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Human rights situations that require the Council's attention**Transitional justice and accountability: a roadmap for sustainable peace in South Sudan****Conference room paper of the Commission on Human Rights in South Sudan***Summary*

Chapter V of the Revitalised Agreement on Resolution of the Conflict in South Sudan provides a pathway to building sustainable peace based on the recognition that it can only be achieved through accountability for serious international crimes, truth recovery about the past violations and the underlying structural causes of political violence, as well as the restoration of dignity to South Sudanese citizens. Chapter V envisages a holistic set of complementary mechanisms for this purpose, namely, the Hybrid Court for South Sudan, the Commission on Truth, Reconciliation, and Healing, and the Compensation and Reparation Authority. These measures were designed by the African Union as appropriate to an African and South Sudanese context.

Yet, more than two years since the signing of the Revitalised Agreement on Resolution of the Conflict in South Sudan, there has been no concrete progress in realising any accountability, national healing, or reconciliation in South Sudan. Persistent political contestation between parties to the peace agreement has resulted in significant delays in implementation of key measures.

Instead, the failure to address underlying causes of the 2013 conflict has fuelled the political competition for South Sudan's resources and corruption between political elites driving ethnic divisions and violence, and deepening impunity in the country. Political violence is spiralling out of control at the inter-communal level but driven by national actors who arm ethnic militias and paramilitary groups with military grade weapons using the ostensible cover of cattle-raiding, which in turn leads to reprisals and revenge killings – all under the cover and control of parties to the conflict in South Sudan.

Conflict in South Sudan should no longer be an option if millions of South Sudanese are to achieve their dream of freedom and a life of dignity. It is only the timely implementation of an inclusive and holistic transitional justice process envisioned in Chapter V that can achieve this.

Contents

	<i>Page</i>
I. Introduction.....	3
II. Mandate	6
III. Lack of political will and a conducive environment for the initiation of transitional justice	7
IV. The impact of COVID-19 on the implementation of transitional justice measures	15
V. Key considerations in implementation of Chapter V of the Revitalised Peace Agreement	16
VI. Recommendations.....	25
 Annexes	
I. Transitional justice workshop report.....	27

I. Introduction

1. Since June 2011, South Sudan's brief history as a newly independent State has been characterised by persistent inter-ethnic conflict fuelled by political contestation for control over the country's oil and mineral resources; factionalism, nepotism, and patronage in government appointments; weak governance institutions; and impunity for grave human rights violations and crimes committed since the pre-independence civil war. In December 2013, internal strife within the ruling Sudan People's Liberation Movement (SPLM) party triggered renewed conflict, which began with fighting between rebel factions and the State's military forces in the capital city Juba, and steadily spiralled into protracted, ethnic-based armed conflict across the country. The conflict has resulted in mass atrocities and gross human rights violations committed against South Sudanese civilians, both by the State and its allies as well as by opposition forces, including mass killings, enforced disappearances and abductions, rape, sexual slavery, torture, forced displacements, and has triggered a devastating humanitarian crisis.

2. In response to the conflict, the African Union Peace and Security Council mandated a Commission of Inquiry on South Sudan (AUCISS), "to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan" and propose measures to "ensure accountability, reconciliation and healing among all South Sudanese communities". The AUCISS established that the conflict merely unearthed deep divisions and persisting resentment within the South Sudanese society. It concluded that the prevailing situation necessitated the disclosure of truth, acknowledgement, justice, and accountability for past abuses and conflict-related violations, in order to achieve healing, reconciliation, and sustainable peace in South Sudan.¹

3. Drawing on extensive views from South Sudanese civilians, the AUCISS made recommendations for the establishment of an African-led, owned, and resourced legal mechanism, to be overseen by the African Union and to pursue accountability against individuals at the highest level and bearing greatest responsibility for the 2013 conflict-related war crimes and crimes against humanity; reforms within the civil and military justice system to support complementary national-level accountability processes; establishment of a Truth and Reconciliation Commission; creation of a national reparation fund and programme to provide both interim and comprehensive remedies to affected victims; enhanced and inclusive humanitarian assistance, including support to internally displaced persons (IDPs) and refugees to return to their homes; and strengthen state-building measures, including decentralisation and devolution of political power, equitable allocation of natural and financial resources, well balanced separation of powers between the executive, legislature, and judiciary, and comprehensive security sector reforms within the army and police.²

4. The findings of the AUCISS generated the impetus for the inclusion of transitional justice, national healing, and reconciliation measures in the mediation process between the warring parties – led by the Intergovernmental Authority on Development (IGAD) – which resulted in the drafting of Chapter V of the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) and the Revitalised Agreement on Resolution of the Conflict in South Sudan in September 2018 (R-ARCSS).

5. Chapter V of the R-ARCSS provides a framework for addressing the legacy of conflict-related human rights and international humanitarian law violations in South Sudan.³ It acknowledges the importance of criminal accountability and the critical purpose it serves in curbing war crimes and limiting the proliferation of atrocity crimes. Recognising the limitations in the criminal justice system and the fact that the judicial system has been decimated by the civil war, however, Chapter V provides for complementary institutions to a Hybrid Court, including the establishment of a Commission on Truth, Reconciliation, and Healing (CTRH), and Compensation and Reparations Authority (CRA).

¹ African Union, Final Report of the African Union Commission of Inquiry on South Sudan, 15 October 2014.

² AUCISS, Final Report, Chapter V, Conclusion: Findings and Recommendations, at p. 275-304.

³ The 2018 R-ARCSS reflects the provisions of the 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), save for minor adjustments on the timelines set out for establishment of the three mechanisms.

6. Chapter V of the R-ARCSS outlines the mandate of the transitional justice mechanisms as follows:

- i. A *Commission for Truth, Reconciliation, and Healing (CTRH)* to investigate and establish an accurate and impartial record of human rights violations, breaches of the rule of law, and excessive abuses of power committed by State and non-State actors, and the circumstances and causes of the conflict in South Sudan between July 2005, when the Comprehensive Peace Agreement was signed between northern and southern Sudan, and 12 September 2018, when the R-ARCSS was signed. The CTRH is expected to identify perpetrators responsible for the violations, and propose measures to provide effective remedies, including reparation, to affected victims and to prevent recurrence of similar violations.⁴
- ii. A *Hybrid Court for South Sudan (HCSS)* to investigate and prosecute individuals responsible for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 to the end of the transitional period anticipated in the R-ARCSS. The HCSS's mandate will include atrocity crimes including genocide, crimes against humanity, and war crimes, as well as other crimes under the law of South Sudan.⁵
- iii. A *Compensation and Reparation Authority (CRA)* that will administer a fund to "provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods." The CRA will also receive applications from victims recorded by the CTRH and provide them with appropriate compensation and reparation.⁶

7. The R-ARCSS anticipates that the CTRH, HCSS, and CRA/fund will be implemented in a mutually reinforcing manner to "promote the common objective of facilitating truth, reconciliation and healing, [and] compensation and reparation for gross human rights violations in South Sudan."⁷

8. Furthermore, national healing and reconciliation processes, humanitarian and reconstruction efforts, and reform measures expected to be initiated pursuant to the R-ARCSS provide additional avenues for acknowledgement of victims as rights-holders, redress for harms they have suffered, and prevention of future violations.

9. Thus, transitional justice mechanisms in Chapter V of the peace agreement are an integral part of a package of measures intended to achieve political, security, and economic reforms for delivering societal transformation, and addressing the structural drivers of a conflict which continues to manifest in ethnic dimensions and patterns of extreme violence, including systematic sexual attacks on women on a wide scale. In a context where exclusionary politics and lack of political and economic accountability have combined with impunity for past and on-going violations, the grievances remain unanswered, fuelling the next cycles of grievance and greed-related violence. In contexts such as South Sudan, transitional justice measures serve not only as redress for past violations but as critical interventions for preventing the next mass atrocity. In this broad conception, transitional justice is thus an indispensable pillar for the recovery of South Sudan from conflict and its transformation into a stable society.

Current Situation in South Sudan

10. More than two years since the signing of the R-ARCSS, there has been no concrete progress toward the realisation of transitional justice, accountability, national healing, and reconciliation in South Sudan. Persistent political contestation between parties to the peace agreement has resulted in significant delays in implementation of key measures, including reconstitution of the Transitional National Legislative Assembly, which is obligated to enact the necessary legislation for establishment of the HCSS, CTRH, and CRA.

11. Consequently, the failure to address underlying causes of the 2013 conflict, including ethnic-based divisions and impunity for past human rights violations and crimes, has created a conducive environment for renewed violence. The Commission has documented a spiralling pattern of systematic, ethnic-based communal violence perpetrated through armed

⁴ See R-ARCSS, Article 5.2.

⁵ See R-ARCSS, Article 5.3.

⁶ See R-ARCSS, Article 5.4.

⁷ R-ARCSS, Article 5.1.3.

cattle raiding, clashes, and revenge killings, particularly in conflict intensive areas⁸ such as in the Western Bahr el Ghazal,⁹ Warrap, Lakes, Unity,¹⁰ and Jonglei States.¹¹ In Central Equatoria, there have been on-going clashes between members of the National Salvation Front (NAS) – one of the parties that rejected the R-ARCSS – and allied Government and opposition forces. The localised conflicts are fuelled by the struggle for political dominance along ethnic,¹² tribal and sub-clan lines;¹³ prolonged absence of State authority at the regional level; disregard for the rule of law; proliferation of light and heavy weaponry; and the State's failure to establish and encourage a shared national identity.¹⁴

12. Moreover, the Commission has established that the attacks merely presented as cattle raiding are in fact highly politicised and systematically orchestrated, often involving organised armed militia groups under the command and control of the main parties to the conflict, including the South Sudan People's Defence Forces (SSPDF) and members of armed opposition groups. The Commission received information that members of Government forces are arming community militias with weapons,¹⁵ including AK-47 assault rifles, rocket-propelled grenades, and PK machine guns, to carry out brutal attacks against neighbouring communities, often during periods of cattle migration.¹⁶ The prevailing situation confirms that the on-going violence in South Sudan is not only criminal but also politically steered by a constituency that is bound and motivated by the need to hold onto power, and to harness and access state resources.

13. The localised violence has been perpetrated through gruesome killings and physical assault and injuries aimed at terrorising targeted communities, and resulting in displacement of hundreds of thousands of South Sudanese from their homes. Sexual violence has also been used strategically by perpetrators engaged in systematic rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence, committed in a calculated manner to punish, terrorise, and destroy individuals and communities. This situation is exacerbated by weak laws and lack of protection of women's rights, lack of accountability against perpetrators, inadequate data collection and reporting on sexual and gender-based violence, proliferation of small arms and light weapons in contravention of the arms embargo and sanctions, and marginalisation of women in political institutions of governance and transitional justice discourses.

14. Perpetrators of these heinous crimes are emboldened by the belief that there will be no consequences. Furthermore, crimes go unreported because citizens have no faith that anything will ever be done, or worse [that] they will be attacked again for speaking out.

Impetus for Transitional Justice in South Sudan

15. The contribution of transitional justice to South Sudan's political transition is critical. Transitional justice is understood as a range of measures and processes aimed at addressing legacies of systematic and largescale violations of human rights and international humanitarian law in the aftermath of conflict. While transitional justice has convergence with other reconstruction, peacebuilding, and development interventions, it is most directly focused on the restoration, protection, and promotion of human rights for individuals and communities who have been affected during conflict. At its core, therefore, transitional justice is a transformative process contributing to the reconstruction of the fabric of society torn apart by conflict. For South Sudan, all the aims of transitional justice measures including

⁸ ERN 103303 – 103309; ERN 102974 – 102977; ERN 102978 – 102981; ERN 102982 – 102985. ERN 103249 – 103254.

⁹ ERN 102675 – 102679, para.6; Confidential Meeting, 22 September 2019. ERN 103249 – 103254. ERN 102632 – 102652, para. 7-11; Confidential Meeting, 22 September 2019. ERN 102632 – 102652, para. 7. *See also*, Confidential Source D120939 – D120948; D120949 – D120950.

¹⁰ ERN 103303 – 103309, para. 4; ERN 102974 – 102977, paras. 7-8; ERN 102978 – 102981, para. 5; ERN 102982 – 102985, paras. 8 and 10.

¹¹ ERN 103303 – 103309, para. 4. D121371 – D121371 is a list of persons killed by community violence in "Northern Liech State", 29 May 2019. ERN 102889 – 102893, para. 7. ERN 103234 – 103239, para. 12. ERN 102889 – 102893.

¹² D120955 – D120956.

¹³ *See, e.g.*, a plan to create Dinka domination in South Sudan that goes as far back as 2015. D120951 – D120954.

¹⁴ *See, e.g.*, a confidential letter that says it is the SSNSS arming groups. D120957 – D120960 and D120961 – D120969.

¹⁵ *See, e.g.*, D120984 – D120992 which states that SSPDF Division 3 was providing arms to civilians.

¹⁶ *See* statement by Commission on Human Rights in South Sudan, 20 February 2020, *available at* <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25582>

to provide an official recognition of victims and survivors as rights-holders; acknowledge and redress human rights and international humanitarian law violations and the resulting harm suffered by victims and survivors; and establish measures to prevent the recurrence of similar violations, have deep resonance in a context where intense competition for resources continues to fuel conflict and associated violations and crimes, and to drive rampant corruption and economic crimes.

16. The concept of transitional justice is rooted in established human rights norms, which obligate States to respect and ensure the protection and realisation of:

- *victims' right to truth* by establishing and promoting mechanisms and processes for clarification of circumstances surrounding human rights and humanitarian law violations, including their underlying causes in order to prevent their recurrence;
- *victims' right to justice* through effective, prompt, thorough, and impartial investigations into allegations of violations of human rights and humanitarian law, and prosecution and punishment of those found culpable;
- *victims' right to remedies* for violations of human rights and humanitarian law and their consequences, including access to adequate, prompt, and effective reparation; and
- *guarantees of non-repetition* of gross violations of human rights and serious violations of international humanitarian law.

17. South Sudan is therefore obligated to ensure victims' access to effective remedies for violations of human rights and international humanitarian law even when they are committed by non-State actors.

18. For more than four decades, countries including South Sudan transitioning from autocracy and conflict have adopted various transitional justice mechanisms to pursue victims' rights to truth, justice, reparation, and guarantees of non-recurrence of human rights and international humanitarian law violations. These include, inter alia, truth commissions, civil and criminal judicial accountability processes, court-based and administrative reparation programmes, and constitutional, legal, and institutional reforms.

19. Transitional justice, however, does not merely involve the establishment of institutions and programmes. The process of designing and implementing such measures is also essential to the effective realisation of transitional justice goals. Experiences in several contexts demonstrate that transitional justice measures which are deliberately designed and implemented to restore and uphold human rights, including non-discrimination, equality, and due process, can significantly contribute to the cultivation of shared values, social cohesion, healing, and reconciliation; respect for the rule of law; restoration of civic trust and confidence in State institutions; and sustainable human development. Conversely, if mismanaged, transitional justice measures could deepen inequalities, exacerbate tensions in divided societies, and trigger renewed cycles of conflict.

20. Transitional justice measures are, therefore, not an end in themselves, but rather provide a meaningful opportunity to initiate and promote long-term social, political, and economic transformation undergirded by respect for human rights in the aftermath of breakdown in societies resulting from conflict or repression. To that extent, transitional justice, security, development, and reconciliation measures ought to be conceptualised and implemented in an integrated and mutually reinforcing manner, in order to achieve the ultimate goal of sustainable peace.

II. Mandate

21. In its resolution 31/20, the Human Rights Council established the Commission on Human Rights in South Sudan for a period of one year. The Commission submitted its first report to the Council at its thirty-fourth session (A/HRC/34/63).

22. In its resolution 34/25, the Human Rights Council extended the mandate of the Commission for another year, and requested it to continue to monitor and report on the situation of human rights in South Sudan, to make recommendations to prevent further deterioration of the situation, and to report and provide guidance on transitional justice, including reconciliation.

23. The Human Rights Council also requested the Commission to determine and report the facts and circumstances of, to collect and preserve evidence of, and to clarify responsibility for alleged gross violations and abuses of human rights and related crimes, including sexual and gender-based violence and ethnic violence, with a view to ending impunity and providing accountability. The Council further requested the Commission to make such information available to all transitional justice mechanisms, including those to be established pursuant to Chapter V of the Agreement on the Resolution of the Conflict in South Sudan, including the Hybrid Court for South Sudan, to be established in cooperation with the African Union.¹⁷

24. In its resolution 37/31, the Human Rights Council extended the mandate of the Commission for an additional year, and again in its resolution 40/19. The current members of the Commission, appointed by the President of the Council, are Yasmin Sooka (Chair), Andrew Clapham, and Barney Afako.

25. The Commission extends its gratitude to the Government of South Sudan for facilitating its missions. It also appreciates the assistance and contributions of the African Union, the United Nations Mission in South Sudan (UNMISS), United Nations agencies, civil society organisations, and experts.

III. Lack of political will and a conducive environment for the initiation of transitional justice

26. Unresolved political contestation between the parties to the R-ARCSS has resulted in undue delays in the establishment of the CTRH, HCSS, and CRA, thereby perpetuating impunity for gross human rights violations and serious violations of international humanitarian law committed in the context of conflict in South Sudan.

27. The R-ARCSS required that the R-TGoNU be formed within eight months following its adoption. The R-TGoNU would then establish the CTRH, HCSS, and the CRA within six months following its formation. However, failure by the parties to the R-ARCSS to reach consensus on the number and boundaries of regional states, and delays in the implementation of the unification of the necessary unified forces, led to the postponement of the formation of the R-TGoNU for a period of 9 months. The Incumbent-TGoNU, on its part, insisted that it could not move forward with any of the R-ARCSS Transitional Period obligations before the actual formation of the Revitalised-TGoNU.

28. The R-TGoNU Executive was eventually constituted in February 2020, following the swearing into office of the First Vice-President and four Vice-Presidents, and appointment of Ministers and Deputy Ministers in March 2020. This followed an agreement by the parties to the R-ARCSS to create internal boundaries within 10 states and three Administrative Areas, and to carry over implementation of the pre-transitional period security arrangements into the Transitional Period. February 2020, therefore, marked the commencement of the Transitional Period of the peace agreement.

29. Under the revised Transitional Period, the R-TGoNU was expected to enact legislation to establish the CTRH, HCSS, and CRA by May 2020. All three mechanisms were anticipated to be operational by August 2020. At the time of writing (September 2020), there has been no movement on the creation of these mechanisms. Moreover, the R-TGoNU has neither provided public updates on the status of drafting the required legislation, nor has it issued a formal statement on any challenges it may be experiencing.

30. Regrettably, further contestation between the parties to the R-ARCSS on sharing of responsibilities within the newly formed 10 states, three Administrative Areas, and local governments has resulted in a protracted political stalemate that has stalled reconstitution of the Transitional National Legislative Assembly, which is obligated to enact domestic legislation for the establishment of the HCSS, CTRH, and CRA. Furthermore, parties to the

¹⁷ In pursuance of its mandate, the Commission collects and preserves evidence that it stores in a database and that it catalogues by a unique evidence registration number (ERN). Reference is made to these numbers throughout the report so that States may use them when requesting to consult the evidence.

agreement maintain that the current Parliament lacks the legal authority to conduct Transitional Period legislative functions outlined in the R-ARCSS, including to enact legislation to create the HCSS, CTRH, and CRA.¹⁸

31. While the Government of South Sudan has publicly pledged to support the establishment of the CTRH, it has not committed the required resources to make it operational. A technical committee created in 2017 to support sensitisation activities and raise awareness about the CTRH conducted limited consultations across the country with minimal impact, leaving questions open about the timing, relevance, and credibility of the process. The Commission is of the view that all South Sudanese civilians should be able to participate freely in processes for establishing truth, understanding the causes of conflict, and promoting reconciliation and healing. If the country is still in conflict, and significant numbers of citizens remain displaced internally and abroad, the prevailing consensus is that this would be difficult to achieve, but should not prevent the establishment of these mechanisms, whose reach and activities can be extended incrementally during the implementation phase. Any preparations for the establishment of the CTRH, particularly consultations, should bear these realities in mind.¹⁹

32. Since 2017, the African Union-led negotiations with the Incumbent-TGoNU to set up the HCSS pursuant to the R-ARCSS have seemingly led to a deadlock. The AU sought the cooperation of the Government of South Sudan in operationalising the Hybrid Court, including to prepare the draft Statute and determine the location, funding, infrastructure, and appointment of personnel to the Court. However, the resulting Memorandum of Understanding between the Government of South Sudan and the AU and the Statute to create the Court are yet to be signed. The national-level legislation required to establish the Hybrid Court is also yet to be passed in parliament.

33. The establishment of the broadly constituted R-TGoNU is an opportunity for the African Union to renew this conversation with the new government. When they previously spoke to the Commission, certain sources within the Incumbent-TGoNU had intimated that the HCSS lacked support from some political elites within the Government who were wary of coming within the Court's jurisdiction.²⁰ Some officials have repeatedly insinuated that South Sudan would prefer to pursue a mediated peace, truth, and reconciliation process, rather than criminal accountability for conflict-related violations, which, they fear, would undermine the peace process.²¹ This position was reinforced by the public disclosure in April 2019 that the Government had entered into a multi-million dollar contract with a US lobbying firm, explicitly to "delay and ultimately block establishment of the hybrid court envisaged in the R-ARCISS." The contract was later amended.²²

34. The Government of South Sudan has thus far paid little to no attention to the CRA, due to its position that the CRA will have major financial implications. This could be connected to President Kiir's reservations about the CRA at the time of the signing of the ARCSS in August 2015; he argued that resources should instead be channelled towards "the reconstruction of infrastructure and rebuilding of livelihoods of communities in the States most affected by the conflict."²³ The Commission notes that while every citizen is entitled to benefit from development, it should not be a substitute for tailored reparations, which involve specific acknowledgement of the experiences of the recipients and are linked to accountability mechanisms.

35. While the on-going humanitarian crisis, delays in demilitarisation within civilian sites and the unification of armed forces, and renewed armed hostilities and internecine violence

¹⁸ Confidential Meetings, 8 and 11 June 2020.

¹⁹ See additional details provided in the annexed transitional justice workshop report (Annex I).

²⁰ Confidential Meeting, 2 June 2020. ERN D121400 – D121401; see also <https://af.reuters.com/article/topNews/idAFKCN1S60Q6-OZATP>.

²¹ Commission on Human Rights in South Sudan: Conference on Transitional Justice and Promotion of Peace in South Sudan, Addis Ababa, 17 December 2019.

²² See <https://efile.fara.gov/docs/6667-Exhibit-AB-20190418-2.pdf>; and <https://www.hrw.org/news/2019/04/30/south-sudans-cynical-bid-block-war-crimes-court>; and <https://www.voanews.com/archive/critics-slam-multimillion-dollar-deal-between-south-sudan-us-based-lobbying-firm>.

²³ The Reservations of the Government on the IGAD Plus Compromise Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015, available at <https://carleton.ca/africanstudies/wp-content/uploads/GRSS-reservations.pdf>.

create a challenging environment for the implementation of transitional justice in South Sudan, they are not a reason to avoid transitional justice; rather, they underscore why measures for accountability, reconciliation, and healing are necessary. The majority of the internally displaced persons and refugees are unable to return to their homes due to lack of essential services such as food, water, sanitation, shelter, as well as insecurity. Civilians continue to experience violations resulting from armed hostilities and inter-communal violence including killings, rape and other forms of sexual and gender-based violence, abductions, disappearances, destruction of property, and mass displacement.²⁴

36. The Government of South Sudan continues to deploy its national security apparatus to suppress dissent, debate, and inclusive participation on governance issues, including accountability and implementation of the peace process.²⁵ This situation is characterised by heightened state surveillance, clamp downs on radio stations and newspapers, fear and self-censorship, arbitrary arrests and detentions, and restrictions on citizens' exercise of their rights to information, expression, and association, mostly affecting civil society activists, journalists, human rights defenders, and opposition politicians. The outcome has been the entrenchment of a police state.

37. These violations are often carried out by the National Security Service (NSS), which uses extra-legal measures, including requiring civil society organisations to secure approvals before conducting activities as a means to frustrate and infiltrate their programmes, surveillance of social media and digital communications, and arbitrary arrests to create a chilling effect among targeted individuals who express critical or dissenting views against the Government.²⁶ As a consequence, victims are largely absent in public policy discussions, mainly due to justifiable fears of persecution if they speak publicly about their experiences.²⁷

38. To date, the Government has failed to establish programmes to create public awareness on Chapter V of the R-ARCSS and initiate a process of national reconciliation and healing, although these were prerequisites in the pre-transitional period implementation of the peace agreement. These processes would have been essential beginning efforts to reformulate the Government's relationship and engagement with victims and conflict-affected communities as rights-holders, and identify victims' priorities and concerns regarding their rights to truth, justice, and reparation. Victims and stakeholders have also raised concerns regarding the lack of inclusivity and broad participation of all stakeholders and conflict-affected communities in the on-going national dialogue process and consultations on the creation of the CTRH. If left unaddressed, these concerns have the potential to undermine the quality and credibility of these institutions, and, ultimately, the goals of achieving national reconciliation and healing.

39. More than two years since the signing of the R-ARCSS, the Government has failed to initiate an inclusive and participatory process of national healing and reconciliation. Such a process is essential, and would have begun setting the ground for transitional justice measures by identifying critical issues of concern, needs, and priorities of conflict-affected victims and communities.²⁸

Involvement of the African Union and other regional and international actors

40. The African Union has been afforded a critical role in the implementation of the R-ARCSS and the transitional justice framework therein. Notably, the AU is mandated to establish the Hybrid Court for South Sudan, appoint judges and prosecutors to the Hybrid Court, and nominate Commissioners to the CTRH. The R-TGoNU is further obligated to co-operate with the AU's mechanisms and organs in developing and implementing other transitional justice mechanisms under Chapter V of the R-ARCSS. The Reconstituted Joint Monitoring & Evaluation Commission (R-JMEC) is also expected to report to various organs

²⁴ See, generally, A/HRC/43/56 and

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26167&LangID=E>.

²⁵ See additional details in the annexed Transitional justice workshop report. (Annex I).

²⁶ See Report of the Secretary General on the Situation in South Sudan – S/2019/936 – 11 December 2019.

²⁷ ERN 102903 – 102908; and Confidential meeting 30 October 2019.

²⁸ See Articles 1.4.3.3 and 2.1.11.6 of the R-ARCSS, which require the TGoNU to initiate a national reconciliation and healing process at the beginning of the pre-transitional period, “led by the Parties to the agreement, faith-based groups and civil society organizations inside and outside South Sudan”, including “all forces and affected people”.

of the AU on progress of implementation of the R-ARCSS. The Commission has received information that the African Union Commission conducted internal expert consultations in 2019 on the implementation of the Hybrid Court.²⁹

41. In addition, the AU's broad mandate to promote regional peace and security and protection of fundamental rights enshrined in the African Charter on Human and Peoples' Rights, provides a further basis for its sustained engagement with the Government of South Sudan in implementation of the peace agreement. More specifically, the African Commission on Human and Peoples' Rights Study on Transitional Justice and the AU's recently launched Transitional Justice Policy provide important bases for the AU's support toward realisation of transitional justice in South Sudan. Significantly, the Transitional Justice Policy mandates the AU to exercise political oversight over all transitional justice processes initiated across the African continent.

42. Stakeholders however have expressed concerns that the AU's engagement on implementation of the R-ARCSS has, thus far, been mostly one-sided, with a primary focus on the Government of South Sudan. They noted, for instance, that there had been little to no consultation with local civil society actors and victims on the draft Statute of the Hybrid Court. Moreover, there was a general sense of frustration among key stakeholders on the lack of apparent action or position taken by the AU on the Government of South Sudan's delay in signing the MoU and adoption of the Statute for establishment of the Hybrid Court. This feeling seems to stem from the belief of key actors and affected communities that the AU would play a more prominent role in pushing for implementation of the R-ARCSS by all parties. It was felt that, while the Government of South Sudan's co-operation is necessary for establishment of the Court, the AU should strongly consider alternative measures within its broader regional mandate, given the Government's manifest lack of political will to end impunity for serious crimes in South Sudan.³⁰

43. The lack of political will to address justice and accountability is apparent in the political establishment in South Sudan. The Commission considers, however, that more robust diplomatic engagement is necessary, not only from the African Union, but from the range of international and regional stakeholders, including IGAD and key regional governments that should encourage and support the Government of South Sudan to abide by the totality of its transitional justice commitments in a meaningful and timely manner.

National Dialogue

44. President Kiir established a National Dialogue process in December 2016 that was ostensibly intended to collect the views of South Sudanese on conflict resolution and related political, economic, and social concerns, which will eventually be submitted to a national healing and reconciliation process.³¹ The National Dialogue Steering Committee (NDSC) gathered and analysed information from both within and outside of South Sudan in preparation for a national conference that was scheduled to take place in March 2020, but has since been postponed, initially due to the President's unavailability to preside over it and subsequently, as a result of the COVID-19 pandemic.³²

45. The timing and manner in which the National Dialogue was established created considerable concern leading to its rejection by some South Sudanese stakeholders, notably the opposition. Notably, the establishment of the dialogue process occurred via presidential decree, while South Sudan was still in conflict, causing profound cynicism among many South Sudanese who are concerned that it may have been designed as a cover to shield

²⁹ Confidential Meeting, 17 December 2019.

³⁰ Confidential meeting, 7 December 2018; Confidential meeting 10 October 2018; Confidential meeting, 28 August 2018; Confidential meeting 4 December 2018; and consultations with stakeholders at the Commission's transitional justice workshop in December 2019.

³¹ See Speech of President Salva Kiir announcing commencement of the National Dialogue on 14 December 2016, *available at* <https://paanluelwel2011.files.wordpress.com/2016/12/president-kiir-address-to-the-nation-the-call-for-national-dialogue-initiative-in-south-sudan.pdf> and South Sudan National Dialogue Objectives, *available at* <https://www.ssnationaldialogue.org/national-dialogue-objectives>.

³² South Sudan National Dialogue Press Release, *available at* <https://www.ssnationaldialogue.org/press-release/national-dialogue-conference-postponement-later-date>.

political actors from accountability for conflict-related violations.³³ Yet, as coverage of its consultations, and indeed the findings published by the National Dialogue Steering Committee indicate, many of those citizens who engaged with the process were in fact quite openly critical of the leadership weaknesses within the political system in South Sudan. During a consultative conference with religious leaders held in Juba in November 2019, a number of faith based institutions, whilst pledging support to the National Dialogue process, still called for the immediate establishment of the CTRH.³⁴ Civil society organisations also raised concerns about the inclusivity and transparency of the dialogue process during its Steering Committee's plenary session in December 2019.³⁵

46. Of great concern is the lack of participation of many South Sudanese refugees who have rejected the National Dialogue, with some in Ethiopia and Uganda commenting on the inappropriateness of the timing of the process. Members of the National Dialogue Steering Committee who visited refugee camps themselves confirmed to the Commission that refugees had declined to engage with them.³⁶

47. The dialogue process has also failed to garner the support and participation of opposition parties and opposition groups who continue to cite the lack of consultations prior to its establishment, as well as the lack of inclusivity, transparency, impartiality, insecurity, and logistical issues such as inappropriate venues and implementation modalities.³⁷

48. Furthermore, on-going clashes between Government and opposition forces, and intercommunal violence in South Sudan also limited the effective participation of citizens in the affected areas, with some fearing reprisals for their involvement in the dialogue. As a result, the National Dialogue Steering Committee reported low attendance in the dialogue forums.³⁸

49. Failure to address the foregoing concerns is likely to result in a skewed outcome of the dialogue process that would inevitably perpetuate the exclusion of conflict-affected communities already facing marginalisation, and cause increased mistrust of state-driven consultations, truth-seeking, reconciliation, and other transitional justice processes among citizens.

50. Moreover, while the National Dialogue process has the potential to make a significant contribution to addressing historical and underlying grievances that have continuously fuelled conflict in South Sudan, the R-TGoNU should exercise great caution to ensure that it does not undermine the mechanisms which were adopted under Chapter V of the ARCSS and R-ARCSS, which take precedence in the pursuit of truth, justice, reparation, and the preventive aims of transitional justice.

Impunity for serious violations of human rights and international humanitarian law

51. A lack of accountability for gross human rights violations and abuses, serious violations of international humanitarian law, and related international crimes continues to characterise the human rights situation in South Sudan. The persistent failure to address past violations has been the key driver of violence in South Sudan. Information gathered by the Commission during the past year alone reconfirms once more that impunity in South Sudan remains deeply entrenched and that victims of gross human rights violations, serious violations of international humanitarian law, and related crimes continue to be denied their rights to remedy and reparations. A profound lack of political will to hold warring parties accountable for crimes including rape and torture has allowed for widespread impunity.

52. Largely in response to international and national pressure, the Government of South Sudan has occasionally been compelled to set up a series of commissions of inquiry to investigate mostly high-profile issues and cases, including into the December 2013 clashes

³³ Confidential meeting, 6 February 2020.

³⁴ UNMISS Daily Sitrep – 23 November 2019.

³⁵ UNMISS Daily Sitrep – 4 December 2019.

³⁶ Commission meeting with Members of the National Steering Committee, 14 December 2017.

³⁷ See ACCORD, Conflict Trends 2018/1, The National Dialogue Initiative in South Sudan, by Clayton Hazvinei Vhumbunu, An assessment of progress made and challenges faced by South Sudan's National Dialogue Initiative to reconcile intercommunal violence, available at <https://www.acCORD.org.za/conflict-trends/the-national-dialogue-initiative-in-south-sudan>.

³⁸ *Ibid.*

in Juba.³⁹ Yet in almost all instances, the findings of these Commissions have not been published and the investigations have not resulted in prosecutions for crimes committed against South Sudanese people.

53. While the Government bears primary responsibility for investigating and prosecuting crimes, the lack of capacity and competence of the South Sudanese justice system to independently and impartially investigate and adjudicate serious crimes has been well documented in numerous reports.⁴⁰ The reach of the formal justice system remains very limited outside the national and state capitals. Furthermore, the conflict has left profound deficits in the criminal justice chain across police, judicial, and prison services. These include, among other things, 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.⁴¹ The consequence of these deficits is that traditional customary courts have been left to address cases of serious crimes even though they are not authorised to adjudicate such matters, and do not meet international fair trial and due process standards.

54. Questions have also been raised about the competence and independence of the judiciary. The Commission noted reports that the regular courts have failed to provide justice to victims of the conflict. Ordinary courts – the civilian justice system – are crippled by a severe lack of independence. Prosecutors follow the directives of the executive, and, in the absence of such directives, do not investigate serious crimes. Judges experience political interference and risk being dismissed when they act, or are perceived to act, against the Executive's interests.⁴² Furthermore, in most instances, prosecutors do not initiate investigations and prosecutions when there is no formal complaint lodged by a complainant. This seriously limits access to justice for victims of violence who often are unable to file a complaint due to fear of reprisals, or simply because there is no police station in their proximity.

55. In some cases, people found to have committed grave violations have been reappointed to higher political offices. A notable example was the political reappointment of an individual found in a UN report to bear the greatest responsibility for grave violations, possibly amounting to war crimes, in southern Unity between April and May 2018.⁴³ In November 2019, an UNMISS team of human rights and correction officers on a routine visit to the Bentiu Central Prison discovered that three convicts sentenced to various prison terms on charges of murder and homicide had been released, one of them on the instruction of the Governor of then "Northern Liech State."⁴⁴

56. There is also the question of whether in the current political and security environment sufficient arrangements can be made for the protection of victims and witnesses who choose to appear before the regular courts. 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. Creating and sustaining such a climate is essential if the full goals of accountability and reconciliation are to be realised. If a justice system is unable to secure convictions because of failures in the production of witness evidence, its capacity to deal effectively with past abuses as well as the confidence of its people in the justice system will be severely compromised. Thus, the development and implementation of effective victim-witness protection measures should remain a major priority throughout and beyond the transitional justice processes.

³⁹ See Amnesty International, *South Sudan: Crippled justice system and blanket amnesties fuelling impunity for war crimes*, 7 October 2019.

⁴⁰ See, e.g., Report of the UN High Commissioner for Human Rights on the situation of human rights in South Sudan, UN Doc. A/HRC/28/49; Ending the era of injustice – Human Rights Watch – 10 December 2014; "Do you think we will prosecute ourselves?" – No prospects for accountability in South Sudan – Amnesty International – October 2019.

⁴¹ Ending era of injustice – Human Rights Watch – 10 December 2014.

⁴² Amnesty Report May October/2019 – "Do you think we will prosecute ourselves?" – No Prospects for Accountability in South Sudan.

⁴³ Report of the Secretary General on the Situation in South Sudan – S/2019/936, at p. 10.

⁴⁴ OHCHR Weekly – 20 December 2019/ UNMISS Daily Sitrep – 20 December 2019.

57. Amidst these setbacks, a military court martial convicted and sentenced 10 military soldiers for the murder of a journalist and rape of aid workers at the Terrain Hotel in July 2016. The Terrain trial represents a significant step towards establishing a culture of accountability in a country where virtually no other measures have been put in place to address serious conflict-related crimes against civilians since December 2013. Yet, while marking an important milestone, the Terrain trial failed to consider command responsibility within the Sudan People's Liberation Army (SPLA), an issue that will be critical in future justice and accountability processes. The trial also witnessed a number of limitations related to the lack of independence of military courts, most clearly demonstrated through the President's control in the creation of martial courts for high-ranking officers and power to confirm or reject their final decisions.

58. Questions have also emerged regarding whether the military court had legal jurisdiction under South Sudan law to prosecute soldiers for crimes committed against civilians in the Terrain case. The Terrain victims have also appealed the judgement in the case pertaining to reparations and compensation. To date, however, the appeal has not proceeded as the case file has reportedly gone missing since the trial concluded.

59. On 23 August 2019, the Chief Justice of South Sudan, Chan Reec Madut, told the media that plans were underway to establish a special court for gender-based violence and that the court would handle both domestic violence cases and cases involving serious human rights violations. The mandate of the specialised court however does not explicitly extend to 2013 conflict-related violations. The Government also recently announced the establishment of a special court to try national security operatives accused of committing crimes. While the establishment of this court five years after it was mandated by the NSS Act (2014) is welcome news, there remains concern about the potential jurisdictional conflict between this tribunal and the ordinary courts for cases involving crimes against civilians. The Minister of Justice also reported that more than 400 conflict-related cases involving SSPDF officers have been concluded in military courts, but have not been given the same media coverage as other high profile cases such as the *Terrain Hotel* case.⁴⁵ There are, however, no public records available on the nature or outcome of these cases.

60. Given the very small prospect for justice before domestic courts, many people see the proposed Hybrid Court for South Sudan as the only viable option for ensuring justice and accountability. However, as noted, the establishment of the Hybrid Court has met resistance from elements within the Government who are wary of being prosecuted for the relevant crimes (see para. 33, above). Thus, despite the drafting of a Statute of the Court and a Memorandum of Understanding for its establishment between the African Union and the Government of South Sudan (see para. 32, above), the latter has failed to sign these agreements.

61. The Commission expresses serious concern that the Government continues to be ambiguous in its commitment to establishing the Hybrid Court with some officials publicly declaring their concern that its establishment will undermine the peace process.⁴⁶

62. Likewise, since the conflict began, the Commission has found no evidence or available public information of any genuine efforts by the SPLA/IO and other opposition groups to investigate and punish any forces within their ranks for gross human rights violations and serious violations of international humanitarian law.

63. Now that the Revitalised-TGoNU has been established, the Commission considers that the time has come for the new partners in government to take an unequivocal stance in support of the establishment of all the transitional justice mechanisms they agreed upon in Chapter V of the R-ARCSS, including by immediately signing the Memorandum of Understanding with the African Union for the establishment of the Hybrid Court.

Failure to pursue accountability for sexual and gender-based violence

64. The scale and severity of sexual and gender-based violence (SGBV), and particularly conflict-related sexual violence (CRSV) has remained significantly high since the outbreak

⁴⁵ Statement by the Minister for Justice at the UN CHRSS Transitional Justice Stakeholders Workshop, Addis Ababa, 2019.

⁴⁶ See statement by Minister for Information, Michael Makuei – October 2018.

of the conflict in December 2013, in spite of the overall decrease in fighting and political violence. Various Government officials, including the Minister of Defence and Veteran Affairs and Chief of the South Sudan People's Defence Forces, have publicly acknowledged that members of the Government security forces have been involved in perpetrating sexual violence and urged commanders to ensure that the perpetrators of these acts be held accountable.⁴⁷ This notwithstanding, victims of sexual and gender-based violence continue to face significant challenges in seeking justice. Across the country, victims and survivors continue to express reluctance to report their experiences owing to stigma, the fear of reprisals, rejection by their families and communities, and their lack of confidence in judicial and non-judicial responses. The Commission has previously noted that impunity for conflict related sexual-violence and sexual and gender-based crimes remains at an all-time high, while survivors of sexual violence still have limited access to redress.⁴⁸ In Bentiu, the Commission heard testimonies of sexual violence from women who were waiting to share their stories with an accountability mechanism. Women across the country, particularly in Yei, Wau, and Bentiu, were still reporting high levels of sexual and gender-based violence following the alleged rape and sexual assault of over 150 women and girls in November 2019.

65. The Commission is also concerned that many cases of sexual and gender based-violence continue to be heard by traditional customary courts, which are not equipped to meet international fair trial and due process standards, and often act outside their jurisdiction. These courts are often conducted in open public spaces, with mostly male community members in attendance, and are presided over by male elders.⁴⁹ Women who speak out in front of their community about their experiences of SGBV are often subject to stigmatisation and physical abuse.⁵⁰ Furthermore, rape and sexual violence are seen, not as individual crimes involving only the perpetrator and the survivor, but as collective issues affecting the entire community. The type and level of justice accessible to survivors is, therefore, influenced by factors such as the victim's age and marital status, social standing and perceived "value," often in relation to bride price.⁵¹ In addition, the justice that is available generally takes the form of reparations determined between customary elders, rather than individual legal redress for the survivor.⁵²

66. In August 2019, the UN Special Representative on Sexual Violence in Conflict noted that, despite the adoption of clear provisions in the Revitalised Peace Agreement calling for an end to all forms of sexual and gender-based violence, such violence continued unabated in South Sudan, and is widely used to humiliate both victims and entire communities, in a climate of near-total impunity.⁵³ Further to this, the UN Security Council Sanctions Committee on South Sudan called for targeted measures against individuals credibly suspected of bearing command responsibility for sexual violence crimes, noting that seven of the eight individuals listed by the Committee are also cited for sexual violence. The Special Representative has since engaged with the Government, the SPLA/IO, and the leadership of the non-signatory National Salvation Front (NAS) armed group to ensure the cessation and non-repetition of sexual violence and encourage the parties to hold perpetrators accountable. Since then, the leadership of the SPLA/IO has conceded that its soldiers have been involved in CRSV, as documented in an UNMISS report in October 2018.⁵⁴ The SPLA/IO has now adopted an Action Plan on CRSV and agreed to conduct internal investigations into alleged sexual violence perpetrated by its forces in Western and Central Equatoria States. The leader of the SPLA/IO, First Vice President Dr. Riek Machar, also

⁴⁷ See Minister of Defence statement on 14 March 2019.

⁴⁸ See Report of the Commission on Human Rights in South Sudan – A/HRC/40/CRP.1.

⁴⁹ D. Deng, 'Challenges for Accountability', March 2013, South Sudan Law Society, Pact, and USAID.

⁵⁰ United Nations Security Council, Report of the Secretary General on Conflict Related Sexual Violence, 23 March 2015, S/2015/203 para. 48; Deng, DK, Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan (March 2013) at p. 2.

⁵¹ SIHA, December 2012, *Falling Through the Cracks: Reflections on Customary Law and the Imprisonment of Women in South Sudan*, p. xiv. 56.

⁵² *Ibid.*

⁵³ See UN Security Council Sanctions Committee on South Sudan Concerning South Sudan Meets with the Special Representative on Sexual Violence in Conflict – SC/13947, 11 September 2019.

⁵⁴ See Conflict Related Violations and Abuses in Central Equatoria, September 2018 to April 2019 – UNMISS, 3 July 2019.

issued a command in July 2019 calling for all women and girls held in SPLA/IO bases in Western Equatoria to be released, resulting in the *ad hoc* release of a few individuals.⁵⁵

67. Since last year, the United Nations, with support from South Sudan's judiciary, has also been holding sessions in mobile courts in the towns of Malakal, Bentiu, and Rumbek, trying cases including rape, robbery, and assault. In December 2018, mobile courts in Bentiu sentenced three men identified as soldiers of the South Sudan People's Defence Forces to imprisonment ranging from 6 to 12 years for sexual violence crimes, which represents important progress.⁵⁶

68. Stakeholders at a Transitional Justice Workshop convened by the Commission in December 2019 identified accountability for atrocity crimes as a cornerstone for sustainable peace in South Sudan. The workshop underscored the need to explore additional domestic, regional, and international avenues that could be pursued, to keep the quest for accountability in South Sudan alive, including through the African Commission on Human and Peoples' Rights and universal jurisdiction.⁵⁷

IV. The impact of COVID-19 on the implementation of transitional justice measures

69. Following the lapse of the May 2020 timeline for enactment of the legislation to create transitional justice mechanisms, the R-TGoNU has neither provided public updates on progress achieved, nor issued a formal statement on any obstacles it may be experiencing due to the COVID-19 pandemic. While the pandemic has created genuine obstacles towards the implementation of various aspects of the R-ARCSS, it is critical that the Government should not cite the current situation to justify further delay in the formation of transitional justice mechanisms anticipated in Chapter V.

70. While certain public consultations and participation by South Sudanese, including victims, in the conceptualisation and formation of the anticipated transitional justice measures are likely to be impeded due to restrictions on movement, social distancing, risk of physical interactions, and weak internet and digital technology coverage in South Sudan, these conditions are not a reason not to commence on exercises. Notably, the R-ARCSS requires that the R-TGoNU conduct national consultations with conflict-affected communities, especially marginalised and minority groups, so as to ensure that their needs and priorities are incorporated in the draft legislation for the establishment of the Commission on Truth, Reconciliation, and Healing. The R-ARCSS anticipated that the national consultations should have been concluded by April 2020.

71. The Commission notes with concern that the R-TGoNU has not put in place any mechanisms to facilitate the broad and effective participation of conflict-affected communities and individuals in such national consultations. Civil society and victims' groups have also expressed concerns over the lack of inclusion of previous consultations conducted by a State-established technical committee in 2017 and 2018. Enhanced vigilance is therefore required to ensure that any transitional justice processes initiated during the pandemic period will be as participatory and inclusive as possible, with the possibility to continue the consultations once circumstances permit. Only in this way will the process be informed by the views and perspectives of South Sudanese so as to effectively respond to victims' and survivors' needs.

72. The Commission notes that the African Union Commission also postponed a meeting with key stakeholders that was scheduled to take place in March 2020, to draft rules and regulations for the operation of the Hybrid Court. This meeting was intended to foster the opportunity for discussions with both State and non-State actors in order to resolve the current stalemate following the Government's failure to adopt the draft Statute and sign the Memorandum of Understanding with the African Union to establish the Hybrid Court. The African Union also expressed security concerns over the use of online communication

⁵⁵ Report of the Secretary General on the situation in South Sudan – December 2019, S/2019/936 – p.13.

⁵⁶ Conflict Related Sexual Violence – Report of the Secretary General – 29 March 2019 – S/2019/280 – p. 18.

⁵⁷ See the annexed report of the transitional justice workshop (Annex I).

platforms to convene such a meeting, especially given the highly sensitive nature of the discussions surrounding the Hybrid Court. Nonetheless, the African Union Commission has indicated that it is continuously exploring feasible ways to achieve progress on the formation of the Hybrid Court and transitional justice in South Sudan more broadly, despite the prevailing situation regarding COVID-19.

73. The Commission notes moreover that there have been delays in establishing consultative processes geared towards monitoring of the R-TGoNU's implementation of the R-ARCSS, including transitional justice measures in Chapter V. For example, the Reconstituted Joint Monitoring & Evaluation Commission (R-JMEC) reported that it was unable to convene meetings with key stakeholders soon after the formation of the R-TGoNU to formulate an implementation plan for the transitional period of the R-ARCSS, including the establishment of Chapter V mechanisms.

V. Key considerations in implementation of Chapter V of the Revitalised Peace Agreement

Transitional Justice should be pursued as an integral part of peacebuilding and development in South Sudan

74. The post-conflict transition in South Sudan undoubtedly calls for extensive rebuilding, reconstruction, and reforms in virtually every sphere of society. Thus, there will be competing demands for limited resources to ensure sustained peace and security, and stabilisation of infrastructure and institutions to support development, including the provision of essential services to the people of South Sudan. In this regard, the Commission reiterates that the failure to address past grievances and continued impunity have been the primary drivers of renewed conflict and continued violations of human rights and international humanitarian law in South Sudan, thereby affecting the prospects for sustainable peace and development.

75. The Commission therefore underscores that transitional justice measures should be integrated as a critical, rather than secondary, component of the post-conflict peacebuilding and development agenda in South Sudan. The R-TGoNU must demonstrate its commitment to ensure timely and effective implementation of mechanisms to guarantee victims' rights to truth, justice, and reparation, and prevention of recurrent violations of international human rights and humanitarian law, within its available resources, alongside all other measures anticipated under the R-ARCSS. This will ensure that the momentum to identify and address underlying causes and consequences of conflict and related violations is maintained during the transitional period, and informs anticipated governance, security, justice, and Constitutional reforms.

76. Further, the R-TGoNU should desist from propagating the narrative that accountability processes will undermine peace, or from adopting a selective approach to transitional justice that supports rehabilitation and compensation at the expense of victims' rights to truth, justice, reparation, and other remedies. Instead, the R-TGoNU should initiate broad awareness campaigns that highlight the mutual linkages between accountability, justice, reparation, reforms, and sustainable peace and development.

Timely establishment and operationalisation of Chapter V mechanisms

77. The Commission calls on the R-TGoNU to ensure the prompt formation and implementation of truth, justice, and reparation mechanisms set out in Chapter V of the R-ARCSS. Following its constitution in February 2020, the R-TGoNU is obligated to immediately initiate legislation for the creation of the HCSS, CTRH, and CRA, and was to ensure their enactment by the Transitional National Legislative Assembly by May 2020. The draft Statute for establishment of the HCSS that has been in place since 2017 and views emerging from national consultations on the creation of the CTRH in some parts of South Sudan provide a useful starting point in this regard. Furthermore, the R-TGoNU was required

to take all necessary steps to facilitate commencement of operations of the CTRH by June 2020, and the HCSS and CRA by August 2020.⁵⁸

Strengthening civil society engagement in South Sudan

78. The Commission reiterates its calls to all stakeholders engaged in peacebuilding in South Sudan to develop and deploy targeted measures aimed at enhancing the capacities of civil society to effectively organise, collaborate, coordinate, and scale up its participation in transitional justice processes. A strengthened civil society movement, including conflict-affected individuals and communities, and citizens drawn from all spheres, has the potential to stand as a strong bulwark against political machinations to undermine the realisation of victims' rights to truth, justice, and reparation. Support measures should prioritise the provision of adequate and long-term financial and technical resources to facilitate the operation of civil society organisations, including in remote and marginalised areas of South Sudan; provision of psychosocial and rehabilitation measures, especially to address on-going trauma within affected communities; and safety of victims, survivors, human rights defenders, and documentation databases. Moreover, political actors, including the IGAD, R-JMEC, and the African Union should create spaces for robust engagement with civil society as critical actors in monitoring and implementation of the R-ARCSS and transitional justice processes.

79. In the wake of the December 2013 conflict, various civil society actors have emerged and provided perspectives on prospects for transitional justice in South Sudan, including on the design and formation of Chapter V mechanisms. Notably, the South Sudan Transitional Justice Working Group (TJWG) was constituted in 2015 to facilitate a coordinated and unified engagement of civil society in transitional justice processes. The TJWG consists of seven core non-governmental organisations that work in collaboration with a broad-based group of non-State actors, women's groups, and faith-based organisations across the 10 states of South Sudan. Its main activities include documentation of human rights violations, promoting public awareness, advocacy, and linkages between national and international stakeholders and formal mechanisms to support implementation of Chapter V of the R-ARCSS.⁵⁹ More recently, the South Sudan Civil Society Forum was established in December 2017 as a unified platform for civil society participation in the High-Level Revitalisation Forum. The South Sudan Civil Society Forum consists of more than 200 civic groups, including civil society organisations, women and youth groups, academia, and community- and faith-based organisations from across South Sudan with an interest in promoting "peace, freedom and respect for human dignity."⁶⁰

80. A survey conducted by the South Sudan Civil Society Forum in 2018 to assess citizens' perspectives on the peace process and its outcome, demonstrates the potential of, and proposes an enhanced role for, civic actors in steering dialogue, promoting awareness, and providing oversight to support a people-owned and driven transitional justice process in South Sudan.⁶¹ However, limited financial and human resources and technical and logistical capacities pose significant barriers to the ability of civil society actors to reach their full potential to inform and influence transitional justice processes in South Sudan. These capacity gaps are compounded by the mounting State suppression of civic space, particularly targeting civic actors involved in creating awareness and promotion of accountability and justice for conflict-related violations (see paras. 36 and 37, above).⁶²

81. In readiness for anticipated transitional justice processes, the Commission urges civil society actors to prioritise the consolidation of documentation efforts on incidents, patterns, and victims of human rights violations; public awareness campaigns on the R-ARCSS and Chapter V measures; identification and organisation of victims and survivors, especially in

⁵⁸ See R-ARCSS Articles 5.1.1, 5.2.1.2, 5.2.2.5, and 5.4; and R-JMEC, R-ARCSS (2018); Implementation Matrix for the period February 2020 to March 2023.

⁵⁹ See <http://tjwgsouthsudan.org/about>.

⁶⁰ See South Sudan Peace Portal, *available at* <https://www.southsudanpeaceportal.com/repository/revitalizing-peace-in-south-sudan-citizen-perceptions-of-the-peace-process>.

⁶¹ Revitalizing Peace in South Sudan – Citizens Perceptions of the Peace Process, Survey by the South Sudan Civil Society Forum (SSCSF) – November 2018

⁶² Transitional Justice Working Group Strategic Plan 2016-2021, assessment of external threats, <http://tjwgsouthsudan.org/wp-content/uploads/2016/10/Transitional-Justice-Working-Group-South-Sudan-Strategic-Plan-2016-2021-Web-version.pdf>.

marginalised areas; and collaboration with allies at community, national, regional, and international levels. Moreover, civil society actors must constantly seek innovative and practical ways to push for the realisation of victims' rights to truth, justice, and reparation.

82. Notably, development partners and the regional and international movement of civil society should consider working in collaboration with South Sudanese civil society actors to equip them with relevant operational and technical resources, including victim and witness protection resources, to pursue accountability for on-going State suppression of civic space and violations against human rights defenders and journalists. In this regard, civil society actors should not overlook the potential of feasible opportunities that may be availed through domestic courts and regional human rights accountability mechanisms.⁶³

Sustained involvement of and strategic action by regional and international actors

83. There is a further need for more robust and sustained engagement of the African Union, IGAD, United Nations Human Rights Council, United Nations Security Council, and Troika states with the R-TGoNU to ensure adherence by all parties to the Revitalised Peace Agreement and the realisation of transitional justice in South Sudan. The citizens of South Sudan would like to see regional and international actors assert their political leverage with the same zeal and level of investment as was applied in securing the peace agreement and subsequent political arrangements.

84. The enhanced engagement of international and regional actors has the potential to catalyse the creation of a favourable environment for the initiation of transitional justice measures, including by creating a stronger demand for adherence to the permanent ceasefire agreement by all parties, and resolution of persisting political contestation that has led to unwarranted delays in the establishment of State governments and reconstitution of the Transitional National Legislative Assembly. The anticipated contribution of regional and international development partners to the Special Fund for Reconstruction provides an opportunity to push for the R-TGoNU's initial funding of \$100 million USD per annum as demonstration of its commitment to the timely and effective provision of humanitarian assistance and rehabilitation of victims and conflict-affected communities.⁶⁴ Such measures should aim to provide recognition of affected individuals and communities as rights-holders and address their immediate essential needs, thereby motivating their meaningful participation in transitional justice processes.

85. Because of the specific roles conferred upon it by the R-ARCSS, visible action is expected from the African Union to influence progress by the R-TGoNU in pursuing accountability for gross violations of human rights and international humanitarian law in South Sudan. Beyond its responsibility to establish the Hybrid Court as set out in the R-ARCSS, the African Union has a broader mandate to promote regional peace and security, and the protection of fundamental rights. Moreover, the recently launched Transitional Justice Policy mandates the AU to exercise political oversight over all transitional justice processes initiated across the African continent.

Transitional justice measures should be inclusive and impartial

86. The R-TGoNU should ensure that transitional justice processes and mechanisms are implemented in accordance with established human rights principles, particularly to guarantee equality, non-discrimination, impartiality, and inclusivity.

87. The design and implementation of transitional justice measures must guarantee equal and impartial access, reach, and participation of all segments of the South Sudan population, regardless of ethnicity, religion, gender, age, political affiliation, social status, residence, level of education, or any other arbitrary grounds. The R-TGoNU should establish effective measures to facilitate broad public participation, including of women, youth, children, opposition parties, citizens in remote areas, and other marginalised groups, in the conceptualisation, development, implementation, and monitoring of transitional justice measures. The Government should also ensure that civil society in its plurality, including

⁶³ CHRSS Transitional Justice Workshop, December 2019.

⁶⁴ R-ARCSS, Article 3.2.

victims' organisations, non-governmental organisations, religious organisations, labour unions, and social movements are involved.

88. The emergence of the COVID-19 pandemic and public health measures put in place to mitigate its spread, are likely to hamper public consultations and engagement. Nonetheless, the R-TGoNU must take all measures possible to identify feasible avenues for public engagement on the legislation, composition, and operation of transitional justice institutions. The use of radio stations and broadcast media with widespread reach, including at community levels, and collaboration with focal points within protection of civilian sites and refugee camps offer viable avenues for public participation in the formation of the HCSS, CTRH, and CRA.

89. The R-ToGNU should collaborate with civil society and other national, regional, and international stakeholders to conduct a comprehensive outreach programme targeting the full cross-section of the South Sudan population. Lessons can be drawn from successful outreach programmes related to transitional justice processes in South Africa, Sierra Leone, and Tunisia.⁶⁵ An effective outreach programme should provide clarity on the goals, objectives, and parameters of anticipated transitional justice mechanisms, thereby managing citizens and victims' expectations. It should also seek to address misconceptions and misinformation regarding the aims and expected outcomes of transitional justice measures, such as the notion that accountability will lead to destabilisation of the fragile peace in South Sudan.

90. Specific measures should be put in place to address structural inequalities that may hinder the accessibility or effectiveness of transitional justice measures for certain groups or individuals, due to prior or existing vulnerabilities. This will, for instance, require that gender and child-sensitive approaches, policies, measures, and technical capacities are put in place to identify, understand, and effectively respond to the varied ways that women, men, girls, and boys have experienced conflict-related violations and their consequences. Furthermore, every effort must be made to address State and societal denial of conflict-related sexual violence and the stigmatisation of affected survivors and their families, so that they are empowered to effectively participate in truth, justice, and reparation processes. Transitional justice measures should also be cognisant of pre-existing gender-based inequalities that are likely to hinder survivors, especially women, to ensure their optimal participation in anticipated truth-seeking, accountability, reparation, reconciliation, and healing processes.

Transitional justice measures should be victim-centred, holistic, and context-specific

91. The HCSS, CTRH, CRA and any other transitional justice measures initiated in South Sudan must resonate with the experiences, needs, and priorities of conflict-affected victims and communities. South Sudanese have repeatedly articulated the need for a transitional justice process that encompasses truth-seeking, criminal accountability, reparation (including redistributive and restorative justice), and reform measures all pursued in a mutually reinforcing manner to address past violations and prevent their recurrence.

92. A context-specific approach to transitional justice calls for consideration of factors that may be unique to the conflict situation in South Sudan. Notably, economic crimes, violations of land rights, and cattle rustling have emerged as significant drivers of conflict and resulting violations in South Sudan.

93. Further, a holistic approach to transitional justice in the context of South Sudan will necessitate the incorporation and engagement of, and support to, traditional and customary justice measures. Customary authorities remain an integral part of the social fabric of South Sudan. The Transitional Constitution of South Sudan provides that customary law should be regarded as a source of law in South Sudan, and is binding to the extent that it does not conflict with provisions of the Constitution.⁶⁶ Furthermore, customary processes are far more accessible geographically, culturally, and in terms of costs than statutory institutions, and have played a major role in dispute resolution among civilians for decades. 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. In

⁶⁵ See Report of the Commission on Human Rights in South Sudan – A/HRC/37/CRP.2, at p. 118.

⁶⁶ South Sudan Constitution (2011), Sections 5(a) and 167.

South Sudan, 80 per cent of local disputes are resolved by customary courts.⁶⁷ Traditional authorities also have extensive ground knowledge about the facts and 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. Exploring traditional justice mechanisms and incorporating their positive practices into the current transitional justice framework would, therefore, enhance the credibility and participation of local communities.

94. The R-ARCSS envisages a role for traditional authorities in providing input for remedial processes such as the provision of reparations and compensation. For example, Article 5.2.1.5 requires the Commission on Truth, Reconciliation, and Healing to draw on existing traditional practices, processes, and mechanisms, where appropriate, when determining mechanisms and processes for the enjoyment of the right to remedy. One suggested approach has been for the CTRH to refer certain cases that it comes across to customary courts for the determination of compensation and to facilitate reconciliation or ask traditional authorities to oversee post trial reconciliation of parties.⁶⁸ Yet, while traditional mechanisms can be empowered to support transitional justice process, each mechanism adopted needs to be context specific and familiar to South Sudanese. Among other things, it may be necessary to map out traditional mechanisms that have worked in the past and factors that influence success or failure before applying them to the current context.

95. Harnessing traditional customary mechanisms in the current transitional justice context also means critically reviewing their promises and pitfalls. Customary institutions are often criticised for being male-dominated spaces that marginalise and discriminate against women and girls. It is a known fact that many customary law provisions in respect of women contradict with their right to equality under the Constitution and the current statutory framework. Decisions of customary law courts are also unpredictable and may violate international human rights norms. Customary institutions may also struggle with disputes that cut across community boundaries, where different customary laws apply and the traditional authority may not have as much control over the non-local party. With the diversity of customs in South Sudan, another key challenge would be the difficulty of formalising different customary processes through legislation without undermining their flexibility, which makes them adaptable to local conditions. It is therefore imperative to ensure that the application of relevant customary norms in the transitional justice process is in line with natural justice principles as envisaged in the R-ARCSS.⁶⁹

Commission on Truth, Reconciliation, and Healing

Transparent and participatory selection of Commissioners

96. Numerous concerns have been raised by citizens, survivors, and civil society organisations about the lack of transparency in the Government's appointment of individuals to lead past commissions of inquiry, and other national healing, reconciliation investigations, and accountability processes. The Commission, therefore, calls on the R-TGoNU, the African Union, and the United Nations to take deliberate steps to ensure broad public participation in an open and transparent process for the nomination and selection of commissioners to the CTRH.⁷⁰ Every effort must be made to ensure that the CTRH is composed of individuals of high integrity and competence, in order to instil legitimacy and civic trust in the truth-seeking process.

Sufficient temporal mandate and resources

97. The R-ARCSS anticipated that the CTRH would be established within four months of the commencement of the Transitional Period, and would carry out its mandate for a period of two years and nine months. Given the R-TGoNU's continued delay to create the CTRH, corresponding measures must be put in place to ensure that it is, nonetheless, accorded

⁶⁷ Baseline Perception Survey of Access to Justice and Rule of Law Institutions in South Sudan – UNDP (August 2013).

⁶⁸ See *New Beginnings – A Way Forward for Transitional Justice in South Sudan* – Transitional Justice Working Group/South Sudan Law Society/UNDP – Conference Report and Analysis – February 2016, at p. x.

⁶⁹ R-ARCSS, Article 5.2.2.3.9.

⁷⁰ Article 5.2.3 of the R-ARCSS requires the R-TGoNU Executive, in consultation with the African Union and UN, to select and appoint seven Commissioners, including four South Sudanese nationals and three from other African states.

sufficient time, and financial, human, and technical resources, to: effectively investigate, understand, and document the antecedents, causes, patterns, scope, and consequences of gross human rights and international humanitarian law violations in South Sudan; and identify and propose feasible reforms, reparations, and other measures to address the harm suffered by victims and guarantee non-recurrence of similar violations in future. These are critical processes that should not be rushed.

Rehabilitation measures to accompany truth-seeking process

98. The CTRH should incorporate measures to facilitate survivors' access to rehabilitation, particularly in recognition of on-going individual and collective trauma within conflict-affected communities. Community-based psychosocial support, psychotherapy, emergency healthcare, and other interventions can help to mobilise broad participation and mitigate re-traumatisation of victims and survivors during the truth-seeking process.

Hybrid Court for South Sudan

99. Experiences in several post-conflict contexts demonstrate that, when accompanied with the necessary political, financial, and technical support, criminal trials have the potential to: prevent or mitigate recurrent cycles of conflict; deter would-be-perpetrators; initiate social transformation founded on new norms such as respect for human rights and the rule of law, inclusivity, equality, and non-discrimination; and provide relief and a sense of justice for affected victims and communities, thereby averting cycles of revenge attacks and recurrent conflict.⁷¹ Criminal prosecutions against individuals responsible for planning, committing, and perpetuating conflict-related atrocities have the potential to begin dismantling entrenched impunity in South Sudan.

100. The Commission notes that the R-ARCSS places primary responsibility for the establishment of the Hybrid Court on the African Union Commission, including for the selection of judges, prosecutors, and other court officials.⁷² The R-TGoNU, on the other hand, is obligated to support the operation of the Hybrid Court through enactment of national legislation to provide for primacy of the Hybrid Court over national courts and cooperation with national authorities.⁷³ However, in light of the R-TGoNU's continued delay in signing the MoU with the AU and adopting the Statute, the Commission holds the view that a more purposive reading of the R-ARCSS should be adopted to permit the AU Commission to independently complete the process of establishing the Hybrid Court. While a collaborative approach between the AU and R-TGoNU is desirable for the effective operation of the Court, a narrow reading of the R-ARCSS risks rendering it an instrument to delay the possibility of timely justice and reconciliation for South Sudanese people. At the very least, the AU Commission should intensify preparatory work, including the establishment of an investigative mechanism related to prosecution to complement the collection and preservation of evidence mandate of this Commission, pending the establishment and full operationalisation of the Hybrid Court.

101. Victims and survivors who expressed their views to the Commission are adamant that criminal accountability is imperative to halt cycles of conflict and accompanying violations in South Sudan, and to provide affected individuals and communities with a sense of closure from past violations.

As one victim stated,

*"Something needs to be done to stop this on-going suffering inflicted on innocent civilians. In order to do it, those military commanders and civilians . . . should be held accountable for human rights violations that took place during the attacks of April and May 2018."*⁷⁴

Similarly, another victim stated that,

⁷² R-ARCSS, Articles 5.3.1 and 5.3.3.

⁷³ RARCSS, Articles 5.1.1 and 5.1.2.

⁷⁴ ERN 101638 – 101642.

“If there is a Hybrid Court, people will have to provide answers as to why I was detained and who took me there. I am willing to speak to you because it means justice will be done and if it not done, I will not be able to live with it.”⁷⁵

102. The AU Commission, R-TGoNU, and their collaborators should ensure that the legislation, guidelines, and proposed design for the operationalisation of the Hybrid Court will enable it to effectively achieve its stated objectives, namely: investigations and prosecutions of individuals bearing responsibility for international and serious crimes under international and South Sudanese law, with the overall aim of facilitating truth, reconciliation, healing, compensation, and reparation. To this end, the AU Commission and the R-TGoNU must expressly include and articulate specific measures for the implementation of core aspects that are central to the Hybrid Court’s mandate, jurisdiction, and operation, as articulated in the R-ARCSS. These core aspects include:

(a) Broad investigations and a prosecutorial strategy to incorporate a wide range of serious crimes under international and South Sudanese law, including: patterns of deliberate starvation as a method of warfare and related economic crimes to the conflict that have been documented by the Commission; a broad temporal period including on-going violations until the end of the Transitional Period; and cases that depict a true reflection of the patterns of the conflict, including geographic representation and liability of both State and non-State actors. Furthermore, the requirement for the Hybrid Court to bring cases against “individuals bearing responsibility” provides room for broad accountability, not only against those bearing the highest level responsibility, but may also include those responsible for the most serious, gross, or significant violations in South Sudan.⁷⁶

(b) Effective and appropriate safety measures, psychosocial support, and legal representation to guarantee meaningful participation of victims in the proceedings of the Hybrid Court without fear of reprisals (5.3.4.1).

(c) Even though the existing political and security considerations may necessitate locating the Hybrid Court abroad, deliberate measures should be put in place to promote in-country public awareness, understanding, and engagement.

(d) Explicit recognition that amnesties to prevent the prosecution of individuals who may be legally responsible for war crimes, genocide, crimes against humanity, and other gross violations of human rights are inconsistent with the State’s obligations under international law. Even though Article 6(5) of Additional Protocol II of the Geneva Conventions makes provision for the granting of the broadest possible amnesties to “persons who have participated in armed conflicts or those deprived of liberty, whether interned or detained, for reasons related to the armed conflict”,⁷⁷ the International Committee of the Red Cross has specified that the granting of amnesties within the scope of this article does not extend to persons suspected of, accused of, or sentenced for war crimes.⁷⁸ Furthermore, the R-ARCSS expressly precludes the possibility of immunity or amnesty from criminal responsibility.⁷⁹

State cooperation with the Hybrid Court

103. The R-ARCSS requires the R-TGoNU to fully support and facilitate operations of and cooperate with the Hybrid Court.⁸⁰ However, the experiences of the International Criminal Court and the *ad hoc* criminal tribunals are illustrative of the challenges associated with investigations and prosecution of political actors who continue to wield significant state power and influence in post-conflict settings. Most critical is often the lack of state cooperation in establishing appropriate mechanisms to guarantee effective investigations, apprehend suspects, and ensure the safety and protection of victims and witnesses. The Nairobi Principles on Accountability assert that, in such situations, accountability

⁷⁵ ERN 101725 – 101736.

⁷⁶ See R-ARCSS Article 5.3.1.

⁷⁷ See Article 6, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁷⁸ See Rule 159 of the ICRC Customary IHL study; See also OHCHR Rule of Law Tools for Post Conflict States: Amnesties 2009.

⁷⁹ R-ARCSS, Article 5. 3.5.4.

⁸⁰ See R-ARCSS, Article 5.1.4.

mechanisms should proceed with “no expectation of good faith cooperation”.⁸¹ This approach necessitates a thorough assessment of potential barriers likely to result from conflicting political interests, and the establishment of a legal framework, and investigative, prosecutorial, and witness protection strategies that anticipate and provide mechanisms to mitigate a lack of political will, political interference, or sabotage for accountability processes through state officials and political actors.

Dealing with residual cases at the domestic level

104. The prolonged period of conflict in South Sudan, the wide range of violations involving millions of casualties, and overlapping roles and experiences of affected individuals and communities both as victims and perpetrators, has created a complex web of potential criminal liability that cannot be addressed exclusively through the Hybrid Court. As has been the case in many post-conflict and post-authoritarian contexts, *ad hoc* international and hybrid criminal tribunals often pursue emblematic trials against individuals who bear the highest level or greatest responsibility for mass atrocities and most serious or grave crimes committed during the conflict. This approach is often informed by the complexities involved in obtaining convictions for international and other serious crimes, high costs of operation, and limited resources and capacity to cover the full scope of violations, balanced against the primary aim of sending a strong message against impunity for atrocity crimes.⁸²

105. Inevitably, even with the successful implementation of the Hybrid Court, it will still be necessary for the R-TGoNU to develop a clear and effective strategy to deal with the broad layer of other high, middle, and lower level individuals involved in perpetrating gross violations and serious crimes during the conflict. Accountability for individuals bearing the highest or greatest responsibility for mass atrocities could deter their mid- and lower-level foot soldiers from perpetrating future violence. Nonetheless, failure to deal with the wider scope of the violations has the potential to leave intact a broad base of affected individuals who could easily be ignited to engage in revenge attacks or be exploited by emerging factions to perpetuate the conflict and related crimes.

106. This reality brings into focus the complementary role that the Commission on Truth, Reconciliation, and Healing (CTRH) is intended to play in comprehensively identifying underlying causes, patterns, affected victims, and perpetrators of conflict-related violations in South Sudan. The CTRH’s findings could form a basis for further investigations and prosecution of cases and individuals falling within the mandate of the Hybrid Court or future domestic accountability processes against an extensive number of perpetrators.

107. The AU Commission and R-TGoNU should explore the potential benefits of adopting a structure that will support anticipated reforms that can strengthen the prospects for future accountability within the domestic justice sector. This could, for instance, include mechanisms for the Hybrid Court to progressively refer cases, transfer its data/evidence base, and provide capacity building and technical assistance to domestic courts in South Sudan.

Compensation and Reparation Authority

108. In its earlier reports, the Commission underscored established international human rights law, norms, and standards, which note that material compensation constitutes only one element of holistic reparations. Reparations provided to conflict-affected communities and individuals in South Sudan should be holistic, consisting of both material and non-material elements, including restitution, compensation, rehabilitation, and guarantees of non-recurrence. The Commission is of the view that priority should be given to building the institutional and policy frameworks required for the smooth implementation of a long-term reparations programme, as well as an interim reparations programme to address the immediate needs of victims.

⁸¹ Kenyans for Peace with Truth and Justice & Ulster University Transitional Justice Initiative, Nairobi Principles on Accountability, 2019, *Principle 5*, available at <http://kptj.africog.org/wp-content/uploads/2019/01/Nairobi-Principles-on-Accountability-ONLINE-version.pdf>.

⁸² International Center for Transitional Justice, *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, 2018.

109. A survey conducted in 2014-15 found that 81 per cent of survivors agree that the Government should provide compensation to victims of human rights violations and abuses.⁸³ 40 per cent of the respondents believed that reparations should be individual, while an equal number supported both collective and individual reparations.⁸⁴ The same survey also revealed significant support (61 per cent) for memorialisation initiatives as important lessons for future generations, and to see reparations programmes expanded to provide a reminder of the past. All of these needs can be addressed through a comprehensive reparations programme.

110. Since the rationale for reparations programmes is to repair the harm caused by human rights violations, restore civic trust in the state and its institutions, and ensure that citizens are reinstated with full rights, it is critical for these programmes to be developed in consultation with key stakeholders including the government, all political parties, civil society, and victim groups. The Commission underlines that in implementing the transitional justice agenda in South Sudan, victims and vulnerable communities especially women, the internally displaced and refugees, are core stakeholders who must be included in the design and implementation of such mechanisms. Victims in South Sudan have generally been overlooked when it comes to seeking their views with regards to peace, truth, justice, and reconciliation. They have never received any form of reparation for the harm suffered during the conflict.

111. The Commission is of the view that priority should be given to building the institutional and policy frameworks required for the smooth implementation of a long-term reparations programme, as well as an interim reparations programme to address the immediate needs of victims. Preliminary activities that could be undertaken towards a sustainable reparations programme include mapping the potential universe of victims, as well as the nature of harm suffered and the consequences, so as to inform planning and measures. Nationwide consultations should be held with communities affected by the conflict as well as individual victims which would assist to identify potential reparations measures. Consultations should also be about process, including how to ensure that victims are identified and informed of the reparations measures available, the procedures in place to register victims, as well as evidentiary requirements which may apply once the process is underway. This may prove challenging in the South Sudan context, given the scale of ethnic and tribal divisions which will require sensitive context specific approaches, including adequate capacity building.

112. With almost one-third of the South Sudan population displaced, there is also a large risk that victims and communities living in the diaspora may be excluded from the reparation process. Consultations with the internally displaced and refugee communities is therefore critical to ensure that reparations programmes are designed in a targeted manner to reflect their needs. Furthermore, given the staggering scale of sexual and gender-based violence in the current conflict, and the lack of attention it has received from the authorities, it is important to factor a gender-sensitive approach into all aspects of the design and implementation of the reparations programme, including by ensuring that women are well represented in the executive body of the Compensation and Reparations Authority.

113. Funding for reparations will require that the Government of South Sudan reprioritise its spending on the military and security sectors to assist victims. Successful reparations programmes across the world owe their success to the early identification of sustainable funding mechanisms, which include the establishment of a victims' trust fund drawn from a national budget on an annual basis. This requires political commitment as well as national ownership. If funding is not secured or appropriated at the outset of any transitional justice programme, any discussion of reparations risks raising unreasonable expectations and undermining reconciliation amongst victims and survivors.

114. Notwithstanding the vast amount of resources that have been spent on conflict, and the many other financial demands of setting up the Transitional Government, the R-TGoNU must nevertheless recognise reparations as an integral part of its obligations during the transition, and allocate commensurate resources that will represent societal solidarity and

⁸³ South Sudan Law Society, *Search for a New Beginning*, fn. 14.

⁸⁴ *Ibid.*, at p. 54 of the survey.

give due regard to the suffering of victims, their families, and communities whose fundamental human rights were violated by the conflict.

115. As in Sierra Leone, reparations measures may need to prioritise certain classes of victims through a package of measures, rather than just compensation alone. Other countries have prioritised those most vulnerable, children, and youth, those having suffered sexual violence, the elderly, and war wounded. The Commission will continue to advocate for the setting up of a Reparations Fund by the Government of South Sudan to be funded by 1 per cent of South Sudan's oil revenues which should be set aside for reparations to victims of the conflict.

116. Development programmes can also be used to complement reparations through providing wider benefits to all South Sudanese as well as to respond in the interim to victims' needs. This notwithstanding, the Government should consider symbolic measures including memorialisation initiatives that will serve as an acknowledgement of the State's failure of its responsibility to protect its citizens and also awaken society to the crimes that were committed in order to prevent repetition.

117. While both President Kiir and First Vice President Dr. Riek Machar have occasionally tendered apologies for the violations committed by their forces in the course of the conflict, the most meaningful apologies are those that are made in the context of the implementation of the transitional justice process, including reparations. Indeed, a cogent sign of contrition would be the implementation of Chapter V of the R-ARCSS.

118. Reparations and compensation are also rooted in the traditional customary adjudication of disputes in South Sudan. Traditional authorities, who have long managed disputes arising from the conflicts, are an important resource to assist in formulating reparation measures that are tailored to local contexts. In South Sudan, cattle raiding has long been a source of conflict between communities which has been settled using traditional dispute mechanisms which could provide a conducive environment for reparations to operate in. At the local level, payment of compensation through cattle by responsible perpetrators and their clan for murder or serious violations to the victims' family or clan, have sometimes helped to restore the social equilibrium and avoid blood feuds. Often such payments are associated with symbolic reconciliation ceremonies involving the slaughtering of cattle and the sharing of meals among hitherto feuding parties. A preliminary study of how traditional authorities have used reparations and compensation to settle disputes, as well as the kind of measures that have been adopted and accepted by both victim and perpetrator, should be compiled to assist in the planning of any future programme.

VI. Recommendations

119. **The Commission recommends that the Government of South Sudan:**

(a) Take immediate steps to remedy persistent and undue delays in implementation of the R-ARCSS, including reconstitution of the Transitional National Legislative Assembly and establishment of State governments, to facilitate enactment of legislation and a conducive environment for initiation of transitional justice processes in South Sudan;

(b) Expedite the enactment of legislation and establishment of the Commission on Truth, Reconciliation, and Healing, Hybrid Court for South Sudan, and Compensation and Reparation Authority, in accordance with Chapter V of the R-ARCSS;

(c) Ensure that transitional justice is pursued as an integral, rather than a secondary, component of peacebuilding and development in South Sudan, including by ensuring appropriate allocation of adequate resources for operationalisation of the Commission on Truth, Reconciliation, and Healing, Hybrid Court for South Sudan, and Compensation and Reparation Authority;

(d) Issue a public report to the citizens of South Sudan, indicating the steps it has taken so far, with regard to implementation of Chapter V of the R-ARCSS, and

outlining any obstacles resulting from the COVID-19 pandemic, and measures it is taking or intends to take to mitigate identified challenges;

(e) Establish a focal point in the R-TGoNU to oversee implementation of Chapter V of the R-ARCSS and transitional justice processes in South Sudan;

(f) Initiate deliberate measures to ensure broad and inclusive public, victims', and civil society participation in the conceptualisation, implementation, and monitoring of transitional justice processes, including the selection of Commissioners to the Compensation and Reparation Authority;

(g) Ensure that transitional justice measures are holistic, contextualised, respond to victims' needs, and uphold human rights principles, including the guarantee of equality, non-discrimination, impartiality and inclusivity;

(h) Take prompt action to investigate and prosecute State security officers and other actors responsible for violations of fundamental freedoms and rights to information, expression, association, and assembly, and suppression of civic space; and

(i) Allocate at least 1 per cent of oil revenues to reparations, alongside other non-monetary measures to promote a broad approach to reparation, including compensation, restitution, rehabilitation, symbolic measures, and guarantees of non-repetition.

120. The Commission recommends that UN Members States, the United Nations, and other development partners:

(a) Initiate targeted programmes to support the strengthening of civil society and victims' groups capacity, so as to ensure their effective engagement in transitional justice processes, including at grassroots levels;

(b) Provide technical and financial assistance, with clear requirements for transparency and accountability, to support transitional justice processes in South Sudan; and

(c) Provide political support to sustain momentum on implementation of the R-ARCSS and initiation of transitional justice mechanisms in Chapter V.

121. The Commission recommends that the African Union:

(a) Provide a public update on the challenges it has experienced in its attempts to establish the Hybrid Court in collaboration with the R-TGoNU, and its proposed solutions to address the current stalemate;

(b) Initiate contingency preparations to unilaterally establish a Hybrid Court along with a functioning Prosecutor's Office, in the event that the Government of South Sudan continues to delay its formation; and

(c) Take deliberate steps to pursue the implementation of the R-ARCSS and transitional justice measures in South Sudan, in line with its broader mandate in the AU Charter and African Union Transitional Justice Policy.

Annex I

Transitional justice workshop report⁸⁵

I. Background and Context

1. In August 2015, the parties to the conflict in South Sudan signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), committing to “national reconciliation, accountability, healing and combating impunity” among other priorities. Chapter V of the Agreement provided for the establishment of three transitional justice institutions: (i) the Hybrid Court for South Sudan (HCSS), to investigate and prosecute individuals suspected of committing genocide, war crimes, crimes against humanity, serious human rights violations, and violations of international humanitarian law; (ii) the Commission for Truth, Reconciliation, and Healing (CTRH), to address the legacy of past human rights abuses; and (iii) the Compensation and Reparation Authority (CRA), to administer the Compensation and Reparation Fund (CRF), to be established by the Transitional Government of National Unity.

2. Despite commitments made by the parties, the Agreement has never been fully implemented. On the contrary, renewed conflict between Government forces and the opposition heightened in July 2016, after fighting had broken out in Juba, resulting in the virtual collapse of the Agreement. The clashes further resulted in the departure of opposition leader Dr. Riek Machar from his position as Vice President, who was replaced by Taban Deng Gai, his chief negotiator. It also transformed the crisis from a conflict primarily between the Sudan People’s Liberation Army (SPLA) and the SPLA-in-Opposition (SPLA/IO) to one that spread into new areas in the Equatoria region which had hitherto remained untouched, with multiple defections and splinter groups. Since then, the political landscape in South Sudan has become contentious, with hardliners on all sides of the political divide openly expressing dissatisfaction with the terms of the Agreement.

3. Amidst increasing repression by the National Security Service (NSS) and other intelligence arms of the Government, civic space for debate and dissent has continued to shrink, which has given rise to myriad human rights violations including activists and journalists being deprived of their fundamental freedoms. Moreover, little effort has been made to establish any of the Chapter V mechanisms during this period. Amidst the increased insecurity and new conflicts, the Government launched a national dialogue process in December 2016, as a new forum to promote national unity, healing, and reconciliation, which many observers and South Sudanese saw as a means to deflect attention from the Chapter V mechanisms. The national dialogue also attracted deep scepticism among displaced persons and the refugee communities who continued to make the point that there could be no genuine national dialogue without Chapter V being implemented. Within this context, the Intergovernmental Authority for Development (IGAD) – the mediating body – launched a high-level forum to revitalise the 2015 Agreement.

4. In September 2018, the Government and the other parties to the conflict signed a Revitalised Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS). The new Revitalised Agreement reaffirmed the commitment to the transitional justice framework adopted in the 2015 Agreement, and almost maintained in full the Chapter V provisions. It however set new timelines for the establishment of the transitional justice institutions. Under the R-ARCSS, the responsibility for initiating legislation for establishing the three transitional justice mechanisms, namely the Truth, Reconciliation, and Healing Commission, the Hybrid Court for South Sudan, and the Compensation and Reparation Authority now rested with a Revitalised Transitional Government of National Unity, which was expected to be formed in May 2019. Another noteworthy provision introduced in the Revitalised

⁸⁵ This report summarises the discussions and conclusions from the workshop on transitional justice and the promotion of peace in South Sudan from 16th - 18th December 2019. The workshop was organised by the Commission on Human Rights in South Sudan. It took place Addis Ababa, Ethiopia.

Agreement was that women's participation in the transitional justice institutions must now meet the 35 per cent general threshold of the 2015 Agreement.⁸⁶

5. In May 2019, when the parties to the R-ARCSS agreed to extend the pre-transitional period leading to the formation of a unified Government for an additional six months, key reasons were to enable: the implementation of critical prerequisites for the transition, including the resolution of the number of states and their boundaries; the review and drafting of key legislation; the incorporation of the Revitalised Agreement into the Transitional Constitution; and the cantonment, training, and redeployment of the Necessary Unified Forces. More than halfway into this period, implementation of these tasks continues to face delays, while key timelines and benchmarks have remained largely unmet.

6. The foregoing Workshop fell under the backdrop of the end of the pre-transitional period in November 2019, presenting an opportunity to reflect on the progress and challenges in implementing the Chapter V mechanisms of criminal prosecutions, truth seeking, reparations, and institutional reforms. South Sudanese women, men, and children are desperate for genuine peace and reconciliation, but many are asking what channels exist to support a just and meaningful transitional justice process to achieve accountability, peace, reconciliation, and to establish the rule of law.

II. Goals and Objectives

7. The workshop looked at the following key issues among others;

- Examine the role of national, regional and international mechanisms including the UN, African Union and other stakeholders in assisting with the implementation of R-ARCSS and strengthening justice and accountability mechanisms;
- Discuss critical issues that implementing actors, including the AU, the Government of South Sudan, the RJMEC and civil society need to take into account when considering the establishment of the hybrid court, and the truth seeking and reparations mechanisms of the RARCSS;
- Assess and analyze the, security challenges and political context that need to be taken into account to create a conducive environment for a successful transitional justice program in South Sudan including political will, national ownership and security;
- Examine the coordination and sequencing (where necessary) of the various transitional justice mechanisms outlined in the RARCSS with a view to ensuring their timely establishment;
- Assess the challenges of ensuring a victims centered, gender sensitive transitional justice process which pays particular attention to women and girls as well as the youth who have been disproportionately affected by the conflict.;
- Identify and examine best practices for a holistic approach to the pursuit of accountability, justice, truth, reconciliation and reparation in South Sudan;
- Examine the complimentary role of traditional justice and reconciliation mechanisms in shaping transitional justice processes in South Sudan;
- Explore the viability of domestic accountability options and the reach of the formal justice system in ensuring meaningful accountability for serious conflict related crimes;

III. Expected Outcomes

- A comprehensive policy framework and strategy for:
- implementing Chapter V of the R-ARCSS in accordance with international norms and standards;

⁸⁶ R-ARCSS, Article 5.1.1.

- securing a conducive environment for the implementation of a holistic transitional justice programme that includes a strengthened domestic legal system, an enhanced role of local indigenous reconciliation and justice processes, and an effective public awareness programme;
- strengthening civil society engagement with the African Union, Reconstituted Joint Monitoring and Evaluation Commission (R-JMEC), and the Government of South Sudan on the implementation of the Chapter V mechanisms taking into account linkages and sequencing; and
- produce a report that will summarise the discussions and outcomes/recommendations.

Summary

8. Between 16 to 18 December 2019, the Commission on Human Rights in South Sudan (CHRSS) convened a workshop on *Transitional Justice and Promotion of Peace in South Sudan*. The meeting was held in Addis Ababa, Ethiopia, and symbolically marked six years since the outbreak of the conflict in South Sudan.

9. The Commission organised the Workshop against the backdrop of mounting anxiety and uncertainty due to significant delays in the initiation of transitional justice measures anticipated in Chapter V of the 2018 Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS). Despite the creation of a Technical Committee in December 2016 to conduct national consultations on a truth-seeking process, the Commission for Truth, Reconciliation, and Healing (CTRH) intended to address the legacy of past human rights abuses was yet to be established. Likewise, the process of establishing the Hybrid Court for South Sudan (HCSS) to investigate and prosecute individuals suspected of committing conflict-related crimes had stalled since 2017, following the Transitional Government of National Unity's (TGoNU) failure to adopt the draft Statute and sign a Memorandum of Understanding (MoU) with the African Union for establishment of the Court. At the same time, the conceptualisation of a comprehensive reparation programme including setting up the Compensation and Reparation Authority and Fund had not begun. On a parallel level, the National Dialogue process continued to gather and analyse information from within and outside of South Sudan in preparation for a national conference. However, many South Sudanese remained profoundly cynical about the process, and expressed concern that it was purposely designed to circumvent accountability processes anticipated in Chapter V of the RARCSS.

10. The workshop drew over 70 participants from the TGoNU, including the Minister for Justice and Constitutional Affairs, parties to the R-ARCSS including Sudan People's Liberation Movement (SPLM) and Sudan People's Liberation Movement-in-Opposition (SPLM-IO), the Real SPLM, the Transitional Justice Working Group, and other South Sudan civil society and faith-based organisations, international non-governmental organisations, the Revitalised Joint Monitoring and Evaluation Commission (R-JMEC), United Nations Development Programme (UNDP), United Nations Mission in South Sudan (UNMISS), United Nations Secretary General's Representative to the African Union, Chairperson of the African Commission on Human and Peoples' Rights and South Sudan Country Rapporteur, the African Court on Human Rights and Justice, and diplomatic corp.

11. Participants and experts with technical and contextual knowledge on various aspects of transitional justice and the socio-political situation in South Sudan led panel presentations, including by sharing lessons learned and observations drawn from comparative post-conflict and transitioning contexts. Presentations were followed by plenary discussions and breakout sessions to generate consensus among participants on the way forward for transitional justice and national reconciliation in South Sudan.

12. This report presents the outcomes of the workshop, including key policy considerations and proposals that implementing actors, civil society organisations, and development partners should take into account to surmount political obstacles and ensure a holistic and context-specific approach to transitional justice in South Sudan.

13. The main highlight was the formation of an informal inter-agency working group from the participants focused on six main areas, namely: (i) creating tangible solutions for the security and political challenges; (ii) engaging with the AU; (iii) alternative traditional justice mechanisms and victim-centred processes; and (iv) advocacy for institutional reform and strengthening of domestic systems.

Transitional justice as a means to promote accountability, national reconciliation and healing in South Sudan

14. There was recognition among the participants that South Sudanese are craving for sustainable peace. With an objection from a participant from the Ministry of Justice, most participants concurred that the agreements reached in the R-ARCSS, including specific mechanisms anticipated in Chapter V, provide a watershed opportunity to initiate transitional justice as one of the means to secure sustainable peace in South Sudan.

15. The Hon. Angelina Teny from the SPLM-IO emphasised that genuine commitment is required from all parties to ensure the realisation of transitional justice measures, particularly to: address historical grievances, marginalisation and injustices that have led to protracted conflict; cultivate a common nationhood and identity on what it means to be South Sudanese; provide individual and collective criminal and political accountability for past violations; and promote institutional reforms and other systemic changes that can catalyse effective societal transformation.

16. Dr. Lam Akol from the Democratic Change party acknowledged that the R-ARCSS creates an opportunity for implementation of preceding negotiations, agreements, and processes, and highlighted key priorities to achieve accountability, national reconciliation, and healing through transitional justice in South Sudan. Mr. Akol stated:

“As a result of the fighting there were atrocities committed on both sides of the divide, though not at the same scale. At least there is acknowledgment of those atrocities. These atrocities need to be addressed because at least there are no perpetrators that should go free.”

To this end, Dr. Akol noted that it is important that the Commission on Truth, Reconciliation, and Healing (CTRH), Hybrid Court for South Sudan (HCSS), and Compensation and Reparation Fund and Authority are all conceived and implemented in a mutually reinforcing manner, to *“promote the common objectives of facilitating truth, reconciliation, healing, compensation, and reparation in South Sudan”*.⁸⁷

17. The Chairperson of the United Nations Commission on Human Rights in South Sudan, Ms. Yasmin Sooka, reflected on the AU Commission of Inquiry on South Sudan’s report that provided detailed proposals on potential solutions to address documented human rights and humanitarian law violations and underlying causes of the conflict, including truth-seeking, a Hybrid Court, compensation and reparation, and political arrangements and approaches. The AU Inquiry was then followed by various negotiations that resulted in the 2015 ARCSS and 2018 R-ARCSS.

18. During a plenary discussion, participants noted that the workshop provided a timely and critical opportunity to deliberate on the policies, institutions, and processes that would be necessary for the design and implementation of proposed transitional justice measures to effectively meet the needs of South Sudanese as articulated in the R-ARCSS, and initiate a process that will lead to significant transformation in South Sudan.

19. The workshop further underscored South Sudanese people’s views, as reflected in the R-ARCSS, that justice and peace must be pursued together as mutually reinforcing, rather than diametrically opposed, objectives. Commissioner Barney Afako emphasised that the transitional justice measures and mechanisms should, in a complementary manner, ensure: holistic interrogation of the past to accurately understand and document what took place before and during the conflict, how and why it happened, who was affected, and responsible actors.

20. Participants acknowledged that a few positive actions have already taken place, for instance a thorough and high-level fact-finding mission capable of establishing responsibility

⁸⁷ R-ARCSS, Article 5.1.3.

for serious crimes, gross violations of human rights, and violations of international humanitarian law set up by the UN Human Rights Council, and the public acknowledgement by all parties to the conflict of the sheer loss that South Sudanese have experienced. Participants also recognised, however, that there is need for tangible remedies and reparation measures that will guarantee non-recurrence of conflict and related violations in future, such as the Hybrid Court and constitutional and institutional reforms within the security and justice sectors.

IV. Security and political context

21. H.E. Paulino Wanawilla Unango, Minister of Justice, Government of South Sudan, observed that the prevailing security and political context in South Sudan has not been conducive for the effective initiation of transitional justice. Although there has been a decline in widespread armed fighting since the adoption of the R-ARCSS, there is still on-going conflict and insecurity in parts of the country, including recruitment of local “youth” and children, contrary to the permanent ceasefire agreements.

22. South Sudanese human rights activists emphasised that civic and political space is still severely constricted and South Sudan is essentially run as a police-state. Participants additionally submitted that the Government has restricted dissemination of the peace agreement, demonstrating its lack of political will to ensure citizens’ full and meaningful participation in implementation of anticipated transitional justice and reform measures.

23. The participants were informed by civil society organisations that they must seek approval to assemble or conduct their civic activities from the National Security Service (NSS), which operates as a fully-fledged military operating unit, contrary to its constitutional function of collecting security intelligence. Civil society organisations supporting accountability for serious crimes and violations are also targeted for surveillance, leading to arbitrary arrests and detention in many cases. Victims and witnesses fear reprisal from authorities if they were to report violations or seek justice. Therefore, they have shunned formal judicial systems.

24. Hon. Angelina Teny observed an overall lack of political will to uphold and implement the agreements reached in the R-ARCSS. Critical political interventions anticipated in the peace agreement, including establishment of the Transitional Unity Government, had not been initiated at the time of the workshop, leading to heightened anxiety and confusion among citizens on advancement of the R-ARCSS and its Chapter V transitional justice measures. Japhet Bigeon from Amnesty International noted that there had been strong resistance to justice and accountability measures from political actors, with some expressing apprehension against the establishment of the Hybrid Court, which they perceive to be a tool for regime change. Dr Lam Akol’s opinion was that, consequently, more attention was given to the National Dialogue, which is widely viewed as a parallel process intended to circumvent accountability mechanisms in the peace agreement.

25. Deliberations at the workshop culminated in the following proposals for measures to be taken by State and non-State actors to address the adverse security and political situation in South Sudan:

IGAD	Address the linkages between regional economic and political dimensions of the conflict in South Sudan, which may explain the disinterest of neighbouring countries in supporting implementation of the peace agreement. Explore avenues to build trust and confidence among political actors on the significance of accountability processes in achieving sustainable peace, national reconciliation, and healing in South Sudan. The buy-in of the
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	political leadership is vital for successful implementation of transitional justice in South Sudan. Besides their role in enacting required legislation and policies, political actors must be at the forefront as champions of transitional justice goals and measures.
R-JMEC	Support timely and effective implementation of security sector reforms to address on-going securitisation of every aspect of life in South Sudan.
CHRSS	Robustly engage the Inter-Governmental Authority on Development (IGAD) and the African Union (AU) to play a more active role in pushing for implementation of the R-ARCSS. Stakeholders were concerned that the IGAD and the AU had not sufficiently deployed their political position to influence the Transitional Government's timely establishment and implementation of transitional justice measures.
Diplomatic corps	Identify and collaborate with other regional (in addition to the AU and IGAD) and international entities, including States, that can direct their political leverage to advance implementation of the R-ARCSS and transitional justice in South Sudan.
AU	Continuously explore innovative strategies to overcome political obstacles to the implementation of transitional justice in South Sudan. For instance, participants reasoned that it would have been perilous to peg implementation of Chapter V of the R-ARCSS on formation of the Unity Government, which had been delayed since 2016. They considered that the AU, IGAD, and other actors ought to have considered the establishment of an <i>ad hoc</i> tribunal in the event of the interim Government's further delay in establishing the HCSS

Overarching principles and issues proposed for consideration in the design and implementation of transitional justice measures in South Sudan

Holistic and far-reaching

26. While leading a plenary discussion, Commissioner Barney Afako said that transitional justice measures should aim to include a broad range of conflict-related atrocities, their causes and consequences, affected victims, responsible actors, and geographic locations of the violations. Mr. Afako continued with emphasis on economic crimes, violation of land rights, and patterns of cattle raiding that should be considered alongside other civil, political, and socio-economic violations in the context of the conflict in South Sudan.

Participants in group discussions pointed out areas that require import:

- Measures should be taken to ensure that transitional justice processes cover all affected geographic locations and victims, including opposition-controlled territories, as well as violations committed both by State security and non-State armed groups throughout the country.
- Transitional justice measures should also pay attention to the antecedents and causes of the 2013 conflict, including historical injustices and systemic marginalization, as well as ongoing conflict and violations in parts of South Sudan and within internally displaced persons (IDPs) and refugee camps.
- Traditional justice mechanisms and customary practices are highly valued in South Sudanese society, and should, to the greatest extent possible, be pursued to contribute to truth-telling, reconciliation, healing, reparation, and accountability. Participants noted that restoration of traditional authority to the esteemed position it occupied prior to the conflict may be a form of guarantee of non-recurrence of conflict and related abuses that violated established socio-cultural norms.
- Further, whereas a Hybrid Court is anticipated, there should be continuous exploration of other potential avenues for broader accountability through national courts, including enhanced capacity and reforms within the justice sector. Participants emphasised the need for key actors to also focus their attention on other aspects of Chapter V, besides the Hybrid Court.
- South Sudanese further want to see an inclusive, complementary process that includes various aspects of transitional justice including truth-seeking, reparation (including redistributive and restorative justice), and reforms, rather than an exclusive focus on retributive justice.

Inclusive and locally driven

27. One key element Commissioner Afako presented on was local ownership. He advised that transitional justice measures must resonate with the experiences, needs, and priorities of South Sudanese citizens and conflict-affected victims/survivors and communities. Implementation of the R-ARCSS and transitional justice measures should not be viewed or driven as an external, imposed, elitist, technical, or political agenda, devoid of the people's views and expectations. Inclusion and buy-in of South Sudanese in all segments of society, including rural areas, uneducated citizens, women, marginalised communities, and those in opposition, is essential for the effective design and successful implementation of transitional justice processes and measures in South Sudan.

28. Additionally, participants agreed that a sense of ownership and buy-in into transitional justice processes by the general population can also contribute to addressing unhealed trauma resulting from marginalisation and cycles of violence from one generation to the next. Moreover, South Sudanese must be effectively positioned to steer transitional justice processes long after external actors depart.

29. The proposed action to be taken is to encourage State actors and civil society organisations to initiate robust public awareness campaigns to enhance the South Sudanese citizens' understanding of the R-ARCSS and anticipated transitional justice measures, and reflect on strategies to promote meaningful inclusion and participation of ordinary citizens in transitional justice discourses.

Gender sensitive

30. It will be imperative to incorporate a gender lens during the conceptualisation, implementation, and monitoring of all transitional justice mechanisms. This will require that deliberate policies, measures, and technical capacities are put in place to identify distinct ways in which women, men, boys, and girls have experienced the conflict and its consequences; and address pre-existing gender-based inequalities that caused or exacerbated violations or that continue to pose obstacles to the effective participation of either gender in anticipated truth-seeking, accountability, reparation, reconciliation, and healing processes.

31. During deliberations, Esther Ikere Eluzai Ladu from the Ministry of Gender, Child and Social Welfare agreed, and further reiterated that the Government will be committed to the R-TGoNU ensuring strict adherence to the requirement in the R-ARCSS for 35 per cent

women representation in all the Chapter V mechanisms (5.1.1). Participants from civil society mentioned the alarming scale of the use of sexual violence as weapon of war in the South Sudan conflict, and how every effort should be made to address the existing State and societal denial, even tolerance, of its occurrence and stigmatisation of affected victims/survivors and their families – only then would the relevant stakeholders be empowered to ensure effective and comprehensive reporting and documentation of cases, patterns, and consequences of conflict-related sexual violence in South Sudan.

Complementary

32. Participants also observed that it will be challenging to achieve the objectives of Chapter V without the effective realisation of other crucial aspects of the R-ARCSS. Security, judicial, and other institutional and constitutional reforms, humanitarian assistance, and rehabilitation of conflict-affected communities, and barring of corrupt officials from holding public office as anticipated in the R-ARCSS, are all essential to create a conducive environment for transitional justice. Commission Chair Yasmin Sooka also noted that transitional justice measures should include an assessment of the manner in which various state security, resource management, and financial institutions have been misused to perpetuate the conflict, and contribute to identification of relevant accountability and reform measures so as to guarantee non-recurrence.

Prioritisation and sequencing

33. During group discussions, all participants acknowledged that, in a post-conflict context such as South Sudan, there will inevitably be competing demands for rebuilding, reparation, and accountability. Thus, duty bearers and stakeholders should continuously deliberate on prioritisation and sequencing between and within various transitional justice measures, to ensure their timely establishment and effective implementation within the evolving social, political, and economic context in South Sudan.

34. Stakeholders from the Government of South Sudan agreed that there should be a greater push for implementation of measures where consensus has been achieved, while continuing negotiations on contentious issues. Hon. Clement Kuc Achol, a member of the Transitional National Assembly – Legislation and Justice committee, submitted that it is possible to fast track the initiation of renewed and inclusive national consultations and development of legislation for creation of the CTRH; and provision of urgent and interim reparation measures including health care and land restitution. Other considerations include timing of the establishment of the Compensation and Reparation Fund and Authority and their connection to the CTRH and HCSS.

35. As a note, Commissioner Barney Afako referred participants to the report by late Kofi Annan, on Transitional Justice in Peacebuilding titled “UN, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*” (UN Doc. S/2004/616). The report points out challenges if a form of weak institutions, unfavourable political environment, and weak security.

Coordination among state and non-state actors

36. Civil society participants from the Transitional Justice Working Group identified the need for enhanced information sharing and coordination among State and non-State actors involved in the promotion of transitional justice. Such coordination would enable actors to have a common understanding of the goals and mandate of various transitional justice mechanisms, avoid duplication and optimally utilize available resources to ensure that all conflict-affected communities and transitional justice issues are effectively covered. Civil society organisations were encouraged to consider collaborative approaches for data collection and documentation on patterns of violations, which could support the work of various transitional justice mechanisms. This calls for an urgent review of existing documentation and databases, and action to address any identified gaps. Regional and international civil society organisations and friendly States can also play an active role, including through advocacy, to elicit political action toward implementation of transitional justice in South Sudan.

Resources and capacity

37. Participants observed that provision of inadequate financial resources and weak institutional and technical capacity present significant challenges to implementation of transitional justice mechanisms. This situation is compounded by corruption and the lack of transparent and accountable management of available resources within the Government. Some stakeholders proposed that resources raised to support establishment and operation of transitional justice mechanisms should be managed by a third party.

Role of the African Union

38. Ms. Hanna Tetteh, Special Representative to the African Union and Head of the United Nations Office to the African Union, during the workshop's opening remarks, recognised the long history of the African Union's role in conflict resolution and peacebuilding in South Sudan. Notably, the findings of the AUCISS formed a basis for negotiations that resulted in various elements of the peace agreement, including recognition of the need to address entrenched impunity for past violations and serious crimes, and pursue genuine national processes for truth-seeking, reparation, healing, and reconciliation.

39. Participants were however concerned that the African Union and the African Commission on Human and Peoples' Rights engagement on implementation of the R-ARCSS has, thus far, been one-sided, with a primary focus on the Government of South Sudan. They called on the AU to enhance its collaboration with opposition parties to the agreement, South Sudanese citizens, and civil society in its future engagements in order to obtain a comprehensive picture of the people's views and priorities. Participants were also curious about the utilisation of USD \$10 million that is said to have been provided to the AU by the United States of America for establishment of the HCSS. They also expressed concern that there was little to no consultation by the AU with local civil society actors and victims/survivors on development of the draft Statute of the HCSS. Moreover, there was a general sense of frustration among key stakeholders on the lack of apparent action by the AU on the interim Transitional Government of South Sudan's delay in signing the MoU and adoption of the Statute for establishment of the HCSS. This feeling seemed to stem from the belief by key actors and affected communities that the AU would play a more prominent role in pushing for implementation of the R-ARCSS by all parties. It was felt that, while the Transitional Government's co-operation is necessary for establishment of the HCSS, the AU should strongly consider alternative measures within its broader regional mandate, given the Government's manifest lack of political will, to end impunity for serious crimes in South Sudan.

40. Solomon Dersso, a Commissioner with the African Commission on Human and Peoples' Rights, submitted during deliberations that, beyond the R-ARCSS, the AU has a broader mandate to promote regional peace and security, and protect fundamental rights and freedoms enshrined in the African Charter on Human and Peoples' Rights (ACHPR). The African Commission on Human and Peoples' Rights Study on Transitional Justice (TJ Study) and the AU's recently launched Transitional Justice Policy (AUTJP) were identified as important bases for the AU's support toward realisation of transitional justice in South Sudan. Significantly, the AUTJP mandates the AU to exercise political oversight over all transitional justice processes initiated in the African region.

41. Chris Gitari, an officer with R-JMEC, submitted that the AU holds a pivotal role and responsibility to promote transitional justice and sustenance of the peace agreement in South Sudan. Under the R-ARCSS, the R-TGoNU is obligated to co-operate with the AU in developing and implementing transitional justice measures; for its part, the AU is obligated to establish the HCSS and appoint its judges and prosecutors, and nominate Commissioners to the CTRH; and R-JMEC is required to report to the AU on the progress of implementation of the R-ARCSS.

42. A member of the Secretariat of the IGAD reminded participants that, while calling for enhanced interventions by the AU, all key actors should bear in mind the principle of subsidiarity, which places IGAD as the primary regional intervener in the South Sudan situation. Nonetheless, it was also underscored that subsidiarity anticipates the complementary involvement of the AU, UN, and other regional and international actors to advance peace and security based on their comparative advantage. In this case, the AU should

not hesitate to lend explicit support based on its regional mandate to advance transitional justice in South Sudan.

V. Supporting Truth, Reconciliation and Healing in South Sudan

43. Chapter V of the R-ARCSS envisages the establishment of a Commission on Truth, Reconciliation, and Healing (CTRH) to inquire into and establish an accurate and impartial historical record of human rights violations and abuses, breaches of the rule of law, and excessive abuses of power committed by State and non-State actors and/or their agents and allies from the date of signing the Agreement to July 2005. The R-ARCSS requires the R-TGoNU to promulgate legislation to define the mandate, jurisdiction, operations, and selection of members of the CTRH within three months of its formation. To this end, the Ministry of Justice & Constitutional Affairs, in collaboration with other stakeholders and civil society, is obligated to conduct public consultations at least one month prior to establishment of the CTRH, to ensure that the experiences of all key segments of South Sudan's population, including women, men, and children, are sufficiently documented and incorporated in the legislation creating the CTRH.

National Consultations on Establishment of the CTRH⁸⁸

44. Mr. Lawrence Kamilo, an officer with the Ministry of Justice and in his presentation, informed participants that, in December 2016, the Ministry of Justice and Constitutional Affairs established a Technical Committee, consisting of State and non-State actors, to lead national consultations on the creation of the CTRH. Members of the Technical Committee received training from various partners and experts on ensuring a human-rights based and victim-centred approach to the national consultations, and lessons drawn from comparative truth-seeking experiences in other transitioning/post-conflict countries. The Committee received support from the UNDP to undertake national sensitisation and consultations. The sensitisation programme was rolled out in 2017 to establish rapport with members of the public and provide them with an opportunity to share their views with the Committee.

45. Subsequently, the Committee carried out national consultations between May and June 2018. The table below demonstrates the activities, methodology, and findings of the national consultations of the Technical Committee:

Activity	Methodology	Finding
Due to the volatile security situation resulting from on-going conflict in some parts of the country, the Technical Committee, with support from UNMISS, conducted a mapping to identify accessible areas.	28 members of the Committee were divided to conduct consultations across 17 locations, including, Bor, Aweil, Malakal, Kuajok, Rumbek, Renk, Torit, Yambio, Wau, Leer, Bentiu, Mundri, and Yei etc.	UNMISS confirmed that there were no security concerns reported and the environment was generally open in all the areas where the sensitization and consultations took place. Only one location had NSS presence in the building where the consultations were being conducted. Committee members were not able to visit refugee settlements outside of South Sudan.
The Committee consulted a total of 4610 respondents, including 1929 women.	Consultations were conducted through targeted and separate meetings to gain insight on the experiences and perspectives of	There is a desire for the creation of a CTRH with a broad mandate; some respondents stated that they would like to see prosecutions for

⁸⁸ See <https://reliefweb.int/report/south-sudan/undp-supports-government-s-public-sensitization-efforts-establishment-commission>; https://www.ss.undp.org/content/south_sudan/en/home/presscenter/pressreleases/2017/08/25/technical-committee-for-the-commission-for-truth-reconciliation-and-healing-completes-training-in-conducting-inclusive-consultations.html; and https://www.ss.undp.org/content/south_sudan/en/home/presscenter/pressreleases/2018/ministry-of-justice-and-constitutional-affairs-launches-consulta.html.

	various groups including women, Internally Displaced Persons (IDPs), faith-based groups, academics, political parties, and the business community. A questionnaire was used to elicit specific details from respondents including on the mandate of the CTRH and selection of Commissioners.	violations, while others want compensation and reparations for loss of property and physical injuries. Regarding the CTRH's operations, there were both advocates for open as well as in-camera proceedings. On the composition of the CTRH, participants noted that the Commissioners should not include individuals who have served in the previous nor the current Government. Others proposed that credible individuals to lead the CTRH process could include religious leaders and South Sudanese who have worked with the United Nations and other bodies perceived to be neutral or competent on truth seeking and reconciliation processes.
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46. The Technical Committee presented the outcome of the national consultations to the Council of Ministers, which approved a budget of 25 million SSP for the truth-seeking process. The next step is to present a bill for the establishment of the CTRH to the Transitional National Legislative Assembly (TNLA). However, the process has stalled as the required funds are yet to be released.

47. Mr. Kamillo additionally informed participants that sensitisation and consultations conducted by the Technical Committee are, thus far, the most concrete step taken by the Interim Transitional Government of National Unity (I-TGoNU) to advance aspects of Chapter V of the R-ARCSS, and particularly toward establishment of the CTRH.

48. However, during deliberations, civil society participants felt that the consultations fell short of the process envisaged in the R-ARCSS and expressed a number of concerns that are likely to have considerable implications on the design of the CTRH legislation and legitimacy of any resulting truth-seeking process.

The five main concerns were that:

- The report of the outcome of the national consultations conducted by the Technical Committee should be made public as a matter of priority. The failure to make the findings public raises concerns about transparency in the development of the CTRH legislation and the extent to which it will accurately incorporate the views of affected communities as envisaged in the R-ARCSS. For instance, participants noted that from other assessments, citizens feel strongly that the CTRH's mandate should incorporate land issues, which, if not addressed, could be a trigger for future violence.
- The consultations conducted thus far have been partial, leaving out a significant proportion of the affected population. When consultation took place, there was on-going conflict and serious violations in certain parts of the country including Western Upper Nile, Southern Unity, and Equatoria (Yei). Consequently, many of these areas were inaccessible, civilians had fled to neighbouring countries, and there was a high level of mistrust of the Government among the victims who were left behind. The Technical Committee ended up collecting views only in Government-controlled areas and protection of civilian sites (PoCs).
- Out of the three Chapter V mechanisms, the CTRH has the greatest potential to draw the broad participation of South Sudanese people. It is, therefore, critical for the CTRH to ensure widespread reach to victims and affected communities. Thus, further mapping is required to ensure that the experiences of victims/survivors left out of the 2018 national consultations, including in hitherto opposition-controlled areas, are obtained and considered in designing the CTRH legislation. It will also be important to identify and collaborate with local actors

that have created a trust relationship with affected communities over a period of time to carry out the consultations. Participants also reported that there is a need to enhance women's participation in the consultations.

- The timing of the consultations, prior to addressing victims'/survivors' immediate and essential needs, is likely to result in limited and ineffective engagement with affected communities. The immediate priorities of the affected communities are restoration of peace, safe return to their homes and land, and accurate documentation of their experiences. For instance, in Malakal, the consultations coincided with a period when communities were preoccupied with resolving denial of burial rights resulting from re-categorisation of states and boundaries. Furthermore, stakeholders were concerned about the feasibility of conducting consultations among victims who are still highly traumatised from conflict and related atrocities, without any form of psychosocial interventions from the state and other partners.
- The period allocated for the consultations was insufficient. The context of war crimes and dealing with the past in a society that has many cultures will require careful and long-term planning and implementation; it cannot be a rushed process.
- There is a tension between consultations and sensitisation. Participants observed that there is very limited knowledge about the R-ARCSS, Chapter V, and the anticipated transitional justice process among the general population in South Sudan. Under these circumstances, it is difficult to contemplate achieving effective consultations with meaningful contribution to the design of the CTRH. There is need for broad-based civic education on transitional justice and other relevant aspects of the peace agreement. Such sensitisation efforts could, for instance, debunk the growing public misperception that Chapter V and the transitional justice agenda are exclusively focused on retributive justice and aimed at seeking revenge against certain individuals in the Government.

VI. Ensuring Criminal Accountability in South Sudan

Lack of political will for establishment of the Hybrid Court for South Sudan

49. Commissioner Prof. Andrew Clapham led presentations on ensuring criminal accountability for the establishment of the Hybrid Court. However, during deliberations, the civil society participants raised concerns with the Transitional Government's continued lack of political will to establish the Hybrid Court or pursue any domestic accountability measures for conflict-related atrocities committed in South Sudan. Dr. Lam Akol pointed out that the R-TGoNU's rejection of accountability processes was most clearly demonstrated through its hiring of a US-based lobby group in April 2019 with one of its explicit purpose being to "delay and ultimately block establishment of the hybrid court envisaged in the R-ARCSS".⁸⁹

50. Civil society participants informed the workshop that the African Union-led negotiations to set up the HCSS ended up in a deadlock since 2017, with the R-TGoNU's failure to sign a Memorandum of Understanding with the AU and adopt the Statute for establishment of the Court. The Hon. Paulino Wanawilla Unango, Minister for Justice, reported that the Council of Ministers had raised a number of reservations on some provisions in the draft Statute for the HCSS that had not yet been resolved at the time of the workshop. Ambassador Kureng Akuei Pac Garang from the Ministry of Foreign Affairs was also adamant that the HCSS could only be established following formation of the R-TGoNU, which would collaborate with the AU.

51. Several stakeholders were also apprehensive about the National Dialogue process initiated by President Kiir in December 2016, which appears to have an overlapping mandate with several transitional justice, national, reconciliation, and healing mechanisms envisaged in the R-ARCSS, except accountability. Dr. Lam Akol noted that, in a sense, the National Dialogue process seems to have been set up to circumvent the Hybrid Court.

⁸⁹ See <https://efile.fara.gov/docs/6667-Exhibit-AB-20190418-2.pdf>; and <https://www.hrw.org/news/2019/04/30/south-sudans-cynical-bid-block-war-crimes-court>.

Persisting impunity and weak capacity for accountability at the domestic level

52. Civil society participants raised concerns regarding capacity of the judiciary, in its current state, to handle the magnitude of conflict-related violations, interference of the executive in accountability processes, and lack of independence of judicial officers. As such, impunity for conflict-related violations has continued in the absence of a HCSS or other domestic mechanisms to pursue effective investigations and prosecutions.

53. Notably, participants echoed concerns of persisting impunity for conflict-related sexual violence. Extensive documentation has been done in emblematic cases since 2013, some resulting in Government-led inquiries, but no meaningful action has been taken by the state to guarantee prosecution of perpetrators. The Terrain Hotel case is the only known prosecution of conflict-related sexual violence in South Sudan, to date.

54. Colonel Mayiel Chamtang, the lead Prosecutor in the Terrain case, informed participants that his prosecution in the military court and resulted in the conviction of 10 SPLA soldiers and NSS officers for charges of sexual violence against six foreign humanitarian workers, murder of a South Sudanese journalist, and theft and robbery during attacks against civilians in Juba in July 2016. However, civil society participants asserted that it was a confluence of political factors, including pressure from the international community and a fallout within the SPLM/A leadership, that led to the eventual prosecution and conviction of the military soldiers in the Terrain case in September 2018.

55. Participants agreed that the Terrain case confirmed that even with practical challenges, domestic accountability is feasible where political will and state support exists. However, since then, the Government of South Sudan has maintained a public stance of willingness to pursue accountability against perpetrators of conflict-related sexual violence, while effectively turning a blind eye to several cases reported prior to and following the Terrain case.

56. A good governance activist, from a civil society organisation, informed participants that efforts to hold perpetrators of sexual violence committed by military forces against women and girls in Kubi village in February 2017 and Bentiu in November 2018 have stalled. Five low-ranking soldiers were arrested in 2018 for alleged involvement in the Kubi attacks following military investigations, but there has been no further progress since. Participants were informed that women in Juba protested in the hundreds and presented a petition to the Minister for Justice to demand for accountability in the Bentiu incidences. A Government-led committee of inquiry was established by President Kiir in December 2018 to investigate these allegations. The committee submitted its report to the President in May 2009. The findings of the inquiry however have never been made public and no individuals have been charged for the related crimes. Instead, the Government issued verbal communication asserting that no rapes took place in Bentiu.

57. Paulino Wanawilla Unango, the Minister for Justice, however, reported that more than 400 conflict-related cases involving SSPDF officers had already been concluded, but had not been given the same coverage as the Terrain Hotel case.

58. The recent establishment of specialised courts for sexual and gender-based violence and juvenile justice in Juba in 2019 presents a promising opportunity to improve accountability. However, some of the civil society participants were concerned that the mandate of these specialised courts does not explicitly extend to 2013 conflict-related violations. Nonetheless, the discussions emphasised the need to consider the causes and consequences of peace time and conflict-related sexual violence in a continuum rather than as isolated concerns. Additional measures should also be established to support the rehabilitation of victims and survivors of conflict-related sexual violence, including persisting psychological trauma.

59. Participants heard from civil society presentations on the mobile courts – learning that they were re-established in 2018 with support from UNMISS and the UNDP, in collaboration with the South Sudan Ministry of Justice and Constitutional Affairs. David Deng, an independent Transitional Justice researcher on South Sudan, reported that the mobile courts have, thus far, held proceedings in more than 10 areas where protracted conflict resulted in significant neglect of the justice system and delayed trials. Mr. Deng informed participants

during deliberations that the courts deal with the backlog of cases involving serious crimes, including murder, rape, robbery, and theft. While hailed as a positive step toward enhancing access to justice, participants noted several concerns regarding the mobile courts' potential to reduce the impunity gap for conflict-related crimes in South Sudan:

- First, the geographic scope and cases covered by the mobile courts thus far are quite limited relative to the large magnitude of serious crimes, pending cases, and suspects still held in detention without trial.
- Second, there are concerns on due process and the potential that the approach adopted by the mobile courts may compromise fair trial principles due to the limited time allocated to the hearing of cases and the absence of early engagement between prosecutors and affected victims prior to trial. For instance, mobile courts recently heard 12 cases and sentenced accused persons in less than two weeks.
- Third, the proceedings have highlighted the need for more deliberate efforts to cultivate local ownership and effective participation of victims and affected communities in the mobile courts' proceedings, if they are to contribute to truth, national reconciliation, and healing. Participants observed that there appears to be heavy involvement of external actors that are not well versed or connected with local contexts, authorities, or communities in preparing for and conducting the mobile courts' proceedings.
- Participants were also concerned about the potential effect of public hearings of sexual violence cases on the safety and well-being of victims and their families. Further, the mobile courts' hearings are characterised by a large presence of security personnel, which unwittingly has the effect of limiting the participation of local communities and individuals not associated with the cases. Consequently, some cases that could easily be resolved through alternative dispute resolution are brought for hearing before the mobile courts, thereby reducing the already limited time available for determination of serious crimes.

Potential avenues for obtaining justice and accountability for atrocities in South Sudan

60. Despite the existing political hurdles, it was felt that the quest for accountability for past atrocities must not be abandoned as it is a cornerstone of sustainable peace in South Sudan. Some participants felt that the government's willingness to ensure that perpetrators of conflict-related crimes are held responsible would be the clearest signal of its intention to genuinely pursue national reconciliation and healing and rebuild a transformed South Sudanese society. They further questioned the value of pursuing implementation of all other aspects of the R-ARCSS in the absence of accountability for past violations.

61. During group discussions and cognisant of the foregoing reality, participants deliberated on potential domestic, regional, and international avenues to keep the quest for accountability in South Sudan alive.

a. Political measures

62. US Ambassador Kelly Currie indicated that sanctions against politicians and Cabinet Ministers blocking implementation of the peace agreement and accountability processes, including those already issued by the US Government were cited as a progressive measure. In addition, participants called for the AU to engage more robustly on the establishment of the HCSS, including requiring the R-TGoNU to sign the MoU and adopt the draft Statute within specific timelines. Most participants proposed that, in the absence of concrete movement by the R-TGoNU, the AU should consider alternative avenues to initiate an accountability process as envisaged in the R-ARCSS. However, some participants were of the view that collaboration with the Government of South Sudan is essential if any accountability process is intended to effectively contribute to the broader goals of national reconciliation, healing and sustainable peace.

b. Regional accountability measures

63. It was noted that, as South Sudan has ratified the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights may provide a feasible avenue for state accountability and reparation for conflict-related human rights violations committed in South Sudan, subject to admissibility considerations. Solomon Dersso encouraged participants to join in advocacy efforts aimed at promoting ratification of

and amendments to the Protocols of the African Court on Human Rights and Justice, by South Sudan and other AU member States, as the Court may provide a viable opportunity in future to pursue individual criminal responsibility against perpetrators of conflict-related crimes in South Sudan.

c. Universal jurisdiction

64. Commissioner Prof. Andrew Clapham elaborated upon the possibility of initiating accountability for atrocities committed in South Sudan through the application of universal jurisdiction. Under universal jurisdiction, a national court may prosecute individuals for serious crimes against international law, such as war crimes, crimes against humanity, genocide, torture, and enforced disappearances, based on the principle that such crimes go against established international norms. Universal jurisdiction may be invoked in instances where the accused person is not a national of the prosecuting State and/or where crimes were committed in the territory of another state against foreigners. In most cases, universal jurisdiction has been pursued against individuals present in the territory of a prosecuting State, due to the practicalities of conducting investigations and arrests. The prosecuting State exercises its jurisdiction on the basis of national legislation prohibiting the relevant crimes and authorising their prosecution based on customary international law or international treaties such as the Convention Against Torture.

65. Illustrations cited included cases that have been successfully pursued against Liberian nationals involved in committing atrocities during the Liberian First Civil War between 1989 and 1996, under criminal and immigration laws in the United Kingdom and United States of America. These cases have been initiated through the relentless efforts of local victims' groups, journalists, and civil society organisations under the banner of the Global Justice and Research Project, in collaboration with an international non-governmental organization, Civitas Maxima, based in Geneva.⁹⁰

d. International Criminal Court

66. Prof. Andrew Clapham also reminded participants that South Sudan is not yet a State Party to the Rome Statute of the International Criminal Court (ICC). Moreover, given the existing impunity and lack of state political will to pursue accountability for conflict-related atrocities, it seems improbable that the present Government would seek the ICC's intervention. The backlash against the ICC by the African Union and the ensuing geopolitics further complicate the prospects of a referral of the South Sudan situation by the Security Council under Article 13(b) of the Rome Statute. Nonetheless, the meeting identified two potential opportunities, which should be explored further, to invoke the ICC's jurisdiction over international crimes committed in South Sudan, as a last resort. One, is the potential to initiate cases against suspected South Sudanese with dual nationality, where their second country of citizenship is a State Party to the Rome Statute or agrees to lodge a declaration to accept the ICC's jurisdiction under Article 12(3) of the Rome Statute. Second, a future South Sudan government could ratify the Rome Statute and lodge a declaration under Article 12(3) to trigger the ICC's jurisdiction over the 2013 conflict-related crimes retrospectively or retroactively.

VII. Supporting a sustainable reparation program in South Sudan

Victims and survivors' experiences and priorities must inform the design and implementation of a reparation program

67. Howard Varney, an expert with the International Center for Transitional Justice, led discussions that emphasised that victims' and survivors' needs and priorities must be at the core of the development and implementation of a reparation programme for South Sudan. Mr. Varney used his research experience to inform participants that the involvement of victims and survivors will be vital to resolve persisting questions and dilemmas associated

⁹⁰ See TRIAL International Universal Jurisdiction Annual Review (2020); see also <https://www.civitas-maxima.org/en/trials/legal-monitoring-of-the-jungle-jabbah-case>.

with reparations in South Sudan, and to ensure that proposed measures result in the intended aims of acknowledging and addressing harms suffered, preventing recurrence of conflict-related violations, national reconciliation, and healing. Several preliminary surveys and assessments involving victims across South Sudan already provide useful insights on key aspects that ought to be considered in designing a reparation program.

68. South Sudan Law Society representatives referred to an assessment conducted by South Sudan Law Society between January and February 2017, entitled *Reparations for Conflict-Related Abuses in South Sudan: A Preliminary Assessment of Public Priorities*, which sought to understand victims' perspectives on options for reparations, and to contribute to the development of a credible and transparent reparation process in South Sudan. The assessment was conducted in Juba, Bor, Wau, Bentiu, and Malakal, which are five of the most conflict-affected areas of South Sudan. Notably the findings of that assessment were that:

- While 85 per cent of the respondents had heard about the ARCSS, the majority of them, particularly the less educated, were not informed of the transitional justice or reparation measures therein. This points to the need for extensive outreach programmes to elicit understanding of the reparation programme and its goals, anticipated procedures, and avenues for participation among victims and conflict-affected communities. Such programmes should be targeted at all levels and segments of the society, including those who lack formal education and in rural settings.
- Nonetheless, given the extensive nature of the conflict – affecting a vast population of South Sudanese – there was widespread agreement (92 per cent) within the surveyed locations, that affected victims should receive reparations. Respondents believed that reparations would signify the State's intolerance for conflict-related violations committed against civilians, which defied existing norms, including rape and other abuses against women, children and elderly people; and enable victims to overcome practical obstacles in rebuilding their livelihoods. Respondents viewed murder (92 per cent), rape and SGBV (79 per cent), displacement (74 per cent), destruction of property and looting (72 per cent), and torture (52 per cent) as the most serious conflict-related abuses. Participants across all field sites believed that women, children, and elderly persons were most severely affected by conflict-related abuses in comparison to other groups. They considered victims of rape and SGBV (78 per cent), those who were physically injured or disabled (77 per cent), those experiencing psychological trauma (69 per cent) and widows (66 per cent) to be the most vulnerable.
- Furthermore, 83 per cent of the respondents surveyed favoured provision of material reparations commensurate to the harm suffered by affected individuals rather than symbolic measures. Yet, at the same time, 53 per cent of those surveyed believed that reparations should prioritise entire communities while 47 per cent considered individual reparations to be more suitable.
- Despite widespread agreement on the need for reparations, there were variances in participants' views based on their geographic location, related experiences of conflict, and ensuing or persisting needs. For instance, a higher percentage of respondents in Bentiu, Bor, and Juba considered rape and SGBV to be the most serious conflict-related abuse compared to other sites; respondents in other sites prioritised health care and other essential services compared to Juba, which is considered to have relatively better access to basic services than other parts of South Sudan; and demand for individual reparations was highest in Bentiu PoC (85 per cent) and Bentiu Town (82 per cent), and lowest in Malakal PoC (0 per cent) and Malakal Town (7 per cent). Thus, a reparation programme must also take into account specific local needs and challenges, which are likely to impact the nature and potential success of reparation measures in different contexts.
- Even though there were little to no statistical differences between responses from male and female respondents in the study, participants generally highlighted the impact of conflict on women and challenges that widows and victims of SGBV are likely to encounter in rebuilding their livelihoods. It will, therefore, be imperative to include a detailed understanding of the gendered nature of violence and structural inequalities, and identify practical measures to dismantle and overcome such inequalities, in all stages of the design and implementation of a reparation programme.

Reparation measures should go beyond compensation and material measures

69. Commission Chair Yasmin Sooka encouraged the R-TGoNU and all stakeholders involved in the design of a reparation programme should consider other forms of reparation that may be implemented alongside compensation and material measures.

70. Commission Chair Sooka also advised on options that may be considered include the potential to design return to one's place of residence or land for the vast population of displaced South Sudanese as reparative restitution measures. Rehabilitation measures, including medical and psychological care, can also be initiated to address physical injuries, psychological trauma, and other persisting health-related complications experienced by victims. Participants observed that, due to the history of poor governance, some of the victims may have no expectation of tangible benefits from the state and may therefore emphasise symbolic measures that would greatly promote sustainable peace. Such satisfaction or symbolic measures may include truth-seeking and an accurate documentation, and the state's acknowledgement of and public apologies for the harm and losses experienced by victims as a result of conflict-related violations; commemoration, tributes, and memorials of significant events or departed members of community such as renaming of schools and roads, among other measures. Security sector and other institutional reforms envisaged in the R-ARCSS should also be considered and designed as potential measures of reparation, which could contribute to prevention of cycles of conflict and related abuses in South Sudan.

Relationship between reparation, development and humanitarian assistance

71. Participants noted with concern the varying interpretations of reparation envisaged in Chapter V of the ARCSS, with state actors being more focused on development-based interventions such as building schools and other infrastructure. These concerns demonstrate the dilemma faced by several post-conflict countries who grapple with addressing competing demands for resources for humanitarian assistance, development, and reparation. Moreover, in most cases, as in South Sudan, victims of massive or systemic violations have historically been socially, politically and economically marginalised, and are in need of essential services and infrastructure that development and humanitarian assistance efforts can provide. Experts underscored the importance of drawing a distinction, as well as potential linkages, between the concepts of reparation as a transitional justice measure and development or humanitarian assistance, which are all contemplated within the ARCSS. Post-conflict reconstruction, development, and humanitarian assistance to address victims' immediate basic needs such as shelter, food, healthcare, and education, will have to be pursued in tandem with reparation measures in South Sudan. However, the key criterion for determining whether any overlapping measures can be considered as reparation, will be the existence of state acknowledgement in the design and delivery of such measures.

72. Reparation requires direct and explicit state acknowledgement of victims and past violations committed against them; victims' right to remedies for violations as the basis for provision of reparations; and state responsibility and commitment to provide remedies in recognition of violated rights and to address the consequences of violations suffered by victims. Experience in other transitioning contexts has demonstrated that any measures, including monetary payments, provided to victims in the absence of state acknowledgment, risk being perceived as mere hand-outs or "blood money," thereby negating the intended aim of reparation – to promote truth, national reconciliation, and healing, including rebuilding a trust relationship between citizens and the state. The case of victims involved in the 9/11 terrorist attacks in the United States of America was cited as an illustration where, even though affected individuals and families received incredible amounts of money from the state, they were unsatisfied because there was no acknowledgement about what happened.

Important issues to resolve during the development and implementation of a reparation program for South Sudan

- *Linkage between the Compensation and Reparation Authority (CRA), Commission on Truth, Reconciliation, and Healing (CTRH), and Hybrid Court for South Sudan (HCSS):* participants observed that it is unclear how the reparation mandates and operations of the CRA, CTRH, and HCSS will be linked in order to avoid double reparation, maximize available resources and reduce the burden on victims seeking reparations. The R-ARCSS anticipates the establishment of a CRA with powers to provide material and financial support

to citizens whose property was destroyed, help victims to rebuild their livelihoods, receive applications from victims from the CTRH, and make necessary compensation and reparation. The CTRH will be expected to receive applications from alleged victims, identify and determine their right to remedy, and recommend guidelines to be adopted by the legislature for determining the type and size of compensation and reparation for victims. The HCSS will also be required to award appropriate remedies to victims within its jurisdiction including reparations and compensation.

- *Designing a reparation process capable of impacting long lasting peace, national reconciliation, and healing:* participants underscored the importance of an inclusive reparation process that is responsive to the needs and priorities of affected communities and individual victims and survivors. In addition, responsible mechanisms should be granted the autonomy to establish their own policies and ensure that registration, verification, and implementation processes are not overly restrictive or burdensome on potential beneficiaries. Public outreach and awareness creation will be essential to understand and manage victims' expectations, and develop a public consensus on the aims of and feasible approaches for achieving reparation in South Sudan.
 - *Prioritisation and sequencing:* fundamental questions regarding the universe of victims, who will be considered the most vulnerable, who could be excluded, or whether the reparation programme should include victims of conflict-related violations committed prior to the 2013 conflict, are yet to be resolved. Experts advised that difficult choices and compromises often have to be made in post-conflict contexts such as South Sudan, which are literally undergoing reconstruction. In a similar context, Sierra Leone, the choice was made to prioritise reparations for children affected by violence, followed by women and then amputees. These decisions were reached following consultations with victims' and survivors' groups. Women, for instance, prioritised reform of marriage laws and education of girls, due to existing gender-based and structural inequalities. Victims also received specialised surgery to repair injuries suffered as a result of SGBV.
 - *Urgent and interim reparation:* It will be important to consider feasible avenues and measures to address some of the victims' crucial needs, such as healthcare, in the interim period, before the establishment of an elaborate reparation programme.
 - *Cost of reparations:* The reparation programme must explicitly identify the state sources for funding the reparation programme. The practice from other transitioning contexts has been that development partners and donors will be apprehensive to support domestic reparation programmes in the absence of direct funding from the government. In this regard, civil society organisations and victims' groups were encouraged to consistently engage government institutions and Ministries in deliberations regarding feasible and effective options for reparations in South Sudan, as these are the actors who will eventually have to make critical policy, administrative and budgetary decisions.
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