



**“DO YOU THINK WE WILL
PROSECUTE OURSELVES?”**

NO PROSPECTS FOR ACCOUNTABILITY IN SOUTH SUDAN

AMNESTY
INTERNATIONAL



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Cover photo: *In pursuit of justice in South Sudan: Blindfolded Lady Justice holding balance scales and a sword over the South Sudanese victims escaping the country's violence*

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1. EXECUTIVE SUMMARY

Two and a half years after South Sudan gained its independence, soldiers loyal to President Salva Kiir Mayardit and then Vice President Riek Machar Teny Dhurgon clashed in the country's capital, igniting an armed conflict between the Sudan People's Liberation Army (SPLA), the national army, and armed opposition groups including the SPLA-In Opposition (SPLA-IO). Both government and opposition forces have committed crimes under international law and other serious human rights violations and abuses during the conflict, which saw thousands of civilians killed, hundreds of thousands displaced and countless people raped, tortured, arbitrarily detained or forcibly disappeared. Yet, impunity is the norm both for crimes committed by armed groups and crimes committed by South Sudanese security forces.

This report documents the failure of the South Sudanese government to investigate and prosecute suspects of such crimes since the start of the conflict in December 2013. The report is based on 47 interviews conducted mainly in South Sudan in March and April 2019 with legal professionals, government officials, UN personnel, and civil society representatives working in or with the justice sector, alongside review of documentary evidence.

South Sudanese tribunals have failed to provide justice to victims of the conflict. Ordinary courts – the civilian justice system – are crippled by a severe lack of independence. Prosecutors follow the directives of the executive, and in the absence of such directives, do not investigate serious crimes. Judges experience political interference and risk being dismissed when they act, or are perceived to act, against the executive's interests. Military courts are not independent, as the President controls the creation of martial courts for high-ranking officers and has the power to confirm or reject judicial decisions. They also do not have jurisdiction to prosecute soldiers for crimes committed against civilians.

The only case dealing with serious crimes perpetrated against civilians in the context of the conflict since 2013 is the Terrain case. A military court convicted 10 soldiers in connection with the killing of a journalist and rape and sexual assault of aid workers during a July 2016 attack. The case was hailed as a success, but a closer analysis demonstrates fair trial concerns, the court's lack of jurisdiction and failure to investigate and prosecute high-ranking members of the army.

The South Sudanese government lacks political will to hold perpetrators of the most serious crimes accountable. Blanket amnesties were granted on several occasions in recent years. While some specific incidents of deliberate killings of civilians, sexual violence and indiscriminate attacks have led to the creation of government-led investigative committees, these processes have not led to formal criminal investigations and trials and cannot be considered legitimate attempts to bring perpetrators to justice and provide remedies to victims. The President himself appoints members to these committees and receives their reports, which are neither made public nor followed by prosecution. Further, senior government representatives have repeatedly proven that they have no interest in ensuring accountability for past crimes by denying crimes by state security forces, promoting individuals allegedly responsible for atrocities and under sanctions by the United Nations, publicly calling for peace instead of justice, and actively blocking the establishment of the Hybrid Court for South Sudan (HCSS).

The HCSS is one of the transitional justice mechanisms provided for in the 2015 peace agreement and the 2018 revitalized peace agreement. Many victims have placed their hope in this court, given the current lack of prospects for justice before South Sudanese courts. However, the government has delayed the establishment of the HCSS for several years. Pressure from the African Union (AU), the United Nations and foreign states, including from the East African region, will be key to ensure that competent national authorities in South Sudan sign the Memorandum of Understanding (MOU) with the AU and enact legislation necessary for the establishment of the hybrid court.

In the event that external pressure does not prove efficient, the AU should consider the unilateral creation of an *ad hoc* tribunal for South Sudan. More specifically, Amnesty International calls on the AU to promptly issue a new roadmap for the establishment of the HCSS in which it gives South Sudan a deadline and ultimatum, not exceeding a period of six months, within which the government should sign the MoU and enact enabling legislation, failing which the AU will proceed to unilaterally establish an *ad hoc* tribunal.

However, the hybrid court, and other international justice mechanisms, will not be sufficient to bring all perpetrators to justice, and the judicial system of South Sudan must be rebuilt to ensure access to justice for victims of these crimes as well as to ensure a right to remedy in general. South Sudanese authorities should implement judicial reforms to enable effective investigations and prosecutions before independent, impartial and competent courts in South Sudan, in a manner that respects international standards of fairness and without recourse to the death penalty. Meanwhile, the collection and preservation of evidence of crimes must be a priority for future proceedings before the HCSS or other competent judicial mechanisms inside or outside the country. And in that regard, Amnesty International believes that the ongoing work of the UN Commission on Human Rights in South Sudan (CoHRSS) remains critical and calls for the UN to ensure the renewal of its mandate.

2. METHODOLOGY

This report is based on research by Amnesty International, including through field research in Juba and Bentiu, South Sudan, in March and April 2019 as well as remotely. Amnesty International interviewed 47 legal professionals, including judges, former judges and lawyers, government officials, UN staff, civil society representatives and victims. They were selected for their experience with, and knowledge of, South Sudan's justice sector. Around 12 of these were women. All interviews took place individually, in English, and in secure locations. Sources based in the East African region were interviewed remotely.

Amnesty International also examined primary documentary evidence, including presidential decrees and orders, reports by government-led investigation committees and court documents. The organization also reviewed over 134 reports and studies by UN bodies, intergovernmental and non-governmental organizations published between 2013 and 2019, communiqués, resolutions, laws and conventions, and media articles.

Amnesty International sought interviews with the Minister of Justice and Constitutional Affairs and the Director of the Directorate of Public Prosecution but did not receive a response to these requests. Letters summarizing the report's findings and requesting a response were sent to South Sudan's Office of the President, Ministry of Foreign Affairs, Ministry of Justice and Constitutional Affairs, the Judiciary of South Sudan, and the military justice department on 31 July and 2, 3 and 10 September 2019. At the time of writing, these letters remain unanswered.

This research analyzes prospects for justice for high-level suspects of serious crimes and human rights violations committed since 15 December 2013. It focuses on the civilian and military justice systems, since customary courts in South Sudan do not have jurisdiction over criminal cases, and Amnesty International would oppose such jurisdiction.

Amnesty International thanks everyone who took part in the research, sometimes at personal risk. Names and other identifying details have been omitted to protect identities of interviewees.

3. BACKGROUND

3.1 THE CONFLICT IN SOUTH SUDAN

On 15 December 2013, two and a half years after the Republic of South Sudan's (RoSS) gained independence after a decades long liberation struggle, a non-international armed conflict erupted. Following months of political disputes within the ruling Sudan People's Liberation Movement (SPLM) party, an armed confrontation started at the military barracks in the capital city, Juba, and escalated into a full-blown conflict. In Juba, government forces deliberately killed Nuer soldiers and civilians based on their ethnicity and perceived political affiliations. The violence quickly spread to other areas of the country including Jonglei, Upper Nile and Unity States. The confrontation led to further splits in the SPLM party and the formation of the Sudan People's Liberation Movement/Army in Opposition (SPLM/A-IO) led by Riek Machar Teny Dhurgon. Riek Machar had been the Vice President of the RoSS from 2011 until his dismissal by President Salva Kiir Mayardit in July 2013.

Both government and opposition forces are responsible for gross violations or abuses of international humanitarian law and international human rights law, including the deliberate killing of civilians, acts of sexual violence, including gang rape and rape of children, elderly and pregnant women, forced recruitment of children, looting and destruction of civilian property, and enforced disappearances.¹ Throughout the conflict, South Sudan's National Security Service (NSS) and Military Intelligence Directorate (MID) have arbitrarily detained hundreds of people, mostly men, in detention facilities across the country,² subjected them to torture and other forms of ill-treatment as well as extra-judicial executions.³

A lengthy peace process under the auspices of the Intergovernmental Authority on Development (IGAD)⁴ quickly started but parties to the conflict repeatedly violated ceasefire agreements. In August 2015, the warring parties signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS).⁵ Preparing the ground for elections, the ARCSS provided for an ambitious post-conflict transition period including reforms to the security, governance and justice sectors, the establishment of transitional justice mechanisms including a Hybrid Court for South Sudan (HCSS), and a permanent constitution. Riek Machar and other members of the SPLA-IO returned to Juba in April 2016 and a transitional government

¹ Amnesty International, *Nowhere Safe: Civilians Under Attack in South Sudan* (Index: AFR 65/003/2014); Amnesty International, *South Sudan: Escalation of violence points to failed regional and international action* ([Press release](#), 21 May 2015); Amnesty International, *'Their Voices Stopped': Mass Killing in a Shipping Container in Leer* (Index AFR 65/3598/2016); Amnesty International, *'We Are Still Running': War Crimes in Leer, South Sudan* (Index AFR 65/4486/2016). Amnesty International, *'We Did Not Believe We Would Survive': Killings, Rape and Lootings in Juba* (Index AFR 65/5028/2016); Amnesty International, *'It Was As If My Village Was Swept By a Flood': Mass Displacement of The Shilluk Population From the West Bank of the White Nile* (Index AFR 65/6538/2017); Amnesty International, *'If Men Are Caught, They Are Killed, If Women Are Caught, They Are Raped' – Atrocities in Equatoria Region Turn Country's Breadbasket Into A Killing Field* (Index AFR 65/6612/2017); Amnesty International, *'Do Not Remain Silent': Survivors of Sexual Violence in South Sudan Call for Justice and Reparations* (Index AFR 65/6469/2017); Amnesty International *'Anything That Was Breathing Was Killed' – War Crimes in Leer and Mayendit, South Sudan* (Index AFR 65/8801/2018).

² Amnesty International, *Denied Protection of the Law: National Security Service Detention in Juba* (AFR 65/3844/2016); Amnesty International, *Broken Promises: Arbitrary Detentions by South Sudan's Intelligence Agencies Continues* (Index AFR 65/8823/2018)

³ Amnesty International, *South Sudan: Investigate Apparent 2017 Killing of Activists* ([Press release](#), 30 April 2019); United Nations Panel of Experts on South Sudan, *Final Report, S/2019/301, 9 April 2019, www.undocs.org/S/2019/301*

⁴ IGAD is a block composed of Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan and Uganda to enhance regional cooperation in, among others, peace and security.

⁵ Upon signing the agreement, the government of South Sudan raised 16 reservations, including on compensation for victims of the conflict, reasoning that it had not been provided for victims of past conflicts and would therefore be "inappropriate, unprecedented" as well as "susceptible to abuse because the whole country would qualify." The Republic of South Sudan, *The Reservations of the Government of the Republic of South Sudan, on the "Compromise Peace Agreement on the Resolution of the Conflict in South Sudan"*, 26th August 2015, <https://carleton.ca/africanstudies/wp-content/uploads/GRSS-reservations.pdf>

was sworn in. However, within months the ARCSS collapsed in July 2016 when government and opposition forces fought each other for four days in Juba.

Following the July 2016 crisis, the number of armed groups increased, and violence spread, submerging previously peaceful areas of the country such as the Equatorial region in the south and marking them with widespread commission of crimes under international law. In June 2017, regional leaders endorsed a new peace process to 'revitalize' the ARCSS, culminating in the signing of the Revitalized-Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) in September 2018.

Civilians have borne the brunt of the violence and the security and human rights situation remains precarious. At least tens of thousands of people have been killed, often based on their ethnicity or perceived affiliations, since December 2013.⁶ Since the start of the conflict, the violence has forced up to 1.9 million, 85% of whom are women and children,⁷ from their homes; many of them multiple times, displacing them within South Sudan and driving thousands to UN camps in search of protection. These large camps are now known as UNMISS⁸ Protection of Civilian (PoC) sites and currently still protect over 180,000⁹ people. Over 2.2 million¹⁰ people sought refuge outside the country creating the largest movement of refugees in Africa and the third largest in the world.¹¹

Parties to the conflict have deliberately obstructed humanitarian assistance using food as a weapon of war. An estimated 6.9 million people faced severe food insecurity in May – July 2019 and 50,000 people were estimated to face a famine-like situation.¹² The mental health impact of the conflict is devastating. Forty-one percent of respondents to a survey displayed symptoms that could be diagnosed as Post-Traumatic Stress Disorder (PTSD).¹³

Despite continued attacks against civilians in Yei area,¹⁴ in the south of the country, and armed groups that refused to sign the R-ARCSS the revitalised peace agreement has offered the leaders of South Sudan another opportunity to end the armed conflict and to deal with its legacy. This includes providing justice for victims and survivors of gross violations and abuses of international humanitarian law and international human rights law committed during the conflict.

3.2 LEGAL FRAMEWORK

After gaining independence on 9 July 2011, South Sudan moved away from a sharia law system in Arabic, to a pluralist legal system,¹⁵ mostly inspired by common law and operating in English. However, many court proceedings are still held in Arabic.

⁶ Council on Foreign Relations, *Civil War in South Sudan, Global Conflict Tracker*, www.cfr.org/interactives/global-conflict-tracker#/conflict/civil-war-in-south-sudan. A study by the London School of Hygiene and Tropical Medical attributes 190,000 violent deaths to the conflict and 383,000 deaths as the result of indirect causes related to the conflict. See, F. Checchi, A. Testa, A. Warsame, L. Quach, R. Burns, 'Estimates of crisis-attributable mortality in South Sudan, December 2013 – April 2018': *A Statistical Analysis*, London School of Hygiene & Tropical Medicine, 2018, crises.lshtm.ac.uk/2018/09/25/south-sudan/

⁷ United Nations, *Humanitarian Needs Overview South Sudan 2018*, November 2017, reliefweb.int/sites/reliefweb.int/files/resources/South_Sudan_2018_Humanitarian_Needs_Overview.pdf

⁸ UNMISS is the United Nations Mission in South Sudan, which objective is to consolidate peace and security, and help establish conditions for development in the Republic of South Sudan. It was created by the UN Security Council resolution 1996 (2011) and has been present in the country since 9 July 2011. Its current mandate run until 15 March 2020.

⁹ UNMISS, *Protection of Civilian (PoC) sites Update No. 249, 23 September 2019*, unmiss.unmissions.org/sites/default/files/20190923_-_poc_update.pdf

¹⁰ UNHCR, *South Sudan, 31 August 2019*, data2.unhcr.org/en/situations/southsudan

¹¹ UNHCR, *Emergencies*, www.unrefugees.org/emergencies/south-sudan/

¹² OCHA, *South Sudan Situation Report, 18 April 2019*, reliefweb.int/sites/reliefweb.int/files/resources/Situation%20Report%20-%20South%20Sudan%20-%2018%20Apr%202019_2.pdf

¹³ D. Deng, B. Lopez, M. Pritchard and L. Ng, *Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan, June 2015*,

www.ss.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf. For more on the mental health impact of the conflict, see Amnesty International, *Our Hearts Have Gone Dark*, (Index AFR 65/3203/2016).

¹⁴ Human Rights Watch, *South Sudan: Government Forces Abusing Civilians, 4 June 2019*, www.hrw.org/news/2019/06/04/south-sudan-government-forces-abusing-civilians

¹⁵ Sources of legislation are the Constitution, customs and traditions of the people, the will of the people, and any other relevant source (article 5 of the Transitional Constitution of the Republic of South Sudan (TCoSS)).

Criminal offenses under South Sudanese law include murder,¹⁶ bodily injury (including ‘force against another person’¹⁷, ‘hurt’¹⁸), rape¹⁹ and other sexual violence²⁰ and abduction.²¹ The Penal Code also contains, among others, provisions related to offenses against the state, including treason, insurgency, possession of dangerous weapons and other crimes,²² and offences against public order that include public violence and promotion of violence.²³

Individuals above 14 years²⁴ hold criminal responsibility and can be prosecuted, convicted and sentenced for these crimes according to the law.²⁵ Individuals are also liable for such crimes committed jointly with others, if they had common knowledge or intention to commit the act;²⁶ as well as when individuals intentionally cooperate in the commission of the crime.²⁷ In addition, an individual is criminally responsible for abetment if he or she instigates another person to commit such a crime, engages in a conspiracy with one or multiple persons in the commission of the crime, and/or intentionally aids or facilitates the commission of a crime.²⁸

Members of the army can be investigated, prosecuted and convicted of criminal offences included in the Penal Code under the same modes of criminal liability as mentioned above before civilian courts,²⁹ in addition to offenses of a military nature before military courts.³⁰ Command responsibility does not exist under South Sudanese law as a mode of criminal liability. Consequently, army commanders cannot be prosecuted for having failed to prevent the commission of crimes by members of the armed forces under their command, or for having failed to punish them once crimes were committed that they knew, or should have known, about.

Crimes under international law – war crimes, crimes against humanity, genocide, and others - have not been incorporated into South Sudanese law. The Ministry of Justice introduced a Penal Code amendment bill on these crimes to Parliament in 2016, but Amnesty International, other civil society organizations and the UN raised serious concerns. The definitions of war crimes, crimes against humanity and genocide did not conform with international law. Furthermore, the draft bill did not include provisions on torture, enforced disappearance and the non-applicability of amnesties and immunities.³¹ The bill was withdrawn and referred to the specialized parliamentary ‘Committee on Legislations and Justice’, whose chairperson committed to call for consultations to address these concerns.³² Instead, consultations were never conducted, the bill disappeared and later reappeared with its original wording before Parliament around August or September 2018, leaving concerns raised by civil society and the UN unaddressed. It is still under parliamentary discussion at the time of writing.

Nevertheless, both international humanitarian law and international human rights law also apply in South Sudan. South Sudan has ratified the Geneva conventions and protocols,³³ which rules are in any case generally reflected in customary international law and thus binding on the parties to the conflict in South Sudan. Consequently, rules of international humanitarian law related to non-international armed conflict apply to the situation of conflict ongoing since December 2013.

In addition, international human rights law remains applicable in times of peace³⁴ and war. South Sudan has ratified the UN Convention on the Rights of the Child (CRC), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and its first protocol, enabling individuals to submit claims before the Committee Against Torture, the UN Convention on the Elimination of all Forms of

¹⁶ Articles 206, 207, 208, 210 of the Penal Code Act.

¹⁷ Articles 224 to 229 of the Penal Code Act.

¹⁸ Articles 230 to 240 of the Penal Code Act.

¹⁹ Article 247 of the Penal Code Act.

²⁰ Article 248, 249, 250 and 256 of the Penal Code Act.

²¹ Article 270 to 275 of the Penal Code Act.

²² Chapter V of the Penal Code Act.

²³ Chapter VII of the Penal Code Act.

²⁴ Children are criminally liable from age 14, and in some cases from age 12, Child Act article 138. They can be sentenced to imprisonment from age 16, Child Act article 182.

²⁵ Article 6 of the Penal Code Act.

²⁶ Article 48 and 49 of the Penal Code Act.

²⁷ Article 50 of the Penal Code Act.

²⁸ Article 52 and following, and article 62 of the Penal Code Act.

²⁹ The Penal Code Act and the Criminal Procedure Act are both applicable for members of the army before the military courts, SPLA Act article 34. When crimes are committed against civilians, militaries shall be brought before civilian courts, section 37(4). See also Chapter 4 of this report.

³⁰ Chapter VIII of the SPLA Act.

³¹ Amnesty International and 8 other civil society organisations (CSOs), *Observations and Recommendations on the Penal Code (Amendment) Bill, 2016 (Open Letter, 1 February 2016)*.

³² Interview with a UN official, Juba, 26 March 2019.

³³ South Sudan adopted the Geneva Convention Act, 2012 through which it ratified the Geneva conventions of 1949 and 1977 and the additional protocols thereto.

³⁴ This includes areas or periods under state of emergency too.

Discrimination Against Women (CEDAW), and the Parliament of South Sudan recently allowed the ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁵ South Sudan is also a member of the African Union and it has ratified the African Charter on Human and Peoples' Rights.³⁶ In addition, some human rights are also protected by international customary law, such as the protection from torture or enforced disappearance.

The Transitional Constitution of South Sudan also contains a bill of rights, which commits South Sudan to "respect and promote human rights and fundamental freedoms" including the right to life, dignity and the integrity of his or her person (article 11), the right to liberty and security of person (article 12), freedom from torture and other ill-treatment (article 18), and the right to a fair trial (article 19). Furthermore, article 9(3) of the Constitution states that rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan are integral to the bill of rights.

DEATH PENALTY

In March 2019, Amnesty International reported on South Sudan's use of the death penalty since independence in 2011 and raised alarm about South Sudan's spike in executions in 2018 and 2019. Between 2011 and February 2019, at least 140 people had been sentenced to death and at least 39 executed, including at least one individual below 18 years at the time of the crime.³⁷

In South Sudan, the 2008 Penal Code provides for the use of the death penalty³⁸ for murder; bearing false witness resulting in an innocent person's execution or for fabricating such evidence or using as true evidence known to be false; terrorism (or banditry, insurgency or sabotage) resulting in death; aggravated drug trafficking, and treason.³⁹ Civilians sentenced to death are executed by hanging.⁴⁰ Soldiers sentenced to death by military courts are executed by a firing squad.⁴¹

Amnesty International opposes the death penalty in all cases because it is the ultimate cruel, inhuman and degrading punishment, as well as a violation of the right to life. Until an official moratorium is in place, future judicial proceedings before both civilian and military courts present a high risk of death sentences and executions.

CULTURE OF SECRECY

Laws, judgments, decrees and government reports are shrouded in secrecy in South Sudan. Precise information about national laws and the ratification process of international conventions is difficult to obtain. The Ministry of Justice and Constitutional Affairs (MoJCA, hereinafter Ministry of Justice) does not have a website or a library where laws can easily be accessed, and South Sudan does not have a functioning gazette.⁴² Civil servants or members of the public can only access hard copies of laws by physically requesting them from the Ministry of Justice, but they are inaccessible to most people, including judges, prosecutors, police and legal practitioners in the country.

Although judgments are intended as public documents, they are difficult, and at times impossible, for the public to access. Whilst efforts are underway,⁴³ South Sudan does not yet publish law reports. This prevents people from being informed about judicial decisions and hampers legal professionals from using judgments as precedent in other cases.

³⁵ UN Office of the High Commissioner for Human Rights, *Press briefing note, 7 June 2019*, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24683&LangID=E.

³⁶ Note that South Sudan has also ratified the Convention Governing Specific Aspects of Refugee Problems in Africa and has signed, but not yet ratified, several other conventions of the African human rights system. (

³⁷ Amnesty International, *'I told the judge I was 15': The use of the death penalty in South Sudan*, (Index: AFR 65/9496/2018); Amnesty International, *South Sudan: Seven men including members of one family hanged amid spike in executions* ([Press release](#), 1 March 2019).

³⁸ The death penalty is provided for in South Sudanese law by article 8 of the Penal Code Act.

³⁹ Penal Code Act, articles 206, 131(2), 67(2), 383, 64.

⁴⁰ Code of Criminal Procedure Act, Article 275.

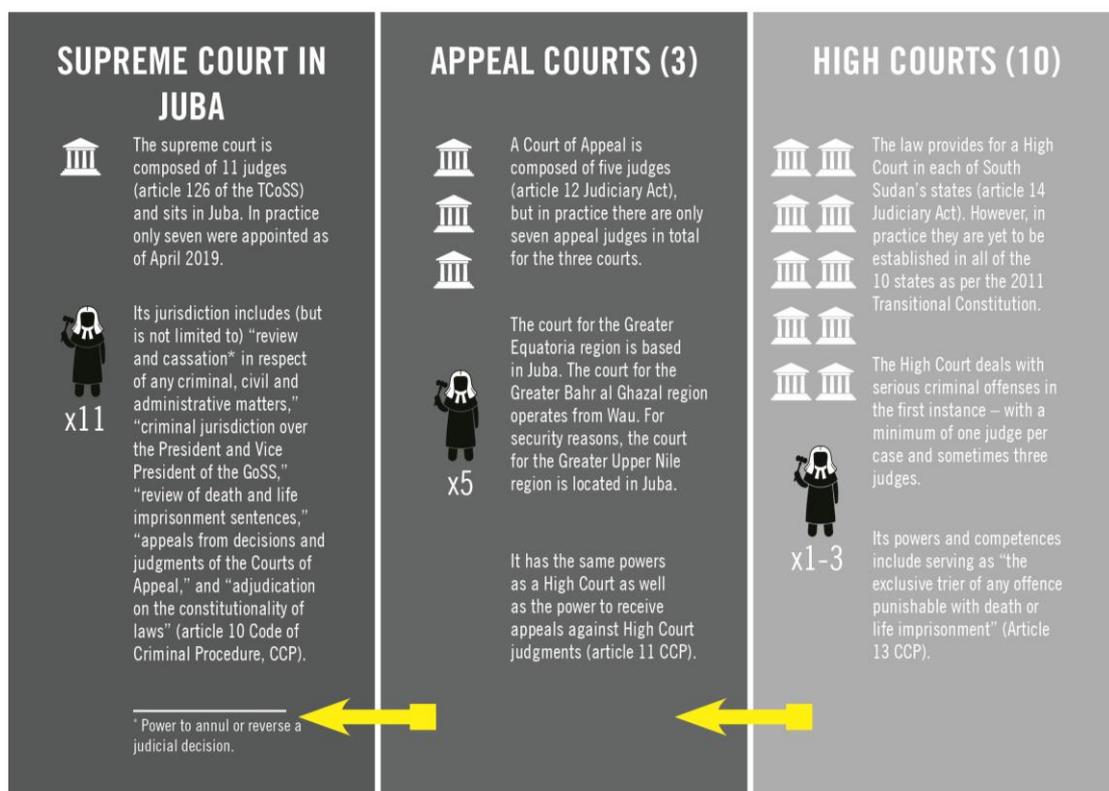
⁴¹ SPLA Act, Section 85. The practice was confirmed by an official of the military justice department.

⁴² A gazette is a periodical publication by the government that contains public or legal notices, including new laws and amendments to legislation.

⁴³ Supported by an international non-governmental organization, the Judiciary of South Sudan is in the process to publish a compilation of supreme court decisions.

4. EXECUTIVE CONTROL OF THE JUDICIARY

4.1 CIVILIAN COURTS





4.1.1 NO CASE ON SERIOUS CRIMES COMMITTED IN THE CONFLICT

There have not been any judicial proceedings related to serious crimes committed in the context of the conflict since December 2013 before ordinary civilian courts.⁴⁴ None of the people interviewed by Amnesty International during the field research could identify a trial dealing with crimes or human rights violations committed against civilians in the context of the conflict by government security forces or armed opposition groups.⁴⁵ The lack of investigations or prosecutions, or even prospects of such, against alleged high-level perpetrators of crimes under international law – despite repeated calls for accountability from South Sudanese,⁴⁶ civil society and the international community – is particularly concerning.

Negligible prospects for such judicial proceedings before domestic civilian courts are partially explained by the judicial system’s lack of effective independence.⁴⁷ Although article 125 of the 2011 Transitional Constitution of the Republic of South Sudan (TCoSS) guarantees independence of the judiciary, in practice no judicial actors are fully independent. The UN Commission on Human Rights for South Sudan (hereinafter the CoHRSS) found that “actual or perceived executive interference in the functioning of prosecutorial and judicial authority casts doubt on the fairness of proceedings.”⁴⁸ Political interference appears widespread

⁴⁴ UN Commission on Human Rights in South Sudan (CoHRSS), *Report of the Commission on Human Rights in South Sudan, 18 February 2019*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx para. 109: “Pervasive impunity is still the norm.”

⁴⁵ This includes a government official working on justice-related issues, who said that he was not aware of any case that has been brought to the civilian courts, as well as around 40 interviews conducted in South Sudan in March/April 2019 (see Methodology section).

⁴⁶ 93% of 1525 respondents to a perception survey on transitional justice supported prosecutions for individuals responsible for abuses committed during the conflict. D. Deng, B. Lopez, M. Pritchard and L. Ng, *Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan, June 2015*, www.ss.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf

⁴⁷ This lack of independence has already been highlighted in previous research by international organisations and civil society organisations. See AUCISS, *Final Report of the African Union Commission of Inquiry on South Sudan, 15 October 2014*, www.peaceau.org/uploads/auciss.final.report.pdf, paras 278-281; OHCHR, *Assessment mission by the Office of the UN High Commissioner for Human Rights to improve human rights, accountability reconciliation and capacity in South Sudan: detailed findings, 10 March 2016*, www.refworld.org/docid/56e2ee954.html, para. 376 (hereinafter: OHCHR, *Assessment Report*, March 2016); CoHRSS, *Report of the CoHRSS, 23 February 2018*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, paras 675-678; and by NGOs: Amnesty International and International Federation for Human Rights (FIDH), *Looking for Justice, Recommendations for the Establishment of the Hybrid Court for South Sudan, 2016*, (Index AFR 65/4742/2016), page 9; Human Rights Watch, *Ending the Era of Injustice. Advancing Prosecutions for Serious Crimes Committed in South Sudan’s New War, 10 December 2014*, www.hrw.org/report/2014/12/10/ending-era-injustice/advancing-prosecutions-serious-crimes-committed-south-sudans, pages 17-24; ABA Rule of Law Initiative, *Assessment of Justice, Accountability and Reconciliation Measures in South Sudan, June 2014*, www.americanbar.org/content/dam/aba/directories/roll/sudan/aba_rol_i_sudan_assessment_final_report_0614.authcheckdam.pdf, page 6; International Commission of Jurists, *South Sudan Country Profile, June 2014*, www.icj.org/wp-content/uploads/2014/06/CJL-Country-Profile-South-Sudan-June-2014.pdf, pages 8-13.

⁴⁸ CoHRSS, *Report of the Commission on Human Rights in South Sudan, 23 February 2018*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 675.

and obstructs attempts to prosecute individuals allegedly responsible for crimes committed in relation to the conflict, or more broadly prosecutions perceived to be against the state's interests. "Where the executive has an interest, the case will go forward. Otherwise, it may not," summarizes one lawyer.⁴⁹

4.1.2 PROSECUTORS ACT UNDER EXECUTIVE DIRECTIVES OR NOT AT ALL

The Directorate of Public Prosecutions (DPP) sits within the Ministry of Justice and Constitutional Affairs and is subordinate to the executive. It supervises investigations, public attorneys and takes prosecutions to criminal courts.⁵⁰ The DPP's director is appointed to, and removed from, office by presidential order. This is done on the Minister of Justice's recommendation and the DPP director is answerable to the Minister and his Undersecretary - both presidential appointees bound by presidential and Council of Ministers' decisions.⁵¹ The law does not provide for an independent DPP or autonomous public prosecutors. Moreover, offences against the government require a previous written approval by the President or by the person whom he authorizes to give such approval for prosecutions to proceed.⁵²

According to a UN official, the DPP is willing to cooperate with the UN on some initiatives,⁵³ but its decisions go through the Undersecretary of the Ministry of Justice.⁵⁴ Two former judges recounted that the government supervises and directs the prosecution of individual cases.⁵⁵ Speaking of a corruption case against high-level officials, the judge recounted that they "had been dictated."⁵⁶

Lack of prosecutorial independence has impeded prosecution of serious human rights violations perpetrated since 2013 in the context of the conflict. As one lawyer explained to Amnesty International, public prosecutors would not bring cases against the government since they answer to the executive, and they would not bring cases against members of armed groups because they operate in areas beyond the reach of the statutory justice system. When armed groups do set foot in Juba, they do so under political arrangements with state authorities shielding them from prosecution.⁵⁷ Conversely, prosecutors have initiated numerous highly politicized prosecutions targeting political opponents for alleged crimes against the state in the past few years.⁵⁸

Prosecutors in South Sudan seem to operate under the assumption that they cannot initiate investigations in the absence of complainants, running counter to South Sudanese law.⁵⁹ South Sudan's Code of Criminal Procedure leaves no doubt as to the responsibility of prosecutors to initiate, direct and supervise police investigations of alleged crimes.⁶⁰ The Undersecretary of the Ministry of Justice also explained that criminal cases of public interest can be initiated by a complaint or when information about an alleged crime, including dead bodies, medical reports, witnesses or other types of evidence, is available.⁶¹ Nevertheless, prosecutors show a passive attitude and largely refrain from opening investigations when there is no complainant.⁶²

According to a UN official, prosecutors do not act if there are no complainants and authorities routinely deny allegations as opposed to investigating them. "In a functioning country, where there are credible allegations of crimes, investigations would be opened into these allegations. Here, instead, authorities would deny the allegations."⁶³ Since victims mostly lack access to courts or confidence in the judicial system, they rarely lodge formal complaints and hence no investigations are carried out.

⁴⁹ Interview with a lawyer representative of a civil society organisation, Juba, 1 April 2019.

⁵⁰ Ministry of Legal Affairs and Constitutional Development Organization Act, article 8; Code of Criminal Procedure, article 23.

⁵¹ Ministry of Legal Affairs and Constitutional Development Organization Act, articles 26, 27, 30, 32 and 33.

⁵² Code of Criminal Procedure Act, article 44.

⁵³ See box below, for instance the work on the mobile courts.

⁵⁴ Interview with a UN official, Juba, 26 March 2019.

⁵⁵ Interview with two former judges, Juba, 27 March 2019 and 1 April 2019.

⁵⁶ Interview with former judge, Juba, 1 April 2019.

⁵⁷ Interview with a lawyer with several decades of experience, Juba, 25 March 2019.

⁵⁸ These include the trial of James Gatdet Dak in 2018, the trial of William Endley in 2018, and the trial of Peter Biar Ajak, Kerbino Agok Wol and others in 2019. Note that all these individuals were first arbitrarily arrested and detained by the National Security Service before being charged and tried. See for instance, Amnesty International, *South Sudan: Amnesty International slams sham trial that resulted in prison sentences for six men including activist Peter Biar Ajak* (Index: AFR 65/0510/2019).

⁵⁹ Code of criminal procedure Act, article 34: "a criminal case shall be initiated under the directives of the Public Prosecution Attorney, Magistrate or Court "upon such information or complaint as may be presented to them."

⁶⁰ Code of Criminal Procedure Act, articles 52, 53, 57, and 58.

⁶¹ Interview with the Undersecretary of the Ministry of Justice and Constitutional Affairs, Juba, 2 April 2019.

⁶² Confirmed in interviews with more than 30 persons, including lawyers, UN officials, and representatives of the civil society, Juba and Bentiu, March-April 2019.

⁶³ Interview with a UN official, Juba, 26 March 2019.

4.1.3 LACK OF JUDICIAL INDEPENDENCE

“The judiciary is not functional because there is a political decision for it not to be functioning,”⁶⁴ said a former judge.

Judicial appointments lack transparency. The Chief Justice, who is responsible for recommending judicial appointments for the lower courts, has not always abided by procedures in the Judiciary Act.⁶⁵ Members and ex-members of the judiciary, as well as a few lawyers interviewed by Amnesty International questioned the Chief Justice’s independence and impartiality.⁶⁶ In one instance that took place in 2015, a former judge recalls the Chief Justice circumventing the Judicial Service Council which is mandated to review applications for prospective judges and unilaterally appointed 15 judges, although the Chief Justice has no power of appointment. In another instance, the Council was prevented from accessing information to verify credentials of potential judges.⁶⁷ Amnesty International wrote to the Chief Justice seeking his response to the instances but did not receive an answer.

At least two instances of dismissals of judges reveal blatant executive interference with the judiciary.

Under South Sudanese law, the President has no power to dismiss judges. Instead, such disciplinary measure must be decided by the Board of Discipline after investigation of the alleged misconduct.⁶⁸

In March 2016, the President summarily dismissed the then Deputy Chief Justice by presidential order.⁶⁹ Lawyers, former judges and civil society representatives interviewed by Amnesty International believe that his dismissal was the direct result of his support for an application requesting the Chief Justice to recuse himself from a constitutional panel constituted to rule on a highly political and controversial presidential decree. On 2 October 2015, President Kiir divided South Sudan into 28 states,⁷⁰ instead of the 10 states enshrined in the country’s constitution as well as the 2015 ARCSS. The Chief Justice publicly pledged his support for the decision.⁷¹ A political opposition party challenged the decree before the constitutional panel of the Supreme Court and requested the Chief Justice presiding over the panel to recuse himself on grounds that he was partial to the matter having publicly welcomed the decree. The members of the panel unanimously supported the Chief Justice recusing himself, but he refused. At the same time, the Deputy Chief Justice, perceived to be the voice of the panel by the Chief Justice as he conveyed the views of the panel to him,⁷² was dismissed by presidential order – without motivation and in violation of the procedure provided by law.⁷³

Another striking example of politically-motivated dismissals by the President followed the judges’ strike on their working conditions in 2017.⁷⁴ That year, a group of judges organized in a committee led a three-month

⁶⁵ Judiciary Act, articles 20 to 25 relate to the appointment of judges and justices. Any person appointed to a judicial position shall be Sudanese, ‘of sound mind’, holder of at least LLB Degree or equivalent in law, over 25/35/45 years old (depending on the level of the court) and shall not have been convicted ‘of an offence involving dishonesty or moral turpitude’. Justices of the Supreme Court shall be appointed by the President, on recommendations by the Judicial Service Council and after approval by two-thirds majority of the legislative assembly. Justices of the Courts of Appeal should be appointed by the President, after recommendations by the Judicial Service Council. Judges of the high courts, county and payam courts shall be appointed by the President on recommendation of the president of the Supreme Court, that is to say the Chief Justice. In addition, the Headquarters Committee shall study the applications referred to it by the Council or the president of the Supreme Court, and submit recommendations (article 37 of the Judiciary Act).

⁶⁶ Interview with a lawyer representative of a civil society organisation, Juba, 1 April 2019; Interviews with two former judges, Juba, 30 March 2019 and 1 April 2019; Interview with a lawyer, Juba, 25 March 2019.

⁶⁷ Interview with a former judge, Juba, 1 April 2019. The incident concerned a candidate for whom the Council could not verify the diploma obtained abroad and the Chief Justice prevented them from contacting the university and from requesting a translation of the document.

⁶⁸ The dismissal of judges is a disciplinary measure. As such, articles 48 to 57 of the Judiciary Act apply. A justice “who contravenes his or her duty, or the ethics of the profession, or conducts himself or herself either by an act or omission in such a way as may degrade his or her judicial position or absents himself or herself from work without permission or acceptable reason, or is convicted for any offence or commits an act of insubordination, may be subject to disciplinary measures.” A board of discipline may conduct an investigation into a judge and shall avail the justice or judge being disciplined the opportunity of being heard and to defend himself or herself. The board of discipline is competent to impose penalties, including dismissals. A copy of the decision of the Board of Discipline shall be delivered to the judge who was been disciplined and be submitted to the chief justice and the Judicial Service Council. The decision of the board is then confirmed, or dismissed, by the Council in respect to justice of the Supreme Court and of the Court of Appeal, and by the Chief Justice in respect of the judges of the other lower courts.

⁶⁹ Case described by three former judges and two lawyers. Following the dismissal, the complainant decided not to pursue the case anymore. See also media articles: Sudan Tribune, *South Sudanese president sacks deputy chief justice*, 6 March 2016, www.sudantribune.com/spip.php?article58216; Radio Tamazuj, *Kiir ousts deputy chief supreme court justice*, 5 March 2016, www.radiotamazuj.org/en/news/article/kiir-ousts-deputy-chief-supreme-court-justice

⁷⁰ Republic of South Sudan, “*Presidential order on the Establishment Order Number 36/2015 For the Creation of 28 States*” in the *Decentralized Governance System in the Republic of South Sudan*, 2 October 2015, <http://extwprlegs1.fao.org/docs/pdf/ssd1944.pdf>

⁷¹ Radio Tamazuj, *S. Sudan Chief justice announces support for Kiir’s establishment order in spite of pending litigation*, 16 October 2015, www.radiotamazuj.org/en/news/article/s-sudan-chief-justice-announces-support-for-kiir-s-establishment-order-in-spite-of-pending-litigation

⁷² Interview with a former judge, Juba, 27 March 2019.

⁷³ See articles 48 to 56 of the Judiciary Act.

⁷⁴ Including lack of basic equipment and electricity, delays in payment of salaries, lack of security measures, lack of transportation means, practices of corruption, and so on. Case described by two former judges as well as several lawyers and civil society representatives. See also media articles: Sudan Tribune, *S.Sudan lawyers says dismissal of judges “unprocedural”*, 22 September 2017,

strike. The President invited the committee members to participate in a meeting at his office. According to participants, President Kiir heard the judges' complaints and committed to address the issues they raised. Instead, in June 2017, nine of the 11 judges present at that meeting were dismissed by presidential order. The order did not include the motivation for the dismissal and hence contradicted South Sudanese procedural law.⁷⁵ According to some dismissed judges, they were also not notified and learned about their dismissal through the media or their relatives. Even though the decree could be challenged in court, the former judges collectively decided not to pursue legal remedy, as the panel would have been presided over by the Chief Justice. Several other judges resigned following these dismissals, including one from the Supreme Court.⁷⁶

Any judge perceived to be acting against the executive's interest can be dismissed. As a former judge puts it, "how can a judge be independent in a case brought by the government? They can be dismissed if they take decisions against the government's wishes."⁷⁷ Lawyers have lost faith in the institution, with one describing these latest dismissals as "the event which destroyed the image of the independence of the judiciary" and another one concluding "all judges who tried to protect their integrity were sacked."⁷⁸

The AU Commission of Inquiry on South Sudan⁷⁹ also found that judicial independence "is undermined in a variety of ways", including as the result of interference by executive and military powers.⁸⁰

4.1.4 COMPETENT INDIVIDUALS CANNOT FIGHT THE SYSTEM ALONE

All individuals interviewed by Amnesty acknowledge that there are committed and well-trained individuals within the judicial system and the legal community, but that the system is compromised by the executive's political interests, lack of support for accountability for serious crimes and lack of respect for victims' right to remedy. Without political backing, these individuals can achieve little. "As a lawyer, there is not much one can do. The presidency has no interest in changing a system that benefits him, but nor does the opposition. Lawlessness benefits everyone," says a former judge.⁸¹

Legal professionals who operate in the system also work in a threatening and intimidating climate. The NSS is omnipresent, including in corridors of the civilian courts.⁸² Actual or perceived critics, or anyone thought to be acting against the state, may be under surveillance. The NSS is also heavily involved in investigations and detention of suspects.⁸³ Cases that affect the interests of political or military elites are too dangerous for many lawyers to take on.⁸⁴ Six lawyers that Amnesty International interviewed had received threats related to the cases they worked on. Fear of reprisals – dismissals of judges, arbitrary detention and threats to life and limb – are on everyone's minds.

sudantribune.com/spip.php?article63574; Tong Kot Kuocnin, *Justice under fire: the dismissal of 13 Justices and Judges from the Judiciary of South Sudan*, 15 July 2017, www.southsudanation.com/justice-under-fire-the-dismissal-of-13-justices-judges-from-the-judiciary-of-south-sudan/; Nabeel Biajo, *South Sudanese Judges' strike continues despite dismissals*, 14 July 2017, www.voanews.com/a/south-sudan-judges-strike-continues-despite-dismissals/3944773.html

⁷⁵ See articles 48 to 56 of the Judiciary Act. In particular, a dismissal is a disciplinary measure which can be justified if a judge "contravenes his or her duty, or the ethics of the profession, or conducts himself or herself [...] in such a way as may degrade his or her judicial position or absents himself or herself from work without permission or acceptable reason, or is convicted in the court of law for any offence or commits an act of insubordination." And such disciplinary process should go through a board of discipline.

⁷⁶ Kukurlopita Marino Pitia, Justice of the Supreme Court, resigned in November 2017 citing executive interference in the judiciary, CoHRSS, *Report of the CoHRSS, 20 February 2019*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para 676.

⁷⁷ Interview with a former judge, Juba, 9 April 2019.

⁷⁸ Interviews with two lawyers, Juba, 25 March 2019 and 28 March 2019.

⁷⁹ The AU Peace and Security Council created the AU Commission of Inquiry on South Sudan on 30 December 2013 mandated to investigate human rights violations and causes of the conflict and provide recommendations on the way forward. The commission completed its report in October 2014, in which it found that crimes against humanity and war crimes were committed and recommended a number of measures for accountability and institutional reforms, including reforming the justice systems and establishing a hybrid court.

⁸⁰ AUCISS, *Final Report of the African Union Commission of Inquiry on South Sudan, 15 October 2014*, www.peaceau.org/uploads/auciss.final.report.pdf, paras 280-281.

⁸¹ Interview with a former judge, Juba, 1 April 2019.

⁸² For instance, Amnesty International staff observed heavy presence of NSS agents in and around the courtroom during the trial of Kerbino Wol, Peter Biar Ajak, Simon Dau, Bol Akech, Benjamin Agany Akol and Gar Duel Gar in March and April 2019.

⁸³ The NSS headquarters referred to as "the Blue House" is a notorious detention center in Juba. Also, interview with a civil society representative, confirming that the NSS often investigates instead of the police, Juba, 2 April 2019. And see also: CoHRSS, *Report of the CoHRSS, 20 February 2019*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, paras 273-283; UN Panel of Experts on South Sudan, *Final report of the Panel of Experts on South Sudan submitted pursuant to resolution 2428 (2018)*, 9 April 2019, www.undocs.org/S/2019/301, paras 41- 66; Amnesty International, *'We Are At Risk and On The Run': Security Agents Track Down Peaceful Protesters* (Index: AFR 65/0692/2019).

⁸⁴ Written correspondence with a lawyer, 27 and 28 August 2019.

MOBILE COURTS

To address the backlog of criminal cases where ordinary civilian courts have no or limited presence, South Sudanese authorities, supported by the UN,⁸⁵ have created “mobile courts”. Judges, prosecutors and other judicial personnel temporarily travel from Juba to such locations to organize trials for pending cases under the jurisdiction of high courts. Generally, these courts deal with ‘ordinary criminal’ cases between civilians, ranging from petty crimes to serious crimes, such as murder and rape.⁸⁶

According to UN staff, mobile court sessions have had a positive impact in remote and/or conflict-affected areas.⁸⁷ In Bentiu, at least three mobile court sessions were organized in 2018 and 2019⁸⁸ with UN support to deal with crimes committed inside the Protection of Civilian (PoC) site.⁸⁹ UN and state officials believe mobile courts sessions have a deterrent effect linking this to a reported decrease in criminality in the PoC site.⁹⁰ In parallel, boosted by the mobile courts’ experience, local authorities have taken steps to re-build the civilian justice system: a prosecutor was re-deployed to Bentiu in early 2019 and the governor submitted a request to the Chief Justice for the deployment of a permanent high court judge.⁹¹

While mobile courts contribute to the (re-)establishment of basic justice services, such trials are limited to persons suspected of ‘lesser grave’ offenses, whereas individuals suspected of crimes under international law committed in the context of the conflict remain beyond the reach of justice. “This focus on ‘normal’ criminality sinks the real issue - ordinary criminals are brought before justice, and war criminals have full impunity” a UN official explained.⁹²

4.2 MILITARY COURTS

4.2.1 MILITARY COURTS SHOULD NOT DEAL WITH CRIMES AGAINST CIVILIANS

Military courts in South Sudan do not have jurisdiction over crimes against civilians committed by the army. Section 37(4) of the SPLA Act⁹³ clearly states: “Whenever a military personnel commits an offence against a civilian or civilian property, the civil court shall assume jurisdiction over such an offence.” If such cases are reported within the army, the military justice system should transfer the case to civilian courts. Both civilian and military judicial authorities recalled this clear division of jurisdiction during interviews with Amnesty International.⁹⁴

⁸⁵ Both UNDP and the UNMISS Rule of Law section support mobile court sessions in South Sudan. Interview with the Director of the UNMISS Rule of Law Section, and interview with a technical advisor working for UNDP, Juba, 26 March 2019. In 2018, areas covered by mobile courts include Ruweng, Bentiu (PoC), Kuajok, Cueibet, Yirol, Pibor, Kapoeta, Terekeka, Yambio, Juba PoC, and Malakal PoC. For more information on locations where mobile court sessions supported by the UN were organized and number of cases dealt with, see: UNDP, *Mobile Courts in South Sudan, 25 March 2019*, www.ss.undp.org/content/south_sudan/en/home/library/democratic_governance/mobile-courts-in-south-sudan.html

⁸⁶ Interview with a UN official, Juba, 26 March 2019.

⁸⁷ Confirmed by people interviewed by Amnesty International in March and April 2019 who work for UNDP in Juba, UNMISS in Juba and UNMISS in Bentiu – with the caveat that these individuals are involved with the support provided to mobile courts and therefore are not necessarily unbiased.

⁸⁸ Sessions were organized in December 2018, January 2019 and April 2019. They last around one week each.

⁸⁹ Camp protected by UN peacekeepers where internally displaced people live.

⁹⁰ Interview with the UNMISS Head of Field Office, Bentiu, 4 April 2019; Interview with the Governor of Northern Liech State, Bentiu, 5 April 2019.

⁹¹ Interview with the Governor of Northern Liech State, Bentiu, 5 April 2019; Interview with the Director of the UNMISS Rule of Law Section, Juba, 26 March 2019.

⁹² Interview with a UN official, Juba, 26 March 2019.

⁹³ The SPLA Act was enacted in 2009. It ‘provides for the establishment, governance and discipline’ of the army of South Sudan, including proceedings before military courts and offences of military nature.

⁹⁴ Interviews with an official of the military justice department, Juba, 29 March 2019; Interview with former judge, Juba, 27 March 2019; Interview with a government official, Juba, 10 April 2019.

In practice, military courts often claim jurisdiction over any offence committed by army officials, including on crimes against civilians. They decide which court is competent based on the perpetrator rather than the victim of the crime, contrary to the SPLA Act. A UN official felt this stemmed from the army wanting to show they command their soldiers.⁹⁵ A former civilian judge also considered commanders choose when to retain jurisdiction over their troops, often not allowing their referral to civilian courts.⁹⁶ Officials from the military justice system instead suggested that cases were brought before military courts by victims who prefer martial courts over civilian high courts, or alternatively that the President may choose when cases go to court martial instead of civilians courts in the interest of efficiency.⁹⁷ The Terrain trial, documented below, is one such case.

Some observers consider military courts to have better capacity than ordinary civilian courts⁹⁸ or think they are in a better position to arrest suspects on active duty and implement judicial decisions.⁹⁹ However, others believe military justice personnel are not well trained in judicial matters and proceedings before military courts present serious due process and fair trial concerns.¹⁰⁰

Amnesty International firmly opposes South Sudanese military courts dealing with cases of crimes and serious human rights violations committed against civilians. Trials before military courts for crimes against civilians are illegal in South Sudan, and not warranted because of serious concerns over the independence and impartiality of military courts, as well as concerns over impunity. There is also growing acceptance under international law that military courts should not have jurisdiction to try members of the military and security forces for human rights violations or other crimes under international law.¹⁰¹

4.2.2 THE PRESIDENT SUPERVISES JUDICIAL PROCEEDINGS BY MILITARY COURTS

Judicial proceedings are only initiated with approval from the highest military and/or political authority. General court martials are convened by the Commander-in-Chief, the President, when the accused is a military official of Brigadier rank or higher, under Section 36 of the SPLA Act.¹⁰² The Chief of General Staff¹⁰³ can constitute general court martials for officers ranking below Brigadier. But in practice, at least in some instances, the President has created court martials for army officials of lower rank than Brigadiers.

The President also has veto power over verdicts and sentencings passed by court martials. Section 89(2) of the SPLA Act reads: “The findings and sentences of a general court martial shall be confirmed by the President and Commander-in-Chief or by any officer authorized in his or her behalf by warrant issued by the President and Commander-in-Chief, provided that no death sentence shall be confirmed unless reviewed and recommended by the Southern Sudan Supreme Court.” This allows the President to mitigate or commute punishments imposed, remit punishments, suspend their execution, or refuse to confirm the verdict and sentence and order a fresh trial by another court martial.¹⁰⁴ Proposed verdicts drafted by military courts, accompanied by a summary of the case, findings, and judges, are submitted for approval to the

⁹⁵ Interview with a UN official, Juba, 26 March 2019.

⁹⁶ Interview with a former judge, Juba, 27 March 2019.

⁹⁷ Interviews with the Director, the Deputy Director and the Head of Defence of the military justice system, Juba, 29 March 2019.

⁹⁸ See ABA Rule of Law Initiative, *Assessment of Justice, Accountability and Reconciliation Measures in South Sudan, June 2014*, www.americanbar.org/content/dam/aba/directories/roli/sudan/aba_rolisudan_assessment_final_report_0614_authcheckdam.pdf, page 7-9; CoHRSS, *Report of the CoHRSS, 18 February 2019*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 966.

⁹⁹ Interview with a victims' representative, Juba, 2 April 2019.

¹⁰⁰ Interview with former judge of civilian courts who used to train military personnel, Juba, 9 April 2019. Also: Interview with lawyer with several decades of experience, Juba, 25 March 2019, who explains that “When civilians are involved, special courts [high courts panels of 3 judges] would be better to deal with these cases, normal courts have more experience than military courts.”; Interview with a UN official, Juba, 26 March 2019, who notes that most actors of the military justice system are not legal professionals. Amnesty International notes that the UNMISS Rule of Law Section has started a training program with the military justice department.

¹⁰¹ Principle 29 of the UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 2005, E/CN.4/2005/102/Add.1. See also jurisprudence and conclusions of the Special Rapporteur on torture, the UN Committee against Torture, the UN Special Rapporteur on extrajudicial executions and the UN Human Rights Committee.

¹⁰² There are two degrees of courts within the military justice system: district court martials have jurisdiction over any SPLA personnel for any offence except murder, mutiny, desertion, cowardice during combat and any other offence punishable with death; while general court martials have jurisdiction over any SPLA personnel for any offence, and thus including the most serious offences punishable by death (Section 37 of the SPLA Act).

¹⁰³ The Chief of General Staff is an officer of the army responsible for the preparation of the military strategy, the organisation of the forces into combat units and combat support units, the recruitment and training of military personnel, the development of operational plans, the development of the necessary military rules, among other responsibilities. See section 18 of the SPLA Act.

¹⁰⁴ Section 90 of the SPLA Act.

President. Verdicts are only delivered in public after presidential approval.¹⁰⁵ The President has the first say and final say, although in theory verdicts may then be appealed.¹⁰⁶

4.2.3 THE TERRAIN CASE: A SHOW TRIAL WITH SERIOUS FLAWS

On 11 July 2016, between 50 to 100 members of the government security forces attacked Terrain hotel for several hours, killing one South Sudanese journalist, and sexually assaulting and raping at least six foreign aid workers, among other violent acts. This incident led to the first and only case before South Sudanese tribunals related to crimes against civilians in the context of the conflict that broke out in December 2013. In May 2017, the trial of 12 soldiers accused of participation in the attack began, and on 6 September 2018, 10 of them were found guilty of murder, rape and other offenses.¹⁰⁷

While UN observers raised some fair trial concerns during the proceedings, including detention conditions of the accused persons, the death of one of the 12 suspects in detention,¹⁰⁸ impediments to their access to lawyers, and delays in issuing the verdict,¹⁰⁹ the handling of the trial broadly demonstrated respect of basic international standards. Hearings were public, victims were able to participate and testify by video link, all parties were represented by legal counsel and measures were taken to protect witnesses' identities.¹¹⁰ Overall, the trial was welcomed as a first step towards accountability for crimes committed in South Sudan's conflict.¹¹¹

However, the Terrain case was exceptional due to political dynamics in the government¹¹² and following significant pressure from foreign states¹¹³ and humanitarian organizations, given the involvement of foreign victims working in the humanitarian sector. After media pressure on the US, the US Federal Bureau of Investigation (FBI) supported national authorities with investigations to seek justice for US nationals.¹¹⁴ All persons interviewed by Amnesty International, unanimously concluded that the case would not have happened without international pressure before the trial. Military justice officials admitted that the Terrain case was exceptional due to the presence of foreign victims and international pressure, and that as a UN member state South Sudan did their best to respond to calls for accountability and to try these suspects in accordance with international norms.¹¹⁵

¹⁰⁵ This was confirmed by officials of the military justice system during interviews, Juba, 29 March 2019.

¹⁰⁶ Judgments by general court martials may be appealed before the Supreme Court of South Sudan, section 88 of the SPLA Act.

¹⁰⁷ The highest-ranking accused died in NSS custody and one was acquitted for lack of evidence against him. To know more about the trial see: UNMISS, *Perpetrators of violence against civilians at Terrain Hotel held accountable for their crimes*, 6 September 2018, https://reliefweb.int/sites/reliefweb.int/files/resources/20180906%20-%20UNMISS%20PRESS%20RELEASE%20-%20Perpetrators%20of%20Violence%20Against%20Civilians%20at%20Terrain%20Hotel%20Held%20Accountable%20for%20Their%20Crimes_.pdf; Jason Burke, *South Sudan soldiers jailed for murder and rape in hotel attack*, 6 September 2018, www.theguardian.com/world/2018/sep/06/south-sudan-soldiers-jailed-for-and-in-hotel-attack; Denis Dumo, *South Sudan soldiers sentenced to jail for murder, rape in 2016 hotel raid*, 6 September 2018, <https://www.reuters.com/article/us-southsudan-security/south-sudan-soldiers-sentenced-to-jail-for-murder-rape-in-2016-hotel-raid-idUSKCN1LM0XK>; Flora McCrone, *War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016-18*, August 2019, www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf

¹⁰⁸ Amnesty International, *South Sudan: Sentencing of soldiers for killing journalist and raping aid workers a step forward for justice*, 6 September 2018, www.amnesty.org/en/latest/news/2018/09/south-sudan-sentencing-of-soldiers-for-killing-journalist-and-raping-aid-workers-a-step-forward-for-justice/; Flora McCrone, *War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016-18*, August 2019, www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf

¹⁰⁹ UNMISS, *Perpetrators of violence against civilians at Terrain Hotel held accountable for their crimes*, 6 September 2018, https://reliefweb.int/sites/reliefweb.int/files/resources/20180906%20-%20UNMISS%20PRESS%20RELEASE%20-%20Perpetrators%20of%20Violence%20Against%20Civilians%20at%20Terrain%20Hotel%20Held%20Accountable%20for%20Their%20Crimes_.pdf; Gurtong, *UN Human Rights Commission concerned over delay of Terrain case verdict*, 13 June 2019, www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/21578/UN-Human-Rights-Commission-Concerned-Over-Delay-of-Terrain-Case-verdict.aspx

¹¹⁰ Interviews with the defence lawyer in the case, Juba, 29 March 2019; as well as interviews with lawyers of two victims' groups, Juba, 28 March 2019.

¹¹¹ Amnesty International, *South Sudan: Sentencing of soldiers for killing journalist and raping aid workers a step forward for justice*, ([Press release](http://www.amnesty.org/en/latest/press-releases/2018/09/south-sudan-sentencing-of-soldiers-for-killing-journalist-and-raping-aid-workers-a-step-forward-for-justice/), 6 September 2018)

¹¹² According to a recent analysis done by the Small Arms Survey, amongst other factions, tensions between the Akol Koor Kuc, Director of the Internal Bureau of Security of the NSS and then Chief of General Staff Paul Malong Awan enabled the Terrain investigations to gain traction before international pressure mounted, indicating that political stars need to align for accountability efforts to proceed. The Terrain incident was used by the NSS as a means to antagonize Malong who was ultimately responsible for the conduct of the SPLA soldiers who constituted most of the Terrain attackers. For more, see Flora McCrone, *War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016-18, August 2019*, www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf

¹¹³ In the early days of the investigation, the US and other partner states were reluctant to get involved, despite requests from their affected nationals and the Terrain Hotel management. Amnesty International interview with applicant on behalf of the Terrain hotel, Remote, 25 July 2019; Amnesty International interview victim of Terrain attack, Remote, 26 August 2019; See also, Flora McCrone, *War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016-18, August 2019*, www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf

¹¹⁴ US Embassy in South Sudan, *FBI Legal Attaché Visits South Sudan*, 6 June 2017, ss.usembassy.gov/fbi-legal-attache-visits-south-sudan/

¹¹⁵ Interviews with two officials of the military justice system, Juba, 29 March 2019.

Following praise from foreign governments and civil society organizations after the Terrain trial, the government used this case to bolster its argument that the South Sudanese justice system is able to deal with conflict-related cases and did not need another accountability mechanism.¹¹⁶ One lawyer describes the Terrain case as “a PR [Public Relations] case for the government”,¹¹⁷ another as a “one man show by the government.”¹¹⁸

While welcoming the trial as a step towards justice for victims, Amnesty International is concerned by fundamental flaws in the procedure which further demonstrate the lack of independence of military courts. Since the victims were civilians, the case should have been heard by civilian courts. The President decided otherwise and established the general court martial, resulting in a court that was not competent. All accused were low-ranking soldiers, who may have been acting upon order of their commanders, or alternatively their commanders have not taken all measures in their power to prevent or punish these crimes. One of the victims’ lawyers in the case expressed his dissatisfaction and described it as only going after “the small fishes” while others remain untouchable.¹¹⁹

Finally, military court officials¹²⁰ and a judge¹²¹ confirmed that the case file has been lost. UN officials and diplomats strongly suspect that the casefile was lost after it was sent to the Office of the President for confirmation of the verdict.¹²² Consequently, victims and accused are prevented from exercising their right to appeal. Both defense and victims’ lawyers who intended to appeal have been told that the Supreme Court has not received the file and cannot examine any appeal.¹²³ One of them told us: “The file is lost and nobody wants to take responsibility for it,” adding that the case should have gone before the high courts of the civilian justice system in the first place.¹²⁴

4.2.4 THERE WILL NOT BE OTHER CASES

When Amnesty International staff inquired about efforts to hold officials to account for crimes committed during the conflict, interviewees unanimously explained that Terrain was the only such case.¹²⁵ “The Terrain case, nothing else,”¹²⁶ said one Juba-based lawyer. Senior military justice officials previously resigned in February 2017 citing high-level interference and impunity as reasons for their resignation.¹²⁷ Efforts by military courts to investigate and prosecute serious crimes against South Sudanese people have essentially been non-existent.

Stalled efforts to seek justice for an attack by government forces on Kubi village in February 2017 is one of the cases which demonstrates that without strong international pressure, authorities are unwilling to prosecute such cases. During the attack, soldiers looted houses, beat people and raped girls and women.¹²⁸ Soon after, army commanders were informed about the attack and violations by their soldiers,¹²⁹ but did not open an investigation or refer the case to the civilian system. A bishop advocating on behalf of the victims went to Juba to ask the Ministry of Defense for accountability and denounced the attack in the media to put

¹¹⁶ See Chapter 5 of this report.

¹¹⁷ Interview with a lawyer, Juba, 26 March 2019.

¹¹⁸ Interview with a lawyer and civil society organisation’s representative, Juba, 1 April 2019

¹¹⁹ Interview with one of the victims’ lawyer of the Terrain case, Juba, 28 March 2019.

¹²⁰ Interviews with two officials of the military justice system, Juba, 29 March 2019.

¹²¹ Interview with a judge, Juba, 28 March 2019, who also regretted nobody is responsible or can be held accountable for mismanagement of administration and handling of cases within the judicial system.

¹²² Interviews with UN officials and diplomats, Juba, March 2019.

¹²³ See also Amnesty International, Human Rights Watch and Legal Action Worldwide, *South Sudan: Missing file blocks justice for Terrain hotel rapes and murder* (Press release, 6 September 2019)

¹²⁴ Interview with one of the victims’ lawyer in the Terrain case, Juba, 28 March 2019. See also media articles: Sam Mednick, *Survivors of South Sudan’s Terrain attack demand justice*, 8 May 2019, mg.co.za/article/2019-05-08-survivors-of-south-sudans-terrain-attack-demand-justice; John Tanza, *South Sudan rape victims demand justice*, 4 March 2019, www.voanews.com/archive/south-sudan-rape-victims-demand-justice.

¹²⁵ Confirmed by the several dozens of individuals interviewed by Amnesty in March-April 2019. See also the Table of statistics on cases dealt by military courts in 2018, on file. There have been some cases of crimes against civilians such as robbery or looting, but no cases dealing with murder, sexual violence or other violent acts.

¹²⁶ Quote by a lawyer interviewed in Juba, 26 March 2019.

¹²⁷ In February 2017, then Director of Military Justice and the Head of Military Courts resigned citing high-level interference, ethnic partiality and impunity as reasons for their resignation, accusing the President and the Chief of General Staff of deliberately frustrating the legal process and failing to prosecute soldiers for murder and rape. See, CoHRSS, *Report of the CoHRSS, 20 February 2019*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 677 (reference to resignation letter).

¹²⁸ See for instance Voice of America, *South Sudan army troops accused of mass rape*, 16 February 2017, www.voanews.com/africa/south-sudan-army-troops-accused-mass-rape.

¹²⁹ The bishop went to inform them and ask them to investigate and punish the responsible soldiers. The commanders had seen the women with blood on them., They were very well aware of the crimes. They may have been implicated too by way of ordering the crimes, or at the very least, they failed in their responsibility to prevent and punish these crimes.

pressure on political authorities.¹³⁰ His strategy worked and an investigation was subsequently opened by the military justice system: they visited Kubi, victims were heard by the investigators in Juba, and five low-ranking soldiers were arrested in 2018. Since then, however, the case stalled. A court martial has not been established for the case and it is unclear whether the suspects are still detained or whether they have been charged.¹³¹

This incident shows the state's unwillingness to prosecute cases involving the military, even when evidence is available, and victims come forward. In other cases where victims do not come forward, where evidence has to be collected and preserved, or where pressure is not exercised at the highest political level, investigations and trials are less likely. As the Director of military justice expresses, military courts do not intervene if matters are settled by customary courts, or if "no client comes to them," comparing the military justice system to a shop.¹³²

¹³⁰ See Voice of America, *South Sudan army troops accused of mass rape, 16 February 2017*, www.voanews.com/africa/south-sudan-army-troops-accused-mass-rape.

¹³¹ Interview with the bishop acting as victims' representative, Juba, 2 April 2019.

¹³² Interview with the Director of the military justice system, Juba, 29 March 2019.

5. NO POLITICAL WILL FOR ACCOUNTABILITY

Since the outbreak of the violence in December 2013, and despite the signing of two peace agreements containing provisions for accountability in 2015 and 2018, the government of South Sudan has shown no political will to investigate and prosecute crimes under international law and other serious human rights violations and abuses committed in the context of the conflict.

The South Sudan government has granted (blanket) amnesties to non-state actors implicated in serious violations of international humanitarian law and abuses of international human rights law. The President has also frequently promoted political and military officials suspected of having perpetrated or orchestrated crimes under international law, including individuals sanctioned by the UN Security Council for their alleged role in violations of international humanitarian law. On both SPLA or SPLA-IO sides of the conflict, the President chooses to protect alleged perpetrators of crimes under international law from prosecution. Consequently, no commander of SPLA or SPLA-IO has ever appeared in court for alleged war crimes.

While the President has established investigative committees in response to some major incidents, the committees analyzed by Amnesty International have lacked independence, impartiality and transparency and have not resulted in any judicial prosecution. They cannot be considered genuine attempts to bring accountability and justice to the victims. In fact, members of the government have on several occasions denied crimes committed by security forces and declared their lack of interest in bringing alleged perpetrators to justice.

5.1 CRIMES COVERED BY BLANKET AMNESTIES

Cycles of violence in South Sudan have been fuelled by decades of impunity. Following the trend set by the government of Sudan,¹³³ the government of South(ern) Sudan consistently granted (blanket) amnesties and integrated non-state actors implicated in abuses of international humanitarian law into the Sudan People's Liberation Army (SPLA), making insurrection a profitable endeavour by creating opportunities for gaining power and access to resources.

Since the outbreak of conflict in 2013, the government has granted blanket amnesties at least six times to entice opposition groups to renounce violence. Only once did the President limit an amnesty to exclude allegations of crimes under international law.

On 24 February 2015, President Salva Kiir Mayardit decreed an unconditional and unlimited amnesty to "all those waging war against the State,"¹³⁴ preventing legal proceedings against persons allegedly responsible for, amongst others, war crimes and crimes against humanity so long as they reported to government-controlled areas before 31 March 2015.

¹³³ For instance, officials implicated in crimes committed during the 1958 – 1964 military dictatorship were granted amnesties. The 1972 Addis Ababa peace agreement that ended the first Sudanese civil war granted a general amnesty for acts relating to mutiny and rebellion. See also, OHCHR, *Assessment Report*, March 2016, para. 109-110.

¹³⁴ Republican Order No. 6/2015 in OHCHR, *Assessment Report*, March 2016, para. 366.

On 2 April 2016, President Kiir granted amnesty to the South Sudan National Liberation Movement/Army (SSNLM/A),¹³⁵ an armed non-state actor formed in 2015 in Western Equatoria, as part of a peace agreement.

On 13 July 2016, just two days after a ceasefire ended heavy clashes between government security forces and opposition forces, President Kiir granted amnesty to members of the SPLM/A-IO “who had taken up arms against the Transitional Government of National Unity (TGoNU) from the 8th to 10th of July, 2016.”¹³⁶ Approximately four months later, on 16 November 2016, the President extended amnesty¹³⁷ to 750 SPLM/A-IO fighters who had congregated in the Democratic Republic of Congo (DRC) following fighting in Juba in July 2016 and who were willing to return to South Sudan.

During the 30th Extra-Ordinary IGAD Summit held on 25 March 2017 in Nairobi, Kenya, President Kiir extended amnesty¹³⁸ to those who would renounce violence to encourage participation in the National Dialogue launched on 14 December 2016.¹³⁹

On 8 August 2018, the President granted a general amnesty to his rival Riek Machar Teny, chairman of the SPLM-IO “and other estranged Groups that waged war against the Government of the Republic of South Sudan from 2013 to date,”¹⁴⁰ but later specified that this excluded allegations of crimes under international law and only covered crimes against the state as defined in the 2008 Penal Code.¹⁴¹

Customary international law prohibits states from granting amnesties for crimes under international law.¹⁴² The African Commission on Human and Peoples’ Rights (hereafter African Commission) also found that the prohibition of amnesties leading to impunity for serious human rights violations has become a rule of customary international law.¹⁴³ Moreover, the prohibition of amnesties is enshrined in the UN Convention Against Torture¹⁴⁴ which South Sudan ratified in April 2015.

By repeatedly granting these blanket amnesties, the President violates South Sudan’s obligations under international law and denies victims’ rights to truth, justice and reparations.¹⁴⁵ To the extent that they cover crimes under international law, these amnesties violate the South Sudanese constitution and international law and should not bar the investigation and prosecution of those suspected of criminal responsibility for war crimes, crimes against humanity and other crimes under international law.¹⁴⁶

¹³⁵ CoHRSS, *Final report of the CoHRSS, 6 March 2017*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 60.

¹³⁶ Republican Order No. 18/2016, RSS/RO/J/18/2016, 13 July 2016. In UNMISS and OHCHR, *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016, January 2017*, www.ohchr.org/Documents/Countries/SS/ReportJuba16Jan2017.pdf, para. 93.

¹³⁷ Sudan Tribune, *South Sudanese President grants amnesty to rebels, 16 November 2016*, www.sudantribune.com/spip.php?article60860 and CoHRSS, *Final report of the CoHRSS, 6 March 2017*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 60.

¹³⁸ IGAD, *Communiqué of the 30th Extra-Ordinary Summit of the IGAD Assembly of Heads of State and Government on South Sudan, 25 March 2017*, reliefweb.int/sites/reliefweb.int/files/resources/Final%20Communiqué%20of%20the%2030th%20Extra-Ordinary%20IGAD%20Summit%20on%20South%20Sudan.pdf.

¹³⁹ On 14 December 2016, President Kiir launched the National Dialogue; an initiative composed of a series of community, regional and national level peace dialogues that was met with much scepticism and criticism from both national and international commentators.

¹⁴⁰ Republic of South Sudan, Republican Order No. 14/2018, RSS/RO/J/14/2018, 8 August 2018.

¹⁴¹ CoHRSS, *Final report of the CoHRSS, 20 February 2019*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 958.

¹⁴² This is supported by, among other sources, the jurisprudence of the Special Court for Sierra Leone, the jurisprudence of the Inter-American Court of Human Rights, the jurisprudence of the African Commission on Human and Peoples’ Rights, the interpretation of the Protocol II to the Geneva conventions by the International Committee of the Red Cross (regarding war crimes), and the interpretation of the Special Rapporteur on the question of torture. See also the Economic and Social Council (ECOSOC), Commission on Human Rights, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, E/CN.4/2005/102/Add.1

¹⁴³ African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Decision of 15 May 2006, para. 201.

¹⁴⁴ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984, article 4.

¹⁴⁵ See Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, March 2006, UN Doc. A/RES/60/147

¹⁴⁶ In addition to the legal prohibitions, three surveys conducted between 2014 and 2016 amongst South Sudanese also show considerable opposition to amnesties for perpetrators of crimes under international law. 59% of 1525 survey respondents opposed amnesties in a perception survey conducted by the South Sudan Law Society (SSLS) with support from UNDP. See, D. Deng, B. Lopez, M. Pritchard and L. Ng, *Search for a New Beginning: Perceptions of Truth, Justice, Reconciliation and Healing in South Sudan, June 2015*, www.ss.undp.org/content/dam/southsudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf 69% of 1178 respondents in the Malakal PoC site opposed amnesties, See, D. Deng and M. Pritchard, *A War Within: Perceptions of Truth, Justice Reconciliation and Healing in Malakal PoC, 1 December 2015*, tjwgsouthsudan.org/document/a-war-within-perceptions-of-truth-justice-reconciliation-and-healing-in-malakal-poc/. A third survey showed that whilst the majority (55%) of the 1912 respondents would accept amnesties given to people responsible for crimes committed during the conflict, a large minority (42%) opposed this idea. See, D. Deng and R. Willems, *Expanding the Reach of Justice and Accountability in South Sudan, April 2016*, www.upeace.nl/cp/uploads/downloadsprojecten/Expanding%20the%20Reach%20of%20Justice%20and%20Accountability%20-%20Policy%20Brief.pdf

5.2 GOVERNMENT-LED INVESTIGATIONS: DEAD ENDS

The handful of investigative committees set up by President Kiir into major incidents¹⁴⁷ between 2013 and 2018 analyzed by Amnesty International lack independence and impartiality. All the analyzed cases demonstrate that the President handpicks committee members, committee mandates are shrouded in secrecy and their reports, once submitted to the Office of the President, rarely see the light of day. When they do, their findings largely ignore crimes committed by government forces.

Furthermore, the investigations were not convincingly conducted in a manner consistent with an intent to hold suspects of alleged crimes to account, but instead undertaken to recommend measures to prevent these incidents from happening again. Whilst some of these reports seen by Amnesty International recommended accountability measures, the various government initiated and administered committees have not led to prosecution of those responsible for the major incidents or to justice for victims of the crimes except for the Terrain investigation.

International law obliges governments to investigate allegations of crimes under international law and other serious human rights violations and to prosecute and punish those proven to be responsible for these violations. Investigations must be competent, timely, effective, independent and impartial. And investigations alone are not enough, they must be followed by prosecutions of alleged perpetrators of crimes under international law and fulfillment of the rights of victims to truth, justice and reparations.

5.2.1 INVESTIGATIVE COMMITTEES ON THE DECEMBER 2013 CRISIS IN JUBA

In response to the outbreak of violence on 15 December 2013¹⁴⁸ high-level government officials issued orders of arrest. Human Rights Watch reported that, on 21 December 2013, the then SPLA Chief of Staff, General James Hoth Mai, ordered the arrest of “a number of members of various security forces suspected of killing “innocent soldiers and civilians simply because they hail from different tribes.”¹⁴⁹ Three days later, President Kiir ordered the police to arrest individuals attempting to illegally enter another person’s house and “who is found to have killed a person or a number of people.”¹⁵⁰

In December, the police,¹⁵¹ and the army,¹⁵² each set up their own investigation committees. Their reports were reportedly consolidated in the final report of a separate “Investigation Committee to Investigate on Human Rights Abuses in the Attempted Coup of 15th December, 2013,”¹⁵³ created by presidential decree on 24 January 2014.¹⁵⁴ Its eight members, hand-picked by the President and led by the late Chief Justice John Wol Makec, were mandated to investigate human rights violations allegedly committed by the government’s

¹⁴⁷ The report analyses five government national-level investigations including the two incidents that lead to the (resumption of) the conflict: December 2013 and July 2016, as well as three additional processes representing a different geographical spread. Amnesty International acknowledges that investigation committees were established in response to other incidents of violence, for instance violence that occurred in Wau in February 2016 when, according to the CoHRSS, SPLA soldiers allegedly targeted and killed at least a dozen civilians (CoHRSS, *Final report of the CoHRSS, 23 February 2018*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 407). The establishment order and report of this committee are not publicly available. Amnesty International also acknowledges state-level efforts such as the fact-finding mission that was established by the Governor of Wau to clarify the reported attacks on civilians on 10 April 2017, when witnesses saw SPLA soldiers and armed men going from house to house targeting and shooting civilians based on their Luo and Fertit ethnicities. This report is also not publicly available. Reportedly, investigations into fourteen incidents of killings related to the April 2017 crisis have been opened by the Wau police (CoHRSS, *Final report of the CoHRSS, 23 February 2018*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 426, 461 and 462) but it is unclear what further action this has generated.

¹⁴⁸ See background in chapter 3 of this report.

¹⁴⁹ Human Rights Watch, *South Sudan: Ethnic Targeting, Widespread Killings, 16 January 2016*, www.hrw.org/news/2014/01/16/south-sudan-ethnic-targeting-widespread-killings

¹⁵⁰ The President of the Republic of South Sudan, *President Salva Kiir Mayardit calls for an end to all ethnic violence, 24 December 2013*, www.sudantribune.com/IMG/pdf/president_salva_kiir_christmas_message.pdf

¹⁵¹ On December 28, 2013, a five-member committee was established by the Inspector General of Police to investigate reports of killings of civilians in particular the role of the police in the commission of these crimes but the findings have never been made public or resulted in criminal investigations or trials. See, Amnesty International, *Nowhere is Safe: Civilians Under Attack in South Sudan* (Index: AFR 65/003/2014).

¹⁵² At the end of December 2013, the SPLA had set up two investigation committees: one to investigate what triggered the fire fight within the Republican Guard on 15 December 2013 and one to investigate extra-judicial killings in Juba. Both committees have submitted their reports to the SPLA Chief of General Staff but the reports have never been made public. See, Amnesty International, *Nowhere is Safe: Civilians Under Attack in South Sudan* (Index: AFR 65/003/2014) and UNMISS, *Conflict in South Sudan: A Human Rights Report, 8 May 2014*, unmiss.unmissions.org/conflict-south-sudan-human-rights-report-8-may-2014.

¹⁵³ OHCHR, *Assessment Report*, March 2016, para. 366.

¹⁵⁴ Republic of South Sudan, Republican order number 6/2014, 24 January 2014.

security agencies and SPLA-IO members following the outbreak of violence on 15 December 2013 in Juba, Jonglei, Upper Nile and Unity states.

In February 2014, the SPLA announced the arrest of 100 individuals in relation to the December 2013 violence,¹⁵⁵ a number that has not been confirmed. And it is also unclear whether the arrests were the result of the SPLA investigation committee. However, the Director of military justice told Amnesty International that no member of the army had been tried or prosecuted in relation to serious human rights violations perpetrated during the December 2013 outbreak.¹⁵⁶ It appears that the General Court Martial set up in 2014 has only handled cases of discipline and misconduct.¹⁵⁷

The consolidated report of the Investigation Committee to Investigate on Human Rights Abuses in the Attempted Coup of 15th December 2013 was presented to the President on 2 December 2014.¹⁵⁸ Kiir committed several times to hold perpetrators of crimes implicated by the investigation committee to account,¹⁵⁹ but the report has never been publicly released and his vow was broken when he issued the blanket amnesty on 24 February 2015. When Amnesty International delegates asked a current government official and former member of the judiciary about the report more than four years after its submission to the President, they were told to “forget about it” as it was “controversial.”¹⁶⁰ “They will not do anything with it,”¹⁶¹ lamented a former judge.

5.2.2 INVESTIGATIVE COMMITTEE INTO THE FEBRUARY 2016 ATTACK ON UNMISS CAMP IN MALAKAL

On 17 February 2016, violence broke out in Malakal PoC site between internally displaced persons (IDPs). SPLA members breached the protection site’s perimeter and actively participated in the burning of the site and fighting,¹⁶² which resulted in the killing of at least 29 people, wounding of 140 and destruction of 1,251 shelters.¹⁶³ UNMISS peacekeepers failed in their responsibility to protect IDPs, including by not taking preventative measures and delaying their efforts to stop violence.¹⁶⁴

In response to the attack, the President directed the establishment of the “National Committee to Investigate the Undesirable Incident That Occurred in the Malakal Protection of Civilian (PoC) Site on February 17th and 18th 2016.”¹⁶⁵ The seven-member committee was tasked to investigate the fighting in the Malakal PoC and hold rallies to restore public order. On 5 April 2016, the committee submitted its report, which was not made public, to the Office of the President.

The report seen by Amnesty International, concludes that IDPs of two ethnicities ganged up against IDPs of another ethnicity and that the fighting was fueled by politically influential people from outside the PoC. It finds that UNMISS failed to protect civilians and recommends holding the UNMISS State Coordinator and

¹⁵⁵ Amnesty International, *Nowhere is Safe: Civilians Under Attack in South Sudan* (Index: AFR 65/003/2014). UNMISS was also informed of the arrest of 17 SPLA soldiers, the highest ranking of which was a Colonel, in relation to the investigations and another 18 for looting. It is unclear whether these soldiers were ever tried. See, UNMISS, *Conflict in South Sudan: A Human Rights Report, 8 May 2014*, unmiss.unmissions.org/conflict-south-sudan-human-rights-report-8-may-2014.

¹⁵⁶ Interview with Director of military justice, Juba, 28 March 2019.

¹⁵⁷ Amnesty International written correspondence UN official, 28 August 2019.

¹⁵⁸ OHCHR, *Assessment Report*, March 2016, para. 366.

¹⁵⁹ In a press statement released on 24 December 2013, President Kiir said that all “unruly and undisciplined soldiers...will not escape the long arm of justice, and will have to be punished” see, The President of the Republic of South Sudan, *President Salva Kiir Mayardit calls for an end to all ethnic violence, 24 December 2013*, www.sudantribune.com/IMG/pdf/president_salva_kiir_christmas_message.pdf. In his Easter address on April 2014, President Kiir declared the end of impunity and promises to hold perpetrators to account. See, Sudan Tribune, *South Sudan President celebrates Good Friday with calls to bury differences, 21 April 2014*, www.sudantribune.com/spip.php?article50726 and AA, *Kiir Vows to Try People Involved in South Sudan Crimes, 16 May 2014*, www.aa.com.tr/en/world/kiir-vows-to-try-people-involved-in-south-sudan-crimes/159019

¹⁶⁰ Interview with government official, Juba, South Sudan, 28 March 2019. The same sentiment was echoed by a former member of the Judiciary of South Sudan. Interview with former judge Juba, South Sudan, 27 March 2019.

¹⁶¹ Interview with former judge, Juba, South Sudan, 9 April 2019.

¹⁶² Center for Civilians in Conflict, *A Refuge in Flames: The February 17-18 Violence in Malakal PoC, 21 April 2016*, civiliansinconflict.org/wp-content/uploads/2017/09/ViolenceMalakalPOC_LowResSingle.pdf and The Daily Beast, *After the Malakal Massacre, Investigating South Sudan War Crimes, 24 February 2016 (updated 13 April 2017)*, www.thedailybeast.com/after-the-malakal-massacre-investigating-south-sudan-war-crimes

¹⁶³ Protection Cluster South Sudan, *Protection Situation Update – Violence in the Malakal PoC Site, 17-18 February 2016, 30 March 2016*, reliefweb.int/sites/reliefweb.int/files/resources/pc-protection_situation_update-violence_in_the_malakal_poc_site-final_20160330.pdf

¹⁶⁴ MSF, *MSF internal review of the February 2016 attack on the Malakal Protection of Civilians Site and the post-event situation, June 2016*, reliefweb.int/sites/reliefweb.int/files/resources/malakal_report_210616_pc.pdf; Voice of America, *UN Peacekeepers Accept Responsibility for Massacre at Malakal, 24 June 2016*, <https://www.voanews.com/africa/un-peacekeepers-accept-responsibility-massacre-malakal>

¹⁶⁵ Resolution 36/2016 passed by the Council of Ministers on 19 February 2016. In: The Republic of South Sudan, Report of the National Committee to Investigate the Undesirable Incident That Occurred in the Malakal Protection of Civilian (PoC) Site on February 17th and 18th 2016.

Force Commander accountable for their failure to act. The report only looks at the responsibility of the UN and does not mention SPLA involvement in the attacks,¹⁶⁶ as documented by international organizations and media,¹⁶⁷ therewith raising serious impartiality concerns. The report does not recommend investigations into individuals with direct responsibility for killings and other crimes during the attack.

5.2.3 INVESTIGATIVE COMMITTEE ON THE JUNE 2016 VIOLENCE IN WAU

Following weeks of rising hostilities, violence broke out in Wau town on 24 June 2016. The number of people reportedly displaced by the violence ranges from 26,000 to¹⁶⁸ an estimated 70,000 people.¹⁶⁹ The CoHRSS found reasonable grounds to believe that SPLA soldiers killed civilians and destroyed and looted property.¹⁷⁰

On 28 June 2016, President Kiir formed an investigation committee to determine what happened in Wau on 24-25 June 2016. The committee was led by National Minister of Health, Dr. Riek Gai Kok, and composed of senior members of the Ministry of Justice and Constitutional Affairs (MoJCA), SPLA, National Security Service, SSNPS, Ministry of Foreign Affairs and a member of the South Sudanese Civil Society Alliance,¹⁷¹ as well as support staff. It did not include anyone from the civilian or military justice. Within one month, the committee conducted its investigation and drafted and submitted its report to President Kiir.¹⁷² Although the report is available on a media website,¹⁷³ it has not officially been made public.¹⁷⁴

The committee concluded that rebels who infiltrated Wau escalated pre-existing violence among different communities that the government's security forces had tried to contain. Apart from two victim accounts implicating soldiers in killings of civilians, the report is silent on the SPLA's role in killing civilians and destroying and looting property as documented by the CoHRSS, again casting serious doubts on its impartiality. It recommends, among other things, that the President orders dialogue with the rebels and offers amnesty to those willing to surrender constraining avenues for accountability. Nevertheless, the committee also made a general recommendation, not restricted to the two victims' accounts, that the SPLA command arrest soldiers accused of committing atrocities against civilians and looting of property and presents them to the military justice and recommends that the police investigates and arrests those responsible for the killing of soldiers and civilians.¹⁷⁵

In October 2017, the commander of the SPLA's fifth division told the CoHRSS that several SPLA soldiers were apprehended for killings that occurred during the 24-25 June incident and handed over to the Attorney General/DPP.¹⁷⁶ The Commission's official letter for details of these prosecutions went unanswered. Amnesty International's research into this issue, including interviews with lawyers and (former) judicial officials, reveals no evidence of prosecutions. And the organization's official request for information from the Minister of Justice and Constitutional Affairs sent on 31 July 2019 is also left unanswered. As such, to Amnesty International's knowledge, the recommendations of the committee for arrest and investigation of soldiers in relation to the 24-25 June incident were not followed by any independent investigative or judicial proceedings.¹⁷⁷

¹⁶⁶ The Republic of South Sudan, Report of the National Committee to Investigate the Undesirable Incident That Occurred in the Malakal Protection of Civilian (PoC) Site on February 17th and 18th 2016.

¹⁶⁷ Center for Civilians in Conflict, *A Refuge in Flames: The February 17-18 Violence in Malakal PoC, 21 April 2016*, civiliansinconflict.org/wp-content/uploads/2017/09/ViolenceMalakalPOC_LowResSingle.pdf and The Daily Beast, *After the Malakal Massacre, Investigating South Sudan War Crimes, 24 February 2016 (updated 13 April 2017)*, www.thedailybeast.com/after-the-malakal-massacre-investigating-south-sudan-war-crimes

¹⁶⁸ CoHRSS, *Final report of the CoHRSS, 23 February 2018*, <https://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx>, para. 418.

¹⁶⁹ UN Security Council, *Security Council Press Statement on Fighting in Wau, South Sudan, 1 July 2016*, www.un.org/press/en/2016/sc12431.doc.htm.

¹⁷⁰ CoHRSS, *Final report of the CoHRSS, 23 February 2018*, <https://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx>, para. 454 and 455.

¹⁷¹ The South Sudanese Civil Society Alliance is widely perceived to be pro-government.

¹⁷² Republican Order No. 15/2016. See, Republic of South Sudan, Report of the Investigation Committee on Wau Incident of 24th – 26th June 2016, 1 August 2016 is available on Radio Tamazuj: <https://radiotamazuj.org/uploads/media/58efad0639319.pdf>.

¹⁷³ Republican Order No. 15/2016. See, Republic of South Sudan, Report of the Investigation Committee on Wau Incident of 24th – 26th June 2016, 1 August 2016 is available on Radio Tamazuj: <https://radiotamazuj.org/uploads/media/58efad0639319.pdf>.

¹⁷⁴ The report online is signed by members of the committee, giving sufficient reason to believe that it is the authentic version.

¹⁷⁵ Republic of South Sudan, Report of the Investigation Committee on Wau Incident of 24th – 26th June 2016, 1 August 2016 is available on Radio Tamazuj: <https://radiotamazuj.org/uploads/media/58efad0639319.pdf>.

¹⁷⁶ CoHRSS, *Final report of the CoHRSS, 23 February 2018*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 460

¹⁷⁷ On 22 July 2016, two soldiers of the SPLA's fifth division were sentenced to death after having been found guilty of killing two civilians on 17 July 2016. However, Amnesty International notes that the killing took place after the peak of the violence on 24-25 June 2016 and it is therefore unlikely that it was related to the 24-25 events in Wau, despite allegations to the contrary by public authorities. See, Radio Tamazuj, *Two SPLA soldiers executed by firing squad for killings in Wau, 25 July 2016*, radiotamazuj.org/en/news/article/two-spla-soldiers-executed-by-firing-squad-for-killings-in-wau. While Amnesty International welcomes the prosecution of soldiers for crimes committed

5.2.4 INVESTIGATIVE COMMITTEE ON THE JULY 2016 FIGHTING IN JUBA

On 8 July 2016, the ARCSS collapsed and heavy fighting between government security forces and the SPLA-IO consumed Juba until 11 July 2016 when Kiir and Machar declared a ceasefire. The clashes saw crimes under international law and other serious violations and abuses of international human rights law committed by both sides including the deliberate killing of civilians, indiscriminate attacks, sexual violence, arbitrary arrests, massive looting of civilian property, and attacks on the UN PoC site.¹⁷⁸ SPLA soldiers also attacked Terrain hotel in Juba killing a journalist and gang-raping and sexually assaulting several female international aid workers during this period.¹⁷⁹

Following the violence in July 2016, the President announced the formation of an investigation committee, excluding the Terrain incident, led by Alfred Ladu Gore, the SPLA-IO's former Deputy Chair who joined Taban Deng Gai after splitting from the SPLA-IO and who was subsequently appointed First Vice President in the Transitional Government of National Unity (TGoNU) after Riek Machar fled Juba following the clashes. The President announced he would invite the United Nations Secretary General (UNSG) and IGAD to each appoint a representative to this committee,¹⁸⁰ but to the best of Amnesty International's knowledge, this never happened. Amnesty International formally requested information from the Office of the President on 31 July but did not receive a response. The decree establishing the investigative committee is not publicly available, and Amnesty International does not have details on the committee's composition or exact mandate. Further, there has been no public update from the committee on its investigations¹⁸¹ and it is unclear if its final report, which was not made public, was submitted to the President.

Although military justice officials and other interviewees did not recall trials related to crimes against civilians committed during the July 2016 violence,¹⁸² at least 22 soldiers were nonetheless tried before military courts in relation to these events, but almost exclusively on looting and theft charges.¹⁸³ Nothing indicates that these trials were organized based on the committee's findings or recommendations, and they did not address the most serious crimes committed during the period of fighting in Juba in July 2016.

5.2.5 INVESTIGATIVE COMMITTEE INTO THE 2018 SPIKE IN SEXUAL VIOLENCE IN BENTIU

On 30 November 2018, Médecins Sans Frontières (MSF) reported a significant increase in the number of women raped in, and around, Bentiu over a period of 10 days that same month.¹⁸⁴

President Kiir established a government-led committee in December 2018 to investigate these allegations¹⁸⁵ and appointed members from the MoJCA, SPLA military justice, Ministry of Interior (MoI), SSNPS, NSS, and the South Sudan Relief and Rehabilitation Commission (SSRRC) who were supported by technical staff.¹⁸⁶ Only one of them, a member of the technical staff, was a woman, contrary to international guidelines on

against civilians in or outside the context of conflict, it notes that this should happen in civilian courts and opposes the death penalty in all cases.

¹⁷⁸ Amnesty International, *"We Did Not Believe We Would Survive": Killings, Rape and Looting in Juba* (Index: AFR/65/5028/2016).

¹⁷⁹ This particular incident led to a separate investigation (through the establishment of an investigative committee on the Terrain hotel incident by Republican Order No. 20/2016, and with support from the FBI) and judicial process before military courts, see chapter 4 of this report.

¹⁸⁰ YouTube, 'President Salva Kiir Speech during the Inauguration of the Transitional National Legislative Assembly', 15 August 2018, www.youtube.com/watch?v=LO5y8lZR3Ew

¹⁸¹ Communication with UN official, 27 April 2019.

¹⁸² Amnesty International interviews in Juba, between 25 March – 10 April 2019.

¹⁸³ On 16 August 2016, the General Court Martial convicted 21 soldiers for, among other charges, loitering, theft, random shooting and loss of gun committed between 7 and 11 July 2016. Only one was charged and convicted for murder and sentenced to death and another was acquitted. In September 2016 the SPLA spokesperson announced that 77 SPLA soldiers were prosecuted and sentenced by the General Court Martial. This number includes the soldiers already sentenced in August, and it is unclear which charges or which events the remaining 55 soldiers were tried for. In addition, according to UNMISS the defence lawyers were given inadequate time and facility to prepare the defence. See, UNMISS and OHCHR, *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan, in July 2016, January 2017*, www.ohchr.org/Documents/Countries/SS/ReportJuba16Jan2017.pdf, para. 96.

¹⁸⁴ MSF, *125 women and girls seek emergency assistance in Bentiu after horrific sexual violence, 30 November*, www.msf.org/125-women-and-girls-seek-emergency-assistance-bentiu-after-horrific-sexual-violence-south-sudan

¹⁸⁵ Radio Tamazuj, *No evidence to back claims of Bentiu rapes: investigation team, 21 December 2018*,

radiotamazuj.org/en/news/article/no-evidence-to-back-claims-of-bentiu-rapes-investigation-team. The investigation committee established by the President was preceded by an inter-departmental delegation led by the Ministry of Gender, Child and Social Welfare. For unclear reasons, the President then established a second team by decree.

¹⁸⁶ Interview with government official, Juba, 28 March 2019, Interview with official of the military justice department, Juba, South Sudan, 29 March 2019.

documentation of sexual violence which recommend that, wherever possible, victims can choose between male and female interviewers.¹⁸⁷

The committee conducted its investigation in Juba, Bentiu and surrounding areas in January 2019 and submitted its report to the President in or around May 2019.¹⁸⁸ At the time of writing, the report is not publicly available, and to Amnesty International's knowledge, no judicial proceedings have been initiated following this investigation.¹⁸⁹

5.3 DENIAL OF CRIMES AND OTHER EFFORTS TO BLOCK JUSTICE PROCESSES

“Do you think we will prosecute ourselves?”

South Sudanese government official, Juba, 11 June 2018.

South Sudanese authorities regularly deny credible reports that their forces have been implicated in crimes under international law. Brigadier General Lul Ruai Koang, the army's spokesperson, dismissed Amnesty International's report about the April – July 2018 government offensive in southern Unity State containing detailed accounts of acts that could amount to war crimes and crimes against humanity, as a collection of “broad statements” that “do not carry water at all.”¹⁹⁰ Allegations of human rights violations committed by South Sudanese security forces documented by Human Rights Watch¹⁹¹ or the UN¹⁹² have also been summarily dismissed and denied by the government.

The President has also frequently promoted political and military officials suspected of having perpetrated or orchestrated serious crimes under international law, including individuals sanctioned¹⁹³ by the United Nations Security Council (UNSC) for their alleged role in such crimes.

¹⁸⁷ S. Ferro Ribeiro and D. van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, March 2017, assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf.

¹⁸⁸ Interview with government official, remote, 19 June 2019.

¹⁸⁹ There is one exception: The mobile court in Bentiu PoC sentenced a soldier of the SSPDF to 12 years of imprisonment for the rape of a 13-year-old girl that took place around Madrasa, approximately four kilometers from the UNMISS camp, and was one of the incidents of the high number of sexual violence cases that were reported around Bentiu. However, the trial was the result of the merging of coincidences rather than active investigation and prosecution, as the victim accidentally identified the perpetrator within the PoC and reported it to the UN Police (UNPOL) who police the PoC site. At the moment, only crimes occurring within the PoC are tried by these mobile courts. Note: local authorities and police did not know of any other case of sexual and gender-based violence that was brought before military, civilian or mobile courts in Unity state.

¹⁹⁰ Voice of America, *Report Accuses South Sudan Troops of Rapes, Killings, 19 September 2018*, www.voanews.com/africa/report-accuses-south-sudan-troops-rapes-killings

¹⁹¹ Minister of Information and Broadcasting denied allegations by Human Rights Watch about violations against civilians by government soldiers during counter-insurgency operations in the southern Yei River state in December 2018 – January 2019 and asserted that the report was meant to tarnish the reputation of the army and the government. Xinhua, *South Sudan government denies committing crimes against civilians, 6 June 2019*, www.xinhuanet.com/english/2019-06/06/c_138122433.htm

¹⁹² SSPDF spokesperson said that UN findings about sexual violence committed by soldiers against civilians in Unity state were “a pile of lies”. Voice of America, *South Sudan Rebels Say They Are Investigating Sexual Abuse Accusations, 21 February 2019*, www.voanews.com/a/south-sudan-rebels-say-they-are-investigating-sexual-abuse-accusations/4798514.html as well as South Sudan's statement before the Human Rights Council in February 2019, from page 5.

¹⁹³ Sanctions include asset freezes and travel bans.

NAME	MARIAL CHANUONG YOL MANGOK	SANTINO DENG WOL	MALEK REUBEN RIAK RENGU
POSITION AT THE TIME OF ALLEGED CRIMES	Commander of the Presidential Guard.	SPLA Third Division Commander.	Former SPLA Deputy Chief of Staff for Logistics.
REASON FOR UNSC SANCTIONS	Listed on 1 July 2015 pursuant to paragraphs 7(c) and 7(d) of UNSC resolution 2206 (2015) for, amongst others, “planning, directing, or committing acts that violate applicable international human rights law or international humanitarian law, or acts that constitute human rights abuses, in South Sudan” and “targeting of civilians, including women and children, through the commission of acts of violence (including killing, maiming, torture, or rape or other sexual violence), abduction, enforced disappearance, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law.” ¹⁹⁴	Listed on 1 July 2015 pursuant to paragraph 7(d) of UNSC resolution 2206 (2015) for, amongst others, “the targeting of civilians, including women and children, through the commission of acts of violence (including killing, maiming, torture, or rape or other sexual violence), abduction, enforced disappearance, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or through conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law.” ¹⁹⁵	Listed on 13 July 2018 pursuant to paragraph 14 (e) of UNSC resolution 2418 (2018) for, amongst others, “planning, directing, or committing acts involving sexual and gender-based violence in South Sudan.” ¹⁹⁶
PROMOTIONS AND/OR CURRENT POSITION	<ul style="list-style-type: none"> • May 2017: promoted to commander of the Ground Forces.¹⁹⁷ • December 2017: promoted to Chief of Army Operations, Training and Intelligence.¹⁹⁸ • March 2018: dismissed without explanation,¹⁹⁹ but still lives comfortably in Juba.²⁰⁰ 	<ul style="list-style-type: none"> • December 2017: promoted to head of the Ground Forces.²⁰¹ 	<ul style="list-style-type: none"> • September 2018: appointed Deputy Minister of Defence and Veteran Affairs.²⁰²

¹⁹⁴ UNSC, *Marial Chanuong Yol Mangok*, www.un.org/securitycouncil/sanctions/2206/materials/summaries/individual/marial-chanuong-yol-mangok

¹⁹⁵ UNSC, *Santino Deng Wol*, www.un.org/securitycouncil/sanctions/2206/materials/summaries/individual/santino-deng-wol

¹⁹⁶ UNSC, *Malek Reuben Riak Rengu*, www.un.org/securitycouncil/content/malek-reuben-riak-rengu

¹⁹⁷ Eye Radio, *Kiir appoints new Chiefs and Commanders for the Defense Forces, 2017*, eyeradio.org/kiir-appoints-chiefs-commanders-defense-forces/ and UN Panel of Experts on South Sudan, *Interim report of the Panel of Experts in accordance with paragraph 2 of resolution 2353 (2017), 20 November 2017*, www.undocs.org/S/2017/979, Annex III.

¹⁹⁸ Middle East Monitor, *South Sudan's Kiir promotes three generals facing UN sanctions, 16 December 2017*, www.middleeastmonitor.com/20171216-south-sudans-kiir-promotes-three-generals-facing-un-sanctions/

¹⁹⁹ The East African, *South Sudan military chief, Finance minister fired, 13 March 2018*, www.theeastafrican.co.ke/news/ea/South-Sudan-military-chief-Finance-minister-sacked/4552908-4339592-format-xhtml-7htxcxz/index.html

²⁰⁰ Flora McCrone, *War Crimes and Punishment: The Terrain Compound Attack and Military Accountability in South Sudan, 2016-18, August 2019*, www.smallarmssurveyssudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf

²⁰¹ Middle East Monitor, *South Sudan's Kiir promotes three generals facing UN sanctions, 16 December 2017*, www.middleeastmonitor.com/20171216-south-sudans-kiir-promotes-three-generals-facing-un-sanctions/

²⁰² Radio Tamazuj, *Kiir appoints blacklisted general as deputy defense minister, 24 September 2018*, radiotamazuj.org/en/news/article/kiir-appoints-blacklisted-general-as-deputy-defense-minister.

Table: List of government officials sanctioned by the UNSC for their alleged role in serious crimes under international law and their current positions.

Instead of investigating individuals sanctioned by the UNSC for their alleged role in serious crimes under international law, the government has promoted them. The government has also failed to investigate sanctioned members of the armed opposition. The lack of credible, impartial and independent investigations into any senior officials for allegations of serious crimes and human rights violations perpetrated in South Sudan since December 2013, means that no commander of SPLA or SPLA-IO has ever appeared in court. As one South Sudanese lawyer explained, “It is a waste of time to think that the government will prosecute these incidents. For victims, [there is] no justice for them.”²⁰³

²⁰³ Interview with South Sudanese lawyer, Juba, 28 March 2019.

6. HYBRID COURT FOR SOUTH SUDAN: WHEN?

6.1 THE LAST HOPE FOR VICTIMS

The 2015 and the 2018 (revitalized) peace agreements provide for a holistic transitional justice process.²⁰⁴ Chapter V provides for a Commission for Truth Reconciliation and Healing (CTRH), a Compensation and Reparations Authority (CRA), and a Hybrid Court for South Sudan (HCSS) to address the legacy of past violence and provide justice, truth and reparations to victims of the conflict.

The HCSS is intended to try those responsible for serious violations of international human rights and humanitarian law and South Sudanese law since the start of the conflict on 15 December 2013,²⁰⁵ including genocide, crimes against humanity, and war crimes.²⁰⁶

While the peace agreements task the AU Commission (AUC) with establishing the HCSS,²⁰⁷ they also require the government of South Sudan to adopt enabling legislation,²⁰⁸ making the court a joint endeavor. The government of South Sudan is yet to take this critical step. Yet, given the lack of prospects for genuine, independent and impartial domestic investigations and prosecutions of crimes under international law and other serious violations of international humanitarian and human rights law, the HCSS remains the most viable option for pursuing effective accountability and achieving justice. Indeed, most people Amnesty International interviewed expressed hope in the role the HCSS could play.

A former judge told Amnesty International that “Arusha [implying that the hybrid court would be based there] would be the best avenue for justice. All parties [to the peace agreement] should be serious [about it].”²⁰⁹ Another former member of the judiciary was not as convinced about the hybrid court’s ability to resonate with concepts of justice understood by South Sudanese, but nevertheless agreed that it needed to be established as a legal obligation enshrined in the peace agreement and “in a way that is meaningful for the people [in South Sudan].”²¹⁰

²⁰⁴ In addition to Chapter V, the (R)-ARCSS chapters include provisions for broader institutional reform processes as a guarantee for non-recurrence, including the development of a permanent constitution, and reforms of judicial, security and financial institutions.

²⁰⁵ The idea to establish a hybrid court to deal with the most serious crimes committed in the conflict first emerged in the recommendations of the 2014 report of the AU Commission of Inquiry. It was then included as part of the negotiation process towards a peace agreement, first in the 2015 ARCSS and then reiterated in the 2018 R-ARCSS. Article 5.3.1.1 of the R-ARCSS reads: “There shall be established an independent hybrid judicial court, the Hybrid Court for South Sudan. The Court shall be established by the African Union Commission to investigate and where necessary prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the transitional period.”

²⁰⁶ Article 5.3.2.1 of the R-ARCSS and article 1(2) of the Draft Statute of the Hybrid Court for South Sudan, 10 April 2017 (hereinafter the Draft Statute).

²⁰⁷ Article 3.1.1 of the 2015 ARCSS and Article 5.3.1.1. of the 2018 R-ARCSS.

²⁰⁸ Article 1.1 of the 2015 ARCSS 2015 and Article 5.1.1 of the 2018 R-ARCSS. Article 5.1.2. of the 2018 R-ARCSS also specifies that this legislation “shall clearly define the mandate and jurisdiction of the three [transitional justice] institutions including but not limited to their establishment and funding, actors, and defined processes for public participation in the selection of their respective members.”

²⁰⁹ Interview with a former judge, Juba, 1 April 2019.

²¹⁰ Interview of a former judge, Juba, 27 March 2019.

Another lawyer explained that “people in South Sudan are too afraid to bring complaints [before national courts], they are waiting for the hybrid court.”²¹¹ A UN official also considers that “the hybrid court is the only option,” although according to this person it would need to be backed up by, and work in complementarity with, a domestic accountability mechanism.²¹² A national lawyer shared the view that the hybrid court would be the avenue to “go after the big fishes.”²¹³

Amnesty International and other civil society organizations have over the years called repeatedly for the implementation of Chapter V of the peace agreement and the creation of the hybrid court.²¹⁴ The HCSS is not intended to and will not be able to deal with all cases of serious crimes committed in relation to the conflict. Ultimately accountability for past and current crimes will require a complementary approach between the HCSS and South Sudanese ordinary courts, and potentially other foreign judicial mechanisms such as through exercise of universal jurisdiction cases in other countries.

As established in this report, given the current context of widespread and systematic culture of impunity, and lack of political will to ensure accountability for crimes under international law, the establishment of the hybrid court is crucial to enable some justice to victims of the conflict. The non-establishment of the HCSS, coupled with the complete failure of the domestic legal system to bring perpetrators of crimes under international law to justice, not only violates South Sudan’s obligations under international law to ensure victims’ rights to truth, justice and reparations but also ends the last hope for justice to victims of atrocities.

6.2 DELIBERATE EFFORTS TO STALL AND BLOCK THE ESTABLISHMENT OF THE COURT

On 26 September 2015, just over a month after the signing of the 2015 peace agreement, the AU Peace and Security Council (PSC) asked the chairperson of the AUC to “take all necessary steps towards the establishment of the HCSS.”²¹⁵ The chairperson mandated the AU Office of the Legal Counsel (OLC) to coordinate the process leading to the establishment of the HCSS. Within the AUC, formal discussions on the operationalization of the HCSS commenced in March 2016 when the OLC convened a meeting of an inter-departmental taskforce created to develop a project proposal. The OLC then embarked on elaborating the drafts of the key legal instruments that would be required for the establishment of the court, mainly a Memorandum of Understanding and a Statute of the HCSS. In early October 2016, the OLC informed the UN of its commitment and ability to start work on establishing the court and estimated it would take three years to be operational by the last quarter of 2019.²¹⁶

In late July 2017, representatives of the AUC, UN and the South Sudan Ministry of Justice and Constitutional Affairs met in Juba for a one-day technical consultative meeting, where they agreed on, and adopted, a joint roadmap for the establishment of the HCSS. The roadmap envisaged that the South Sudan government would enact the enabling legislation for the HCSS by the end of November 2017. In mid-August 2017, the AUC and representatives of the South Sudanese government held a week-long meeting where they reviewed and finalized the draft MoU and Statute of the HCSS.²¹⁷ The two legal instruments were then submitted to relevant senior South Sudanese government officials for their consideration.

According to the CoHRSS, the South Sudan’s Council of Ministers approved the two legal instruments in December 2017.²¹⁸ However, to date, the Presidency has neither approved them nor sent them to

²¹¹ Interview with lawyer with several decades of experience, Juba, 25 March 2019.

²¹² Interview with a UN official, Juba, 26 March 2019.

²¹³ Interview with a lawyer, Juba, 28 March 2019.

²¹⁴ Amnesty International and 33 other South Sudanese and international civil society organisations, *A way forward for the Hybrid Court for South Sudan*, ([Open letter](#), 1 November 2016); Amnesty International and International Federation for Human Rights (FIDH), *Looking for justice: Recommendations for the establishment of the Hybrid Court for South Sudan* (Index AFR 65/4742/2016); Amnesty International, *“Do not remain silent” – Survivors of sexual violence in South Sudan call for justice and reparations* (Index AFR65/6469/2017); Amnesty International, *“Anything that was breathing was killed” – War crimes in Leer and Mayendit*, South Sudan (Index AFR 65/8801/2018); Human Rights Watch, *South Sudan: stop delays on Hybrid Court*, 14 December 2017, www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court.

²¹⁵ Communiqué of the 547th meeting of the AU Peace and Security Council, at the level of heads of state and government, on the situation in South Sudan, 26 September 2015.

²¹⁶ CoHRSS, *Final report of the CoHRSS*, 6 March 2017, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 63.

²¹⁷ African Union, *African Union Commission and the Republic of South Sudan successfully conclude Working Session on the Draft Legal Instruments of the Hybrid Court for South Sudan*, 14 August 2017, au.int/en/pressreleases/20170814/african-union-commission-and-republic-south-sudan-successfully-conclude

²¹⁸ CoHRSS, *Final report of the CoHRSS*, 23 February 2018, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 631: “The draft statute together with the Memorandum of Understanding between the AU and the Government was approved by the South

parliament. These instruments need to be passed by parliament to enter into force. Until that is done, the process is blocked and the HCSS cannot be established. In its February 2019 report, the CoHRSS concludes that “the process of establishing the Hybrid Court for South Sudan has stalled. Lack of political will and uncertainty about the future of government contributed to this. Officials continued to cite, two (undisclosed) outstanding issues preventing completion of the memorandum of understanding to establish the court.”²¹⁹

All individuals interviewed by Amnesty International in South Sudan confirmed that the signing of the MoU and statute is actively obstructed at the highest political level.²²⁰ The government of South Sudan has not hidden its aversion to the HCSS and has increasingly and publicly undermined the need for justice for serious crimes which were committed or are being committed in the context of the conflict. It consistently espouses the position that peace should come before justice. Rejecting an invitation to attend a transitional justice workshop, South Sudan’s sanctioned Minister of Information and Broadcasting, Michael Makuei Lueth, said in January 2017: “There seems to be more concern about the transitional justice and establishment of the hybrid court other than thinking of bringing peace first to South Sudan, and thereafter make people accountable.”²²¹ He later labelled the future hybrid court “a tool of regime change by the Troika,”²²² making it clear that his opposition is not only a question of sequencing, but that he opposes the establishment of the HCSS.

In June 2017, the *New York Times* published an op-ed under Salva Kiir and Riek Machar’s names advocating for truth, not trials, and calling on the international community to reconsider the HCSS.²²³ They claimed that: “In contrast to reconciliation, disciplinary justice — even if delivered under international law — would destabilize efforts to unite our nation by keeping alive anger and hatred among the people of South Sudan. That is why we call on the international community, and the United States and Britain in particular, to reconsider one element of the peace agreement to which they are cosignatories: support for a planned international tribunal, the Hybrid Court for South Sudan.”²²⁴

In the latest, and most outrageous, series of government efforts to obstruct the HCSS, the government of South Sudan contracted Gainful Solutions, a US-based lobby firm on 2 April 2019, in order to “delay and ultimately block [the] establishment of the hybrid court envisaged in the R-ARCSS.”²²⁵ With this move, the Office of the President demonstrated that it does not intend to establish the HCSS and is willing to waste dire public resource to evade justice.²²⁶ Two months before this deal, President Kiir cited a lack of government funds to justify delays in the implementation of the peace agreement and criticized donor countries for “not pay[ing] their money.”²²⁷ Following public outrage, the parties amended the contract on 7 May 2019 and removed the clause obstructing the HCSS.²²⁸ Nevertheless, with this action, the South Sudanese government has shown its unrelenting intent to block the creation of the HCSS.

Sudan Council of Ministers in December 2017” (referencing Letter of the Minister of Justice to the Minister of Foreign Affairs dated 15 December 2017); see also Human Rights Watch, *South Sudan: stop delays on Hybrid Court*, 14 December 2017, www.hrw.org/news/2017/12/14/south-sudan-stop-delays-hybrid-court.

²¹⁹ CoHRSS, *Final report of the CoHRSS, 20 February 2019*, <https://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx>, para. 115.

²²⁰ See last section of Chapter 5 of this report.

²²¹ Sudan Tribune, *South Sudan says establishing Hybrid Court undermines peace*, 31 January 2017, www.sudantribune.com/spip.php?article61533

²²² Voice of America, *South Sudan Government Objects to War Crimes Court*, 3 October 2018, www.voanews.com/archive/south-sudan-government-objects-war-crimes-court. The Troika consists of the US, the United Kingdom and Norway who have been at the forefront of the wider diplomatic community during the peace negotiations.

²²³ Four days after publication, Machar claimed he had not been consulted and disavowed the op-ed.

²²⁴ S. Kiir and R. Machar, *South Sudan Needs Truth, not Trials*, *New York Times op-ed*, 7 June 2016, www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html

²²⁵ Gainful Solutions, Inc., *Consulting Contract Agreement with the Government of South Sudan*, 2 April 2019, efile.fara.gov/docs/6667-Exhibit-AB-20190418-2.pdf

²²⁶ The contract also secures Gainful Solution’s services to improve bilateral relations between South Sudan and the United States to expand economic and political relations, support and mobilize American private sector investment in South Sudan and persuade President Donald Trump to commence a military relationship with South Sudan as well as to reverse current and block future sanctions.

²²⁷ Voice of America, *South Sudan’s Kiir Blames Outsiders for Peace Deal Inaction*, 7 February 2019, www.voanews.com/africa/s-sudans-kiir-blames-outsiders-peace-deal-inaction.

²²⁸ Gainful Solutions, Inc., *Consulting Contract Agreement with the Government of South Sudan*, 7 May 2019, On file.

6.3 TOWARDS ESTABLISHING A HYBRID OR AD HOC COURT

The AU's commitment to ensure the hybrid court would be established and operationalized by the last quarter of 2019²²⁹ encountered political obstacles and was overshadowed by efforts to revitalize the collapsed ARCSS. Three years later, as South Sudan enters the last quarter of 2019, little progress has been achieved.

Public pressure from foreign states, government partners or the UN for the establishment of the court seems to have faded too since the signing of the 2018 peace agreement. Some states, such as the United States, made early commitments to provide funding to the HCSS.²³⁰ However, more recently public demands or support for the establishment of the court and accountability as a priority for South Sudan, are few and far between. The UN CoHRSS consistently calls for the establishment of the HCSS amongst other transitional justice measures.²³¹

Given the government of South Sudan's demonstrated lack of appetite on the establishment of the HCSS, all actors who may have influence over South Sudan's political authorities should reiterate and amplify demands for the establishment of the hybrid court. Pressure from the AU, the UN, and foreign government, including those from the East African region, through all available diplomatic and political channels, is very much needed to ensure that competent national authorities in South Sudan sign the MoU with the AU and enact legislation necessary for the establishment and operationalization of the HCSS.

In the event that external pressure does not prove efficient and that South Sudanese authorities continue to stall and block the establishment of the hybrid court, the AU should take measures to address the continuous violation of victims' rights to truth, justice and reparations.

Specifically, Amnesty International calls on the AU to consider the unilateral establishment of an *ad hoc* tribunal for South Sudan if, after a publicly specified period, the government of South Sudan would not have signed the MoU or adopted the Statute for the HCSS. In other words, the AU should promptly issue a new roadmap for the establishment of the HCSS in which it gives South Sudan a deadline and ultimatum within which the government should sign the MoU and adopt the Statute for the HCSS, failing which the AU will proceed to unilaterally establish an *ad hoc* tribunal. The deadline given to South Sudan should not exceed a period of six months.

The AU, through its Peace and Security Council (PSC), has the power to unilaterally establish a tribunal, both under the AU Constitutive Act and the Protocol Relating to the Establishment of the PSC (hereafter PSC Protocol). In particular, the *ad hoc* tribunal should be established through a communiqué of the PSC to which the statute of the tribunal would be annexed. Under Article 3 of the PSC Protocol, the first objective of the PSC is to "promote peace, security and stability in Africa, in order to guarantee the protection of life and property." To this end, the PSC has the power under Article 7(b) of the PSC Protocol to "undertake peace-making and peace-building functions to resolve conflicts where they have occurred." This power corresponds to its objective and function under Articles 3(c) and 6(e) of the PSC Protocol. These provisions relate to peace-building or consolidation and the prevention of the resurgence of violence in conflict countries.

Amnesty International believes that the PSC may unilaterally establish an *ad hoc* tribunal for South Sudan in exercise of its power relating to implementation of peace-building measures and the prevention of the resurgence of violence in South Sudan. Peace-building measures may take numerous forms, and their selection depends on the context. The entrenched impunity in South Sudan is a key factor fueling the cycle of violence and accountability will need to feature prominently as a measure to provide redress to victims, bring peace and prevent future violence. Indeed, the AUCISS having considered the context in South Sudan concluded already in 2014 that "in order for the reconciliation process to begin, those with the greatest responsibility for the atrocities at the highest level should be brought to account" and recommended an accountability mechanism "under the aegis of the African Union supported by the international

²²⁹ CoHRSS, *Final report of the CoHRSS, 6 March 2017*, UN doc A/HRC/34/63, para. 63

²³⁰ US Mission to the African Union, *Embassy Fact Sheets*, www.usau.usmission.gov/our-relationship/policy-history/embassy-fact-sheets/; United States of America, *South Sudan: United States Provides Support for Justice and Accountability*, 5 May 2015, 2017.state.gov/r/pa/prs/ps/2015/05/241927.htm

²³¹ See for instance CoHRSS, *Outraged by renewed fighting and continuing human rights violations in South Sudan, UN Human Rights experts urge all parties to stop conflict, end impunity and respect provisions of the revitalized peace agreement*, 20 February 2019, www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24183&LangID=E.

community.”²³²This approach is also consistent with the recently adopted African Union Transitional Justice Policy which states that “where national courts lack the capacity and confidence of affected communities, steps should be taken to use special courts, extraordinary chambers or hybrid courts,”²³³ as well as the UN position that transitional justice mechanisms are also measures contributing to sustainable peace.²³⁴

The *ad hoc* tribunal would operate as a subsidiary body of the PSC within the meaning of Article 8(5) of the PSC Protocol, albeit with all the attributes of a judicial body, including independence and autonomy. Article 8(5) provides in part that the PSC “may establish such subsidiary bodies as it deems necessary for the performance of its functions.” The establishment of an *ad hoc* tribunal for South Sudan would not be the first time that the PSC establishes a subsidiary body through a communiqué. On 30 December 2013, following the outbreak of conflict in South Sudan, the PSC adopted a communiqué which laid the basis for the formation of the AU Commission of Inquiry on South Sudan (AUCISS).

The establishment of the *ad hoc* tribunal as proposed here would neatly accord with the purpose and object of the AU. Under Article 4(o) of its Constitutive Act, the AU recognizes the “condemnation and rejection of impunity” as one of its organizing principles. Article 3(h) of the Act provides that one of the AU’s objectives is to “promote and protect human rights and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights (ACHPR) and other relevant human rights instruments.” It follows that the AU recognizes and upholds the right of victims to truth, justice and reparations, and should thus take affective measures to bring perpetrators of gross human rights violations in South Sudan to justice.

In the particular circumstances of South Sudan, it is also important to recall that an AU body – the AUCISS – has already determined that war crimes and crimes against humanity have been committed in the country.²³⁵ This determination brings into sharp focus the potential application of Article 4(h) of the Constitutive Act in South Sudan. Article 4(h) provides for the right of the AU to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Even though the term “intervention” has been traditionally used to refer to “military intervention”, it could be interpreted to allow the establishment of an *ad hoc* tribunal – which would be aligned with the explicit principle of rejection of impunity for crimes under international law.

6.4 COMPLEMENTARY ACCOUNTABILITY AVENUES

The government of South Sudan has primary responsibility to conduct investigations into crimes under international law and other serious human rights violations and abuses committed in the context of the ongoing conflict, as well as prosecute and punish the perpetrators of these crimes. As established in this report, much judicial reform is needed in South Sudan to improve the independence of the domestic judicial system and to ensure the future conduct of fair judicial processes in accordance with international standards and without recourse to the death penalty.

At present however, given the lack of independence of the South Sudanese justice system, the HCSS represents the most immediate and viable avenue for criminal accountability, and justice for victims. Nonetheless, the HCSS alone will not be sufficient to tackle the issue of impunity for crimes committed since December 2013. In parallel to the establishment of the HCSS (or the AU *ad hoc* tribunal version of it), and in parallel to reforms to the domestic judicial system, other criminal accountability mechanisms outside of South Sudan could and should also be pursued.

²³² AUCISS, *Final report of the AUCISS, 15 October 2014*, www.peaceau.org/uploads/auciss.final.report.pdf, para. 1142 and 1148.

²³³ African Union, *Transitional Justice Policy, February 2019*, au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf.

²³⁴ Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide, *Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence, 6 June 2018*,

www.un.org/en/genocideprevention/documents/A_HRC_37_65_AdvanceEditedVersion.pdf, para. 11: “Although transitional justice should not be conceived primarily as a peacemaking instrument, numerous indicators demonstrate that it can contribute to sustainable peace and security by helping to break cycles of violence and atrocities, delivering a sense of justice to victims and prompting examinations of deficiencies in State institutions that may have enabled, if not promoted, those cycles.”

²³⁵ AUCISS, *Final Report of the African Union Commission of Inquiry on South Sudan, 15 October 2014*, www.peaceau.org/uploads/auciss.final.report.pdf, paras. 1126-1131, 1133-1137.

The government of South Sudan should consider ratifying the Rome Statute and making a declaration under article 12(3) of this Statute accepting the jurisdiction of the International Criminal Court (ICC) with respect to all crimes under international law²³⁶ perpetrated on its territory since 15 December 2013.

In the event that South Sudan does not adopt legislation to establish the HCSS, or if the AU does not unilaterally establish a tribunal for South Sudan in due course, the UN Security Council (UNSC) should then be seized of the matter and take the appropriate measures to ensure criminal accountability for crimes committed in South Sudan and respect for victims' rights to truth, justice and reparations. The UNSC may decide to create an *ad hoc* tribunal itself under chapter VII of its Charter, as it has already done in the past for crimes committed in the former Yugoslavia or in Rwanda with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)²³⁷ respectively. In the alternative, it may refer the situation of South Sudan to the ICC, such as it did with regards to the Darfur situation in Sudan or the Libya situation.²³⁸

In addition, countries other than South Sudan should support and enable cases related to crimes under international law committed in the conflict of South Sudan to be brought before their own domestic courts where the opportunity arises, under the principle of universal jurisdiction and in accordance with their domestic legal framework.

6.5 COLLECT AND PRESERVE EVIDENCE

Finally, the collection and preservation of evidence of crimes must be secured for future proceedings before the HCSS or other judicial mechanisms. When time passes, evidence will be lost, especially in a conflict context such as South Sudan, there is a high risk that documents could be destroyed, witnesses displaced or killed, crime scenes transformed or contaminated, and memories fade.

Since 2016, Amnesty International has consistently called on the AU and South Sudanese authorities to prioritize the establishment of the investigative branch of the HCSS in order to preserve evidence.²³⁹ Until this investigative arm is fully operational and functional, the collection and preservation of evidence of serious crimes committed since December 2013 by the UN CoHRSS remains critical.²⁴⁰ The CoHRSS was established in March 2016 by the UN Human Rights Council²⁴¹ for a one-year mandate, which has since been renewed three times.²⁴² The CoHRSS has published some of the most comprehensive reports²⁴³ on human rights violations perpetrated in South Sudan since its establishment.

The CoHRSS itself understands its mandate as such: "The mandate of this Commission is to collect and preserve evidence and ensure its availability to the Hybrid Court and other transitional justice mechanisms. This Commission has in the short time available to it, made considerable progress in collecting evidence and has established that the collection and preservation of evidence can be done. This aspect of the commission's work is critical for the successful operation of any potential Hybrid Court in the future."²⁴⁴

This Commission has already conducted investigations in anticipation of judicial proceedings and should continue to do so until it can hand the evidence collected to the HCSS or any other competent, independent and impartial judicial authority, making sure evidence and witnesses are protected in the process.

²³⁶ Under the Rome Statute, crimes within the jurisdiction of the International Criminal Court include genocide, crimes against humanity and war crimes.

²³⁷ The UNSC, acting under Chapter VII of the UN Charter, created the International Criminal Tribunal for the ex-Yugoslavia (ICTY) through UNSC resolution S/RES/827 (1993) adopted on 25 May 1993 and the International Criminal Tribunal for Rwanda (ICTR) UNSC resolution S/RES/955 (1994) adopted on 8 November 1994.

²³⁸ The UNSC referred the situation of Darfur, Sudan to the ICC through resolution S/RES/1593 (2005) on 31 March 2005, and referred the situation of Libya to the ICC through resolution S/RES/1970 (2011) on 26 February 2011.

²³⁹ Amnesty International and International Federation for Human Rights (FIDH), *Looking for Justice, Recommendations for the Establishment of the Hybrid Court for South Sudan*, 2016, (Index AFR 65/4742/2016), page 21.

²⁴⁰ International bodies currently doing investigative work on crimes and human rights abuses in South Sudan include the UN [Commission on Human Rights in South Sudan](#) and the [UNMISS Human Rights Division](#). However, the UNMISS Human Rights Division has not publicly published periodical reports on the human rights situation in South Sudan, making it difficult to have information about their investigative activities.

²⁴¹ Human Rights Council (HRC) resolution 31/20, 23 March 2016, UN doc A/HRC/RES/31/20.

²⁴² HRC resolutions 34/25 of March 2017, 37.31 of March 2018 and 40/L.16/Rev.1 of March 2019.

²⁴³ The CoHRSS has published one report per year of its mandate, making a total of three reports which can be found here: www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx.

²⁴⁴ CoHRSS, *Final report of the CoHRSS, 23 February 2018*, www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx, para. 632.

7. RECOMMENDATIONS: TIME TO STEP UP

The government of South Sudan's consistent failure to address violations and abuses is a key driver of the cycle of violence in the country. It is also a violation of the government's legal obligations to investigate and prosecute suspects of violations of international human rights and humanitarian law and to punish those found responsible. This denies victims their rights to truth, justice and reparations.

Presidential interference with justice processes is rampant. This ranges from failing to make public reports of government-led investigation committees to confirming or denying judgments of court martials, to ousting judges of ordinary courts, and to actively obstruct the establishment of the Hybrid Court for South Sudan.

7.1 TO SOUTH SUDANESE AUTHORITIES

7.1.1 TO THE GOVERNMENT AND THE PRESIDENT OF SOUTH SUDAN:

- Sign the Memorandum of Understanding for the Hybrid Court for South Sudan and adopt the Draft Statute of the Hybrid Court for South Sudan, and ensure that the court becomes rapidly operational;
- Conduct judicial and legal reform to improve the domestic justice system's independent ability to address impunity for crimes committed in the context of the ongoing conflict, including:
 - Ensure the independence of the judiciary as guaranteed in article 125 of the Transitional Constitution and take positive measures to ensure effective independence of judges and prosecutors, including the creation of an independent office of the Director of Public Prosecutions and refraining from directing the public prosecutors or interfering with the work of the judges on individual cases;
 - Ensure respect for the division of jurisdiction between military and civilian courts, including that cases related to crimes against civilians by the military should be brought before civilian courts in accordance with section 37(4) of the SPLA Act;
 - Incorporate crimes under international law into the penal code, including but not limited to genocide, crimes against humanity, war crimes and torture in line with definitions under international law;
 - Take all other legal and practical measures to ensure all individuals allegedly responsible for crimes under international law can be investigated, prosecuted and punished at the domestic level before independent, impartial and competent courts, in accordance with fair trial standards and without being subjected to the death penalty;

- Immediately establish an official moratorium on executions with a view to abolishing the death penalty and to commute all death sentences to terms of imprisonment;
- Implement all other transitional justice provisions of the peace agreement, including those related to the Commission on Truth Reconciliation and Healing (CTRH) and the Compensation and Reparation Authority (CRA);
- Make the terms of references and reports of all government-led investigations into violations of international human rights and humanitarian law publicly available;
- Ratify the Rome Statute establishing the International Criminal Court and make a declaration under article 12(3) of the Rome Statute accepting the jurisdiction of the ICC for crimes committed in South Sudan since 15 December 2013;
- Deposit the instruments of accession to finalize the ratification of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), the Convention on the Rights of Persons with Disabilities, the African Charter on the Rights and Welfare of the Child, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), as well as consider ratifying other UN and regional human rights treaties;
- Until independent, impartial and effective investigations are conducted, suspend public officials or prevent the appointment to public positions of individuals alleged responsible for violations of international humanitarian or human rights law.

7.1.2 TO THE TRANSITIONAL NATIONAL LEGISLATIVE ASSEMBLY:

- As a matter of urgency, amend the definitions of crimes under international law currently incorporated in the 2015 Penal Code Amendment Bill in conformity with international law and include provisions on torture, enforced disappearance, command responsibility, the non-applicability of amnesties and immunities;
- Amend the Penal Code to ensure conformity with human rights obligations and international standards of fairness, including in view of:
 - Guaranteeing the independence of the Directorate of Public Prosecution and the autonomy of public prosecutors;
 - Abolishing the death penalty, and applying an official moratorium in the interim;
 - Incorporating all other legal provisions necessary to ensure fairness of the proceedings and enjoyment of the rights of the defence and the victims.

7.1.3 TO THE SOUTH SUDAN PEOPLE'S DEFENCE FORCES (SSPDF):

- Refer all cases of crimes committed against civilians by members of the SSPDF to the civilian courts, in accordance with section 37(4) of the SPLA Act and international standards;
- Until independent, impartial and effective investigations are conducted, suspend military officials and prevent the integration in the military of individuals sanctioned by the UNSC for their alleged responsibility in violation of international humanitarian or human rights law;
- Take steps to ensure that all rules of engagement prohibit the commission of crimes under international law and ensure respect for the rules of international humanitarian law especially those of distinction and precaution;
- Take all steps to prevent the commission of war crimes and other crimes under international law and to independently investigate and punish those responsible.

7.1.4 TO THE MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS AND THE JUDICIARY:

- Take all necessary measures to guarantee the independence of the justice system, including:
 - Restructure the Ministry of Justice and Constitutional Affairs to guarantee the autonomy of public prosecutors, and ensure prosecutors use their power to initiate investigations when information of the occurrence of a crime is available, including in the absence of complainants;
 - Ensure the respect of procedures provided by law for the appointment or the dismissal of members of the judiciary;
 - Establish safeguards preventing executive interference in individual judicial cases;
- Ensure greater transparency and access to the law by:
 - Making all laws of the Republic of South Sudan publicly available;
 - Ensuring court judgements are easily accessible to the public.

7.2 TO THE AFRICAN UNION

7.2.1 TO THE AFRICAN UNION PEACE AND SECURITY COUNCIL (PSC):

- Convene a briefing session on South Sudan to assess the status of the implementation of previous AU decisions on the establishment of the HCSS, call upon the government of South Sudan to take immediate steps to establish the HCSS and adopt a clear timeline for the establishment of the HCSS. The deadline given to South Sudan should not exceed a period of six months;
- If the government of South Sudan has not signed the MoU and adopted the Statute for the HCSS within the deadline provided by the PSC, unilaterally establish an *ad hoc* tribunal for South Sudan under the AU Constitutive Act and the Protocol Relating to the Establishment of the PSC (PSC Protocol).

7.2.2 TO THE AU COMMISSION (AUC):

- Issue a communiqué, recommitting to the establishment of the Court, informing the public about a timeline for establishment and operationalization of the HCSS and in which the AU gives South Sudan a deadline or ultimatum within which the government should sign the MoU and adopt the Statute for the HCSS, failure to which the AU will proceed to unilaterally establish an *ad hoc* tribunal;
- Guarantee the transparency of the process for establishment of the HCSS or the *ad hoc* tribunal and ensure that South Sudanese civil society actors will be consulted throughout.

7.3 TO THE UNITED NATIONS AND INTERNATIONAL DONORS

7.3.1 TO THE UNITED NATIONS AND INTERNATIONAL DONORS:

- Increase pressure on the government of South Sudan to sign the MoU and enact the Statute for the HCSS promptly, but not later than a deadline provided by the AU of maximum six months;

- Support the establishment of an eventual *ad hoc* tribunal for South Sudan by the AU in the event that the government of South Sudan does not sign the MoU and enact the statute by an AU provided deadline;
- Until the HCSS or an *ad hoc* tribunal is fully operational and functional, ensure the renewal of the mandate of UN Commission on Human Rights in South Sudan to secure the collection and preservation of evidence of serious crimes committed since 2013, with a view to transferring such documentation to independent and competent judicial authorities in the future;
- Encourage UN member states to exercise their jurisdiction over crimes under international law committed in South Sudan under the principle of universal jurisdiction and where the opportunity arises.

7.3.2 TO THE UNITED NATIONS SECURITY COUNCIL:

- If investigations and prosecutions are not initiated in the near future before independent, impartial and competent courts with regards to crimes under international law committed in the context of the conflict in South Sudan since 15 December 2013, either before domestic or international/internationalized courts, consider referring the situation of South Sudan to the International Criminal Court or establishing an *ad hoc* court under Chapter VII of the UN Charter.

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“DO YOU THINK WE WILL PROSECUTE OURSELVES?”

NO PROSPECTS FOR ACCOUNTABILITY IN SOUTH SUDAN

After six years of conflict characterized by crimes under international law committed by both sides, justice remains elusive for victims of the conflict in South Sudan.

Based on 47 interviews with people working in or with the justice sector and the review of 134 documents, this report documents the failure of the South Sudanese government to investigate and prosecute suspects of such crimes since the start of the conflict.

Civilian courts are crippled by a severe lack of independence. Prosecutors follow the directives of the executive and judges experience political interference. Military courts are not independent as the President has the power to confirm or reject judicial decisions, and they lack jurisdiction to prosecute soldiers for crimes committed against civilians.

The government lacks political will to hold perpetrators of serious crimes accountable. Blanket amnesties were granted, and individuals sanctioned by the UN Security Council for their involvement in serious crimes have been promoted. Government-led investigation committees lack independence and impartiality and, except one, have not resulted in prosecutions of serious crimes. The government also blocks the establishment of the Hybrid Court for South Sudan enshrined in the peace agreements.