

# Finally Placing Accountability: Hybrid Court Being Set Up in South Sudan - Part

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## Introduction

After seven years of violence and multiple failed attempts to prosecute those responsible for injustice, on January 29, 2021, the government of South Sudan approved the establishment, in cooperation with the African Union, of a hybrid court with competent jurisdiction for international crimes committed on the territory of the countries in context of the conflict that erupted in December 2013.

Considering how difficult it has been to believe that South Sudan's government has any desire to investigate or prosecute previous occurrences, the news offers unexpected hope. Additionally, this situation raises several theoretical and practical problems about introducing a new mixed court, such as whether a new generation of hybrid courts is imminent. What precedents should serve as a basis for establishing this new Court? South Sudan has a tumultuous history, and its future is even less assured.

This piece is divided into two parts. The first part focuses on the war in South Sudan and the lengthy effort to bring those responsible to justice for their international crimes. In the second part, we will examine the Court's founding agreement and speculate on its potential future.

## The Conflict in South Sudan

In December 2013, violence broke out in South Sudan. In the following eight years, approximately 400,000 people were slain. In addition, about four million South Sudanese nationals were driven out of their homes, seeking safety in neighboring countries or areas less devastated by the hostilities. By 2020, it is expected that 100,000 people will have been forced to leave their homes because of the fighting.

Attacks against civilians, often motivated by assumptions about their ethnicity or allegiance, were common in the early months of the conflict and often ended in horrific violence. Mass deaths, arbitrary imprisonment, and interrogation, torture, damage, and theft of privately owned and humanitarian facilities, including numerous hospitals, have

all been blamed on government and opposition troops. Without regard for and in direct violation of international humanitarian law (South Sudan ratified the Geneva Conventions of 1949 and the Additional Protocols of 1977 on January 25 2013), both sides have attacked civilian refugees, religious sites, schools, and humanitarian bases, including those of the United Nations, committing violations of domestic law (in particular, with the commission of crimes of this kind, some provisions of the transitional constitution of South Sudan are also violated, which protect the right to life and outlaw torment), and of course international law (in particular, Art. 3 common to the four conventions imposes minimum standards for the adequate treatment of non-combatants.)

More than a million people have been driven to hunger because of the crisis, and the situation has not been resolved yet. Even the UN Commission on Human Rights in South Sudan, a body established in March 2016 by the Human Rights Council to ascertain the facts and collect evidence relating to possible violations, noted in their report how the destruction \of food resources and the hunger starvation of civilians could be seen as an intentional way of conducting the conflict, by both sides. Further, Dapo Akande has also questioned how such a conflict resulting in starvation can be considered an international crime.

Moreover, the UN Commission has condemned and documented the widespread sexual violence, including rape, genital mutilation, and forced marriage. The political differences between Dinka President Salva Kiir Mayardit and Nuer Vice President Emeritus Riek Machar, both supported by their followers, has expanded the conflict and pitted the two major ethnic groups of the nation against each other, displacing the other minorities in the process.

After months of escalating tensions, the *casus belli* emerged on December 15, 2013, when Nuer troops and other Dinka government forces clashed in Juba, the nation's capital. In reaction to the slaughter of Nuer men in Juba by Dinka government security forces, hundreds of armed Nuer people had assembled hours before the battle, mostly to avenge the killings. In the following months, more fighting broke out in the Greater Upper Nile area in the northeast of the nation. The group supporting Machar immediately formed, calling itself the Sudan People's Liberation Movement-In Opposition (SPLM-OP). Since the initial peace accord was signed in 2015, the violence has been frequently reignited by newly formed rebel political groupings.

In 2018, the parties committed to forming a transitional government of national unity based in Juba to implement the rest of the agreement, which seeks peace, reconciliation, and stability in the country through the Revitalised Agreement on the Resolution of the

Conflict in the Republic of South Sudan (2018 Agreement). Despite occasional confrontations in the west and south of the nation with other organisations who did not sign the pact, the signing of this pact put an end to combat amongst the factions that signed it. Even while the scale of the fighting has diminished over time, non-governmental organisations have decried an uptick in localised skirmishes in 2020 that included political and military figures from factions that had previously signed the pledge. In February 2020, South Sudanese authorities began the formal process of constructing a unity government, which was formally appointed in June and has remained in power since.

### **The Protracted Quest for Prosecuting International Crimes**

However, the concept of a special court to try those responsible for international crimes has a longer history. Proponents of civil society have been calling for the establishment of a hybrid jurisdiction in South Sudan since at least 2014. However, not all government officials have been on board with the plan. In fact, a UN panel of experts has frequently accused the South Sudanese president of trying to stymie the establishment of an independent judiciary.

Scholars believe that the most recent African state lacks a firmly ingrained legal culture and the fight against impunity. This is because, ever since its independence in 2011, the country has been a terrain of armed rebellions and conflicts on an ethnic basis, with no judicial mechanism ever being activated to investigate those responsible for the same. The South Sudanese court system is not yet sufficiently autonomous to independently prosecute crimes of this size. As a result, measures focused only on the domestic front have often been seen as a last-ditch option at best.

With the signing of the 2015 Pre-Treaty Peace Agreement, the South Sudanese government has been quietly taking efforts to deepen cooperation with the African Union to create an international crimes tribunal. A draft agreement for a future court and a memorandum of agreement on its functioning were released by South Sudan and the African Union in 2017. Both papers were submitted in August 2017 and approved by the Cabinet in December 2017; however, there has been no additional development or release of material since then. The government, on the other hand, has taken a stance against the establishment of the Court in 2019. However, in the same year, the African Union Commission took steps toward creating the Court, convening a panel of specialists to form it and evaluate the legislative instruments on which it would be based.

The South Sudan Civil Society Forum, a coalition of over 200 Non-Governmental Organisations (NGOs), has asked the African Union to strongly encourage the newly constituted government of South Sudan to find a permanent solution for the establishment of a hybrid court by the end of July 2020. True, the African Union

established a Commission of Inquiry in December 2013 to look into the possibility of international crimes. The 2018 Agreement gave new life to these plans by providing the parties' 2015 promises, which provided an in-depth description of the future hybrid court's expected features.

As stated in Chapter V of the Agreement, the Court will work with the Court of the African Union. South Sudanese jurists and the finest judges, investigators, and prosecutors from around south will work together in this hybrid composition of "high moral character, impartiality and integrity, and [...] expertise in criminal law and international law" in the Court. When established on State territory, a hybrid court will be more easily accessible to the general establishment and will have far-reaching consequences in improving the quality of South Sudan's judicial system.

To examine any breaches of international or local law from December 15, 2013, to the conclusion of the Transitional period, the African Union Commission, in cooperation with the Government of South Sudan, is anticipated to create the Court in 2019. As such, it is up to the African Union to establish rules for the establishment of this Court, including its location, infrastructure, funding methods, execution mechanisms, relevant jurisprudence, number and composition of judges, and privileges and immunities enjoyed by court workers. In addition, the Court needs to function as a judicial instrument that embodies a uniquely African prerogative.

On the other hand, the agreement specifically limits the Court's jurisdiction *ratione materiae* to genocide, war crimes, and crimes against humanity, while leaving some wiggle room for the inclusion of "other serious crimes relevant in international law and domestic law" (primarily, in all probability, sexual violence and the so-called gender-based crimes which are identified, by the penal code of South Sudan, with a definition that does not match international forecasts). When concerns of concurrent jurisdiction arise, the hybrid court will take precedence over any South Sudanese domestic court.

The composition of the Court is also outlined in the agreement: most judges in each chamber should be from African states other than South Sudan; similarly, the bodies responsible for defense and continuation will be comprised of non-South Sudanese African citizens who may, in any case, be assisted by South Sudanese personnel or personnel from other African states as far as may be necessary to effectively and equitably carry out their duties. More specifically, suspects retain the inherent right to retain counsel of their own choosing, either in addition to or in substitute for the attorney formally assigned by the Court.

In each situation, the chairperson of the African Union Commission shall be responsible

for nominating and selecting the staff members to fill the open positions. Reports of the African Union Commission of Inquiry and other documents or materials, in the custody of the African Union or other institutions, may be used by the Court in its inquiry.

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