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ENDING THE ERA OF INJUSTICE

Advancing Prosecutions for Serious Crimes Committed in South Sudan



Ending the Era of Injustice

**Advancing Prosecutions for Serious Crimes Committed in
South Sudan's New War**

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Summary

On December 15, 2013, a political dispute between South Sudan's President Salva Kiir and his former vice president, Riek Machar, triggered a new war in South Sudan, which has been characterized by shocking brutality, destroying so much in this young nation. The war began with gun battles in the capital, Juba, between the supporters of Kiir and Machar and soldiers loyal to them. Kiir is from the Dinka ethnic group, while Machar, now in charge of the opposition forces, is from the Nuer ethnic group. The fighting quickly spread, leaving a trail of humanitarian crises in its wake, engulfing much of Upper Nile, Jonglei, and Unity states, where the conflict now continues.

The period between mid-Dec 2013 and mid-April 2014 saw widespread acts of cruelty, including gruesome massacres of civilians and attacks on individual men, women, and children, shot because of their ethnicity in their homes, churches, hospitals, and as they fled. This period also saw extraordinary levels of destruction and pillaging of civilian property.

The conflict, and ongoing abuses perpetrated against civilians because of their ethnicity, has created a deep rift between South Sudan's two largest ethnic groups that threatens to upend the country further, including through more violence, even if a peace agreement is reached between the belligerents.

The speed and scale at which the destruction and killings took place is no less shocking, but easier to understand, within the context of old grievances and wounds between the Dinka and the Nuer dating to Sudan's North-South 1993-2005 civil war, and, more broadly, a history of conflict, criminal violence, and abuse without any form of accountability or meaningful inter-communal healing.

War crimes committed during Sudan's long civil war, which ended with the Comprehensive Peace Agreement in 2005, were never addressed, including those committed by the then-rebel forces that became South Sudan's government and army. Since its independence in 2011 and during the previous six years of semi-autonomous rule, South Sudan's government also has failed to provide accountability for serious human rights abuses committed against civilians in the context of inter-communal conflict, forced disarmament, and anti-insurgency operations. Instead of ensuring accountability, South Sudan's leaders

have pursued a “big tent” strategy, granting abusive commanders de facto amnesty and positions of power. Such impunity has undoubtedly emboldened the perpetrators of serious crimes committed in the current conflict.

Human Rights Watch’s experience in many different country contexts over two decades bears out that lack of justice for violent crimes too often fosters further abuses. By contrast, fair criminal trials for the most serious crimes build confidence in the rule of law, thereby providing one important ingredient to promoting long-term stability.

Broader accountability initiatives, such as compensation for victims, an independent national reconciliation process, and other measures to promote healing, are also important. Measures beyond accountability—such as economic reconstruction and development—will be crucial to move South Sudan beyond this crisis. However, none of these is an alternative or a substitute to criminal investigation and prosecution.

Drawing on research conducted by Human Rights Watch staff in Nairobi and Juba between October 6 and October 10, 2014, and on Human Rights Watch researchers’ fact-finding on abuses committed during the conflict since the new war began in late 2013, this report focuses on criminal accountability for serious crimes committed during South Sudan’s current conflict. Human Rights Watch conducted approximately 20 interviews with legal practitioners, including judges, public prosecutors, and private lawyers; representatives from international and local civil society groups; victims; diplomats from South Sudan’s international partners; and United Nations staff.

South Sudanese victims of abuses during the conflict expressed a strong desire to Human Rights Watch for a break from the ways of the past—for perpetrators to be held to account. South Sudanese civil society is campaigning for those implicated in the gravest crimes committed to face a court of law.

But the culture of impunity that contributed to the current crisis also means criminal justice will face an uphill battle. None of the South Sudanese lawyers, judges, or members of civil society whom Human Rights Watch met in October 2014 was able to recall any cases since independence in which senior commanders or politicians in favor with the government faced successful prosecution for significant crimes before a civilian court. In addition, deficits in South Sudan’s justice system, apparent lack of willingness on the part

of domestic authorities to prosecute government-connected suspects of crimes, and the sensitive nature of cases involving serious crimes committed during the current conflict mean that a purely domestic initiative to try alleged perpetrators is not realistically viable in the short- to medium-term.

The possibility of a hybrid judicial mechanism to try serious crimes committed in South Sudan has gained currency in international and domestic policy debates and has been advocated by South Sudanese civil society groups. Hybrid mechanisms—which involve varying degrees of participation by international and domestic judges and staff—have important advantages, including the ability to bolster domestic capacity and to help to insulate the independence of the bench. However, a hybrid mechanism can be expected to face significant challenges for holding to account perpetrators of serious crimes committed in South Sudan. First, it is unclear if the government of South Sudan is willing to support the establishment of a hybrid court. Second, the significant lack of independence and capacity of South Sudanese prosecutors, a climate of threats and intimidation of domestic judges, and overall insecurity in South Sudan suggest that a hybrid mechanism would need a number of specific elements to be effective. It would need to be a free-standing tribunal, likely located outside of South Sudan at least at the outset, distinct from the South Sudanese judicial system, and with a majority of international judges and a robust contingent of international prosecutors, investigators, and other staff.

Given its role as a permanent court of last resort when national courts are unable or unwilling to prosecute, the International Criminal Court (ICC) is also an important option for consideration in ensuring justice for South Sudan, although opposition to involving the ICC can be expected. South Sudan is not a party to the ICC, so the ICC could only investigate crimes committed in South Sudan if the government of South Sudan requested the ICC's involvement or the UN Security Council referred the situation to the court.

Backlash against the ICC, led in recent years by the government of Kenya after ICC suspects were elected as Kenya's president and deputy president in 2013, has created a difficult climate for the court in Africa. Among member states of the Intergovernmental Authority on Development, Uganda and Ethiopia have rallied behind Kenya's assault on the court. South Sudan's President Kiir also threw his weight behind the Kenyan president and expressed opposition to the court ahead of the African Union's (AU) June 2013 Summit.

The Security Council has yet to take up the issue of possible ICC referral for serious crimes committed in South Sudan, although in meetings on South Sudan some council members have expressed support for consideration of an ICC investigation. Some members have also suggested to Human Rights Watch in discussions that opposition to the court in Africa would factor in negatively to prospects for referral, however.

South Sudan's government could demonstrate it is committed to accountability by promptly requesting international assistance from the United Nations and the African Union to establish a hybrid court and/or requesting that the ICC exercise jurisdiction over crimes committed on its territory. Countries such as Sierra Leone, Lebanon, and Cambodia have all requested UN assistance in ensuring justice for serious crimes, which led to the creation of hybrid mechanisms.

South Sudan should also ratify the ICC's Rome Statute, which would give the ICC jurisdiction over serious crimes committed in South Sudan should they occur in the future.¹

In addition, South Sudan should introduce much needed legal reforms, such as the abolition of the death penalty and inclusion in domestic law of serious crimes under international law, such as genocide, crimes against humanity, and war crimes.

Timeliness in the delivery of justice is important, and fair, credible investigation and prosecution of the crimes should not be conditioned on peace negotiations and conclusion of a peace agreement. Much of the violence against civilians in this conflict has taken the form of reprisal attacks for earlier violence and, if unaddressed, risks spiraling further. Fair, credible investigation and prosecution of the most serious crimes without delay could increase the incentives for commanders to stop further abuse and could also help reduce anger, which is driving brutality and the conflict.

South Sudan's international partners also have a key role to play in ensuring that those responsible for the worst atrocities of this conflict are held to account fairly and effectively.

¹ The ICC's Rome Statute becomes binding on a state between two and three months after the state ratifies it. Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 126(2) (The statute enters into force "on the first day of the month after the 60th day following the deposit by such State of the instrument of ratification, acceptance, approval or accession.").

At time of writing, a first ever African Union Commission of Inquiry, which is mandated to investigate human rights violations committed in South Sudan and to make recommendations on accountability, healing, and reconciliation, has completed its report, although it has yet to be made public. Having raised expectations with its unprecedented commission on South Sudan, the AU can show its commitment to victims and to rejecting impunity—consistent with article 4 of its Constitutive Act—with a strong public report that insists on fair, credible prosecutions and provides for follow-up to see that the recommendations are implemented. Such recommendations have the potential to be a significant lever to propel justice initiatives forward.

Meanwhile, as mediators in the peace negotiations, the Intergovernmental Authority on Development is uniquely placed to ensure that amnesty for alleged perpetrators of serious crimes has no place in any peace agreement and that the parties commit to fair, credible trials of the crimes.

For their part, the UN Security Council, the AU, and other concerned partners—such as the United States and the European Union—should support fair, credible trials through a hybrid judicial mechanism and/or the involvement of the ICC to provide justice for serious crimes committed and ensure adequate financial assistance for fair, credible trials.

All of these efforts are crucial if South Sudan is to make a break from impunity, ensure perpetrators are held to account, and promote redress for victims, thereby contributing to long-term peace and stability for the country. One South Sudanese lawyer captured the importance of accountability when he told Human Rights Watch in October 2014: “If you want to bring South Sudan to normalcy, you need accountability...[T]hat would send a strong message that the era of injustice has become [one of] justice.”

Recommendations

To Both Parties to the Conflict

- Exclude amnesty for serious crimes committed in violation of international law from any peace agreement.
- Publicly commit to fair, credible criminal investigation and prosecution of serious crimes committed during the recent conflict without delay, and as part of any peace agreement. A peace agreement should also include plans for broader accountability mechanisms, such as compensation for victims and an independent national reconciliation process.

To the Government of South Sudan

- Request international assistance from the United Nations and African Union to establish a hybrid mechanism to try the most serious crimes committed during the current conflict and/or invite the ICC to have jurisdiction over crimes committed in South Sudan.
- Undertake domestic reform by:
 - Imposing a moratorium on the use of the death penalty and promoting its abolition in South Sudan.
 - Ratifying the ICC's Rome Statute.
 - Supporting legislation to incorporate genocide, war crimes, and crimes against humanity into domestic law, and relevant forms of criminal liability such as command responsibility.
- Complete investigations already underway into allegations of violations of international humanitarian and human rights law, in accordance with international standards, and make all findings public.

To the African Union Commission of Inquiry on South Sudan and the African Union Peace and Security Council

- Recommend fair, credible investigation and prosecution of crimes, in accordance with international standards, through the establishment of a hybrid tribunal and/or before the ICC.

- Establish follow-up measures to ensure implementation of the commission's recommendations.
- Publish the commission's report.
- Ensure adequate financial assistance for fair, credible trials for the most serious crimes committed in South Sudan.

To the Intergovernmental Authority on Development (IGAD)

- Ensure that any peace agreement does not include amnesty for alleged perpetrators of serious crimes and commits the parties to fair, credible trials of the crimes in accordance with international standards. A peace agreement should also include plans for broader accountability mechanisms such as compensation for victims and an independent national reconciliation process.
- Press for fair, credible, impartial investigation and prosecution of serious crimes committed during the conflict in accordance with international standards through a hybrid mechanism, acceptance of the ICC's jurisdiction by the government of South Sudan, and/or UN Security Council referral of the situation in South Sudan to the ICC.

To the United Nations Security Council

- Press for fair, credible, impartial investigation and prosecution of serious crimes committed during the conflict in accordance with international standards through a hybrid mechanism, acceptance of the ICC's jurisdiction by the government of South Sudan, and/or council referral of the situation in South Sudan to the ICC.
- Ensure adequate financial assistance for fair, credible trials for the most serious crimes committed in South Sudan.
- Call for the UN Mission in South Sudan (UNMISS) to more actively investigate, document, and publicly report on violations with a view to ensuring information and evidence is not lost and putting an end to impunity.

To the United Nations Mission in South Sudan

- More regularly document, investigate, and publicly report on human rights and humanitarian law violations with a view to ensuring information is not lost and to promoting an end to impunity.

Methodology

This report draws from research conducted by two Human Rights Watch staff in Nairobi and Juba between October 6 and October 10, 2014, along with fact-finding by Human Rights Watch researchers on abuses committed during the conflict since the new war² began in late 2013. During the October mission, staff conducted approximately 20 interviews with legal practitioners, including judges, public prosecutors, and private lawyers; representatives from international and local civil society groups; victims; diplomats from South Sudan's international partners; and UN staff.

Many of the individuals we interviewed wanted to speak candidly, but did not wish to be cited by name given the sensitivity of the issues concerned. As a result, we have used generic descriptions of interviewees throughout the report to respect the confidentiality of these sources.

This report focuses on criminal accountability for serious crimes committed in South Sudan's current conflict. After many painful years of violence, wider accountability for these and previous abuses, including truth-telling, societal healing initiatives, and vetting of members of the security services and officials to exclude human rights violators will also be needed; traditional justice processes may have a role to play as well. However, these issues are beyond the scope of this report.

² In this report, "new war" is used to distinguish the current conflict from Sudan's North-South civil war, which lasted from 1993 to 2005 and ended with the signing of the Comprehensive Peace Agreement that led to the creation of the state of South Sudan.

I. The Case for Criminal Justice

The current conflict in South Sudan has been characterized by serious crimes committed in violation of international law, the cruelty and scale of which have devastated large parts of the country, led to mass displacement, and prompted a humanitarian crisis.

A political dispute in mid-December 2013 between South Sudan's President Salva Kiir, from the Dinka ethnic group, and his former vice president Riek Machar, from the Nuer ethnic group and now in charge of the opposition forces, and their supporters, triggered the war. A year since the conflict between the government and Machar's Sudan People's Liberation Army/Movement-in Opposition and their allies began, an estimated 1.8 million people remain displaced from their homes and famine continues to threaten parts of the area in conflict.

The crimes, often ethnic in nature, have driven a frighteningly deep divide between South Sudan's two largest ethnic groups, Dinka and Nuer, which threatens to upend the country for decades to come. Especially in the first months of the war, soldiers from both opposition and government forces committed war crimes and possibly crimes against humanity. Attacks on towns were marked not so much by fighting between forces, but by abusive tactics by both sides and targeting and killing civilians, including the elderly, disabled, and children in their homes, in hospitals, and in UN compounds. The conflict has also seen extraordinary levels of destruction and pillage by forces on both sides. Homes, hospitals, markets, and humanitarian aid supplies were attacked, leaving towns and swaths of rural areas emptied and devastated.³

Human Rights Watch documented widespread abuses in Juba by Dinka government forces on Nuer civilians shortly after disputes within the armed forces erupted along ethnic lines. The patterns of attacks, killings, looting, and arrests should be investigated as crimes against humanity. The number of security forces involved and the fact that the abuses took place at the same time in different places—for example, ethnic profiling and attacks on

³ Human Rights Watch, *South Sudan's New War: Abuses by Government and Opposition Forces*, August 2014, http://www.hrw.org/sites/default/files/reports/southsudano814_ForUpload.pdf.

homes and round-ups of Nuer men in different neighborhoods in Juba on December 16 and 17—suggest organization and planning.⁴

International law requires prosecution of serious crimes, such as crimes against humanity and war crimes, which helps to ensure individual victims' rights to truth, justice, and an effective remedy, along with combating impunity.⁵ Major international treaties that South Sudan has signed up to—the Convention against Torture and the Geneva Conventions—provide that alleged perpetrators of relevant serious crimes must be fairly prosecuted.⁶

Experience in South Sudan underscores that impunity for past violations of human rights can facilitate serious crimes committed in the current conflict. Gruesome reprisal killings of civilians, often targeted on the basis of their ethnicity, have played a major role in the current conflict but have also occurred in past violence, including during government counter-insurgency efforts in earlier, smaller conflicts.⁷

⁴ Ibid.

⁵ See Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles), February 8, 2005, E/CN.4/2005/102/Add.1, preamble, principle 19; International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 2(3). See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted December 16, 2005, G.A. Res. 60/147, U.N. Doc. A/RES/60/147, preamble and parts VII and VIII.

⁶ Geneva Conventions, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987. South Sudan acceded to the Geneva Conventions on January 25, 2013 (although the International Committee of the Red Cross announced South Sudan's accession to the Geneva Conventions in 2012, its country table of accessions lists January 2013). South Sudan has indicated that it acceded to the Convention against Torture in 2013, although the accession process appears to remain incomplete. See "South Sudan: World's newest country signs up to Geneva Conventions," ICRC news release, 12/154, July 19, 2012, <https://www.icrc.org/eng/resources/documents/news-release/2012/south-sudan-news-2012-07-09.htm> (accessed November 3, 2014); Waakhe Simon Wudu, "South Sudan ratifies UN Convention Against Torture," *Gurtong*, December 4, 2013, <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/14019/categoryId/33/South-Sudan-Ratifies-UN-Convention-Against-Torture.aspx> (accessed November 3, 2014); Letter from non-governmental organizations to South Sudan President Salva Kiir, October 30, 2014, <http://www.amnesty.org/en/library/asset/AFR65/014/2014/en/e955f4e9-6f48-41f4-9429-5dedf46bc8dd/af650142014en.pdf> (accessed November 30, 2014) (The Office of the High Commissioner for Human Rights also has yet to list South Sudan among states that have acceded to the Convention against Torture).

⁷ See Human Rights Watch, "*They are Killing Us*": Abuses Against Civilians in South Sudan's Pibor County, September 2013, http://www.hrw.org/sites/default/files/reports/southsudan0913_ForUpload_3.pdf; UNMISS, "Incidents of Inter-communal Violence in Jonglei State," June 2012, <http://unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/June%202012%20Jonglei%20Report.pdf> (accessed November 3, 2014); David Deng, South Sudan Law Society, "The Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan," March 2013, http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%202016.pdf (accessed October 28, 2014).

South Sudan has a history of de facto blanket amnesties as part of peace deals when leaders have allegedly committed serious crimes, including for abuses committed during the North-South conflict, prior to the country's independence. Violence, including the abuse of civilians, has been a path to promotion and power for individuals. South Sudan's history of unaddressed abuses in conflict and even in relative peacetime, following inter-communal violence, has resulted in anger and ethnic divisions that undoubtedly fuelled the brutality that the South Sudanese have endured in the past year. Local civil society, victims, members of the legal community, and international experts that Human Rights Watch met with in October 2014 shared this view.

South Sudan's experience is consistent with the findings of the UN secretary-general's seminal 2004 report on the rule of law and transitional justice in conflict and post-conflict societies: "[E]xperience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice."⁸

Human Rights Watch's experience in many different country contexts over two decades reinforces that impunity for violent crimes too often fosters further abuses.⁹ By contrast, criminal justice can yield short- and long-term benefits. The fair prosecution of persons for serious crimes under international law may assist in restoring dignity to victims by acknowledging their suffering. Prosecutions also serve to channel condemnation and outrage at violations. By providing means of redress for victims and punishment for perpetrators, criminal justice may also deter future violations.¹⁰ Further, fair trials can contribute to a historical record that protects against revisionism by those who will seek to deny that atrocities occurred. Finally, fair, credible trials of those implicated in the gravest crimes helps to build respect for the rule of law by solidifying society's confidence in judicial institutions. This in turn helps cement long-term peace and stability.¹¹

⁸ UN Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," August 23, 2004, S/2004/616*, <http://www.unrol.org/files/2004%20report.pdf> (accessed May 5, 2007), para. 2.

⁹ See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, http://www.hrw.org/sites/default/files/reports/ijo709webwcover_1.pdf, pp. 123-127.

¹⁰ For a fuller discussion of deterrence, see *ibid.*, pp. 93-116.

¹¹ *Ibid.*, pp. 117-127.

Human Rights Watch researchers have interviewed hundreds of victims since the conflict began. The primary concerns of many civilians who have been unlawfully attacked, have had family members murdered, or have been pushed into crisis by the conflict included day-to-day survival and that the belligerents quickly sign a peace deal. But victims have also expressed a strong desire for perpetrators to be held to account to provide a clean break from past practice of rewarding perpetrators of grave crimes.

Civil society activists in South Sudan have also taken a strong position in support of justice.¹² One activist explained to Human Rights Watch:

“If we repeat [past] mistakes, it will be a problem of instability. [There is a] need for justice and accountability to take its own course...”¹³

Another activist said:

“Justice is needed. [There is] this issue of committing a crime because there is no justice. When peace [with Sudan] was signed, there was nothing.”¹⁴

Members of South Sudan’s legal community echoed this perspective:

“If you want to bring South Sudan to normalcy, you need accountability...[T]hat would send a strong message that the era of injustice has become [one of] justice.”¹⁵

“[To date] if you want to be appointed to the government, you must kill many people. People are rewarded with government posts when they commit murder.”¹⁶

¹² See David Deng, South Sudan Law Society, “Special Court for Serious Crimes (SCSC): A Proposal for Justice and Accountability in South Sudan,” May 2014, http://www.sslawsociety.org/public_html/SSLS_SCSC_Proposal_for_a_Hybrid_Court.pdf (accessed November 5, 2014); UN Human Rights committee, “Joint Written Statement Submitted by CIVICUS – World Alliance for Citizen Participation,” February 19, 2014, http://www.sslawsociety.org/public_html/HRC25_NGO_Joint_Written_Statement_on_South_Sudan.pdf (accessed October 28, 2014).

¹³ Human Rights Watch interview with member of South Sudanese civil society, Juba, October 9, 2014.

¹⁴ Human Rights Watch interview with member of South Sudanese civil society, Juba, October 10, 2014.

¹⁵ Human Rights Watch interview with a South Sudanese lawyer, Nairobi, October 6, 2014.

“If you try [the alleged perpetrators], there will be a sigh of relief of victims. When you do not punish, [there are] cycles of violence....”¹⁷

Others have also noted the importance of justice. “There must be justice for what happened here [in Juba], or else I will rebel!” a senior government-allied Sudanese People’s Liberation Army (SPLA) official told Human Rights Watch soon after the killings in the capital in December 2013. In interviews with Human Rights Watch over the past months, other senior army officers have also underlined how a lack of accountability for killings and other crimes in the conflict could likely lead to further instability in South Sudan’s future.¹⁸

Traditional justice processes and wider accountability efforts, including truth telling, social healing initiatives, and vetting of officials in an effort to exclude human rights violators, are also very important and may have a role to play.¹⁹ Other measures, such as economic reconstruction and development will also be essential to help move South Sudan beyond the crisis. However, such efforts are not an alternative to or a substitute for fair, credible trials.

Timeliness in the delivery of justice is also important. Much of the violence against civilians in this conflict has taken the form of reprisal attacks for earlier violence and as history suggests, if unaddressed, these will spiral further. A serious, timely justice effort could help to encourage commanders to stop further abuse and could also help to reduce anger, which is driving brutality and the conflict.

¹⁶ Human Rights Watch interview with a South Sudanese lawyer, Juba, October 7, 2014.

¹⁷ Human Rights Watch interview with two South Sudanese lawyers, Juba, October 7, 2014.

¹⁸ Human Rights Watch interviews with senior SPLA officers, Juba, Bor, January – August 2014.

¹⁹ See David Deng, South Sudan Law Society, “Transitional Justice Strategy for South Sudan,” September 2014, [http://www.sslawsociety.org/public_html/Transitional_Justice_Strategy_for_South_Sudan_\(Sep%202014\).pdf](http://www.sslawsociety.org/public_html/Transitional_Justice_Strategy_for_South_Sudan_(Sep%202014).pdf) (accessed October 28, 2014).

II. Options for Justice

Cases involving serious crimes tend to be complex and sensitive, and they can strain even the most robust national justice systems. For South Sudan, trials involving grave crimes can be expected to be extremely delicate—both government and opposition forces are implicated in the crimes and there are questions as to what responsibility leaders, including President Salva Kiir and former Vice President Riek Machar, may hold in their commission.

Many of the crimes were committed on the basis of an individual's ethnic group, and the ethnic dimension of the conflict will also contribute to high emotion around trials. The country is currently deeply polarized along ethnic lines; attacks on individuals because of their ethnicity have continued and many Dinka and Nuer communities fear that offensives in the upcoming dry season will include attacks on their communities around the country, as fighting was hampered during the rainy season.

Trials for serious crimes committed in violation of international law should meet the following benchmarks, which are effectively the same standards that should apply for the trial of any person brought to justice for a serious criminal offense, namely: credible, independent, and impartial investigation and prosecution; rigorous implementation of internationally recognized standards of fair trial; and appropriate penalties that reflect the gravity of the crime in the event of conviction.²⁰

Human Rights Watch's experience with trials for grave crimes committed in a wide range of countries has also shown the significance of witness protection and support; security for judges, court staff, and defense counsel; victim engagement with the process; and the accessibility of information about trials to local communities.²¹

In December 2013, the African Union Peace and Security Council established a commission of inquiry on South Sudan with a mandate to “investigate the human rights violations and other abuses committed during the armed conflict in South Sudan, and make recommendations on the best way and means to ensure accountability, reconciliation and

²⁰ For a fuller discussion of these benchmarks, see Human Rights Watch, *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA Leaders: A Human Rights Watch Memorandum*, no. 1, May 2007-February 2008 http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf, pp. 1-11.

²¹ *Ibid.*, no. 3, pp 21-34.

healing among all South Sudanese communities.”²² This is an unprecedented move by the AU. At time of writing, the AU had prepared a report, but it had not been made public.

As discussed below, deficits in South Sudan’s justice system, lack of willingness to prosecute the crimes on the part of domestic authorities, and the sensitive nature of the cases mean that a purely domestic initiative to try serious crimes is not a realistic option in the short- to medium-term.

A hybrid international-national justice mechanism to try serious crimes committed in South Sudan has certain advantages, but making such a mechanism effective will be challenging. First, it is unclear if the government of South Sudan is willing to support the establishment of a hybrid court. Second, the significant lack of independence and capacity of South Sudanese prosecutors, a climate of threats and intimidation of domestic judges, and overall insecurity in South Sudan suggest that a hybrid mechanism would need a number of specific elements to be effective. It would need to be a free-standing tribunal, likely located outside of South Sudan at least at the outset, distinct from the South Sudanese judicial system, and with a majority of international judges and a robust contingent of international prosecutors, investigators, and other staff.

As a permanent court of last resort when national courts are unable or unwilling to prosecute, the International Criminal Court remains an important option to be considered to ensure justice for serious crimes committed, despite likely political opposition. As South Sudan is not a party to the ICC, the ICC could investigate crimes committed in South Sudan only if the government of South Sudan requested the ICC’s involvement or the UN Security Council referred the situation.

Domestic Trials

South Sudan’s government has made some promises to ensure accountability for violations committed during the current conflict, but has yet to make any concrete progress.²³ South Sudan’s army and police began investigations soon after the violence in

²² African Union Peace and Security Council, Communiqué on South Sudan of the 411th Meeting, Banjul, 30 December 2013, <http://www.peaceau.org/uploads/psc-com-411-south-sudan-30-12-2013.pdf> (accessed October 28, 2014), para. 8.

²³ For example, President Salva Kiir promised soon after violence in Juba that forces that unlawfully killed civilians would face justice. See “President Salva Kiir Mayardit calls for an end to all ethnic violence,” Republic of South Sudan press release, December 24, 2013, http://www.sudantribune.com/IMG/pdf/president_salva_kiir_christmas_message.pdf (accessed May 16, 2014).

Juba in mid-December 2013. Both investigations resulted in reports that identified alleged perpetrators, but these reports were never made public, and neither has led to any criminal investigations or trials. Government officials point to the “Investigation Committee to Investigate on Human Rights Abuses in the Attempted Coup of 15th [D]ecember 2013” established by President Kiir in January, headed by a senior judge, John Wol Makec, as evidence that efforts are being made to provide accountability for abuses committed. The earlier reports of investigations were handed over to this committee.²⁴ However this body has not provided any public report or update on its activity since it was established in January and is not perceived to be independent from the government.²⁵

Meanwhile, the South Sudanese justice system suffers from a range of weaknesses.²⁶ Several of these deficits raise particular concern with respect to trials of serious crimes: inadequate independence and capacity of prosecutors; a climate of intimidation and insecurity for judges and lawyers; gaps and inadequacies of domestic law; inadequate protection of fair trial guarantees; insufficient witness protection and support; and the availability of the death penalty as a punishment.

South Sudanese lawyers, judges, and members of the civil society were unable to recall any cases in which senior commanders or politicians had been successfully prosecuted for alleged crimes in recent years. Even military leaders who have defected and have established militias to fight the government have not been punished for abuses; instead, they have received promotions and/or de facto amnesties for themselves and their forces.

²⁴ See UNMISS, “Conflict in South Sudan: A Human Rights Report,” May 8, 2014, <http://www.unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf> (accessed November 3, 2014), para. 299; UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan,” A/HRC/27/74, September 19, 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A-HRC-27-74_en.pdf (accessed November 3, 2014), paras. 71-74.

²⁵ Makec’s investigation has also refused to cooperate with the AU Commission of Inquiry and the committee has refused to provide information to Human Rights Watch and other groups about their activities. Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interviews with AU staff, Juba, August 2014.

²⁶ For a more detailed description of South Sudan’s criminal justice system see Human Rights Watch, *Sudan – “There is No Protection”: Insecurity and Human Rights in Southern Sudan*, February 2009, http://www.hrw.org/sites/default/files/reports/southsudano209_webwcover.pdf, p. 40; Human Rights Watch, *“Prison Is Not For Me”: Arbitrary Detention in South Sudan*, June 2012, http://www.hrw.org/sites/default/files/reports/southsudano612ForUpload_1.pdf; UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan,” paras. 44-62.

Taken together, these factors suggest that credible attempts to prosecute serious crimes, in particular holding any senior officials accountable, are unlikely to be initiated by domestic prosecuting authorities; even if they are, any purely domestic attempt to prosecute serious crimes committed during the conflict is likely to be deeply flawed. As discussed in the subsequent section, several deficits in the domestic system also create significant challenges for any hybrid mechanism.

Inadequate Independence and Capacity of Prosecutors

International standards require prompt, thorough, independent, and impartial investigation and prosecution. At the same time, investigation and prosecution of serious crimes can be extremely complex. For example, demonstrating the responsibility of perpetrators who may have been leaders far removed from crime scenes, or the systematic and widespread nature of crimes can pose tough challenges.

The lack of independence of South Sudanese prosecutors combined with their limited capacity are major concerns for credible, effective efforts to hold perpetrators of serious crimes to account, particularly where the perpetrators are state officials or linked to government.

Under South Sudanese law, prosecutors fall under the authority of the executive branch through the minister of justice, who is also the government's legal adviser.²⁷ International standards highlight that such arrangements can create risks for prosecutors' actual and perceived independence.²⁸ Furthermore, South Sudanese law states that prosecutors need approval to proceed with certain cases involving crimes against the state and public servants.²⁹

²⁷ Government of Southern Sudan, The Transitional Constitution of the Republic of South Sudan, July 9, 2011, Article 135. Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

²⁸ UN Human Rights Council, "Report of the Special Rapporteur on the Independence of Judges and Lawyers," Gabriela Knaut, A/HRC/20/19, June 7, 2012, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A.HRC.20.19_En.pdf (accessed December 1, 2014), paras. 26-28.

²⁹ Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014. Laws of Southern Sudan, The Code of Criminal Procedure Act, 2008, sects. 43 and 44.

Members of the legal community described prosecutors as “not independent” and “highly politicized.”³⁰

Some lawyers complained of several cases involving officials, including those implicated in corruption and embezzlement, which were dropped without basis.³¹ In one example, a government official described to Human Rights Watch how a prosecutor was instructed by the minister of justice, apparently at the request of President Kiir, to stay a corruption case involving a well-connected government official.³² The official also noted that in practice it would have been unthinkable to arrest the individual because of his relationship with a senior government official.

Prosecutors also generally pursue cases only where a formal complaint by a victim is brought to them or where police have arrested someone caught in the commission of a crime.³³ This approach does not lend itself to investigating and prosecuting sensitive cases where many victims and witnesses can be expected to be reluctant to come forward and cases where a pattern of abuse is part of the definition of the crimes, such as crimes against humanity.

The lack of prosecutorial independence is evident by the response to previous crimes. For example, in 2013 Human Rights Watch documented a pattern of killings, looting, and destruction of civilian property, including burning civilian homes and other abuses by government soldiers against civilians from the Murle ethnic group, in Pibor county, Jonglei state, during a government counter-insurgency against Murle rebels in 2012 and 2013.³⁴ When Human Rights Watch asked state and national prosecutors whether they would

³⁰ Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

³¹ Human Rights Watch interview with South Sudanese lawyers, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

³² Human Rights Watch interview with South Sudanese official, Juba, October 8, 2014.

³³ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014. A complaint or arrest is not required for prosecutors to pursue cases. The Code of Criminal Procedure Act, sect.34.

³⁴ Human Rights Watch, *“They are Killing Us”*; Human Rights Watch, *South Sudan’s New War*, p. 88; “South Sudan: Army Making Ethnic Conflict Worse,” Human Rights Watch news release, July 19, 2013, <http://www.hrw.org/news/2013/07/19/south-sudan-army-making-ethnic-conflict-worse>. See also UNMISS, “Incidents of Inter-communal Violence in Jonglei State,” p. 28.

investigate the killings they said they would not do so unless directly requested to do so by victims or the victims' families.³⁵

However, prosecutors were not located geographically close enough to the victims for the victims to be able to lodge complaints. Victims also told Human Rights Watch that as the government was perpetrating abuses against them they were too frightened to request help in this way in any event.³⁶ Human Rights Watch researchers have also often been told by various civilian officials that the responsibility for dealing with abuses by the army lies within the army, despite clear stipulation in South Sudan's army law, the Sudan People's Liberation Act, that trials for crimes committed against a civilian should be heard in civilian courts.³⁷

Lack of independence is also apparent from what's known as the "Wau crisis cases." At the instigation of the state governor of Western Bahr el Ghazal, a three-man "special" panel of judges was established in Wau, the state capital, to deal with a range of cases connected to violence in the town in November and December 2012; this followed a politically-charged administrative decision by the governor to move a local government office from the town to a nearby rural area.³⁸

A largely peaceful protest against the decision on December 9, 2012 ended in tragedy when security forces shot into the crowd, killing eight young men and injuring dozens of others. Government security forces subsequently arrested and detained dozens of people, including politicians whose policies were in conflict with the governor's, young men who had been protesting the government, journalists, and a group of people accused of murder, allegedly in revenge for the killing of the protestors. The court was essentially established to prosecute individuals from these categories and convicted dozens of people for various crimes including public violence and murder. However, the prosecutors never pursued cases against the security forces implicated in the killing of eight protesters.

³⁵ Human Rights Watch interviews, prosecutors, Juba, Bor, October and November 2013. See also Letter from Human Rights Watch to H.E. Salva Kiir Mayardit, President of the Republic of South Sudan, Commander in Chief of the SPLA, "The violence in Jonglei State," August 23, 2012, <http://www.hrw.org/news/2012/08/23/letter-south-sudans-president-salva-kiir-violence-jonglei-state>.

³⁶ Human Rights Watch interviews with Murle witnesses and victims, Juba, July – November 2013.

³⁷ Section 37 (4) of SPLA Act 2009 states: "Whenever a military personnel commits an offense against a civilian or civilian property, the civil court shall assume jurisdiction over such an offense."

³⁸ "South Sudan: No Justice for Protestor Killings," Human Rights Watch news release, May 24, 2013, <http://www.hrw.org/news/2013/05/24/south-sudan-no-justice-protester-killings>.

An example of lack of prosecutorial action from the current conflict relates to an April 17, 2014 attack on the UNMISS compound in Bor town, Jonglei State, resulting in the killing of at least 53 people of the several thousand of the mostly Nuer who were sheltering there, and injuring scores of others. In the incident a large group of Dinka youth and armed men, including some in government police and military uniforms, attacked the UNMISS compound and although some government officials, including a senior police officer, were present at the attack, there have been no efforts by local or national prosecutors to investigate, arrest, or prosecute any of those who attacked the base.³⁹

Interlocutors also cited a range of other concerns related to prosecutors, including overall limited professional capacity; poor communication between police and prosecutors; limited numbers of prosecutors; lack of understanding on proper handling of evidence; lack of competence in the official language of English, as they were trained in Arabic; and poor case management capacity.⁴⁰ As of October, prosecutors were benefitting from basic training facilitated by an international non-governmental legal organization on the role of a prosecutor.⁴¹

Climate of Intimidation and Threats against Judges and Lawyers

Judicial independence is a cornerstone of effective criminal proceedings. While South Sudan's constitution and laws guarantee the independence of judges,⁴² this independence is not respected in practice, particularly for cases involving officials or army personnel.

³⁹ "South Sudan: Ethnic Killings Spiraling," Human Rights Watch news release, April 23, 2014, <http://www.hrw.org/news/2014/04/23/south-sudan-ethnic-killings-spiraling>; "Security Council Press Statement on South Sudan," United Nations press release, SC/11363-APR/2870, April 24, 2014, <http://www.un.org/press/en/2014/sc11363.doc.htm> (accessed November 17, 2014); Human Rights Watch, *South Sudan's New War*, pp. 54-56. Although Human Rights Watch did not interview police for this report, prior research indicates that police have also shown reticence to investigate crimes despite relevant information, further increasing the challenges to ensure justice in sensitive cases. Human Rights Watch, *"There is No Protection,"* p. 40; Human Rights Watch, *"They are Killing Us,"* pp. 36-38; "South Sudan's Army Must Be Held Accountable," Human Rights Watch news release, September 13, 2013, <http://www.hrw.org/news/2013/09/13/south-sudan-s-army-must-be-held-accountable>. See also UNMISS, "Incidents of Inter-communal Violence in Jonglei State," June 2012, p. 31.

⁴⁰ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with two South Sudanese lawyers, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014. See also UNMISS, "Incidents of Inter-communal Violence in Jonglei State," p. 30.

⁴¹ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014.

⁴² Transitional Constitution of the Republic of South Sudan, secs. 122, 124; Laws of Southern Sudan, The Judiciary Act, 2008, sec. 6.

Members of South Sudan's legal community described to Human Rights Watch multiple incidents where judges faced physical threats and intimidation.⁴³ Lawyers offered examples of three such incidents in 2014: one where the guards of a senior SPLA officer who faced court proceedings threatened the responsible judge, and the case has subsequently been put on hold;⁴⁴ a second where a different judge was threatened by security personnel at the direction of a minister;⁴⁵ and a third where national security officers detained a judge at Juba airport after the judge froze an account of the Juba City Council.⁴⁶

Lawyers also highlighted that government officials had threatened judges and interfered in their work.⁴⁷ One lawyer told of an incident where a governor asked a judge to leave the area in Malakal as a result of a judgment by the judge.⁴⁸ Another lawyer described an incident where a senior government official allegedly ordered the release of a suspect in custody who was a relative.⁴⁹ Several lawyers further expressed concern over the current chief justice's close ties with President Salva Kiir and interference by the chief justice in the appointment of judges and deliberations in particular cases.⁵⁰

⁴³ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014. See also Human Rights Watch, *"There is No Protection,"* p. 40; International Commission of Jurists, "South Sudan: An independent Judiciary in An Independent State?," 2013, <http://www.refworld.org/pdfid/530cb3604.pdf> (accessed October 29, 2014), pp. 26-28.

⁴⁴ Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁴⁵ Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁴⁶ Human Rights Watch interview with two South Sudanese lawyers, Juba, October 7, 2014.

⁴⁷ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

⁴⁸ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014.

⁴⁹ Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014.

⁵⁰ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014. See also Peter Gai Manyon, "Analysis about Justice John Clement resignation from Judiciary," *Sudan Tribune*, March 15, 2013, <http://www.sudantribune.com/spip.php?article45817> (accessed October 29, 2014).

Judges serving in South Sudan's appeals courts and lower courts formally raised concern over interference of the executive and legislature with the justices of the Supreme Court (along with other issues) in July 2014.⁵¹

Some lawyers suggested that a climate of intimidation may have prompted reticence among judges to handle sensitive cases. They cited irregularities in a 2013 case challenging a presidential order that forbade Pagan Amum, the secretary-general of South Sudan's ruling party, the Sudan People's Liberation Movement, to travel or speak to the media.⁵² They noted that the Supreme Court never constituted a panel of the appropriate size—which should have included all Supreme Court justices—to consider the challenge to the presidential order, and the panel dismissed the challenge on a basis not provided by law, the failure to exhaust remedies.⁵³

In other instances, judgments seemed to fly in the face of evidence. For example in the 2013 Wau crisis trials, conducted in an environment of intense political pressure, eleven people were sentenced to death for murders, despite a range of problems with these cases, including apparently obvious intimidation of witnesses.⁵⁴ In another example, lawyers complained of a case dismissed against a high level official charged with corruption despite strong eyewitness evidence.⁵⁵

⁵¹ Meeting of Justices of the Supreme Court held at the office of the Hon. Deputy Chief Justice to discuss issues raised by judges in their memo of 16/7/2014, August 13, 2014; Response to the Justices of the Supreme Court proposals of 13/8/2014 as solutions for the issues raised in our memo of 16/7/2014, August 18, 2014 (on file with Human Rights Watch).

⁵² Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014. See also "S. Sudan leader petitions against President orders," *Yahoo News*, August 7, 2013, <http://news.yahoo.com/sudan-leader-petitions-against-president-orders-141612572.html> (accessed October 28, 2014).

⁵³ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014. See also The Judiciary Act, 2008, secs. 10-11; "Amum's lawyer says Supreme Court ruling 'slap' on Rule of Law," *Sudan Tribune*, November 1, 2013, <http://www.sudantribune.com/spip.php?article48643> (accessed October 28, 2014).

⁵⁴ Human Rights Watch interviews with South Sudanese lawyers, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁵⁵ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

Private lawyers have also faced intimidation, physical threats by security personnel, and even detention,⁵⁶ although judges have taken significant steps to prevent such efforts from being carried out.⁵⁷ Threats were made to lawyers representing those accused of killings during the Wau crisis. However, the judges in the case took the threats very seriously, suspending proceedings until more effective security arrangements were put in place.⁵⁸ Lawyers for the defense in 2014 proceedings against senior politicians accused of treason following the December 2013 violence in Juba, also faced threats and difficulties meeting with their clients due to intimidation, although the judges intervened to ensure such meetings could take place.⁵⁹

In 2013, a lawyer also fled South Sudan as a result of threats he faced after submitting a legal petition against the president for alleged violations of the constitution.⁶⁰ In another case, in 2014, lawyers representing a foreign businessman in a land dispute were called into a state governor's office, verbally told to "handle this case" to the benefit of the other party, a message later repeated in a written order from the governor to the judge.⁶¹

Lawyers suggested that a number of judgments related to land grabbing cases also have yet to be executed due to security-related risks, and that soldiers have flouted court orders in land disputes.⁶² Another lawyer suggested police would never be able to arrest high

⁵⁶ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, October 7, 2014. See also Ayuen Panchoi, "Lawyer Dong Samuel flees the country," *Eyeradio*, August 16, 2013, <http://eyeradio.org/lawyer-dong-samuel-flees-country/> (accessed November 3, 2014); "Q&A: Exiled lawyer says regime change 'only way forward' in South Sudan," *The New Sudan Vision*, September 23, 2013, <http://www.newsudanvision.com/diaspora-publisher/2753-q-a-exiled-lawyer-says-regime-change-only-way-forward-in-south-sudan> (accessed November 3, 2014).

⁵⁷ Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, October 7, 2014.

⁵⁸ Human Rights Watch interview with South Sudanese lawyer, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014.

⁵⁹ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁶⁰ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014.

⁶¹ Human Rights Watch interviews with two South Sudanese lawyers, Juba, October 7, 2014.

⁶² Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014; Human Rights Watch, "There is No Protection," p. 32; Human Rights Watch, "Prison Is Not For Me, pp. 23-25. See also US State Department, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices – 2013: South Sudan," <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (accessed November 11, 2013), pp. 8-9.

level suspects, in part because of the complex networks of ethnic and political allegiances that protect top officials and which could obstruct justice, but also because some senior politicians and commanders have their own powerful body guards surrounding them who could physically prevent arrests.⁶³

A recent example illustrates the difficulties facing those trying to arrest and detain suspects. A number of soldiers and members of other security forces were arrested in December 2013 and January 2014 by South Sudan's army, for alleged crimes committed during the mid-December violence in the capital, including killings of civilians and looting. The arrests and detentions were made under the orders of the then-chief of staff of the army and with the cooperation of the inspector general of police. However, almost all of these prisoners, including at least two men being held because of their alleged connections to a massacre of between 200 and 400 Nuer in the Gudele area of Juba on December 16, 2013, escaped during a gun battle in the military barracks where they were being held. Senior army officials and police officials have told Human Rights Watch privately that they believe these men were helped to escape. At least one commander was at large in the town in the following weeks and was not re-arrested.⁶⁴

Given the ethnic nature of the current conflict, a related challenge is that very few judges (perhaps as few as one) at the Supreme Court or appeals court level are from the Nuer ethnic group.⁶⁵ At the very least, this creates the risk that judicial panels may not be seen to be impartial in cases involving serious crimes.

Interlocutors noted a range of additional challenges related to judges, including the limited number of qualified judges in the country, which leads to major backlogs;

⁶³ Understood in its full breadth, this problem presents a massive challenge for South Sudan. The successful implementation of any peace deal in South Sudan will involve bringing and keeping numerous commanders—together with their loyal armed supporters—on the side with the government. “At the threat of prosecution these (men) will just go back to the bush (i.e. rebel),” one lawyer told Human Rights Watch. Human Rights Watch interview with two South Sudanese lawyers, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

⁶⁴ Human Rights Watch, various interviews with military and police officials, Juba, January 2014 – August 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

⁶⁵ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

difficulties for some judges to work in the official language—English—as they were trained in Arabic; corruption; and limited resources and supplies.⁶⁶

Gaps and Inadequacies in the Law

South Sudan lacks adequate substantive law on serious crimes; the offenses of war crimes and crimes against humanity are not included in the South Sudanese penal code.⁶⁷

Offenses which underlie these serious crimes, such as murder and rape, are prohibited under domestic law.⁶⁸ However, charging the atrocities committed only as individual murders and rapes would fail to capture their magnitude and gravity, in addition to their ethnically motivated character in many instances.

South Sudanese law does not include command responsibility as a mode of criminal liability.⁶⁹ This form of criminal responsibility is particularly important when leaders are implicated in responsibility for serious crimes. Command responsibility allows for liability of those who were not involved in the direct commission of crimes, but were responsible for them due to their leadership positions.

Moreover, under South Sudanese law, the president and members of the national legislature are immune from prosecution during their tenure with limited exceptions.⁷⁰ With respect to the president, immunity may only be lifted in relation to treason, gross violations of the constitution, or gross misconduct, and only following a resolution approved by a two thirds majority of the legislature; limited conditions where immunity can be denied also exist for members of the legislature.⁷¹

⁶⁶ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with two South Sudanese lawyers, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014. See also Human Rights Watch, *“There is No Protection,”* p. 40.

⁶⁷ Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014. Laws of Southern Sudan, The Penal Code Act, 2008.

⁶⁸ Laws of Southern Sudan, The Penal Code Act, 2008, arts. 206, 247.

⁶⁹ Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁷⁰ Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁷¹ Transitional Constitution of South Sudan, Articles 67, 103.

Inadequate Fair Trial Protections

Adherence to fair trial protections—which are largely contained in the International Covenant on Civil and Political Rights (ICCPR)—are crucial to a trial’s legitimacy. They include the rights to:

- a fair and public hearing before a competent, independent, and impartial tribunal;
- a presumption of innocence;
- adequate time and facilities to prepare a defense;
- not be compelled to testify against oneself or to confess guilt;
- have a lawyer of the accused’s own choosing;
- be protected from torture or cruel, inhuman, or degrading treatment; and
- have a conviction be reviewed by a higher tribunal.⁷²

Adherence to fair trial rights is a significant concern in South Sudan. Many accused do not have legal representation; there is no legal aid scheme in place for indigent accused and accused who have representation often lack timely access to their lawyers.⁷³ These challenges extend to high profile cases; suspects who faced charges of treason in 2013 were detained for more than one month without charges being brought and without access to a lawyer; judges had to intervene with security personnel to ensure accused could meet with their lawyers during the trial.⁷⁴ Accused also regularly suffer from illegal detention and abuse while in detention.⁷⁵

Lawyers cited other concerns, including adequate interpretation into a language the accused understands and overall communication between judges and lawyers—many were trained in Arabic, while the official language for proceedings is now English.⁷⁶

⁷² ICCPR, arts. 7, 14.

⁷³ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014. For a more detailed review in challenges to the protection of fair trial rights, see Human Rights Watch, *“Prison Is Not For Me,”* pp. 37-49; “South Sudan: No Justice for Protestor Killings,” Human Rights Watch news release, May 24, 2013.

⁷⁴ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

⁷⁵ See Human Rights Watch, *“Prison Is Not For Me,”* pp. 37-49 and 76-90.

⁷⁶ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

Witness Protection and Support

Given the sensitive nature of trials for war crimes or crimes against humanity, witnesses in such trials can face serious risks. They may confront direct threats to the safety of their families and themselves before or after testifying in court. If they were victims of the crimes, they may also be in need of ongoing psychosocial support in the aftermath of testifying about deeply traumatic events. In circumstances where a conflict is ongoing or has only recently ended, the risks to all witnesses are particularly acute.

There is no witness protection and support scheme in effect in South Sudan, although judges sometimes issue protective measures on an ad hoc basis.⁷⁷

Members of the South Sudanese legal community indicated that witnesses had faced intimidation and abuse in past cases.⁷⁸ Witnesses involved in the Wau crisis cases faced particularly strong intimidation.⁷⁹

Lawyers also noted that the former chief of military intelligence, Mach Paul Kuol, testified in March 2014 during treason cases that he had no evidence that any of the four accused had attempted the coup the government accused them of.⁸⁰ In April 2014, Paul was removed from his position.⁸¹ Another lawyer raised an incident where a witness changed testimony in a case against an army official once the official came back into favor with the government.⁸²

Lawyers also described incidents where witnesses saw crimes committed, but refused to come forward due to safety concerns.⁸³

⁷⁷ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

⁷⁸ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with two South Sudanese lawyers, Juba, October 7, 2014.

⁷⁹ Human Rights Watch interview with two South Sudanese lawyers, Juba, October 7, 2014.

⁸⁰ Philip Thon Aleu, "Prosecution Witness in South Sudan Treason Trial Testifies in Favor of the Accused," Voice of America, March 26, 2015, <http://www.voanews.com/content/prosecution-witness-in-south-sudan-treason-trial-testifies-in-favor-of-accused-/1879733.html> (accessed October 27, 2014).

⁸¹ According to a defense lawyer involved in the case, another senior official refused to come to the court to provide testimony. Human Rights Watch interview South Sudanese lawyer, Juba, October 8, 2014.

⁸² Human Rights Watch interview with South Sudanese lawyer, Juba, October 9, 2014.

⁸³ Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014. See discussion of this issue also in the above section regarding prosecutors.

A framework to ensure that witnesses and victims are adequately protected and supported is vital to promoting the well-being of those involved in proceedings. This should include risk assessment and the provision of physical and psychological assistance before, during, and after the proceedings; facilitating court appearances, including through the use of pseudonyms and private courtroom sessions as needed; and measures to protect the confidentiality, integrity, and autonomy of the proceedings, while overall ensuring a fair trial, including the right of all persons to be able to challenge the evidence and witnesses against them.⁸⁴

Death Penalty

The death penalty is an available punishment under South Sudanese law.⁸⁵ South Sudan voted in favor of a moratorium on the death penalty at a UN General Assembly vote on the issue in 2012.⁸⁶ Despite this, multiple sources indicated that several individuals were executed over the past year.⁸⁷ International human rights law favors the abolition of capital punishment and Human Rights Watch believes the death penalty constitutes an inherently cruel and inhuman punishment.⁸⁸ No international or hybrid war crimes tribunal allows the death penalty and the UN Secretary-General's 2004 report on justice and the rule of law recommended that the UN should never establish or participate in any tribunal that allows the death penalty.⁸⁹

⁸⁴ Notably, witness protection and support are areas where accumulated expertise exists among international and hybrid international-national courts, including the ICC and the Special Court for Sierra Leone. See Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, vol. 16, no.8(A), September 2004, <http://www.hrw.org/sites/default/files/reports/sierraleoneo904.pdf>, pp. 29-31; Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, July 2008, <http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf>, pp. 149-176. A small number of African states—Senegal, Kenya, and South Africa, have also developed witness protection programs. See Chris Mahony, Institute for Security Studies, “The justice sector afterthought: Witness protection in Africa,” 2010, <http://dspace.africaportal.org/jspui/bitstream/123456789/31089/1/WitnessProt4.pdf?1> (accessed November 5, 2014).

⁸⁵ The Code of Criminal Procedure Act, 2008, arts. 251-252 and 275-277.

⁸⁶ “South Sudan: Heed Global Call to End Death Penalty,” Human Rights Watch news release, December 20, 2012, <http://www.hrw.org/news/2012/12/20/south-sudan-heed-global-call-end-death-penalty>.

⁸⁷ Human Rights Watch interview with international expert, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 7, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014. See also “Amid a Shroud of Secrecy the Government of South Sudan Quietly Executes Four People,” South Sudan Law Society news release, “November 25, 2013, <http://www.southsudannewsagency.com/news/press-releases/south-sudan-quietly-executes-four-people> (accessed October 29, 2014); “South Sudan: UN urges death penalty moratorium following reported executions,” UN News Centre, November 29, 2013, <http://www.un.org/apps/news/story.asp?NewsID=46616#.VFFxvmdXTp> (accessed October 29, 2014). An official at Juba prison also told Human Rights Watch in November 2013 he had witnessed the executions of two men on November 12, 2013, in Juba prison. At least two other men were also reported to have been executed in Wau around the same time.

⁸⁸ ICCPR, art. 6.

⁸⁹ Report of the U.N. Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, August 23, 2004, S/2004/616, para. 2.

Hybrid Model

The establishment of a hybrid international-national justice mechanism to try the most serious crimes committed in South Sudan's recent conflict has gained currency in policy debates and has been advocated by South Sudanese civil society groups.⁹⁰ There would be important advantages to such an effort, including the opportunity to bolster the capacity of domestic practitioners and a degree of domestic ownership over the process. Meanwhile, hybrid mechanisms can help to insulate the process from political pressure and risks to national judges, prosecutors, and witnesses, and to manage gaps in capacity within domestic systems.

At the same time, as detailed below, serious questions remain as to the creation of a hybrid mechanism that could ensure fair, credible trials for serious crimes committed in South Sudan.

Elements of Hybrid Mechanisms

Hybrid judicial mechanisms can take a variety of forms, although they all entail degrees of international and domestic involvement.⁹¹

On one end of the spectrum, they can be stand-alone independent tribunals with a majority of international judges and staff that apply international and domestic law, such as the Sierra Leone Special Court.⁹² On the other end of the spectrum, they may involve a limited number of international staff and be subject to domestic law. The latter is the case

⁹⁰ See "The AU Commission of Inquiry Undertakes Consultations in Nairobi," African Union, press statement, May 15, 2014, <http://www.au.int/en/content/commission-inquiry-south-sudan-undertakes-consultations-nairobi> (accessed June 13, 2014); David Deng, South Sudan Law Society, "Special Court for Serious Crimes (SCSC): A Proposal for Justice and Accountability in South Sudan," May 2014, http://www.sslawsociety.org/public_html/SSLS_SCSC_Proposal_for_a_Hybrid_Court.pdf; American Bar Association Rule of Law Initiative, Assessment of Justice, Accountability and Reconciliation Measures in South Sudan, June 2014, http://www.americanbar.org/content/dam/aba/directories/roli/sudan/aba_rolisudan_assessment_final_report_0614.authcheckdam.pdf (accessed December 1, 2014). UN Secretary General Ban Ki Moon has also recommended a hybrid court be considered for South Sudan, as has UNMISS. See "Secretary-General Briefing to the Security Council on South Sudan," UN News, May 12, 2014, <http://www.un.org/sg/statements/index.asp?nid=7666> (accessed November 5, 2014); UNMISS, "Conflict in South Sudan: A Human Rights Report," May 8, 2014, para. 312.

⁹¹ An overview of hybrid mechanisms is contained in OHCHR, "Rule-of-law tools for post-conflict States: Maximizing the legacy of hybrid courts," 2008, <http://www.ohchr.org/documents/publications/hybridcourts.pdf> (accessed October 27, 2014), p. 3. See also Human Rights Watch, *World Report 2004 - Beyond the Hague: The Challenges of International Justice*, <http://www.hrw.org/legacy/wr2k4/>, pp. 195-196, 201-203.

⁹² See Agreement for the Special Court of Sierra Leone, 16 January 2002, arts. 1, 2; Special Court Agreement, 2002 (Ratification) Act, *Parliament of Sierra Leone*, No. 22, <http://www.rscsl.org/Documents/SCSL-ratificationamendmentact.pdf>, art. 11(2); Statute of the Special Court of Sierra Leone (SCSL Statute), January 16, 2002, arts. 1-5.

of the Extraordinary African Chambers (EAC), which was set up to try former Chadian President Hissène Habré and others most responsible for crimes committed during Habré's rule.⁹³ The State Court of Bosnia and Herzegovina took a slightly different approach, initially having a majority of international judges who were then phased out over time, while also being based within the local justice system.⁹⁴

The ad hoc tribunals, the International Criminal Tribunal for Yugoslavia, and the International Criminal Tribunal for Rwanda are international, not hybrid, tribunals as they do not provide for domestic participation.

In hybrid tribunals to date, government support to see their establishment has been essential. The main way the institution has been set up is through an agreement between the relevant state and an international entity, following a request by the relevant government.⁹⁵ The United Nations has often partnered with the government of the affected state, although the African Union partnered with Senegal in the EAC, and in the case of the State Court of Bosnia and Herzegovina, the government partnered with the High Representative for Bosnia and Herzegovina.⁹⁶ The Special Tribunal for Lebanon was unique in that it was ultimately established by a Security Council resolution, but was nevertheless

⁹³ Statute of the extraordinary African Chambers within the Senegalese judicial system, January 30, 2013, http://legal.au.int/en/sites/default/files/Agreement%20AU-Senegal%20establishing%20AEC-english_o.pdf (accessed November 14, 2014), arts. 11-13, 16(2), 17(1), 22. See also "Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal," May 21, 2014, Human Rights Watch news release, <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal>.

⁹⁴ Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina, December 1, 2004, http://www.genderjurisprudence.org/documents/bih/Statutes,_Rules,_and_Documents/Agreement_btwn_High_Rep_for_BiH_and_BiH_on_Esta_of_Registry.pdf (accessed November 14, 2014), arts. 3(2)(6); Human Rights Watch, *Bosnia and Herzegovina – Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, vol. 18, no. 1(D), February 2006, <http://www.hrw.org/sites/default/files/reports/ij0206webwcover.pdf>, pp. 5, 7.

⁹⁵ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the President of the Security Council, United Nations Security Council, S/2000/786, August 10, 2000; Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, A/51/93023 and S/1997/488, June 24, 1997; Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, S/2005/783, December 13, 2005. The exception has been where there is no functioning government, such as Kosovo or East Timor. OHCHR, "Rule-of-law tools for post-conflict States: Maximizing the legacy of hybrid courts," 2008, <http://www.ohchr.org/documents/publications/hybridcourts.pdf> (accessed October 27, 2014), p. 3.

⁹⁶ Agreement between the Government of the Republic of Senegal and the African Union on the establishment of Extraordinary African Chambers within the Senegalese judiciary, 22 August 2012, art. 1(1), (3); Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina, 1 December 2004, art. 1(1). [add link]

initiated as an agreement between the Lebanese government and the United Nations; the Security Council stepped in when the Lebanese legislature stalled in ratifying the agreement.⁹⁷

To date, most hybrids have been based in the country where the crimes were committed, but they need not be. The Special Tribunal for Lebanon, for example, is based in The Hague. The Special Court for Sierra Leone also conducted the trial of Charles Taylor in The Hague, although it conducted the rest of proceedings in Freetown, Sierra Leone's capital.⁹⁸

Funding has been a key issue for hybrid mechanisms. Most hybrid mechanisms have been set up to be funded by voluntary contributions by the international community, but it has proven immensely difficult to maintain adequate funding for operations, and court officials have had to devote massive amounts of time to fundraising.⁹⁹

Challenges for a Hybrid Mechanism for South Sudan

There are likely to be significant challenges for holding perpetrators of serious crimes committed in South Sudan to account before a hybrid judicial mechanism. The first challenge is whether the government is willing to work with an intergovernmental organization to ensure justice for the crimes. Indeed it is impossible to imagine how a mechanism composed of international and domestic participation would function in the absence of a significant degree of openness to its work on the part of South Sudanese officials. To date, officials have made statements about their willingness to promote justice.¹⁰⁰ However, as discussed above, political will to transform such statements into a more concrete commitment to fair, credible prosecutions of the crimes, potentially against government officials, is unclear.

⁹⁷ UN Security Council, Resolution 1757 (2007), S/RES/1757 (2007), para. 1(a).

⁹⁸ Agreement for the Special Court of Sierra Leone, January 16, 2002, art. 10; "Charles Taylor: Q&A On The Case of Prosecutor v. Charles Ghankay Taylor at the Special Court for Sierra Leone," Human Rights Watch, April 17, 2012, <http://www.hrw.org/news/2012/04/16/charles-taylor-qa-case-prosecutor-v-charles-ghankay-taylor-special-court-sierra-leon#7>.

⁹⁹ See President of the Special Court for Sierra Leone, "Eleventh Annual Report" 2013, <http://www.rscsl.org/Documents/AnRpt11.pdf> (accessed October 27, 2014), p. 44.

¹⁰⁰ See, for example, "President Salva Kiir Mayardit calls for an end to all ethnic violence," Republic of South Sudan press release, December 24, 2013.

The second challenge would be effectively ensuring the independence of the judiciary. As discussed above, attempted interference in the independence of the judiciary is a very serious problem in South Sudan.

One key method of promoting the actual and perceived independence of a hybrid mechanism is to have a majority of international judges on each bench (trial and appeals).¹⁰¹ The Special Court for Sierra Leone and the Special Tribunal for Lebanon have employed this approach.¹⁰² Meanwhile, the experience of the Extraordinary Chambers of the Courts of Cambodia (ECCC) has shown the risks of not having a majority of international judges hear cases, especially where the participating country has a history of interference with the judiciary. The ECCC has been plagued by concerns over the tribunal's independence from the government of Cambodia amid questionable action by the court's judges.¹⁰³

Any hybrid mechanism to try crimes committed in South Sudan should also be established outside of the existing South Sudanese domestic legal system. This would bolster the actual and perceived independence of the bench.

In addition, current deficiencies in South Sudanese law would impose untenable limitations to holding perpetrators to account. These include domestic laws that provide immunity to the president and legislators. The UN Office of the High Commissioner for Human Rights cited a similar consideration for the Special Court for Sierra Leone: “[t]he Special Court for Sierra Leone could not exist as part of the domestic legal system without raising complex questions relating to a prior amnesty law and the sovereign immunity of Charles Taylor.”¹⁰⁴

A third challenge is having investigators and prosecutors who will proactively pursue cases involving serious crimes, potentially including government officials, given the lack of independence and capacity of South Sudanese prosecutors. A substantial contingent of international investigators and prosecutors who not only have experience in investigating

¹⁰¹ See OHCHR, “Rule-of-law Tools for Post-Conflict States: Prosecution Initiatives,” 2006, pp. 33-34.

¹⁰² SCSL Statute, art. 12; STL statute, art. 8.

¹⁰³ See, for example, “Cambodia: Political Pressure Undermining Tribunal,” Human Rights Watch news release, July 22, 2009, <http://www.hrw.org/news/2009/07/22/cambodia-political-pressure-undermining-tribunal>; “Cambodia: Government interferes in Khmer Rouge Tribunal,” Human Rights Watch news release, December 6, 2006, <http://www.hrw.org/news/2006/12/04/cambodia-government-interferes-khmer-rouge-tribunal>; UN General Assembly, “Khmer Rouge trials: Report of the Secretary-General,” September 19, 2012, http://www.un.org/ga/search/view_doc.asp?symbol=A%2F67%2F380&Submit=Search&Lang=E (accessed November 11, 2014), paras. 54-55.

¹⁰⁴ OHCHR, “Rule-of-law tools for post-conflict States: Maximizing the legacy of hybrid courts,” p. 12.

and prosecuting serious crimes, but are also well versed in initiating and actively pursuing sensitive cases would be important.

A fourth challenge relates to location. The climate of insecurity that currently pervades much of South Sudan, including its capital, would create serious difficulties to ensuring trials could take place with adequate safety for staff. Some hybrid courts, such as the Special Court for Sierra Leone, have utilized UN peacekeepers to provide security.¹⁰⁵ This is unlikely to be adequate in South Sudan; in addition to concerns given past insecurity for members of the judiciary, members of South Sudan's legal community pointed out that civilians have faced attack even in the confines of UNMISS bases in South Sudan.¹⁰⁶

Members of the legal community and civil society offered various views as to where trials might be held. Several suggested it would be desirable and even possible to have proceedings in country, but recognized the security challenges.¹⁰⁷ Others suggested that war crimes trials would be better held outside the country given the current security situation, with one lawyer describing the situation as “fragile,” noting that “anything could ignite” insecurity.¹⁰⁸ Interlocutors cited locations within the region in which there are also South Sudanese diaspora, such as Kenya, Tanzania, and Rwanda. Other nearby countries were seen as less desirable choices given their relationship with the conflict, such as Uganda, whose army has been shoring up South Sudan's government defenses in the current conflict since December 2013.¹⁰⁹

A final challenge relates to time and resources. Establishing a hybrid mechanism is a major undertaking. Some hybrid mechanisms' operations have exceeded \$200 million in costs.¹¹⁰ Others are operating on a more limited budget, such as the Extraordinary African Chambers, which has a projected budget of just under \$10 million, but it is also projected

¹⁰⁵ UN Security Council, “Seventeenth report of the Secretary-General on UNAMSIL,” March 17, 2003, S/2003/321, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2003/321 (accessed November 17, 2014), para. 50.

¹⁰⁶ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with international expert, Juba, October 7, 2014.

¹⁰⁷ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

¹⁰⁸ Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

¹⁰⁹ Human Rights Watch interview with South Sudanese lawyer, Nairobi, October 6, 2014; Human Rights Watch interview with two South Sudanese lawyers, October 7, 2014.

¹¹⁰ For the costs of the Special Court, see Annual Reports of the President of the Special Court for Sierra Leone 1 to 11, available at <http://www.rscsl.org/documents.html> (accessed December 1, 2014).

to have a small number of trials, maybe even just one, and operates within the Senegalese justice system, which can be expected to reduce costs.¹¹¹ In addition, the total cost is unclear at this stage given it has just commenced proceedings.

A range of additional considerations that would be important for any hybrid mechanism are beyond the scope of this report. These include adequate arrangements for high-quality defense representation; protection and support for witnesses; communication about proceedings with affected populations (“outreach”); and engagement with victims. Any hybrid tribunal to try serious crimes committed in South Sudan should draw from best practice that has been accumulated in such areas, particularly by the Special Court for Sierra Leone and the State Court of Bosnia and Herzegovina.¹¹²

The ICC or Ad Hoc International Tribunal

Although its involvement could be expected to face political opposition, the ICC is an important option to consider for justice for serious crimes committed in South Sudan, especially if progress is not otherwise made in providing accountability for serious crimes.

The ICC was established in 2002 as a court of last resort to prosecute genocide, war crimes, and crimes against humanity where national authorities are unwilling or unable to prosecute domestically. The ICC focuses on cases involving those with higher-level responsibility for the crimes and tries only a few individuals in each situation it investigates.¹¹³ The ICC’s cases are ideally combined with additional cases before national or hybrid mechanisms, especially of alleged mid- or lower-level perpetrators, and there have been limited efforts to do so by some national courts.¹¹⁴

¹¹¹ See “Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal,” May 21, 2014.

¹¹² See, for example, Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone*, vol. 16, no.8(A), September 2004, <http://www.hrw.org/sites/default/files/reports/sierraleoneo904.pdf>, pp.29-31; Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials Before the State Court of Bosnia and Herzegovina*, March 2012, http://www.hrw.org/sites/default/files/reports/bosniao312_o.pdf.

¹¹³ ICC (Office of the Prosecutor), “Strategic Plan June 2012-2015,” October 11, 2013, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf (accessed November 3, 2014).

¹¹⁴ See, for example, Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division*, January 16, 2012, <http://www.hrw.org/reports/2012/01/16/justice-serious-crimes-national-courts>; “Côte d’Ivoire: ICC Seeking Militia Leader,” Human Rights Watch news release, October 3, 2013, <http://www.hrw.org/news/2013/10/03/cote-d-ivoire-icc-seeking-militia-leader>; “Libya: A Rebuff to the ICC,” Human Rights Watch news release, September 19, 2013, <http://www.hrw.org/news/2013/09/19/libya-rebuff-icc>.

Some members of South Sudan’s legal community and community leaders suggested that the ICC would be the best option to address crimes committed in South Sudan. They highlighted that those implicated in the crimes are high-level leaders. They suggested that, because of a lack of political will on the part of authorities, the only possibility to ensure trials of such individuals would be through the ICC.¹¹⁵

The ICC offers unique advantages as a standing institution; it can move more quickly to open investigation and pursue prosecutions in certain circumstances, and has a more predictable funding stream.¹¹⁶ As a permanent institution, its structure is less vulnerable to short-term efforts to block its work.

The ICC is by design completely distinct from the South Sudanese (and any other domestic) justice system. This is a bulwark for its independence, which, as discussed above, is a major concern with regard to national trials for serious crimes committed in South Sudan.

At the same time, the ICC is not a panacea—it does not have a police force to enforce its orders, it can be blocked from conducting on-site investigations, as is the case with its investigation into crimes committed in Darfur, Sudan, and its docket is overloaded. The court is currently investigating crimes committed in eight different country situations.¹¹⁷

South Sudan has not ratified the Rome Statute of the ICC. Accordingly, the situation in South Sudan could only come before the ICC if the government submitted a declaration voluntarily accepting the court’s jurisdiction under article 12(3) of the ICC’s Rome Statute, or if the UN Security Council referred the situation in South Sudan to the ICC.¹¹⁸

Although an ICC intervention would be a logical option given the challenges described above for a domestic or hybrid proceeding, the ICC could face serious political opposition in the region. Since 2009, the International Criminal Court has faced backlash from some African leaders and African Union officials. The backlash first manifested in the wake of the issuance of ICC arrest warrants for Sudanese President Omar al-Bashir for serious crimes committed in

¹¹⁵ Human Rights Watch interview with South Sudanese lawyer, October 6, 2014; Human Rights Watch interview with South Sudanese lawyer, Juba, October 8, 2014.

¹¹⁶ Rome Statute, art. 115.

¹¹⁷ These are Central African Republic, Côte d’Ivoire, Democratic Republic of Congo, Libya, Kenya, Mali, Sudan (Darfur), and Uganda.

¹¹⁸ Rome Statute, arts. 12(3), 13.

Darfur. Attacks on the ICC from African leaders intensified significantly in 2013, however, after ICC suspects for serious crimes committed in Kenya were elected as president and as deputy president in that country. Among member states of the Intergovernmental Authority on Development, Uganda and Ethiopia have rallied behind Kenya's assault on the court. South Sudan's President Kiir also threw his weight behind the Kenyan president and expressed opposition to the court ahead of the June 2013 AU summit.¹¹⁹

While many African governments remain supportive of the ICC, few have challenged the attacks on the court.¹²⁰ This has fueled perceptions that Africa has turned against the court and made it more difficult for the ICC to conduct its operations effectively.

The Security Council has yet to seriously take up the question of possible referral of South Sudan. Some council members have expressed support for consideration of referral during various meetings on South Sudan.¹²¹ Others have suggested in private discussions that lack of support for the court among states in the Intergovernmental Development Authority would be a significant factor cutting against referral.¹²²

South Sudan should in any event ratify the court's statute without delay as a sign of its commitment to justice for serious crimes and to give the ICC jurisdiction over serious crimes committed in South Sudan should they occur in the future.¹²³

Some international experts have raised the possibility of repurposing the mandate of the International Criminal Tribunal for Rwanda (ICTR) to try serious crimes committed in South Sudan.¹²⁴ Such an approach is an awkward fit. The ICTR has held a highly specific limited mandate to try crimes committed in Rwanda, trying these crimes for two decades and now

¹¹⁹ See Hannah McNeish, "South Sudan's President says 'never' to ICC," Voice of America, May 23, 2013, <http://www.voanews.com/content/south-sudan-president-says-never-to-icc/1667226.html> (accessed November 11, 2014); "South Sudan's Kiir backs Kenya's Uhuru against ICC charges," *Sudan Tribune*, May 24, 2013, <http://www.sudantribune.com/spip.php?article46676> (accessed November 11, 2014).

¹²⁰ For some discussion of these issues, see Letter to Foreign Ministers on International Justice in Africa in Advance of AU Summit, May 14, 2013, <http://www.hrw.org/news/2013/05/14/letter-foreign-ministers-international-justice-africa-advance-au-summit>.

¹²¹ During a May 2014 meeting of the Security Council, Argentina, Australia, France, Jordan, Lithuania, and Luxembourg discussed to varying degrees the need to consider referral of South Sudan to the ICC. UN Security Council, 7168th meeting, Friday, May 2, 2014, S/PV.7168, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7168 (accessed November 11, 2014).

¹²² Human Rights Watch meetings with diplomats of Security Council members, New York, September 2014.

¹²³ Rome Statute art. 126(2) (The statute enters into force "on the first day of the month after the 60th day following the deposit by such State of the instrument of ratification, acceptance, approval or accession.").

¹²⁴ Telephone conversation with international expert, New York, November 2014.

completing this mandate. Such an approach could also be expected to face opposition by some Security Council members who have opposed the costs of the ad hoc tribunals, which are funded by UN assessed contributions.

At the same time, a hybrid court could use the ICTR's facilities without falling under its legal authority. As discussed above, the Special Court for Sierra Leone conducted the trial of Charles Taylor at the premises of the ICC and the Special Tribunal for Lebanon after it moved the trial away from the court's seat in Sierra Leone over security concerns.

Establishment of a different ad hoc international court focused on crimes committed in South Sudan is also theoretically possible, but would present a range of political, financial, and logistical difficulties. Since the ICC's creation, the trend has been against these types of courts due to their cost and the inefficiency of creating a new institution from scratch when the ICC now exists.

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ENDING THE ERA OF INJUSTICE

Advancing Prosecutions for Serious Crimes Committed in South Sudan

On December 15, 2013, a political dispute between President Salva Kiir and his former vice president, Riek Machar, triggered a war in South Sudan. The war has been characterized by shocking brutality, including gruesome massacres of civilians and attacks on individuals in their homes, churches, and hospitals on the basis of ethnicity.

Fair, credible trials of serious crimes committed in violation of international law during the conflict are a crucial component to long-term peace and stability for South Sudan and lack of justice for earlier abuses has emboldened perpetrators in the current conflict.

This report—which draws on interviews with South Sudanese judges, prosecutors, private lawyers, government officials, civil society, UN staff, and foreign diplomats in South Sudan’s capital, Juba—details the imperative for justice and presents recommendations to ensure criminal accountability. Deficits in the country’s justice system and apparent lack of willingness by domestic authorities mean that a purely domestic initiative to try alleged perpetrators is not realistic in the near term.

The possibility of a hybrid judicial mechanism has gained currency in international and domestic policy debates, but also can be expected to face significant challenges. To be effective, a hybrid would need to be distinct from the domestic system, likely located outside of South Sudan, and with a majority of international judges and a robust contingent of international prosecutors and investigators. The International Criminal Court (ICC) is also an important option, although opposition to involving the ICC can be anticipated.

Ending the Era of Injustice calls on the African Union Commission of Inquiry on South Sudan to show its commitment to victims by recommending fair, credible prosecutions. The International Governmental Authority on Development, the United Nations Security Council, the United States, and the European Union, should also press for criminal accountability.



Bodies of civilians, including 11 women killed in January by forces opposed to President Kiir, lie in body bags at the St Andrews Episcopal Church compound in Bor town, Jonglei State.

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