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## **Statement from the Transitional Justice Working Group (TJWG) on the Establishment of the Transitional Government of National Unity (TGONU) and the Implementation of Chapter V of the Agreement on the Resolution of the Conflict in South Sudan (ARCISS)**

20 April 2016

We, members of the Transitional Justice Working Group (TJWG), a group of South Sudanese civil society organizations committed to the promotion of transitional justice and reconciliation in South Sudan, note with deep concern the delays that have been encountered in forming the Transitional Government of National Unity (TGONU) and implementing the Agreement on the Resolution of the Conflict in South Sudan (ARCISS). The TJWG calls on the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement-in-Opposition (SPLM-IO) to immediately establish the TGONU without further delay and to move ahead with their plans to initiate a comprehensive transitional justice and reconciliation program in South Sudan.

In August 2015, the GRSS, SPLM-IO and other stakeholders signed the ARCISS in an effort to resolve the crisis that erupted in December 2013. More than six months since the agreement was signed, the parties have yet to establish the TGONU, much less embark on the extensive post-conflict stabilization and reform agenda that is stipulated in the ARCISS. The parties' inability to agree on the initial steps required to form the TGONU is presenting a major stumbling block for the fledgling peace process.

Chapter V of the ARCISS, entitled "Transitional Justice, Accountability, Reconciliation and Healing," stipulates the parties' plans for combating impunity and addressing the legacies of conflict in South Sudan. At the heart of Chapter V are three institutions: the Commission for Truth, Reconciliation and Healing (CTRH), the Hybrid Court for South Sudan (HCSS) and the Compensation and Reparations Authority (CRA).

Together, the three institutions are responsible for initiating an extensive transitional justice program during the 30-month transitional period that will follow the establishment of the TGONU. The CTRH will be responsible for investigating, documenting and reporting on human rights abuses over a predetermined time period in order to "spearhead efforts to address the legacy of conflicts, promote peace, national reconciliation and healing." The HCSS will be established to bring cases against "individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period." The CRA will be established to provide compensation and reparations to people who lost property or were victims of abuses as a result of the conflict.

There are no shortcuts to lasting peace in South Sudan. Though the ARCISS is ambitious in its purpose and scope, the people of South Sudan must find a way of moving forward with the programs described in Chapter V and in other parts of the ARCISS if the country is to set itself on a path towards long-term peace and prosperity. Towards this end, the TJWG urges the GRSS,

SPLM-IO, together with their international partners in the African Union (AU) and United Nations (UN), to take the following recommendations into consideration in establishing the TGONU and implementing Chapter V:

*On the design and establishment of the CTRH*

- Timeframe – The ARCISS provides for a 21-month timeframe for the CTRH to establish itself, conduct its investigations and produce its report. This is far too short given the scale of its task and the logistical difficulty of operating in South Sudan. The TJWG recommends that this timeframe be expanded to at least three to five years, so that the CTRH begins its work during the transitional period and issues its report under the elected government that is to succeed the TGONU.
- Temporal mandate – According to the ARCISS, the CTRH is to examine abuses committed between 2005 when the regionally-autonomous Government of Southern Sudan was formed and the signing of the peace agreement in August 2015. Given the manner in which abuses from the 22-year civil war (1983-2005) continue to drive violence in contemporary South Sudan, the TJWG recommends that the CTRH's mandate be crafted in such a way that the institution is given discretion to selectively investigate particularly contentious issues from the pre-2005 period.
- Sequencing truth-seeking and reconciliation/healing – The CTRH is responsible for promoting the distinct, yet related goals of truth-seeking and reconciliation/healing. Whereas the goal of truth-seeking is more timebound, and focuses on developing a credible and impartial record of human rights abuses over a predetermined time period, the goal of reconciliation/healing is more open-ended and will be pursued for many years to come. The TJWG therefore recommends that the CTRH mandate clearly delineates between the institution's truth-seeking and reconciliation/healing activities, with a focus on developing report on truth-seeking in the first 3-5 years and supporting reconciliation/healing activities over a longer time period.

*On the design and establishment of the HCSS*

- Investigations – Evidence of international crimes in South Sudan is fast disappearing and the longer that it takes to establish the HCSS the more difficult that it will be to build cases against the individuals responsible. In order to begin compiling evidence and setting the stage for the HCSS, the AU should immediately embark on investigations to preserve evidence as they work to establish the HCSS.
- Interim president of the HCSS – Leadership is needed to drive the process of establishing the HCSS forward. Towards this end, the TJWG recommends that the AU appoints an interim president to the HCSS to help build political support for the institution as it is being designed and established.
- South Sudanese judges – The designers of the HCSS should ensure that South Sudanese judges and legal professionals are well-represented in the institution in accordance with the terms of the ARCISS and with the principle that the HCSS should leave a positive legacy in the national justice system.
- Location – Establishing the HCSS in South Sudan would serve a number of advantages,

some of which may include accessibility of the institution to local populations and positive spillovers for the national justice system. However, serious questions remain as to whether the security context and available infrastructure would allow for a court of this type to be based in South Sudan. The TJWG recommends that the AU, UN and TGONU carefully assess the feasibility of different options for the location of the HCSS, and if it is not possible to situate the court in South Sudan in the short-term, plans should be put in place from the outset to relocate court operations to South Sudan if certain benchmarks can be met.

- Transition to a permanent institution – In order to ensure that the HCSS leaves a permanent legacy in the national justice system in South Sudan, the TJWG recommends that the HCSS be designed so that with time it can phase out international involvement and transition into a permanent international crimes chamber within the judiciary of South Sudan.
- Coordination with existing justice mechanisms – The designers of the HCSS should devote thought to how the institution will coordinate with and support existing justice mechanisms in South Sudan, whether in the statutory or customary systems. This will help to maximize the positive legacy that the HCSS has for local justice systems in South Sudan.

#### *On the design and establishment of the CRA*

- Compensation and reparations policy – Of the three institutions in Chapter V, the CRA is the least developed. There is an urgent need for more detailed policies on reparations to guide the design and establishment of the institution. Among the issues that must be addressed are the types of victims that will be eligible for reparations, the types of harms that are eligible for reparations, the time period in which the abuse must have occurred and types of reparations or compensation that will be provided.
- Short-term focus on collective and emergency reparations – The scale of conflict-related harms, South Sudan's weak institutional capacity, the immense workload of the transitional period and the economic situation that the country finds itself in make it difficult to envisage an individual reparations program being successful in the short-term. The TJWG therefore recommends that the TGONU and its international partners focus on collective and emergency reparations in the short-term as they develop an individual reparations program in accordance with the findings of the CTRH.

#### *Cross-cutting issues*

- Creating conducive environment – For this transitional justice program to be successful, the TGONU and its international partners must create a conducive environment for civil society and citizens to engage with all relevant actors on transitional justice issues. Such public discussions are vital if the country is to develop a process that is driven and owned by the people of South Sudan. The leadership of the TGONU should therefore publicly express their support for Chapter V and ensure that space is provided to discuss these issues in a free and open manner.
- Public consultations – Public consultations should begin immediately and proceed throughout the life of the transitional justice program, including the design, establishment, operations and closure of the institutions provided for in Chapter V.

These consultations are crucial if we are to design a program that reflects the views and aspirations of the people of South Sudan.

- Selection and appointment processes – For the three institutions, selection and appointment processes must be designed with care so as to avoid any real or perceived political interference, bias or favoritism in the process. This is as true of processes on the regional or international level as processes on the national level in South Sudan. Selection and appointment processes must be based on merit, fully transparent and well-designed to vet candidates for moral integrity, technical capacity and experience.
- Coordination mechanisms – Experience from other contexts has shown that when transitional justice processes are initiated simultaneously without a coherent strategy for managing the relationships among the institutions and actors involved, they inevitably come into conflict with one another. It is therefore vitally important that coordination mechanisms be embedded into the Chapter V institutions to manage the relationships among the institutions and deal with problems before they arise.
- Victim and witness protection – Victim and witness protection are always a concern in transitional justice processes and all the more so in a place like South Sudan that is characterized by high levels of insecurity and little to no infrastructure for victim and witness protection. If people do not feel safe, they will not engage with the Chapter V institutions. It is therefore vital that the TGONU and its international partners incorporate ‘best practice’ in victim and witness protection and ensure that sufficient institutional resources are invested into these efforts from the start.

**Signatories:**

1. Assistance Mission for Africa (AMA)
2. Dialogue and Research Initiative (DRI)
3. Human Rights Development Organization (HURIDO)
4. South Sudan Law Society (SSLS)
5. South Sudan Women Empowerment Network (SSWEN)
6. Foundation for Democratic and Accountable Governance (FODAG)
7. Solidarity Ministry Africa for Reconciliation and Development (SMARD)