILITY: AN ASSESSMENT OF DISPUTE RESOLUTION PROCESSES IN RURAL SOUTH SUDAN, SOUTH SUDAN LAW SOCIETY (SSLS) AND PACT (Mar. 2013), *available at*

http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%202016.pdf.

¹² U.N. Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, U.N. Doc. S/2004/616, ¶ 64 (2004), *available at* <http://www.unrol.org/files/2004%20report.pdf>.

¹³ The Security Council also established the ICTY and ICTR using its Chapter VII powers.

¹⁴ Government of South Sudan, Penal Code Act, ch. XVI, § 206 (2008), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=250684.

¹⁵ HRW, PRISON IS NOT FOR ME: ARBITRARY DETENTION IN SOUTH SUDAN (Jun. 21, 2012), *available at* <http://www.hrw.org/reports/2012/06/21/prison-not-me>.

¹⁶ HRW, BENCHMARKS FOR SERIOUS CRIMES IN NORTHERN UGANDA, HUMAN RIGHTS WATCH MEMORANDA ON JUSTICE STANDARDS AND THE JUBA PEACE TALKS, MAY 2007 – FEBRUARY 2008, *available at* http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf.

¹⁷ U.N. Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, U.N. Doc. S/2004/616, ¶ 43 (2004), *available at* <http://www.unrol.org/files/2004%20report.pdf>.

¹⁸ The NPPR is a joint initiative of the Committee for National Healing, Peace and Reconciliation (CNHPR), the Peace Commission and the Committee for Peace and Reconciliation in the National Legislative Assembly. It was established to collect the views and aspirations of people across South Sudan on how the country can go about achieving sustainable peace and genuine reconciliation.

¹⁹ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), MAXIMIZING THE LEGACY OF HYBRID COURTS (2008), *available at* <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>.

²⁰ HRW, JUSTICE FOR ATROCITY CRIMES: LESSONS OF INTERNATIONAL SUPPORT FOR TRIALS BEFORE THE STATE COURT OF BOSNIA AND HERZEGOVINA (2012), *available at* http://www.hrw.org/sites/default/files/reports/bosnia0312_0.pdf.

²¹ *Id.*

²² Rome Statute, Art. 17(2), *supra* note 10.