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The Hybrid Court of South Sudan: Progress Towards Establishment and Sustainable Peace

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THE HYBRID COURT OF SOUTH SUDAN: PROGRESS TOWARDS ESTABLISHMENT AND SUSTAINABLE PEACE

Elizabeth Watchowski*

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I. Introduction

In December 2013, civil war in South Sudan erupted between the “Sudan People’s Liberation Movement” and the “Sudan People’s Liberation Movement-In-Opposition”.¹ A political struggle between Salva Kiir, South Sudan’s President, and Riek Machar, South Sudan’s former/current Vice-President contributed greatly to the conflict.² Despite political roots, the conflict has ethnic and familial ties through which soldiers from the Dinka ethnic group aligned with President Kiir and soldiers from the Nuer ethnic group aligned with Machar.³ The resulting violence has led to innumerable human rights abuses including the direct targeting of civilians by armed groups, ethnic cleansing, rape and sexual violence, destruction of property and looting, arbitrary detentions, torture, enforced disappearances, and the use of child soldiers.⁴ In August 2015, the Intergovernmental Authority on Development, an eight-country trade bloc in Africa, mediated the “Agreement on the Resolution of the Conflict in the Republic of South Sudan”,

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¹ *Global Conflict Tracker: Civil War in South Sudan*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/civil-war-in-south-sudan> (last visited Oct. 19, 2017).

² *Id.*

³ *Id.*

⁴ *Id.*

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also known as the “Compromise Peace Agreement”.⁵ The aforementioned agreement provided for the creation of an independent hybrid judicial court, the Hybrid Court for South Sudan (“HCSS”), to be established by the African Union Commission to facilitate the investigation and prosecution of individuals responsible for violations of international and national law since the beginning of the conflict.⁶ Shortly thereafter, Kiir and Machar spoke out against the HCSS, and instead advocated for a “national truth and reconciliation commission”.⁷ Since the August 2015 ratification, the African Union and South Sudanese government have taken little to no concrete steps to set-up the court and prosecute those accountable for gross violations of international and national law.⁸ In June 2016, the conflict resumed resulting in further civilian killings, rapes and sexual violence, property destruction and looting.⁹

The continuation of this conflict underscores the need for the HCSS’s establishment to ensure accountability, promote deterrence, and encourage sustainable peace. The establishment of the HCSS is preferable to the “national truth and reconciliation commission” proposed by Kiir and Machar as the sole means of transitional justice in South Sudan because truth is not an alternative to justice.

II. Background

A. Formation of South Sudan and the South Sudanese Civil War

In July 2011, the Republic of South Sudan gained independence from Sudan following a six-year peace process beginning with the “Comprehensive Peace Agreement” and culminating in a national referendum, thereby becoming the newest country in the world.¹⁰ Five years after gaining independence, violence erupted between presidential guard soldiers in the country’s capital on December 15, 2013.¹¹ Soldiers of the Dinka ethnic group aligned with South Sudanese President, Salva Kiir, and those of the Nuer ethnic group aligned with former vice president, Riek Machar.¹² On December 16, 2013, Kiir appeared on state television to declare that he had successfully suppressed a coup led by Machar, certain

⁵ *Id.*

⁶ *Agreement on the Resolution of Conflict in the Republic of South Sudan, NDFSS-SPLM/SPLA-IO-Former Detainees-Political Parties of South Sudan*, INTERGOVERNMENTAL AUTH. ON DEV. (Aug. 17, 2015), https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf [hereinafter *Agreement on Resolution*].

⁷ Salva Kiir & Riek Machar, *South Sudan Needs Truth, Not Trials*, N.Y. TIMES (June 7, 2016), http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?_r=2.

⁸ *South Sudan: One Year Since Peace Deal, Justice Still Elusive for Victims*, AMNESTY INT’L (Aug. 17, 2016), <https://www.amnesty.org/en/latest/news/2016/08/south-sudan-one-year-since-peace-deal-justice-still-elusive-for-victims/>.

⁹ *Id.*

¹⁰ *South Sudan Profile – Overview*, BBC NEWS (Apr. 27, 2016), <http://www.bbc.com/news/world-africa-14019208>; *UNMIS*, U.N. MISSION IN SUDAN, <https://unmis.unmissions.org/Default.aspx?tabid=515> (last visited Oct. 18, 2017); *UNMISS Background*, U.N. MISSION IN THE REPUBLIC OF S. SUDAN, <http://www.un.org/en/peacekeeping/missions/unmiss/background.shtml> (last visited Oct. 18, 2017).

¹¹ *Global Conflict Tracker*, *supra* note 1; *UNMISS Background*, *supra* note 10.

¹² *Global Conflict Tracker*, *supra* note 1.

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ex-cabinet ministers, and officials.¹³ Subsequently, the outbreak of violence escalated and civil war erupted throughout South Sudan within the same month.¹⁴ The root of the conflict stems from the political power struggle between Kiir, an ethnic Dinka, and Machar, an ethnic Nuer.¹⁵ Though, it should be noted that the conflict's course and escalation is heavily influenced by a history of violence and ethnic tension in the region.¹⁶ Both Kiir and Machar are backed by their respective political parties, the Sudan People's Liberation Movement ("SPLM") and the Sudan People's Liberation Movement-In-Opposition ("SPLM-IO") each of which are generally divided along the aforementioned ethnic lines.¹⁷

Since the initial outbreak of violence in December 2013, an estimated 50,000 people have been killed, over 1.6 million individuals have been displaced, and around 200,000 individuals are seeking protection on United Nations Missions bases throughout the country.¹⁸ The violence has resulted in famine, disease and the flight of thousands of South Sudanese citizens to neighboring countries that lack adequate resources to offer aid.¹⁹ Reports have established that armed forces on both sides are deliberately targeting civilians along ethnic lines as part of their military tactics.²⁰ Since the start of the conflict in December 2013, there have been thousands of civilian deaths and numerous human rights violations, including forced disappearances, arbitrary arrests, torture, and much more. Moreover, there have been serious war crimes, such as attacks on medical workers, aid workers, media personal, and places of worship.²¹ As of November 2016, the UN Security Council reports that the violence has not only continued, but human rights violations perpetrated by SPLM and SPLM-IO "are taking on an increas-

¹³ Douglas H. Johnson, *Briefing: The Crisis in South Sudan*, 113 AFR. AFF. 451, 300-309 (Apr. 2014), <http://afraf.oxfordjournals.org/content/113/451/300.full>.

¹⁴ Interview with Alex de Waal, Executive Director, World Peace Foundation (Sept. 14, 2016), <http://www.cfr.org/south-sudan/understanding-roots-conflict-south-sudan/p38298>.

¹⁵ Carlo Koos & Thea Gutschke, *South Sudan's Newest War: When Two Old Men Divide a Nation*, GER. INST. ON GLOB. AND AREA STUD. FOCUS INT'L (May 2, 2014), <https://www.giga-hamburg.de/en/publication/south-sudan%E2%80%99s-newest-war-when-two-old-men-divide-a-nation>.

¹⁶ Skye Wheeler, *South Sudan's New War: Abuses by Government and Opposition Forces*, HUMAN RIGHTS WATCH (Aug. 7, 2014), <https://www.hrw.org/report/2014/08/07/south-sudans-new-war/abuses-government-and-opposition-forces>.

¹⁷ Lauren Ploch Blanchard, *The Crisis in South Sudan*, CONG. RES. SERV. (Jan. 9, 2014), <http://www.markswatson.com/south%20sudan%20-%20CRS.pdf>.

¹⁸ *Global Conflict Tracker*, *supra* note 1.

¹⁹ U.N. Secretary-General, *Report of the Secretary-General on South Sudan*, U.N. Doc. S/2014/708, U.N. SEC. COUNCIL (Sept. 30, 2014).

²⁰ *Global Conflict Tracker*, *supra* note 1; *South Sudan: Events of 2015*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2016/country-chapters/south-sudan> (last visited Sept. 27, 2017); Letter from the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206 Addressed to the President of the Security Council, U.N. SEC. COUNCIL (Aug. 21, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=S/2015/656.

²¹ U.N. Secretary-General, *Report of the Secretary-General on South Sudan*, U.N. Doc. S/2014/537, U.N. SEC. COUNCIL (July 25, 2014) [hereinafter U.N. S/2014/537]; U.N. Doc. S/2014/708, *supra* note 19; U.N. Secretary-General, *Special Report of the Secretary-General on the Review of the Mandate of the United Nations Mission in South Sudan*, U.N. Doc. S/2016/951, U.N. SEC. COUNCIL (Nov. 10, 2016) [hereinafter *Review of the Mandate*]; Human Rights Council Res. 31/20, U.N. Doc. A/HRC/RES/31/20 (Apr. 27, 2016).

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ingly ethnic dimension, and hate speech is on the rise throughout the country,” this raises concern that ethnic cleansing campaigns may occur similar to that which occurred in Rwanda²² Additionally, the violence resulting from the conflict prevented the planting or harvesting of crops as early as July 2014.²³ This led the UN Security Council to declare the food crisis in South Sudan as the worst in the world.²⁴ The UN Security Council estimates that four million people could potentially be affected by the ongoing food crisis and die of hunger.²⁵

B. International Response, and Previous Peace Agreements and Ceasefires

There have been numerous international responses to the conflict and its aforementioned effects.

In late December 2013 following the initial clashes between SPLM and SPLM-IO, the UN Security Council through the United Nations Mission in the Republic of South Sudan (“UNMISS”) increased the interim troop level in South Sudan to 12,500 peacekeeping personnel and 1,323 police personnel.²⁶ As of September 2016, 18,000 peacekeeping troops, police and military observers backed by the UN Security Council are present in South Sudan.²⁷

In addition to the United Nations’ role in attempting to achieve sustainable peace in South Sudan, the African Union, the Intergovernmental Authority on Development (“IGAD”), and the Intergovernmental Authority on Development Plus (“IGAD+”) have participated by mediating numerous peace talks between SPLM and SPLM-IO, resulting in numerous agreements between the parties.²⁸ The first direct negotiations between South Sudanese parties, mediated by IGAD, occurred in January 2014.²⁹ These negotiations ultimately resulted in the “Agreement on the Cessation of Hostilities between the Government of the Republic of South Sudan (GRSS) and the Sudan People’s Liberation Movement/Army in Opposition (SPLM/A In Opposition)” of January 23, 2014.³⁰ In the following weeks, both parties violated the aforementioned ceasefire and the con-

²² *Review of the Mandate*, *supra* note 21; U.N.: ‘Ethnic Cleansing Under Way’ in South Sudan, AL JAZEERA NEWS (Dec. 1, 2016), <http://www.aljazeera.com/news/2016/12/ethnic-cleansing-south-sudan-161201042114805.html>.

²³ *Global Conflict Tracker*, *supra* note 1.

²⁴ U.N. S/2014/537, *supra* note 21.

²⁵ *Review of the Mandate*, *supra* note 21.

²⁶ *Global Conflict Tracker*, *supra* note 1; *UNMISS Mandate*, U.N. MISSION IN THE REPUBLIC OF S. SUDAN, <https://peacekeeping.un.org/en/mission/unmiss> (last visited Nov. 12, 2017).

²⁷ Jeffrey Gettleman, *South Sudan to Allow More U.N. Peacekeepers, but Force Will Be No ‘Panacea’*, N.Y. TIMES (Sept. 5, 2016), <https://www.nytimes.com/2016/09/06/world/africa/south-sudan-un-peacekeepers.html>.

²⁸ Interview with Dr. Getachew Gebrekidan, Visiting Scholar, Southern Voices Network, and John Prendergast, Founding Director, The Enough Project in Washington, D.C. (July 16, 2015) <https://www.wilsoncenter.org/event/the-role-igad-regional-approach-to-the-crisis-south-sudan>.

²⁹ Press Release, Intergovernmental Auth. on Dev., Direct Negotiations Between South Sudanese Parties (Jan. 6, 2014), <http://reliefweb.int/sites/reliefweb.int/files/resources/Press%20Release-%20Direct%20negotiations%20between%20South%20Sudanese%20Parties%2C%206%20Jan%2714.pdf>.

³⁰ Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and Sudan People’s Liberation Movement/Army (In Opposition) (SPLM/A In Opposition),

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flict continued.³¹ Despite the failure of this agreement to cease hostilities, IGAD commenced operations in South Sudan to monitor the implementation and enforcement of this agreement through “monitoring and verification teams” in April 2014, in continuance of the mediation process.³²

Peace talks mediated by IGAD continued through April 2014.³³ On May 9, 2014 both Kiir and Machar through their capacity as leaders of the SPLM and SPLM-IO, respectively, committed to the cessation of hostilities and the creation of a transitional government of national unity through an agreement mediated by IGAD.³⁴ On June 10, 2014, Kiir and Machar committed to expedite and complete negotiations to create a transitional government of national unity within sixty days.³⁵

On June 20, 2014, multi-stakeholder roundtable negotiations, mediated by IGAD, began with the intention of implementing the cessation of hostilities reaffirmed through the May 9, 2014 agreement, and establishing an agenda and arrangements for the transitional government of national unity.³⁶ However, the SPLM-IO failed to attend the negotiations and the multi-stakeholder IGAD-led peace talks adjourned on June 23, 2014.³⁷ The violence continued and the parties’ failed to create a transitional government of national unity within sixty days as set forth under the June 10, 2014 agreement.³⁸ On August 25, 2014, IGAD threatened sanctions against SPLM and SPLM-IO if they did not reach an agree-

GRSS-SPLM/A, INTERGOVERNMENTAL AUTH. ON DEV. (Jan. 23, 2014), http://reliefweb.int/sites/reliefweb.int/files/resources/Agreement%20on%20Cessation%20of%20Hostilities_0.pdf.

³¹ *South Sudan Profile – Timeline*, BBC NEWS (Dec. 5, 2016), <http://www.bbc.com/news/world-africa-14019202>; Press Release, U.S. Dep’t of State, U.S. Concern About Violations of Cessation of Hostilities in South Sudan (Feb. 8, 2014), <https://www.state.gov/r/pa/prs/ps/2014/02/221487.htm>.

³² Press Release, Intergovernmental Auth. On Dev., IGAD Monitoring and Verification Teams Commence Operations in South Sudan (Apr. 11, 2014), http://igad.int/attachments/804_Press%20release%20MVM%20team%20Commence%20Operations%20in%20South%20Sudan.pdf.

³³ Press Release, Intergovernmental Auth. On Dev., Phase II of IGAD-Led South Sudan Talks Resume in Addis Ababa (Apr. 28, 2014), <https://docs.google.com/file/d/0B5FAwdVtt-gCWFFac2dfbUdiWFZqdGx2cFotRVJPykY0UnI0/edit>.

³⁴ Agreement to Resolve the Crisis in South Sudan, GRSS-SPLM/A (In Opposition), INTERGOVERNMENTAL AUTH. ON DEV. (May 9, 2014), <https://sites.tufts.edu/reinventingpeace/2014/05/10/agreement-to-resolve-the-crisis-in-south-sudan/>.

³⁵ *Communique of the 26th Extraordinary Session of the IGAD Assembly of Heads of State and Government on the Situation in South Sudan*, INTERGOVERNMENTAL AUTH. ON DEV. (June 10, 2014), <https://docs.google.com/file/d/0B5FAwdVtt-gCZHhMYXE2WmdBVDNnaG51ejhtckVFbmi0Z1Vn/edit>.

³⁶ Press Release, Intergovernmental Auth. On Dev., Inclusive Negotiations for South Sudan Launched: Stakeholders to Discuss Security and Transitional Government Arrangements (June 20, 2014), <https://docs.google.com/file/d/0B5FAwdVtt-gCZ1NQRjN0MUIkWkRWUwVtVQkVwb0R5MTNqZFB/edit>.

³⁷ Press Release, Intergovernmental Auth. On Dev., Multi-Stakeholder South Sudan Peace Talks Adjourn for Consultations (June 23, 2014), <https://docs.google.com/file/d/0B5FAwdVtt-gCRElfc2UtNjBkcUx4MndPTI9XQWN4ckRMdGZF/edit>.

³⁸ *South Sudan Rivals Sign New Ceasefire Deal*, AL JAZEERA NEWS (Aug. 25, 2014), <http://www.aljazeera.com/news/africa/2014/08/south-sudan-ceasefire-deal-2014825135823800543.html>; *Communique of the 27th Extraordinary Session of the IGAD Assembly of Heads of State and Government on the Situation in South Sudan*, INTERGOVERNMENTAL AUTH. ON DEV. (Aug. 25, 2014), <https://drive.google.com/file/d/0B5FAwdVtt-gCeURpOGdEZkRXNFBIZjohbXIIURug3X315Tkx3/edit>.

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ment for the formation of a transitional government of national unity in 45 days.³⁹ While the parties did not reach an agreement within the 45-day timeline, they did, however, sign an agreement for the *Re-Dedication of and Implementation Modalities for the Cessation of Hostilities Agreement Signed on 23rd January 2014 Between the Government of the Republic of South Sudan and the Sudan People's Liberation Movement/Army (In Opposition)* on November 9, 2014.⁴⁰

Within forty-eight hours the agreement to cease hostilities was violated when a battle broke out between SPLM and SPLM-IO troops.⁴¹ On January 21, 2015, the parties signed the *Agreement on the Reunification of the SPLM*.⁴² The agreement included commitments to comply with the existing cessation of hostilities agreements, to hold negotiations on a sustainable peace agreement, and to support the establishment of an unspecified comprehensive system of transitional justice.⁴³ Due to the parties failure to comply with existing ceasefire agreements, on February 2, 2015, Kiir and Machar signed a new agreement which provided for a ceasefire, committed to a final and comprehensive peace agreement by March 5, 2015, and confirmed agreed areas between the parties.⁴⁴ Despite the “power sharing” language contained in the agreement, Kiir and Machar failed to compromise on a mutually agreeable “power sharing formula” and the violence continued.⁴⁵ Finally, on August 26, 2015 both parties signed the *Agreement on the Resolution on the Conflict in the Republic of South Sudan* under threat of UN sanctions, despite Kiir’s reservations.⁴⁶ The signing of this peace agreement marked the

³⁹ IGAD Gives South Sudanese Rivals 45 Days to End Conflict, SUDAN TRIBUNE (Aug. 25, 2014), <http://www.sudantribune.com/spip.php?article52166>; *South Sudan Rivals Sign New Ceasefire Deal*, AL JAZEERA NEWS (Aug. 25, 2014), <http://www.aljazeera.com/news/africa/2014/08/south-sudan-ceasefire-deal-2014825135823800543.html>; *Communique of the 27th Extraordinary Session*, *supra* note 38.

⁴⁰ Re-Dedication of and Implementation Modalities for the Cessation of Hostilities Agreement Signed on 23rd January 2014 between GRSS-SPLM/A (In Opposition), INTERGOVERNMENTAL AUTH. ON DEV. (Jan. 23, 2014), <http://southsudan.igad.int/attachments/article/272/CoH%20Implementation%20Matrix%20and%20Addendum%20signed%209%20%20November.pdf>.

⁴¹ The Associated Press, *South Sudan: Cease-Fire Ends After 48 Hours*, N.Y. TIMES (Nov. 10, 2014), <https://www.nytimes.com/2014/11/11/world/africa/south-sudan-cease-fire-ends-after-48-hours.html>.

⁴² Agreement on the Reunification of the SPLM, SUDAN TRIB. (Jan. 21, 2015), https://www.sudantribune.com/IMG/pdf/agreement_on_reunification_of_splm_210115_.pdf.

⁴³ *Id.*

⁴⁴ Reuters, *Rebels Agree to Cease-Fire in South Sudan*, N.Y. TIMES (Feb. 1, 2015), <http://www.nytimes.com/2015/02/02/world/africa/rebels-agree-to-cease-fire-in-south-sudan.htm>; *South Sudan Parties Sign Areas of Agreement on the Establishment of the Transitional Government of National Unity*, INTERGOVERNMENTAL AUTH. ON DEV. (Feb. 2, 2015), https://igad.int/index.php?option=com_content&view=article&id=1041:south-sudan-parties-sign-areas-of-agreement-on-the-establishment-of-the-transitional-government-of-national-unity&catid=1:latest-news&Itemid=150.

⁴⁵ Statement Attributable to the Spokesman for the Secretary-General on South Sudan, U.N. Secretary-General (Feb. 3, 2015), <https://www.un.org/sg/en/content/sg/statement/2015-02-03/statement-attributable-spokesman-secretary-general-south-sudan>; Press Release, Office of the UK Foreign Minister for Africa, FCO Regrets Failure of South Sudan Leaders to Reach a Peace Agreement (Mar. 7, 2015), <https://www.gov.uk/government/news/fco-condemns-failure-of-south-sudan-leaders-to-reach-a-peace-agreement>.

⁴⁶ *Agreement on Resolution*, *supra* note 6; Press Release, Security Council, Security Council, in Statement, Welcomes Peace Accord Signing by South Sudan’s President, Affirming Readiness to Ensure Full Compliance (Aug. 28, 2015), <https://www.un.org/press/en/2015/sc12029.doc.htm> [hereinafter Security Council Press Release]; *South Sudan President Salva Kiir Signs Peace Deal*, BBC NEWS (Aug. 26, 2015), <http://www.bbc.com/news/world-africa-34066511>.

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first concrete and comprehensive step toward establishing a transitional government of national unity and achieving sustaining peace in South Sudan.⁴⁷

III. Discussion

While the parties' subsequently failed to abide by the permanent ceasefire provision of the *Agreement on the Resolution of the Conflict in the Republic of South Sudan*, this agreement establishes a transitional government of national unity, Commission for Truth, Reconciliation and Healing, the Hybrid Court of South Sudan, Compensation and Reparation Authority/Fund, parameters for a permanent constitutions, and the Joint Monitoring and Evaluation Commission.⁴⁸

A. Agreement on the Resolution of the Conflict in the Republic of South Sudan

The August 2015 peace agreement between SPLM and SPLM-IO was signed in Addis Ababa, Ethiopia and witnessed by members of IGAD.⁴⁹ Kiir initially refused to sign the agreement, but ultimately signed the document a full week after Machar under the threat of a US-drafted resolution that would have imposed an arms embargo and other targeted sanctions.⁵⁰ Since the signing of the August 2015 peace agreement, the conflict has continued, and the parties have failed to establish or enforce any of the agreement's provisions aside from those identified below.⁵¹

Chapter 1 of the August 2015 peace agreement commits the signatories to the establishment of the transitional government of national unity of the Republic of South Sudan ("TGoNU").⁵² Over a year after the ratification of the August 2015 peace agreement, Kiir in his role as President of South Sudan appointed the TGoNU on April 28, 2016.⁵³ Chapter 1 requires the TGoNU to hold elections within sixty days of the transition period, thereby establishing a democratically elected government. Additionally, this chapter establishes a "power-sharing ratio" for composition of the TGoNU Executive Branch including the President, First Vice President, Vice President, Council of Ministers and the Deputy Ministers, and state governments.⁵⁴ Individuals indicted or convicted by the Hybrid Court of South Sudan ("HCSS"), established in Chapter 5 of the August 2015 peace agreement, are not eligible for participation in the TGoNU or the following

⁴⁷ Security Council Press Release, *supra* note 46.

⁴⁸ *Agreement on Resolution*, *supra* note 6.

⁴⁹ *Id.*

⁵⁰ *South Sudan President Salva Kiir Signs Peace Deal*, *supra* note 46.

⁵¹ Letter from the Panel of Experts on South Sudan Established Pursuant to Security Council Resolution 2206 (2015) Addressed to the President of the Security Council, S/2016/963 (Nov.15, 2016), http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/963.

⁵² *Agreement on Resolution*, *supra* note 6.

⁵³ *South Sudan: Security Council Calls on Transitional Government to Implement Peace Accord*, UN NEWS CTR. (May 4, 2016), <http://www.un.org/apps/news/story.asp?NewsID=53854#.WG217bGZNsM> [hereinafter *Security Council Calls*].

⁵⁴ *Id.*

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permanent government for a specified time to be determined by law, or if these individuals are members of the TGoNU or its successor government, they will lose their position in government.⁵⁵ Chapter 1 establishes the responsibility of the TGoNU for implementing the provisions of the agreement itself, and appointed Kiir as President, Machar as First Vice President/ Vice President for the duration of the Transition Period subsequent to change upon democratic elections.⁵⁶ Chapter 1 also establishes the Transnational Legislative Assembly, which is to be replaced upon the end of the Transition Period by the National Legislative Assembly along with those members whom are democratically elected, and the National Constitutional Amendment Committee.⁵⁷

Chapter 2 of the August 2015 agreement provides for a permanent ceasefire; establishes prohibited actions; commits the parties to a “Permanent Ceasefire and Transitional Security Arrangements workshop”; establishes a “Temporary National Architecture for the Implementation of Permanent Ceasefire” and unification of forces; provides for the transition of the existing IGAD monitoring and verification mechanism into the “Ceasefire and Transitional Security Arrangements Monitoring Mechanism”; and forms a “Strategic Defense and Security Review Board”.⁵⁸

Chapter 3 establishes “agreed principles for humanitarian assistance and reconstruction”, and a Special Fund for Reconstruction administered by the Board of Special Reconstruction Fund”.⁵⁹

Chapter 4 provides for “resource, economic and financial management” through the following means.⁶⁰ First, the TGoNU is required to review all national legislation specifically including the legislation governing the Bank of South Sudan with the ultimate goal of restructuring, the Anti-Corruption Commission Act and National Audit Chamber Act. Next, the TGoNU is required to establish specified new institutions; to implement the provisions of the Petroleum Revenue Management Act; expedite specified land policy and administration measures; develop environmental protection policies; establish effective revenues, revenue collection and revenue allocation. Finally, the TGoNU is required to establish an effective public expenditure system and borrowing requirements; establish various enterprise development funds; and establish an Economic and Financial Management Authority⁶¹ Additionally, this chapter requires the Ministry of Finance and Planning to develop a Strategic Economic Development Roadmap.⁶²

Chapter 6 and 7 establish parameters for a permanent constitution and establish a “Joint Monitoring and Evaluation Commissioner”, respectively. Finally,

⁵⁵ *Agreement on Resolution*, *supra* note 6, at 45.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Agreement on Resolution*, *supra* note 6, at 45.

⁶² *Id.*

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Chapter 8 concerns the supremacy of the August 2015 peace agreement over any national legislation and provides procedures for the agreement's amendment.⁶³

B. Hybrid Court of South Sudan

Chapter 5 of the August 2015 peace agreement states agreed upon principles for transitional justice, and commits the signatories to the establishment of "The Commission for Truth, Reconciliation and Healing ("CTRH"), the Hybrid Court of South Sudan ("HCSS"), and the Compensation and Reparation Authority ("CRA").⁶⁴

The CTRH requires at least a month-long period of public consultations to accurately document the experiences of victims of the conflict with specific inquiry into human rights violations, breaches of the rule of law, and excessive abuses of power committed against citizens of South Sudan.⁶⁵ Additionally the CTRH will recommend process and mechanisms to allow victims the right to seek remedy for the crimes and abuses perpetrated against them.⁶⁶

The HCSS is an independent hybrid judicial court to be established by the African Union Commission with a mandate to investigate and prosecute individuals criminally responsible for the perpetration of violations of international and/or South Sudanese law committed from December 15, 2013 through the end of the transitional period.⁶⁷ The HCSS is independent from South Sudan's judiciary and the Chairperson of the African Union Commission will appoint the seat, prosecutors, defense counsel, and the registrar of the HCSS.⁶⁸ In order to maintain impartiality, the majority of judges, prosecutors, defense counsels, and the registrar are to be composed of individuals from African states other than South Sudan.⁶⁹ This chapter also permits the HCSS to use the African Union Commission of Inquiry on South Sudan and other existing materials, not limited to those possessed by the African Union, in carrying out its investigations so long as the use of these documents are in accordance with "applicable international conventions, standards and practices."⁷⁰

The TGoNU is further required through this Chapter to establish the Compensation Reparation Fund ("CRF") and the Compensation Reparation Authority ("CRA") to manage this fund through the reception of applications of victims that participated in the CTRH, and the dispensation of compensation and reparation to these victims.⁷¹

⁶³ *Agreement on Resolution*, *supra* note 6, at 45.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Agreement on Resolution*, *supra* note 6, at 43.

⁶⁸ *Id.* at 43-44.

⁶⁹ *Id.* at 43.

⁷⁰ *Id.* at 44-45; *Final Report of the African Union Commission of Inquiry on South Sudan*, AU COMMISSION OF INQUIRY ON SOUTH SUDAN (Oct. 15, 2014), <http://www.peaceau.org/uploads/auciss.executive.summary.pdf> [hereinafter *Final Report*].

⁷¹ *Id.* at 45.

IV. Analysis

To achieve the ultimate goal of the August 2015 peace agreement, sustainable peace, the African Union Commission and the government of South Sudan must take concrete steps toward the establishment of the HCSS. Furthermore, the establishment of the HCSS is preferable, for achieving national unity and sustainable peace, over the establishment of a national truth and reconciliation commission as the sole form of transitional justice in South Sudan, as advocated for by Kiir and Machar.⁷²

A. Argument in Support of the Hybrid Court of South Sudan

The African Union Commission, IGAD, IGAD+, UN, South Sudanese and international non-governmental organizations, and certain South Sudanese civilians all support and specifically call for the establishment of the HCSS as a means of achieving sustainable peace, justice and criminal accountability.⁷³ The African Union Commission's final report on South Sudan (October 2014), recommended the "creation of a Africa-led, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account."⁷⁴ This recommendation followed consultations and interviews with numerous South Sudanese victims of the conflict, citizens, regional and international leaders, civil society organizations and intellectuals, and government and opposition officials.⁷⁵ These consultations further revealed that many South Sudanese view reconciliation as dependent upon justice and that "those who committed atrocities should be prosecuted, and that victims and communities are unlikely to embrace reconciliation otherwise, given the culture of impunity in South Sudan."⁷⁶ As the ICC currently does not have jurisdiction to investigate and prosecute the crimes related to the conflict, and because of deficiencies in South Sudan's current judicial system, the HCSS is the best means of prosecution, so conditional to reconciliation in South Sudan.⁷⁷

In addition to the aforementioned considerations, hybrid courts are lauded for their domestic capacity for the following reasons. First, hybrid courts are generally located closer to the location of the crimes' commissions allowing for easier participation by witnesses and victims and reducing costs. Second, hybrid courts

⁷² Kiir & Machar, *supra* note 7 (Machar has now disowned authorship on this piece).

⁷³ *Joint Letter: A Way Forward for the Hybrid Court for South Sudan*, HUMAN RIGHTS WATCH (Nov. 1, 2016), <https://www.hrw.org/news/2016/11/01/joint-letter-way-forward-hybrid-court-south-sudan-0>; *Final Report*, *supra* note 70. *UN Rights Chief Urges Establishment of Hybrid Court for Atrocities in South Sudan*, UN NEWS CTR. (Dec. 14, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55801#.WHF1c7YrJsM>.

⁷⁴ *Final Report*, *supra* note 70, at 24-25.

⁷⁵ *Id.* at 6.

⁷⁶ *Id.* at 25.

⁷⁷ *Looking for Justice: Recommendations for the Establishment of The Hybrid Court for South Sudan*, AMNESTY INT'L & INT'L FED'N FOR HUMAN RIGHTS (Oct. 2016) at 9-10, <https://www.amnesty.org/download/Documents/AFR6547422016ENGLISH.pdf>.

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allow for the “insulation of the independence of the bench” through use of both national and international judicial personnel. Third, hybrid courts have the potential to assist in strengthening the national judicial system through the interaction between international and national judicial personnel.⁷⁸ Any challenges to the use of a hybrid courts may be significantly decreased by the structure and organization of the court as proposed in Section V.

Additionally, the relative success of the use of hybrid court in Sierra Leone among other countries offers insight into the promise of the HCSS to ensure justice and promote sustainable peace. The Special Court for Sierra Leone (“SCSL”) was established by an agreement between the United Nations and the Government of Sierra Leone.⁷⁹ The SCSL was located in Sierra Leone and mandated to try those bearing the most responsibility for national and international crimes committed during country’s civil war.⁸⁰ The SCSL composition included both international and national judges and staff members, whom successfully tried and convicted nine people prior to its transfer to a residual mechanism.⁸¹

Based on the above, the HCSS currently provides the best means of prosecution, punishment and redress for the people of South Sudan. As such, it’s establishment pursuant to the August 2015 peace agreement must be pursued by the AUC and the government of South Sudan.

B. An Examination of the National Truth and Reconciliation Commission

Despite signing the August 2015 peace agreement, Kiir and Machar jointly wrote an article in the *New York Times* requesting the international community and signatories to the agreement to reconsider the HCSS in favor of a “national truth and reconciliation commission” as the sole form of transitional justice for South Sudan.⁸² The “national truth and reconciliation commission” would investigate and interview the people of South Sudan, with those who tell the truth about their actions or events they witnessed receiving amnesty from prosecution.⁸³ In advocating for this commission, Kiir and Machar argue for “truth, not trials”, stating that disciplinary justice would destabilize efforts to unite South Sudan.⁸⁴ However, the establishment of a truth and reconciliation commission without a complementary judicial system for prosecution, such as the HCSS, will not be effective. During the course of the conflict, the government of South Su-

⁷⁸ *Id.* at 11; Ending the Era of Injustice: Advancing Prosecutions for Serious Crimes Committed in South Sudan’s New War, HUMAN RIGHTS WATCH (Dec. 10, 2014), https://www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans?_ga=1.227964440.429423661.1399935943/.

⁷⁹ *Final Report*, *supra* note 70; Elise Keppler, *Dispatches: Giving Justice the Slip in South Sudan*, HUMAN RIGHTS WATCH (June 8, 2016), <https://www.hrw.org/news/2016/06/08/dispatches-giving-justice-slip-south-sudan>; Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 299-300 (2003).

⁸⁰ *Final Report*, *supra* note 70, at 12-14.

⁸¹ *Id.*

⁸² Spokesman Statement, *supra* note 45.

⁸³ *Id.*

⁸⁴ *Id.*

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dan has failed to prosecute human rights abuses committed against civilians and has instead granted de facto amnesty to the perpetrators.⁸⁵ As the conflict continues, it is clear that neither truth alone nor amnesty will provide the solution to sustainable peace. Both the international community and many South Sudanese people call for prosecution and accountability through the establishment of the HCSS.⁸⁶ The “national truth and reconciliation commission” proposed by Kiir and Machar is a self-serving effort to avoid prosecution and accountability for their own roles in conflict-related crimes.⁸⁷

Though complementary, truth alone is not an alternative to justice. For the foregoing reasons, the establishment of the HCSS is preferable to the establishment of a “national truth and reconciliation commission” as the sole means of transitional justice for South Sudan.

V. Proposal

Since the signing of the August 2015 peace agreement, few concrete steps have occurred to formally establish and implement the HCSS.⁸⁸ Commitments on a national level through the August 2015 peace agreement and on a continental level through the African Union Peace and Security Council’s authorization for the Chairperson of the AUC to take all steps necessary to establish the HCSS provide sufficient authority for the AUC to establish the HCSS.⁸⁹ Despite the continuance of the conflict, delays in implementing other elements of the peace agreement, such as the ceasefire agreement, should not hinder the establishment of the HCSS.⁹⁰ It should be noted that the August 2015 peace agreement established both the HCSS and the CTRH, so while the establishment of the HCSS is crucial to achieving sustainable peace, justice and accountability, the HCSS and the CTRH are not mutually exclusive. The HCSS may be effectively established in conjunction with other forms of transitional justice as provided for in the August 2015 peace agreement.

Through its authority in this capacity, the AUC should consider implementing the following in establishing the HCSS.

First, as called for in an open letter to H.E. Mme. Nkosazana Dlamini-Zuma, Chairperson of the AUC, from South Sudanese and International Non-Governmental Organizations, the AUC in consultation with the South Sudanese stakeholders and individuals with relevant experience on international and hybrid

⁸⁵ Spokesman Statement, *supra* note 45.

⁸⁶ Letter from South Sudanese and International Non-Governmental Organizations, to H.E. Mme. Nkosazana Dlamini-Zuma (Nov. 1, 2016) [hereinafter Letter to Mme. Nkosazana Dlamini-Zuma]; *Final Report*, *supra* note 70; Keppler, *supra* note 79.

⁸⁷ *South Sudan’s Kiir and Machar profited during war – report*, BBC News (Sept. 12, 2016), <http://www.bbc.com/news/world-africa-37338432>.

⁸⁸ Keppler, *supra* note 79.

⁸⁹ Communiqué of 547th Meeting of the Peace and Security Council (Sept. 26, 2015); Letter to Mme. Nkosazana Dlamini-Zuma, *supra* note 86.

⁹⁰ H.E. Festus G. Morgae, *On Status of the Implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan* (2016), <http://www.jmecsouthsudan.com/index.php/reports/jmec-quarterly-reports>.

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justice tribunals should form a comprehensive draft statute for the HCSS.⁹¹ This draft should address the court's jurisdiction and location; composition of judges and staff; provide for victim participation; victim and witness protection; public outreach; rights of the accused, cooperation from national authorities; the court's investigative branch; and the court's funding mechanism.⁹²

In addressing the most basic elements of the HCSS draft statute, the following should be considered. The August 2015 agreement provides that the Chairperson of the AUC will decide the seat of the HCSS, whether within South Sudan or another country.⁹³ South Sudan is the preferable location of the court as it better facilitates witness, victim and public accessibility, increased public visibility, increased understanding of South Sudan's culture by international members of the Court's staff, and enhances the court's legitimacy in South Sudan.⁹⁴ However, increased violence in the country provides a security risk to victims, witness, and court personnel. Additionally, unless indicted or convicted by the HCSS, individuals responsible for crimes remaining in positions of power may negatively influence witnesses, court personnel, or court proceedings.⁹⁵ In considering the composition of the court's judges and staff, the August 2015 peace agreement provides that the majority of HCSS judges should be from African states other than South Sudan.⁹⁶ The inclusion of qualified South Sudan judges is important to increase the national legitimacy of the court, enhance capacity building, knowledge and skills transfer from non-South Sudanese judges to South Sudanese judges to ensure the improvement of the domestic judicial system once the HCSS has dissolved.⁹⁷ Currently, the most pressing matter for the court's establishment, which is to be addressed in the draft statute, is the creation of an investigation branch—the most immediate purpose of which is to collect and preserve evidence for later use in HCSS trials.⁹⁸ This investigative body may be established before the rest of the HCSS, as has occurred in other international and hybrid courts including the Special Criminal Court for the Central African Republic.⁹⁹

Second, though the August 2015 peace agreement provides the AUC with the power to establish the HCSS, the agreement also requires that the TGoNU initiate legislation necessary for the HCSS's establishment.¹⁰⁰ Though the AUC has already provided numerous commitments to the HCSS's establishment, this will likely require further commitment from the government of South Sudan.¹⁰¹

⁹¹ Keppler, *supra* note 79, at 2.

⁹² *Id.*; U.N. S/2014/537, *supra* note 21.

⁹³ *Security Council Calls*, *supra* note 53.

⁹⁴ *Final Report*, *supra* note 70, at 21-22.

⁹⁵ *Security Council Calls*, *supra* note 53; U.N. S/2014/537, *supra* note 21 at 22.

⁹⁶ *Security Council Calls*, *supra* note 53.

⁹⁷ *Final Report*, *supra* note 70, at 22; Keppler, *supra* note 79; *Final Report*, *supra* note 70, at 21.

⁹⁸ Keppler, *supra* note 79, at 2; *Final Report*, *supra* note 70, at 21.

⁹⁹ *Final Report*, *supra* note 70, at 21; Keppler, *supra* note 79, at 2.

¹⁰⁰ *Agreement on Resolution*, *supra* note 6, at 40.

¹⁰¹ *Id.*

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While this is not necessary for the AUC's draft of the aforementioned statute, an agreement between the AUC and the government South Sudan pertaining to the passive of proper legislation by the TGoNU should ultimately be considered.

VI. Conclusion

The HCSS offers the best means of achieving sustainable peace in South Sudan, as truth alone is not an alternative to criminal justice. Despite the continuing conflict, the AUC should heed the call by both the South Sudanese and international community to take concrete steps towards the court's establishment.