



# South Sudan: Justice Landscape Assessment

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## Introduction

This report presents the main findings of a justice landscape assessment that the Transitional Justice Working Group (TJWG) conducted between June and July 2020.<sup>1</sup> In recent years, progress towards the Hybrid Court for South Sudan, as provided for in the September 2018 peace agreement, has stalled.<sup>2</sup> Protracted delays in implementing the peace agreement, ongoing insecurity, and a lack of political will to address crimes committed during the conflict have all contributed to the political impasse over the Hybrid Court. Meanwhile, several fledgling attempts to prosecute conflict-related crimes in military tribunals and national courts have emerged in recent years, suggesting that more could be done to engage existing accountability mechanisms to provide some form of justice and redress to victims. The purpose of the assessment was to provide baseline information on what is being done to address conflict-related crimes at the national and subnational level, and to stimulate thought on how to promote criminal accountability through existing mechanisms as policymakers work towards the establishment of the Hybrid Court.<sup>3</sup>

The report is structured in five main sections. Section One provides a brief contextual overview. Section Two discusses the role of civilian courts in addressing conflict-related crimes.<sup>4</sup> Section Three explores recent innovations in the criminal justice system, including mobile courts and an as yet to become operational Sexual and Gender Based Violence (SGBV) Court. Section Four provides an overview of how the military justice system addresses conflict-related crimes. Section Five discusses the role that customary courts play in addressing crimes associated with intercommunal conflict, including through ‘special courts’ comprised of a combination of statutory court judges and chiefs. The concluding remarks summarize several key points made over the course of the report.

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<sup>1</sup> For more on the Transitional Justice Working Group (TJWG), see TJWG website, <http://tjwgsouthsudan.org>.

<sup>2</sup> The Hybrid Court was envisaged as a joint endeavor by the Government of South Sudan and the African Union (AU) “to prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law” during the civil war. The South Sudan Ministry of Justice and the AU Office of Legal Counsel have developed legal instruments for the court, and the documents were tabled at the South Sudan Council of Ministers in December 2017, but since then no further progress has been made. See Intergovernmental Authority for Development (IGAD), Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS), Ch. V, Art. 5.3 (12 Sep. 2018), available at <https://igad.int/programs/115-south-sudan-office/1950-signed-revitalized-agreement-on-the-resolution-of-the-conflict-in-south-sudan>.

<sup>3</sup> This report is based on desk research and virtual interviews conducted with key informants, including representatives of national and international human rights organizations, lawyers, multilateral organizations and donors, over the course of several weeks in June and July 2020. Due to the limitations of the interview platform, and concerns about the Covid-19 pandemic, researchers limited themselves to a small number of key informants with whom they already had strong relationships. As experts and professionals who have spent their careers working on issues of human rights and rule of law, interviewees were able to offer unique insights into how accountability mechanisms at the national and subnational level address conflict-related crimes.

<sup>4</sup> This report uses the term ‘civilian’ courts to distinguish the statutory court system as provided for in the Judiciary Act (2009) from the military justice system as provided for in the Sudan People’s Liberation Army (SPLA) Act (2009). The term ‘criminal justice’ also refers exclusively to the civilian courts.

## 1 Context

As the Covid-19 pandemic was working its way across the globe, the warring parties in South Sudan reached a milestone on the path towards implementing the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS). In February 2020, after 17 months of what was meant to be an eight-month pre-transitional period, the parties managed to partially form the Revitalized Government of Transitional Unity (R-TGONU) when President Salva Kiir swore in First Vice-President, Dr. Riek Machar, and the four Vice-Presidents.<sup>5</sup> Since then, implementation has mostly ground to a halt. A ceasefire signed in 2018 had succeeded in reducing levels of violence between many of the warring parties, but the delays in implementing the agreement and the consequent governance vacuum at the state and local levels have precipitated declines in the security situation.<sup>6</sup> Over the last year, hundreds of thousands of people have been displaced by widespread intercommunal conflict, much of it linked to political actors at the national level, and unprecedented flooding in parts of the country.<sup>7</sup> There has also been a resurgence of politically motivated violence in parts of Central Equatoria between government and Sudan People's Liberation Movement-in-Opposition (SPLM-IO) forces and non-signatories to the R-ARCSS.<sup>8</sup> The lack of a conducive environment presents a fundamental challenge to the consolidation of peace and the broader reform agenda.

### 1.1 Transitional Justice and Judicial Reforms

The R-ARCSS provides for an ambitious reform agenda to be implemented over the course of a three-year transitional period. Among the reform processes is a transitional justice program that focuses on the establishment of a Commission for Truth, Reconciliation and Healing, a Hybrid Court for South Sudan and a Compensation and Reparations Authority. The agreement also requires the parties to undertake a judicial reform process that includes the

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<sup>5</sup> The partial formation of the R-TGONU came after the parties agreed, under great pressure from the region and the international community, to revert to the preexisting 10 states with three new 'administrative areas' and to allow the screening, training and redeployment of the Necessary Unified Forces (NUF) to continue into the transitional period.

<sup>6</sup> Khartoum Declaration of Agreement Between Parties of the Conflict in South Sudan (Jun. 2018), *available at* <https://reliefweb.int/report/south-sudan/khartoum-declaration-agreement-between-parties-conflict-south-sudan>.

<sup>7</sup> In its February 2020 report, the United Nations Commission on Human Rights in South Sudan (CHRSS) noted a 192 per cent increase in casualties from inter-communal conflict between February and May 2019 as compared with the same period in 2018. *See* Report of the Commission on Human Rights in South Sudan, U.N. Doc. A/HRC/43/56, ¶ 61, *available at* <https://undocs.org/A/HRC/43/56>. According to United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), the record-breaking floods affected 37 of South Sudan's 79 counties and displaced an estimated eight hundred thousand people. *See* UNOCHA, *South Sudan: Flooding Snapshot* (5 Oct. 2020), *available at* <https://reliefweb.int/report/south-sudan/south-sudan-flooding-snapshot-05-october-2020>.

<sup>8</sup> When the R-ARCSS was signed in September 2018, several opposition groups rejected the agreement and vowed to continue their armed struggle. A separate political process was convened under the auspices of the Community of Sant'Egidio in Rome to broker an agreement between the holdout groups and the signatories to the agreement, resulting in the signing of a new ceasefire agreement in January 2020. *See* Dimo Silva Aurelio, *Fighting Raises Tension Between Government, Rebel Force in South Sudan*, Voice of America (VOA) (29 Apr. 2020), *available at* <https://www.voanews.com/africa/south-sudan-focus/fighting-raises-tension-between-government-rebel-force-south-sudan>.

reconstitution of the Judicial Service Commission, an administrative body charged with oversight of the judiciary, among other reforms.<sup>9</sup>

Ever since it was first established in 2005, the Judiciary has struggled with deep structural problems. Formal justice sector institutions are mainly present only in urban areas and inaccessible to the majority of the population living in rural areas. The Judiciary has been chronically understaffed, and the few judges who are serving on the bench have had to endure political interference and intimidation.<sup>10</sup> In 2016 and 2017, a number of judges and lawyers went on strike over what they viewed to be the mismanagement of the Judiciary, complaining of a lack of basic equipment and electricity, delays in payment of salaries, lack of security measures, lack of transportation, and corruption, among other issues. The President responded by dismissing nine judges who represented the group without going through the Judicial Service Commission, as required by the Judiciary Act and the Constitution.<sup>11</sup>

The war has also decimated justice sector institutions in parts of the country. Bentiu, for example, has not had a permanent statutory court judge since 2015.<sup>12</sup> Although the Judiciary has made pledges to station a judge there, they have been unable to do so because of the destruction that occurred during the conflict and the lack of housing to accommodate the judge. A prosecutor was deployed to Bentiu in early 2019, but he is being forced to work from a dilapidated police station without adequate space for interviewing people or storing files.<sup>13</sup> As a result, he reportedly spends most of his time in Juba and travels to Bentiu mainly to support when the mobile court is in session. In addition, the state-level Ministry of Physical Infrastructure is currently working from the courthouse premises, pointing towards a more

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<sup>9</sup> See R-ARCSS, Ch. I, Art. 1.17.2.

<sup>10</sup> According to a UN official: “The judiciary has a serious shortage of judges at the moment. The Chief Justice has plans to promote magistrates up a level – to move high court judges to appeals level, and then bring in attorneys to fill the lower levels – but they haven’t acted on it yet.” Interview with UN official 2 (25 Jun. 2020). For more on the intimidation of judicial personnel, see Salva Mathok Gengdit, *The Incidence Occurred in the Judiciary Headquarters on 20<sup>th</sup> July 2020*, South Sudan 24 News (27 Jul. 2020), available at <http://southsudan24news.com/the-incidence-occured-in-the-country-judiciary-headquarters-on-20th-july-2020/>; David K. Deng, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan*, South Sudan Law Society (SSLS) and Pact, p. 19 (Mar. 2013) (stating that “during the interim period (2005-11) there were several occasions when Governors and County Commissioners threatened and even physically assaulted judges whose rulings were contrary to their executive interests”), available at [https://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability\\_FINAL%20May%2016.pdf](https://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf).

<sup>11</sup> “Do you think we will prosecute ourselves?": No Prospects for Accountability in South Sudan, Amnesty Int’l (2019), p. 16, available at <https://www.amnesty.org/download/Documents/AFR6511052019ENGLISH.PDF>. Several other judges resigned in protest to the decision, including one member of the Supreme Court. See S. Sudan lawyers says dismissal of judges “unprocedural”, Sudan Trib. (22 Sep. 2017), available at <https://sudantribune.com/spip.php?article63574>. On 1 September 2020, the Minister of Justice issued a press release stating that the dismissed judges could apply for reinstatement following a ruling in their favor by the East African Court of Justice. See David Mayen, *Court orders South Sudan’s Kiir to reinstate 13 illegally fired judges*, The East African (28 Jul. 2020), available at <https://www.theeastafrican.co.ke/tea/news/east-africa/court-orders-south-sudan-kiir-reinstate-fired-judges-1907508>.

<sup>12</sup> David Deng and Matthew Pritchard, *Cracks in the Foundation: Rapid Assessment of Housing, Land and Property (HLP) Issues in Bentiu, South Sudan*, Danish Refugee Council (DRC) and Danish Demining Group (DDG) (Oct. 2019) (on file with author).

<sup>13</sup> A UN official noted how competition for infrastructure with military personnel in parts of the conflict zone is affecting justice sector institutions: “Everything has been taken over by military personnel in many of these locations. We’re looking at Bentiu and trying to add space in the court compound so that everyone is co-located.” Interview with UN official no. 2.

general lack of secure space for state institutions in Bentiu and other parts of the conflict zone.

## 1.2 Domestication of Human Rights Law

South Sudan's legal framework is severely underdeveloped with regard to basic state functions, and even more so in the specialized field of atrocity crimes.<sup>14</sup> Crimes under international law have not yet been incorporated into the Penal Code. With the support of the United Nations Mission in South Sudan (UNMISS), the Transitional National Assembly has plans to develop an international crimes bill that would reportedly be based on the Ugandan model, adopting the definition of international crimes used by the International Criminal Court (ICC) and providing for the establishment of an international crimes division in the Judiciary.<sup>15</sup>

In the meantime, conflict-related offences could technically be prosecuted as normal crimes under the Penal Code, even though this approach does not capture the same gravity in terms of scope and scale as the crimes of genocide, crimes against humanity and the full range of war crimes. Nor does it allow for the application of international criminal law jurisprudence, which has far more developed substantive and procedural law as it relates to a number of international crimes, including conflict-related sexual violence. In addition, command responsibility does not exist as a mode of criminal liability under South Sudanese law, and military commanders cannot currently be prosecuted for failing to prevent or punish crimes committed by their subordinates.<sup>16</sup> Provisions for victim and witness protection are also largely nonexistent, although some reforms have been introduced in recent years through the Terrain trial (see Section Five) and mobile courts (see Section Three).<sup>17</sup>

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<sup>14</sup> For more on the justice system's shortcomings in terms of due process and fair trial standards, see Human Rights Watch, *"Prison Is Not For Me": Arbitrary Detention in South Sudan* (Jun. 2012), available at [https://www.hrw.org/reports/southsudan0612\\_insert\\_LOW\\_WITH\\_COVER.pdf](https://www.hrw.org/reports/southsudan0612_insert_LOW_WITH_COVER.pdf).

<sup>15</sup> In 2019, UNMISS supported a delegation of parliamentarians, legal professionals, and civil society representatives to travel to Uganda and learn from the Ugandan parliament's experiences with their international crimes legislation.

<sup>16</sup> According to Amnesty Int'l, command responsibility does not exist under South Sudanese law: "[A]rmy commanders cannot be prosecuted for having failed to prevent the commission of crimes by members of the armed forces under their command, or for having failed to punish them once crimes were committed that they knew, or should have known, about." *Do you think we will prosecute ourselves?*, p. 10. Some human rights advocates argue that command responsibility could be invoked through the Geneva Conventions, which South Sudan ratified in 2012. See Government of South Sudan, Geneva Convention Provisional Order (2012), available at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=352A5730B42BBDCCC1257C40005897C8&action=openDocument&xp\\_countrySelected=SS&xp\\_topicSelected=GVAL-992BU6&from=state](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=352A5730B42BBDCCC1257C40005897C8&action=openDocument&xp_countrySelected=SS&xp_topicSelected=GVAL-992BU6&from=state). However, the provisional order domesticating makes no direct reference to command responsibility and the issue has never arisen for adjudication in South Sudanese courts.

<sup>17</sup> In the Terrain trial, victims were permitted to provide remote and closed testimony. The court also allowed for the redaction of names and identifying information. See Kristen Lavery, *South Sudanese Perceptions of Justice: The Terrain Trial*, 18 *Journal of International Criminal Justice* (JICJ) 284 (2020). As a UN official observed in relation to mobile courts: "Initially, there were some concerns relating to protection of victims. We managed to resolve some of them through advocacy. ...This gave us some confidence to strengthen our engagement." Interview with UN official no. 1. South Sudan is also party to the United Nations Convention Against Corruption, Article 32 of which requires states to develop mechanisms for witness protection. See U.N.

South Sudan has ratified a number of international human rights and humanitarian treaties over the years, albeit at an excruciatingly slow pace.<sup>18</sup> According to the Transitional Constitution, international human rights treaties that have been ratified or acceded to by the Government of South Sudan are an integral part of the bill of rights. However, the Constitution does not clarify whether ratified treaties can be applied directly by courts or whether another process is required, so it is not clear whether or not the ratified treaties are justiciable in South Sudanese courts.<sup>19</sup>

### 1.3 *Development Assistance in the Justice Sector*

Development assistance in the justice sector has dwindled in recent years. The outbreak of large-scale violence in December 2013, after almost a decade of donor investments into building state institutions, came as a shock to the international community. Donors diverted their funding towards humanitarian assistance, no longer willing or able to fund a Government that stood accused of numerous acts of war crimes and crimes against humanity.

As of this writing, the two main bilateral donors that have continued to fund programs in the justice sector are the European Union and the Netherlands, alongside UN agencies such as the United Nations Development Programme (UNDP) and UNMISS.<sup>20</sup> None of the donors interviewed as part of this study were aware of any international actors providing direct financial support to military justice. Aside from FBI support during the Terrain trials, and technical support and capacity building activities that UNMISS has provided to military justice

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Doc. A/58/422 (2003), available at

[https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf).

<sup>18</sup> South Sudan is currently party to the UN Convention on the Rights of the Child (CRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its first protocol, the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). In June 2019, the Legislative Assembly adopted legislation to ratify the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), but it is not clear whether the executive has taken the final step of depositing the legal instruments with the UN Secretary-General. See *UNMISS welcomes ratification of international human rights covenants in South Sudan*, UN Peacekeeping (7 Jun. 2019), available at <https://peacekeeping.un.org/en/unmiss-welcomes-ratification-of-international-human-rights-covenants-south-sudan>. South Sudan is also a member of the African Union and party to the African Charter on Human and People's Rights (ACHPR).

<sup>19</sup> Transitional Constitution of the Republic of South Sudan (TCRSS), Pt. 2, Art. 9(3) (2011), available at <https://www.wipo.int/edocs/lexdocs/laws/en/ss/ss013en.pdf>; Lavery, pp. 274-75.

<sup>20</sup> The European Union (EU) continues to fund a project that the British Council started before the December 2013 crisis to improve access to justice in South Sudan and a new project by the Max Planck Institute that focuses on statutory courts. The Dutch have funded a range of justice sector programs, including the SGBV Court, mobile courts, and other activities by NGOs and civil society organizations. The main UN institutions that are involved are the UNMISS Human Rights Department, the UNMISS Rule of Law Advisory Section, both of which primarily provide technical assistance, and the United Nations Development Programme (UNDP). The International Bureau of Narcotics and Law Enforcement (INL) at the US State Department, and the UK's Department for International Development (DFID) both suspended their access to justice activities at the start of the war. See Interview with donor representative no. 1 (13 Jul. 2020); Interview with donor representative no. 2 (10 Jul. 2020).

personnel, the little development assistance that has been provided has been channeled towards the civilian courts.<sup>21</sup>

Donor engagement is also complicated by the lack of basic information about the justice sector. For example, the Judiciary has reportedly been unable to provide development partners with a figure for the number of judges that are currently serving on the bench. Formal and informal justice mechanisms are opaque and poorly understood by development partners. Several ongoing activities seek to fill these gaps. The British Council, for example, has documented more than 1,000 customary court cases in Juba, Bor and Wau and is considering publishing a compendium of cases in the near future, and the EU has supported the Supreme Court to develop the first ever law report detailing a number of key rulings it has made since independence.<sup>22</sup> Nevertheless, major information gaps remain.

## 2 Civilian Courts

Civilian courts in South Sudan, as a general rule, do not adjudicate conflict-related crimes.<sup>23</sup> The two main trials for crimes committed during conflict – the Terrain trial and a recent court martial in Yei – have both taken place in the military justice system (see Section Five).<sup>24</sup> The only documented instances of civilian courts adjudicating conflict-related crimes (excluding those committed during intercommunal conflict) is the prosecution of two low-ranking soldiers in front of a mobile court in Bentiu (see Section Three).

The civilian system's inability to adjudicate conflict-related crimes can be traced to a number of familiar shortcomings. As mentioned above, judges and prosecutors are subject to political interference and lack the independence to allow investigations and prosecutions to proceed without approval from the executive. When they do act against the interest of the executive, they risk dismissal or worse. For example, in 2016, then Deputy Chief Justice of the Supreme Court, Reuben Madhol, supported an application requesting the Chief Justice to recuse himself from a lawsuit contesting a presidential decree to divide South Sudan into 28 states.<sup>25</sup> The President dismissed the Deputy Chief Justice by presidential order even though the

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<sup>21</sup> Following the Terrain trial, UNMISS provided technical and capacity building support to help military justice implement the SSPDF action plan for ending conflict-related sexual violence. This included monthly trainings throughout 2018 on international law as applied to conflict-related sexual violence and other serious human rights violations. As discussed in Section 3, UNMISS is also providing support for mobile courts in several locations.

<sup>22</sup> Interview with donor representative no. 1.

<sup>23</sup> According to Amnesty Int'l, "There have not been any judicial proceedings related to serious crimes committed in the context of the conflict since December 2013 before ordinary civilian courts." *Do you think we will prosecute ourselves?*, p. 13. For more on the inability and unwillingness of national courts to address conflict-related crimes, see *Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan*, U.N. Doc. A/HRC/31/49 (10 Mar. 2016), available at <https://undocs.org/A/HRC/31/49>.

<sup>24</sup> According to the Sudan People's Liberation Army (SPLA) Act, civil courts are meant to have sole jurisdiction over crimes that military personnel commit against civilians. See SPLA Act, § 37(4) (2009) (stating, "Whenever a military personnel commits an offence against a civilian or civilian property, the civil court shall assume jurisdiction over such an offence"), available at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/5B52142980650C08C1257B270047C469>.

<sup>25</sup> *Do you think we will prosecute ourselves?*, p. 16.

Judiciary Act and the Constitution reserve that power for the Judicial Service Council.<sup>26</sup> For crimes involving military personnel, a lack of cooperation from commanding officers often presents a major obstacle to justice efforts. However, instances have been documented where commanding officers have cooperated with justice sector authorities leading to the arrest and transfer of perpetrators to the civilian system.<sup>27</sup>

Other constraints are procedural in nature. For example, there is a strong perception among judges and lawyers in South Sudan that prosecutions cannot proceed in the absence of a complaint submitted by an aggrieved party.<sup>28</sup> This belief, while deeply seated, conflicts with the Criminal Procedure Code Act, which contains no such requirement.<sup>29</sup> Given the risks of openly accusing political or military actors of having committed serious crimes, and the lack of trust in the willingness and capacity of justice sector institutions to investigate and prosecute such crimes even if a complaint were submitted, very few survivors of conflict-related crimes make any effort to seek redress through the civil courts.

When civilian courts do engage with crimes associated with conflict, they are sometimes instrumentalized to serve the interests of political actors. For example, many residents of Western Bahr-el-Ghazal trace the start of the current civil war to a period of social unrest in 2012/13 associated with efforts to relocate the county headquarters of Wau County outside of Wau town.<sup>30</sup> The decision was resisted by Fertit communities who perceived it as an effort to consolidate Dinka control over the regional capital of Wau. The standoff reached a head when security officers opened fire on a crowd of non-violent protesters, killing eight people.<sup>31</sup> The police and the security services responded by arresting dozens of politicians, youth activists, and community leaders and charging them with an assortment of crimes relating to their support for the protesters. A few months later, the Judiciary established an ad hoc court and sent three judges from Juba to hear the cases against the accused individuals. The security personnel who killed the peaceful protesters were never arrested or charged.

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<sup>26</sup> See Judiciary Act, § 51(1) (2009) (stating that a board of discipline to investigate allegations against a justice of the Supreme Court may only be formed by an order of the Judicial Service Council (JSC) based on a recommendation from the President (or Chief Justice) of the Supreme Court), *available at* [http://www.africanchildforum.org/cir/Legislation%20Per%20Country/South%20Sudan/ssudan\\_judiciary\\_2008\\_en.pdf](http://www.africanchildforum.org/cir/Legislation%20Per%20Country/South%20Sudan/ssudan_judiciary_2008_en.pdf).

<sup>27</sup> Interview with UN official 1.

<sup>28</sup> As human rights researcher noted, “[W]e didn’t find any case [in the civil courts], in part because when we spoke with prosecutors, there was a sense that they can’t bring any cases because survivors aren’t forthcoming and they need a plaintiff to proceed. This is not correct but is ingrained and quite a number of prosecutors believe this to be true.” Interview with human rights researcher 1.

<sup>29</sup> According to § 34 of the Code of Criminal Procedure: “A criminal case shall be initiated, upon taking cognizance by the police under the directives of the Public Prosecution Attorney, Magistrate or Court, as the case may be, upon such information or complaint as may be presented to them.” Code of Criminal Procedure Act, Ch. V, § 34 (2008), *available at* <https://docs.southsudanngoforum.org/sites/default/files/2017-09/Criminal-Procedure-Code-South-Sudan-2008.pdf>.

<sup>30</sup> *South Sudan: No Justice for Protester Killings*, Human Rights Watch (24 May 2013), *available at* <https://www.hrw.org/news/2013/05/24/south-sudan-no-justice-protester-killings>; *South Sudan: Civil Unrest and State Repression: Human Rights Violations in Wau, Western Bahr el Ghazal State*, Amnesty Int’l (21 Feb. 2013), *available at* <https://www.hrw.org/news/2013/05/24/south-sudan-no-justice-protester-killings>.

<sup>31</sup> Shortly thereafter, the bodies of six Dinka farm workers were found outside of Wau town, triggering revenge attacks by Dinka youth inside the town in which at least six people were killed and more than 150 houses burned.

These structural constraints notwithstanding, there are nonetheless spaces within the civilian system that show more promise than others for exercising jurisdiction over conflict-related cases. For example, while criminal courts do not typically adjudicate conflict-related cases, there are instances of police and other security actors being charged for non-conflict-related crimes in the criminal courts.<sup>32</sup> Greater cooperation between the civilian and military systems may also present opportunities. In the past, the Judiciary has sought the support of the military in enforcing its decisions on military personnel involved in land grabbing.<sup>33</sup> While that cooperation was ad hoc, more structured and institutionalized cooperation between civilian and military actors could provide a means of increasing the enforcement capacity of civilian courts and normalizing their jurisdiction over military personnel.<sup>34</sup> If more conflict-related cases begin appearing in mobile courts, it could also establish precedents that could have positive spillover effects in the ordinary criminal justice system.

### 3 Innovations in the Criminal Justice System: Mobile Courts and the SGBV Court

While the civilian courts have not proven effective at adjudicating conflict-related cases, several innovations in recent years may be providing opportunities to begin channeling some of these cases towards the criminal justice system. The subsections below examine mobile courts that have been deployed to adjudicate criminal cases in POC sites and other areas that do not have access to a civil court, and an SGBV Court that has recently been established in Juba.

#### 3.1 Origins of Mobile Courts

Mobile courts are an innovation of the criminal justice system that arose as a response to its geographical limitations.<sup>35</sup> In an effort to extend justice services to rural areas, the Judiciary

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<sup>32</sup> According to a UN official, it is not uncommon for military personnel to be held criminally accountable for ordinary crimes, even though accountability for conflict-related crimes remains largely out of reach: “At an operational level, there’s not so much resistance to accountability for mid and low-level people. We have a lot of examples in the mobile courts of soldiers and police officers among accused, or even bringing their own cases.” Interview with UN official no. 2.

<sup>33</sup> See David K. Deng, *South Sudan Country Report: Findings of the Land Governance Assessment Framework (LGAF)*, South Sudan Law Society (SSLS) and The World Bank, p. 68 (Jan. 2014), available at <http://documents1.worldbank.org/curated/en/756521504872888898/pdf/119635-WP-P095390-PUBLIC-7-9-2017-10-34-1-SouthSudanCountryReport.pdf>.

<sup>34</sup> UNMISS is developing plans for a forum that would bring together military and civilian justice actors to discuss opportunities for coordination with a view to possibly formalizing the arrangements through an MOU of some kind.

<sup>35</sup> South Sudan faces formidable logistical challenges in extending state presence throughout the country, given its size and highly underdeveloped infrastructure. According to the Judiciary Act, there are supposed to be high courts in each of the 10 state capitals, county courts in each of the 79 counties, and payam courts in every payam. See Judiciary Act, §§ 14, 16. In practice, however, a large proportion of counties have never had their own court and not a single payam court has been established in the 12 years since the Judiciary Act was adopted. The large distances that prospective litigants and witnesses have to travel to access civil courts is a central barrier to justice for the vast majority of the population that resides in rural areas. See Cherry Leonardi *et al.*, *Local Justice in Southern Sudan*, Rift Valley Institute (RVI) and United States Institute of Peace (USIP) (2010), available at <https://www.usip.org/sites/default/files/PW66%20-%20Local%20Justice%20in%20Southern%20Sudan.pdf>.

embarked on a mobile court program shortly after independence. In 2012, the Judiciary began deploying judges and lawyers to locations with high backlogs of criminal cases – mostly ordinary, non-conflict-related cases – to process them through the formal system. Around the same time, the Ministry of Justice deployed prosecutors to the county level throughout much of the country to provide additional oversight and support, including in places that did not have their own courts.<sup>36</sup> These efforts to extend the reach of the formal justice sector were interrupted due to the economic crisis that gripped the country following the shutdown of oil production in 2012 and the civil war that broke out in December 2013.

The Judiciary began scaling up mobile courts in 2018, but this time with a primary focus on adjudicating cases in the POC sites. Since UNMISS first opened its doors to civilians fleeing large-scale violence in December 2013, the POC sites have presented the mission with a host of humanitarian, legal and administrative challenges. Among these is the question of what to do about serious crimes committed in POC sites.<sup>37</sup> UN Police (UNPOL) can detain individuals in ad hoc detention facilities in the POC sites, but the mission lacks an executive mandate that would enable it to adjudicate these incidents as criminal matters.<sup>38</sup> Initially, the UN was reluctant to hand the suspects over to formal justice sector institutions for fear that they could face political reprisals and mistreatment.<sup>39</sup> However, this calculation changed as the UN came to realize that it was not in a position to manage serious criminal cases over a long period of time. Mobile courts offered a partial, short-term solution to the problem.

The mobile courts have evolved with the changing context in South Sudan. As the peace process gathered momentum resulting in improvements to the political and security context, the mobile courts expanded beyond the POCs to reach remote rural areas and conflict-affected areas that would otherwise not have access to statutory courts.<sup>40</sup> The courts are primarily concerned with backlogs of cases in areas where they are deployed, and they focus

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<sup>36</sup> Statistics on the current coverage of justice sector institutions are not publicly available, but it is likely that the conflict has left many of the positions vacant.

<sup>37</sup> The Status of Forces Agreement (SOFA) that UN missions sign with host governments typically stipulate that the land on UN bases is inviolable and government authorities can only enter with the approval of the UN, which has the effect of restricting the jurisdiction of national-level justice sector institutions on UN bases. See Caelin Briggs, *Protection of Civilian Sites: Lessons from South Sudan for Future Operations*, Norwegian Refugee Council (NRC) (31 May 2017), available at [https://www.nrc.no/globalassets/pdf/reports/poc-sites\\_lessons-from-south-sudan-copy.pdf](https://www.nrc.no/globalassets/pdf/reports/poc-sites_lessons-from-south-sudan-copy.pdf).

<sup>38</sup> From the earliest days of the POCs, community leaders have operated their own customary courts in the POCs that provide an important service in terms of addressing lesser disputes and crimes. However, these courts were barred from adjudicating more serious offences such as murder and rape.

<sup>39</sup> According to the Norwegian Refugee Council (NRC): “The legal and security context in South Sudan posed unique dilemmas with regard to the treatment of serious offenders. On the one hand, transferring individuals to government custody created a risk of persecution and ill-treatment, and could arguably constitute refoulement. On the other hand, detaining individuals indefinitely without due process could be seen as unlawful detention. ...In South Sudan, it was ultimately decided that in most cases, the risks associated with potential persecution at the hands of the government outweighed the risk of indefinite detention in the POC site.” NRC, p. 80.

<sup>40</sup> A legal aid attorney that has worked with mobile courts described the pressure she feels to engage with cases from further afield in Unity state: “The cases that are supposed to be prosecuted are being referred to us from as far away as Nyal, Koch, Mayendit, those far locations. ...We are incapacitated to provide support to those cases. ... We don’t have the mobility. We don’t even have a bicycle to go to those locations to make sure the cases exist, that the witnesses are there, and perpetrators are known. The roads are bad, and it gets worse with the floods. The insecurity is also a problem.” Interview with legal aid attorney (22 Jul. 2020).

on SGBV, juvenile crimes, and other serious offences. The courts typically consist of two to three high court judges that are deployed from Juba along with prosecutors and lawyers for the victims and the accused. Over the past few years, the Judiciary has deployed mobile courts to several POC sites with the support of UNMISS, to places outside the POCs with the support of UNDP, and to yet other locations in partnership with NGOs.<sup>41</sup>

### 3.2 Conflict-related Cases in Mobile Courts

Mobile courts do not devote special attention to conflict-related cases. Indeed, case records do not actually distinguish whether a particular case is conflict-related or not.<sup>42</sup> Interviews with UN officials and lawyers involved with the mobile courts indicate that the courts have only adjudicated two cases that directly flow from large-scale, politically motivated violence. Both incidents took place in November 2018 when Médecins Sans Frontières (MSF) reported that it was treating 125 women and girls who had been raped, beaten, and brutalized by unidentified assailants outside of Bentiu.<sup>43</sup> As it happened, two of the perpetrators involved in the incident found themselves in the Bentiu POC where they were identified by their victims and reported to UNPOL. The two perpetrators were arrested and brought before the mobile court.

On the one hand, the fact that the mobile court came across the cases by chance, and that these are probably the only two cases associated with large-scale politically motivated violence that have been prosecuted before mobile courts, demonstrates how rare it is for mobile courts to adjudicate conflict-related cases. On the other hand, the fact that the mobile

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<sup>41</sup> According to UNDP, mobile courts covered nine locations (Bentiu, Ruweng, Kuajok, Cueibet, Yirol, Pibor, Terekeka, Kapoeta and Yambio) in seven of the ten states and decided 273 cases in 2018. UNDP and UNMISS also helped to establish mobile courts in Malakal and Rumbek in 2019. Eastern Equatoria is among the locations where mobile courts have been deployed through partnerships between the Judiciary and NGOs. See Press Release, *Mobile court concludes proceedings in Malakal*, UNMISS (23 Sep. 2019), available at <https://reliefweb.int/report/south-sudan/mobile-court-concludes-proceedings-malakal>; Press Release, *Mobile court delivers long-awaited justice in Western Lakes* (25 Sep. 2019), available at <https://reliefweb.int/report/south-sudan/mobile-court-delivers-long-awaited-justice-western-lakes>. A report by Danish Refugee Council (DRC) found that by June 2019, three mobile court sessions had been held in Bentiu, trying a total of 53 people and resulting in 27 convictions. *Cracks in the Foundation*, p. 36.

<sup>42</sup> According to a UN official: "...sometimes it's difficult to distinguish between what's murder and what's conflict related. When a case is presented, we only know the category of the offence, and we usually only get bits and pieces of information." Interview with UN official no. 2. A legal aid attorney that works with mobile courts expressed a similar viewpoint: "With our experience of mobile courts, if we have prosecuted the uniformed men, as our accused persons, then it should be around two to three [individuals]. As an organization, our focus has not been whether it's conflicted related. Our focus has been on SGBV." Interview with legal aid attorney.

<sup>43</sup> Press Release, *125 women and girls seek emergency assistance in Bentiu after horrific sexual violence*, Médecins Sans Frontières (MSF) (30 Nov. 2018), available at <https://www.msf.org/125-women-and-girls-seek-emergency-assistance-bentiu-after-horrific-sexual-violence-south-sudan>. A government investigation led by Awut Deng, then Minister of Gender, concluded on 19 December 2018 that the allegations of rapes were unfounded and baseless. President Kiir subsequently formed a new committee of inquiry that submitted its report to the Office of the President in May 2019. Neither committees' reports were ever made public. See *No evidence to back claims of Bentiu rapes: investigation team*, Radio Tamazuj (21 Dec. 2018), available at <https://radiotamazuj.org/en/news/article/no-evidence-to-back-claims-of-bentiu-rapes-investigation-team>; *Do you think we will prosecute ourselves?*, pp. 27-28. Since the establishment of the Government of Southern Sudan in 2005, there have been many examples of similar investigations that do not result in any meaningful action by the government.

court was able to adjudicate these cases at all suggests a certain appetite for addressing cases involving lower-ranking soldiers through civilian courts. Whether or not these cases would have proceeded outside the POC where the UN has less control over the situation remains an open question.<sup>44</sup>

Mobile courts have had somewhat more success adjudicating cases associated with intercommunal conflict, as have the ‘special courts’ discussed in more detail in Section Six below. These conflicts are typically associated with issues such as cattle raiding, land disputes, or other local grievances that have been a major source of instability in many parts of the country.<sup>45</sup> To a large extent, the notion of a clear dividing line between inter-communal and politically motivated conflict is a misconception, in that political elites at various levels are invariably involved either as instigators or in arming the various groups, and local grievances are often manipulated for broader political or military objectives.<sup>46</sup> The scale of intercommunal conflicts is also noteworthy; it is not unusual for hundreds of civilians to be killed in a single battle.<sup>47</sup> Detailed information is not available for the cases associated with intercommunal conflict that have arisen in mobile courts.

### 3.3 Challenges Confronting Mobile Courts

Discussions with UN officials and lawyers involved with mobile courts have highlighted a number of challenges that they regularly confront. For example, coordination between UN agencies and between government institutions and the UN has at times been lacking. This is most apparent in the preparations that are made before mobile courts visit a particular location. In some instances, the Judiciary has presented a caseload to be examined but when the mobile courts arrived on the ground, they found that the cases were not ready to present, necessary parties were absent due to a lack of information or protection concerns, or the personnel to conduct trials were not available. The Judiciary, UNDP and UNMISS have started conducting more thorough pre-assessments of locations where mobile courts are to be deployed to avoid these problems.

Several interviewees also expressed some due process concerns with mobile courts. Although victims and accused are ensured access to lawyers, and the mobile courts do not issue death

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<sup>44</sup> A UN official described the different circumstances that mobile courts face inside and outside of the POC: “Our courts in the POCs are easier to run because we have access to access to victims, witnesses and the accused. We can control things a lot more. We know the legal aid providers. We can facilitate travel by planes and control the docket. As the courts move out, they’ve been successful, but you see the usual problems coming to a head.” Interview with UN official no. 2.

<sup>45</sup> According to a UN official: “Many of the cases [in mobile courts] are conflict-related, though mostly regular forms of communal violence, including cattle raiding. This has been evident in Rumbek and other places.” Interview with UN official no. 2.

<sup>46</sup> In reference to clashes in Jonglei in July 2020, the UNMISS Special Representative of the Secretary-General, David Shearer, said: “This conflict is not simply intercommunal between ethnic groups. Other political figures are at work.” See UNMISS press release, *Thousands of families flee fresh violence in Jonglei and seek sanctuary at UN base* (23 Jul. 2020), available at <https://unmiss.unmissions.org/thousands-families-flee-fresh-violence-jonglei-and-seek-sanctuary-un-base>.

<sup>47</sup> For example, a Murle attack on a Nuer village in Pieri in May 2020 claimed 300 lives. The attacks were in retaliation for Nuer attacks in February. See *Hundreds Killed in Intercommunal Clashes in South Sudan*, Al Jazeera (20 May 2020), available at <https://www.aljazeera.com/news/2020/05/hundreds-killed-inter-communal-clashes-south-sudan-200520165329158.html>.

sentences, they nevertheless adjudicate up to a dozen or more criminal cases in a matter of weeks, sometimes on the basis of expedited investigations, leading to frequent adjournments and dismissals. Interviewees also cited language barriers and the lack of translation services as an issue of concern for litigants that are not fluent in English or Arabic. While it may be unrealistic to expect mobile courts to be immune from the problems that plague the justice system more broadly, and monitoring by UNMISS has not documented any violations of fair trial rights, the due process standards of mobile courts nonetheless present an area that should be independently examined.

Mobile courts are also costly undertakings as compared to ordinary court proceedings. A representative of a legal aid organization that worked with a mobile court that was deployed by the Judiciary independently of UN support described how the organization had to pay for road and air transport for the judge and a security detail from the South Sudan People's Defence Forces (SSPDF), accommodation for the judge and his bodyguard for a month, refreshments and meals for court staff and police, logistical costs associated with investigations, and all the fees associated with transporting victims from refugee camps in a neighboring country and accommodating them in South Sudan.<sup>48</sup> UN-supported mobile courts also provide court staff with daily subsistence allowances for the time they spend in the field.

A final constraint that could be applied to accountability mechanisms more broadly concerns the types of perpetrators that are prosecuted. All of the conflict-related cases that have appeared to date, whether the two rape cases associated with politically motivated violence in Bentiu, the cases relating to intercommunal conflict, or the cases that have arisen in the military courts, focus on low-level perpetrators without political protection. This is both a limitation as well as a likely reason for why the cases have appeared at all. In the short-term, it may not be politically feasible to expect mobile courts to adjudicate cases against more senior political and military actors. But by increasing their coverage of conflict-related crimes, mobile courts can establish precedents that over time can build appetite for more politically sensitive cases. The Hybrid Court for South Sudan, if and when it is established, could provide an additional contribution by addressing accountability gaps at higher levels.

Mobile courts have gained prominence in recent years as short-term responses to dilemmas that the UN is facing with justice in the POCs, as well as the severe degradation of justice sector infrastructure throughout the country as a result of the civil war. They demonstrate how justice and rule of law are of fundamental importance even in the midst of a humanitarian emergency, and how short-term responses to crisis situations can develop in unforeseen ways. Even if the mobile courts were not designed to address the challenge of accountability for atrocity crimes, they nonetheless present certain opportunities for creating space for civilian courts to begin addressing conflict-related issues in a politically feasible manner. Perhaps the main advantage of mobile courts in this regard is their proximity to survivors and perpetrators in conflict zones and the justice options that proximity creates. Additional outreach to survivors and a more deliberate strategy for how mobile courts can address crimes associated with the conflict itself, not just the byproducts of conflict, could

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<sup>48</sup> Interview with legal aid attorney. According to the legal aid attorney, the mobile court will typically waive court fees for the complainant parties since so many of their costs are being covered by the UN and NGOs.

help to maximize their contribution to the longer-term objective of holding accountable perpetrators of atrocity crimes.

### 3.4 SGBV Court

In March 2019, the Judiciary established a ‘Special Court for Gender-Based Violence and Juvenile Cases’ (SGBV Court) in Juba with the support of UNDP and the UNMISS Rule of Law Advisory Section and with funding from the Government of the Netherlands.<sup>49</sup> The Court was established to focus on SGBV and juvenile justice cases. There was no explicit mandate for the Court to address cases of sexual violence perpetrated by the military, although UNMISS conducted trainings for court personnel that covered conflict-related sexual violence. There are reportedly approximately 300 SGBV cases adjudicated by statutory courts across the country per year and it is hoped that the SGBV Court will help to increase the capacity of courts to address the issue.<sup>50</sup> One of the innovations that the SGBV Court plans to adopt is the co-location of justice sector personnel in order to overcome some of the coordination and logistical challenges that have hampered operations in other courts.

Shortly after its establishment, the SGBV Court ran into political obstacles when the Judiciary announced that it would be using the new court building for wildlife crimes. The donors responded by saying that they would not support the initiative if it was not used for its original purpose. The impasse seems to be associated with a confluence of factors, including political concerns about prosecuting sexual violence cases given the prevalent use of rape as a weapon of war in South Sudan. The inauguration event also took place immediately after a visit from the UN Security Council (UNSC) ambassadors when tensions between the Government of South Sudan and the international community were at a high point. The disagreements were ultimately resolved and the SGBV court was officially declared operational at an inaugural event in December 2020. According to UNDP, as of this writing, the court has prosecuted 13 cases of rape, including four cases involving perpetrators who were uniformed personnel, resulting in 12 convictions.<sup>51</sup> More than 600 cases have been filed since October 2019.

Even though it does not explicitly address conflict-related sexual violence, the SGBV Court nonetheless presents opportunities for promoting accountability for such crimes. As is the case with conflict-related crimes more broadly, it can sometimes be misleading to draw too sharp of a distinction between conflict-related and non-conflict-related sexual violence. As Alicia Luedke observes in a 2016 report:

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<sup>49</sup> *High level officials from the Netherlands and head of UNDP’s Crisis Bureau tour the newly established special court for gender-based violence and juvenile cases in Juba*, UNDP Press Release (1 Mar. 2019), available at [https://www.ss.undp.org/content/south\\_sudan/en/home/presscenter/articles/2019/high-level-officials-from-the-netherlands-and-head-of-undps-cris0.html](https://www.ss.undp.org/content/south_sudan/en/home/presscenter/articles/2019/high-level-officials-from-the-netherlands-and-head-of-undps-cris0.html). UNDP and the Government of the Netherlands provided funding and helped to construct the court premises and UNMISS ROLAS provided technical assistance.

<sup>50</sup> *Assessing the Effectiveness of the United Nations Mission in South Sudan / UNMISS*, Effectiveness of Peace Operations Network (EPON), p. 85 (2019), available at <https://effectivepeaceops.net/publication/unmiss/>.

<sup>51</sup> Press Release, *South Sudan’s Gender Based Violence Court Inaugurated During #16DaysOfActivism*, UNDP (3 Dec. 2020), available at [https://www.ss.undp.org/content/south\\_sudan/en/home/presscenter/pressreleases/2020/gbv-court-south-sudan-launch.html](https://www.ss.undp.org/content/south_sudan/en/home/presscenter/pressreleases/2020/gbv-court-south-sudan-launch.html).

“[C]onflict-related sexual violence does not occur in a vacuum: it is conditioned by, and exists alongside more ‘everyday offences’, such as the rise in domestic violence inside South Sudan’s various internally displaced person (IDP) sites. Although justice and accountability is critical for war crimes and crimes against humanity, there is also a need to respond to everyday justice issues.”<sup>52</sup>

While policymakers must be careful not to ignore accountability for conflict-related sexual violence or conflate conflict-related and non-conflict-related sexual violence, an approach that seeks to create space to adjudicate more ‘everyday offences’ as they work to tackle the more politically sensitive ones may help to increase justice options for survivors and contribute to increased demand for justice. The SGBV Court also provides an opportunity for legal professionals to begin developing capacity and expertise on the adjudication of SGBV cases that could also be applied to conflict-related sexual violence cases when they arise. Moving forward, policymakers should work to ensure that the court follows through with its operational plan and that political considerations do not interfere with the administration of justice.

## 4 Military Courts

Military courts are typically the first option for public authorities seeking to prosecute conflict-related cases in South Sudan. However, South Sudanese law clearly states that soldiers who commit crimes against civilians should be prosecuted in civilian courts. As discussed in the subsections below, this divergence between law and practice gives rise to fundamental dilemmas that must be addressed in any strategy to promote the prosecution of conflict-related cases in South Sudan.

### 4.1 Constraints of Military Courts

Military courts are subject to many of the same structural constraints that confront other accountability mechanisms in South Sudan. Chief among these are their susceptibility to political interference.<sup>53</sup> The SPLA Act grants the executive far more discretion over the functioning of these court martials than it has over the civil courts. The Chief of Defense has the sole authority to convene general court martials for military personnel below the rank of brigadier, the President has to convene them for officers of brigadier rank or higher, and one of the two individuals must convene a special court martial.<sup>54</sup> Indeed, the two court martials for conflict-related crimes that have occurred to date – the Terrain trial and a recent series of

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<sup>52</sup> Alicia Luedke, *Violence Begets Violence: Justice and Accountability for Sexual and Gender-Based Offences in South Sudan*, Draft Report, Justice Africa, Community Empowerment for Progress Organization (CEPO), and South Sudan Women Lawyers Alliance (SSWLA) (May 2016), available at <http://justiceafrica.org/wp-content/uploads/2016/08/Violence-Begets-Violence-SGBV-South-Sudan-Draft1.pdf>.

<sup>53</sup> In February 2017, two senior military court officials resigned, claiming that political interference in court proceedings made it impossible to discipline soldiers. See Lavery, p. 276.

<sup>54</sup> SPLA Act, § 36(2). The SSPDF convenes two types of court martials: a general court martial that adjudicates more routine cases and a special court martial for extraordinary circumstances. According to McCrone, the special court martials were provided for in an expansion of executive powers that happened through constitutional amendment since 2013. McCrone, p. 5.

prosecutions in Yei – both required a direct act from the President to proceed. Sentences delivered by court martials must be confirmed by the President.<sup>55</sup>

Another constraint concerns the manner in which military courts address crimes against civilians. The SPLA Act explicitly prohibits military courts from adjudicating crimes that military personnel commit against civilians, but in practice, these jurisdictional limitations are rarely adhered to.<sup>56</sup> A number of justifications are put forward for prosecuting these cases in military courts. The military justice system tends to move faster than civilian courts and is perceived to have greater enforcement capacity over military personnel. The Sudan People's Liberation Movement and Army (SPLM/A) has also struggled to transition from a rebel movement to a political party, and military leaders may be reluctant to cede these powers to a civilian administration. Judges in civilian courts sometimes do not feel safe adjudicating cases against military personnel.

But the military justice system has its drawbacks as well. In addition to concerns about political interference and lack of transparency, convictions against military personnel for crimes against civilians may be subject to appeal in civilian courts for lack of jurisdiction. Indeed, the soldiers convicted in the Terrain trials have reportedly sought to appeal their convictions on these grounds, though their appeals, along with those of the victims, have been prevented from moving ahead due to the loss of the case files.<sup>57</sup> If they or a future convicted person were successful in such an appeal, it could potentially invalidate any preexisting convictions of soldiers found guilty of conflict-related crimes against civilians.

#### 4.2 *Conflict-related Crimes in the Military Courts*

The above-mentioned constraints notwithstanding, military courts provide some of the few instances of military personnel being held criminally accountable for conflict-related crimes in South Sudan.<sup>58</sup> Two cases are notable in this regard: a conviction against 10 soldiers for crimes committed during an attack on Terrain hotel in Juba in 2016, and a recent prosecution of crimes committed in the vicinity of Yei.

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<sup>55</sup> SPLA Act, § 89(2) (stating “The findings and sentences of a general court martial shall be confirmed by the President and Commander-in-Chief or by any officer authorized in his or her behalf by warrant issued by the President and Commander-in-Chief, provided that no death sentence shall be confirmed unless reviewed and recommended by the Southern Sudan Supreme Court.”). According to Amnesty, “This allows the President to mitigate or commute punishments imposed, remit punishments, suspend their execution, or refuse to confirm the verdict and sentence and order a fresh trial by another court martial.” *Do you think we will prosecute ourselves?*, p. 18.

<sup>56</sup> See SPLA Act, § 37(4).

<sup>57</sup> According to Amnesty: “UN officials and diplomats strongly suspect that the casefile was lost after it was sent to the Office of the President for confirmation of the verdict.” See *Do you think we will prosecute ourselves?*, p. 20.

<sup>58</sup> Other military courts have been established in recent years, but they mostly address more commonplace criminality by security sector personnel. In 2018, for example, the SSPDF established a “mixed court” in Juba to adjudicate security personnel accused of non-conflict-related criminality, including crimes against civilians. These courts share many of the shortcomings mentioned above in relation to the Terrain and Yei trials: they focus on low-ranking soldiers and they allow for the prosecution of offences committed against civilians in military tribunals in contravention of South Sudanese law.

The Terrain trials flowed from an incident that took place in July 2016 amid battles between government and opposition forces in Juba. On 11 July, a group of military personnel, including members of the Presidential Guard, regular SSPDF, National Security Services (NSS) and police, stormed the hotel compound, took occupants hostage, killed a South Sudanese journalist, and sexually assaulted both South Sudanese and expatriate women. Following a government investigation, the President established the first ever special court martial to try 12 soldiers identified in the investigation committee's report. In September 2018, the court convicted 10 of the accused on charges that included murder and rape.<sup>59</sup> Among the victims of sexual assault, only six expats provided testimony and none of the victims from South Sudan or other African countries participated. This contributed to a perception among South Sudanese that justice is only possible under extreme diplomatic pressure and that crimes against South Sudanese do not elicit the same level of condemnation as those committed against foreigners.<sup>60</sup>

The court martial in Yei began to test some of these assumptions.<sup>61</sup> In July 2020, the SSPDF deployed military judges to Yei to investigate and prosecute dozens of soldiers for a range of crimes, including murder, rape and burglary, committed in the context of the government's counter-insurgency operations against non-signatories to the R-ARCSS.<sup>62</sup> According to interviewees, the military tribunal was constituted following a visit that the new Chief of Defense staff made to Yei. In September 2020, at least 26 soldiers were convicted of committing crimes against civilians, including murder, rape, looting and loss of firearms and ammunition.<sup>63</sup> Due in part to Covid restrictions, there is little information about the military tribunal currently available in the public domain.<sup>64</sup>

The Terrain trial and the ongoing cases in Yei may be the exceptions that prove the rule of impunity in South Sudan, but they nonetheless provide a number of lessons for how South

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<sup>59</sup> The most senior officer among the accused died in custody before the sentence was issued. Of the 11 convicted, two were given death sentences, one was acquitted, three were found guilty of rape, four of sexual harassment, and one of theft and armed robbery. The owners of the hotel were awarded \$2.25 million USD for damages, while the rape victims were each awarded just \$4,000 each for sexual assault and rape and the family of the murdered journalist was awarded 51 cows as blood compensation under South Sudanese law.

<sup>60</sup> Both the complainants and the accused appealed the military court's verdict; the accused on the grounds that the court lacked jurisdiction to try crimes committed against civilians and the complainants appealing the damages award. However, these appeals were prevented from proceeding when the case file was lost in the Office of the President. *Do you think we will prosecute ourselves?*, p. 20.

<sup>61</sup> As of this writing, additional prosecutions through court martials have taken place. In November and December 2020, the SSPDF, with the support of UNMISS and a South Sudanese legal aid organization, convened a general court martial in Bentiu that heard 16 cases involving 33 suspects. According to UNMISS, trial proceedings were concluded in seven cases involving serious offences such as murder, culpable homicide, and robbery. One suspect was acquitted for lack of evidence and the eight remaining suspects were convicted and sentenced to terms of imprisonment ranging from two to six years, plus compensation in the form of cattle or cash equivalents to the victims or their families.

<sup>62</sup> The UN Panel of Experts documented some of the crimes committed during these operations in its April 2020 report. See Final report of the Panel of Experts on South Sudan submitted pursuant to resolution 2471, U.N. Doc. S/2020/342, ¶¶ 48-49 (2019), available at <https://www.undocs.org/S/2020/342>.

<sup>63</sup> *Over 25 government soldiers convicted for crimes against civilians in Yei*, Radio Tamazuj (9 Sep. 2020), available at <https://radiotamazuj.org/en/news/article/over-25-government-soldiers-convicted-for-crimes-against-civilians-in-yei>.

<sup>64</sup> See *Military Court Launched in Yei*, Radio Tamazuj (12 Jul. 2020), available at <https://radiotamazuj.org/en/news/article/military-court-launched-in-yei>.

Sudanese justice systems approach conflict-related crimes.<sup>65</sup> First, all the accused are relatively low-ranking soldiers. The highest-ranking officer charged in the Terrain trial was a captain and he died while in custody before the verdict was delivered. The justice system has not demonstrated any appetite for more politically sensitive prosecutions of higher-ranking military personnel. Second, it appears the incidents under investigation involved acts of indiscipline that arguably did not serve a military objective. While the SSPDF and allied militia have been accused of deliberately targeting civilians as a war tactic throughout the conflict, when the acts are a product of indiscipline, the military establishment may have more of an incentive to hold the perpetrators accountable. Lastly, despite a pronounced lack of political will to hold people accountable for conflict-related crimes, South Sudanese political and military leaders nonetheless played a role in advancing accountability in both the Terrain and Yei trials.<sup>66</sup>

#### 4.4 Addressing Jurisdictional Problems

So long as South Sudanese law does not recognize their jurisdiction, military courts will remain a problematic forum for adjudicating atrocity crimes against civilians. As noted above, a single successful appeal could potentially invalidate past convictions and frustrate any ongoing cases in the military system.

At the same time, policymakers should be careful not to discount one of the few spaces where accountability for conflict-related crimes has been possible in the military justice system, particularly if the civilian system is not able to fill the gap. If policymakers wanted to retain concurrent jurisdiction between civilian and military courts over crimes that military personnel perpetrate against civilians, they could amend the SPLA Act accordingly. While the lack of transparency and political interference in the military courts are a definite source of concern, similar problems permeate the civil system.

Indeed, there may be advantages to having access to both civilian and military courts for conflict-related crimes in that people will naturally gravitate towards the system that suits their interests. The adoption of a referral mechanism between the civilian and military courts could also help to coordinate activities between the two systems. Otherwise, if policymakers opt to maintain the current legal framework, conflict-related cases should be channeled towards civilian courts as provided for in the SPLA Act and military leaders should coordinate

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<sup>65</sup> The vast majority of conflict-related crimes continue to go unpunished. A more typical example concerns a February 2017 attack on Kubi village 15 kilometers southeast of Juba in which government forces sexually assaulted a number of women and committed other crimes. A prominent bishop lobbied the SSPDF to take action against the perpetrators, but despite ample evidence, including victim testimony, media attention, and the eventual arrest of five responsible soldiers, the authorities still have not convened a court martial to try the case. See Mustapha Dumbuya, *The South Sudanese Bishop Seeking Justice for Rape Survivors*, The New Humanitarian (20 Apr. 2017), available at <https://deeply.thenewhumanitarian.org/womenandgirls/community/2017/04/20/the-south-sudanese-bishop-seeking-justice-for-rape-survivors>.

<sup>66</sup> See McCrone, p. 8. Most analysis of the Terrain trials view the international pressure that came to bear on the government as a central factor in their success. A study by Flora McCrone with the Small Arms Survey offers a slightly different perspective. According to McCrone, when the President first established the investigation committee in August 2016, the US government and UNMISS had not yet started exerting diplomatic pressure on the government of South Sudan to investigate and prosecute the matter. See *Id.*, p. 5.

more closely with justice chain actors to improve enforcement capacity in the criminal justice system.

## 5 Customary Courts and Special (or Mixed) Courts

Since colonial times, customary courts have served as a primary means of dispute resolution at the local level throughout South Sudan. The adaptability, cultural familiarity and cost-effectiveness of customary courts have made them important sources of social cohesion throughout decades of conflict. The subsections below provide an overview of the institutional framework of customary courts and the difficult relationship they sometimes have with military actors.

### 5.1 Institutional Framework of Customary Courts

The role of traditional authorities and customary law is formally recognized in the Transitional Constitution (2011).<sup>67</sup> The Local Government Act (2009) provides additional details on the administrative and judicial role that traditional authorities play.<sup>68</sup> However, the actual institutional framework of customary courts as they exist on the ground often diverge substantially from this model. In some cases, parallel dispute resolution structures exist for customary courts that are associated with government administrative structures and others that are more deeply embedded in non-state, community institutions.<sup>69</sup>

The Local Government Act also restricts customary courts from adjudicating criminal cases unless the case has a 'customary interface' and has been referred by a statutory court.<sup>70</sup> In practice, customary courts do not adhere to these jurisdictional limitations and often adjudicate a range of criminal matters. In some places, they even negotiate remedies for murder in the form of blood compensation – or payments often made in the form of cattle from the perpetrator and his or her family to the family of the deceased. Blood compensation is provided for in the Penal Code, provided the family of the deceased agrees, but it is meant to be done as part of a formal criminal prosecution in statutory courts and should be accompanied by a jail term of no less than 10 years.<sup>71</sup>

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<sup>67</sup> The Transitional Constitution recognizes the "customs and traditions of the people" as being among the sources of legislation in South Sudan. See Pt. 1, Art. 5. It also recognizes traditional authority as an institution of local government and states that the "courts shall apply customary law subject to this Constitution and the law." *Id.*, Pt. 11, Ch. II, Art. 166(1), (3).

<sup>68</sup> The Local Government Act adopts the official hierarchy of customary courts as initially laid out during the colonial period consisting of A courts, B courts and C courts that correspond to customary courts at the boma, payam and county levels of local government, respectively. See Local Government Act, § 97 (2009), available at <http://southsudanhumanitarianproject.com/wp-content/uploads/sites/21/formidable/The-Local-Government-Act-2009.pdf>.

<sup>69</sup> Among the Lotuka-speaking peoples of Eastern Equatoria, for example, the institutions of the age-sets young men called monyomiji and local 'kings' or 'rainmakers' are the most highly regarded traditional authorities at the local level and stand in contrast to the 'government chief', who tends to have lesser legitimacy. See Lucian Harriman, Ilona Drewry and David Deng, "Like the military of the village": Security, justice and community defence groups in south-east South Sudan, Saferworld, p. 13 (Feb. 2020), available at <https://www.saferworld.org.uk/resources/publications/1245-alike-the-military-of-the-villagea-security-justice-and-community-defence-groups-in-south-east-south-sudan>.

<sup>70</sup> Local Government Act, § 98(2).

<sup>71</sup> Penal Code Act, § 206 (2009), available at <https://www.wipo.int/edocs/lexdocs/laws/en/ss/ss014en.pdf>.

## 5.2 Advantages and Constraints of Customary Courts

Before the current conflict, it was often estimated that as much as 80 percent or more of the civil and criminal cases in South Sudan were adjudicated in customary courts.<sup>72</sup> If anything, the conflict has increased this caseload as statutory courts have ceased to function throughout much of the conflict zone.<sup>73</sup> In many ways, customary courts in South Sudan have evolved to function in highly unstable conflict situations. Proceedings are typically held under trees and courts can migrate along with displaced populations if necessary. The administrative costs are fairly low, which enables them to operate while charging far less to court users than statutory courts. Perhaps most importantly, customary courts dispense justice in a culturally familiar, quick, and accessible manner that makes them attractive to the populations they serve.

Customary courts also have major drawbacks. They tend to be male dominated spaces and the customary norms they apply often violate basic standards of human rights, particularly with respect to how they treat women and girls. Customary court proceedings sometimes violate people's due process rights and can be associated with unlawful and arbitrary detention. The lack of formal records in many instances also makes it difficult to monitor customary court proceedings and enforce compliance with jurisdictional rules. As a result of these systematic shortcomings in customary justice systems globally, the Committee on Civil and Political Rights (CCPR) has taken the position that customary courts should only adjudicate minor civil and criminal matters.<sup>74</sup> These reservations are also reflected in the manner in which development assistance is channeled in South Sudan, as rule of law actors have struggled to engage effectively with traditional authorities and customary courts and the vast majority of assistance goes towards the formal system.<sup>75</sup>

## 5.3 Conflict-related Cases in Customary Courts

While customary courts frequently adjudicate cases that involve military actors as either complainants or accused, they do not typically address more serious crimes associated with politically motivated conflict. However, there are some noteworthy exceptions to this general rule. A 2016 study by Pendle and Ibreck noted instances in which customary courts played a role in restraining military authority. In 2014, for example, the SPLM-IO created a court in

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<sup>72</sup> Judges in Wau and Aweil East estimated in 2010 that customary courts adjudicated approximately 70 and 90 percent of the cases in those respective locations. See *Local Justice in Southern Sudan*, p. 36.

<sup>73</sup> According to a representative of an international human rights organization: "[T]he stress has shifted to customary courts. You have customary courts being used more and more, because of their ease of access, presence in the ground, and the fact that most court officers are based in Juba. Now with COVID-19 it enhances the stress on customary justice." Interview with human rights researcher no. 2.

<sup>74</sup> UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, U.N. Doc. CCPR/C/GC/32 (23 Aug. 2007), available at <https://undocs.org/CCPR/C/GC/32>.

<sup>75</sup> Donors and development partners are considering some shifts in this regard. UNDP says that they are trying to engage more with customary courts, the EU has funded a number of activities relating to customary courts, including the documentation of hundreds of customary courts cases through an access to justice project managed by the British Council, and the Swiss have also been engaging with customary authorities for many years as part of their programming focusing on local government. Interview with UN official 3; Interview with donor 1; interview with donor no. 2.

Leer comprised of senior chiefs from all the counties under its control that took appeals from customary courts across southern Unity and was active in trying to end longstanding feuds and maintain peace in SPLM-IO areas.<sup>76</sup> According to Pendle and Ibreck, “Such initiatives underline the potential of chiefs to regulate violence, exert civil authority over military forces and thus contribute to the protection of civilians.”<sup>77</sup>

Pendle and Ibreck also documented a case in a customary court in Bentiu POC in which a woman who was raped and abducted during a government offensive in Koch and forced to marry her attacker. The woman escaped and sought refuge with her parents in the POC. When the man came to the POC to demand her return, her parents convinced him to take the matter to the customary court. Applying Nuer customary law, the court decided that the woman had not been lawfully married since no bride price had been paid to her parents. However, when the question arose of whether the man should be punished for the sexual assault and abduction, the court followed a suggestion from the girl’s father that “the time has not yet come for accountability for what has happened in Unity State.”<sup>78</sup>

#### 5.4 Special Courts

Customary courts have also been enlisted in efforts to address justice issues in the context of intercommunal conflict, including cattle theft and killings. Using his authority under the Judiciary Act to temporarily grant judicial powers to “any judge or person for a specified period,” the Chief Justice is able to create special courts comprised of a combination of statutory court judges and chiefs to adjudicate criminal matters that arise during intercommunal conflicts. In Warrap and Western Bahr-el-Ghazal, for example, the Chief Justice is reportedly planning to establish a special court that will be comprised of one statutory court judge and three traditional authorities from the various ethnic groups involved with intercommunal conflict in the area.<sup>79</sup> There are also reports that some of the special courts have been issuing death sentences. South Sudanese law allows for capital punishment in murder trials, but such punishments would preclude support from the UN and other bilateral donors.

The special courts that have been established recently appear to be entirely supported by the government and none of the donors interviewed for this assessment were aware of any international support being channeled towards them. To work more effectively with customary courts in addressing conflict-related crimes, policymakers must strike a balance between adhering to the restrictions that South Sudanese law and international law place on customary courts, while also recognizing their central role as justice service providers in contexts where state institutions are largely absent. More than a decade of investment in the formal system has failed to deliver meaningful progress in addressing even commonplace

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<sup>76</sup> The governor of Sobat also sought to harness traditional authorities to bring the White Army – a notorious collection of armed youth groups among the eastern Nuer – under control.

<sup>77</sup> Rachel Ibreck and Naomi Pendle, *Customary Protection? Chiefs’ courts as public authority in UN Protection of Civilian sites in South Sudan*, Justice and Security Research Programme (JSRP) Paper 34, pp. 14-15 (Sep. 2016), available at <http://eprints.lse.ac.uk/84472/>. An interviewee for this assessment also observed that communities in some areas are organizing cleansing rituals in which victims and perpetrators come together under the auspices of an elder to promote reconciliation and healing. Interview with UN official no. 3.

<sup>78</sup> *Customary Protection*, pp. 34-35.

<sup>79</sup> Interview with UN official no. 1.

crimes, much less the far more complicated conflict-related crimes, and policymakers should be looking to increase opportunities for victims to secure redress wherever they may be found.

## Concluding Remarks

The purpose of this landscape assessment is to describe the justice sector institutions that are relevant to efforts to hold accountable perpetrators of atrocity crimes at the national or subnational level in South Sudan. As such, the report does not go out of its way to provide policy prescriptions for how this could best be done. Nonetheless, a number of themes have emerged from the assessment that are worth emphasizing. First, the notion that there is a complete absence of accountability in South Sudan obscures some of the fledgling efforts to rein in abuses by the military that are happening at the margins of the justice sector. Admittedly, these efforts are woefully insufficient compared to the gravity and scale of the abuses that political and military actors have perpetrated over the course of the conflict. But if the end goal is building the capacity of South Sudanese to manage these issues on their own with a view towards preventing their recurrence, then policymakers must start with what is there and develop strategies for scaling up efforts over time.

In some cases, an approach that seeks to bring in less controversial conflict-related cases in a more circumspect manner, whether it is through opportunistic prosecutions in mobile courts or the prosecution of serious crimes committed in the context of intercommunal conflict, can help to normalize accountability and build confidence among justice sector actors at a local level. While a strategy that seeks to hold accountable those most responsible for atrocities may make sense in terms of maximizing coverage of the crime base and deterring offences by those in positions of authority, when there is no political will for such an approach, policymakers must adapt and explore options for pursuing multiple lines of accountability simultaneously. Prosecutions at the national or subnational level cannot substitute for efforts at the regional and international level through the Hybrid Court, but they can provide an important complementary avenue for justice.

Second, policymakers should clarify which courts have jurisdiction over conflict-related crimes against civilians. If policymakers want to maintain military courts as options for victims, they should make the necessary amendments to the law. Policymakers should also invest more into building the capacity of the civilian courts to address conflict-related crimes. In the longer-term, this could be done by establishing a specialized division in the Judiciary along the lines of what is proposed in the draft international crimes legislation. In the short-term, other urgent interventions would be necessary, including closer cooperation between military and other executive actors and the civilian courts around conflict-related cases.

Third, more information is needed about how conflict-related cases are being addressed at the national and subnational level. For example, the Government and its development partners could develop criteria by which to assess whether cases are conflict-related or not and track those figures over time in the various forums. Independent organizations could be tasked with monitoring justice sector institutions and reporting on both the successes and the challenges to encourage cross-learning and growth. This applies equally to basic

information about the justice sector, such as how many courts there are and where, how many judges are presiding over those courts, and what are their caseloads and disposal rates.

Lastly, donors and policymakers should devote more attention to the importance of rule of law and access to justice programming as a complement to both the humanitarian response and post-conflict recovery efforts, and not merely in relation to longer-term state-building efforts. Justice is essential to people's livelihoods, as seen in the way mobile courts, customary courts and other accountability mechanisms continue to function even in the most challenging of conflict situations. As South Sudanese seek to rebuild their lives in the aftermath of conflict, confidence in the rule of law will provide an essential foundation for restoring relationships and building trust between citizens and government. By emphasizing judicial reforms, including increasing the justice systems capacity to adjudicate conflict-related cases, the government and its international partners can help to ensure that justice sector institutions are not instrumentalized to perpetuate political or military interests. Policymakers should identify champions of justice that are currently working in justice sector institutions and support them to act as agents of change moving forward. The construction and reconstruction of justice sector infrastructure will also be critical to longer-term efforts to promote accountability. The accountability mechanisms discussed in this assessment, coupled with grassroots access to justice programming, including legal aid and paralegal programs, also have a demonstrated track record of success in South Sudan and elsewhere and should be scaled up as the country moves into the transitional period.