



Building a Foundation for Justice in South Sudan

An Agenda for the Revitalized Transitional Government of National Unity (R-TGONU)

January 2021

Contents

Introduction	1
Political and Security Context	2
Current Status of Chapter V Institutions	2
Guiding Principles	3
Towards an Agenda for Transitional Justice	5
Jumpstarting Chapter V of the R-ARCSS	5
Reparations and the Special Reconstruction Fund (SRF)	7
Emergency Response to Enforced Disappearances and Abductions	9
Advancing Criminal Accountability at the National and Subnational Levels	11
Building a Foundation for Justice through Judicial Reforms	13
Priorities for Legislative Reforms	14
Concluding Remarks	15
Annex – List of Acronyms	16

Introduction

Addressing the legacies of mass human rights violations is a daunting task for any society emerging from conflict. The challenges are all the more complex in South Sudan, where people have struggled with civil wars, state repression, and developmental neglect for generations. With the current conflict, transitional justice – or the range of judicial and non-judicial measures that countries emerging from a period of conflict or authoritarian rule use to address past human right violations – has come onto the agenda for the first time. However, the foundational elements that are required for transitional justice interventions to succeed are lacking. Political leaders are largely uninformed about the role that transitional justice can play in restoring peace, and some are deeply uncomfortable with the notion of scrutinizing and holding people accountable for wartime abuses. Survivors are conspicuously absent from discussions about how best to address the legacies of the conflict, and human rights advocates are confronted with an ever-shrinking civic space. Moreover, there are real fears that the tense peace that currently exists among most armed groups could collapse at any moment and the country could return to full-scale civil war.

The uncertainties of the current situation make it all the more important for South Sudanese to develop a carefully considered plan for transitional justice that identifies priorities and sequences activities in a manner that sustains and builds momentum over time. Most importantly, transitional justice interventions must be tailored to the context and designed and implemented in a manner that is meaningful to South Sudanese. Transitional justice in South Sudan will be a generational undertaking. While the current generation may not realize

the full rewards of their efforts, it is nonetheless incumbent upon us to begin the process and establish a strong foundation that subsequent generations might build upon.

This paper seeks to stimulate dialogue among political and civic actors on an agenda for transitional justice in South Sudan in the coming years. The ideas put forward are based on many years of engagement that the Transitional Justice Working Group (TJWG) has had with South Sudanese across the country, including citizens, political and military leaders, colleagues in civil society, and international experts. After a brief overview of the context, including a summary of the limited progress made thus far in implementing the transitional justice provisions of the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS), the paper outlines a series of guiding principles on transitional justice that are meant to provide a common reference point for individuals and organizations seeking to engage in this area. The third section outlines priorities for transitional justice in the short to mid-term, including a number of policy positions for the Revitalized Transitional Government of National Unity (R-TGONU) to consider as it develops its plans for the transitional period. The final section offers concluding remarks to help orient policymakers on the task ahead.

Political and Security Context

A little more than two years since the signing of the R-ARCSS, implementation of the agreement remains far behind schedule. Under great pressure from the region and the international community, the parties managed to reach a compromise on the number of states, paving the way for the partial formation of the R-TGONU in February 2020. Disagreements arose soon thereafter over the allocation of states among the parties and the appointments of state and local government positions. At this writing, most state governors have assumed their positions, but the parties remain divided over the allocation of several key positions. Transitional security arrangements have encountered similar delays. The parties have established cantonment sites and training centers, but they lack the essential logistical support and military personnel have been abandoning them due to lack of basic necessities such as food and water. There are also reports that commanders are instructing their forces to remain outside of the security reunification process in case fighting resumes.

While the ceasefire has largely held among signatories to the R-ARCSS, other sources of insecurity have been on the rise. The delays in implementing the R-ARCSS and the consequent governance vacuum at the state and local levels have contributed to the problem. Over the course of 2020, hundreds of thousands of people were displaced by widespread intercommunal conflict and unprecedented flooding in parts of the country. In April 2020, there was 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 signaling the breakdown of a ceasefire previously mediated by the Community of Sant'Egidio in Rome.

Current Status of Chapter V Institutions

The transitional justice program provided for in Chapter V of the R-ARCSS remains almost entirely unimplemented. According to the timeframe provided for in the agreement, the parties were meant to enact legislation for three transitional justice institutions – a Hybrid

Court for South Sudan (HCSS), a Commission for Truth, Reconciliation and Healing (CTRH), and a Compensation and Reparations Authority (CRA) – by May 2020.¹

In December 2016, the Ministry of Justice established a 28-member technical committee to conduct public consultations on the CTRH. The technical committee reportedly consulted 4,610 people in 17 locations in May and June 2018. Due to the prevailing political and security context at the time, the committee was restricted to government-controlled areas and protection of civilians (POC) sites. The committee presented its report to the Council of Ministers who reportedly approved a budget of 25 million SSP (roughly the equivalent of \$70,000 at the prevailing exchange rate in early 2020) for the truth-seeking process.² At this writing, the report has as yet to be made public, and no legislation for the CTRH has yet been developed.

Regarding the HCSS, the African Union Office of Legal Counsel (AUOLC) and the South Sudan Ministry of Justice developed legal instruments for the Court, and the Council of Ministers reportedly approved the documents in December 2017, though these have not been made public. Since then, the process has come to a standstill and no further information has been made available. Meanwhile, the parties have not made any meaningful progress on the CRA since the signing of the R-ARCSS.

Guiding Principles

The following principles were developed at a national conference on transitional justice that the TJWG organized in partnership with the Republic of South Sudan Ministry of Justice, the United Nations Development Programme (UNDP) and the Embassy of the Kingdom of the Netherlands in November 2015.³ Since then, through its civic engagement and advocacy efforts, the TJWG has reaffirmed these principles as important reference points for efforts to promote transitional justice in South Sudan:

¹ According to the R-ARCSS, the CTRH will be responsible for investigating, documenting and reporting on human rights abuses over a predetermined time period in order to “spearhead efforts to address the legacy of conflicts, promote peace, national reconciliation and healing”; the HCSS will be established to bring cases against “individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period”; and the CRA will be responsible for administering a Compensation and Reparations Fund (CRF) to “provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods in accordance with a well-established criteria by the TGoNU.” See Intergovernmental Authority for Development (IGAD), Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS), Ch. V (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>.

² Commission on Human Rights in South Sudan (CHRSS), *Transitional Justice and Accountability: A roadmap for sustainable peace in South Sudan*, Conference room paper of the Commission on Human Rights in South Sudan, U.N. Doc. A/HRC/45/CRP.4 (5 Oct. 2020), available at https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_45_CRP_1.pdf.

³ *New Beginnings: A Way Forward for Transitional Justice in South Sudan*, Transitional Justice Working Group (TJWG), South Sudan Law Society (SSLS) and United Nations Development Programme (UNDP) (6 Sep. 2016), available at https://www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/way-forward-for-transnational-justice.html.

Principle 1	<i>South Sudanese-owned and driven</i>	Time and resources must be invested into civic engagement and public consultation activities to inform the design of institutions and public outreach must continue throughout the life of the various bodies that are to be formed.
Principle 2	<i>Independent and impartial</i>	Freedom from political interference and bias is critical to the success of the transitional justice program. Any perception of ‘victor’s justice’ or of a bias in favor of any particular group would undermine the credibility of the program and alienate segments of the population.
Principle 3	<i>Credible and transparent</i>	By providing timely and accurate information to people and incorporating their feedback into decision-making processes, the transitional justice program can better reflect local priorities and help people to overcome the silence, denial and hostility that accompany periods of large-scale human rights abuses. Adherence to existing commitments in peace agreements and international standards are critical to the credibility of the process.
Principle 4	<i>Inclusive</i>	In order to make a meaningful contribution to state and citizenship-building efforts, it is important that the transitional justice program be designed and implemented in an inclusive and representative manner that does not exclude segments of society.
Principle 5	<i>Holistic</i>	Transitional justice programs do not lend themselves to a ‘one-size-fits-all’ approach and there is a need to pursue multiple objectives and activities simultaneously, including criminal justice, truth-seeking, reparations and institutional reforms.
Principle 6	<i>Integrated</i>	Integrating justice and reconciliation into the post-conflict stabilization and reconstruction agenda would allow South Sudan to take full advantage of the transitional moment to foster more meaningful and sustainable reforms. An integrated transitional justice program would coordinate closely with other transitional processes, such as constitutional development, security sector reform and return and resettlement activities.
Principle 7	<i>Maximize legacy</i>	Since transitional justice processes are temporary in nature, it is important that their contribution to political and institutional transformation in the medium- to long-term is paid sufficient attention from the start.

Towards an Agenda for Transitional Justice

The subsections below discuss a number of priorities for the R-TGONU and its development partners to consider as they put in place plans for transitional justice in South Sudan.

Jumpstarting Chapter V of the R-ARCSS

As noted above, the parties have made little progress towards fulfilling their commitments to initiate a program of transitional justice as described in Chapter V of the R-ARCSS. On one level, it is not surprising that the parties have failed to establish the Chapter V institutions since they have struggled so much with even basic governance and security arrangements. However, the lack of progress on transitional justice also belies an underlying discomfort that some political and military leaders have with the idea of discussing openly the abuses that have been committed during the war, holding accountable those who are responsible, and providing remedies to survivors.

A key question at the outset concerns the timing of the establishment of the Chapter V institutions. The R-ARCSS is clear that the three institutions should be established at the start of the transitional period and should conduct their activities simultaneously. However, between the many tasks that the R-TGONU has on its plate, the difficult relationship among the leadership, and the many crises facing the country, including the Covid-19 pandemic and macroeconomic troubles, it is difficult to imagine the R-TGONU effectively implementing such a complicated undertaking as a hybrid court, truth commission or reparations program so soon in the transition.

In confronting this dilemma, the R-TGONU and the African Union (AU) could consider an incremental approach that begins by putting in place essential components of the Chapter V institutions and scaling up their activities over time. Under such an approach, the R-TGONU would enact legislation for the three institutions as soon as possible, but the institutions may not become fully operational until later in the transitional period or after the elections at the end of the transitional period. With respect to the HCSS, for example, the R-TGONU could proceed with tabling the statute for the court once the new Transitional National Legislative Assembly (TNLA) has been established. In the meantime, the African Union Peace and Security Council (AUPSC) could issue a resolution mandating the AUOLC to establish an investigative unit to compile and preserve evidence as a precursor to the full establishment of the HCSS.

Alongside these processes, the R-TGONU should embark on a nationwide civic engagement process that informs people about its commitment to transitional justice and solicits ideas about how the program might be structured. The consultations that the Ministry of Justice conducted on the CTRH in 2018 were a welcome first step, but the report has never been made public and much more needs to be done. This civic engagement effort should not be approached as a tick box exercise. The one month of consultations on the CTRH legislation that is provided for in the R-ARCSS is insufficient and should be scaled up to a level that is commensurate with the ambitious transitional justice agenda provided for in Chapter V. Citizen views should inform the development of the legislation for the CTRH and the CRA, but the consultations should not stop there. The R-TGONU should make a commitment to engage

citizens both as a means of keeping them informed and soliciting their views throughout the life of the transitional justice program.

In addition to more outspoken and decisive leadership at the national level, this approach to transitional justice will require a more forward leaning approach to diplomatic and political engagement at the regional and international levels. The Intergovernmental Authority for Development (IGAD), the AU and the UN should appoint high-level statespersons to help guide South Sudan through its transition, including a permanent Chairperson of the Revitalized Joint Monitoring and Evaluation Commission (R-JMEC), and special envoys on South Sudan at the AU and the United Nations (UN). These individuals should have strong credentials in human rights and transitional justice and should work with diplomatic partners to generate momentum for the transitional justice agenda, including the provision of funds to support the implementation of Chapter V.

Our recommendations with respect to Chapter V of the R-ARCSS include the following:

To the R-TGONU:

- Sign the memorandum of understanding for the HCSS and deposit the instrument with the AU. Once the new TNLA has been established, table the statute for the HCSS for adoption without further delay.
- Meet with the AUOLC to develop a roadmap and timetable for the full establishment of the HCSS.
- Building on the consultations that have been done thus far, expedite widespread public consultations on the CTRH and CRA. On the basis of these consultations, develop an adopt legislation for the two institutions as soon as possible.
- Conduct additional civic engagement efforts on transitional justice that pick up from where the previous round of consultations left off. Civic engagement efforts should start immediately and proceed throughout the life of the transitional justice institutions.
- Devote special attention to reaching areas that were not covered in the 2018 consultations, including opposition-controlled areas, rural areas, and refugee camps.
- Ensure that survivors are thoroughly sensitized and that their views are reflected throughout the civic engagement process. Address essential survivor needs through emergency reparation programs so that they are in a position to engage effectively in the consultations.
- Ensure that consultations reach the grassroots level and are conducted in other languages in addition to English and Arabic. Enlist civil society actors and faith-based institutions in the effort.
- Provide public assurances that civic space for public consultations on transitional justice will be protected and that people will be permitted to share their views freely without fear of retribution.
- Publish the report from the first round of consultations so that people can learn from the work that has been done thus far in designing future consultation initiatives.
- Convene a diverse multi-stakeholder group that includes political and civic thought leaders to meet periodically to discuss the TJ agenda and how it may be promoted among the relevant actors. Involve survivors to help ensure that the group's approach

is grounded in the views and experiences of those who have been most directly impacted by human rights violations and abuses.

To the AU:

- Establish an investigative unit to compile evidence of human rights violations and international crimes, with a view to preparing cases for eventual prosecution by the HCSS.
- Conduct a capacity assessment of South Sudanese legal professionals and set up a mentoring program that could be used to identify legal professionals to work with the hybrid court.
- Create a roster of South Sudanese and other African justice practitioners for future potential hire at the HCSS.
- Appoint a provisional registrar, president, and chief prosecutor to organize the court's preliminary activities.
- Recruit witness protection and security experts to determine a witness protection regime for the HCSS.
- Determine a location for the HCSS.

Reparations and the Special Reconstruction Fund (SRF)

After a period of violence involving atrocity crimes, in addition to whatever humanitarian assistance people may need, they are also entitled to redress for violations of international human rights and humanitarian law that they have suffered. Justice means different things for different people and often a range of measures will be required to provide legal, material, or social remedies to restore their rights. Given South Sudan's experience with long-term humanitarian interventions, there may be a tendency among some segments of the population to look to the international community for assistance. While international donors may provide technical assistance or supplementary funding, reparations are part of survivors' right to redress for specific harms that they have endured, and should therefore come in the first instance from the actor or institution responsible for the harms or from the State in fulfilment of its responsibility to protect citizens and to provide remedies for human rights abuses.

The range of measures to restore survivors' physical, psychological, legal, material, or social status may include rehabilitation measures to address medical and psychosocial consequences of the violations and restitution measures to restore legal rights to citizenship or property. Where these measures cannot restore what has been lost, compensation may be needed. Furthermore, public recognition of wrongdoing is often highly valued by survivors and can help to restore their dignity and place in society. In this regard, measures of satisfaction include accountability, published accounts of the truth, public apologies, and memorials. While reparations programs are often considered difficult to design and implement, technical assistance is available and examples of good practice can provide opportunities for comparative learning. Given the complexity of the task, the R-TGONU should devote time and seek technical assistance at the outset in developing an approach to reparations.

The R-TGONU could start by ensuring that consultations on transitional justice programs include questions about the impact of violations and how best to address those impacts. The consultations should also specifically include survivors of atrocity crimes. Identifying categories of victimization and related remedies will be an important first step in developing a context-specific reparations program. Reparation initiatives that intersect with humanitarian priorities in the transitional context may provide logical entry points. For example, restoring and enforcing land and property rights and providing compensation for housing to displaced populations could be seen as a form of reparations that could help to facilitate the return and resettlement process. South Sudan also has a rich tradition of reparative justice through customary mechanisms that can be built upon and incorporated into its reparation program.

The outcomes of the CTRH will provide important indications on reparations priorities that other institutions, including the CRA, may incorporate into their programs. However, the establishment of the CRA should not be unduly delayed as the CRA will need to be operational and fully prepared for implementation by the time the CTRH completes its work. In the initial stages, alongside its consultations on transitional justice, the R-TGONU may want to identify priority categories of victimization and conduct victim mapping activities in collaboration with other actors. A mapping of victimization could draw on existing information in the public domain as well as the many databases that various actors have been compiling over the years. Given the widespread and persistent sexual violence since December 2013, the mapping should consider and make recommendations for a gender-sensitive reparations process that recognizes the multiple ways in which the conflict has affected men, women, boys, and girls on the basis of their gender.

A potential next step, in close consultation with survivors and local stakeholders, could be to devise some pilot programs to address specific categories of victimization. These could include medical services, psychosocial support or educational opportunities in areas that have large concentrations of survivors. Such pilot programming can help to build expertise and instill confidence in the broader population that reparations are feasible in the South Sudanese context.

The CRA could also advise the Special Reconstruction Fund (SRF) provided for in Chapter III of the R-ARCSS on ensuring survivor-centered “assistance to IDPs, returnees and those affected by the conflict”, and it could try to arrange funding for its priority pilot projects through this already established funding stream. According to the R-ARCSS, the R-TGONU is required to invest \$100 million USD per year into the SRF which is meant to “lead in assessing and determining the priorities for reconstruction of infrastructure in the country, with priorities to conflict-affected States and areas.”⁴ In pursuing such initiatives, the R-TGONU must be careful not to conflate reparations with the public goods and services that people are entitled to by virtue of their citizenship.

Our recommendations to the R-TGONU with respect to reparations include the following:

⁴ R-ARCSS, Ch. III, Art. 3.2.5.

- Seek advice from the AU, UN and international organizations that have experience with reparations programs to develop an approach that takes into consideration prevailing opportunities and constraints and is tailored to the context in South Sudan.
- Prioritize the establishment of the SRF provided for in Chapter III of the R-ARCSS and deposit the required amount of funds on an annual basis.
- Initiate a plan for reparations programs to address specific categories of victimization in the form of medical services, psychosocial support, and educational opportunities in areas that have large concentrations of survivors.
- Design a program for land restitution, including a process to resolve disputes that may ensue.
- Conduct a mapping of victimization in current and past conflicts to inform the transitional justice agenda more broadly and the design of a reparations program specifically.

Emergency Response to Enforced Disappearances and Abductions

Another critical area that must be addressed as an urgent priority is the status of men, women and children that have been either disappeared or abducted by armed groups. Enforced disappearances and abductions have been a feature of conflict in South Sudan for a long time. They arise in many different contexts ranging from organized military campaigns, to intercommunal conflict, to human trafficking that has more of a business character. Since December 2013, however, the practice has become much more widespread. In 2018, for example, SPLM-IO groups in Western Equatoria reportedly abducted nearly 900 civilians to serve as combatants, forced laborers, and sex slaves.⁵ Government forces and other opposition groups have been accused of similar abuses.⁶ A survey that the South Sudan Civil Society Forum (SSCSF) conducted with 1,147 people in five locations in South Sudan and a refugee camp in Uganda found that 40 percent of survey respondents knew women or children that had been abducted by armed groups since the conflict started in 2013.⁷

The parties have struggled to implement previous commitments made under both the December 2017 cessation of hostilities agreement and under the R-ARCSS to release political

⁵ See Winnie Cirino, *UN Report: SPLA-IO Abducted 900 People, Forced 24,000 to Flee Western Equatoria This Year*, Voice of America (19 Oct. 2018), available at <https://www.voanews.com/archive/un-report-spla-io-abducted-900-people-forced-24000-flee-western-equatoria-year>. In January 2020, the SPLM-IO released 78 of the women and 50 of the children that they had abducted in 2018. However, according to Human Rights Watch, SPLM-IO forces subsequently coerced the women and children that they had released back to an SPLM-IO base in the area. See Nyagoah Tut Pur, *Freeing South Sudan's Captive Women and Girls: 128 Down, Thousands to Go*, Human Rights Watch (HRW) (19 Feb. 2020), available at <https://www.hrw.org/news/2020/02/19/freeing-south-sudans-captive-women-and-girls>;

⁶ See e.g., United Nations Mission in South Sudan (UNMISS), *Conflict-Related Violations and Abuses in Central Equatoria, September 2018-April 2019* (2 Jul. 2019), available at https://unmiss.unmissions.org/sites/default/files/final_human_rights_division_report_on_central_equatoria_-_3_july_2019.pdf.

⁷ Eighty percent of the people who knew someone who had been abducted said that the individual had not been released at the time of the survey. See David K. Deng, *Revitalizing Peace in South Sudan: Citizen Perceptions of the Peace Process*, South Sudan Civil Society Forum (SSCSF) (Nov. 2018), available at <https://www.southsudanpeaceportal.com/repository/revitalizing-peace-in-south-sudan-citizen-perceptions-of-the-peace-process/>.

detainees, prisoners of war, and women and children who were abducted by armed groups. The cessation of hostilities agreement, for example, requires the parties to release the following persons to the International Committee for the Red Cross (ICRC) without delay:

- (a) any persons who has been deprived of their liberty for reasons related to the conflict;
- (b) any Prisoners of War (POWs);
- (c) all political prisoners and detainees;
- (d) all abducted women and children.⁸

While a few political prisoners have been released over the years, many more remain in detention along with an untold number of abducted men, women, and children. Meanwhile, the many people forcibly disappeared remain almost entirely unaccounted for, leaving their families uncertain of whether they are alive or dead. The R-TGONU should conduct a thorough investigation into enforced disappearances and abductions across the country. An external party, such as the Commission on Human Rights in South Sudan (CHRSS) or the AU, should monitor the investigations to help ensure a degree of independence, credibility and transparency. In addition to immediate remedies in the form of freeing abducted persons and providing information to the families of disappeared persons about the whereabouts or fate of their loved ones, cases could be forwarded to the appropriate institutions for further action, including national courts and the Chapter V mechanisms, if and when they are established.

Our recommendations to the R-TGONU with respect to the enforced disappearances and abductions by armed groups include the following:

- Establish an investigative committee to examine these issues and develop recommendations on how to provide remedies to survivors and develop mechanisms to prevent the recurrence of the practice.
- Ensure that a credible third-party institution is able to monitor the investigations and that the investigative committee's report is made public.
- Immediately release abductees, facilitate their reintegration into their home communities, or help them to resettle elsewhere if they wish.
- Provide the families and friends of disappeared individuals with information on their whereabouts or their fate.
- Ensure that medical and psychosocial support services are put in place for survivors and their families.

⁸ Communiqué of the 31st Extra-Ordinary Summit of Intergovernmental Authority for Development (IGAD) Heads of State and Government on South Sudan (12 Jun. 2018), *available at* https://igad.int/attachments/article/1575/120617_Communique%20of%20the%2031st%20Extra-Ordinary%20IGAD%20Summit%20on%20South%20Sudan.pdf; *see also* High Level Revitalization Forum, *Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access* (21 Dec 2017), *available at* <http://www.sudantribune.com/spip.php?article64322>.

Advancing Criminal Accountability at the National and Subnational Levels

As the R-TGONU works towards the establishment of the Chapter V institutions, justice sector institutions should also begin prosecuting more conflict-related crimes in national courts. Such prosecutions are an important means of instilling discipline among armed groups and deterring human rights abuses. They can also serve as an important complementary measure to the HCSS, if and when it is established, which will likely focus on a small number of cases involving individuals who are most responsible for international crimes. By building the justice sector's capacity to investigate and prosecute some of these crimes at the national level, the R-TGONU can put itself in a position to maximize positive spillovers from the Chapter V institutions.

As of this writing, only a handful of conflict-related cases have been prosecuted at the national level, including the Terrain trials, a recently concluded series of court martials in Yei, and a handful of cases in the civil courts, including a chance conviction of two individuals accused of participating in a mass rape by a mobile court in Bentiu.⁹ While it is encouraging to see a bit more willingness from the authorities to prosecute individuals for conflict-related crimes, much more must be done. The R-TGONU should encourage the Ministry of Justice and the Judiciary to be more proactive in addressing conflict-related crime, including by having prosecutors initiate cases in instances where victims do not feel safe enough to open the case themselves. Political and military leaders should provide justice sector institutions with assurances that they will not interfere with their work. The Judiciary could also explore opportunities for collaboration with military justice to increase their enforcement capacity over military personnel.

Another major problem concerns the prosecution of military personnel who commit crimes against civilians in military courts. According to the Sudan People's Liberation Army (SPLA) Act (2009), such cases are meant to be before civilian courts.¹⁰ In theory, individuals convicted before a military court could appeal the decision for lack of jurisdiction, which could result in an overturning of previous convictions that were wrongly delivered by military courts. There are also concerns about the independence and transparency of the military justice system, which according to South Sudanese law, is subject to more discretionary control by the executive than the civilian courts. The R-TGONU should either channel cases involving conflict-related crimes against civilians to the civilian criminal justice system, as the law requires, or else amend the SPLA Act to give military courts concurrent jurisdiction over the cases.

The R-TGONU should also work to develop protocols and infrastructure for victim and witness protection, both as a critical component of criminal accountability efforts and as part of the broader transitional justice program. South Sudan is party to the United Nations Convention Against Corruption, Article 32 of which requires states parties to develop mechanisms for

⁹ David K. Deng, *South Sudan: Justice Landscape Assessment*, Transitional Justice Working Group (TJWG) (Jan. 2020).

¹⁰ See SPLA Act, § 37(4) (2009) (stating that "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://www.ilo.org/dyn/natlex/docs/MONOGRAPH/98164/116700/F1105592601/SSD98164.pdf>.

witness protection.¹¹ International commitments such as these, coupled with data about the impact that a lack of witness protection has on people's ability to access justice services in South Sudan, could be used to lobby for the government to develop appropriate mechanisms. As this issue tends to be very context specific, the R-TGONU could begin engaging national actors that have experience with victim and witness protection, including civil society organizations and human rights defenders. The R-TGONU could also seek advice from other post-conflict countries that have managed to build their capacity for victim and witness protection. The combination of national expertise and comparative experience could help to develop a practical and effective approach that is suited to the context in South Sudan.

Lastly, the R-TGONU should encourage justice sector institutions to collaborate with civil society actors in establishing legal aid programs to help increase access to justice for conflict-related crimes. Donor support for legal aid programs reduced dramatically in the wake of the 2013 crisis. Nonetheless, legal aid organizations continue to play an important role in increasing access to justice, including in relation to conflict-related crimes. For example, legal aid organizations played a role in monitoring the recent military court martials in Yei and providing legal advice to victims. Legal aid organizations also serve as private prosecutors and defense counsel in many mobile court hearings. Scaling up programs such as these and including a component that specifically addresses conflict-related crimes could help to support the R-TGONU's efforts to prosecute these cases at the national and subnational level. If necessary, the Legal Aid Bill currently under development in the National Legislative Assembly could be amended to consider how legal aid programs can complement criminal accountability for conflict-related crime, as well as the broader transitional justice agenda.

Our recommendations to the R-TGONU with respect to promoting accountability for conflict-related crimes at the national level include the following:

- Ensure that cases involving crimes committed by military personnel against civilians are either channeled to civil courts where they belong or else amend the SPLA Act to give military courts concurrent jurisdiction over the cases.
- Encourage prosecutors to initiate prosecutions themselves in instances where victims do not feel safe enough to do so.
- Develop protocols and infrastructure for victim and witness protection in consultation with South Sudanese and international experts. Undertake consultations and obtain expertise on drafting witness protection legislation to address both physical and psychosocial protection of witnesses.
- Encourage greater cooperation between civilian and military justice sector actors on cases involving conflict-related crime.
- Invest more into mobile courts, special courts, and the Sexual and Gender-Based Violence (SGBV) court. Encourage independent third-party assessments of the courts and periodically publish data about the functioning of the courts.
- Establish an international crimes division in the Judiciary as envisaged in the International Crimes Bill currently under development in the Legislative Assembly.

¹¹ See United Nations Convention Against Corruption, U.N. Doc. A/58/422 (2003), available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

Make clear that the international crimes division is meant to supplement and not replace the HCSS and frame its jurisdiction accordingly.

- Compile information on the number of conflict-related cases that are adjudicated in the various forums and make the information available for public consumption.
- Invest more in legal aid and access to justice programming.

Building a Foundation for Justice through Judicial Reforms

The reconstruction and reform of justice sector institutions is critical to building a foundation for transitional justice in South Sudan. The war has decimated justice sector institutions in many parts of the country.¹² Even before the conflict, formal courts were mainly present only in urban areas and inaccessible to the majority of the population living in rural areas. The Judiciary has also been chronically understaffed, and the few judges that are there are often subject to political interference, intimidation, and abuse. In recent years, senior judges have been removed by presidential decree, contrary to the provisions of the Judiciary Act requiring that the decision be made by the Judicial Service Council.¹³ In 2016 and 2017, a number of judges and lawyers went on strike, complaining of a lack of basic equipment and electricity, delays in payment of salaries, lack of security measures, lack of transportation means, and practices of corruption, among other issues.¹⁴

Chapter I of the R-ARCSS mandates the R-TGONU to undertake judicial reforms and “to build the capacity of the judicial, personnel and infrastructure.”¹⁵ The agreement does not provide much detail on what those reforms would entail, but it does reference the reconstitution of the Judicial Service Council. Other reforms could include the establishment of more robust transparency and accountability safeguards in the judicial administration and the reinstatement of judges that were improperly dismissed.

The R-TGONU should also move quickly to reestablish justice sector institutions, including courts, police stations and prisons, in places where they have ceased to function due to conflict. This may require investments into infrastructure for personnel deployed to these locations. The government can explore opportunities for sharing the costs of this with development partners. Concurrently with the reconstruction of justice infrastructure, the Judiciary should continue to pursue innovative accountability mechanisms, such as the deployment of mobile courts to areas that do not have ready access to justice services, special

¹² Bentiu, for example, has not had a permanent statutory court judge since 2015. See 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).

¹³ See *S. Sudan lawyers says dismissal of judges “unprocedural”*, Sudan Trib. (22 Sep. 2017), available at <https://sudantribune.com/spip.php?article63574>; 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>.

¹⁴ See e.g., Nabeel Biajo, *South Sudanese judges strike despite dismissal*, Voice of America (VOA) News (14 Jul. 2018), available at <https://www.voanews.com/africa/south-sudanese-judges-strike-continues-despite-dismissals>.

¹⁵ According to Article 1.17.2: “There shall be reforms of the judiciary that shall include but not be limited to the review of the Judiciary Act during the Transition. Notwithstanding, efforts shall be made to build the capacity of the judicial, personnel and infrastructure.” R-ARCSS, Ch. I, Art. 1.17.2.

courts comprised of a mixture of statutory court judges and chiefs to adjudicate crimes associated with intercommunal conflict, and the new SGBV Court in Juba.

In the longer-term, the R-TGONU could consider a vetting process in the Judiciary to remove judges that have committed serious offences, are corrupt, have consistently failed to deliver, have exceeded the age requirements, or otherwise do not meet the minimum requirements of the office. Given the many other responsibilities that the R-TGONU has over the transition, they might consider tasking the vetting process to the elected government that will assume power after elections. Nonetheless, developing a contextually relevant plan now can help ensure that the Judiciary adopts an appropriate approach when the time is right.

Our recommendations to the R-TGONU with respect to judicial reforms include the following:

- Rebuild justice sector infrastructure and deploy personnel to areas where courts, police and prisons have ceased to function due to the conflict.
- Reconstitute the Judicial Service Commission as required by the R-ARCSS.
- Reinstate judges and compensate them for any harms that they have incurred as a result of their improper dismissal.
- Facilitate dialogue with justice sector institutions and legal professionals about the types of judicial reforms that the R-TGONU should be considering and how to prioritize and sequence them moving forward.
- Develop a program for judicial reform that includes provisions to strengthen the financial independence of the Judiciary.
- Develop plans for a vetting of the Judiciary to be sequenced relative to other parts of the transitional justice program.
- Scale up monitoring programs in courts, police stations and prisons to better understand the functioning of justice sector institutions and the specific types of reforms that can provide added value.

Priorities for Legislative Reforms

The peace process necessarily involves an extensive legislative reform process, both to give the R-ARCSS a basis in South Sudanese law and also to correct some of the shortcomings in the legal framework. Some reforms are focused more on removing or amending laws that are viewed as repressive. For example, some advocates are pushing for the National Security Services (NSS) Act to be amended to reorient the institution around information gathering and combating national security threats rather than the policing role that it now has. The amendment of the Non-Governmental Organizations (NGO) Act could also help to legitimize the work of advocacy organizations and remove some of the administrative regulation that is prone to abuse.

As important as remedying these shortcomings existing statutes is the enactment of new laws to fill gaps in the legal framework. In addition to legislation for the Chapter V institutions, some of the laws that have been discussed include an International Crimes Bill, an SGBV Bill, a Legal Aid Bill and a Witness Protection Bill. In developing any such legislation, the R-TGONU should invest more into the process of legislative development and avoid treating it as a tick box exercise. Civic engagement in the development of legislation is critical to familiarize

people with what it entails and lay a foundation for implementation. Legislation should be accompanied by a detailed implementation framework, including estimated costs, to overcome implementation gaps that have plagued so much legislation in South Sudan.

Among the legislation that the R-TGONU should prioritize over the transitional period is the following:

- Enabling legislation for the HCSS, CTRH and CRA
- International Crimes Bill
- SGBV Bill
- Legal Aid Bill
- Witness Protection Bill
- Amendment of the Penal Code Act
- Amendment of the NSS Act and NGO Act

Concluding Remarks

Transitional justice in South Sudan is necessarily a long-term endeavor. Decades of impunity and politicized narratives of conflict have damaged the social fabric to an extent that it will take generations to repair. The enormity of the task makes it all the more important that we start now by laying a foundation for what will hopefully be a more robust transitional justice process moving forward. Now that the R-TGONU has been established and South Sudan is more than two years into the implementation of the R-ARCSS, the parties can no longer justify the continued delay in establishing the Chapter V institutions by saying that we need to have peace first and justice will come later. The R-TGONU should abide by its commitments and establish the CTRH, HCSS and CRA without further delay. South Sudanese should also look beyond the R-ARCSS to consider types of initiatives that are suited to the current situation and to the context in South Sudan.

Annex – List of Acronyms

AU	African Union
AUOLC	African Union Office of Legal Counsel
AUPSC	African Union Peace and Security Council
CHRSS	Commission on Human Rights in South Sudan
CRA	Compensation and Reparations Authority
CTRH	Commission on Truth, Reconciliation and Healing
HCSS	Hybrid Court for South Sudan
ICRC	International Committee for the Red Cross
IGAD	Intergovernmental Authority for Development
NGO	Non-Governmental Organization
NSS	National Security Services
POC	Protection of Civilians Site
POWs	Prisoners of War
R-ARCSS	Revitalized Agreement on the Resolution of the Conflict in South Sudan
R-JMEC	Revitalized Joint Monitoring and Evaluation Commission
R-TGONU	Revitalized Transitional Government of National Unity
SGBV	Sexual and Gender-Based Violence
SPLA	Sudan People’s Liberation Army
SPLM-IO	Sudan People’s Liberation Movement-in-Opposition
SSCSF	South Sudan Civil Society Forum
TJWG	Transitional Justice Working Group
TNLA	Transitional National Legislative Assembly
UN	United Nations
UNDP	United Nations Development Programme