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Justice for War Crimes in South Sudan

Questions and Answers

Since South Sudan's conflict began in December 2013, the population has been plagued by brutal violations and abuses committed by government and opposition forces. Widespread impunity for the crimes has fueled further violence. This questions-and-answers document provides information and analysis on accountability mechanisms agreed to by the parties to the conflict and the role of the African Union to establish one of those mechanisms, the Hybrid Court for South Sudan.

1. [What violations and abuses have been committed in South Sudan?](#)
2. [What accountability mechanisms are provided for in South Sudan's peace agreements to address the serious crimes?](#)
3. [What is the mandate and path to the creation of the Commission for Truth, Healing and Reconciliation?](#)
4. [What is the mandate and path to the creation of the Hybrid Court for South Sudan?](#)
5. [What is the mandate and the path to the creation of the Compensation and Reparations Authority?](#)
6. [What is the relationship between the three accountability mechanisms provided under the peace agreements, and can they operate at the same time?](#)
7. [Why have organizations called for the unilateral establishment of the Hybrid Court for South Sudan?](#)
8. [Could the International Criminal Court \(ICC\) open an investigation into South Sudan?](#)
9. [How can criminal justice contribute to long-term stability in South Sudan?](#)
10. [Do customary courts have a role to play in providing justice and healing for abuses?](#)
11. [What is the next step for the AU on accountability mechanisms for South Sudan?](#)

1. What violations and abuses have been committed in South Sudan?

In December 2013, political conflict within the ruling Sudan People's Liberation Movement (SPLM) led to a violent clash between government troops loyal to President Salva Kiir, a Dinka, and those of the then-vice president, Dr. Riek Machar, a Nuer. Within hours, the mainly Dinka government troops carried out large-scale targeted killings, detentions, and torture of mainly Nuer civilians around Juba, the capital. In the following months, fighting spread to Bor, Bentiu, Malakal, and across the Greater Upper Nile region, with civilians targeted by all sides based on their ethnicity and perceived political allegiance.

Machar's forces later became the Sudan People's Liberation Movement-In Opposition (SPLM-IO) and diversified to include other ethnic groups. Soldiers from armed opposition groups and government forces and their affiliated militia [committed](#) war crimes and possibly crimes against humanity. All parties to the conflict used abusive tactics, targeting and killing civilians, including the elderly, people with disabilities, women, and children in their homes, in hospitals, and in United Nations compounds. The parties also attacked homes, hospitals, markets, and humanitarian aid supplies, leaving towns and swaths of rural areas emptied and devastated. The conflict displaced millions of people, forcing hundreds of thousands to seek shelter at UN bases.

In late 2015, after the parties signed a peace deal in August, the conflict spread to the Equatoria region as new political and rebel groups formed with varied grievances, while government forces carried out deadly counterinsurgency campaigns in regions [south](#) and [west](#) of the capital. In February 2016, government soldiers and allied fighters attacked civilians sheltering inside the [UN bases in Malakal](#). In July of that year, fighting once again erupted in Juba and [government forces attacked, killed, and raped civilians](#), including displaced people at the UN base and foreign aid workers at the Terrain compound. The violence in Juba was followed in other parts of the country with forces from all sides committing abuses against civilians in parts of Upper Nile, Unity, Wau, and parts of Western and Central Equatoria.

The signing of the 2018 peace deal curtailed fighting between those that had signed the agreement. But sporadic clashes have continued in the [western](#) and [southern](#) parts of the country with groups that didn't sign, with all sides committing abuses against civilians. While the large-scale conflict has decreased over time, intercommunal fighting in Lakes, Jonglei, and Warrap has intensified since the beginning of the year and has displaced thousands of people and included abuses such as killings and sexual violence. Senior military and political officials have been implicated in taking sides and fueling the intercommunal fighting in Jonglei and Greater Pibor administrative area.

The fighting has created a humanitarian crisis and has led to the displacement of close to [100,000](#) civilians. Persistent low-level fighting in the southern and central parts of the

Equatoria region continues to displace civilians. Fighters on all sides have destroyed villages, abducted women and children, and committed other abuses against civilians.

2. What accountability mechanisms are provided for in South Sudan's peace agreements to address the serious crimes?

Both agreements to end the conflict in South Sudan – the [2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan](#) (ARCSS) and the [2018 Revitalized ARCSS](#) – provide for three important mechanisms to deal with past abuses in South Sudan: the Commission for Truth, Healing and Reconciliation (CTRH), the Hybrid Court for South Sudan (HCSS), and the Compensation and Reparations Authority (CRA).

Each has a distinct mandate and function in supporting South Sudanese who have suffered atrocities during the conflict.

3. What is the mandate and path to the creation of the Commission for Truth, Healing and Reconciliation?

The Commission for Truth, Healing and Reconciliation is mandated to “inquire into all aspects of human rights violations and abuses, breaches of the rule of law and excessive abuses of power” committed by all state and non-state actors. The commission is further mandated to “investigate, document and report on the course and causes of conflict” and “recommend processes for the full enjoyment by victims of the right to remedy, including by suggesting measures for reparations and compensation.”

The commission is to be established by the transitional government – the Revitalised Transitional Government of National Unity (RTGoNU): “[t]he RTGoNU shall establish the CTRH as a critical part of the peace building process in South Sudan, to spearhead efforts to address the legacy of conflicts, promote peace, national reconciliation and healing.”

South Sudanese authorities have taken some steps toward establishing the commission. Prior to the 2018 revitalized peace agreement, they established a [technical committee](#) on the establishment of the commission and worked with the UN Development Program to hold [consultations](#) on developing it with support from the Office of the UN High Commissioner for Human Rights and the Netherlands. In 2018, the technical committee began public [consultations](#) on the commission, although the results have not been made public and the Commission on Human Rights in South Sudan indicated the consultations were too “[limited.](#)”

The legislation to create the commission remains outstanding, however.

4. What is the mandate and path to the creation of the Hybrid Court for South Sudan?

The revitalized peace agreement provides: “There shall be established an independent hybrid judicial court, the Hybrid Court for South Sudan (HCSS). The Court shall be established by the African Union Commission (AUC) to investigate and where necessary to prosecute individuals bearing responsibility for violations of international law and/or South Sudanese law, committed from 15th December 2013 through the end of the Transitional Period.”

The agreement provides that the AUC should provide “broad guidelines related to including the location of the HCSS, its infrastructure, funding mechanisms, enforcement mechanism, the applicable jurisprudence, number and composition of judges, privileges and immunities of Court personnel or any other related matters.”

The agreement provides that South Sudan should also pass legislation for the court’s establishment alongside legislation on the Commission for Truth, Reconciliation and Healing and the Compensation and Reparations Authority.

The court is designed to be an African judicial mechanism with South Sudanese and other African judges with a “majority of judges on all panels, whether trial or appellate ... composed of judges from African states other than the Republic of South Sudan.” Prosecutors are to be practitioners from African states other than South Sudan.

The court’s judicial selection procedure is under the exclusive authority of the AU Commission: the AUC chairperson will appoint all judges, whether they are South Sudanese or international. The chairperson will also appoint prosecutors and defense counsels. African countries other than South Sudan will appoint the court’s chief administrator, the registrar.

Crimes under the court’s mandate are genocide, war crimes and crimes against humanity, other serious crimes under international law, and South Sudan’s “relevant laws... including gender based crimes and sexual violence.” The court is to be distinct from South Sudan’s ordinary courts and has primacy over them.

The agreement provides that an individual’s role as a government or elected official is not a bar to being prosecuted. And individuals indicted or convicted by the court cannot participate in the government.

The court has yet to be established, which is further discussed in question 7.

5. What is the mandate and the path to the creation of the Compensation and Reparations Authority?

The 2018 peace agreement provides that the “[t]he RTGONU, in recognition of the destructive impact of the conflict to the citizens of South Sudan, shall establish within six (6) months from the commencement of the Transitional Period, a Compensation and Reparation Fund, CRF and Compensation and Reparation Authority, CRA to administer the CRF.” The aim of the authority is to “provide material and financial support to citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods.”

The authority is the least developed of the mechanisms under the agreement. No progress has been made to establish it. President Kiir in 2015 expressed [concerns](#) about the authority as “inappropriate, unprecedented” as well as “susceptible to abuse because the whole country would qualify.”

The Commission on Human Rights in South Sudan in its most recent [report](#), in March 2020, said that “no effort has been made to conduct any consultations whatsoever on the CRA. While the Commission is aware that the Government has had concerns about the monetary cost of reparations, it calls upon the Government to set aside at least 1 per cent of oil revenues for reparations.”

6. What is the relationship between the three accountability mechanisms provided under the peace agreements, and can they operate at the same time?

The effective and complementary operations of the court, the truth commission, and the compensation authority can give South Sudan and its people increased chances of achieving justice and securing a society respectful of human rights. They each have different roles to play, and they can proceed alongside one another, while all should take account of the [interests](#) of victims and maximize their meaningful participation in designing and carrying out their mandates. Additional trials before the South Sudan’s domestic courts can also complement these processes, with reforms to the system to strengthen its capacity for investigation and prosecution of grave crimes.

The pursuit of criminal trials, truth telling, and compensation efforts in parallel in South Sudan is supported by the revitalized peace agreement. The agreement does not provide for different operating periods, but instead that they, “[s]hall independently promote the common objective of facilitating truth, reconciliation and healing, compensation and justice.” Local stakeholders also have supported the mechanisms moving forward [in tandem](#), albeit with proper [coordination](#) between the institutions.

Broader accountability initiatives, such as reparations for victims, truth telling, institutional reforms that contribute to guarantees that crimes will not recur, and other

measures to promote healing, are essential to delivering on victims' rights to [truth](#) and a [remedy](#). Truth telling can [shed light](#) on the nature and extent of abuses, document dynamics that gave rise to violence, and make recommendations to avoid repetition of past violations. It can also empower individuals and communities to weigh in on these issues. [Reparations](#) can help victims access compensation or other remedies, such as physical and psychological rehabilitation support.

However, broader accountability initiatives are not an alternative or a substitute for criminal investigation and prosecution. International law [requires](#) the 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. Major international treaties that South Sudan has signed on to – the Convention against Torture and the Geneva Conventions – provide that those allegedly responsible for serious crimes must be fairly prosecuted.

Delaying trials often leads to problems that could make justice even more difficult to achieve or the sidelining of trials entirely. Memories fade over time, witnesses move or pass away, documentary or physical evidence can be lost, and suspects may no longer be available for prosecution.

A strategy that provides for “justice later” often [yields](#) little in terms of trials, as reflected by the experiences in Afghanistan, Burundi, the Democratic Republic of Congo, Indonesia, and other countries. In South Africa, the envisioned plan that individuals who did not cooperate with the country's truth commission would be prosecuted did not [materialize](#) and victims are still [seeking justice for crimes](#).

This has been a major source of frustration for victims and does not build confidence in post-conflict regimes. Ultimately, the failure to follow through on justice measures may undermine a hard-won peace.

7. Why have organizations called for the unilateral establishment of the Hybrid Court for South Sudan?

After a slow start following the 2015 peace agreement, the South Sudan government seemed to make substantial progress in collaboration with the AU Commission towards establishing the court. In mid-2017, the AU held two sets of consultations with the South Sudanese Justice Ministry, in [Juba](#) and then [Addis Ababa](#), producing a draft statute for the court and a memorandum of understanding between the AU and the South Sudanese government on the court.

Both documents were submitted to the South Sudan Council of Ministers in August, after which the process began to stall. On December 13, 2017, the Council of Ministers

reportedly approved the hybrid court statute and the government's memorandum of understanding. But since then, no further information has been available.

The establishment of the court has continued to lag as the government of South Sudan failed to prioritize processes that would ensure accountability. In 2019 the government hired a lobbying firm to work to [block](#) the creation of the court, although the contract was later revised. There also has been a [lack](#) of communication and shared understanding of next steps between the AU and South Sudan.

In 2019, the AU Commission took new steps toward establishing the court. The AU Office of the Legal Counsel [convened](#) expert consultations in December 2019 in Dar es Salaam about the establishment of the court and reviewed the court's legal instruments.

In February 2020, South Sudanese authorities started to form a unity government, appointing vice presidents and a Council of Ministers, and in June appointed some state governors. In April, the Intergovernmental Authority on Development directed the parties to reconstitute the Transitional National Legislative Assembly within 10 days. However, this is yet to be done and has prevented key legislative reforms, including legislation on any of the accountability mechanisms.

The unity government should have already sought assistance from the AU, UN, and the African Commission on Human and Peoples' Rights to design, create, and facilitate the operation of the envisioned accountability mechanisms according to the implementation schedule for the revitalized peace agreement. According to the latest schedule, South Sudanese authorities should have passed legislation on the accountability mechanisms in May 2020, paving the way for the AU Commission to establish the court in August with the government's concurrence.

In the face of years of delay during which the South Sudanese authorities have failed in their obligations, we believe the AU has no choice but [to act](#) unilaterally to establish the court. While progress on the peace agreement may be slowed in part due to Covid-19, stalling and selective implementation of the 2018 agreement pre-date the pandemic.

One member of South Sudan's Civil Society Forum told Human Rights Watch on August 12, 2020: "The establishment of the Hybrid Court for South Sudan was not achieved in the 2015 peace deal and the process is behind schedule for the revitalized agreement, indicating that the government does not take it as a priority. The AU should act unilaterally on this matter because the victims need justice."

Unilateral establishment of the court would be consistent with the peace agreements, which provide in Chapter V that the court "shall be established by the African Union Commission," as opposed to the government, although domestic legislation on the court is also envisioned. Under the peace agreements, the AU Commission chairperson

also has an exclusive role in determining the location of the court and appointing judges and other staff.

Local stakeholders have [supported](#) the AU Commission moving ahead to establish the court. The Commission on Human Rights in South Sudan supported this approach in its March 2020 [report](#), recommending the AU Commission to: “Make contingency preparations for unilaterally establishing a hybrid court, in line with the decisions made by the Peace and Security Council, in the event that the Government of South Sudan fails to meet the deadline to establish the Court.” A 2015 AU Peace and Security Council [communique](#) supports the AU Commission acting to establish the court: the “Council requests the Chairperson of the Commission to take all necessary steps towards the establishment of the HCSS.”

Unilateral establishment is also in line with the [authority](#) of the AU, through its Peace and Security Council, to “undertake peacemaking and peace-building functions to resolve conflicts where they have occurred.” In addition, it is supported by the African Union’s [Transitional Justice Policy](#) which provides: “Where national courts lack capacity and the confidence of affected communities, steps should be taken to use special courts, extraordinary chambers or hybrid courts that bring in the required capacity and legitimacy to ensure the support and confidence of affected members of society, including victims on all sides of the conflict.”

Some observers note that cooperation and participation in the court by South Sudanese authorities is necessary to its effective functioning. Their [cooperation](#) would undoubtedly contribute to the court’s operations. Conducting investigations and securing the surrender of accused by the court are likely to be far more complex and difficult without their cooperation, for example.

Waiting for the government to partner with the AU on the creation of the court or to prosecute the crimes domestically, however, seems poised to leave South Sudanese people with no chance to see those responsible for the crimes held to account given inadequacies in the domestic justice system. The AU’s commitment to reject impunity under its Constitutive Act and the African Charter on Human and Peoples’ Rights’ recognition of justice as an essential objective of African people support the AU’s establishment of the court.

In addition, nothing precludes South Sudan from reversing course to collaborate on the court as it becomes operational. Fair, credible trials by the court can also offer important [lessons](#) for the domestic courts in South Sudan on holding those responsible for atrocity crimes to account. The 2018 agreement provides that the court should “strive to leave a permanent legacy” in South Sudan.

The recommendations of the AU's own Commission of Inquiry on South Sudan, which concluded in its 2014 [final report](#) that war crimes and crimes against humanity had been committed, underscore the need for a hybrid court:

“Given the expressed view by many of the respondents that they had little or no confidence in the national ... system to deliver accountability ..., and the current capacity of the national criminal justice system, the Commission recommends an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account. Such a mechanism should include South Sudanese judges and lawyers.”

8. Could the International Criminal Court (ICC) open an investigation into South Sudan?

The ICC is the [global court](#) of last resort to try genocide, war crimes, and crimes against humanity. The court can act where states are unwilling or unable to prosecute serious international crimes.

As South Sudan is not an ICC member, the ICC could only open an investigation into crimes committed in South Sudan if the UN Security Council [referred](#) the situation to the court or the government of South Sudan requested the ICC to become involved.

In recent years, political dynamics have hindered initiatives for other situations – [Syria and Myanmar](#) – in need of ICC investigation to be referred to the court.

Council members should act on the basis of [principle](#) to see that the ICC can deliver justice where the worst crimes are committed with impunity. If a credible, fair, and independent hybrid court does not progress, the option of the International Criminal Court should be pursued.

9. How can criminal justice contribute to long-term stability in South Sudan?

Trials signal that atrocity crimes will not be tolerated, thereby helping to deter future violations and bring redress to victims and their families. Trials also build confidence in the rule of law, which provides one important ingredient to promoting long-term stability. By contrast, experience in various countries over more than two decades bears out that the lack of credible prosecution of atrocity crimes often [fosters](#) further abuses.

Lack of justice for past violations in South Sudan has [fueled](#) crimes in the current conflict. Gruesome reprisal killings of civilians, often based on 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.

South Sudan has a history of de facto blanket amnesties, including for abuses during the North-South conflict, prior to the country's independence. As exemplified by the power sharing matrix in South Sudan peace deals, violence has been a path to promotion and power for individuals. Unaddressed abuses in conflict and even in relative peacetime, following inter-communal violence, has resulted in anger and ethnic divisions that undoubtedly helped foster the brutality that the South Sudanese have endured in the past year.

The domestic system generally [lacks capacity](#), and has largely [failed](#) to prosecute atrocity crimes, which may be complex and require specialized expertise. It also lacks independence and has faced interference from political leaders and security forces.

While there have been some limited cases involving abuses, they have failed to capture the full nature and extent of the crimes, have often taken place in [court martials](#) with concerns related to [witness protection](#), and limited civilian participation. And, the cases have taken place in the wake of intensive international pressure, such as the Terrain case, and still had [deficiencies](#).

A South Sudanese organization, Community for Empowerment and Progress Organization, [said](#): "From the citizens' perspectives, healing and reconciliation without enforcing justice and accountability is meaningless because impunity is appreciated and not condemned... Delaying justice and accountability is a clear legitimizing of revenge as a strategy of preventing impunity Communities of South Sudan have undergone numerous healing and reconciliation event[s] and [the] same communities have revenged after [a] short period. It's time to use justice and accountability as factor for deterring future return to violence."

10. Do customary courts have a role to play in providing justice and healing for abuses?

Customary courts in South Sudan have played an [important](#) role in promoting truth and justice and fostering peace among communities in rural areas and towns, and may be able to complement criminal prosecutions, truth telling, and reparations in promoting social healing in the country.

The jurisdiction of customary courts, under the Local Government Act of 2009, is limited to "[customary disputes](#)." In practice, however, they apply statutory law and hear and determine most criminal cases including theft, assault, rape, and homicide primarily because the customary courts are often more accessible, or litigants prefer them to formal statutory courts. In UN "protection of civilians" sites, customary authorities continue to play a key role in mediating disputes among residents and have in some cases [addressed](#) conflict-related abuses.

But customary courts lack [capacity](#) to determine responsibility for crimes of the extent and nature committed during the conflict since December 2013. Traditional leaders have also faced threats and [harassment](#) from local authorities, government, and security officials, making it difficult to enforce decisions. Additionally, customary law often does not comply with [human rights](#) or [constitutional principles](#). For instance, decisions can [discriminate](#) against women and youth.

In addition, the 2018 revitalized peace agreement envisages a complementary role for customary justice in dispute resolution in the mandate of the Commission for Truth, Reconciliation and Healing.

11. What is the next step for the AU on accountability mechanisms for South Sudan?

The AU Commission has a unique role on accountability for international crimes committed in South Sudan relating to the Hybrid Court for South Sudan, as the 2018 peace agreement provides an express mandate for the AU Commission in creating the court, which is different from the Commission for Truth, Reconciliation and Healing and the Compensation and Reparations Authority.

The AU Peace and Security Council is expected to have a session on South Sudan to discuss the implementation of the Revitalized ARCSS and the council's April 9 [communiqué](#) on the situation in South Sudan, although a date has not been set.

The council should use the opportunity to unequivocally direct the AU Commission to proceed with establishing the HCSS after so many delays by the South Sudanese authorities on the court. Action by the council would not only demonstrate the AU's commitment to rejecting impunity but would also be implementing its 2020 theme, "Silencing the Guns."

Concrete steps in the formation of the court that can be undertaken unilaterally by the AU Commission include:

- Adoption of the statute and the rules of procedure;
- Appointment of the court's principle officials, including chief investigator, chief prosecutor, and judges;
- Staffing of the court's registry, including experts in witness protection, defense representation, and outreach; and
- Decision on location of the tribunal.

The AU Commission and its Office of Legal Counsel (OLC) has notable experience with these types of efforts, particularly in its work on the [Extraordinary African Chambers](#) which tried Hissène Habré in Senegal. Such steps would build on the efforts of the OLC to date on the HCSS.

The AU Peace and Security Council should also press South Sudanese authorities to urgently reconstitute the Transitional National Legislative Assembly and move ahead with legislation and action in support of the creation of the commission and the authority, building on previous [calls](#) toward this objective.