



**TRANSITIONAL JUSTICE  
WORKING GROUP**  
SOUTH SUDAN



Webinar Report:

# The Establishment of the African Union Hybrid Court for South Sudan

Tuesday, August 25, 2020, 2:30p.m.- 5:00p.m. East Africa Time

## Introduction

On August 25, Transitional Justice Working Group of South Sudan, Human Rights Watch, and Institute for Security Studies held a webinar for the African Union (AU) Peace and Security Council (PSC) members and other officials to discuss the urgency for the establishment of the AU Hybrid Court for South Sudan, as a key factor to ensuring long term stability and accountability for serious crimes in South Sudan.

The initiative came on the heels of a [joint letter](#), signed by 24 South Sudanese, regional and international civil society organizations calling upon the AU PSC to take concrete action to enable the immediate creation of the Hybrid Court on South Sudan (HCSS). In preparation for the webinar, Human Rights Watch published a question and answer document on the three accountability mechanisms provided for in South Sudan's 2015 and 2018 peace agreements and the rationale for the AU's unilateral establishment of the hybrid court, available [here](#).

On the day of the webinar, the panelists – who represented perspectives from AU officials as well as South Sudanese and international lawyers and activists – presented on accountability mechanisms agreed to by the parties to the conflict and opportunities and challenges to achieving accountability to break the cycles of violence and impunity in South Sudan.

The panelists, whose biographies are provided in the annex, were: Commissioner Solomon Dersso, Chairperson, African Commission for Human and Peoples' Rights; Nyagoah Tut Pur, South Sudan researcher, Human Rights Watch; John Ikubaje, Senior Political Officer, AU Department of Political Affairs, AU Commission; and David Deng, Transitional Justice Working Group on South Sudan. Boitshoko Mokgathe, Senior Political Officer, Peace and Security Department, AU Commission, and Don Deya, Executive Director, Pan African Lawyers Union, also provided comments as respondents. Carine Kaneza Nantulya, Africa Advocacy Director, Human Rights Watch, Allan Ngari, Senior Researcher, Institute for Security Studies, and Ibrahima Kane, Director, AU Advocacy Program, Open Society Initiative for West Africa moderated the discussion.

Attendees of the webinar included AU PSC member and other African government delegations, regional advisers, UN staff, Western diplomats, South Sudanese civil society members, and regional and international non-governmental organization representatives. Attendees were able to ask questions and offer views following the presentations.

The webinar offered a rich exchange and important perspectives on the key issues. Below are selected excerpts from points made by panellists and attendees, which we believe offer significant insights expressed during the webinar. These points have been edited for readability.

## Context

- I should start by saying that 20 years ago when the African Union (AU) was created, it was supposed to take up what happened in Rwanda, and it released its report talking about the genocide that we could really have avoided. They made a number of recommendations to the AU to make sure that mass killing and mass atrocities will be avoided. That's in 2000. We are in 2020, and we are still experiencing these problems of mass atrocities on the continent, South Sudan being one of the latest examples. (Dr. Ibrahima Kane, AU Advocacy Program of the Africa Regional Office, Open Society Initiative for West Africa)
- It is important to understand that Chapter V of [South Sudan's] peace agreement comes against the background of quite important work that has been undertaken, including at the AU in terms of documenting the nature and type of atrocity crimes that were perpetrated. The most seminal manifestation of this is of course the South Sudan Commission of Inquiry, which basically is unprecedented in terms of the level of documentation. One can say that the proposal for a Hybrid Court originated from their report. I think that is an opportunity. (Solomon Dersso, Chairperson, African Commission for Human Rights and Peoples' Rights (ACHPR))
- If you look at Chapter V of the revitalized peace agreement, it is indirectly a reflection of the recommendation that was made in the report of the AU Commission of Inquiry on South Sudan. This is one of the accomplishments of the AU, having this reflection of its recommendation on justice and accountability captured as Chapter V of the revitalized agreement on South Sudan ... And, all of the three core elements of transitional justice in South Sudan are important. Be it accountability, national reconciliation or national healing. There is no one that is more important than the other. (John Ikubaje, AU Department of Political Affairs (DPA))
- We tend to make a lot of assumptions about what political leaders will and won't do in South Sudan. This both undervalues the progress that has been made, but maybe also sells the leaders short in many important ways.... There is some interesting sort of parallel that can be drawn to the AU Commission of Inquiry

report, the process leading up to the release of the report ... Of course, it wasn't made public until later, but when the South Sudanese leaders saw it, they fully endorsed everything in the document. (David Deng, Transitional Justice Working Group (TJWG))

- Among the three accountability mechanisms [in the peace agreement] the AU has the core responsibility to establish the Hybrid Court for South Sudan. Both peace agreements (2015 and 2018) provided for the AU Commission to establish this judicial mechanism in order to investigate and prosecute individuals bearing responsibility for violations of international law and South Sudanese law.... This is different from the other two transitional justice mechanisms where the AU Commission does not have a direct role in their creation ... It is for this reason that in part we look to the Peace and Security Council to direct the AU Commission to move ahead. (Nyagoah Tut Pur, Human Rights Watch (HRW))
- International law and international relations are systems of “carrots and sticks” and if the carrots don't work let us not be afraid to bring out the sticks. (Donald Deya Omondi, Pan-African Lawyers' Union (PALU))

### **The Role of South Sudan**

- We have to ask: Have we discussed with the government of national unity what their visions of what this Chapter V is? Has there been any discussion with them about what they think and how they think this can be operationalized and realized? And what it means? What their fears are, what their concerns are as far as the operationalization and the implementation of Chapter V particularly the Hybrid Court is concerned? Have there been any such discussions? (Solomon Dersso, Chairperson, ACHPR)
- We cannot doubt the parties' political will to sign two peace agreements which lay out these transitional justice mechanisms in detail. Not only did they agree with [the AU Commission of Inquiry report], but a few months later they proceeded with an agreement, which has an entire chapter devoted to transitional justice. And if that wasn't enough, they reaffirmed their commitment in 2018 to the Hybrid Court and other mechanisms. (David Deng, TJWG)
- In September 2019, I met with several South Sudan leaders who claimed that the ball is in the court of the AU. And in fact, opined that when the AU came to South Sudan. If the AU really wanted us to sign the memorandum of understanding on the

court or really wanted to establish this court, they could have done so when they came last month. (Nyagoah Tut Pur, HRW)

- What is delaying the process is the response that we are not getting on the other side, which is the South Sudan government, in signing some of the agreements, the memorandum of understanding and others. At the level of the AU ... everything has been finalized because we also appreciate the fact that some of the victims that need justice have died.... So, the ball is actually in the court of South Sudan for them to sign what the AU has put in place so that we can operationalize. The AU is ready and we believe that it should start at any time. (John Ikubaje, AU DPA)
- Now, some arguments that have been raised that South Sudan needs more time and they have pointed out the implementation schedule of the peace agreement, stating that there is a matrix in place and nothing can move until a full government is formed, and that COVID-19 also is happening. But this is not factual. There are so many steps that the South Sudanese authorities could have taken to demonstrate goodwill and commitment to justice. (Nyagoah Tut Pur, HRW)
- The issue is about the commitment by the South Sudanese government. And it seems there is a lack of political will. So, how long will you continue negotiating as the situation is getting bad day to day, and more crimes are ongoing, and the AU is open to discussion and talks? (Webinar attendee)
- There is nothing that precludes South Sudan from coming on board as the court becomes functional. But the government needs to see that justice cannot be blocked and the court is moving ahead with or without its collaboration. Fair, credible trials will signal at last that atrocities will not be tolerated and there must be respect for the rule of law. (Nyagoah Tut Pur, HRW)

### **The Role of the African Union**

- The AU is mandated to establish the Hybrid Court for South Sudan, and this process is ongoing. The AU Office of the Legal Counsel, which is the office that is mandated to lead the process, is on the top of the work. The memorandum of understanding on the court has been drafted and shared with the government of South Sudan, a draft statute for the court is in place, and the rules of procedure have been finalized.... The other role of the AU is to decide on the location of the court, and to mobilize resources, financial and human, that will support the court.

The AU is also to appoint judges, staff, prosecutors, and defence counsel, including the registrar of the court. (John Ikubaje, AU DPA)

- We as the AU have a responsibility to make sure that the world understands that to resolve the problems of South Sudan it is not just through the Hybrid Court.... One of the critical issues is the process of the establishment of the commission for national healing and reconciliation. The South Sudanese government has actually undertaken some form of reconciliation processes. We have come as the AU very strongly both at the policy level of the AU Peace and Security Council and at the Chairperson's level to question some of the approaches that have been used in the establishment of the commission because if you don't have a commission that is inclusive, that people feel has the opportunity of actually addressing their challenges, then you are just going to be running around in circles. (Boitshoko Mokgathe, Senior Political Adviser, Peace and Security Department, AU Commission)
- The AU established a high-level ad-hoc committee for South Sudan, made up of five countries. Having South Africa as the Chairperson, other members including Nigeria, Algeria, Rwanda and Chad. This committee has been up and going, having several discussions with the government of the South Sudan. The other thing that has been done is the creation of an interdepartmental task force under the Secretariat of the Office of the Legal Counsel to bring all the relevant departments of the AU Commission on the court together. (John Ikubaje, AU DPA)
- It is clear that the level of commitment towards the establishment of the Hybrid Court by South Sudanese government does not exist. If the AU is truly committed to forming the court what is preventing the AU from establishing the court unilaterally? (Webinar Attendee)
- The other area of work that the AU has done is the adoption of the AU Transitional Justice Policy. And what we are currently doing now is to make sure that we make available this policy and we are currently working with some of the civil society organizations and even including the government officials making available this policy. (John Ikubaje, AU DPA)
- The AU has an exclusive role in selecting judges, in selecting the location of the court, its infrastructure, funding mechanisms and other applicable jurisprudence.... It is important that the AU steps up not only to protect its own vision in Agenda 2063, its own commitment to stamping out impunity on the continent, and its own

commitment to transitional justice mechanisms provided in Chapter V, but to stand up in solidarity for the South Sudanese whose leaders have so far failed to respond to their rights, to their needs, and to their interest in building a sustainable future. (Nyagoah Tut Pur, HRW)

- Whatever it is we are engaged in is premised on the understanding that an institution like the AU was never meant just to serve governments but really to work with and to assist the African people. (Boitshoko Mokgathe, AU PSD)

### **Peace “versus” justice in South Sudan**

- This question of peace vs. justice: it’s probably the wrong framing because it is premised on the assumption that we have this thing called “peace” and we have this thing called “war” and as we move from the situation of war to the situation of peace these opportunities magically open up....There is actually a lot more of continuity between these periods of peace and war.... The more appropriate question is to ask how the Hybrid Court can function in a highly insecure environment. We have the Commission of Human Rights of South Sudan which has done extensive investigations for many years now. The Commission of Inquiry itself did investigations at the height of the conflict. So, I think these processes have shown that it is possible to compile evidence and to build cases even in a highly insecure environment. (David Deng, TJWG)
- Our belief at the AU is that the kind of exercise where you actually interrogate the transition from war to peace gives you an opportunity to say that there are other elements that have been proposed that can actually be utilized going forward to create a space while we are trying to establish this Hybrid Court.... You can’t always resolve the problems in South Sudan through retributive justice. You’ve got to find other ways, particularly, as you can’t have, you are not going to have the end of war and then the beginning of peace. It is not going to be that linear. (Boitshoko Mokgathe, AU PSD)
- There is a continuum between the past and present. What happened to them in the past continues to happen to them now even though they have a government for now close to 10 years. As PALU, as we are currently dealing with a situation where the South Sudan bar association gave notice of a general meeting, held elections at that meeting, and had a new bar executive elected. Then after an individual contested this election and went to court to challenge the elections, and while the case was still in court, a single judge even without the applicant there or the people

he sued, without giving them an audience, decided to set aside the elected executive, and replace him with the electoral committee that conducted the elections. So, I ask, if this is happening to the lawyers, what is happening to the ordinary South Sudanese? (Donald Deya Omondi, PALU)

- In 2014, I conducted research in the UN base in Juba. And one of the questions I had for most of the people I was interviewing was “do you want justice and what form should justice take?” And I was surprised by most of the people I spoke with, most of whom are South Sudanese, who are not literate, would come back and say “we want the ICC or we want a court that is not within South Sudan.” That was one of the most surprising responses I ever got because there was a recognition that one, there has been harm and injustice done, and two, we don’t believe in our national systems to be able to address this and three, something has to be done in order for us to heal, to reconcile and move ahead as a society. (Nyagoah Tut Pur, HRW)
- This will continue to happen until we, the African community and international community work with the genuine people of South Sudan and regional and international organs and institutions, such as [the Intergovernmental Authority on Development] IGAD and the African Union, to ensure that there is indeed a break with the past. (Donald Deya Omondi, PALU)
- We know that justice delayed is justice denied, denied and there are challenges in that aspect. But for the AU what we have been doing is to continue the negotiation. And to continue to work with the government of South Sudan and other stakeholders so at the end of the day we are able to have a process, mechanisms that are in place that will give us our desired end goals. (John Ikubaje, AU DPA)
- If we don’t do this, if we don’t actually ensure that the people of South Sudan get justice there is going to be a culture of revenge that is going to be so systematic we will not be able to arrest it. (Boitshoko Mokgatlhe, AU PSD)

### **Opportunities and Next Steps**

- The AU is an organization of rules, and therefore rules must be followed and respected. And when you look at the revitalized agreement and you are familiar with it very well it provides that there must be a legislation that will come from the government of South Sudan for the whole process to be orchestrated accordingly –

and so these things must be obeyed.... And if we are an organization of rules it also is on us that we obey the rules too. (John Ikubaje, AU DPA)

- I think a very clear step that can be taken now even in the absence of legislation is to establish some kind of investigative capacity perhaps even have it be hybrid in nature so that some South Sudanese are involved and some other African countries. The AU through a mandate from the Peace and Security Council would have more than enough legal ground in order to take that one small step towards the court and that would put us in the position where at least we are preserving evidence and creating a foundation that could lead to the full establishment of the court. (David Deng, TJWG)
- Yes, challenges are around, at times not being able to reach agreement, not finalizing the memorandum of understanding, signing from the government of South Sudan. But we do believe that as we continue to negotiate and also to discuss with South Sudan, definitely we will overcome these challenges. One thing that we are currently working is to ensure that this process does not delay beyond necessary in such a way that it will jeopardize the essence of Chapter V of the Agreement. (John Ikubaje, AU DPA)
- The best path is for South Sudan and the AU to partner and jointly establish the court following the adoption and signature of the memorandum of understanding. It is very important that South Sudan participates, and South Sudanese participate in this monumental process. But we have to remember it has been ... how many years? It has been since 2015 when the first peace agreement was signed. South Sudanese leaders had five years to get themselves together. Five years during which atrocities have been committed. Women, girls and boys and men have been raped, forced to leave their homes, their villages burnt, forced to starve. (Nyagoah Tut Pur, HRW)
- I want to believe that it will be helpful as well to see where the national healing and reconciliation process is. What has gone wrong? What is it that we can do to actually make sure that it achieves the results intended? This is not to suggest that we are giving up on the Hybrid Court. We all understand that accountability is something that has to be done and everybody that is accountable should be held accountable. But we have to be cautious of how we engage in these processes. (Boitshoko Mokgathe, AU PSD)

- We call on the Peace and Security Council to move ahead to unilaterally establish the Hybrid Court. Why? The AU Commission has taken a lot of steps in a difficult political climate. They have reached out to the South Sudanese leaders, they have negotiated the memorandum of understanding, they have worked with South Sudanese authorities to draft the Statute, and they have sought input from external experts. But South Sudanese leaders continue to delay. They have made no effort to give a path forward on how this court can be established. (Nyagoah Tut Pur, HRW)
- Another idea that has been proposed is some vetting of South Sudanese and African jurists. To begin identifying ... getting a sense of what kind of capacity exists and, you know, who might we be able to pull into such a court from the judiciary or from elsewhere. (David Deng, TJWG)
- We need to have engagement at the level of the guarantors of the peace process, at the level of the AU system widely. (Solomon Dersso, Chairperson, ACHPR)
- It is to be understood that there are going to be very difficult engagement with the leaders and so there is got to be a way that we create opportunities to make sure that this process moves forward. (Boitshoko Mokgatlhe, AU PSD)

## ANNEX: AGENDA AND PANELISTS BIOS

### Agenda

2:30 p.m. - 2:35 p.m.: Welcome remarks, Carine Kaneza Nantulya

2:35 p.m. - 3:00p.m.: Panel I

3:00p.m. - 3:15 p.m.: Questions and Answers

3:15 p.m. - 3:40 p.m.: Panel II

3:40 p.m. - 3:55 p.m.: Questions and Answers

3:55 p.m. - 4:00 p.m.: Closing remarks, Carine Kaneza Nantulya

### Panel I

*Moderator: Allan Ngari*

- **Commissioner Solomon Dersso**

*Chairperson, African Commission for Human and Peoples' Rights*

**Topic:** Opportunities and challenges for accountability in South Sudan (10 minutes)

- **Nyagoah Tut Pur**

*South Sudan researcher, Human Rights Watch*

**Topic:** The case for AU's engagement on justice in South Sudan (10 minutes)

*Respondents: Don Deya, Executive Director, Pan African Lawyers Union; AU Office of Legal Counsel (TBC) (5 minutes)*

Questions and Answers (15 min)

### Panel II

*Moderator: Ibrahima Kane*

- **John Ikubaje**

*Senior Political Officer, African Union Department of Political Affairs*

**Topic:** The role of the AU on TJ processes in South Sudan (10 minutes)

- **David Deng**

*Transitional Justice Working Group on South Sudan*

**Topic:** Sudanese perspectives on reparations and the need for justice (10 minutes)

*Respondent: Boitshoko Mokgatlhe, Senior Political Officer, Peace and Security Department, AU Commission (5 minutes)*

Questions and Answers (15 min)

## Presenter Bios



### Solomon Dersso

Dr. Solomon Ayele Dersso is Chairperson of the African Commission for Human and Peoples’ Rights. Dr. Dersso is an Adjunct Professor in the School of Law at the Addis Ababa University in Ethiopia and served until his appointment as a Commissioner of the African Commission. He is also the Chair of the Working Group on Extractive Industries in Africa and the Executive Director of Amani Africa Media and Research.



### Nyagoah Tut Pur

Nyagoah Tut Pur is a researcher within the Africa division at Human Rights Watch. Prior to her current role, she worked with Amnesty International as Campaigner on Sudan and South Sudan where she spearheaded campaigns and advocacy on the two countries. Her work contributed to the publication of the report of the AU Commission of Inquiry on South Sudan and the establishment of the UN arms embargo on South Sudan. She also contributed to research and publication of reports such as “Our Hearts have gone dark: The mental health impact of South Sudan’s conflict” and “Uninvestigated, Unpunished: Human Rights violations against Darfuri students.” Previously, Nyagoah worked with South Sudan Law Society as Advocacy Officer where she not only led advocacy with the government, UN, AU and others but also coordinated a Death Penalty abolition project.

Nyagoah holds a Master’s degree from Harvard University, Law School and a Bachelor’s degree from University of Nairobi. She speaks English and Swahili.



### **John Ikubaje**

John G. Ikubaje is a Senior Political Officer in the Department of Political Affairs at the African Union Commission, Addis Ababa, Ethiopia. A fellow of the United Nations' Regional Human Rights System. He holds Masters in Political Science, University of Ibadan in Nigeria and MA in Governance and Development from the Institute of Development Studies (IDS), University of Sussex, Brighton UK. He is in charge of

Human Rights and Transitional Justice within the Democracy, Governance, Human Rights and Elections Division of the Department.



### **David Deng**

David Deng is a South Sudanese/American human rights lawyer who spent much of the last decade engaged in research and advocacy in South Sudan. Deng's research has touched on a range of issues, including the challenges and opportunities of large-scale land investment, local dispute resolution mechanisms, citizen views on peace processes, and perceptions of

transitional justice.



### **Boitshoko Mokgathe**

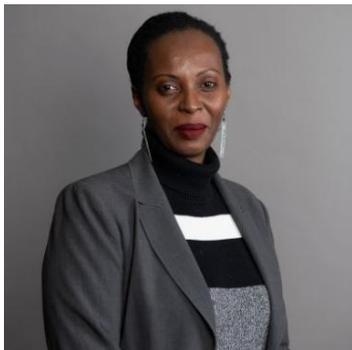
Boitshoko Mokgathe is the Coordinator of the Conflict Management and Post Conflict Reconstruction and Development Division in the Peace and Security Directorate at the African Union Commission. He oversees the AU engagements in multiple conflicts within the continent. He has been coordinating the AU Commission engagements in Sudan and South Sudan since 2003.



### **Donald Deya**

Don Deya is the Chief Executive Officer (CEO) of the Pan African Lawyers Union (PALU). Among other things, he chairs the Executive Committees of the Pan African Citizens' Network (*PACIN, formerly known as the Centre for Citizens' Participation in the African Union [CCP AU]*) and the International Coalition for the Responsibility to Protect (ICRtoP). He is a Steering Committee member (and former Chair) of the African Court Coalition (ACC), and is also a former Secretary of the African Forum of the International Bar Association (AfriBA).

### **Moderator Bios**



### **Carine Kaneza Nantulya**

Carine Kaneza Nantulya is the Africa Advocacy Director within the Africa Division at Human Rights Watch. Before joining Human Rights Watch, she was spokesperson for the Women and Girls Movement for Peace and Security in Burundi. She is a transitional justice practitioner with over fifteen years' experience in human rights programming and conflict resolution in Burundi, Uganda, Sierra Leone and South Africa, among others. She coordinated a human rights program at the Desmond Tutu Peace Centre; worked on the peace negotiations between the Uganda Government and the Lord's Resistance Army and advised the negotiation teams. She has worked as an independent consultant and evaluator for international organizations, governments and African organizations, including the National Unity and Reconciliation Commission of Rwanda, the Forum of Conscience in Sierra Leone, United Nations Development Program (UNDP) in Uganda, Ugandan Ministry of Justice, Search for Common Ground, Global Rights and the Juba Initiative Fund (JIP) of the peace process between the Government of Uganda and Lord's Resistance Army (LRA). Carine holds a master's degree in Human Rights Law and International Humanitarian Law from the University of the Western Cape in South Africa.



### **Ibrahima Kane**

Ibrahima Kane heads the Africa Union Advocacy Program of the Africa Regional Office and is qualified as a lawyer in Senegal and France. Prior to joining the Open Society Initiative for Eastern Africa in 2007, he was a senior lawyer in charge of the Africa program at INTERIGHTS for 10 years. As a founding member of RADDHO, a Senegalese human rights organization, Kane directed a program that focused on public education and women’s human rights in five West African countries—Cape Verde, the Republic of Guinea, the Republic of Guinea-Bissau, Mauritania, and Senegal—for six years.



### **Allan Ngari**

Allan Ngari is a Senior Researcher in the Complex Threats in Africa Programme at the Institute for Security Studies (ISS). He oversees ISS engagement on international criminal justice and works on counterterrorism and countering violent extremism.