

NOTES

HOPE FOR ACCOUNTABILITY: THE HYBRID COURT OF SOUTH SUDAN

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ABSTRACT

In January of 2021, the government of South Sudan indicated its intent to establish a hybrid war crimes tribunal, the Hybrid Court of South Sudan (“HCSS”), to prosecute human rights violations that occurred during the civil war that began in 2013. With this announcement came a renewed hope of justice, accountability, and peace for the South Sudanese people. However, given the government’s previous hostility toward the HCSS, prior efforts to delay its establishment, and the fact that it may well be implicated in many of the Court’s investigations and cases, there is also a justifiable skepticism surrounding the creation of the Court. Indeed, establishing and operationalizing the HCSS is sure to present immense challenges, including the government’s lack of political will to prosecute, difficulties surrounding victim participation and protection, and funding. However, this Note argues that it is precisely because of these challenges that a hybrid court is the mechanism most suited to this circumstance, and that the HCSS is South Sudan’s best hope for achieving justice and accountability. This Note examines the many advantages of the hybrid court paradigm, including its flexibility, increased legitimacy, capacity building, and norm diffusion, and analyzes how these benefits could be leveraged in the South Sudanese context. This Note concludes by proposing several specific recommendations for establishing an effective, independent hybrid court capable of bringing justice and accountability to the people of South Sudan and ending the cycle of violence and impunity.

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I. INTRODUCTION

On January 29, 2021, the government of South Sudan finally signaled its intent to establish a hybrid war crimes tribunal by directing the Ministry of Justice to take the necessary steps to form the Court.¹ The Hybrid Court for South Sudan (“HCSS”) was first conceived in 2015 as part of the historic peace deal known as the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS).² The ARCSS provided for a range of ambitious transitional justice mechanisms, including the establishment of the HCSS, a truth and reconciliation mechanism, and a reparations authority.³ However, for the past five and a half years, the HCSS has seemed a distant dream. Despite agreeing to the HCSS, the government of South Sudan has made no

1. *South Sudan: UN rights commission welcomes ‘first steps’ towards transitional justice institutions*, UN NEWS (Feb. 1, 2021), <https://news.un.org/en/story/2021/02/1083492>.

2. Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa–Eth., Ch. V, Aug. 17, 2015, IGAD [hereinafter ARCSS 2015]. In 2016, this agreement fell through when fighting broke out between government factions. The peace agreement, including the HCSS, was reaffirmed in the 2018 Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS).

3. *Id.*

secret of its contempt for the Court⁴ and has made brazen attempts to obstruct its establishment.⁵ Moreover, through its domestic judicial system, the South Sudanese government has perpetuated a culture of impunity, failing to undertake serious investigations and prosecutions of those involved in human rights abuses committed in the context of the conflict.⁶ Given the government's reticence to hold perpetrators accountable and its antipathy towards attempts to launch the HCSS, many in the international community lost faith in the Sudanese government and called on the African Union ("AU") to unilaterally establish a court to hear international crimes committed in South Sudan.⁷

Thus, the government's recent actions have renewed hope for many in the region who believe that fair, credible trials are necessary to achieve lasting peace and healing for victims.⁸ The Court will bring South Sudanese nationals and African experts together to prosecute individuals responsible for violations of both international law and South Sudanese law.⁹ The HCSS promises to provide many of the benefits typical of hybrid courts, including increased flexibility, legitimacy, capacity building, and norm diffusion.¹⁰ Most importantly, the HCSS represents an important opportunity to bring justice and accountability to the people of South Sudan and advance peace and stability within the country and region.

However, designing and implementing the HCSS will be no easy task. With a government that has been openly hostile toward the HCSS, has actively sought to delay its establishment, and may well be implicated in many of the court's investigations and cases, the way forward is unclear and raises difficult questions. Does the government's sudden

4. Dimo Silva Aurelio, *South Sudan Government Objects to War Crimes Court*, VOICE OF AMERICA (Oct. 3, 2018), <https://www.voaafrica.com/a/south-sudan-government-objects-war-crimes-court/4598220.html>; Salva Kiir & Riek Machar, *South Sudan Needs Truth, not Trials*, N.Y. TIMES (June 7, 2016), www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html.

5. Robbie Gramer, *Former U.S. Diplomats Lobby to Stop South Sudan War Crimes Court*, FOREIGN POL'Y (Apr. 19, 2019), <https://foreignpolicy.com/2019/04/29/former-us-diplomats-lobby-to-stop-south-sudan-war-crimes-court-salva-kiir-lobbying-contract-africa-peace-deal-riek-machar/>.

6. Amnesty Int'l, "Do You Think We Will Prosecute Ourselves?" No Prospects for Accountability in South Sudan, AI Index AFR 65/1105/2019 13 (2019) [hereinafter Amnesty Report].

7. Hum. Rts. Watch [HRW], *Webinar Report: The Establishment of the African Union Hybrid Court for South Sudan* (Aug. 25, 2020), https://www.hrw.org/sites/default/files/media_2020/10/Webinar%20Report%20-%20Establishment%20of%20the%20AU%20Hybrid%20Court%20for%20South%20Sudan.pdf.

8. Nyagoah Tut Pur, *A Glimmer of Hope for South Sudan's Victims*, HRW (Jan. 31, 2021), <https://www.hrw.org/news/2021/01/31/glimmer-hope-south-sudans-victims>.

9. ARCSS 2015, *supra* note 2.

10. Laura Dickinson, *The Promise of Hybrid Tribunals*, 97 AM. J. INT'L L. 295 (2003).

decision to embrace the HCSS reflect a genuine intent to provide justice or merely a desire to control and undermine the process? Under these circumstances, how can the HCSS fulfill the promise of justice and accountability? Can an effective, independent court be realized?

This author believes that it is precisely because of these challenges that a hybrid court is the mechanism most suited to this context. The flexibility and adaptability of the hybrid paradigm will allow the creators of the court to design a mechanism tailored to addressing these challenges. It further allows international and regional actors, such as the AU, to have a heavy hand in the process, strengthening the Court's legitimacy and independence. Moreover, the inclusion of South Sudanese laws and people and the sanctioning of the national government will make it harder for the government to paint as politically motivated prosecutions. This paper will examine the prospects and challenges of the forthcoming Hybrid Court for South Sudan and offer recommendations for creating an effective, legitimate body that is fit to fulfill its lofty purpose. In particular, it will assess lessons learned from past hybrid courts, the AU's role in the establishment and operationalization of the HCSS, and the internal organization of the Court itself.

Part II of the paper comprises a historical background of the conflict and an analysis of the peace process to date. Part III gives a theoretical background on the hybrid court paradigm and explores the mandate and legal framework of the HCSS as laid out in Chapter Five of the peace agreement. Part IV focuses on the challenges of operationalizing the court, including the government's lack of political will and issues surrounding independence, funding, and victim participation. Finally, Part V offers recommendations for creating an effective hybrid court, focusing on the AU's role in the court and lessons learned from previous hybrid courts.

II. HISTORICAL CONTEXT TO PEACE AND CONFLICT IN SOUTH SUDAN

The people of South Sudan have suffered from nearly constant war for over sixty years, first in their struggle for independence from the north and more recently in a brutal civil war between political and ethnic factions.¹¹ Issues of colonial oppression, religious animosity, resource struggles, and ethnic tension underlie this complex and protracted conflict. In conjunction with this relentless state of war, there has been a complete lack of justice and accountability for countless atrocities and human rights abuses visited on the South Sudanese

11. ØYSTEIN ROLANDSEN & M. W. DALY, A HISTORY OF SOUTH SUDAN (2016).

people.¹² From its history of failed peace attempts,¹³ it is evident that South Sudan's refusal to address these crimes has perpetuated a culture of impunity and fed the endless cycle of violence.

A. *Post-Colonialism & The North-South Struggle*

Prior to its independence in 2011, South Sudan suffered decades of war in its struggle for liberation from brutal oppression of the primarily Muslim, Arab northern provinces. This conflict is widely recognized as the result of British colonial rule.¹⁴ The British government took control of Sudan in 1899 and implemented a "divide and rule" strategy, originally administering the northern and southern regions separately.¹⁵ Under this policy, the Northern Sudanese provinces, which were overwhelmingly Arab and Muslim, became far more politically and economically developed than the Southern Sudanese provinces, which consisted of numerous African ethnic groups that practiced a mix of Christian and indigenous religions.¹⁶ The British also placed members of the northern ethnic groups in positions of power and authority and encouraged Islamization, further contributing to the marginalization and underdevelopment of the south.¹⁷ As a result, the British established a social hierarchy rooted in fear, distrust, and strife among the peoples of South Sudan.¹⁸ When the British abdicated power in 1956, the underdeveloped and politically disorganized South was unprepared to participate in the newly independent Sudanese government.¹⁹ This power imbalance resulted in further marginalization of the south, ultimately triggering two long and bloody civil wars.²⁰

Violence broke out in 1955, one year before Sudan was officially liberated from colonial rule, but the civil war began in earnest in 1963.²¹ Due to a lack of infrastructure, the south launched a guerilla-style insurgency, with rebel militias divided into factions largely drawn

12. Amnesty Report, *supra* note 6, at 5.

13. See ROLANDSEN & DALY, *supra* note 11.

14. See generally *id.*; Kim Searcy, *Sudan in Crisis*, OSU ORIGINS 65 (July 2019), <https://origins.osu.edu/article/sudan-darfur-al-bashir-colonial-protest>; Conn Hallinan, *South Sudan: Colonialism's Dead Hand*, FOREIGN POL'Y IN FOCUS (Feb. 5, 2014), <https://fpif.org/south-sudan-colonialisms-dead-hand/>.

15. Searcy, *supra* note 14; Hallinan, *supra* note 14.

16. Searcy, *supra* note 14; Hallinan, *supra* note 14/.

17. Searcy, *supra* note 14.

18. *Id.*

19. See generally Searcy, *supra* note 14.

20. *Id.*

21. See ROLANDSEN & DALY, *supra* note 11, at 81).

along ethnic lines.²² In 1971, these rebel forces unified, forming the Southern Sudanese Liberation Movement (SSLM).²³ The war lasted twelve years and ended in 1972 with the signing of the Addis Ababa Peace Agreement, in which the north agreed to cede some regional autonomy to the south and integrate the SSLM into the Sudanese army.²⁴ After this, eleven years of tense peace ensued.²⁵

However, in the late 1970s and 1980s, two major developments reignited the conflict.²⁶ First, vast oil reserves were discovered in central and southern Sudan, and second, a radical Islamic faction was steadily gaining power in the north.²⁷ This led then-President Jaafar Nimeiry to break the Addis Ababa Agreement by attempting to take control of the oil fields in the south and to declare Sudan an Islamic nation governed by Sharia law.²⁸ A violent backlash to these policies, as well as many others, ensued, and the Sudan People's Liberation Army/Movement ("SPLA/M") was formed to fight against the government's power grabs and forced Islamization.²⁹ Both sides eventually turned on the civilian population, leading to devastating human rights abuses.³⁰

The horrors occurring in the south caught the attention of the international community, which began pressuring both sides into peace talks.³¹ In 2005, the negotiations finally resulted in the Comprehensive Peace Agreement ("CPA").³² The CPA provided for six years of southern autonomy, after which a referendum would be held to determine whether the southern provinces would become independent.³³ The agreement also called for overhauls to government security forces, the implementation of more democratic principles, and national

22. See generally *id.* at 77–88.

23. *Id.* at 90.

24. *Id.*

25. *Id.* at 90, 105.

26. See generally Searcy, *supra* note 14.

27. *Id.*

28. Girma Kebbede, *Sudan: The North-South Conflict in Historical Perspective*, 15 CONTRIBUTIONS IN BLACK STUD. 15, 9 (1997), <https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1095&context=cibs>.

29. *Sudan's Independence to Civil War*, OPERATION BROKEN SILENCE (Sept. 30, 2019), <https://operationbrokensilence.org/blog/sudans-independence-to-civil-war>.

30. *Id.*

31. *Id.*

32. *Id.*

33. Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, I.L.M.

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elections.³⁴ It further provided for equal sharing of oil revenue and a referendum on employing Islamic law in the south.³⁵

B. *Independence and Continued Conflict*

In 2011, in accordance with the CPA, the referendum was held, and the people of South Sudan voted overwhelmingly to secede.³⁶ Thus, the Republic of South Sudan was born. In 2011, SPLA/M leaders Salva Kiir Mayardit, a member of the Dinka people, became the first President of South Sudan, and Riek Machar Teny Dhurgon, a member of the Nuer people, became the first Vice President.³⁷ Unfortunately, peace would once again be short-lived as political disputes between Salva Kiir and Riek Machar began inflaming tensions. In December 2013, after President Kiir removed Vice President Machar from office, the country devolved into an all-out civil war.³⁸ Despite the political origins of the conflict, violence broke out along ethnic lines, with Dinka soldiers aligning with President Kiir and Nuer soldiers aligning with former Vice President Machar.³⁹

In response, Riek Machar then formed the Sudan People's Liberation Movement/Army in Opposition ("SPLA/M-IO").⁴⁰ As violence intensified, it deliberately targeted civilians.⁴¹ The U.N. Security Council, which had established a Mission in South Sudan in 2011, authorized the deployment of 6,000 additional peacekeepers to join the 7,600 already present.⁴² It also amended the U.N. Mission's mandate from nation-building to civilian protection and approved the use of force.⁴³ Under threat of international sanctions, a protracted peace process ensued, and in August of 2015, the two sides signed a peace deal known as the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS).⁴⁴ The ARCSS, which was negotiated

34. *Id.*

35. *Id.*

36. ROLANDSEN & DALY, *supra* note 11, at 149.

37. Amy McKenna, *Salva Kiir Mayardit*, ENCYC. BRITANNICA (Jan. 1, 2021), <https://www.britannica.com/biography/Salva-Kiir-Mayardit>.

38. *Global Conflict Tracker: Civil War in South Sudan*, COUNCIL ON FOREIGN RELATIONS (May 12, 2022), <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan>.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Amnesty Report, *supra* note 6, at 8.

under the auspices of the Intergovernmental Authority on Development (“IGAD”), provided for a number of ambitious transitional justice mechanisms, including the Hybrid Court for South Sudan, the Commission on Truth, Reconciliation, and Healing (“CTRH”), and the Compensation and Reparation Authority (“CRA”).⁴⁵

Sadly, less than a year later, in July 2016, fighting between government and opposition forces broke out in Juba, the capital and largest city in South Sudan.⁴⁶ Violence quickly spread through the rest of the country, once again plunging South Sudan into civil war.⁴⁷ Regional leaders began efforts to negotiate peace between the warring factions, culminating in the signing of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (“R-ARCSS”) in September 2018.⁴⁸ The R-ARCSS is similar to the ARCSS and contains the same transitional justice mechanisms of the HCSS, CTRH, and CRA.⁴⁹

Although R-ARCSS has produced the longest ceasefire in South Sudanese history, with violence at the national greatly reduced, peace remains elusive. Many experts have questioned the stability of the peace and the sincerity of the government’s commitment to fulfilling its obligations under the R-ARCSS.⁵⁰ Government and opposition forces are also still involved in ongoing conflict in pockets of the country, particularly Central Equatoria. Most concerning is that violence at the local level has increased dramatically.⁵¹ The Commission on Human Rights in South Sudan estimates that seventy-five percent of the country is now engulfed in brutal violence at the local level, much of which may be supported by the national government.⁵² Commissioner Yasmin Sooka has stated that “[t]he scope and scale of violence we are documenting

45. ARCSS 2015, *supra* note 2.

46. Amnesty Report, *supra* note 6, at 9.

47. *Id.*

48. *Id.*

49. Revitalized Agreement on the Resolution of Conflict in the Republic of South Sudan, *Addis Ababa–Eth.*, Sept. 12, 2018, IGAD [hereinafter R-ARCSS].

50. *See* U.N. Commission on Human Rights in South Sudan, *Detailed Findings of the Comm’n on Hum. Rts. in South Sudan on Its Forty-Sixth Session*, U.N. Doc. A/HRC/46/CRP.2 (2021).

51. *Id.*; Press Release, Off. of U.N. High Comm’r for Hum. Rts. [OHCHR], Despite renewed political commitment, staggering levels of violence continued across South Sudan for the second successive year, UN experts note, U.N. Press Release (Feb. 19, 2021), <https://www.ohchr.org/en/press-releases/2021/02/despite-renewed-political-commitment-staggering-levels-violence-continued>.

52. *Id.*

far exceeds the violence between 2013 and 2019.”⁵³ Commissioner Andrew Clapham also noted that “[t]he scale of the armed violence and the newer weapons used by local groups suggest either the involvement of State forces or external actors.”⁵⁴

Furthermore, the government has consistently failed to implement the R-ARCSS.⁵⁵ There have been significant delays in the formation of the Transitional Government of National Unity, failure to reconstitute the Transitional National Legislative Assembly, and virtually no progress taken toward establishing the transitional justice mechanisms promised in Chapter Five of the Agreement.⁵⁶ These delays have led to further disaffection, mistrust, and suspicion between the opposition and government.⁵⁷ Disconcertingly, the same conditions that preceded the outbreak of violence in 2013 — political and resource competition, poor democratic governance, and failure to manage ethnic diversity — have resurfaced and threaten stability under the R-ARCSS.⁵⁸ However, the government’s recent announcement directing the Ministry of Justice to take the necessary steps to establish the court, as well as President Kiir’s New Year’s speech announcing the commencement of candidate nominations for the Transitional National Legislative Assembly do provide some hope for the future of the R-ARCSS implementation.⁵⁹ Although violence and instability persist, the R-ARCSS, if faithfully implemented, offers a road map for advancing peace and security in South Sudan.⁶⁰

C. Atrocities Committed During The Conflict

As the famous African Proverb states: “When elephants fight, it is the grass that suffers.”⁶¹ Such has been the tragic condition of the people of South Sudan during the civil war. As armed factions have struggled to gain political power and resources, civilians have borne the brunt of

53. *Id.*

54. *Id.*

55. U.N. Commission on Human Rights in South Sudan, *Rep. of the Comm’n on Hum. Rts. in South Sudan on Its Forty-Sixth Session*, U.N. Doc. A/HRC/46/53 (2021).

56. *Id.* ¶¶ 15–17.

57. *Id.* ¶ 19.

58. *Id.* ¶ 22.

59. *Id.* ¶ 23.

60. *Id.* ¶ 22.

61. *When elephants fight, it is the grass that suffers*, THE OXFORD DICTIONARY OF PROVERBS (John Simpson & Jennifer Speake eds., 5th ed. 2009), <https://www.oxfordreference.com/view/10.1093/acref/9780199539536.001.0001/acref-9780199539536-e-650>.

the violence and suffering.⁶² The conflict has resulted in a devastating humanitarian crisis. It is estimated that between 50,000 and 383,000 people have been killed and nearly four million people have been internally displaced or fled to other countries.⁶³ Currently, 7.5 million South Sudanese people require humanitarian relief.⁶⁴

The government, opposition, and localized militias and armed groups are responsible for numerous acts amounting to gross human rights violations and serious violations of international humanitarian law. These horrendous atrocities include the deliberate killing of civilians, forced recruitment of children, looting and destruction of civilian property, torture, enforced disappearances, and acts of sexual violence, involving gang rape and rape of children, elderly and pregnant women.⁶⁵ During the conflict, both the government forces and the SPLA/M-IO deliberately targeted civilians based on their ethnicity.⁶⁶ The conflict has also exacerbated food shortages, resulting in staggering levels of acute food insecurity and malnutrition.⁶⁷ Furthermore, the Commission on Human Rights in South Sudan has also found that both the government and opposition forces have used starvation as a tactic of war, intentionally depriving certain regions of access to food.⁶⁸ The people of South Sudan have endured decades of unimaginable suffering, and without justice and accountability for past crimes, the cycle of violence is unlikely to yield.

III. THEORETICAL BACKGROUND AND LEGAL FRAMEWORK OF THE HYBRID COURT OF SOUTH SUDAN

The history of conflict in South Sudan is plagued with impunity. The failure to deal with mass human rights violations and hold the perpetrators accountable has fueled the conflict and doomed numerous peace agreements. Indeed, the R-ARCSS itself recognizes that justice and accountability are necessary to establishing a lasting peace.⁶⁹

62. Amnesty Report, *supra* note 6, at 9.

63. *Global Conflict Tracker: Civil War in South Sudan*, *supra* note 38.

64. Press Release, Off. of U.N. High Comm'r for Hum. Rts. [OHCHR], Starvation being used as a method of warfare in South Sudan – UN Panel, U.N. Press Release (Oct. 6, 2020), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26350&LangID=E>.

65. Amnesty Report, *supra* note 6, at 8.

66. *See generally* Amnesty Report, *supra* note 6.

67. Detailed Findings of the Comm'n on Hum. Rts. in South Sudan, *supra* note 50.

68. *Id.*

69. *See* R-ARCSS, *supra* note 49.

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A. *Theoretical Background of Hybrid Courts*

While it is widely agreed that accountability is necessary to end the cycle of violence in South Sudan,⁷⁰ there remains the question of what kind of mechanism should be responsible for providing this accountability. In international criminal justice, there are two traditional options: international courts like the ICC and ad hoc tribunals like those created for Yugoslavia or Rwanda, and purely domestic tribunals. However, each of these options comes with many tradeoffs, including legitimacy, capacity building, and norm-penetration problems.⁷¹

International tribunals are often perceived as illegitimate because of their physical distance from and lack of connection with the affected population and the lack of information and transparency shared with local people.⁷² Domestic institutions, on the other hand, also struggle with legitimacy issues.⁷³ These institutions may be too new or too weak to hold reliable proceedings, or they may be staffed by the same individuals who failed to prosecute prior crimes, engendering mistrust.⁷⁴ Both international and domestic tribunals also fail to promote capacity-building.⁷⁵ Locals often do not have the experience to offer training, and international institutions commonly offer little engagement with the local population.⁷⁶ Due to the lack of engagement with the local population, international tribunals also fail to create the kinds of exchanges that lead to norm diffusion.⁷⁷ Finally, norm diffusion can also be challenging for domestic courts due to a limited base of familiarity with these norms.⁷⁸

Hybrid courts, however, offer a third way: a means of blending international and domestic tribunals to harness the benefits of both while simultaneously minimizing their shortcomings.⁷⁹ There is no concrete

70. *Assessment of Justice, Accountability and Reconciliation Measures in South Sudan: Final Reports and Recommendations*, ABA RULE OF L. INST. (June 2014), https://www.americanbar.org/content/dam/aba/directories/roli/sudan/aba_rolisudan_assessment_final_report_0614.authcheckdam.pdf.

71. Laura Dickinson, *The Promise of Hybrid Tribunals*, 97 AM. J. INT'L L. 295, 300–01 (2003).

72. *Id.* at 302–03.

73. *Id.* at 301.

74. *Id.*

75. *Id.* at 303–04.

76. *Id.*

77. *Id.* at 304–05.

78. *Id.* at 305.

79. *Id.* at 306.

definition for a hybrid court.⁸⁰ Thus far, multiple bodies bearing this label have emerged, and all have varied in mandate, structure, and composition.⁸¹ However, these hybrid courts generally share several key features, including the employment of both international and domestic personnel and the application of both international and domestic law.⁸² Indeed, the ambiguity in defining hybrid courts reflects one of their key benefits: flexibility.⁸³ Every post-conflict society faces unique challenges and requires unique solutions.⁸⁴ Hybrid courts allow for the creativity to design a court equipped to address each situation's particular needs.⁸⁵

Hybrid courts are strengthened by the blend of international and domestic personnel.⁸⁶ First, this can bolster legitimacy, as international personnel may increase perceptions of neutrality, while domestic personnel shows local ownership.⁸⁷ Second, through pairing experienced, international experts with domestic professionals, hybrid courts create a rich environment for networking, on-the-job training, and other capacity-building activities.⁸⁸ Hybrid courts are typically located in the country where the crimes took place and offer increased access to victims and the general population.⁸⁹ This proximity can help to promote increased victim participation and general outreach, information sharing, and transparency.⁹⁰ Not only do these benefits help to increase perceptions of legitimacy, but access and outreach can also aid in the diffusion of vital norms of justice, human rights, and democracy.⁹¹

80. Sarah Williams, *Hybrid International Criminal Tribunals*, OXFORD BIBLIOGRAPHIES (Nov. 2, 2017), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0069.xml>.

81. These bodies include the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Panels for Serious Crimes in Timor Leste (SPSC), the International Judges and Prosecutors Program in Kosovo (IJPP, or Regulation 64 Panels), the War Crimes Chamber in the State Court of Bosnia and Herzegovina (WCC), and the Special Tribunal for Lebanon (STL).

82. Dickinson, *supra* note 10, at 295.

83. *Id.*

84. See Jane Stromseth, David Wippman & Rosa Brooks, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 274 (2006).

85. *Id.*

86. Dickinson, *supra* note 10, at 306.

87. *Id.* at 306.

88. *Id.*

89. Jane Stromseth, *Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE L. 87, 89 (2009), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1593&context=facpub>.

90. See *id.* at 96.

91. See *id.*

However, hybrid courts have also had issues, and not all of them have been able to deliver on their promised benefits, particularly when a national government lacks the political will to properly support its work. Examples of this can be seen in the Extraordinary Chambers in the Court of Cambodia (“ECCC”) and the Special Panels for Serious Crimes in Timor-Leste (“SPSC”). In the ECCC, Cambodian personnel were vulnerable to executive pressure on politically sensitive issues, resisting efforts to call sitting officials as witnesses, opposing investigations of other suspects, and seemingly following the government’s lead in decision-making.⁹² This has significantly deteriorated trust in the ECCC.⁹³ In the SPSC, the Timorese government failed to support the efforts of the tribunal.⁹⁴ In several cases, government officials have been unwilling to serve warrants of arrest on Indonesian leaders charged by the SPSC with committing crimes against humanity for fear of jeopardizing their relationship with Indonesia.⁹⁵ In doing so, they prioritized consolidating independence, economic growth, and resolving border issues above justice and accountability, which has been difficult for victims to accept.⁹⁶

Given the significant challenges that the HCSS faces, including a lack of political will, continued violence, and issues of victim protection, the court faces an uphill battle. It has even been suggested that the AU unilaterally establish a court to try international crimes committed during the South Sudanese civil war, something more akin to an ad hoc tribunal.⁹⁷ However, in doing so, South Sudan would miss out on capacity-building opportunities, norm diffusion, and increased participation and outreach that a hybrid court presents. Given the flexibility inherent in hybrid courts, the AU and South Sudan must look for creative solutions to address these challenges in designing and operationalizing the HCSS.

B. *Legal Framework of The R-ARCSS*

The 2018 R-ARCSS sets out the basic framework for the HCSS. It provides that “an independent hybrid judicial court” will be established “to

92. John Giorciari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT’L L. 369, 393–400 (2014).

93. *Id.*

94. STROMSET ET AL, *supra* note 84, at 279.

95. *Id.* at 281.

96. *Id.*

97. *South Sudan: Crippled Justice System and Blanket Amnesties Fuelling Impunity for War Crimes*, AMNESTY INT’L (Oct. 7 2019), <https://www.amnesty.org/en/latest/press-release/2019/10/south-sudan-crippled-justice-system-and-blanket-amnesties-fuelling-impunity-for-war-crimes/>.

investigate and where necessary prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law.”⁹⁸ The Court will have jurisdiction over crimes of genocide, crimes against humanity, war crimes, and other serious crimes under international law and relevant laws of South Sudan, including gender-based crimes and sexual violence.⁹⁹ The Court will have jurisdiction to investigate and prosecute any of these crimes committed between December 15, 2013, to the end of the transitional period.¹⁰⁰ The R-ARCSS also establishes that no one will be “exempted from criminal responsibility on account of their official capacity as a government official, an elected official or by claiming the defen[s]e of superior orders.” The HCSS is also not constrained by prior grants of pardon, immunities, or amnesties that the government of South Sudan has issued. Furthermore, as an independent court, the HCSS will “have primacy over any national courts of the [Republic of South Sudan],” meaning that it can prosecute notwithstanding the domestic judicial system.¹⁰¹

The HCSS will be staffed by impartial experts “in criminal law and international law, including international humanitarian law and human rights law.”¹⁰² Although the Hybrid Court will be composed of a mixture of Sudanese and international professionals, the Court will be uniquely African as all judges, prosecutors, investigators, and defense counsels must come from African states.¹⁰³ Notably, a majority of the judges on all panels must consist of judges from African states *other* than South Sudan.¹⁰⁴ In pursuing its investigations, the HCSS is permitted to draw on the AU Commission of Inquiry (“COI”) in South Sudan as well as other reports, documents, and materials.¹⁰⁵ The Prosecutor is given broad discretion to utilize other entities and sources that he or she “deems necessary” for his or her work.¹⁰⁶

Under the R-ARCSS, the government of South Sudan and the African Union each have certain responsibilities with respect to the formation and establishment of the HCSS.¹⁰⁷ Although the African Union

98. R-ARCSS, *supra* note 49, at 62.

99. *Id.*

100. *Id.*

101. *Id.* at 62, 64.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

Commission shall establish the HCSS, the government “shall initiate legislation for the establishment of the [HCSS].”¹⁰⁸ This legislation must “clearly define the mandate and jurisdiction of the three institutions including but not limited to their establishment and funding, actors, and defined processes for public participation in the selection of their respective members.”¹⁰⁹ The Chairperson of the African Union, on the other hand, has the right to choose the seat of HCSS and has the authority to select and appoint all judges, prosecutors, defense counsels, and the registrar.¹¹⁰ While this gives the AU a great deal of power and control over the Court, the government of South Sudan is still required to “fully support and facilitate the operations of [] and cooperate with the HCSS,” thereby tempering the influence of the AU.¹¹¹

The R-ARCSS also stipulates the basic rights of witnesses and the accused. The HCSS is required to implement measures to protect victims and witnesses consistent with applicable international laws, standards, and practices, and the rights of the accused must be respected.¹¹² The HCSS will also have the power to order the forfeiture of the property, proceeds, and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the state of South Sudan, and may award appropriate remedies to victims, including reparations and compensation.¹¹³ Finally, individuals indicted or convicted by the HCSS will not be eligible for participation in the Revitalized Transitional Government or successor governments.¹¹⁴

C. *Relationship to Other Justice Mechanisms*

The HCSS, CRA, and CTRH each provide a distinctive and essential benefit for the establishment of peace and stability in South Sudan. The R-ARCSS provides that the HCSS, CRA, and CTRH “shall independently promote the common objective of facilitating truth, reconciliation and healing, compensation and reparation.”¹¹⁵ The agreement does not require separate operating periods for these mechanisms, and all three can and should act in tandem to complement and reinforce one

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

another's work.¹¹⁶ Truth-telling and reparations under the CRA and CTRH can provide healing and restorative justice to victims, while prosecutions through the HCSS help to end impunity and provide traditional justice.¹¹⁷ Under the R-ARCSS, South Sudan can simultaneously pursue both peace and justice.

South Sudan is not a member of the ICC and the R-ARCSS does not provide for any specific relationship between the HCSS and ICC. Thus, the ICC has no jurisdiction over crimes committed during the conflict unless the U.N. Security Council refers the situation to the court or the government of South Sudan requests the ICC's involvement.¹¹⁸ Moreover, as a court of last resort, operating under the principle of complementarity, even if one of these preconditions occurred, the ICC involvement would not be necessary where a properly functioning hybrid court was operating.¹¹⁹ However, if the hybrid court becomes unable or unwilling to prosecute certain crimes, the ICC could theoretically step in.

IV. CHALLENGES OF OPERATIONALIZING THE HYBRID COURT OF SOUTH SUDAN

A. *Lack of Political Will to Prosecute*

The greatest challenge facing the HCSS will likely be the government of South Sudan itself. As the history of the peace process shows, the South Sudanese government appears to have no desire to participate in criminal proceedings, which will put its own human rights abuses under a microscope. Although the government has finally conceded to establishing the HCSS, a lack of political will and support may still have tragic effects on the court's ability to function. Rather than accepting defeat, the government's acquiescence to the HCSS may simply signal a shift in strategy — to work against the court from the inside. This is something that the AU must keep firmly in mind as they begin to design and operationalize the court.

The two factors that point most convincingly to a hostile government influence are the culture of impunity perpetuated by the ineffectual domestic justice system and the government's past efforts to obstruct the creation of the court itself. First, the domestic, civilian justice system

116. *Q&A: Justice for War Crimes in South Sudan*, HUM. RTS. WATCH (Aug. 24, 2020, 7:30 AM), <https://www.hrw.org/news/2020/08/24/qa-justice-war-crimes-south-sudan>.

117. *Id.*

118. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; *Q&A: Justice for War Crimes in South Sudan*, *supra* note 116.

119. See Rome Statute of the International Criminal Court, *supra* note 118; *Q&A: Justice for War Crimes in South Sudan*, *supra* note 116.

has proven impotent when it comes to holding perpetrators accountable for human rights abuses.¹²⁰ Indeed, until this past year, there were no investigations or prosecutions brought against either the SPLA or the SPLA-IO in civilian courts, despite the well-documented abuses that have and continue to occur.¹²¹ There is a serious capacity problem among domestic courts. This is perhaps best exemplified by the findings of the U.N. Commission on Human Rights in South Sudan, which stated that “the lack of political will at the highest level of government to hold perpetrators accountable, and persistent interference by the government in judicial matters are the chief obstacles to accountability.”¹²²

The government of South Sudan has accomplished this in a variety of ways. First, the executive branch has a stranglehold on the justice system. The Directorate of Public Prosecutions (“DPP”) is situated within the Ministry of Justice and Constitutional Affairs.¹²³ The President appoints the director of the DPP at the recommendation of the Minister of Justice, who is in turn appointed by the President.¹²⁴ This high degree of control has hindered the ability of prosecutors to bring cases against perpetrators. Judges themselves lack independence and have routinely been dismissed by Presidential Decree.¹²⁵ Second, since the beginning of the conflict in 2013, the government has granted at least six blanket amnesties that have effectively formalized impunity and bound the hands of the judiciary.¹²⁶ Under customary international law and the South Sudanese constitution, these amnesties are

120. Hum. Rts. Couns., *Transitional Justice and Accountability: A Roadmap for Sustainable Peace in South Sudan*, UN Doc. A/HRC/45/CRP.4 (Oct. 5, 2020) [hereinafter H.R.C. Roadmap]; Amnesty Report, *supra* note 6, at 13.

121. See Amnesty Report, *supra* note 6, at 13. In October of 2020 several civilian courts prosecuted and convicted members of the South Sudan People’s Defense force, the South Sudan National Police Force, and the SPLA-IO for crimes of sexual violence. Press Release, U.N. Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, South Sudan: Special Representative Patten Welcomes the Conviction of Perpetrators of Sexual Violence in Yei, Central Equatoria, Marking a Step Forward in the Fight Against Impunity (Nov. 3, 2020), <https://www.un.org/sexualviolenceinconflict/press-release/south-sudan-special-representative-patten-welcomes-the-conviction-of-perpetrators-of-sexual-violence-in-yei-central-equatoria-marking-a-step-forward-in-the-fight-against-impunity/>.

122. Hum. Rts. Couns., *Report of the Commission on Human Rights in South Sudan*, U.N. Doc. A/HRC/43/56 (Feb. 20, 2020).

123. Amnesty Report, *supra* note 6, at 14.

124. *Id.*

125. *Id.* at 15–16.

126. See *id.* at 22.

illegal and deny victims the right to seek justice.¹²⁷ While these amnesties do not bind the HCSS, they are evidence of the government's lack of political will for accountability, even when contrary to the law.¹²⁸ As one former South Sudanese judge succinctly put it, "[t]he judiciary is not functional because there is a political decision for it not to be functioning."¹²⁹

Finally, even on the rare occasions when the government has ordered formal investigations into human rights abuses, they have not been serious attempts to seek truth and justice.¹³⁰ Under international law, investigations must be competent, timely, effective, independent, impartial, and, where necessary, result in genuine attempts to prosecute suspects.¹³¹ South Sudan's investigations have been lacking in nearly all these respects.¹³² In most cases, the President has hand-picked the committee members, and their activities have lacked transparency.¹³³ In some cases, their findings have not been released to the public at all, while in others, the reports do not reflect any investigation into potential government-led abuses.¹³⁴ Moreover, the mandates for these committees do not reflect a genuine intent to prosecute but rather are undertaken with the purpose of preventing these abuses from happening again.¹³⁵

This is further exemplified by the fact that there have been only two military tribunals for crimes committed by government and opposition forces. The first, held in 2018 and known as the Terrain Case, was widely regarded as a show trial¹³⁶ and failed to take into account the command responsibility within the SPLA.¹³⁷ However, recently a more promising trial was held in which 26 soldiers in the government forces

127. *Id.* at 23.

128. *Id.* at 22–23.

129. *Id.* at 15.

130. *Id.* at 24.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 19. The Terrain Case was the first and only trial before South Sudanese courts related to crimes committed in the context of the conflict. It is unique in that at least six foreign aid workers were raped during an attack by government forces on the Terrain hotel. The government of South Sudan faced immense international pressure to hold the perpetrators accountable. Thus, a reasonably fair and impartial trial on par with international standards took place. However, it has been described as "a PR [Public Relations] case for the government" and as a "one man show by the government." Amnesty Report, *supra* note 6, at 19–20.

137. H.R.C. Roadmap, *supra* note 120.

were convicted of rape.¹³⁸ Although this recent case has engendered some hope for prosecutions, military tribunals have been plagued with issues of independence, impartiality, and protection of the rights of the accused. Moreover, they are not the appropriate forum for cases of crimes against civilians.¹³⁹

Further evidence of potential political interference with the HCSS stems from the government's previous efforts to thwart the court. First, the government has consistently delayed the creation of the court.¹⁴⁰ Second, high-ranking public officials have expressed concerns that the HCSS will undermine the peace process. In 2016, President Kiir and Vice President Machar published an op-ed criticizing the hybrid court, claiming that disciplinary justice would "destabilize efforts to unite [the] nation."¹⁴¹ The Minister for Information, Michael Makuei, has also warned that the hybrid court would be "a tool of regime change by the troika," referring to the United States, Great Britain, and Norway, that "they want to use against the people of South Sudan, especially the leadership."¹⁴² Third, some civil society organizations suspected of advocating for the HCSS have occasionally been prevented from speaking or denied clearance by the National Security Service.¹⁴³ Most alarming, however, is the fact that in 2019, the government entered into a multi-million dollar lobbying contract with a U.S. firm to "delay and ultimately block" establishment of the hybrid court envisaged in the R-ARCISS.¹⁴⁴

138. Sam Mednick, *Rare Conviction of South Sudanese Soldiers for Rape Raises Hope*, ASSOCIATED PRESS, (Jan. 15, 2021), <https://apnews.com/article/africa-south-sudan-crime-d1349141044a4fae7257588cb8ad4d05>.

139. Amnesty Report, *supra* note 6, at 18.

140. *Id.* at 5.

141. Salva Kiir & Riek Machar, *South Sudan Needs Truth, not Trials*, N.Y. TIMES (June 7, 2016), www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html. Four days after the op-ed was published, Vice President Machar disavowed the contents, claiming that he had no part in writing it. President Kiir maintains that Machar was consulted. *Id.*

142. Silva Aurelio, *supra* note 4.

143. ALLAN NGARI & JAME DAVID KOLOK, INST. FOR SEC. STUD., CITIZENS' PERCEPTIONS ON TRANSITIONAL JUSTICE PROCESSES IN SOUTH SUDAN (2019), <https://issafrica.s3.amazonaws.com/site/uploads/ear-29.pdf>.

144. See Elise Keppler, *South Sudan's Cynical Bid to Block War Crimes Court: African Union Should Step up on Justice*, Hum. Rts. Watch (Apr. 30, 2019, 10:49 AM), <https://www.hrw.org/news/2019/04/30/south-sudans-cynical-bid-block-war-crimes-court>; Waakhe Simon Wudu, *Critics Slam Multimillion-dollar Deal Between South Sudan, US-based Lobbying Firm*, VOA (Apr. 30, 2019), <https://www.voafrika.com/a/critics-slam-multimillion-dollar-deal-between-south-sudan-us-based-lobbying-firm-/4898118.html>. The contract was later amended, removing this language.

As mentioned above, past hybrid courts, such as the ECCC, have faced similarly hostile governments, resulting in a lack of legitimacy and mistrust in the court's work.¹⁴⁵ Where such situations exist, the Nairobi Principles on Accountability recommend that mechanisms move forward with "no expectations of good faith cooperation."¹⁴⁶ The Commission on Human Rights in South Sudan has advocated this approach, which requires a "thorough assessment of potential barriers . . . and the establishment of a legal framework . . . that anticipate[s] and provide[s] mechanisms to mitigate. . . political interference."¹⁴⁷ Thus, the HCSS must take a realistic approach to the potential for political interference and put in place safeguards to protect against negative government influence, including protections for the South Sudanese court personnel, robust victim and witness protection, and procedural decision-making safeguards.

B. *Victim Participation and Protection*

The success of criminal proceedings depends on the participation of witnesses and victims. The participation of witnesses and victims, in turn, depends on their ability to have easy access to courts and to feel safe from retaliation and intimidation. Indeed, entire cases have failed because witnesses have disappeared or refused, out of fear, to testify.¹⁴⁸ Thus, it is critical for any tribunal to ensure that witnesses and victims are physically, psychologically, and financially protected and supported during their involvement with the justice process.¹⁴⁹

In South Sudan, this is particularly important given the government's culpability for human rights abuses, lack of control over other violent entities in the country, and lack of political will to support the court.

145. *See supra* Part III.A.

146. KENYANS FOR PEACE WITH TRUTH AND JUSTICE & ULSTER UNIVERSITY TRANSITIONAL JUSTICE INITIATIVE, NAIROBI PRINCIPLES ON ACCOUNTABILITY (2019), <http://kptj.africog.org/wp-content/uploads/2019/01/Nairobi-Principles-on-Accountability-ONLINE-version.pdf>.

147. H.R.C. Roadmap, *supra* note 120.

148. In 2016, the ICC dismissed its case against Kenyan Deputy President William Ruto and former journalist Joshua Sang for lack of evidence. However, Judge Chile Eboe-Osuji noted that, "it cannot be discounted that the weaknesses in the Prosecution case might be explained by the demonstrated incidence of tainting of the trial process by way of witness interference and political meddling that was reasonably likely to intimidate witnesses." Anjli Parrin, *Kenya ICC Case Dismissed for Lack for Evidence, Declared a Mistrial*, COLUM. LAW SCHOOL: HUM. RTS. INST. (Apr. 5, 2016), <https://hri.law.columbia.edu/human-rights-clinic-student-anjli-parrin-icc-dismissal-case-against-kenyas-william-ruto-and-joshua>.

149. Elena Naughton, COMMITTING TO JUSTICE FOR SERIOUS HUMAN RIGHTS VIOLATIONS 81 (2018), https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

Even if the South Sudanese government has failed to prevent the establishment of the HCSS, it may still seek to stymie cases by securing the silence of witnesses through violence and intimidation.

This is not a theoretical issue. South Sudan currently has no witness protection and support scheme, and legal professionals have reported that witnesses in domestic cases involving government abuses have faced particularly strong intimidation and abuse.¹⁵⁰ In 2016, *Time Magazine* reported the story of a thirteen-year-old boy who had fled his home and was living in a United Nations refugee camp, hiding from the government.¹⁵¹ The boy was the sole survivor of a massacre in which government soldiers locked fifty three men in a metal shipping container, leaving them to die.¹⁵² As a key witness to a potential war crimes trial, the boy's life is in danger, and his only protection is the anonymity of the refugee camp.¹⁵³ Without assurances of protection from the HCSS, victims like this boy may be loath to come forward about human rights abuses that they have suffered at the hands of the government. This is problematic because not only will it allow for government officials to enjoy impunity, but perceived one-sidedness in investigations and prosecutions may harm the legitimacy of the court.

To ensure that the HCSS is successful, a comprehensive witness protection scheme must be put in place, and a witness and victim services department must be created to administer it. To encourage maximum participation, HCSS should allow for a broad range of people to access witness and victim services.¹⁵⁴ Eligibility should encompass not only those who appear before the court but also those at risk on account of the testimony given by those who appear, and potential witnesses and sources.¹⁵⁵ Furthermore, when determining the necessary services and protections necessary, the relevant authority should undertake individual assessments of witness and victim needs rather than offering blanket protections.¹⁵⁶

150. *Ending the Era of Injustice: Advancing Prosecutions for Serious Crimes Committed in South Sudan's New War*, HUM. RTS. WATCH (Dec. 10, 2014), <https://www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans>.

151. Aryn Baker, *The 13-Year-Old Survived a Horrific War Crime. But He May Never Be Safe Enough to Testify*, TIME (July 5, 2016, 7:01 PM), <https://time.com/4392978/south-sudan-war-crimes-witness/>.

152. *Id.*

153. *Id.*

154. Naughton, *supra* note 149, at 82.

155. *Id.* at 82.

156. *Id.* at 81.

A variety of services should be offered to safeguard the holistic well-being of victims. First and foremost, the HCSS must guarantee the physical safety of witnesses. The HCSS should provide a variety of protection measures depending on the level of threat, including twenty-four-hour protection by a security officer, in camera proceedings, assigning pseudonyms, expunging names and identifying information from records, and relocation.¹⁵⁷ For witnesses whose protection cannot be guaranteed in the country, there must be an opportunity for them to relocate.¹⁵⁸ Typically, this can be challenging because it requires another state to accept and support witnesses, often requiring them to assume the costs of resettlement.¹⁵⁹ Therefore, the AU must encourage member states and international partner states to undertake this responsibility and create formal relocation agreements. One potential way to facilitate this would be for the court to create cost-sharing arrangements to cover the expenses of relocation. Moreover, because the threat to witnesses does not disappear when the tribunal finishes its work, the witness protection scheme must remain part of the residual mechanism, similar to the Special Court for Sierra Leone (“SCSL”).¹⁶⁰

In addition to these physical protection measures, the witness and victim services scheme should include other support systems to ensure the psychosocial and financial wellbeing of victims and witnesses. Testifying about harrowing experiences associated with human rights violations has the potential to retraumatize victims.¹⁶¹ Therefore, it is essential for the HCSS to offer a variety of mental health services to avoid further harm to witnesses and victims. This may include mental health counseling before, during, and after the proceedings, providing an orientation of what to expect during the trial, a twenty-four-hour support hotline, and post-participation check-ins.¹⁶² To shield witnesses and victims from undue financial hardships associated with their participation, the HCSS should minimize travel when possible, cover all travel expenses when necessary, reimburse lost wages, and provide care for witnesses’ dependents during their participation.¹⁶³

These witness and victim protection services will undoubtedly pose a significant cost to the HCSS. There is little information available about the costs of witness and victim protection in past hybrid and

157. *Id.* at 83–84.

158. *Id.*

159. *Id.* at 87.

160. *Id.* at 81.

161. *Id.* at 84.

162. *Id.*

163. *Id.* at 84–85.

international criminal courts.¹⁶⁴ However, limited budget information about some services makes clear that the provision of these services is costly.¹⁶⁵ For example, the SCSL's witness relocation budget alone for one year was \$295,000.¹⁶⁶ The ICTY incurred on average \$1,600 in costs per witness.¹⁶⁷ Witnesses often number in the hundreds, and therefore costs add up quickly.¹⁶⁸

Although comprehensive victim and witness services are expensive, failing to sufficiently protect these individuals is not only unethical but could also negatively impact the functioning of the court. For the HCSS to ensure strong participation and uphold its duty to protect vulnerable people that it relies on, it must offer a robust victims and witnesses services program and guarantee that it is adequately funded.

C. Funding

Justice is expensive. International courts and tribunals have universally faced challenges and criticism over funding.¹⁶⁹ Neither the government of South Sudan nor the AU has yet released a plan for how they plan to fund the HCSS. However, it is sure to be a costly undertaking that will require a great deal of money to be raised in a relatively short period of time.

Most hybrid courts have depended on voluntary funding from a combination of national and international sources, cobbled together through the U.N., private donors, and other states.¹⁷⁰ However, the voluntary nature of this kind of fundraising has created uncertainty and gaps in funding, particularly when funding needs are higher than anticipated, which is almost always the case.¹⁷¹ These gaps in cash flow can create serious problems for hybrid courts.¹⁷² Moreover, they may affect the ability of the court to take on additional activities such as capacity building and community outreach, which are important benefits of hybrid courts.

There are, however, ways to combat the challenges of this voluntary, ad hoc system of funding. For example, the Special Panels in Timor-

164. *Id.* at 87.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 87–88.

169. *Id.* at 93.

170. *Id.*

171. *Id.*

172. *See id.* at 93–94.

Leste and the Special Tribunal for Lebanon were funded in part through assessed contributions, in which countries are asked to contribute funding in proportion to their size and wealth.¹⁷³ Furthermore, to avoid budget shortfalls and gaps in funding, some courts have made efforts to ensure that funding is available to support at least a period of the court's work prior to commencing operations.¹⁷⁴ The statutes of the Special Court for Sierra Leone and the Special Tribunal for Lebanon, for example, included a provision requiring it to have at least twelve months of funding in hand prior to commencing the establishment of the courts.¹⁷⁵ Finally, several courts have established donor-led management committees to assist in raising funds and monitoring court activities. These committees typically consist of important contributors and interested parties, which may provide technical assistance in addition to fundraising.¹⁷⁶

South Sudan, with its vast oil revenues, could potentially fund a large chunk of the HCSS.¹⁷⁷ However, given the government's antipathy toward the Court, and the rampant corruption in the oil sector,¹⁷⁸ this seems unlikely. The majority of the funding will likely have to come from the AU and other donor states. Finding this funding may be difficult due to the "donor fatigue" that many developed countries are feeling after decades of financing of international justice efforts.¹⁷⁹ Moreover, where the funding comes from may also affect perceptions of the court. As mentioned above, some officials have criticized the HCSS as a western effort intended to interfere with South Sudanese sovereignty.¹⁸⁰ Therefore, funding from larger, western donor states may create tensions. However, countries with less powerful economies that would not raise these concerns, particularly those within the AU, have

173. *Id.*

174. *Id.* at 94.

175. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., art. 6, Apr. 12, 2002, 2178 U.N.T.S. 137; Statute of the Special Tribunal for Lebanon art. 5(2).

176. Naughton, *supra* note 149, at 94–95.

177. Press Release, OHCHR, Comm'n on Hum. Rts. in South Sudan Appeals for International Support for Peace Process or Risk Plunging the Country Back Into Full-Scale Conflict (Sept. 16, 2019), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24996&LangID=E>.

178. OHCHR, Human Rights Violations and Related Economic Crimes in the Republic of South Sudan, 4, U.N. Doc. A/HRC/48/CRP.3 (Sept. 23, 2021).

179. OHCHR, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: PROSECUTION INITIATIVES 8–9 (2006), <https://www.ohchr.org/sites/default/files/Documents/Publications/RuleoflawProsecutionsen.pdf>.

180. Silva Aurelio, *supra* note 5.

more limited financial means. Finally, the recent coronavirus pandemic has had a hugely negative effect on the global economy, likely making countries less willing to pledge funds to international courts. These factors will undoubtedly make financing the HCSS a monumental challenge.

V. HOPE FOR ACCOUNTABILITY? RECOMMENDATIONS FOR CREATING AN EFFECTIVE HYBRID COURT

Although the challenges faced by the HCSS are substantial, they are not insurmountable. With creativity, dedication, and ample support, the HCSS can be a successful institution. Not only does it have the potential to help provide justice and peace to the people of South Sudan, but it can also leave a legacy that strengthens the domestic justice system, democracy, and the rule of law. The following section sets forth recommendations for how the HCSS can overcome the myriad challenges it faces to fulfill these lofty ambitions.

A. *The Role of The African Union*

One of the most convincing reasons to remain optimistic about the prospects of the HCSS is the large role that the AU will play in establishing and operationalizing the court. The R-ARCSS provides that the AU will, among other things, have the power to establish the court, choose its location, and appoint personnel. Thus, the AU's influence will be instrumental in enabling the court to overcome the challenges laid out above. In some circumstances, such a strong international influence could be cause for concern. However, in South Sudan's case, where the government itself is implicated in many crimes, a heavier influence from international actors may actually increase the perceived legitimacy of the HCSS.¹⁸¹ Moreover, because it is the AU leading the way, and not the U.N. or other western-dominated intergovernmental body, the HCSS may avoid some of the imperialist, neo-colonial critiques that have plagued other international justice efforts while facilitating more south-to-south exchange. There are a number of actions that the AU can and should take to exert this influence and ensure that the HCSS is functional and fruitful.

First, while the AU works with the government of South Sudan to establish the HCSS, it should immediately create an investigative unit to

181. See Laura Dickinson, *The Promise of Hybrid Tribunals*, 97 AM. J. INT'L L. 295, 306 (2003).

begin documenting crimes and gathering evidence.¹⁸² Even under the best of circumstances, it will take time to set up the court — and South Sudan is not in the best of circumstances. Nonetheless, the AU need not wait for a functional hybrid court to begin investigations. To guard against additional delays and interference by the government and to ensure that the court has the evidence it needs to prosecute crimes in the future, it is critical for the AU to preserve and document as much evidence as possible now.

Second, as discussed above, the AU will also have a large role to play in the fundraising for the HCSS. This will require the AU to raise a significant amount of money rather quickly. To avoid the pitfalls of voluntary funding faced by other hybrid courts, the AU should institute an assessed contributions scheme for AU members — and other partner states and organizations. It should also set up a special management committee to spearhead fundraising efforts so it can focus on more of the technical aspects of the court. In any case, funding from AU member states should be a primary component to preserve the HCSS character as an African-driven institution and guard against critiques of outside influence.¹⁸³ The AU might also consider delaying the establishment of the court until it has adequate funds in hand to proceed. Given the delays that have already taken place, this may not be a palatable option for many victims who have already waited years for justice. However, budget shortfalls could cause future delays, lead to a lack of funding for essential victim and witness protection, and jeopardize the legitimacy of the proceedings. While balancing the desire for prompt action with the necessity of adequate funding will be a major challenge, allowing for reasonable delays may be preferable to pushing forward with an under-funded court. Moreover, the AU might assuage any tensions caused by reasonable delays through its outreach and education efforts, and it might mitigate losses in evidence through establishing an investigative unit.

Third, the AU has the power to choose the location of the HCSS. In choosing the location, it must balance security issues with access to affected people, which is one of the major benefits of hybrid courts. Considering the continuing conflict, instability, and government

182. Transitional Just. Working Grp., *Building a Foundation for Justice in South Sudan: An Agenda for the Revitalized Transitional Government of National Unity (R-TGONU)*, 5, 7 (2021), <https://www.csrf-southsudan.org/repository/building-a-foundation-for-justice-in-south-sudan-an-agenda-for-the-revitalized-transitional-government-of-national-unity-r-tgonu/>.

183. Owiso Owiso, *The Proposed Hybrid Court for South Sudan: Moving South Sudan and the African Union to Action Against Impunity*, 18 AFR. J. ON CONFLICT RESOL. 87, 108 (2018).

abuses, it may be best to initially establish the court outside of South Sudan, with the intent of moving it in-country when security increases.¹⁸⁴ One possible host city for the court would be Arusha, Tanzania. In this location, the HCSS would benefit from the facilities of the International Criminal Tribunal for Rwanda (“ICTR”), reasonable geographic proximity, and the relative political neutrality and security of Tanzania.¹⁸⁵

Finally, in drafting the statute for the HCSS, the AU must make the greatest possible effort to put safeguards in place to protect against political influence and ensure the safety of witnesses and victims. First, it must incorporate in the statute procedural measures that will shield the proceedings from political interference. These measures should embrace policies that call for the highest levels of transparency in all stages of proceedings except where absolutely necessary to protect specific interests such as witness safety.¹⁸⁶ There should also be provisions that protect whistleblowers who come forward with evidence of interference. Second, it should provide a robust victims and witnesses services unit in the statute and set forth what services shall be provided and how the unit is to be administered. These services should include those mentioned in Section IV.B. above.¹⁸⁷

B. *The Role of The Office of The Prosecutor*

The HCSS’s Office of the Prosecutor can also play a significant role in overcoming actual or perceived political influence and ensuring that those most responsible for conflict-related crimes are held responsible. First, choosing a prosecutor who will be trusted and respected by, if not all, factions in South Sudan, at least the SPLA and SPLA-IO, as well as the international community, can enhance trust in the institution. Choosing the prosecutor is another responsibility of the AU, and the candidate must be from an African country other than South Sudan. In making its selection, the AU must consider candidates’ country of origin, their prior experience in international criminal and transitional

184. *Id.* at 94, 109.

185. *Id.* Tanzania is politically neutral compared to other neighboring states such as Uganda, Kenya, and Ethiopia, which host large numbers of refugees and have been accused of harboring plundered South Sudanese resources. Moreover, Tanzania is relatively secure compared to other neighboring countries such as the Central African Republic, the Democratic Republic of the Congo, and Sudan.

186. *See* Political Interference at the Extraordinary Chambers in the Courts of Cambodia, OPEN SOC’Y JUST. INITIATIVE 30 (July 2010), <https://www.justiceinitiative.org/uploads/a236e521-41c5-472a-99e1-f59c755a2d9e/political-interference-courts-cambodia-20100706.pdf>.

187. *See supra* Section IV.B.

justice, and how these factors might affect this individual's actual or perceived neutrality. To engender trust and respect and overcome fears of politicization, the prosecutor must be someone of unimpeachable character who is trusted and respected, who has shown dedication to accountability, who possesses a strong background in international criminal justice, and who will be perceived as neutral regarding the conflict in South Sudan. The good news is that due to the numerous hybrid and international courts that have taken place on the continent, there is a relatively deep bench of professionals with the necessary experience in international criminal law.

One potential candidate could be Gambian attorney Abubacarr Tambadou. Mr. Tambadou recently gained international renown for his commitment to ending the genocide of the Rohingya when he brought a ground-breaking genocide case against Burma to the International Court of Justice.¹⁸⁸ In addition to this, he has more than fifteen years of experience in international justice, having served as Special Assistant to the Prosecutor of the International Residual Mechanism for Criminal Tribunals and Trial Attorney and later Appeals Counsel at the International Criminal Tribunal for Rwanda.¹⁸⁹ He has also served as the Attorney General of the Gambia, where he implemented "significant human rights and justice reforms." He currently serves as the Registrar for the International Residual Mechanism for Criminal Tribunals.¹⁹⁰ Finally, as a Gambian, Mr. Tambadou is from a small, geopolitically-weak country, which could increase perceptions of neutrality.¹⁹¹ With his international reputation for holding perpetrators accountable and his experience with international criminal justice, he, or someone of similar background and qualifications, would be well suited to the position.

The Office of the Prosecutor also has the opportunity to help overcome political interference and increase perceptions of legitimacy through the careful selection of cases and use of discretion. The ICC and other hybrid courts such as the ECCC have faced criticism over who and, more importantly, who not to prosecute.¹⁹² Furthermore,

188. Press Release, U.N. Int'l Residual Mechanism for Crim. Tribunals, UN Secretary-General Appoints Mr. Abubacarr Marie Tambadou as Registrar of the Mechanism (July 2, 2020), <https://www.irmct.org/en/news/20-07-02-un-secretary-general-appoints-mr-abubacarr-marie-tambadou-registrar-mechanism>.

189. *Id.*

190. *Id.*

191. *Id.*

192. See Salem Solomon & Peter Clotey, *ICC President Rejects Criticism that Court Targets Africans*, VOA (Dec. 12, 2019, 9:19 AM), <https://www.voanews.com/africa/icc-president-rejects-criticism->

other post-conflict justice mechanisms have been criticized for failing to go after leaders who were most responsible and only prosecuted lower-level perpetrators.¹⁹³ These flaws can increase perceptions that these courts are illegitimate political bodies that serve the interests of certain powerful factions.¹⁹⁴ Considering the fragility of the current peace process, judicious prosecution is imperative to ensure that ethno-political tensions are not further inflamed by perceived unfairness or targeting of certain groups. Moreover, if high-level leaders are not held responsible, the HCSS runs the risk of furthering impunity underlying the cycles of violence. The prosecutor must be willing to go after the so-called “big fish,” even if they are powerful government officials. At the same time, the prosecutor must also be willing to prosecute all parties who have perpetrated crimes to show that everyone responsible will be held accountable. However, an independent, neutral, and intrepid prosecutor can bolster the legitimacy of the HCSS and allay concerns of political interference and unfairness.

C. Outreach & Capacity Building

Hybrid courts have been praised for their ability to connect with and engage local populations and the domestic justice system, strengthening rule of law and democracy both institutionally and culturally.¹⁹⁵ For the HCSS to have the long-term and widespread impact necessary to end the culture of impunity and promote rule of law, accountability, and justice, its work cannot be confined within the chambers of the court.¹⁹⁶ As the aphorism goes, “justice must not only be done, it must be seen to be done.” For this reason, outreach and capacity building must be central to the Court’s work. However, lessons from other hybrid court experiences have shown that for these benefits to be realized, these efforts must be planned for and well-supported.¹⁹⁷ Thus, outreach and capacity building should not be viewed as ancillary or incidental features of the HCSS but rather as integral parts of its mission.

court-targets-africans; *see also* Press Release, Open Soc’y Just. Initiative, Cambodia’s Khmer Rouge Tribunal Ends Deadlocked Case Against Former Regional Commander (Aug. 11, 2020), <https://www.justiceinitiative.org/newsroom/cambodias-khmer-rouge-tribunal-ends-deadlocked-case-against-former-regional-commander>.

193. Stromseth, *supra* note 89, at 93.

194. *See id.*

195. *See generally id.*

196. *See* KIRSTEN AINLEY & MARK KERSTEN, DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS, HYBRID JUSTICE (2019) [hereinafter DAKAR GUIDELINES], https://hybridjustice.files.wordpress.com/2019/08/dakar-guidelines_digital-version.pdf.

197. *See* Stromseth, *supra* note 89, at 96–97.

To ensure that this happens, the statute creating the court must make these features central elements of the court's activities by establishing an authority within the court mandated with overseeing capacity-building and community engagement.¹⁹⁸

Furthermore, when operationalizing the court, the authority for outreach and capacity-building must be allocated a sufficient budget for staffing and resources. Finally, the HCSS should implement the outreach and capacity-building authority as soon as possible and in any case *before* the court begins proceedings. In particular, outreach should be prioritized to lay the groundwork of public understanding, acceptance, and legitimacy necessary for the court to successfully undertake its work.

Another important consideration is how the location of the HCSS could substantially impact outreach and capacity building efforts. If, as this paper argues, the HCSS were initially located outside of South Sudan, it would be crucial to plan how to best maintain close connections between the court and South Sudanese people across this distance. One potential solution would be to locate the outreach and capacity-building authority separate from the rest of the HCSS within South Sudan. A useful model for this would be the Extraordinary African Chambers outreach efforts for the Hissène Habré case, which were focused on Chad despite the court's headquarters in Senegal.¹⁹⁹ This would provide maximal engagement and many of the benefits of an in-country hybrid while ensuring the security of the other proceedings. Furthermore, the Court could utilize mass media to share information about the proceedings similar to the ICTR's efforts to broadcast trials and promote media access.²⁰⁰ However, coordination and careful planning between both locations would be critical.

1. Outreach

Community outreach and engagement are vital to helping people understand and trust the work of the HCSS, as well as the other transitional justice mechanisms. A recent study found that South Sudanese people have very low awareness of the transitional justice mechanisms

198. See DAKAR GUIDELINES, *supra* note 196; Stromseth, *supra* note 89, at 92.

199. Dakar Guidelines, *supra* note 196, at 79.

200. Adama Dieng, *Capacity-Building Efforts of the ICTR: A Different Kind of Legacy*, 9 NW. J. OF INT'L HUM. RTS. 407–08 (2011), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1118&context=njihr>.

within the R-ARCSS.²⁰¹ In fact, only 68 percent of interviewees “had either heard of or engaged in discussions about the CTA and CTRH,” and more concerning, only 20 percent said the same regarding the HCSS.²⁰² Moreover, among those who were aware of the HCSS, few understood how the court would operate.²⁰³ Many interviewees were not even able to categorize and name the crimes committed and state whether they believed these crimes should be handled by domestic courts or referred to the HCSS.²⁰⁴ For these mechanisms to be successful, not only must there be increased awareness of the mechanisms, but they must clearly understand the mandates of these mechanisms as well as the limits of what they can and cannot provide.

For this outreach to be effective and receive the necessary buy-in from South Sudanese people, it must be undertaken with cultural sensitivity, an understanding of the ethnic and political cleavages in society, and the motivations and underlying beliefs of different groups. Thus, the outreach section should be heavily staffed with South Sudanese people who reflect the diversity of the country and partner with trusted local NGOs that understand the complexity of the conflict. This approach was successful for the Special Courts for Sierra Leone because it strengthened the link between Sierra Leoneans and the court.²⁰⁵ In this way, the values and principles underlying the HCSS’s work may seem less foreign and can be presented as universal values consistent with South Sudanese culture. Moreover, there are already several South Sudanese civil society organizations that have undertaken this work, such as the Center for Inclusive Governance, Peace and Justice (CIGPJ), the South Sudan Human Rights Society for Advocacy, and the Transitional Justice Working Group for South Sudan. Thus, the HCSS need not recreate the wheel in its work but rather bolster the efforts of other organizations.

2. Capacity Building

Through intentional capacity-building, training, and exchange, the HCSS also has the opportunity to establish a legacy of justice, rule of

201. Allan Ngari & Jame David Kolok, *Citizens’ Perceptions on Transitional Justice Processes in South Sudan*, INST. FOR SEC. STUD. (Nov. 2019), <https://issafrica.s3.amazonaws.com/site/uploads/ear-29.pdf>.

202. *Id.* at 8.

203. *Id.* at 10.

204. *Id.* at 9–10.

205. RACHEL KERR & JESSICA LINCOLN, *THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT* 4–6, 10, (2008), <http://www.rscsl.org/Documents/sfinalreport.pdf>.

law, and democracy in South Sudan. This is especially important because, as Section IV describes, the domestic judicial system of South Sudan is currently in shambles.²⁰⁶ Moreover, the HCSS will have a limited mandate and resources. It cannot possibly try every conflict-related case. Thus, the domestic judicial system of South Sudan will play a critical role in providing justice and accountability. The HCSS can help foster a robust, functioning justice system that will be able to carry on its legacy.

Typically, capacity building in transitional justice focuses on building stronger legal institutions, including material support, strengthening court procedures, training judges and other personnel. However, the ineffectiveness of South Sudan's domestic court system stems largely from the tight control of the executive branch and its unwillingness to prosecute cases.²⁰⁷ Thus, these traditional tactics of training individuals and providing material support, while certainly beneficial, may not achieve the extensive justice reform that South Sudan needs. However, when we consider the idea that building rule of law is just as much about increasing public demand for justice as it is about strengthening legal institutions, we see that opportunities for capacity building within civil society abound.²⁰⁸ Focusing resources on strengthening NGOs that can advocate for wholesale justice system reform and that will continue to promote rule of law and democracy long after the HCSS has completed its work may have a more long-term effect.

Furthermore, in addition to strengthening NGOs that will advocate for rule of law and democracy, the HCSS can also help NGOs become capacity builders themselves in a "train the trainer" type of model.²⁰⁹ This model would allow NGOs rather than the HCSS itself to help build the professional capacity of the judiciary and bar in South Sudan. An NGO-led model may be preferable if the HCSS is initially located outside of South Sudan, where it would have less access to actors in the domestic legal system. It would also provide greater access to South Sudanese lawyers and judges generally because the structure of the HCSS does not provide for many South Sudanese to take part in the functions of the court.²¹⁰ This model also has the advantage of sparing the resources of the HCSS and ensuring that capacity-building

206. *See supra* Section IV.A.

207. *Id.*

208. Stromseth, *supra* note 89, at 96.

209. *See* DAKAR GUIDELINES, *supra* note 196, at 81.

210. The prosecutors, defense counsel, registrar, and a majority of judges on every panel must be from African countries other than South Sudan. This will leave relatively few upper-level positions for South Sudanese nationals.

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continues after the HCSS finishes its work. Fortunately, some potential NGO partners are already working in this space, including the Foundation for Democracy and Accountable Governance and the South Sudan Law Society.

VI. CONCLUSION

The advantage of the hybrid court paradigm is its flexibility and adaptability. Hybrid courts can be tailored and shaped to respond to the unique context and challenges of each situation. The Hybrid Court of South Sudan faces enormous challenges and designing and implementing an effective court will be a monumental task. However, it is because of these challenges that the HCSS remains the best hope for accountability for the South Sudanese people. Moreover, it is a unique opportunity for the AU to nurture the domestic judiciary, rule of law, and democratization in the country. While the challenges are daunting, the opportunities for accountability and positive change are equally great. With sanguine resolve and creativity, the HSCC, supported by the international community, particularly the AU, has the potential to shepherd a new era of peace, justice, and accountability into existences for the South Sudanese people.