HANDBOOK

TRANSITIONAL JUSTICE, RECONCILIATION AND HEALING

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Acronyms

AFRC	Armed Forces Revolutionary Council
ARCSS	Agreement on the Resolution of the Conflict in the Republic of South Sudan
AU	African Union
AUC	African Union Commission
CDF	Civil Defence Forces
CNHPR	Committee for National Healing, Peace and Reconciliation
CPA	Comprehensive Peace Agreement
CRA	Compensation and Reparation Authority
CRF	Compensation and Reparation Fund
CSO	Civil Society Organizations
CTRH	Commission for Truth, Reconciliation and Healing
HCSS	Hybrid Court for South Sudan
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
IGAD	Intergovernmental Authority on Development
ICTJ	International Center for Transitional Justice
JMEC	Joint Monitoring and Evaluation Commission
JoSS	Judiciary of South Sudan
LPA	Lomé Peace Agreement
NPPR	National Platform for Peace and Reconciliation
NGOs	Non-Governmental Organizations
ODM	Orange Democratic Movement
RPF	Rwanda Patriotic Front
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SPLM/A-IO	Sudan People's Liberation Movement/Army - In Opposition
TJRC	Truth, Justice and Reconciliation Commission
TGoNU	Transitional Government of National Unity
TNA	Transitional National Assembly
TRC	Truth and Reconciliation Commission
UNDP	United Nations Development Programme

UN	United Nations
UNMISS	United Nations Mission in South Sudan
UNSC	United Nations Security Council

Introduction

Countries emerging from conflict have employed a variety of instruments and mechanisms, both judicial and non-judicial, to deal with conflict-related abuses and crimes. The full range of these mechanisms and processes associated with a society's attempts to come to terms with a legacy of large-scale past abuses is what has become known as *transitional justice*. Transitional justice is pursued in order to ensure accountability, serve justice, achieve reconciliation and guarantee a non-recurrence of the violence. Transitional justice programmes implemented in most post-conflict countries include international and domestic prosecution of crimes, truth commissions, reparation programmes, vetting of security and judicial personnel, institutional reforms and memorials. A range of international best practices from these countries can be adapted to help South Sudan to deal with the aftermaths of the recent violent conflicts.

For a country like South Sudan, the concept of transitional justice can potentially lead to social reconstruction and halt the vicious cycle of mass violence and human rights violations. In the Agreement on the Resolution of the Conflict in the Republic of South Sudan (hereafter ARCSS or "Agreement"), the signatories agreed to three primary transitional justice institutions, namely a Hybrid Court for South Sudan (HCSS), a Commission for Truth, Reconciliation and Healing (CTRH), and a Compensation and Reparation Authority (CRA). In addition, it was agreed to reform the judicial and security sectors. Implementation of the letter and spirit of the agreed upon transitional justice mechanisms will enable South Sudanese society to address the brutal human rights violations that were committed during the conflict and lay a solid ground to stop the culture of impunity and reduce the propensity to commit crimes.

The Government of South Sudan bears the responsibility to ensure full implementation of the Agreement. Implementation of the Agreement requires substantial political will, engagement with the population, and external (monitoring and financial) support from regional actors and the wider international community. The robust support of non-state actors, most notably civil society organisations (CSOs) and faith-based institutions, and the

general public, is important for the viability and success of the peace agreement and the transitional justice programme in South Sudan.

This handbook summarizes and explain parts of the Agreement pertinent to transitional justice, reconciliation and healing. It presents examples from three other countries that experience transitional justice processes, namely Rwanda, Sierra Leone and Kenya. Acknowledging their unique settings, these countries offer best practices and lessons learned that are applicable to the South Sudanese situation. The handbook is intended to be used by civil society organisations to explain the basic concept of transitional justice and the mechanisms provided for in the peace agreement to communities. The engagement can be extended to include politicians, citizens, academia, and traditional authorities, faith-based institutions, and the media.

1. The December 2013 Crisis and the Peace Process in South Sudan

On December 15, 2013, violent conflict broke out between forces loyal to President Kiir and his former Vice President, Dr. Machar.[1] The violence started in Juba and quickly spiralled to other states. A few weeks after the Juba clashes, forces loyal to Dr. Machar formed the Sudan People's Liberation Movement/Army in Opposition (SPLM/A – IO) and announced their intention to fight against President Kiir and the Government of South Sudan. The conflict claimed the lives of tens of thousands of people and displaced more than two million people, including over 1.6 million inside South Sudan and 600,000 who sought refuge in neighbouring countries.[2] Both sides to the conflict have been accused of committing massive human right violations and brutal atrocities against civilians along ethnic lines. Women and children were raped and properties were looted and destroyed.[3]

In August 2015, an Intergovernmental Authority on Development (IGAD) mediated Agreement on the Resolution of the Conflict in the Republic of South Sudan was signed. A Transitional Government of National Unity (TGoNU) was subsequently formed in April 2016. However, sporadic fighting persisted in some states, and a new wave of armed violence erupted in the traditionally calm Yambio and Wau areas.

The Agreement has eight chapters:

- Chapter I - Establishment of Transitional Government of National Unity ;
- Chapter II - Permanent Ceasefire and Transitional Security Arrangements;
- Chapter III - Humanitarian Assistance and Reconstruction;

[1] Dr. Machar is now the First Vice President of the Transitional Government of National Unity (TGoNU) as stipulated in the ARCSS.

[2] Report of UNMISS and UN Human Rights: The State of Human Rights in the Protracted Conflict in South Sudan, December 2016.

[3] Human Rights Watch: South Sudan's New War - Abuses by Government and Opposition Forces, 2014.

- Chapter IV - Economic, Resource and Financial Management Arrangement;
- Chapter V - Transitional Justice, Accountability, Reconciliation and Healing;
- Chapter VI - Parameters of Permanent Constitution;
- Chapter VII - Establishment of Joint Monitoring and Evaluation Commission (JMEC); and
- Chapter VIII which sets out the supremacy of the agreement and the procedures for amending the agreement.

This handbook discusses Chapter V of the Agreement; Transitional Justice, Accountability, Reconciliation and Healing.

2. Transitional Justice: the concept and experiences in other countries

Chapter V of the ARCSS mandates the TGoNU to establish institutions for transitional justice that deal with the violent past, namely: a Commission on Truth, Reconciliation and Healing, a Hybrid Court of South Sudan [4] and a Compensation and Reparation Authority. The CTRH will establish the causes of conflict and promote healing and reconciliation by conducting an inquiry into all aspects of human rights violations and abuses committed against all people in South Sudan by State actors, non-State actors and their allies. The CTRH shall also make recommendations for reparations and compensation of those who suffered violence. The HCSS, composed of South Sudanese and other African judges, will prosecute a select number of high-level individuals that are suspected of the most serious atrocities. The CRA will administer the compensation and reparation schemes for victims of the war to address the harm that they have suffered.

Before these institutions are described more at length in this handbook, a basic definition of transitional justice and the transitional justice programmes in Rwanda, Kenya and Sierra Leone will be presented.

[4] The primary responsibility to establish the HCSS is bestowed upon the African Union Commission.

2.1 What is Transitional Justice?

The United Nations (UN) defines transitional justice as "…the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof." [5] Transitional justice is a key component of democratisation, development, and peacebuilding, during which core relationships between the State and society are strengthened or rebuilt. The International Centre for Transitional Justice's (ICTJ) position is not much different from the UN's definition. According to the ICTJ, transitional justice covers judicial and non-judicial measures implemented in order to redress legacies of human rights abuses such as criminal prosecutions, truth commissions, reparations programs, and various kinds of institutional reforms.[6]

From the two definitions stated above, it becomes clear that transitional justice is a form of justice adapted to the, often unique, conditions of societies undergoing transformation, including a break-away from a system that commits human rights violations on a regular basis.

Whereas in some countries such transformations may happen suddenly and have obvious and profound consequences, in others, they may take place over many decades. However, it is important that each society comes to some common understanding of what transitional justice can mean in their respective setting. Ultimately, transitional justice is what a society chooses as what is necessary to be done in order to come to terms with large-scale violence in their past.

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[5] UN Secretary General (March 2010) *United Nations Approach to Transitional Justice*, Guidance Note of the Secretary General and United Nations (23 August 2004) *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616, page 4.

[6] https://www.ictj.org/about/transitional-justice.

2.2 Experiences in other countries

2.2.1 Rwanda

On 6 April 1994, the deaths of the Presidents of Burundi and Rwanda in a plane crash caused by a rocket attack ignited a 100-day genocide during which between 800,000 and 1 million Tutsis and moderate Hutus were massacred in Rwanda. An estimated 150,000 to 250,000 women were raped. The killings and human rights violations continued until 4 July 1994, when the Rwanda Patriotic Front (RPF) took military control of the entire territory of Rwanda.

After the genocide, only 244 judges, 12 prosecutors, 137 support staff were left in the country[7] and the courts, prisons and other infrastructure had been destroyed. As a response to the large-scale violence, in November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute those most responsible for the genocide. At the national level, the Rwandan government began imprisoning those suspected of having participated in the genocide. By May 1996, an estimated 120,000 people were in prison and the overcrowding caused prisoners to suffocate. By 1999, it became clear that Rwanda's courts could not expeditiously adjudicate the volume of cases. By that time, the courts had only tried 5,000 of 120,000 suspects. At this rate, it would take over a century to try all the cases. Rwanda was faced with a dire need for an alternative form of justice which was more efficient and comprehensive. This gave rise to a re-birth of the traditional justice system known as *Inkiko Gacaca* (loosely translated to mean" justice on the grass"). The new Gacaca courts started to address the enormous backlog of cases in 2001 and became a leading, though controversial, mechanism to provide justice for the vast amount of atrocities as Rwanda transitioned from conflict to peace.[8]

The new gacaca process has five goals:

[7] Muleefu. A. (2016) Transitioning Legal and Justice Systems in Post-Conflict/Transitional Societies. Paper presented at Human Rights Symposium organised by the International Development and Law Organisation, 24 – 26 May 2016, Juba, South Sudan)

[8] https://kuscholarworks.ku.edu/bitstream/handle/1808/20180/04-Westberg_Final.pdf?sequence=1

- Establish the truth about what happened;
- Accelerate the legal proceedings for those accused of the crime of genocide;
- Eradicate the culture of impunity;
- Reconcile Rwandans and reinforce their unity; and
- Use the capacities of Rwandan society to deal with its problems through a justice based on Rwandan custom.

Rwanda continues to use the national court system to try those involved in planning genocide or rape under normal penal law.

The transitional justice agenda in Rwanda was thus not the result of peace negotiations as is the case with South Sudan, but was determined by the victor of the conflict. Rwanda is an interesting example to examine more closely because of its creative and nationally-led way of revamping traditional justice systems known as the Gacaca courts.

2.2.2 Kenya

Kenya's December 2007 presidential elections sparked a wave of violent clashes over allegations of electoral manipulation intersected with ethnic tension, boiling over into fighting along ethnic lines, riots, acts of rape and assault, and bloodshed. The post-election violence resulted in nearly 1,500 deaths, forcing almost 300,000 to flee their homes, and widespread destruction of property and displacement of persons. In January 2008, under the leadership of the African Union's (AU's) Panel of Eminent African Personalities and former UN Secretary-General Kofi Annan, the two main political parties — incumbent President Mwai Kibaki's Party of National Unity and Raila Odinga's Orange Democratic Movement (ODM) agreed to negotiate. This resulted in a power-sharing coalition government between President Mwai Kibaki and Raila Odinga.

The peace process produced agreements to establish several commissions of inquiry, including the Commission of Inquiry on Post-election Violence (this commission became known as the "Waki Commission" after its Chairperson), the Independent Review Commission on the Elections, a National Ethnic and

Race Relations Commission, and the Truth, Justice, and Reconciliation Commission (TJRC).

The Waki Commission and the Independent Review Commission on the Elections completed their work in September and October 2008. Their recommendations included:

1) Creation of a special tribunal to prosecute perpetrators of post-election violence;
2) A constitutional review;
3) Establishing a Truth, Justice and Reconciliation Commission to investigate past violations;
4) Major police reforms, including the merging of Kenya's two police forces — the Administration Police and the Kenya Police Service.

The Waki Commission privately submitted names of individuals implicated in the conflict, to the then United Nations Secretary General, Kofi Annan. A new constitution was adopted in August 2010, and some reforms were instituted, most notably in the judiciary. However, the pace of reforms has been slow. In February 2009, Parliament rejected the bill for the creation of the proposed Special Tribunal. In response, in March 2010, the International Criminal Court (ICC) announced an investigation into Kenya's post-election violence. After turbulent investigations and trial period, two cases have been closed (including the case brought against President Uhuru Kenyatta) and two others remain in the pre-trial stage.

The Kenyan experience provides several lessons learned and challenges that may be useful for the implementation of the South Sudanese transitional justice programme. For instance, Kenya's TJRC's operations were carried out in a highly charged political atmosphere. While the commissioners were writing their final report, Kenyans were debating a new draft constitution (passed in 2010), and engaging in electoral campaigns ahead of the general elections held in March 2013.

The indictments of senior government officials and politicians by the International Criminal Court meant that the truth-seeking process was significantly ignored in the national discourse.[9]

2.2.3 Sierra Leone

In 1990, President Joseph Saidu Momoh amended the constitution of Sierra Leone to allow multiple political parties to participate in elections. This was opposed by the Revolutionary United Front (RUF) led by Foday Sankoh that fought for control of the government, and control of Sierra Leone's diamond industry. The armed conflict in Sierra Leone lasted from 1991 to 2002 and was characterized by extreme violence against civilians, recruitment of child soldiers, corruption and violent struggle for control of diamond mines. Hundreds of civilians suffered from the signature rebel atrocity of limb amputation while thousands of girls and women were subjected to sexual violence. Up to one-quarter of the population was displaced by the fighting. The majority of the crimes were perpetrated by rebels from the Armed Forces Revolutionary Council (AFRC) and the RUF. However, government forces and their allies, notably the Civil Defence Forces (CDF), also committed serious crimes, albeit on a smaller scale and of a different nature than those by rebel groups.

In March 1996, civilian rule was reinstated after a military rule which lasted from 1992 when the government of Joseph Saidu Momoh was overthrown by young military officers. Ahmad Tejan Kabbah was elected as President. He negotiated a ceasefire, but was ousted by the AFRC only to return as President in March 1998.

In July 1999, the Government of Sierra Leone and the RUF rebel group signed the Lomé Peace Agreement (LPA). Like the ARCSS, the LPA created measures for transitional justice. The LPA required Sierra Leone to establish a truth commission, provide reparative measures for victims of the conflict, and

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[9] https://www.ictj.org/our-work/regions-and-countries/kenya; http://www.usip.org/publications/truth-commission-kenya; Ndugu, Gitari Christopher, (May 2014). *Lessons to be Learned: An Analysis of the Final Report of Kenya's Truth, Justice, and Reconciliation Commission*. ICTJ Briefing. Available at https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf.

institute reforms in the military, police, judiciary, and other government institutions. In June 2000, the Sierra Leonean President asked the UN to help establish a special court to prosecute those responsible for human rights violations during the conflict.[10]

Sierra Leone is an interesting case to review for South Sudan because it offers several best practices that are relevant for the HCSS and the CTRH. These include ways of how to engage with communities through outreach programmes employing audio-visual means of communication and targeting of youth.

3. The Commission for Truth Reconciliation and Healing

In chapter V of the Agreement, the signatories to the peace agreement have opted for three transitional justice institutions, namely:

- Commission for Truth, Reconciliation and Healing (CTRH)
- Hybrid Court for South Sudan (HCSS)
- Compensation and Reparation Authority (CRA)

In addition, Chapter I, article 12 provides for reform of the Judiciary of South Sudan (JoSS).

The sections below provide more information per institution. Each section is preceded by a general introduction about the type of mechanism and complemented by examples from Rwanda, Kenya and Sierra Leone.

3.1 Truth Commissions

Gaining popularity in Latin America to unveil the truth of what happened to those who disappeared without trace during the reign of military dictatorships, truth commissions have become an increasingly common mechanism to help victims, their relatives and society come to terms with a violent past. Truth commissions bring the voices and stories of victims, often hidden from the

[10] https://www.ictj.org/our-work/regions-and-countries/sierra-leone; https://www.hrw.org/africa/sierra-leone.

public realm, to light. The right of individuals to know the truth about the fate of disappeared persons or information about other past abuses, has been affirmed by various sources of international law such as treaty bodies, regional courts, and international and domestic tribunals. Truth commissions offer some form of accounting for mass human rights violations and are thus particularly effective in situations where prosecution of crimes is not possible due to the scale of atrocities and the breakdown of the rule of law and judicial institutions.

Truth commissions are non-judicial or quasi-judicial investigative bodies, which map patterns of past violence, and unearth the causes and consequences of these destructive events. Commissions of inquiry and other fact finding mechanisms similarly seek to unravel the truth behind allegations of past human rights violations but generally operate under more narrowly defined mandates. Mapping and documenting violations of human rights is an important step in realising the right to the truth.

Over the past four decades, more than 67 truth and reconciliation commissions have been established in different countries of the world. Some of those commissions have been established by the United Nations, others by governments of the State in question, and very few by Non-Governmental organizations (NGOs).[11] Regardless of the naming or where they are formed, the purpose of truth commissions typically remains similar; i.e. to address the past atrocities and promote lasting peace.

3.1.1 Truth Commissions and Reconciliation

Truth commissions are often bestowed with the connotation that they will advance reconciliation. Though the truth-telling process can indeed contribute to reconciliation, this is not a guarantee. The operational timespan of truth commissions is limited by their very nature whereas reconciliation is a long-term process. Additionally, the capacity of a truth commission to achieve reconciliation depends largely on the context. For some, knowing what happened is sufficient to forgive, whilst others may need complementary mechanisms such as criminal accountability, reparations and other reforms that guarantee non-recurrence. Therefore, truth-telling and truth commissions are only one of multiple components of a comprehensive

[11] IDEA, Reconciliation after Conflict.

transitional justice process and only a part of what is required for reconciliation. It is, therefore, important that expectations of a truth commission's potential to reconcile a society is carefully managed and based on the perceptions and needs expressed by the victims of the conflict.

3.1.2 Kenya

Following the recommendation of the Waki Commission and Independent Review Commission on the Elections to establish a Truth, Justice and Reconciliation Commission to investigate past violations, a bill establishing the TJRC was signed into law in November 2008. The TJRC's bill (also referred to as an "enabling document") was largely copied from the Promotion of National Unity and Reconciliation Act that South Africa used to establish its Truth and Reconciliation Commission (TRC). Since the TJRC legislation was not adequately tailored to the context in Kenya, it was cumbersome to implement.

The TJRC was mandated to investigate and recommend appropriate actions on human rights abuses committed between 12 December 1963 and 28 February 2008 when the power-sharing deal was signed. To address the interval of time specified in the legislation, the Commission adopted a strategy of focusing on certain historical junctures where spasms of violence had taken place. It also adopted a flexible interpretation of the window of time under investigation, looking into incidents and issues that predated the start of its mandated investigation period. The Commission's mandate is considered to be over-ambitious. Little thought seems to have been given to the Commission's capacity to investigate and address such a lengthy period of time (nearly 45 years) with relatively few resources, and under conditions of high political tension.[12]

The Commission was required, amongst other things, to provide as complete a picture as was possible of the causes, nature and extent of the post-election

[12] http://www.usip.org/publications/truth-commission-kenya; Lanegran, K. (2015). *Justice for Economic Crimes? Kenya's Truth Commission.* ASPJ Africa & Francophonie. Available at http://www.au.af.mil/au/afri/aspj/apjinternational/aspj_f/digital/pdf/articles/2015_4/lanegran_e.pdf.

violence. It was also required to cover cases of politically motivated violence, assassinations, displacements and major economic crimes such as grand corruption and irregular acquisition of land.

The explicit inclusion of a wide range of alleged economic injustices is rather innovative for a truth commission's mandate. The Commission was empowered to recommend policies with regard to reparations for victims, recommend prosecutions, and the creation of institutions conducive to a stable and fair society. The Commission's enabling legislation contained provisions for individual amnesty procedures if the Commission was satisfied that the applicant had made full disclosure of all the relevant facts. The mandate stipulated that all findings of the Commission would be made public. The TJRC was ultimately composed of seven commissioners who were nominated by the Panel of African Eminent Personalities: four nationals and three foreigners (from Ethiopia, the United States of America, and Zambia), of which four were male and three female. The President of Kenya made the final appointments from the list of nominated individuals. After controversies surrounding Chairman Bethuel Kiplagat who was implicated in a number of episodes of human rights abuses that fell under the TJRC's mandate, Kiplagat stood down in 2010. In its progress report submitted to Parliament towards the end of 2011, the TJRC pointed out that it had lost a considerable amount of time in getting started due to the controversy surrounding the suitability of its chairperson, and serious financial and resource constraints that resulted in recurrent delays and limitations on its operations. It therefore, requested Parliament to extend its life span beyond the November 2011 deadline. The TJRC started its preparatory work in 2009, commenced public hearings in January 2010, and concluded its work in 2013.

The Commission's treatment of children as both a special group of victims and as participants in the TJRC process has been applauded as has its specific attention to sexual and gender-based violence and their impact on women.

The Commission's report provides findings on several important issues:

- It identifies various constitutional, legislative and institutional reforms, such as police reform or judicial reforms that have been underway since the Commission was established;

- It makes bold recommendations on the release of government-held information related to massacres and killings. This gives non-state actors an opportunity to act on such recommendations if the government fails to provide such information;
- It proposes a robust reparation framework and makes follow-up on reparations for victims a possibility.

The report named senior military personnel as being involved in gross human rights violations and in some instances rank-and-file officers who were involved in atrocities. This is noteworthy because direct identification of alleged perpetrators in other truth commission reports is the exception, rather than the rule.

The TJRC law has been criticised for inconsistencies that allow for amnesties for human rights violations, its exclusion of victims from the process, and its failure to offer sufficient protection for witnesses.[13]

3.1.3 Sierra Leone

The Lomé Peace Accord that ushered in the peace process quickly collapsed, and resumption of the war delayed the establishment of the Truth and Reconciliation (TRC), despite legislation that formally provided for its creation in 2000.

In early 2001, with improving stability in the country, serious efforts were made by both national and international actors to set the process in motion. This led to the creation of the TRC's Interim Secretariat in March 2002 followed by the inauguration of the TRC proper on 5 July 2002. The TRC was composed of seven commissioners: four citizens of Sierra Leone and three foreigners. Four of the commissioners were men and three were women.

The TRC was mandated to establish a historical record of violations and human rights abuses from 7 July 1991 to 1999; address impunity; provide a forum for both victims and perpetrators; respond to the needs of victims; recommend

[13] Charles Manga Fombad (February 2012). *Transitional Justice in Africa: The Experience with Truth Commissions* Available at http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html

policies to facilitate reconciliation; promote healing; and prevent a repetition of such events in Sierra Leone. The Commission's statute explicitly mentioned the obligation to listen to women's voices and to study the role of children as both victims and perpetrators. In addition to its hearings in the State capital, the Commission travelled to each of the 12 districts for one week public hearings each. There were also institutional hearings, which examined the involvement of the armed forces and police, the civil service, and the media in the conflict.[14]

Its 5,000 paged report contains testimonies, history of the conflict, human rights violations (with statistical apportioning of blame and names of responsible persons) external factors and 220 legally binding recommendations. The Commission found that the central cause of the war in Sierra Leone was corruption and an overwhelming control by the executive arm of Government. Colonialism and the subversion of traditional systems were also identified as contributing factors. During its operations, tensions arose between the TRC and the Special Court for Sierra Leone (SCSL) when the TRC sought testimony from an individual who was in the custody of the SCSL.

Amongst its recommendations was the need to fight against corruption, the creation of a new bill of rights developed in a participatory constitutional process, the independence of the judiciary, strengthening the role of parliament and stricter control of the security forces. The Commission recommended the establishment of a reparations program and an implementing agency, as already provided by the Lomé Agreement. The recommendations currently stand at varying levels of implementation. In line with the recommendations institutions such as the Human Rights Commission, National Electoral Commission, and Political Party Registration Commission have been established to protect and promote human rights and good governance.

The Government has enacted various new laws to protect women and children and adopted codes of conduct for judicial officials. Similarly, it has established

[14] African Truth Commissions and Transitional Justice, by John Perry and T. Debey Sayndee, Lexington Books, published April 22, 2015.

institutions to support vulnerable groups such as youth, victims of the conflict, and those affected by HIV/AIDS.

3.2 What is the Commission for Truth, Reconciliation and Healing

In South Sudan, the Commission for Truth, Reconciliation and Healing (CTRH) is one of the transitional justice institutions agreed upon by the parties to the Agreement which shall "spearhead efforts to address the legacy of conflicts to promote peace, national reconciliation and healing."[15]

3.2.1 When shall the CTRH be established?

"The CTRH shall be established by legislation, which shall be promulgated not later than six (6) months after the formation of the TGoNU and commence its activities not later than a month thereafter."[16] With the formation of the TGoNU on 29 April 2016, the CTRH should be established not later than 29 October 2016 and should commence it activities not later than 29 November 2016. The CTRH will be established by law.

"The Ministry of Justice and Constitutional Affairs of the TGoNU, in collaboration with other stakeholders and the Civil Society, shall conduct public consultations for a period not less than one (1) month prior to the formation of CTRH, to inform the design of the legislation referred to in Chapter IV article (1.1) [of the ARCSS]. This notwithstanding, the consultations shall ensure that the experiences of women, men, boys and girls are sufficiently documented and the findings of such consultations are incorporated in the resultant legislations."[17]

People who have been affected by past oppression or conflict need to be able to freely express their views, in a secure environment, so that the transitional justice programmes can identify and take account of their experiences, as well as of their needs and entitlements. Moreover, the consultative process helps victims and other members of civil society to develop local ownership of the resulting programme. National consultations are a form of profound and

[15] Article 2.1.1 of Chapter V, ARCSS.
[16] Article 2.1.2 of Chapter V, ARCSS.
[17] Article 2.1.3 of Chapter V, ARCSS.

respectful dialogue whereby the consulted parties are able to freely express themselves with a view to shaping or enhancing the design of transitional justice programmes.

As per the ARCSS, the consultations are meant to inform the legislation that will establish the CTRH. They are thus supposed to take place well before October 2016 and are supposed to last for at least one month. Alongside the Ministry of Justice and Constitutional Affairs, South Sudanese civil society groups are to play an important role in the consultations.

However, much as the consultations should aspire to reach all South Sudanese, it is practically impossible to think that everyone, or even every village or town, in South Sudan will be reached in less than one month.

3.2.2 What will happen to the Committee for National Healing, Peace and Reconciliation and the National Platform for Peace and Reconciliation after the CTRH has been established?

"Within fifteen (15) days of functioning of the CTRH, the existing Committee for National Healing, Peace and Reconciliation (CNHPR) and National Platform for Peace and Reconciliation (NPPR) shall transfer all their files, records and documentations to CTRH."[18]

The agreement states that the CNHPR and NPPR will transfer their files, but it does not make explicit whether the institutions will cease to exist.

Plenary discussion 15 minutes	Leaving aside the provisions in the ARCSS, in your opinion: who should conduct the consultations? Why have you selected these actors?

[18] Article 2.1.4 of Chapter V, ARCSS.

3.2.3 Who will be the commissioners and how are they selected?

The commissioners can make or break a truth commission. The commission's legitimacy and objectiveness is greatly influenced by its commissioners. As recognized by the ARCSS,[19] commissioners must be persons of high integrity. Commissioners can have a wide array of backgrounds such as religious leaders, practicing lawyers or retired judges, psychologists, educators, experts on violence against women or children, and human rights professionals. Some countries, like South Sudan, have chosen to make provisions for international commissioners. In the case of South Sudan, the ARCSS stipulates that "the CTRH shall be composed of seven (7) commissioners, four (4) of whom shall be South Sudanese national, including two (2) women. The other three (3) Commissioners shall be from other African countries, of whom at least one (1) shall be a women."[20] The inclusion of international commissioners can increase the neutrality of the commission, bring special legal or other expertise to the process as well as useful contacts necessary for securing funds. The ARCSS further stipulates that "the CTRH shall be chaired by a South Sudanese national, deputized by non-South Sudanese national."[21]

The process and timing of the selection of the commissioners is crucial. Commissioners should only be appointed once the commission's establishing legislation has been determined. The establishing document should spell out the process for selection and the general qualities or characteristics of the commissioners. The selection should be a transparent and inclusive process, ideally characterized by public consultations.

A consultative process for the selection of commissioners may include several methods such as calling for nominations from the public and forming a representative selection panel (appointed by a variety of sectors or societal groupings) to vet the nominations, interview the finalists, and recommend the final commissioners to the appointing authority. In the case of South Sudan, the "Executive of the TGoNU shall nominate the four Commissioners of South Sudanese nationality and present to the Transitional National Assembly solely on the basis of the selection to the TGoNU, AUC [African Union Commission]

[19] Article 2.3.1 Chapter V, ARCSS.
[20] Article 2.3.2 of Chapter V, ARCSS.
[21] Article 2.3.2 of Chapter V, ARCSS.

and UN for endorsement."[22] "The Executive of the TGoNU, in consultation with the Chairperson of the African Union Commission and the Secretary-General of the United Nations, shall nominate the three (3) from other African countries and present to the TNA [Transitional National Assembly] for endorsement."[23] International nominees should ideally also be included in the national vetting process before the final appointment.

It is recommendable that some criteria should be agreed upon that substantiate the selection of the commissioners. Some examples include:

- Knowledge of the historical and political dynamics of South Sudan, including traditional forms of reconciliation;
- Availability of the individual;
- Public perception of the individual;
- Notable contributions to the academic, legal, or other relevant professional fields;
- Ability to work in a multicultural/international setting;
- Ability to analyse large amounts of information regarding issues of national interest;
- Maturity and experience relevant to the work of the truth commission, including record of employment;
- Good state of health and ability to work long hours and travel extensively;
- Some insight into and understanding of human rights issues;
- Diversity (profession, gender, religion, region, ethnicity);
- Communication and management skills; and
- Practical experience with the conflicts in South Sudan.

The selection of the commissioners of the Kenyan truth commission offer valuable lessons for the CTRH and are briefly illustrated below.

3.2.3.1 Selection and appointment of commissioners of the TJRC in Kenya

[22] Article 2.3.3 of Chapter V, ARCSS (2015).
[23] Article 2.3.3 of Chapter V, ARCSS (2015).

The TJRC in Kenya was composed of seven commissioners who were nominated by the Panel of African Eminent Personalities: four nationals and three foreigners (from Ethiopia, the United States of America, and Zambia), of which four were male and three female. The President of Kenya made the final appointments from the list of nominated individuals. Controversies surrounded the chairman who was implicated in a number of human rights abuses, forcing him to stand down in 2010. The TJRC lost a considerable amount of time in getting started and its legitimacy came under scrutiny due to the controversy surrounding the suitability of its chairperson.[24]

3.2.4 What will the CTRH do?

The CTRH is mandated to "inquire into all aspects of human rights violations and abuses, breaches of the rule of law and excessive abuses of power, committed against all people in South Sudan by State non-State actors and their allies…. investigate, document and report on the course and cause of conflict….[25] In addition, the CTRH "shall recommend processes for the full enjoyment by the victims of the right to remedy, including by suggesting measures for reparations and compensation."[26]

According to article 2.2.2 of Chapter V of the ARCSS, the CTRH will carry out, amongst others, the following tasks:

Discuss	
15 minutes Please divide into groups and discuss.	What additional criteria can you think of? What can be done to avoid the challenges that occurred during the selection and appointment of the Kenyan truth commission? How can citizens be involved in the selection process?

[24] Charles Manga Fombad (February 2012). *Transitional Justice in Africa: The Experience with Truth Commissions* Available at http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html

[25] Article 2.2.1 of Chapter V, ARCSS.

[26] Article 2.2.1 of Chapter V, ARCSS.

- Establish an accurate and impartial record of human rights violations, breaches of the rule of law and excessive abuses of power, committed by State and non-state actors from the date of signing of this Agreement to July 2005;
- Receive applications from alleged victims, identify and determine their right to remedy;
- Identify perpetrators of violations and crimes proscribed in this Agreement;
- Recommend guidelines, to be endorsed by the Transitional National Assembly, for determining the type and size of compensation and reparation for victims;
- Record the experience of victims, including but not limited to women and girls;
- Investigate the causes of conflicts and their circumstances and make recommendations regarding possible ways of preventing recurrence;
- Develop detailed recommendations for legal and institutional reforms to ensure non-repetition of human rights abuses and violations, breaches of the rule of law and excessive use of power;
- Lead efforts to facilitate local and national reconciliation and healing;
- Where appropriate, supervise proceedings of traditional dispute resolution, reconciliation and healing mechanisms. In this regard, and without prejudice to traditional justice mechanisms, develop standard operating procedures for the functioning of the latter, in accordance with principles of natural justice.[27]

The commission will analyse the information it gathers from victims, survivors, perpetrators, and others, as well as conduct its own research. It will use all of this information to write a report that explains what happened during the period that it is mandated to investigate. The report will indicate the causes, nature, and extent of abuses of human rights; the circumstances in which they occurred; and whether they were part of a plan or policy by rebel groups, the government, or any other group. The report may also make recommendations

[27] Article 2.2.2 of Chapter V, ARCSS.

about how to prevent future conflicts, and the terrible acts that happened, from ever occurring again.

The South Sudan CTRH is also tasked to keep the public of South Sudan involved and informed of its activities. The CTRH will carry out public education, awareness-raising and civic education activities about its work and generate feedback. Three months before the Commission concludes its work, it shall publish a report which should include its findings and recommendations.[28]

It is important to understand that the Commission is not a court and will not try anybody. The CTRH's goal is not to punish, but rather to gather different truths (there is never one version of the truth) and facts about the armed conflicts and facilitate soul-searching and acknowledgement of acts committed by individuals or groups.

3.2.5 How is the CTRH involved with compensation and reparation?

The issue of compensation and reparation for past wrongdoings that forms part of the CTRH's mandate is a sensitive topic and often very important to victims and survivors. However, compensation and reparation programmes are notoriously difficult to implement and it is of crucial importance that people's expectations are not raised beyond what can realistically be done. It is important to explain that the CTRH will not give compensation to victims, although it could recommend that the Government or other bodies make compensation.

Some terms are further clarified below:

Reparation: is a "principle of international law that has existed for centuries, which refers to obligation of a wrongdoing party to redress the damage caused

[28] Articles 2.2.3 and 2.2.4 of Chapter V, ARCSS.

to the injured party."[29] There are many forms of reparations. However, we present these two common forms:

Restitution: a form of reparation which "seeks to restore the victim to the situation that they would have existed had the crime not happened. This may include restoration of liberty, legal rights, social status (return to one's place of residence), and restoration of employment and return of property."[30]

Compensation: is an amount of money, or alternatives, given to a victim of crime to pay for loss, damage or to make amends. This "includes any quantifiable damages resulting from the crime, including physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of potential earning; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services."[31]

Symbolic reparation: reparation can also be symbolic. "Symbolic reparations refer to measures that facilitate the communal process of remembering and commemorating the pain and victories of the past. Such measures, which are seen as mechanisms to restore the dignity of victims and survivors, include exhumations, tombstones, memorials and monuments and the renaming of streets and public facilities."[32]

"In determination of such remedial processes and mechanisms, the CTRH shall draw on existing traditional practices, processes, and mechanisms, where appropriate."[33]

[29] Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928).
[30] Report of the International Law Commission - 53rd session (23 April - 1 June and 2nd July - 10 August 2001), UN Doc. (A/56/10). Ibid., para 23.
[31] Report of the International Law Commission - 53rd session (23 April - 1 June and 2nd July - 10 August 2001), UN Doc. (A/56/10). Ibid., para 23.
[32] Report: South African Truth and Reconciliation Commission, 2003.

Traditional remedial processes and mechanisms include practices such as blood compensation, performance of rituals which symbolizes forgiveness and reconciliation. Debates about modern justice versus traditional practices of justice have focused on the difficulty of the alignment of some traditional practices with international and human rights standards. There have been cases where the two systems have effectively worked in harmony. For example, following Rwanda Genocide in 1994, traditional justice system known as Gacaca - a Kinyarwanda word which means "justice amongst the grass" was used to try numerous combatants who participated in the genocide.

Discuss 30 minutes Please divide into groups and discuss.	1) What are the existing traditional justice processes and mechanisms with respect to reparation of the victims of crimes in your area? 2) How can these be used with regard to the atrocities committed in South Sudan? 3) Are there any symbolic reparations efforts in your area?

Note: *The Rwandan example given above is only intended to explain the concept of traditional justice for easy understanding by the users of this handbook. It must be noted that the Gacaca courts are both championed and criticised.*

3.2.6 How will the CTRH interact with the people?

Aside of CTRH's function to "issue its reports every three (3) months to the Transitional Government of National Unity, it shall make sustained efforts to

publicly and regularly inform and involve all South Sudanese citizens to participate in all the CTRH tasks and activities."[34]

The CTRH "shall be responsible for carrying out public education, awareness-raising and civic engagement activities to the public, particularly to the youth and women."[35]

As part of interacting with all the citizens, the "CTRH shall issue a final public report at the conclusion of its mandate three months before the end of the Transition, that shall include the observations and findings of its documentation activities and its recommendations for peace, reconciliation and healing in South Sudan.[36]"

The success of the dissemination and sharing of information with the wider South Sudanese public, and an inclusive participatory citizen role in CTRH's work will require extensive involvement of civil society organizations. CSOs have played and continue to play an indispensable role in public awareness and in both the dissemination and implementation of the ARCSS, and other wider socio-economic, political and environmental concerns. During the Comprehensive Peace Agreement (CPA) in 2005 and the South Sudan Referendum in 2011, CSOs played an instrumental role in public awareness. Today, civil society organizations in South Sudan have grown in scope and capacity and are better placed than ever before to engage all South Sudanese citizens and to represent express their views.

Likewise, all South Sudanese citizens have to push for their voices to be heard. Public education, awareness-raising and civic engagement present great opportunities for all South Sudanese citizens from all walks of life to partake in influencing activities of the CTRH.

[34] Article 2.2.3 of Chapter V, ARCSS.
[35] Article 2.2.3 of Chapter V, ARCSS.
[36] Article 2.2.4 of Chapter V, ARCSS.

4. Hybrid Court for South Sudan

4.1 What is a hybrid court?

A hybrid court refers to a court in which both international and domestic laws are applied in the trial of cases of suspects of war crimes, crimes against humanity and other serious crimes, and where international judges work alongside their domestic colleagues. “Interventions to create hybrid courts constitute unique moments in terms of the international community’s attention, resources and effort, and this window of opportunity should be maximized.”[37]

The Hybrid Court for South Sudan should not be expected to restore damaged or destroyed domestic legal systems, but rather make a strategic contribution to prosecute high-level individuals. It is imperative to design such hybrid courts with a view to having a permanent[38] and lasting impact on the host domestic justice system. For instance, it provides an opportunity for transfer of skills from international experts to national professionals and enhance their capacity to investigate and prosecute complex and organized forms of crime, including war crimes and crimes against humanity and other complex crimes in absence of assistance from international community.

The most serious atrocities that were committed during the civil war in Sierra Leone were addressed by a hybrid court. In June 2000, the Sierra Leonean President requested the UN to provide assistance in establishing a special court to prosecute those responsible for human rights violations during the conflict.

4.1.1 The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was established by an agreement between the Government of Sierra Leone and the UN. The SCSL, composed of international and national judges, was the first hybrid tribunal in recent history to be located in the country where the crimes were committed. Only the case of former Liberian President, Charles Taylor, took place in The Hague, The

[37] Office of the United Nations Higher Commissioner for Human Rights, Rule of Law tools for Post-Conflict States: Maximizing the legacy of hybrid courts.

[38] Office of the United Nations Higher Commissioner for Human Rights, Rule of Law tools for Post-Conflict States: Maximizing the legacy of hybrid courts.

Netherlands. The court operated for 11 years, from 2002 to 2013. A residual mechanism has now taken over to oversee legal obligations such as witness protection, supervision of prison sentences and management of the SCSL archives.

Much like the HCSS, the SCSL was mandated to try those bearing the greatest responsibility for crimes (war crimes, crimes against humanity, other serious violations of international humanitarian law and certain serious violations of Sierra Leonean law) committed in Sierra Leone after 30 November 1996 (the date of the failed Abidjan Peace Accord).

By the end of the courts operations, it had brought ten persons to trial. Two (2) others died, one before the proceedings could start (RUF leader Foday Sankoh) and one outside the jurisdiction of the Court (RUF commander Sam Bockarie). A third (AFRC chairman Johnny Paul Koroma), fled Sierra Leone shortly before he was indicted. While some evidence suggests that Koroma is dead, it is not considered conclusive and he is therefore officially considered to be at large. One person (Samuel Hinga Norman) died during the course of his trial, and proceedings against him were terminated.[39]

4.2 What is the Hybrid Court for South Sudan?

In the ARCSS, the parties also agreed to the establishment of a Hybrid Court for South Sudan (HCSS), which shall investigate and prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law.[40] The court is likely to only try a handful of people, possibly between ten and twenty. "The HCSS shall be independent and distinct from the national judiciary in its operations, and shall carry out its own investigations: The HCSS shall have primacy over any national court of the Republic of South Sudan."[41]

[39] ICTY *The Charles Taylor Trial and the Legacy of the Special Court of Sierra Leone*, ICTY Briefing (2009); http://www.rscsl.org/; https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Periodic-Review-2010-English.pdf; http://www.rscsl.org/.

[40] Article 3.1.1 of Chapter V, ARCSS.

[41] Article 3.2.2 of Chapter V, ARCSS.

Discuss 15 minutes Please divide into groups and discuss.	In your opinion, why do you think it is, or is not, important to establish the Hybrid Court for South Sudan?

4.2.1 Why should the court be hybrid?

There are reasons and benefits as to why a court should be hybrid. First, the need to involve the international community generally stems from a lack of domestic capacity and the need to secure the independence of the accountability process. Years of protracted conflict often leave behind a weak domestic judicial system that is generally incapable of prosecuting those most responsible for the violence, especially in cases where the suspects still hold powerful positions. Hybrid judicial bodies are understood to be freer from political interference, act in accordance with the highest standards of independence, impartiality, and application of norms of due process and international human rights. Second, it presents an opportunity to rebuild or strengthen the national system. It enables the transfer of skills and provides an opportunity for the domestic legal system to benefit from recent developments in international humanitarian law and human rights law.[42]

Discuss 15 minutes Please divide into groups and discuss	What is your opinion on the combination of international and national judges to be included for the HCSS?

[42] Office of the United Nations Higher Commissioner for Human Rights, Rule of Law tools for Post-Conflict States: Maximizing the legacy of hybrid courts.

4.2.2 Who shall establish the Hybrid Court for South Sudan?

The African Union Commission (AUC) shall establish the HCSS. "The AUC shall provide broad guidelines relating to location of the HCSS, its infrastructure, location, funding mechanisms, enforcement mechanism, the applicable jurisprudence, number and composition of judges, privileges and immunities of court personnel or any other related matters."[43]

4.2.3 Who shall be the judges other personnel and how shall they be selected?

"A majority of judges on all panels, whether trial or appellate, shall be composed of judges from African states other than the Republic of South Sudan. The judges of the HCSS shall elect a president of the court from among their members."[44] This means that there will be several South Sudanese judges on the panels. The judges, as well as the prosecutors, investigators, defence counsels and the registrar, shall be "persons of high moral character, impartiality and integrity, and should demonstrate expertise in criminal law and international law, including international humanitarian and human rights law."[45] "Prosecutors and defence counsels shall be composed of personnel from African States other than the Republic of South Sudan."[46] Defendants will have the right to select their own defence counsel. The Registrar of the HCSS shall be appointed from African countries other than South Sudan.[47] The prosecutors and defence counsel shall be assisted by South Sudanese and African staff of other nationalities as may be required to perform the functions assigned to them effectively and efficiently.[48] The judges (both international and national), prosecutors, defence counsels and the registrar shall be selected and appointed by the Chairperson of the African Union Commission.[49]

[43] Article 3.1.1 of Chapter V, ARCSS.
[44] Article 3.3.2 of Chapter V, ARCSS.
[45] Article 3.3.1 of Chapter V, ARCSS.
[46] Article 3.3.3 of Chapter V, ARCSS.
[47] Article 3.3.5 of Chapter V, ARCSS.
[48] Article 3.3.6 of Chapter V, ARCSS.
[49] Article 3.3.5 of Chapter V, ARCSS.

4.2.4 Where shall the HCSS be located?

It is still undetermined where the HCSS will be located. This will be determined by the Chairperson of the Commission of the AU.[50] Hybrid courts or international tribunals are mostly established outside the countries where war crimes, crimes against humanity or other complex crimes are committed. For example, following the Rwanda genocide in 1994, the United Nations Security Council (UNSC) established the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. However, the seat of the SCSL (also a hybrid body), was in the capital, Freetown. Only the Charles Taylor trial took place in The Hague, The Netherlands, due to security concerns related to such a high profile case.

Discuss 15 minutes Please divide into groups and discuss.	1) Which factors should be taking into consideration when choosing the location of the court? 2) Which location has your preference?

4.2.5 When and for how long shall the HCSS operate?

It is largely dependent on the African Union Commission when the HCSS will be established. It is important to realize that the prosecution of international crimes can take very long. For instance, the ICTR operated for 20 years and indicted a total of 93 individuals. The SCSL operated for 11 years and brought 13 persons to trial. On 30 May, 2016, former Chadian dictator Hissène Habré was convicted of crimes against humanity, war crimes, and torture, including sexual violence and rape, by the Extraordinary African Chambers in the Senegalese court system and sentenced him to life imprisonment. The judgement was delivered 25 years after Habré was overthrown and fled to Senegal.

[50] Article 3.1.3 of Chapter V, ARCSS.

4.2.6 Who may be tried before the HCSS?

"The HCSS shall investigate and prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of transitional period."[51]

A person, who planned, instigated, ordered, committed, aided and abetted, conspired or participated in a joint criminal enterprise or its planning, preparation or execution of a crime that falls within the powers of the HCSS shall also be considered responsible for the crime.[52] Joint criminal enterprise is a type of liability. In cases of collective criminality, every member of the enterprise can be held equally responsible as a co-perpetrator for crimes committed by a group with a common criminal plan or purpose, even if they were remotely involved in the actual commission of the crime(s). For example, if three people commit an armed robbery leading to one shooting a person in the process, all three can be held liable for murder.

Any person suspected of committing a crime under the court's mandate may be prosecuted, regardless of whether he or she is a government official, an elected official or was under the orders of a superior officer.[53]

Superior officers (for instance military commanders) can be held criminally responsible for criminal acts that were committed by their subordinates. This is referred to as "command/superior responsibility". There must be a clear superior-subordinate relationship between the superior and the suspect. The superior officer must have known or had reason to know that the crimes were been committed or were about to be committed and wilfully failed to prevent the crimes from occurring or punishing the subordinate for the crimes.[54] The internationally recognised age for criminal responsibility is 18 years and it is unlikely that the HCSS will try child combatants.

[51] Article 3.1.2 of Chapter V, ARCSS.
[52] Article 3.5.1 of Chapter V, ARCSS.
[53] Article 3.2.1 of Chapter V, ARCSS.
[54] Rule 153, Chapter 43, of customary international humanitarian law. Available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153.

Discuss	Why should the instigators of crimes be held responsible for such crimes?
15 minutes	What is joint criminal enterprise?
Please discuss in your groups.	

4.2.7 Which type of crimes will the HCSS try?

The HCSS is empowered to try individuals suspected of the following crimes:

- Genocide;
- Crimes against humanity;
- War crimes;
- Other serious crimes under international law and relevant law of the Republic of South Sudan including gender based crimes and sexual violence.[55]

The court will have its own statute that will define the crimes that it will be able adjudicate. The HCSS is most likely to use the internationally agreed definitions of genocide, crimes against humanity, war crimes and other serious crimes under international law.

The Statute of International Criminal Court (ICC) commonly referred to as the Rome Statute defines genocide, crimes against humanity, war crimes and other crimes committed under international law as follows:[56]

4.2.7.1 Genocide

Genocide "means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a)

[55] Article 3.5.5 of Chapter V, ARCSS.

[56] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[57]

4.2.7.2 Crimes against humanity

Crimes against humanity "means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender; (i) Enforced disappearance of persons; (j) the crime of apartheid; (k) other inhuman acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[58]

4.2.7.3 War crimes

War crimes refer to serious breaches of international humanitarian law committed against civilians, civilian objects or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis. Such crimes are derived primarily from the four Geneva Conventions of 12 August 1949 and their Additional

[57] See Article II of the 1948 Convention on the Prevention and Punishment of Genocide and article 6 of the Rome Statute of the International Criminal Court (1998), available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[58] Article 7 of the Rome Statute of the International Criminal Court (1998), available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

Protocols I and II of 1977,[59] and the Hague Conventions of 1899 and 1907. The Geneva Conventions are rules that apply only in times of armed conflict and seek to protect civilians or combatants who are no longer taking part in hostilities; these include the sick and wounded combatants on the field, wounded, sick, and shipwrecked members of armed forces at sea, prisoners of war, and civilians. Article 3 which is common to the four Geneva Conventions protects civilians by prohibiting violence against them, in particular murder, mutilation, cruel treatment or torture. It must be noted that common Article 3 of the Geneva Conventions applies to all parties to an armed conflict, whether state or non-state armed groups.

Aside from being a State Party to the four Geneva Conventions of 1949, South Sudan has directly incorporated them into the South Sudanese domestic legal system by enacting South Sudan's Geneva Conventions Act 2012. This means that principles of international humanitarian law that are found in the four Geneva Conventions – including those aimed at protecting civilians and civilian objects in situations of armed conflict – have direct legal enforceability in the domestic setting.[60]

The most recent codification of war crimes can be found in article 8 of the Rome Statute. Article 8 of the Rome Statute states that the term "war crimes" means the following: (a) grave breaches of the Geneva Conventions of 1949; (b) other serious violations of the laws and customs applicable in international armed conflict; and (c) in the case of an armed conflict not of an international character, serious violations of common Article 3 of the Geneva Conventions of 1949 and (e) other serious violations of the laws and customs applicable in such a conflict. [61]

Examples of war crimes include "any of the following acts against persons or property: (i) Willful killing; (ii) Torture or inhuman treatment, including

[59] Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 1977 can be accessed by following this link: https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp.

[60] Please see Geneva Convention Act 2012 of South Sudan, Chapter II, Sections 6-8.

[61] Article 8 of the Rome Statute of the International Criminal Court (1998), available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages."[62]

War crimes also include other serious violations of laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts, among others: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion.[63]

4.2.7.4 South Sudanese legal framework

On 12 January 2016, the National Legislative Assembly passed the Amendment Bill 2016 (the Bill) to the South Sudanese Penal Code 2008 at its first reading.

[62] Article 8 of the Rome Statute of the International Criminal Court (1998), available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[63] Article 8.2(b) of the Rome Statute of the International Criminal Court (1998), available at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

The Bill aims to codify international crimes, including war crimes, genocide and crimes against humanity in the national legislation. When passed into law, the national prosecutors and courts will then have the necessary powers to prosecute and adjudicate on international crimes. Since it is unlikely that the hybrid court will be capable to prosecute the full range of eligible perpetrators, it is, in principle, a positive development that South Sudan is willing to codify these crimes in response to its international obligations derived from the ratification of treaties and customary international law.

Discuss 15 minutes Please divide into groups and discuss.	Is it important that crimes of genocide be prosecuted in South Sudan? If so, why? Should international crimes be prosecuted at the HCSS or in national courts?

4.2.8 How will the HCSS decide whether accused persons are guilty or innocent?

If investigations by the prosecutor have generated enough evidence, a case accusing an individual of certain criminal acts is brought before the HCSS. The job of the prosecutor is to prove to the judges of the court that the accused (also known as the defendant) committed the crime that the prosecutor has charged him or her with. The judges need to be convinced "beyond reasonable doubt" that the accused or defendant committed the crime. This means that there must be a high degree of certainty that the accused committed the crime. It is difficult to establish a high degree of certainty. Therefore, strong evidence is required to prove that a person is guilty of an offense. Evidence can be provided by witnesses in the form of statements; but also by written documents; audio and video recordings; photographs; biological evidence containing DNA such as hair, fingernails, blood; fingerprints; and ballistic evidence such as bullets, shell casings and gun powder. It is to be expected that the HCSS will have its own rules of procedure and evidence.

4.2.9 What will happen with individuals found guilty by the HCSS?

Depending on the sentence, the individuals may be convicted to imprisonment. Given the dire state of the prisons in South Sudan and possible security threats to individuals found guilty of such serious crimes, it is highly likely that the convicts will be relocated to serve their prison sentence in another country. The death sentence will not be applicable since international law does not support the death penalty.

The ARCISS provides that "individuals indicted or convicted by the HCSS shall not be eligible for participation in the TGoNU, or in its successor government(s) for a period of time determined by law, or, if already participating in the TGoNU, or in successor government(s), they shall lose their position in government. If proven innocent, individuals indicted shall be entitled for compensation as shall be determined by law."[64]

4.2.9.1 Convictions of the Special Court for Sierra Leone

The Special Court of Sierra Leone convicted nine persons and sentenced them to prison terms ranging from 15 to 52 years. Sentences of eight (8) RUF, CDF and AFRC prisoners convicted in Freetown are being enforced at Rwanda's Mpanga Prison due to security concerns.

4.2.10 How will the HCSS interact with and protect victims and witnesses?

Much like the CTRH, the HCSS will have to put in place measures that protect victims and witnesses. These measures must be in line with applicable international laws, standards and practices.[65] These standards include the provision of privacy and safety for victims or witnesses of atrocities and the prevention of unnecessary delay in dealing with victims or witnesses.[66]

4.2.11 How will the HCSS impact South Sudan?

The HCSS is supposed to leave behind a permanent legacy in the State of South Sudan.[67] The most direct impact should relate to the development of domestic jurisprudence as well as the promotion of the rule of law in the country. Other effects that can occur are the reform of legislation and judicial institutions and

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[64] Article 4 of Chapter V, ARCSS.

[65] Article 3.4.1 of Chapter V, ARCSS.

[66] United Nations High Commissioner for Human Rights Centre for Human Rights, International Human Rights Standards for Law Enforcement.

[67] Article 3.5.6 of Chapter V, ARCSS.

infrastructure as well as the strengthening of capacities of those working in the legal profession.

4.2.11.1 The impact of the Special Court for Sierra Leone

Some of the court's successes include the conviction of a former Head of State, Charles Taylor, who supported rebel groups and received a 50-year sentence for war crimes and crimes against humanity. With Taylor's indictment, the court affirmed that immunity from prosecution is not open to heads of States in respect of international crimes and gross violations of human rights. The court is also accredited with setting the legal precedent that the reasons for fighting are not important in determining whether crimes against humanity have been committed; it ruled that members of the CDFs —considered heroes by many—could not rely on "just cause" as a mitigating factor in sentencing. Furthermore, the court was the first international tribunal to convict people for crimes relating to the conscription and recruitment of children younger than 15 into hostile forces. Sexual conscriptions, or forced marriages, were also recognized as crimes against humanity.

The decision to try Taylor in The Hague, rather than in Freetown, and the lack of adequate outreach activities made the court's proceedings difficult to access for many in Sierra Leone thereby reducing its impact upon the people of Sierra Leone. In addition, the court experienced limited success in strengthening the domestic judiciary because of insufficient involvement of Sierra Leonean legal personnel. The court also failed to incorporate national laws into its operations.[68]

Discuss	What legacy do you want the HCSS to leave for South Sudan?
15 minutes	How will the HCSS determine whether accused persons are guilty?
Please divide into groups and discuss.	

[68] ICTY *The Charles Taylor Trial and the Legacy of the Special Court of Sierra Leone*, ICTY Briefing (2009); http://www.rscsl.org/; https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Periodic-Review-2010-English.pdf; http://www.rscsl.org/.

5. Compensation and Reparation Authority

5.1 The Compensation and Reparation Authority

The Compensation and Reparation Authority (CRA) is a body that will administer the compensation and reparation schemes for victims of the war to address the harm that they have suffered.

5.1.1 When and by who shall the CRA be established?

The agreement places responsibility on the TGoNU to establish the CRA within six (6) months of the signing of the ARCSS. Since the ARCSS was signed in August 2015, the CRA should be have been established in February 2016.[69] However, the TGoNU was not yet formed in February 2016.

5.1.2 Who will run the CRA?

The CRA will be run by an executive body that will be chaired by an Executive Director who will be appointed by the TGoNU. The executive body shall, amongst others, be composed of the parties in the TGoNU, representatives of civil society organizations, women's organizations, faith-based leaders, the business community and traditional leaders. A law shall be written that contains specific criteria for the selection of the members.

5.1.3 What will the Compensation and Reparation Authority do?

"The CRA shall provide material and financial support to the citizens whose property was destroyed by the conflict and help them to rebuild their livelihoods in accordance with well-established criteria set by the TGoNU."[70] The CRA shall manage a Compensation and Reparation Fund (CRF), the utilization of which shall be guided by a law enacted by the Parliament."[71] The CRA shall receive application of victims, including natural persons (individuals) and legal persons (companies, organizations and/or other entities that have legal rights and are subject to obligations) persons from the CTRH, and make the necessary compensation and reparation."

[69] Article 4.1 of Chapter V, ARCSS.
[70] Article 4.2(d) of Chapter V, ARCSS.
[71] Article 4.2(e) of Chapter V, ARCSS.

Discuss 15 minutes Please divide into groups and discuss.	What should be the selection criteria for the members of the CRA? How should victims receive reparations from the CRA? What forms should reparations take?

5.1.4 Who will fund the Compensation and Reparation Fund?

The agreement does not make clear who will fund the CRF. Generally, compensation schemes have been very expensive and difficult to implement. The agreement does state that the TGoNU will "establish transparent mechanisms to control the proper use of these funds for the intended purpose."[72]

Discuss 15 minutes Please divide into groups and discuss.	Who do you think should fund the CRF?

[72] Article 4.3 of Chapter V, ARCSS.

THANK YOU!