

The proposed hybrid court for South Sudan: Moving South Sudan and the African Union to action against impunity

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Abstract

The 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan provides quite ambitiously and laudably for the creation of the Hybrid Court for South Sudan under the auspices of the African Union. The article is an extract from the author's 2016 LL.M. dissertation submitted to the University of Pretoria. It critically examines the salient features of the proposed court with the aim of testing the court's ability to effectively address historical grievances and injustices in South Sudan. In so doing, the article draws lessons from similar mechanisms in Africa and beyond. It also interrogates the role of the African Union and South Sudan in operationalising this court. It reveals strengths as well as weaknesses in the proposed design of the court as well as in the ability of the African Union and South Sudan to fulfil their obligations. Despite

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these weaknesses, the article argues that by harnessing the strengths identified and learning from lessons from across the continent, the African Union (AU) and South Sudan can overcome the anticipated challenges and operationalise a hybrid court which will effectively deliver sustainable justice to the victims of international crimes committed during the South Sudan civil war.

Keywords: South Sudan, African Union, Hybrid Court, international crimes, human rights, transitional justice

1. Introduction

After months of simmering political tensions, violence erupted in South Sudan on 15 December 2013 when President Salva Kiir attempted to arrest his former deputy Dr Riek Machar on allegations of an attempted *coup d'état*, an allegation that has since been discounted by the African Union Commission of Inquiry on South Sudan (AUCISS). The violence spread fast, resulting in international crimes being committed by forces loyal to Kiir and breakaway forces loyal to Machar (AUCISS 2014:1125–1137). Concerted efforts led by the Intergovernmental Authority on Development (IGAD) and supported by the African Union (AU) and other stakeholders resulted in the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) on 17 August 2015 (Intergovernmental Authority on Development [IGAD] 2015).

The ARCSS provides for the establishment of the Hybrid Court for South Sudan (HCSS), as one among other transitional justice mechanisms, and envisions a major role for the AU in its establishment and operationalisation. This proposal buys into the liberal-prosecution model of transitional justice which emphasises the prosecution of the planners and organisers of international crimes. This article interrogates the capability of the HCSS to deliver sustainable transitional justice solutions to South Sudan and explores how the AU can contribute to its success. The article is primarily a qualitative desk-based research with primary data gathered from relevant instruments and policy documents and statutes and jurisprudence of

similar mechanisms. Secondary data from textbooks, journal articles, newspapers, commentaries and electronic sources are also relied on, with limited discussion interviews being used only to supplement the primary and secondary sources. Section one provides an introduction, methodology and outlay of the article. Section two lays a foundation for discussion of the current conflict by providing a historical context. Section three assesses the potential of the proposed HCSS to learn from the failures of South Sudan's past flirtations with transitional justice and deliver sustainable solutions. Section four explores the potential of the AU to contribute to the success of the HCSS.

2. Historical context of the South Sudan crisis

After over five decades of armed resistance by the people of Southern Sudan against marginalisation and oppression by the government of Sudan (Garang 1992; Kebbede 1997; Deng 2005; Machar 1995), the Comprehensive Peace Agreement (CPA) was signed between the Sudan Peoples' Liberation Movement/Army (SPLM/A) and the Government of the Republic of the Sudan. Consequently, Southern Sudan gained autonomy on 9 July 2005 under Dr John Garang as president of Southern Sudan region and First Vice-President of Sudan. However, Garang died in a helicopter crash on 30 July 2005 and was succeeded by his deputy Kiir with Machar as the new deputy. The pair led the South to independence as the Republic of South Sudan on 9 July 2011 following a referendum in line with the CPA. While the CPA symbolised the beginning of the South's long-overdue journey to democratic and economic prosperity (Natsios 2005:89), the new state's success depended a lot on how it addressed human rights violations committed during the conflict. Eleven years into the CPA, however, the anticipated 'peace dividends' have not materialised and a civil war rages. The South Sudan crisis is complex and multidimensional and an exhaustive discussion is beyond the scope of this article. This section, however, explores some of the factors involved in as far as they have a bearing on the discussion of transitional justice, particularly criminal accountability.

2.1 South-South violations of human rights during the Sudan civil war

While the Sudan civil war mainly pitted the South against Khartoum, the Southerners had unresolved internal issues. Significantly, the split in 1991 within the SPLM/A (then known only as Sudan Peoples' Liberation Army [SPLA]) was a defining moment in intra-South relations. Machar, Lam Akol and others rebelled from the SPLA at Nasir in what came to be known as the Nasir rebellion (Akol 2003). The disagreement was initially a tussle between unitary ideologues who advocated for equality for Southerners but as part of Sudan, and separatist ideologues who advocated for complete independence of the South from Sudan (Malwal 2015:157; Garang 1992). However, the antagonists soon intensified ethnic passions along the lines of Machar's Nuer ethnic group and Garang's Dinka group (The Sudd Institute 2014:2). The splinter group gruesomely killed Dinka combatants within their ranks before massacring the Dinka civilian populations in Twic East and Bor (Malwal 2015:159–160, 205; Crawford-Browne 2006:54; Johnson 2016:6). Deadly confrontations between the SPLA and the splinter group continued for the greater part of the 1990s and Machar eventually aligned with Khartoum in 1997. Even though temporary peace, at least enough to allow refocus towards the common enemy in Khartoum, was achieved after the much-hailed Dinka-Nuer West Bank Peace and Reconciliation Conference in Wunlit (AUCISS 2014:922–951; Ashworth et al. 2014:151–167), this fateful event sowed deep distrust among Southern communities as Machar's actions were considered a Nuer betrayal of the Southern cause.

Other conflicts before and after the events of 1991 equally resulted in destructive violence. These include the disagreements in the 1970s and early 1980s when the then rebel group known as Anyanya was transitioning from the First Civil War to the 1972 Addis Ababa Peace Agreement and to the beginning of the Second Civil War in 1983 (Malwal 2015), as well as later factional clashes in several areas in the South (Human Rights Watch/Africa 1994:19–21; AUCISS 2014:855–856). These too were ignored in the lead-up to the CPA with Garang championing a united Southern front and inviting Machar back to the SPLM in 2002 as it became clear

that the peace process had potential for success (Crawford-Browne 2006:54). Unease and suspicion simmered within SPLM ranks especially after Garang's death and elections in 2010 (The Sudd Institute 2014:3–4). The affected communities did not receive recompense or a genuine apology for the atrocities committed against them during these unfortunate events (Malwal 2015:160; Johnson 2016:151–152).

Some Southerners were also caught in the cross-fire between the SPLA and the Sudanese army. Garrison towns under Sudanese army occupation, such as Malakal, Juba, Wau and Yei were frequently attacked by the SPLM and casualties often included the civilian residents who the SPLM considered as either loyal to or sympathetic to Khartoum (Crawford-Browne 2006:68). When the CPA was signed, these towns and their peoples became part of the South with no mention made of redress for the atrocities committed against them. SPLM and other Southerners who actively fought against Khartoum continued to treat them with suspicion (Zahar 2011:37) and perhaps even contempt. The unaddressed events and old rivalries highlighted above created room for resentment and distrust in the new state and within the SPLM government.

2.2 Criminal accountability under the CPA and the question of state succession

Justice and accountability were not exactly a priority in the CPA process (Basha 2006:28). While it did not expressly provide for amnesty, the CPA was unnervingly silent on the question of accountability for abuses committed during the Sudan civil war. This, Ibrahim (2007:491–492) concludes, was a deliberate *de facto* amnesty intended to ensure continued political goodwill for the CPA. This article, however, asserts that the government of national unity comprising the SPLM and the Khartoum-based National Congress Party (NCP) which governed Sudan during the interim period from 2005 to 2011 was bound under international human rights law to provide effective remedy for human rights violations committed during the war since Sudan was a party to the International Covenant on Civil and Political Rights (ICCPR).

However, the question of state succession arises in relation to human rights treaty obligations of the new Republic of South Sudan after independence in 2011. Article 16 of the Vienna Convention on Succession of States in Respect of Treaties appears to endorse the ‘clean slate’ approach excusing newly-independent states from their predecessors’ treaty obligations. However, this article argues for automatic state succession to human rights treaties since they codify general principles of inherent human dignity and seek to avoid a gap in protection which would expose previously protected populations to potential violations (Weeramantry 1996:645–655). The UN Human Rights Committee later adopted this position in General Comment 26 on continuity of obligations, particularly for ICCPR rights. Therefore, despite South Sudan not having formally acceded to ICCPR, it was obligated to provide effective remedy for the human rights abuses as it automatically assumed ICCPR obligations of Sudan upon its independence. Further, as a member of the UN it is bound by the Charter of the United Nations to act towards the UN’s common purpose of promoting and respecting human rights. The silence of the CPA could not reasonably be interpreted as absolving the government of South Sudan of its obligations under international law.

2.3 South Sudan’s approach to transitional justice after the Sudan civil war

The preceding sections have highlighted the fact that the new nation desperately required genuine accountability and reconciliation to provide closure and draw clear lines on impunity. However, the government of South Sudan failed to prioritise and initiate such processes. Instead, former fighters and militias were unconditionally integrated into the SPLA and the society regardless of their previous misdeeds against civilians (Zahar 2011:37).

Granted, the government launched the Presidential Committee for Community Peace, Reconciliation and Tolerance in Jonglei State in 2012 (Ashworth 2015:177) as this was the area hit hardest by inter-ethnic conflicts. This committee’s recommendations are, however, yet to be implemented

(AUCISS 2014:920). Attempts by Machar's wife, Angelina Teny, to launch a healing and reconciliation initiative also failed as it was not government-driven, but rather a Machar family project widely suspected as political scheming (AUCISS 2014:914–915). Discomfort over Machar's role in the events of 1991 that left some of the deepest scars in South Sudanese society could also have been a factor. Further, the first nationwide government initiative, National Reconciliation Committee for Healing, Peace and Reconciliation, created in 2013, was also unable to fully commence operations since the war broke out shortly after its creation (AUCISS 2014:920).

2.4 Exclusionary governance and poor development record

The South Sudanese people expected their new government to forge a national identity through an inclusive and cohesive development agenda (Jok 2011). Marginalisation was, after all, one of the main reasons why the people of the South so resiliently fought Khartoum for years. Ironically therefore, Khartoum's exploitative style served to set a high bar for the new government with statehood igniting hopes of better governance. However, the SPLM government seems to have done the opposite. The foundations for this lie in the design of the CPA.

Apart from its signatories, the CPA was largely negotiated without reasonable involvement of other Sudanese stakeholders (Ibrahim 2007:475) thereby failing to provide sufficient guarantees and safeguards for minority inclusion. Further, the CPA handed over near-total control of the South to SPLM by giving it 70% representation in the interim Southern parliament with only 15% each left for other Southern stakeholders and the NCP. This imbalance enabled the SPLM to dominate the Southern parliament well into independence. South Sudan comprises over 60 diverse ethnic groups with the Dinka and Nuer being the majority. However, far from the facile and Afro-pessimistic conclusion of commentators like Silva (2014:78–80), ethnic diversity is not in itself the cause of South Sudan's problems. The concern rather is that power in the SPLM was not diversified among the various interest groups, but was instead concentrated around an elite

group (Jok 2011) leading to marginalisation, exclusion, unequal treatment and discontent within large sections of society (Zahar 2011:37).

This exclusion enabled corruption and mismanagement to thrive in government, leading to weak national institutions and eventually crippling provision of basic services. This was compounded by the fact that the new nation had almost non-existent structures and very few qualified civil servants to take up the responsibility of policy development and implementation. These factors heightened public frustration which only required a political trigger that came in the form of the events of 15 December 2013 and quickly spiralled into a civil war.

2.5 National security as a challenge to peace and transitional justice

Despite the SPLM being quite organised in its struggle against Khartoum, it was in fact a 'coalition' of armed factions and ideologues (Deng 2005) over who the SPLM leadership did not always have total control. Further, the CPA required the SPLM to transform into a professional political movement and military force despite most SPLA fighters and commanders being once-regular country-folk hardened by years of bush war and who had probably grown accustomed to operating more as rebels than as professional soldiers or civilians (Guarak 2011:555). However, the much-needed security sector reform, including disarmament, demobilisation and reintegration, was not effectively undertaken. Many ordinary civilians had also acquired undocumented firearms for civil defence which they were reluctant to surrender for a future that seemed uncertain at the time (Crawford-Browne 2006:61). South Sudan was therefore ushered into statehood with many undocumented weapons in the hands of civilians and militias and a 'military' that was more militia than national army.

The SPLA added to its military woes by massively recruiting over 7 500 new soldiers, inevitably from a population comprising many people who had had very little access to education (AUCISS 2014:53–54). While this in itself may not have been a problem, the process was skewed to favour those from groups loyal to Kiir, and to a small extent Machar. Further, the process

of recruitment, training and deployment was opaque and allowed for most recruits to operate outside of official military channels (AUCISS 2014:53–54). A combination of these factors contributed greatly in compromising peace and security in South Sudan.

3. Criminal accountability under the ARCSS

As discussed in the preceding section, South Sudan failed to engage in a much-needed genuine transitional justice process for events during the Sudan civil war. This set the stage for a political conflict to very quickly spiral into a full-blown civil war from 15 December 2013 – characterised by massive violations of human rights and international humanitarian law amounting to international crimes. The ARCSS of 17 August 2015 unequivocally acknowledges the disharmony resulting from past human rights abuses and the need for accountability, and then provides for the establishment of the HCSS. This seems to adopt the recommendation of the AUCISS that accountability must be pursued as part of a wider process of societal reconciliation if sustainable peace is to be achieved in South Sudan.

While individual criminal responsibility as a transitional justice mechanism is now well-established – dating back to the post-World War I aborted attempt to prosecute Kaiser Wilhelm II of Germany and the shambolic Ottoman trials, and its successful affirmation at the International Military Tribunal at Nuremburg in 1946 – criminal prosecutions in circumstances of mass violations are, according to Schabas (2002), generally time and resource intensive such that not all perpetrators can be prosecuted. It is for this reason that the International Criminal Court (ICC), for example, concentrates on individuals considered to bear the greatest responsibility for international crimes. Further, criminal accountability cannot single-handedly ensure genuine transitional justice, but rather reconciliation and justice are both necessary as experiences from Rwanda and Sierra Leone have shown (Sooka et al. 2016). The ARCSS confronts these realities by providing for a Commission for Truth, Reconciliation and Healing (CTRH) and a Compensation and Reparations Authority (CRA) to operate

simultaneously with the court. This article, however, only focuses on the HCSS by analysing and testing it against prevailing standards of transitional justice and human rights.

3.1 Establishment of the HCSS

The UN defines a hybrid court as one whose jurisdiction and composition is mixed, exhibits international and national aspects and is often located within the territory of the crime (Office of the United Nations High Commissioner for Human Rights [OHCHR] 2008:1). As will be discussed below, the HCSS is indeed a hybrid court within this definition. The choice of a hybrid court as opposed to an international tribunal is ideal where national systems are either non-existent or incapable of addressing mass violations and where a purely internationalised mechanism would not earn local acceptance (Kaleck 2015:55; OHCHR 2008:3–4). South Sudan presents such a scenario; hence the proposed HCSS as a court superior to, and independent of, the South Sudan judiciary.

According to the ARCSS, the African Union Commission (AUC) is responsible for the establishment of the HCSS and in this regard, is required to sign a Memorandum of Understanding (MoU) with the government to operationalise the court. The AUC has the mandate of determining key aspects of the court such as location, funding, infrastructure, enforcement and personnel. This design gives the AU a role as prominent as, if not more prominent than, that of the government of South Sudan in relation to the HCSS. While this can potentially promote resistance and non-cooperation from domestic authorities (Bell 2000:273), it is necessary where domestic mechanisms are incapable of conducting genuine investigations and prosecutions for reasons of incapacity or susceptibility to political manipulation. The AUC has since prepared and submitted a draft statute to the transitional government of South Sudan, which statute has been approved by the Council of Ministers (CoM) and is currently awaiting parliamentary approval (Commission on Human Rights in South Sudan 2017:115).

Despite the above powers given to the AUC by the ARCSS, the ARCSS also empowers the government through the general powers of the CoM to initiate the legislation operationalising transitional justice mechanisms, including the HCSS. Parliament is then expected to enact this legislation by consensus or a two-thirds majority vote as a last resort, in an attempt to promote consensus and local ownership. The power bestowed upon the CoM in this regard is quite immense considering that the CoM was an uncomfortable compromise between warring parties (Johnson 2016:294), at least until Machar's departure in July 2016 and the outbreak of renewed violence. As such there is the likelihood of deadlock in decision making at the CoM either due to factional differences, or outright lack of good faith due to the possibility that some members of the CoM are themselves likely to be subjected to the HCSS (Tittmamer 2016:14). Expecting political goodwill on fundamental decisions on transitional justice from these individuals may be stretching the limits of expectation.

Further to the above conflation of responsibilities, the ARCSS gives the National Constitutional Amendment Committee (NCAC) the general mandate of drafting new legislation required under the Agreement. The NCAC is an eight-member committee comprising representatives from government, Machar's breakaway SPLM/A-In Opposition, former political detainees, other political parties and IGAD. Overall, the above powers raise the potential for conflict of responsibilities between the AUC, the responsible ministry, the CoM and the NCAC thereby creating confusion as to who exactly between the AUC and the government (and within the government) is responsible for the creation of the court. The anticipated MoU between the AU and the government should either expressly oust the jurisdiction of one of the above organs over the HCSS legislation or clearly lay out how this responsibility is to be shared.

3.2 Jurisdiction of the HCSS

The HCSS has broad temporal jurisdiction over international crimes committed from 15 December 2013 to the end of the 30-month transition period. In hindsight, there was much wisdom in extending this jurisdiction

to beyond the signing of the Agreement, especially considering that more violations have since occurred after the formation of the transitional government when Kiir and Machar fell out once again. However, the periodic limitation of jurisdiction precludes the court from addressing widespread atrocities committed before 15 December 2013 particularly in Jonglei state where well-organised inter-communal violence was prevalent before and after independence (Johnson 2016). Some commentators, however, believe that this was a necessary political decision in order to avoid constraining the resources of the court and to also give domestic criminal courts the opportunity to complement the HCSS (Musila Interview 2016b). To cure the above temporal gap in the court's mandate and to ensure that persons not prosecuted by the HCSS face domestic processes, the government needs to occasion legislative measures necessary to empower domestic courts to try international crimes in a manner complementary to and respectful of the supremacy of the HCSS.

The court's subject matter jurisdiction encompasses genocide, war crimes, crimes against humanity, sexual crimes, gender-based crimes and other serious crimes under both international law and South Sudanese law. This expansive jurisdiction is designed to ensure that all possible serious crimes committed during this period are prosecuted. However, in relation to South Sudanese law the ARCSS (IGAD 2015: chap V, 3.1.1) simply says 'and/or applicable South Sudanese law' without elaborating the specific laws, be they substantive, procedural or evidentiary. The applicable domestic law should be clarified beforehand, preferably by the anticipated statute, in order to eliminate the possibility of applying laws that may be inconsistent with international standards (OHCHR 2008:12).

Notably, the HCSS has a wide personal jurisdiction over any individual allegedly responsible for international crimes in this context, regardless of nationality. This is necessary considering the complexity of the conflict which raises the possibility of non-nationals also having been involved. Such wide personal jurisdiction was instrumental for the Special Court for Sierra Leone (SCSL) which exercised its jurisdiction in *Prosecutor v Charles*

Ghankay Taylor and prosecuted and convicted Taylor in 2012 for his role in the conflict in Sierra Leone despite him being a Liberian national.

Significantly, the ARCSS also advocates for restorative justice. The court is empowered to order forfeiture of property or proceeds of crime to the state or restoration to the rightful owners. This is in addition to the court's power to order reparations. These powers are designed to ensure that beyond punitive justice, victims get some measure of tangible compensation for the crimes against them.

Related to jurisdiction is the court's mandate to leave a 'permanent legacy' in South Sudan, consistent with the position of the UN that the establishment of a hybrid court must consider what legacy it will leave in the country (United Nations 2004:46). Legacy in this context is the enduring impact the court has on improving the rule of law in the country (OHCHR 2008:4). South Sudan ranks very low on the Rule of Law – being ranked by the 2018 Freedom House Index among the worst of the worst at 2/100 (Freedom House 2018) – and as such, the HCSS is expected to set a lasting example for domestic institutions on accountability and the rule of law. However, the ARCSS is silent on who should have custody of the archival records of the HCSS. While the records are crucial for an impactful legacy and in creating a historical record, the need to protect some witnesses and victims is equally compelling (Nyagoah e-mail 2016). Custody has become a controversial issue between the UN and Rwanda over the archives of the International Criminal Tribunal for Rwanda (ICTR). The UN took custody of the archives after the ICTR wound up in 2015, but Rwanda continues to demand custody as it deems these to be crucial for its national memory of the 1994 genocide (United Nations Mechanism for International Criminal Tribunals 2015). To avoid a similar situation in future between South Sudan and the AU, the anticipated MoU and statute establishing the HCSS should clarify who has the responsibility of keeping the HCSS's archival records upon its winding up.

3.3 Membership and staff of the HCSS

The Agreement seeks impartiality and contextual sensitivity by providing for majority foreign judges from other African nations and minority South Sudanese judges. All prosecutors, the registrar and other staff, on the other hand, shall be foreign nationals from other African states. The ARCSS seems to have adopted a UN recommendation that hybrid courts for divided societies such as South Sudan should ideally be comprised of a majority of international judges in order to guarantee fairness, impartiality and objectivity (United Nations 2004:64). While the South Sudan judges bring deep understanding of the specific cultural and historical context, the other non-national African judges bring a general understanding of the African context and valuable experience. This composition guarantees local ownership, both by South Sudan specifically and Africa in general; ensures contextual sensitivity; and guarantees impartiality, fairness, efficiency and professionalism in accordance with established principles of international criminal justice.

However, the exclusion of South Sudan nationals from the prosecution team is worrying. A mix of majority non-nationals and minority nationals would have been ideal to further promote South Sudan ownership of the process, infuse contextual familiarity in the team while maintaining impartiality and objectivity, and promote capacity building of South Sudanese professionals (Musila Interview 2016b). The Central African Republic's proposed *Cour Pénal Spécial* is instructive in this regard as it provides for an international prosecutor deputised by a national and assisted by a team of prosecutors comprising majority non-nationals and minority nationals (Musila 2016a:23). This provision ought to be reconsidered when drafting the anticipated statute of the HCSS to allow for a South Sudanese national to deputise the non-national chief prosecutor as well as have a reasonable number of South Sudanese prosecutors, investigators and assisting staff.

A poorly worded provision of the ARCSS (IGAD 2015: chap V, 3.3.3) further purports to restrict the right of accused persons to defence counsel of their choice by providing that, '... [duty] defence counsels of the HCSS

shall be composed of personnel from African states *other than the Republic of South Sudan ...*' (emphasis added). It is a recognised international human rights principle that an accused person should not be denied the right to choose counsel of his or her choice. Purporting to preclude South Sudanese nationals from acting as duty defence counsels potentially violates this right (Nyagoah e-mail 2016). Similar concerns arose concerning the fairness of the decision of the *Chambres Africaines Extraordinaires au Sénégal* in *Ministère Public v Hissèin Habré* to appoint Senegalese lawyers for Habré, a former president of Chad, without his approval after he refused to cooperate with the court (Oyugi 2016). Best practice from the ICC, and other criminal courts/tribunals, requires the court to give the accused persons an opportunity to pick from a list of available counsels of *any* nationality where the court has to assign defence counsel, thereby ensuring the above right is upheld. The anticipated statute should clarify this position to expressly allow South Sudanese nationals to be listed as duty defence counsels.

Another concern is on the appointment of support staff for prosecutors and the defence. While the ARCSS is express on the AU being the appointing authority of judges, prosecutors, duty defence counsels and the registrar, it is silent on who should appoint the other staff and investigators. This potentially leaves room for the government to take the lead on these appointments and this could be exploited to compromise the court processes and jeopardise security of witnesses (Nyagoah e-mail 2016). The MoU and anticipated legislation should expressly make the AU responsible for these appointments.

3.4 The HCSS and the question of immunity

The ARCSS expressly precludes the possibility of immunity or amnesty from criminal responsibility. Non-immunity is long established in international criminal law judging by the constitutive instruments of past and current international criminal mechanisms. A recent UNDP survey also reveals significant support by South Sudanese for non-immunity as they attribute the intransigence of some of their leaders to the 2005 CPA's

de facto immunities (UNDP 2015:23). Notably the Agreement departs from the AU's apparent position on immunities as evidenced by the June 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which seeks to add an international criminal chamber to the proposed court, but which expressly provides personal immunity from prosecution for heads of state and government and senior government officials. It is therefore laudable that slightly over a year after the protocol's adoption, an AU-backed mechanism expressly precludes any immunities. This either indicates a change of tune by the AU on the issue of immunity or at the very least signifies hope for such change.

The ARCSS further remarkably provides that persons indicted or convicted by the court are ineligible to participate in government for a period to be determined and further that any indicted person eventually 'proven innocent' will be entitled to compensation (IGAD 2015: chap V, 5). The first part of this provision is a legitimate endeavour aimed at giving the nation a chance to move forward under trustworthy and untainted leadership. However, two issues need to be clarified in this regard. First, it should be clarified whether this lustration takes effect upon indictment or upon conviction. The presumption of innocence principle swings in favour of this lustration taking effect upon conviction. Secondly, it would be prudent to clarify whether this period of exclusion will run concurrently with or subsequent to the sentence. Ideally, this period should run subsequent to serving sentence for it to have any meaningful effect. The exclusion will also inevitably require major shake-up of government which Tiitmamer (2016) argues is potentially destabilising. However, this article asserts that the exercise is necessary to purge the government of persons responsible for heinous crimes against the people. The second part of the provision is a misnomer, which is most likely the result of inattentive drafting, since criminal courts do not pronounce on the innocence of accused persons, but rather on whether a case has been proved to the required standard of proof.

3.5 The legal relationship between the HCSS and the CTRH

The Agreement is rather vague on the legal relationship between the HCSS and the CTRH, a fact that potentially exposes the two mechanisms to an antagonistic relationship. Both mechanisms have concurrent jurisdiction over violations committed between 15 December 2013 and 17 August 2015. This in itself is not a problem since the CTRH is a political institution offering political solutions while the HCSS is a judicial institution offering legal solutions in accordance with international criminal law. In fact, experiences from Peru, Argentina and Timor-Leste have shown that with a well-defined framework, the two mechanisms can beneficially and complementarily work together (United Nations 2004:26).

The experience of Sierra Leone, however, shows the risks of not clarifying a framework for interaction from the onset (Murungu 2011:104–106). In 2003, the SCSL trial chamber asserted in *Prosecutor v Samuel Hinga Norman* and *Prosecutor v Augustine Gbao* that to allow persons charged before the court to testify before the Truth and Reconciliation Commission of Sierra Leone would undermine the court's autonomy and jeopardise the accused's right to presumption of innocence. The appeals chamber disagreed, holding that the existence of the two mechanisms was based on the principles of complementarity and harmonious and practical balance between criminal prosecution and the need for truth and reconciliation, and that as such the accused persons could testify before the commission as long as the procedure for taking testimony upholds the integrity of the court process. While the SCSL appeals chamber's decision is the appropriate position, this may not always be obvious, especially if the enabling instrument does not clearly spell out this relationship as is the case with the ARCSS. It is therefore important that the anticipated statute clarifies this relationship.

4. The African Union and transitional justice in South Sudan

The previous section discussed salient features of the HCSS and identified strengths which should be maximised and shortcomings which should be

addressed by the AU and the government as the two stakeholders with the greatest responsibilities in this regard. While the primary responsibility of forging a path to sustainable peace in South Sudan rests with its people, the AU has a legal, political and ‘moral’ obligation to complement the process (Sooka et al. 2016). The government of South Sudan being a negotiated power-sharing arrangement as opposed to a democratically elected government, it may be prudent to provide for some degree of external pressure and oversight in order to ensure that the government fulfils its obligations regarding the HCSS. This appreciation probably informed the prominent role bestowed by the Agreement upon the AU in relation to the HCSS. How the AU responds to these obligations could determine to a great extent the future of the HCSS. This section therefore examines how the AU, being the regional political organisation, and its various relevant organs can effectively perform this role.

4.2 The legal basis for the African Union’s transitional justice mandate

The fundamental objectives of the AU as entrenched in the Constitutive Act of the African Union include a people-centric approach to the promotion of human rights, peace, security and stability in Africa. The AU seeks to achieve these objectives through peace-building, reconstruction and restoration of the rule of law in post-conflict states and conflict resolution mechanisms at domestic and continental levels. This is recognition of the fact that peace and security are only achievable if governance structures of individual countries and of the AU are effective, stable and responsive to the people’s needs. As such, the security of individual African countries is both a domestic as well as a continental concern.

4.2 The African Union’s continental transitional justice efforts

While the AU has in the past had little success in conflict resolution in Africa, it has recently stepped up its efforts. It adopted the Policy on Post-Conflict Reconstruction and Development in 2006, which emphasised the need for countries emerging from conflict to institute transitional justice

processes in order to address past and current grievances. While this policy affirmed the AU's resolve to address impunity, it merely stated these principles without providing much in the form of a structural roadmap for their actualisation.

Bold movement towards direct AU involvement in post-conflict processes was heralded by the 2009 report of the African Union High-Level Panel on Darfur which recommended the establishment of a hybrid court for Darfur, truth and reconciliation mechanisms, and an AU implementation and monitoring panel. While most of the recommendations of this report have not been implemented, it provided the first clear indication of the AU's practical role in transitional justice in member states.

Taking cue from the above report, the AU Panel of the Wise (PoW) attempted to codify a continental policy on transitional justice. The panel's report, entitled 'Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity', revealed that domestic approaches by individual countries have largely been haphazard. The report recommended that the AU takes a more active and direct role in transitional justice in Africa by consolidating lessons from across the continent and developing common principles and concepts to enable it to effectively balance peace and security with accountability and reconciliation (African Union Panel of the Wise 2013:65–66). The panel attached to the report a draft it called the African Union Draft Transitional Justice Policy Framework (Draft Policy).

The draft was presented to the AU's Specialised Technical Committee on Justice and Legal Affairs in November 2015, but the committee raised concerns that it was not comprehensively reflective of the input of governments (Permanent Mission of Ethiopia to the African Union and the United Nations Economic Commission for Africa 2016). The committee then engaged experts from member states to re-draft the document. This article argues that South Sudan presents an opportunity for the AU to test the Draft Policy including subsequent expert consultations on the draft in order to strengthen it for adoption as a benchmark for continental

transitional justice standards. This will afford the AU the opportunity to develop a responsive and practical policy borne out of wide consultations, experience from *ad hoc* domestic mechanisms and the AU's own experience in South Sudan.

Another complementary process was launched in 2013 by another AU organ, the African Commission on Human and Peoples' Rights (ACHPR), which by a 2013 resolution on transitional justice in Africa commissioned a study to, among others, identify the specific role the ACHPR should play in supporting transitional justice mechanisms in Africa, possibly by means of a thematic special mechanism. The report of this study is due in May 2018. Significantly, the government of South Sudan is expressly obliged by the Agreement to seek the ACHPR's assistance in implementing the transitional justice mechanisms. The ACHPR's work and experience thus far in this regard will be useful to the South Sudanese efforts while also affording the ACHPR the opportunity to develop and enrich its report with practical experience.

This article therefore argues that first the AU's expert drafters and the ACHPR should harmonise their efforts in developing a continental transitional justice policy and then coordinate and direct these harmonised efforts towards facilitating the transitional justice process in South Sudan through sharing experiences, promoting capacity building and enriching the policy drafting effort. By harmonising inter-agency cooperation with the South Sudan process, the AU will ensure proper coordination, and hence efficiency, of its interventions. Further, this will ensure effective monitoring by the AU of the South Sudan process in order to flag potential challenges and mobilise response.

4.3 The African Union and South Sudan before the Agreement

On 17 December 2013, two days after the civil war began, the AU expressed readiness to assist South Sudan find a peaceful solution, and soon thereafter directed the AUC Chairperson to consult the ACHPR and immediately establish a commission to investigate human rights and humanitarian law

violations in South Sudan during the war and make recommendations on accountability, reconciliation and healing. Significantly, this was the first time the AU acted so expeditiously to investigate human rights violations in a member state, and that while South Sudan was not at the time a state party to the African Charter which establishes the ACHPR.

The AUC Chairperson constituted the AUCISS comprising five eminent Africans – former Nigerian President Olusegun Obasanjo, Honourable Sophia Akuffo of Ghana, Ms Bineta Diop of Senegal, Prof Mahmood Mamdani of Uganda and Prof Pacifique Manirakiza of Burundi – in March 2014 after consulting stakeholders including the warring parties, ostensibly to promote acceptance by all parties and dispel any perceptions of bias and impartiality. Its temporal mandate was capped at the date the civil war began, 15 December 2013. The AUCISS presented its final report to the AU on 15 October 2014, but the AU only released it a year later on 27 October 2015. The report revealed widespread and systematic violations of human rights law and international humanitarian law amounting to international crimes, and recommended accountability, as well as healing and reconciliation processes. Having initiated and supported AUCISS, it is imperative that the AU follows up on its recommendations above in order to send a clear message against impunity and to affirm respect for its own processes (Sooka et al. 2016).

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC), another AU organ, whose mandate is to protect and promote children's rights and welfare in Africa, undertook a fact-finding mission to South Sudan in 2014 with the permission of the government and revealed grave violations of the rights of children during the civil war. Despite South Sudan not being a state party to the African Charter on the Rights and Welfare of the Child, the ACERWC interpreted its mandate broadly to allow it to conduct the mission. The ACERWC, like the AUCISS, drew attention to the need for accountability (African Committee of Experts on the Rights and Welfare of the Child 2014:37). This contextual experience of the ACERWC coupled with its thematic expertise can collaboratively

be harnessed in order to ensure that the welfare of children prominently features in the South Sudan transitional justice process.

4.4 The transitional justice role of the African Union under the Agreement

The ARCSS envisions a very prominent role for the AU in operationalising the HCSS and obliges the government to work with the AU towards this end. As discussed in section three above, the ARCSS is ambiguous on who exactly should initiate the drafting of the court's enabling statute. Nonetheless, the ARCSS expressly obliges the AU to establish the HCSS through an MoU with the government, and as mentioned above, the AUC Commission has already assumed a leading role and drafted a statute and submitted it to the government of South Sudan. Experts estimate that if the AU keeps up this pace, the court should be operational within three years (Musila Interview 2016b), which period this article argues is necessary to allow for a properly thought-out court structure and operational design. However, should the government unnecessarily delay the process, the AU should bypass it and establish the HCSS by invoking its powers under article 4(h) of the Constitutive Act of the AU which mandates it to intervene in a member state in the event of international crimes.

The AU is required to appoint personnel of the court as well as determine the location of the court, its infrastructure, its funding and enforcement of its decisions. These responsibilities require the AU to mobilise the necessary financial resources preferably by developing a fundraising outreach framework for the HCSS (Nyagoah e-mail 2016). While targeting global and regional donors, the focus should be on mobilising funds from AU member states as a primary component, either through compulsory member state contributions or as a vote-head in the AU annual budget. This way, funding sustainability can be assured and the AU will maintain the HCSS' identity as an Africa-owned and Africa-led and, for the most part, Africa-resourced initiative.

In deciding the court's location, a balance should be struck between security of court personnel and witnesses and the court's accessibility to the South

Sudanese people (Nyagoah e-mail 2016). Arguably therefore, it cannot be located in South Sudan due to prevailing insecurity. This article argues that Arusha, Tanzania would be ideal with the possibility of relocation to South Sudan if and when security conditions improve. Arusha is reasonably geographically close to South Sudan and has the infrastructural advantage having inherited the facilities of the ICTR that wound up its activities in 2015. Further, Tanzania is politically stable and offers security unlike South Sudan's immediate neighbours Sudan, Central African Republic and the Democratic Republic of Congo. Tanzania is also relatively politically neutral and impartial unlike Kenya, Uganda and Ethiopia who besides hosting large South Sudanese refugee populations, have also been accused of providing a safe haven for resources plundered from South Sudan during the conflict (The Sentry 2016).

Also relevant to the success of the HCSS is the AU's consolidation of the political support of its members and other stakeholders. To avoid the pitfall of lack of political goodwill and cooperation that characterised the ICC's relationship with Sudan and Kenya leading to the hibernation of *Prosecutor v Omar Hassan Ahmad Al Bashir*, withdrawal of charges in *Prosecutor v Uhuru Muigai Kenyatta* and vacation of charges in *Prosecutor v William Samoei Ruto & Joshua arap Sang*, the AU must mobilise its members to unequivocally support the HCSS and collectively put pressure on South Sudan to cooperate with the HCSS. After securing this support, the AU should then embark on galvanising global support for the HCSS. However, the AU should not in the process shirk its responsibilities by delegating to global stakeholders. Rather, it should provide the necessary leadership in coordinating external support to achieve cohesiveness and efficiency (Sooka et al. 2016). This way the transitional justice process in South Sudan will not be dominated by donor interests, but will be Africa-driven with complementary assistance from global stakeholders.

5. Conclusion

This article sought to examine the capability of the proposed HCSS to deliver sustainable transitional justice solutions to South Sudan, and

ways in which the AU can effectively contribute to its success. The article determined that South Sudan became independent against the backdrop of underlying internal grievances that were not subsequently addressed. This, coupled with insecurity, bad governance and political tensions within the ruling SPLM, culminated in the current civil war. The article concludes that the HCSS presents a timely opportunity for accountability. Shortcomings have, however, been identified, which prompted recommendations made to the government and the AU in relation to the HCSS, including limited temporal jurisdiction; exclusion of South Sudanese nationals from the staff of the court; lack of clarification on who between the government of South Sudan and the AU will have custody of archival records of the HCSS; unclear legal relationship between the HCSS and the CTRH; and ambiguity on who is responsible for initiating the HCSS' enabling legislation.

The study also determined that the ARCSS bestows significant responsibilities upon the AU in relation to the HCSS which include operationalising the HCSS in consultation with the government; determining the location of the HCSS; appointing court personnel; availing the necessary infrastructure and funding; providing an enforcement mechanism for HCSS decisions; and coordinating stakeholder support. The article has made recommendations on how the AU can effectively perform these obligations. The study concludes that the AU must take the lead in relation to the HCSS in order to guarantee focus and sustainability.

Finally, the article notes that as of the time of writing, Kiir and Machar had again fallen out with the latter leaving the country and controversially being replaced by Taban Deng Gai as First Vice-President of the transitional government. In response, IGAD launched a High Level Revitalisation Forum to get the process back on track, resulting in Kiir and Machar signing yet another deal in September 2018 for the reinstatement of Machar and recommitting to the ARCSS. While these recent developments have made the situation more fragile, they have also shown the urgency in implementing the ARCSS, particularly the HCSS.

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