



Alternatives for Achieving Justice in South Sudan

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Table of Contents	
Situation Overview	4
Frameworks for Addressing the Situation	6
Alternative 1: Referral to the International Criminal Court (ICC)	6
Alternative 2: AU establishes Hybrid Court unilaterally	8
Alternative 3: Prosecute the crimes entirely within a domestic legal framework	10
Recommendations	14
Bibliography	19

Situation Overview

After years of broken peace agreements between South Sudan's government, led by President Salva Kiir, and rebel forces, led by former Vice-President Riek Machar, in the civil war that began in late-2013, a peace agreement, known as Revitalized Agreement on the Resolution of the Conflict in South Sudan (RARCSS), was signed in September 2018.¹ However, the deal has been plagued with delays in its implementation. For example, the formation of a unity government took multiple extensions and an eleventh-hour deal in February 2020 that resulted in the formation of the Revitalized Transitional Government of National Unity (RTGNU) between Kiir and Machar.² One of the most notable features of the deal was the mandated creation of a Hybrid Court for South Sudan (HCSS) to try individuals for various war crimes and crimes against humanity perpetrated during the civil war.³ The Office of the United Nations High Commissioner for Human Rights defines a Hybrid Court as "one whose jurisdiction and composition is mixed, exhibits international and national aspects and is often located within the territory of the crime."⁴ The HCSS was first proposed in prior peace attempts by the Africa Union (AU) and agreed to under Chapter 5 of the 2018 deal.⁵ The establishment of the Hybrid Court is to be carried out by the Africa Union, with the support of international bodies such as the UN and with the domestic approval, via a Memorandum of Understanding (MoU) and legislative action, of the South Sudanese RTGNU.⁶ The peace deal stipulates that the AU "will take the lead to establish the court and oversee its operations, including decisions on location, funding, appointments, and infrastructure," and that "People accused... will be tried by a panel that includes a majority of judges from African nations other than South Sudan.... The prosecutors will also be drawn from other African nations.... In addition, the court will be distinct from the national system and have primacy over South Sudan's courts."⁷ The AU and various UN bodies involved, including the UN Mission in South Sudan (UNMISS), the Security Council, and the Human Rights Council, have all expressed a desire for the AU to work bilaterally with South Sudan to establish the court, and this is the current policy in this regard.

Ideally, the goal since the signing of the 2018 RARCSS of the AU and the UN was to reach a bilateral agreement on the establishment and operation of the HCSS. However, just as the attempts at reaching a lasting peace were plagued by delays, bad faith, and broken promises, the creation of the HCSS on a bilateral basis has experienced much of the same two years after the RARCSS was signed. Much of this is simply due to the fact that South Sudan's leaders appear to have no interest in working with the AU to move the process forward and establish the conditions necessary to

¹ Windy Dermawan, Febriani Amalina Shalihah, and Akim Akim, "Conflict in South Sudan Human Security Issues and Challenges for Conflict Resolution," *Central European Journal of International and Security Studies* 13, no. 4 (December 19, 2019), 151.

² "South Sudan Rivals Salva Kiir and Riek Machar Strike Unity Deal," BBC News, February 22, 2020, <https://www.bbc.com/news/world-africa-51562367>.

³ Lauren Ploch Blanchard, "Conflict in South Sudan and the Challenges Ahead" (Congressional Research Service, September 22, 2016), 19.

⁴ Owiso Owiso, "The Proposed Hybrid Court for South Sudan," *ACCORD-AJCR*, February 2018, <https://www.accord.org.za/ajcr-issues/the-proposed-hybrid-court-for-south-sudan/>.

⁵ David Mayen, "Activists Petition African Union to Form Hybrid Court in South Sudan," *The East African*, July 20, 2020, <https://www.theeastafrican.co.ke/tea/news/east-africa/activists-petition-african-union-form-hybrid-court-south-sudan-1902204>.

⁶ "Hope for Justice for South Sudan," Human Rights Watch, August 28, 2015, <https://www.hrw.org/news/2015/08/28/hope-justice-south-sudan>; Owiso, "The Proposed Hybrid Court for South Sudan."

⁷ "Hope for Justice for South Sudan."

approve the court and make it operational.⁸ For example, UNMISS chief David Shearer recently remarked that, “The transitional National Legislative Assembly is yet to be reconstituted, so necessary new laws are not being passed and progress on the constitution has been delayed,” which means domestic legislation authorizing the HCSS cannot be passed.⁹ Moreover, a UN report from earlier this month indicated that South Sudan has taken “no concrete steps toward national healing.”¹⁰ Instead, the two years since the RARCSS was signed has seen political infighting, continued killing (often reprisal killings), government obstruction and delay, and a continuation of a culture of impunity and unaccountability.¹¹ As a result, the public, which supports the justice and accountability framework of the deal, remains deeply traumatized, distrustful, and divided.¹² According to Yasmin Sooka, the head of the UN Commission on Human Rights in South Sudan, “Without the timely implementation of an inclusive and holistic transitional justice process, as envisioned in the Peace Agreement, sustainable peace for South Sudan will remain elusive.”¹³

Therefore, it is appropriate, given these unfortunate circumstances and the need to produce timely justice and accountability for crimes committed during the war, for the UNSC and the AU to consider alternate approaches. If there is ever to be lasting peace and stability in South Sudan, it is imperative that criminals are prosecuted, the culture of impunity is vanquished, and the citizens can finally be set on a path to further state-building and social cohesion.

⁸ Hereward Holland, “South Sudan Hires U.S. Lobbyists to Help Block War Crimes Court: Contract | Reuters,” Reuters, April 29, 2019, <https://www.reuters.com/article/us-southsudan-justice/south-sudan-hires-u-s-lobbyists-to-help-block-war-crimes-court-contract-idUSKCN1S51Z2>.

⁹ Dimo Silva Aurelio, “UNMISS Chief: South Sudan Peace Process Limping Along,” VOA News, September 30, 2020, <https://www.voanews.com/africa/south-sudan-focus/unmiss-chief-south-sudan-peace-process-limping-along>.

¹⁰ Cara Anna and Maura Ajak, “UN Report Says South Sudan Has Healed Little since Civil War,” AP News, October 6, 2020, <https://apnews.com/article/virus-outbreak-south-sudan-sudan-united-nations-civil-wars-fc6fc694cd6da41e00f8227dde3d0dc6>.

¹¹ “Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan,” Conference room paper of the Commission on Human Rights in South Sudan, Human Rights Situations That Require the Council’s Attention (UN Human Rights Council, October 5, 2020), 4, https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_45_CRP_1.pdf.

¹² “OHCHR | UN Experts Say Pattern of Years of Extreme Violations in South Sudan Must Be Reversed,” accessed September 26, 2020,

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25686&LangID=E>.

¹³ “Starvation Used as Weapon of War in South Sudan Conflict, UN Rights Body Finds,” UN News, October 6, 2020, <https://news.un.org/en/story/2020/10/1074742>.

Frameworks for Addressing the Situation

Alternative 1: Referral to the International Criminal Court (ICC)

The first alternative to the current policy is for the Security Council to refer the matter to the International Criminal Court (ICC). The ICC is often referred to as the “court of last resort” and is intended both for situations when all other attempts at justice are exhausted and/or when “national authorities are unwilling or unable to prosecute domestically.”¹⁴ The ICC also tends to focus on a more limited number of higher-level authorities in their prosecutions; often, low-mid-level officials who have been credibly accused of crimes are left to be prosecuted via hybrid or domestic mechanisms.¹⁵ The need for the referral by the Security Council stems from the fact that South Sudan is not a party to the ICC, which means the ICC does not have jurisdiction over the country. Therefore, the only way for the ICC to gain jurisdiction over the country is either via Security Council referral or for the South Sudanese government to request the ICC to get involved, which in this case, is highly unlikely given South Sudan’s history of obstruction and impunity.

Having the ICC take over the criminal prosecutions of South Sudanese officials accused of various war crimes and crimes against humanity carries many advantages. One of the main advantages is that the ICC can act independently in situations where a country is not willing or not interested in prosecuting individuals for international crimes. South Sudan has a history of not prosecuting officials for various crimes, even when investigations find those officials culpable.¹⁶ Both President Kiir and Mr. Machar, in particular, have a history of shutting down potential prosecutions.¹⁷ Just last year, documents revealed that South Sudan’s government agreed to pay the US-based lobbying firm Gainful Solutions millions of dollars to lobby on behalf of the country and work to “delay and ultimately block establishment of the hybrid court.”¹⁸ With the ICC leading the criminal proceedings, it would take unwilling South Sudanese officials out of the picture.

Another related advantage is that having the ICC take over jurisdiction of the matter would not only provide a way around the obstruction, but it would make the process independent of officials who are not only unwilling partners, but that are implicated in many criminal acts. For example, it is widely known and reported by various UN bodies that attacks by both government and opposition forces, with consent by high-level authorities, were carried out against civilians and UN personnel during the conflict, and that these “constitute war crimes or crimes against humanity.”¹⁹ It is no wonder then why officials in South Sudan seem intent on delaying the justice process, as mandated by the 2018 peace deal, for as long as possible. Referral to the ICC would force action that many South Sudanese officials do not want. So, it is not surprising that, according to Patryk Labuda, “In South Sudan, where the ICC currently lacks jurisdiction, military commanders reportedly express fear of ICC

¹⁴ “Ending the Era of Injustice” (Human Rights Watch, December 12, 2014), <https://www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans>.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Charles Mutasa and Kudrat Virk, “Building Peace in South Sudan: Progress, Problems and Prospects,” Centre for Conflict Resolution, 2017, JSTOR, 21, <http://www.jstor.org.proxy.libraries.rutgers.edu/stable/resrep05143>.

¹⁸ Holland, “South Sudan Hires U.S. Lobbyists to Help Block War Crimes Court: Contract | Reuters.”

¹⁹ Blanchard, “Conflict in South Sudan and the Challenges Ahead,” 7.

prosecution.”²⁰ It is mainly for this reason why many people in South Sudan, including legal experts and community leaders, advocate for ICC involvement.²¹

Lastly, another crucial advantage is that the ICC is a permanent, standing institution, and not a mechanism created for a specific situation. This independence and permanency carry many benefits. For example, as Human Rights Watch notes, “it can move more quickly to open investigation and pursue prosecutions in certain circumstances and has a more predictable funding stream.”²² Moreover, “As a permanent institution, its structure is less vulnerable to short-term efforts to block its work.”²³ Therefore, the current obstruction and delay tactics on the part of South Sudan’s leaders would likely be quickly overcome, and the fact that the country is still very poor and war-torn makes the ICC’s funding and legitimacy very alluring.

Yet, while there are clearly many advantages, referring the matter to the ICC carries many disadvantages as well. One of the main disadvantages is that ICC involvement would likely produce significant political opposition in the region. Ironically enough, much of the opposition would likely come from the AU and its members. Although the AU supported the ICC in the past, relations deteriorated drastically beginning in 2009, when the ICC issued an arrest warrant against a sitting head of state, President Omar Al Bashir of Sudan.²⁴ In this case, the AU argued that, “sitting heads of state and government should be immune from prosecution based on the need to uphold the sovereignty of states and to avoid jeopardizing the legitimacy of governments and the stability of states.”²⁵ Backlash against the ICC intensified in 2013, this time from Kenya, as the ICC indicted President Kenyatta on various charges.²⁶ These two indictments created solidarity among African leaders, including President Kiir, and “whipped up anti-accountability emotions and galvanized leaders to oppose the Court.”²⁷ To this day, the AU criticizes the ICC for targeting Africans, given a majority of situations under investigation by the ICC are from Africa.²⁸ This has produced two significant implications for the prospects of ICC involvement in South Sudan: Security Council members have said that the continual hostility and opposition towards the court on the continent has “made it more difficult for the ICC to conduct its operations effectively.”²⁹

Furthermore, opposition to ICC involvement is not only coming from within, but it is also coming from external actors. Prospects for ICC referral by the Security Council face their own challenges from the council members themselves. For example, China has said that “Africans should

²⁰ Patryk Labuda, “With or Against the State? Reconciling the Protection of Civilians and Host-State Support in UN Peacekeeping” (International Peace Institute, May 2020), 38, https://www.ipinst.org/wp-content/uploads/2020/05/2005_Reconciling-POC-and-Host-State-Support.pdf.

²¹ “Ending the Era of Injustice.”

²² Ibid.

²³ Ibid.

²⁴ Ndubisi Christian Ani, “Implications of the African Union’s Stance on Immunity for Leaders on Conflict Resolution in Africa: The Case of South Sudan and Lessons from the Habré Case,” *African Human Rights Law Journal* 18, no. 2 (2018): 439, <https://doi.org/10.17159/1996-2096/2018/v18n2a1>.

²⁵ Ibid., 440.

²⁶ “Ending the Era of Injustice.”

²⁷ National Defense University. Africa Center for Strategic Studies, *Envisioning a Stable South Sudan*, Africa Center Special Report; No. 4 (Washington, D.C: Africa Center for Strategic Studies, 2018), 59.

²⁸ Ani, “Implications of the African Union’s Stance on Immunity for Leaders on Conflict Resolution in Africa,” 439.

²⁹ “Ending the Era of Injustice.”

address their own issues in the African way.”³⁰ This would seem to imply that China would not support independent international criminal proceedings by the ICC, and it can be expected that China would likely veto any resolution that would involve referral by the Security Council. China’s position also raises another drawback to the ICC taking over: it would largely remove South Sudan’s national authorities from the equation. This would arguably be detrimental to not only the justice effort, but to South Sudan’s social and state-building efforts. This is because traditional and customary justice measures “remain an integral part of the social fabric of South Sudan,” and traditional authorities not only have extensive knowledge of the situation on the ground, but they also “enjoy a much higher level of trust and confidence with the public than any statutory institution.”³¹

Lastly, it is important to note that the ICC, as an institution, is not perfect. As Human Rights Watch notes, “it does not have a police force to enforce its orders, it can be blocked from conducting on-site investigations, as is the case with its investigation into crimes committed in Darfur, Sudan, and its docket is overloaded.”³² Therefore, while it may be able to get around the obstruction and delays at the hands of South Sudan’s authorities, there is a risk that the ICC will run into these problems in the course of its work anyway. Moreover, with such national and regional opposition, there is also a serious risk that its orders and rulings will fall on deaf ears, and there may actually be further solidarity amongst African leaders against it. Finally, with an overloaded docket, the question of delays and level of expediency in delivering accountability and justice come into focus yet again. So, while referral to the ICC certainly has its benefits, it certainly has its own drawbacks.

Alternative 2: AU establishes Hybrid Court unilaterally

The second alternative actually follows the same framework as the current policy, which is that it involves the creation of a Hybrid Court. However, this method of reaching that end goal is for the African Union to establish it unilaterally and without the initial cooperation of South Sudan’s government. Although the 2018 peace deal stipulated that the HCSS be set up bilaterally between the AU and the government, with the latter approving the Memorandum of Understanding and codifying the court through legislation, this has obviously not happened thanks to South Sudan. In light of this, local actors, NGOs, legal experts, and even the UN Commission on Human Rights in South Sudan, have suggested or outright called for the AU to unilaterally establish the HCSS and have pointed to both the AU’s Transitional Justice Policy and its Peace and Security Council mandate as allowing for it to be done.³³

³⁰ “Human Rights Council Holds Interactive Dialogue with the Commission on Human Rights in South Sudan: The Peace Agreement Had Stipulated the Need for the Establishment of a Hybrid Court for South Sudan Straight Away by the Government,” *African Press Organisation. Database of Press Releases Related to Africa*, March 14, 2018, 2013642942, Social Science Premium Collection, <https://login.proxy.libraries.rutgers.edu/login?url=?url=https://www.proquest.com/docview/2013642942?accountid=13626>.

³¹ “Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan,” 19-20.

³² “Ending the Era of Injustice.”

³³ Mayen, “Activists Petition African Union to Form Hybrid Court in South Sudan”; “Q&A: Justice for War Crimes in South Sudan,” Human Rights Watch, August 24, 2020, <https://www.hrw.org/news/2020/08/24/qa-justice-war-crimes-south-sudan>; “Human Rights Council Holds Interactive Dialogue with the Commission on Human Rights in South Sudan: The Peace Agreement Had Stipulated the Need for the Establishment of a Hybrid Court for South Sudan Straight Away by the Government.”

Having the AU establish the HCSS unilaterally carries certain advantages, many of which stem from the very nature of the Hybrid Court mechanism itself. Firstly, unilateral action allows for the HCSS to be established without the stalling and obstruction of South Sudan's government. This ability to establish the court immediately is seen as an overwhelmingly positive step for both the success of the 2018 peace deal and for peace and stability in South Sudan.³⁴ For example, local activists recently penned a letter to the AU, writing, "Delays in establishing the hybrid court for South Sudan threatens the future of the peace deal and protection of civilians and prevent survivors and families of victims from seeking justice for themselves and their loved ones."³⁵

Furthermore, another benefit to the unilateral establishment of the HCSS is that the very nature of a mixed regional-national judicial framework helps build domestic institutional capacity in a country that desperately needs it for long-term stability and peace.³⁶ For example, Human Rights Watch notes that, "Fair, credible trials by the court can also offer important lessons for the domestic courts in South Sudan on holding those responsible for atrocity crimes to account."³⁷ Similarly, another benefit to the collaboration between national and AU legal mechanisms is that it, "can ensure that the national judiciary addresses continuous abuses occurring outside of the Hybrid Court's original temporal jurisdiction," which can, "leave a permanent legacy in South Sudan."³⁸ Moreover, the mixed regional and national composition of the HCSS is beneficial as well, as "While the South Sudan judges bring deep understanding of the specific cultural and historical context, the other non-national African judges bring a general understanding of the African context and valuable experience."³⁹ This, in turn, "guarantees local ownership, both by South Sudan specifically and Africa in general; ensures contextual sensitivity; and guarantees impartiality, fairness, efficiency and professionalism in accordance with established principles of international criminal justice."⁴⁰ Ultimately, the HCSS would help ensure greater national acceptance of the proceedings and verdicts, which is critical in a divided and distrustful society, such as South Sudan.⁴¹

Finally, the unilateral establishment of the HCSS does not mean South Sudan cannot eventually cooperate with the AU. Arguably, the successful implementation and operation of the HCSS by the AU could produce greater regional and domestic pressure on the government to cooperate.⁴² Essentially, this action would force the government's hand one way or another, and the option to continue obstructing and delaying the establishment of the HCSS would no longer be available.

While there are clearly many benefits to the AU establishing the HCSS via unilateral action, there are also potential drawbacks. One of the main disadvantages is that there obviously would initially be no cooperation between the AU and South Sudan. Many observers believe that "cooperation and participation in the court by South Sudanese authorities is necessary to its effective

³⁴ Mayen, "Activists Petition African Union to Form Hybrid Court in South Sudan"; "Q&A."

³⁵ Mayen, "Activists Petition African Union to Form Hybrid Court in South Sudan."

³⁶ "South Sudan: One Year Later, Injustice Prevails," Human Rights Watch, December 10, 2014, <https://www.hrw.org/news/2014/12/10/south-sudan-one-year-later-injustice-prevails>.

³⁷ "Q&A."

³⁸ Joseph Geng Akech, "Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation," *International Journal of Transitional Justice*, August 13, 2020, 5, <https://doi.org/10.1093/ijtj/ijaa015>.

³⁹ Owiso, "The Proposed Hybrid Court for South Sudan."

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² "Q&A."

functioning,” as, “Their cooperation would undoubtedly contribute to the court’s operations.”⁴³ For example, “Conducting investigations and securing the surrender of accused by the court are likely to be far more complex and difficult without their cooperation.”⁴⁴ This lack of internal support and cooperation could lead to a “risky” and “ineffective” situation where, “While it may succeed in financing, staffing, setting up, and indicting the suspects, arresting and appearance for trials may not be possible, unless the suspects willingly walk to the HCSS.”⁴⁵

This challenge could exacerbate another challenge inherent in hybrid mechanisms: the funding and budgeting of such mechanisms. Hybrid mechanisms have historically been massively expensive and resource-intensive, with many prior courts exceeding \$200 million in costs.⁴⁶ Finding and maintaining a sustainable funding stream is one of the main issues in hybrid mechanisms and often requires intense fundraising efforts from the international community.⁴⁷ Because of the unilateral action and the lack of cooperation from South Sudan, it is likely to push costs even higher as greater resources, including experts and investigators, will need to be recruited and budgeted for, as the AU and HCSS would not have immediate access to the same on-the-ground resources had South Sudan entered into a bilateral agreement. This, ultimately, could work to hinder the timeliness and overall effectiveness in seeking justice and peace in the country.

Finally, just as unilateral action could prompt South Sudan to finally collaborate, it could also lead authorities to further obstruct the investigations and criminal proceedings. Although South Sudan’s leadership has expressed a willingness to bring justice, it is clear that their current and past actions do not support that.⁴⁸ The country’s leadership has a long history of a lack of judicial independence, intimidation, impunity, and unaccountability. So, questions over whether impartial, fair, and credible trials and justice can be instituted on the part of South Sudan become even more questionable when the country has not approved the HCSS mechanism and is uncooperative.⁴⁹ Moreover, before prosecutions even begin, there is a great risk that the government will continue to obstruct investigations on the ground and work to undermine them by claiming that the AU and HCSS staff do not have authority from the government to perform their duties. Ultimately, not only will all the funding and resources in the world not be able to overcome this obstruction, but it could further strain relations between the government and the AU and risk completely undermining of the transitional justice process outlined in the 2018 RARCSS.

Alternative 3: Prosecute the crimes entirely within a domestic legal framework

The third alternative option to the current policy is to institute judicial mechanism and prosecute criminals entirely within the framework of the South Sudanese judicial system, with support/pressure from UN bodies, including UNMISS and the HRC, and the African Union. This mechanism would entail the most serious crimes and abuses, along with high-ranking officials, being tried in the formal national statutory courts; Lower-level offenders and crimes, on the other hand, would be prosecuted in local customary courts, which are well-respected, seen as legitimate, and are

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Nhial Tiitmamer, “Transitional Justice for Stabilizing South Sudan: Lessons from Global and Local Contexts,” Policy Brief (Juba, South Sudan: The Sudd Institute, July 21, 2016), 14.

⁴⁶ “Ending the Era of Injustice.”

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

prevalent in the more rural parts of the country.⁵⁰ This division of labor would act as a legitimate method to both compliment and take some of the capacity burden off the national statutory courts, with the overall goal being to rebuild and strengthen the entire domestic judicial framework to ensure lasting stability. Ultimately, the idea behind this alternative is that South Sudan's leaders do not appear keen on any international (ICC) or hybrid (HCSS) mechanism, which can be deduced by their ongoing delays and obstruction in establishing it, as per the 2018 RARCSS. This alternative would be the most domestic-based of the three options; therefore, it could potentially end the impasse, as South Sudan's leaders would be effectively in control of the transitional justice process, rather than external actors who would largely be supporting the capacity of the process and providing any necessary resources.

Although this alternative may seem like an entirely less-than-ideal option, it does actually have a few benefits in both the short term and long term. One of the main benefits, as noted above, is that allowing the South Sudanese to take ownership over the transitional justice process that was stipulated in the peace deal could finally lead to its long-delayed start. Giving the government the ability to set its own ground rules and scope is not ideal, given South Sudan's culture of impunity. Still, it would likely help spur movement on the justice front, especially if the AU and UN do not relent on pressuring the regime (e.g., embargoes and targeted sanctions).

Another benefit of this alternative is that it helps South Sudan develop the capacity for a legitimate domestic institutional legal framework that helps set the country on a path to long-term stability. For example, the Security Council can re-direct UNMISS's mandate back to capacity building and direct UNMISS and NGOs dealing with law to train South Sudanese lawyers, judges, paralegals, and other legal figures in prosecuting war crimes and other human rights abuses. It can also continue to mandate UNMISS document and report cases of crimes to the SC and to the AU. Moreover, it can mandate UNMISS act as an oversight on the judicial process. Furthermore, this option could not only strengthen the relationships and coordination between local and national courts, but it could also help promote greater social cohesion in the divided country. As Human Rights Watch notes, "Customary courts in South Sudan have played an important role in promoting truth and justice and fostering peace among communities in rural areas and towns, and may be able to complement criminal prosecutions, truth telling, and reparations in promoting social healing in the country."⁵¹ As noted earlier, in this option, local customary courts would act to both compliment and take off some of the capacity burden of the national statutory courts, with the goal of ultimately strengthening both systems for the long-term.

Finally, grounding the justice process within a domestic context that relies heavily on localized courts could have a positive impact on the legitimacy of the decisions by the South Sudanese people. Just as it follows that trials decided by a jury of one's peers is seen as integral in legitimating trials in developed nations, like the US, so too can it be argued that trials with mostly local actors presiding will have the same effect. This is arguably especially the case in South Sudan, where customary authorities are an integral part of the "social fabric" of the country.⁵² This is because, "They are present in areas of the country from which statutory justice institutions are absent; they also enjoy a much higher level of trust and confidence with the public than any statutory institution," and they also have "extensive ground knowledge about the facts and

⁵⁰ "Q&A."

⁵¹ Ibid.

⁵² "Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan," 19.

circumstances of conflict, including the nature and extent of damage done, materially or psychologically, which could provide a rich source of data for truth-seeking efforts.”⁵³ In this way, a domestic framework may provide greater legitimacy and acceptance of the verdicts.

Nevertheless, this alternative also has major flaws. One of the biggest issues with this alternative is that South Sudan’s judicial system is extremely weak, and its institutions are poor and corrupted. This is highlighted throughout a report by the National Defense University, which notes that, “South Sudan has had a rule of law problem since its birth... This has been characterized by personalization of power, weak institutions including the judiciary which is subservient to the executive, a culture of violence, a lack of trust in institutions, and a pervasive military influence on public life, including on the administration of justice and resolution of disputes.”⁵⁴ Given that many of Sudan’s leaders have been in their positions since even before the civil war broke out, this reality could seriously undermine any attempts at transitional justice within a domestic judicial mechanism.

Moreover, even with UN and AU resources and support, South Sudan’s legal system severely lacks capacity. For example, “the capacity limitations of the formal judiciary—insufficient number of judges, limited number of courts over a vast territory, and poor working conditions for judicial officers—restrict the reach of legal institutions” in the country.⁵⁵ Furthermore, the civil war itself has decimated many aspects of the national criminal justice system and many civil rights protections have been rolled back. Among these is the “lack of fair trial and due process rights, arbitrary arrests and detentions, and lack of access to legal counsel and legal aid, deplorable detention conditions, and the application of the death penalty,” which has led to a situation where, “traditional customary courts have been left to address cases of serious crimes even though they... do not meet international fair trial and due process standards.”⁵⁶ While this capacity shortage can theoretically be addressed by appointing foreign judges to sit on these national or local courts, as has been seen in other contexts, such situations also succumb to and are not addressed by many of the same challenges highlighted throughout, including lack of independence and local legitimacy.⁵⁷ All of these capacity challenges pose serious implications not just for South Sudan’s ability to hold fair and credible trials, but also whether the public accepts the outcomes as legitimate.

Another major risk with this alternative is the high probability of South Sudan’s leaders interfering with and manipulating the process. This problem goes beyond the fact that many of South Sudan’s highest-ranking officials have been accused of international crimes. For example, there are fears that, “government actors will instrumentalize justice support to eliminate political and military rivals.”⁵⁸ South Sudan’s judicial system also has a long and troubled history of interference from the highest levels of the military and the government, including the President himself.⁵⁹ To this day, President Salva Kiir can “confirm or reject judgements by the military courts, effectively giving him veto powers over what is supposed to be an independent judicial process,” while, “On at least

⁵³ Ibid., 19–20.

⁵⁴ National Defense University. Africa Center for Strategic Studies, *Envisioning a Stable South Sudan*, 48.

⁵⁵ Ibid.

⁵⁶ “Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan,” 12.

⁵⁷ For a more thorough analysis on the use and challenges of the use of foreign judges on domestic courts, see Rosalind Dixon and Vicki Jackson, “Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts,” *Columbia Journal of Transnational Law* 57 (2019): 283–356.

⁵⁸ Labuda, “With or Against the State? Reconciling the Protection of Civilians and Host-State Support in UN Peacekeeping,” 19.

⁵⁹ “Q&A.”

two occasions, President Kiir has also dismissed judges of civilian courts, violating the laws of the country.”⁶⁰ Lastly, and most concerning, South Sudanese authorities have often either covered-up or denied international crimes and human rights violations; even when investigations are permitted, they almost never lead to even a trial.⁶¹

Finally, although the domestic system could be a source of legitimacy, how it is ultimately operated could seriously undermine the public’s trust in the system, which could further exacerbate conflict and ethnic tensions. Given the long-standing culture of impunity and intimidation of everyone, from judges and prosecutors to citizens and victims, “There is also the question of whether...sufficient arrangements can be made for the protection of victims and witnesses who choose to appear before the regular courts,” as, “In order for transitional justice mechanisms to have the widest reach and engender citizens’ confidence, an environment of trust and security needs to be established, and effective protection provided, to enable victims and witnesses to participate in trials without risk to themselves.”⁶² Moreover, given that both sides of the conflict, which was rooted in ethnic tensions, have been implicated in crimes, any inkling that the process is illegitimate, corrupted, or targeting only one side, via indictments and witness intimidation, it is likely that those same ethnic tensions can spill over once again and lead the country down another path to renewed conflict.

⁶⁰ “South Sudan’s Executive Frustrating Justice for Victims of on-Going Conflict,” Amnesty International, October 7, 2019, <https://www.amnesty.org/en/latest/news/2019/10/south-sudan-crippled-justice-system-and-blanket-amnesties-fuelling-impunity-for-war-crimes/>.

⁶¹ Ibid.

⁶² National Defense University. Africa Center for Strategic Studies, *Envisioning a Stable South Sudan*, 12.

Recommendations

Presented with these three alternatives to the current policy of a bilateral establishment of the HCSS between the African Union and the government of South Sudan, the recommended option for a policy change would be Alternative 2, which is for the AU to unilaterally establish the HCSS. Although it does have its own share of flaws, when looking across different metrics, including timeliness, support, legitimacy, capacity building, potential for future cooperation, and results, it is clear that this option is the best overall for as to how the AU and the UN should proceed. Moreover, it allows for more flexibility regarding the other options presented. It is not in either extreme and it allows the policymaker the ability to adjust the policy again should this option fail to produce the desired outcomes.

Unilateral establishment of the HCSS by the AU would most likely allow for the timeliest creation of the long-delayed body. Since this option is the most similar to the current policy, including the fact that the AU's involvement is still the centerpiece, much of the originally planned framework, mechanisms, and resources agreed to in the 2018 RARCSS can simply be implemented on a unilateral basis. When comparing it to the other options, it is clear that unilateral action would likely produce the desired outcome in the shortest amount of time. For example, trying to get the government to ask for ICC involvement appears nearly impossible given internal opposition to the body, while having the UN Security Council refer the matter is likely to see major pushback from council members, like China.⁶³ Moreover, given South Sudan's history of obstruction, impunity, and lack of capacity, it is likely that it will either take a considerable amount of time to get legitimate and standardized legal mechanisms in place or the government will work to continue delaying the justice process given its implications in many international crimes.

A major factor in each of the options and something that could affect their timeliness and implementation is the level of public and external support; again, Alternative 2 appears to offer the best chance of the widest acceptance by various parties. For example, the unilateral establishment of the HCSS is supported by South Sudanese activists, regional experts, independent UN bodies, and arguably by the AU's policies themselves.⁶⁴ On the other hand, as previously mentioned, there is intense internal opposition from South Sudan's government to ICC involvement, while the other option for its involvement, Security Council referral, is also likely a dead-end. Moreover, there is great solidarity amongst a wide swath of African states and the AU itself in their stalwart opposition to the ICC, which poses serious problems for support and acceptance in the region, should the ICC get involved.⁶⁵ As for Alternative 3, there is skepticism and low levels of trust in the South Sudanese authorities to credibly and fairly pursue justice, while citizens have a long history of both distrust in and fear of state institutions, particularly the judicial system.⁶⁶ This reality is only exacerbated by the fact that citizens are aware that their leaders in government, who would be responsible for this

⁶³ "Human Rights Council Holds Interactive Dialogue with the Commission on Human Rights in South Sudan: The Peace Agreement Had Stipulated the Need for the Establishment of a Hybrid Court for South Sudan Straight Away by the Government."

⁶⁴ Mayen, "Activists Petition African Union to Form Hybrid Court in South Sudan"; "Q&A"; "Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan," 21.

⁶⁵ Ani, "Implications of the African Union's Stance on Immunity for Leaders on Conflict Resolution in Africa," 59; "Ending the Era of Injustice."

⁶⁶ "Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan," 19–20.

justice mechanism, are also clearly implicated in some of the worst atrocities and crimes of the civil war.

These questions of public and external support regarding these alternatives also lead to the question of which alternative is likely to be and be seen as the most legitimate method of attaining justice in this case. As noted earlier, an ICC proceeding may garner some legitimacy from the citizens, but it likely would not see it from South Sudan's neighbors, government, and even some citizens who may want more localized forms of justice.⁶⁷ On the other hand, a strictly domestic justice mechanism may be seen as most legitimate by the government but would be seen as largely illegitimate given citizens' deep distrust of the government and state institutions, especially after so many years of war and impunity.⁶⁸ Therefore, while not a perfect alternative, Alternative 2's HCSS mechanism would largely be seen as legitimate by the most key players in this case, including the country's neighbors, the international community, and many of the citizens and local civil society groups, who have long supported such a mechanism. Even the government could fall in line, given that it is the most similar option to the one they had already agreed to in the 2018 peace deal.

While support and legitimacy are critical in their own regards, the issue of capacity building, particularly in South Sudan, is of utmost importance; this makes Alternative 2 the best option, as well. Given that South Sudan has struggled mightily to establish permanent and strong civil institutions ever since it gained independence, and made worse by the war, it is critical that capacity building be a top priority when selecting an alternative policy option. This is, after all, aside from consolidating peace and security, still one of the top priorities of UNMISS.⁶⁹ Therefore, when considering Alternative 1, it is clear that taking the transitional justice mechanism entirely out of the realm of South Sudan and even its neighbors and into an international forum means that state capacity building would be severely restricted. Meanwhile, while Alternative 3 would involve a largely domestic legal framework and would theoretically provide the greatest potential for capacity building, there are serious concerns about this as well. For example, would the country have the capacity even to start such serious war crimes proceedings and how credible and fair would such trials be, given the country's history of judicial manipulation, interference, intimidation, and impunity? Therefore, while Alternative 3 provides the most capacity building potential in theory, in practice, it also provides the most risk and potential for abuse and poor capacity building. With that in mind, Alternative 2 is the safest choice for capacity building, as a hybrid court mechanism would provide some much-needed domestic judicial capacity building, while also providing direct oversight, expertise, and assistance from the regional partners involved in such a mechanism.

Beyond capacity building, to ensure the long-term positive development trajectory and growth of the country, the potential for future cooperation, both in the transitional justice mechanisms and more broadly, Alternative 2 also provides the most promise and least risk. The successful implementation and operation of the HCSS, via Alternative 2, could produce greater regional and domestic pressure on the government to cooperate with both the AU and international community.⁷⁰ This pressure could, in the short term, cause the government to finally cooperate with the AU on the HCSS and maximize the effectiveness of the transitional justice process and domestic capacity building of the country. In the long term, it could secure stable cooperation and

⁶⁷ "Ending the Era of Injustice."

⁶⁸ "Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan," 19–20.

⁶⁹ "Background," UNMISS, October 16, 2015, <https://unmiss.unmissions.org/background>.

⁷⁰ "Q&A."

partnerships with South Sudan's neighbors, regional bodies like the AU, and the international community beyond the justice and peace process. This long-term cooperation is critical on issues important to South Sudan's growth and development, including trade and foreign investment. On the other hand, Alternative 1 would severely limit regional and international cooperation because it would be in the hands of the ICC, with regional and national actors playing a limited role, while Alternative 3 would produce similar limitations because of the mostly domestic nature of such an alternative. South Sudan needs both external and internal support for it to have a chance at success during and after the peace process, and Alternative 2 clearly provides a good balance of national, regional, and international support.

Ultimately, one of the main reasons an alternative policy is required stems from the need to finally achieve tangible results, in the realms of justice and accountability, in a country where those outcomes have long been out of reach. Of the three alternatives to the current policy, Alternative 2 provides both the best path to success and the path of least resistance. This latter idea is especially crucial to the equation, given how this paper has shown the levels of resistance, from obstruction to deliberate delays, that is at the heart of the current policy's failures and would likely be just as prevalent in Alternatives 1 and 3. Both 1 and 3, as has been noted, do have the potential for success in the end, but that path to success is much narrower and risk-ridden than that of Alternative 2. Although no option is perfect, the unilateral establishment of the HCSS via Alternative 2 is the least extreme and most sensible. Moreover, it is the alternative that already garners the most support on the ground and in the region; and it would also be most likely to produce the needed results in the areas of justice and accountability that is necessary for South Sudan to take the next steps in the still-fragile peace process.

Finally, continuing along those same lines, because Alternative 2 is the most similar to the current policy and is not on either extreme, it allows for greater flexibility to adjust the policy option further in the future. The need for flexibility and adaptability would not come into play at the beginning of the implementation phase of either of the options, but it is important to consider the possible flexibility for each option should such a situation for change arise. In this case, depending on the outcome of Alternative 2, this could include moving more toward Alternatives 1 or 3, as both options would still be available. I would argue that Alternatives 1 and 3 do not offer the same flexibility because attempting to shift or adjust to other options after beginning with either 1 or 3 would be extremely difficult for a number of reasons. Because Alternatives 1 and 3 are both more extreme than Alternative 2 and the current policy, the risks of alienating national and international partners and producing greater distrust, among other things, would make later policy changes much more tedious than simply starting with a more moderate position, like Alternative 2.

As for implementation, the goal would be for this new policy to be implemented as soon as possible, given that the current policy has seen nothing but delays and obstruction. Moreover, South Sudan's citizens are calling for immediate justice and it is an important step in the long-term peace process.⁷¹ By acting unilaterally the AU would no longer have to wait for its partners in South Sudan to get the ball rolling, as they would be able to establish the HCSS as soon as possible.⁷² The framework for the HCSS has already been in the works ever since the failed peace deals that preceded the 2018 RARCSS and many more of its details were finalized the 2018 deal, so the planning stages should already well underway and the biggest hurdles would be bringing together all

⁷¹ Mayen, "Activists Petition African Union to Form Hybrid Court in South Sudan."

⁷² "Q&A."

of the legal figures, including judges and prosecutors; securing stable funding with the help of regional and international partners, like the UN and civil society groups; and establishing fact-finding and evidence gathering missions, including supporting witness engagement and testimony. Once this is done, the process can move forward, with or without the cooperation of South Sudan's government.

While the Africa Union would clearly take on the lead responsibility in establishing and running the HCSS, as per the 2018 peace deal, the UN would still play a supportive role in two main ways. First, UNMISS would continue to maintain its presence and mandate in South Sudan. Its mandate would also not need much adjustment from the Security Council, given that its current objective, "to consolidate peace and security, and help establish conditions for development in the Republic of South Sudan, with a view to strengthening the capacity of the Government of South Sudan to govern effectively and democratically and establish good relations with its neighbours," is perfectly in line with the goals of both the RARCSS and the HCSS.⁷³ The RARCSS covers all of that objective, but the HCSS is undoubtedly a necessary prerequisite for seeing both the RARCSS and UNMISS's objective achieving success. The only recommended adjustment to the mandate that would be including supporting the transitional justice process via the HCSS and having civilian UNMISS staff support the AU's evidence, witness, and fact-finding mission.

The second main role for the UN would be to provide more resources and expertise to both the AU and the HCSS. In terms of resources, the UN can help establish connections between the AU and civil society groups and outside donors, given both the potential capacity and funding constraints on the court. Helping to find funders to support the HCSS is especially important given the high costs of such mechanisms and the limited cooperation of the targeted country, which is severely poor and under-developed in its own right. As for expertise, the UN could provide more legal experts on human rights law and war crimes, given the UN's experience dealing with such issues in other UN missions and having bodies, such as the Human Rights Council, dealing with such abuses constantly. On a similar note, given the relatively rare nature of hybrid court mechanisms, the UN could help the AU craft the legal proceedings and prosecutions in accordance with established international laws and regulations. This would also work to give the AU and the HCSS much more legitimacy from the various actors involved, which is critical in a country whose own institutions severely lack it, like South Sudan. Ultimately, the UN would not only establish much-needed connections between international, regional, and national players, but it would also provide equally necessary resources and expertise, through its various bodies and UNMISS, to ensure the successful implementation and functioning of the HCSS.

In conclusion, the current policy of a bilateral establishment of the HCSS is simply not working due to the sheer unwillingness of South Sudan to move the process forward. When considering all of the positives and negatives of the three alternatives across a range of metrics, including, but not limited to, timeliness, support, legitimacy, capacity building, potential for future cooperation, and results, the recommended option for a policy change would be Alternative 2, which is for the AU to unilaterally establish the HCSS. While this option has its own share of flaws and potential risks, it also has the greatest advantages and the likeliest potential for immediate and long-term success. With a solid framework, support from key players, including local activists and

⁷³ "Background."

regional partners, and resources and expertise from the international community (e.g., the UN), it is clear that this option is the best overall for how the AU and the UN should proceed.

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