

**The prospects of accountability for international crimes  
in South Sudan**



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by

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## 10 STATES + 3 ADMINISTRATIVE AREAS



A map of South Sudan's 10 States and Administrative areas. Source UNMISS

## PLAGIARISM DECLARATION

I, Hilma Ndinelago Moses, with the student identification number u21832669, proclaim the following:

1. I am aware of what plagiarism is and of the University's stance against it.
2. This mini dissertation is all original effort on my part. Wherever someone else's work has been used (whether from a printed book, the internet, or any other source), proper acknowledgement and reference have been provided in accordance with the Faculty of Law's standards.
3. I did not plagiarize or present another student's work as my own.
4. I prohibited anyone from copying my work with the intent of presenting it as their own.

Date: 29 October 2021

## **DEDICATION**

This dissertation is dedicated to the people of South Sudan. My work as a Human Rights Officer with the United Nations Mission in South Sudan (UNMISS) generated a firm connection to the South Sudanese people. I will always stand in solidarity with the people of South Sudan in their efforts to rebuild and regain their nation's peace and stability. My heart will always be with the women and children of South Sudan.

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## ABSTRACT

This study examines the prospects for accountability for international crimes committed in South Sudan since the civil conflict began in December 2013 and resulted in the deaths of at least 400,000 people and displacement of 2.24 million people by September 2018. It argues that both government and opposition forces have committed serious crimes under international law. It claims that since the start of the civil war, the Government of South Sudan has allowed impunity for international crimes to flourish by pursuing only the *Terrain* case. The study further argues South Sudan has neglected to investigate, prosecute, and punish suspects of international crimes. It also crippled the current judicial system to the extent that it cannot provide justice to victims of the civil war due to a severe lack of independence and political interference. This not only shows the lack of political will to address the critical issue of accountability for international crimes, but it feeds impunity and undermines South Sudan's ability to meet its international obligations. It also shows a total disregard for the victims' rights to truth, justice, and reparations. For this reason, this study focuses on the Hybrid Court of South Sudan (HCSS) as one of the accountability measures envisioned to be established under Chapter 5 of the R-ARCSS. The study argues that in the absence of an independent, impartial, and competent judicial system in South Sudan, the HCSS remains the only meaningful and effective alternative justice mechanism to address the plight of the victims of the civil war. The study thus looks at how it could be utilized to ensure that South Sudan adheres to its international obligations. If the HCSS is not established, the study proposes the establishment of an *Adhoc* court by the African Union and the United Nations.

## CHAPTER 1

### INTRODUCTION TO THE STUDY

#### 1.1 Background

Since the pre-independence civil war of 1955, South Sudan has been plagued by inter-ethnic conflict fuelled by political power struggles between government and opposition forces.<sup>1</sup> Internal turmoil within the governing Sudan People's Liberation Movement (SPLM) rekindled violence in December 2013, with clashes between SPLM , South Sudan People's Liberation Army in Opposition (SPLM-IO) and their allies in Juba.<sup>2</sup> The internal strife quickly escalated into a protracted ethnic-based armed conflict across the country that has left at least 400 000 people dead and 2.24 million others displaced.<sup>3</sup> In addition, the conflict resulted in a devastating humanitarian catastrophe and the commission of acts that amounted to war crimes and crimes against humanity.<sup>4</sup>

Notwithstanding the signing of the peace agreement in September 2018 and the formation of the transitional coalition government in 2020, human rights violations and abuses continue to occur to date.<sup>5</sup> According to the UN Commission on Human Rights in South Sudan (CoHSS) February 2021 report, violence against civilians has intensified since the civil war ended in 2018. Victims continue to be targeted along ethnic lines, frequently with government and opposition forces backing.<sup>6</sup> According to this report, the current violence is characterised by revenge killings, attacks, intercommunal violence, cattle raiding, sexual violence, forced recruitment, looting and destruction of civilian property.<sup>7</sup>

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<sup>1</sup> H Johnson 'South Sudan: The untold story from independence to civil war' (2016) London/ New York, I.B. Tauris., p 2

<sup>2</sup> L.P Blanchard 'The Crisis in South Sudan' (2014) Congressional Research Service  
<https://www.refworld.org/pdfid/52cff1494.pdf> (accessed 21 March 2021)

<sup>3</sup> Global Conflict Tracker <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan> ( accessed 19 March 2021)

<sup>4</sup> United Nations Human Rights Council 'Transitional justice and accountability: a roadmap for sustainable peace in South Sudan - Conference room paper of the Commission on Human Rights in South Sudan' 5 October 2020 (A/HRC/45/CRP.4) (accessed 1 May 2021)

<sup>5</sup> 'South Sudan's rival leaders form a coalition government' *Aljazeera* 22 February 2020  
<https://www.aljazeera.com/news/2020/2/22/south-sudans-rival-leaders-form-coalition-government> (accessed 18 March 2021)

<sup>6</sup> South Sudan's current violence 'lot worse' than during civil war UN report says hundreds killed, hundreds of thousands displaced during fighting; women and girls abducted and raped' *Aljazeera* 19 February 2021  
<https://www.aljazeera.com/news/2021/2/19/south-sudans-violence-worse-than-in-civil-war-says-un> (accessed 1 May 2021)

<sup>7</sup> A Dieng 'Accountability in South Sudan – the African Union steps up' *Africa Renewal* 22 April 2014  
<https://www.un.org/africarenewal/web-features/accountability-south-sudan-%E2%80%93-african-union-steps> ( accessed 2 May 2021)

In 2021 the UN continued to call for accountability in South Sudan. It reported that between January and June 2020, organized and heavily armed militias from the Dinka, Nuer and Murle communities carried out planned and coordinated attacks on villages across Jonglei and the Greater Pibor Administrative Area, which killed more than 700 people.<sup>8</sup> Military and political leaders who aided and abetted such community militias also remained unpunished. The accounts of killings committed against people in South Sudan are numerous, horrific, and heartbreaking.

As a response to the acts committed during the civil war, parties to the conflict agreed to establish accountability mechanisms in the 2015 Resolution of the Conflict in the Republic of South Sudan (ARCSS),<sup>9</sup> and the 2018 Revitalized Agreement for Resolution of Conflict in South Sudan (R-ARCSS).<sup>10</sup> Chapter 5 of the R-ARCSS envisages the establishment of crucial transitional justice and accountability mechanisms, such as the Hybrid Court for South Sudan (HCSS), the Commission for Truth, Reconciliation, and Healing (CTRH), and the Compensation and Reparations Authority (CRA), as well as guarantees of non-recurrence through institutional reform to address international crimes and human rights violations. The HCSS is highlighted in Chapter 4 of this dissertation owing to its stated mission of resolving the legacy of previous violence and providing justice, truth, and reparations to the victims of the conflict since it began on 15 December 2013, including genocide, crimes against humanity, and war crimes.<sup>11</sup>

Since the 2013 civil war outbreak, most people responsible for serious crimes under international law have not been held accountable due to a delay in establishing accountability mechanisms proposed in the peace agreements.<sup>12</sup> The *Terrain* case is the country's first and sole case brought before South Sudanese courts for crimes against civilians committed during the civil war in December 2013.<sup>13</sup> In this case, a military court found 10 soldiers guilty of murder, rape, and other offenses in connection with the Terrain Hotel attack on July 11, 2016.<sup>14</sup>

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<sup>8</sup> United Nations News 'Allies of South Sudan militias must be held accountable: UN human rights report' 15 March 2021 <https://news.un.org/en/story/2021/03/1087352> (accessed 2 May 2021)

<sup>9</sup> Inter-Governmental Authority on Development (IGAD) (2015) Agreement on the Resolution of the Conflict in South Sudan. Addis Ababa, 17 August, p. 3.

<sup>10</sup> ( n 4 above)

<sup>11</sup> Intergovernmental Authority on Development (IGAD) 2018. Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS), 12 September 2018. Addis Ababa, IGAD, also see article 5.3.2.1 also see article 1(2) of the Draft Statute of the Hybrid Court for South Sudan

<sup>12</sup> Amnesty International 'OPED: South Sudan Government a stumbling block to justice for victims of crimes against humanity' 14 October 2019 <https://www.amnesty.org/en/latest/press-release/2019/10/oped-south-sudan-government-a-stumbling-block-to-justice-for-victims-of-crimes-against-humanity/> (accessed 19 August 2021)

<sup>13</sup> UNMISS 'Perpetrators of violence against civilians at Terrain Hotel held accountable for their crimes' 6 September 2018 <https://unmiss.unmissions.org/perpetrators-violence-against-civilians-terrain-hotel-held-accountable-their-crimes> (accessed 28 July 2021)

<sup>14</sup> (n9 above)

At least six humanitarian aid workers were raped and a South Sudanese journalist was murdered as a result of the attack. The case was heralded as a triumph, but a closer examination reveals issues on fair trials, the court's lack of authority, and the reluctance to investigate and charge military commanders.<sup>15</sup>

Impunity is profoundly entrenched in South Sudan and remains rampant. The government of South Sudan has mainly provided blanket amnesty and elevated persons sanctioned by the United Nations Security Council (UNSC) to political leadership positions.<sup>16</sup> Akol Koor Kuc, Director of the National Security Service (NSS), was recently promoted to First Lieutenant General, while Santino Deng Wol was appointed as the next Army Chief of Staff.<sup>17</sup> The preceding demonstrates that the leadership lacks the political will to hold the political elite accountable for crimes committed in office.<sup>18</sup> The UNSC sanctioned Santino Deng Wol for his involvement in a May 2015 offensive in Unity State during which dozens of women and children were killed.<sup>19</sup> The above demonstrates the South Sudanese government's inability or unwillingness to stop systematic human rights violations committed by the security apparatus and its inability to guarantee credible investigations and criminal responsibility for personnel involved in severe human rights breaches.

UNMISS and international non-governmental organizations (NGOs) like Human Rights Watch have highlighted the NSS's arbitrary arrests, ill-treatment of detainees, torture, extrajudicial executions, enforced disappearances, and unlawful surveillance.<sup>20</sup> In addition, there is substantial evidence that the NSS regularly targeted journalists, activists, opposition leaders, and critics throughout Kuc's tenure, with victims receiving little to no accountability or redress.<sup>21</sup> As a result of the above, it is evident that the Government has neglected to prosecute top officials and has openly declared that they would not do so.<sup>22</sup>

South Sudan's leaders are primarily responsible for addressing international crimes and need to promote the rule of law, investigate, and hold the perpetrators accountable for abuses. Similarly, the African Union plays a crucial role since its Commission of Inquiry on South Sudan recommended the establishment of transitional justice and accountability institutions to

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<sup>15</sup> (n 10 above)

<sup>16</sup> Human Rights Watch 'South Sudan Government Reshuffle Emboldens Rights Abusers: Regional Partners Should Press for Action on Abusive Security Agency' 14 April 2021 <https://www.hrw.org/news/2021/04/14/south-sudan-government-reshuffle-emboldens-rights-abusers> (accessed 28 July 2021)

<sup>17</sup> (n 16 above)

<sup>18</sup> (n 17 above)

<sup>19</sup> (n 15 above)

<sup>20</sup> (n 15 above)

<sup>21</sup> Human Rights Watch (n 16 above)

<sup>22</sup> Amnesty International 'Do you think we will prosecute ourselves? No prospects for accountability in South Sudan' 13 October 2016 <https://www.amnesty.org/download/Documents/AFR6511052019ENGLISH.PDF> (accessed 28 July 2021)

assist South Sudan in achieving human rights and lasting peace.<sup>23</sup> Based on the above, this research thus investigates the possibility of accountability for international crimes in South Sudan after the outbreak of the civil war in December 2013, committed by both government and opposition forces and their allies.

## 1.2 Research Aims

This research aims to evaluate the prospects of accountability in South Sudan for international crimes as an essential prerequisite for fulfilling its obligations under international law, the realisation of human rights, putting an end to impunity and establishing sustainable peace. It does so by analysing South Sudan's obligations under international law, establishing the crimes committed during the civil war and assessing the HCSS as an accountability measure envisioned to be established under Chapter 5 of the R-ARCSS. This study is significant because it will provide the South Sudanese government, civil society organizations (CSOs) and international non-governmental organizations (INGOs) with information that will assist relevant stakeholders in evaluating the prospects of accountability for international crimes in South Sudan. In addition, the study will serve as a resource for various researchers conducting analyses of accountability and justice for mass atrocities in South Sudan. This research details South Sudan's legal obligations, which is essential for policymakers and may inspire changes to South Sudan's planned accountability mechanisms.

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<sup>23</sup> African Union 'Final report of the African Union Commission of Inquiry on South Sudan' 15 October 2014 Addis Ababa <https://www.peaceau.org/en/article/final-report-of-the-african-union-commission-of-inquiry-on-south-sudan> (accessed 29 July 2021), para 1148

### 1.3 Problem Statement

The 2013 civil conflict claimed tens of thousands of lives, resulting in rampant sexual violence and culminating in Africa's worst humanitarian disaster.<sup>24</sup> In South Sudan, impunity for human rights violations has long been the practice. Unfortunately, South Sudan's leadership has neglected to hold individuals accountable for widespread international crimes. The lack of investigations or prosecutions of suspected senior officials, or even the possibility of such under international law – despite repeated demands for accountability is especially concerning.<sup>25</sup> Apart from the Terrain case, there have been virtually no legal procedures addressing crimes or human rights violations perpetrated by government security forces or armed opposition against civilians in regular civilian tribunals throughout the 2013–2018 civil war.<sup>26</sup>

To this day, South Sudan remains embroiled in conflict, with high levels of violence directed at civilians and their property, attacks on and restrictions on humanitarian aid, arbitrary detentions, enforced disappearances and restraints on the right to free expression and association.<sup>27</sup> Moreover, while efforts were made to form a coalition government in transition after the R-ARCSS was signed in September 2018,<sup>28</sup> little progress has been made toward establishing critical transitional justice and accountability measures such as the HCSS, CTRH, and the CRA.<sup>29</sup> These institutions offer South Sudanese leaders an opportunity to break the cycle of violence resolutely. They also offer a path to achieving lasting peace through accountability for international crimes, truth recovery for past violations, addressing the structural causes of political violence and restoring South Sudanese people's dignity.<sup>30</sup>

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<sup>24</sup> D Muchena 'South Sudanese leaders must bring justice for victims of atrocities' 20 May 2021 <https://mg.co.za/opinion/2021-05-20-south-sudanese-leaders-must-bring-justice-for-victims-of-atrocities/> (accessed 28 July 2021)

<sup>25</sup> (n 18 above) 22

<sup>26</sup> F McCrone 'War crimes and punishment' (2019) Small Arms Survey <http://www.smallarmssurveysudan.org/fileadmin/docs/briefing-papers/HSBA-BP-Terrain.pdf> (accessed on 19 August 2021)

<sup>27</sup> Human Rights Watch. 'World Report South Sudan' 2021 <https://www.hrw.org/world-report/2019/country-chapters/south-sudan#> (accessed 1 May 2021)

<sup>28</sup> Intergovernmental Authority on Development (IGAD) Signed Revitalized Agreement On The Resolution Of The Conflict In South Sudan (R-ARCSS) 12 September 2018 Addis Ababa, pp 86-121

<sup>29</sup> (n 25 above) 86-121

<sup>30</sup>B Takpiny 'South Sudan approves establishment of Hybrid Court' 30 January 2021 <https://www.aa.com.tr/en/africa/south-sudan-approves-establishment-of-hybrid-court/2127899#> (accessed 21 July 2021)

The HCSS has broad jurisdiction over international crimes committed in South Sudan between 15 December 2013 and until the end of the transitional period. It is thus a critical component of accountability and transitional justice in South Sudan, with the potential to end perpetrator impunity. The court is intended to hear cases involving genocide, war crimes, crimes against humanity, sexual offences, gender-based crimes, and other serious crimes under international and South Sudanese law.<sup>31</sup> In January 2021, the Council of Ministers approved a proposal by the Ministry of Justice and Constitutional Affairs to establish the Chapter 5 institutions, including the HCSS. Even though this was a significant step forward, there has been no significant progress apart from creating a task force.<sup>32</sup>

As a result, this study aims to evaluate the issue of accountability for international crimes and how South Sudan may fulfil its obligations under international law by holding individuals responsible for serious crimes.

#### **1.4 Research Questions**

The study's central research question is how the Hybrid Court proposed to address accountability for international crimes committed in South Sudan between 15 December 2013 and until the end of the transitional period can be most effectively used to advance justice, truth, and reparations; for victims?

The specific research questions are as follows: -

- a) What are South Sudan's international legal obligations relating to international crimes committed during the 2013-2018 civil wars?
- b) How should South Sudan's Government implement the Hybrid Court as outlined in Chapter 5 of the 2018 R-ARCSS?
- c) What role should the international community and other international accountability mechanisms play in holding those responsible for international crimes perpetrated in South Sudan accountable?

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<sup>31</sup> R-ARCSS, article 5.3.2

<sup>32</sup> J Tanza 'African Union Welcomes South Sudan's Move to Create Hybrid Court' 31 January 2021 PM <https://www.voanews.com/africa/south-sudan-focus/african-union-welcomes-south-sudans-move-create-hybrid-court> (accessed 28 July 2021)

## **1.5 Hypothesis and assumptions**

This paper is predicated on the premise that for South Sudan to meet its obligations under international law, it must address the absence of accountability for the grave, widespread, and longstanding violations and abuses of international law committed during the 2013-2018 civil war. It supports the notion that there will be little or no change in the *status quo* in South Sudan if the leaders refuse to hold individuals accountable for their actions and to own up to their obligations under regional and international law. Accountability for grave international crimes, truth recovery regarding past violations and the structural causes of political violence, as well as the restoration of South Sudanese people's dignity are thus necessary steps toward establishing sustainable peace in South Sudan. In addition, South Sudan needs to be deliberate about guaranteeing victims' rights to truth, justice, and reparations.

## **1.6 Methodology**

This study is primarily based on desk research, utilizing various published sources about accountability for international crimes in South Sudan. The qualitative approach helps inform new concepts and theories. The study suggests a thorough analysis of secondary sources, primarily national, regional, and international legal instruments and policy documents. Studying secondary sources is critical in establishing fundamental frameworks, principles, and concepts relating to accountability for international crimes committed during the civil war. The study also benefits significantly from the works of scholars from jurisdictions with a wealth of literature on the subject, as well as the research and work of international organizations and non-governmental organizations (INGOs) such as the United Nations, United Nations High Commissioner for Human Rights (OHCHR), Human Rights Watch, African Union (AU), Amnesty International, Human Rights Council, and the United Nations Mission in South Sudan's (UNMISS) public documents. In addition, many textbooks, journal articles, and reports will be analysed.

The study also draws on the author's observations during her two years as a Human Rights Officer with the United Nations Mission in South Sudan (UNMISS). The author has travelled extensively throughout South Sudan and is familiar with the country's history, political context, human rights, and humanitarian situation.



In addition, the author has monitored, investigated, verified, and reported human rights violations and abuses and violations of international humanitarian law, including conflict-related sexual violence (CRSV) in South Sudan. These observations are intended to supplement and connect the study's theoretical foundations to the realities of South Sudan.

## 1.7 Literature Review

Numerous conflicts have coexisted and overlapped in South Sudan since the beginning of the civil war, ranging from inter-communal fighting over land and natural resources to more politically motivated battles over military and political elite power struggles.<sup>33</sup> According to Watchowski, South Sudan's civil war has attracted numerous international responses, which led to the initial deployment of 14 500 peacekeeping personnel after clashes broke out between SPLM and SPLM-IO in late December 2013.<sup>34</sup> Deng and Willems opine that accountability has been long overdue in South Sudan. Many South Sudanese are dissatisfied with how past peace processes rewarded warring parties with blanket amnesties, political and military appointments while allowing victims to suffer needlessly.<sup>35</sup> Accountability and justice are thus essential foundations in South Sudan's transition from war to a peaceful society.

Accountability, in human rights, refers to the capacity to keep individual human rights violators accountable for their acts.<sup>36</sup> Blanchard claims that despite a rhetorical dedication to justice, there has been no recourse for significant atrocities perpetrated during the war in South Sudan.<sup>37</sup> In support of this view, the United Nations Secretary-General reaffirmed that there was 'no proof of any genuine attempt by the parties to the conflict to examine, prosecute, and sanction significant human rights violations and abuses related to the civil war, some of which lead to war crimes and crimes against humanity.'<sup>38</sup>

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<sup>33</sup> DK Deng & R Willems 'Expanding the reach of justice and accountability in South Sudan. Policy Brief. Intersections of Truth, Justice and Reconciliation in South Sudan' (2016) University of Peace. UPEACE Centre The Hague

<sup>34</sup> E Watchowski 'The Hybrid Court of South Sudan: Progress Towards Establishment and Sustainable Peace' (2017) 117 15 Loy. U. Chi. Int'l L. Rev.

<sup>35</sup> (n 30 above)

<sup>36</sup> SR Ratner, JS Abrams, & JL Bischoff 'Accountability for human rights atrocities in international law: beyond the Nuremberg legacy' (2009). OUP Oxford.

<sup>37</sup> LP Blanchard 'Conflict in South Sudan and the challenges ahead' (2016). <https://fas.org/sgp/crs/row/R43344.pdf> (accessed 3 May 2021)

<sup>38</sup> U.N. Security Council, 'Report of the Secretary-General on South Sudan' 13 April 2016 S/2016/341.

Deng stipulates that the 2005 Comprehensive Peace Agreement (CPA) did little to keep the perpetrators of aggression accountable. There has been a hazy reference to national unity but no clear responsibility for past human rights abuses.<sup>39</sup> In examining the status of the civil war in South Sudan,<sup>40</sup> Nyandera believes that the negotiations have struggled to uncover and offer answers to the South Sudanese problems and claims that ethnic grievances and rivalry are a primary underlying factor that has turned political rivalry into a deadly ethnic conflict by vicious mobilization and rhetoric.<sup>41</sup>

The reality is that South Sudan's accountability for international crimes requires tangible transitional justice processes that consider the views of South Sudanese people, which is fundamental to its aspirations for sustainable peace. Ngari and Kolok's report on citizens' views of transitional justice mechanisms in South Sudan documents that 60% of respondents desired the establishment of the Commission for Truth, Reconciliation, and Healing (CTRH) first, followed by 49% for the Hybrid Court for South Sudan (HCSS), and 7% for the Compensation and Reparation Authority (CRA).<sup>42</sup> This shows how much the South Sudanese people desire effective accountability mechanisms as a pathway to sustainable peace.

Ngari and Kolok rejected the concept of transformative justice as being draconian and argued that it restricts interaction with non-judicial bodies.<sup>43</sup> They added that while advocating for transitional justice and accountability is an excellent choice for national actors, relying exclusively on the HCSS while embracing other mechanisms, such as the CTRH, strengthens the government narrative that transitional justice is retributive and global.<sup>44</sup>

It is no secret that South Sudan's absence of accountability procedures has produced a climate favourable to the return of localized violence because of widespread impunity for the crimes and breaches committed. There is an appalling pattern of systematic, ethnic-based communal violence perpetrated through armed cattle raids, clashes, revenge killings, sexual violence, and attacks. According to Wild et al when looking at the context of South Sudan, it is also important to note that historically reported attacks described as cattle raids are often politically motivated.<sup>45</sup> Recently, the UN made credible allegations that government troops

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<sup>39</sup> IRIN, Abuses lead to calls for accountability in South Sudan, 21 January 2014, available at: <https://www.refworld.org/docid/52e265824.html> [accessed 3 May 2021]

<sup>40</sup> IN Nyandera 'South Sudan conflict from 2013 to 2018: Rethinking the causes, situation and solutions. African Journal on Conflict Resolution' (2018), 18(2), 59-86

<sup>41</sup> (n 37 above) 59-86

<sup>42</sup> JD Kolok & A Ngari 'Citizens' perceptions on transitional justice processes in South Sudan' (2019) ISS East Africa Report, 2019(29), 1-16.

<sup>43</sup> Kolok et al (n 39 above)

<sup>44</sup> (n 40 above) 1-16

<sup>45</sup> H Wild, J.M Jok & R Patel 'The militarization of cattle raiding in South Sudan: how a traditional practice became a tool for political violence.' Int J Humanitarian Action 3, 2 (2018).

have been equipping people with AK-47s, RPGs, and PKMs for use in brutal attacks on neighbouring communities during the migratory season.<sup>46</sup>

Ellsberg et al bring to light the issue of lack of accountability for sexual and gender-based violence in South Sudan.<sup>47</sup> Women and children have been raped, gang raped, sexually mutilated, forced into marriages, and sexualized tortured at frightening rates.<sup>48</sup> Across political and ethnic lines, deliberate starvation is occurring.<sup>49</sup> Journalists, activists, human rights defenders, and political dissidents face repression, censorship, and arrest.<sup>50</sup> Disregarding the rule of law exists in more significant amounts.

According to the UN Human Rights report, while many things obstruct accountability in South Sudan, the lack of a political transition in South Sudan exacerbates the problem since the people who are alleged to have committed international crimes continue to hold positions of power today.<sup>51</sup> Moreover, despite the signing of two peace treaties with accountability provisions in 2015 and 2018, the South Sudanese government has shown a lack of political will to investigate and prosecute international crimes, as well as other serious human rights violations and abuses committed during the conflict, political tensions, and current localized violence.<sup>52</sup>

Similarly, there is also protracted political struggles between the parties to the peace agreement and an inability to address the South Sudan conflict's root causes, such as ethnic tensions and impunity for past human rights violations. Thus, impunity has created an environment favourable to accepting and profiting violence, human rights violations, and abuses.<sup>53</sup>

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<sup>46</sup> United Nations News 'Allies of South Sudan militias must be held accountable: UN human rights report' 15 March 2021 <https://news.un.org/en/story/2021/03/1087352> (accessed 2 May 2021)

<sup>47</sup> M Ellsberg, J Ovince and M Murphy et al 'No safe place: Prevalence and correlates of violence against conflict-affected women and girls in South Sudan' 12 October, 2020 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0237965> (accessed 28 July 2021)

<sup>48</sup> (n 46 above)

<sup>49</sup> Human Rights Council 'Deliberate Starvation and Corruption hallmarks of conflict in South Sudan say UN Human Rights Experts' 20 February 2020 <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25583&LangID=E> (accessed 2 May 2021)

<sup>50</sup> C Du Plessis 'UN human rights report: Accountability long overdue in South Sudan' 27 February 2020 Africa Portal <https://www.africaportal.org/features/un-human-rights-report-accountability-long-overdue-south-sudan/> (accessed 02 May 2021)

<sup>51</sup> United Nations 'Human Rights Council Despite renewed political commitment, staggering levels of violence continued across South Sudan for the second successive year, UN experts note' 19 February 2021 <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=26761&LangID=E> (accessed 1 May 2021)

<sup>52</sup> (n 46 above)

<sup>53</sup> (n 6 above)

However even if the conflict in South Sudan has been widely documented and drew significant worldwide attention and various academics, such as Roach,<sup>54</sup> have studied the concept of accountability in South Sudan, the discussion on accountability for international crimes has primarily been dominated by the UN and INGOs.<sup>55</sup> Amnesty International, Human Rights Watch, AU and UNMISS, have all called for the establishment of accountability mechanisms to address the issue of impunity for international crimes in South Sudan.<sup>56</sup> However, academic scholars such as Owiso,<sup>57</sup> and Watchowski,<sup>58</sup> only examined the capability of the proposed HCSS to deliver sustainable transitional justice solutions to South Sudan and how the AU can effectively contribute to its success, neglecting the pertinent issue of accountability for international crimes. A chasm that this study seeks to bridge.

Accountability measures in South Sudan are thus critical interventions for redressing past breaches and avoiding future mass atrocities and a return to a catastrophic conflict. Moreover, the security of South Sudan is dependent on transitional justice since the country urgently needs accountability and restorative justice to foster national healing and reconciliation.

## **1.8 Limitations and delimitations**

South Sudan has been ravaged by war since 1955. This study only examines the prospects for accountability for international crimes committed during the civil war which started in December 2013 and ended in September 2018. Similarly, Chapter 5 of the R-ARCSS envisages creating the HCSS, CTRH, and the CRA. The paper will exclusively cover the HCSS since many victims have faith in the court given the present absence of justice in South Sudanese courts.

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<sup>54</sup> Roach, S. C. (2016). South Sudan: a volatile dynamic of accountability and peace. *International Affairs*, 92(6), 1343-1359.

<sup>55</sup> Human Rights Watch 'South Sudan: African Union Disappoints on Justice Rights Groups Urge AU to Deliver on Commitments for Accountability' <https://www.hrw.org/news/2021/08/05/south-sudan-african-union-disappoints-justice> (accessed 22 August 2021)

<sup>56</sup> ( n 10 above)

<sup>57</sup> O Owiso 'The proposed hybrid court for South Sudan: Moving South Sudan and the African Union to action against impunity' (2018) Vol. 18 No. 2 *African Journal on Conflict Resolution* <https://www.ajol.info/index.php/ajcr/article/view/182088> (accessed 1 May 2021)

<sup>58</sup> ( n 43 above)

## **1.9 Delineation and Structure of the Research**

This dissertation is divided into five chapters:

Chapter 1 sets out the research questions and serves as the justification of the study. Chapter 2 discusses the international normative standards applicable to the civil war. It does so by giving a brief historical background of the conflict, discussing the international crime committed in the South Sudan civil war, and further discussing the specific elements of the crimes committed. Chapter 3 discusses South Sudan's obligations to address international crimes. It does so by looking at its duty to investigate, prosecute or punish in line with the Geneva conventions, Rome Statute, CAT, UN resolutions and soft laws. This chapter also examines what South Sudan has done to address international crimes through its judiciary, criminal justice system and other mechanisms. Chapter 4 discusses the Hybrid Court of South Sudan (HCSS) as outlined in Chapter 5 of the R-ARCSS. It looks at the nature and scope of the HCSS, the challenges encountered, assesses the status of implementation and how the international community's can support its operationalization to address the absence of accountability in South Sudan. Finally, chapter 5 will conclude the findings and make appropriate recommendations.

## CHAPTER 2

# OVERVIEW OF SOUTH SUDAN'S CIVIL WAR AND INTERNATIONAL CRIMINAL LAW NORMATIVE FRAMEWORK APPLICABLE

### 2.1 Introduction

This chapter discusses how international crimes are defined under international law and how international legal norms apply to South Sudan's civil conflict. There are two main parts to this chapter. The first part covers South Sudan's civil conflict, which lasted from December 2013 to September 2018. It also outlines the history of the conflict, classification and discusses the international crimes committed during South Sudan's civil war. The second part highlights the elements of the crimes perpetrated in the context of the civil war. The last section of this chapter is the conclusion.

### 2.2 History of South Sudan's Civil War

South Sudan achieved independence from Sudan on 9 July 2011, marking the conclusion of Africa's longest-running civil war.<sup>59</sup> This came after the culmination of a six-year peace process which began with the signing of the Comprehensive Peace Agreement (CPA) in 2005.<sup>60</sup> South Sudanese people voted by an overwhelming majority in a January 2011 referendum to secede from Sudan and become Africa's youngest nation.<sup>61</sup>

On 15 December 2013, just two years after its independence, it descended into a national, political, and ethnic civil conflict following a political standoff between President Salva Kiir Mayardit and Vice President Riek Machar, Teny Dhurgon.<sup>62</sup> Which later culminated in Machar's removal as vice president. The Dinka ethnic group sided with Kiir during the standoff, while those from the Nuer ethnic group sided with Machar.<sup>63</sup> In Juba, government troops murdered Nuer soldiers and civilians based on their ethnicity and suspected political connections.<sup>64</sup> Kiir claimed that Machar attempted a coup during the upheaval, removed him, and instability quickly spread to the Jonglei, Upper Nile, and the Unity States.<sup>65</sup> Riek Machar had been the Vice President of the Republic of South Sudan from 2011 until his dismissal in

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<sup>59</sup> United Nations Mission in the Republic of South Sudan (UNMISS) 'Conflict in South Sudan: A Human Rights Report' 8 May 2014, para 2

<sup>60</sup> BBC South Sudan Profile Overview <https://www.bbc.com/news/world-africa-14019208> 7 July 2011 (accessed 23 August 2021)

<sup>61</sup> (n 1 above)

<sup>62</sup> (n 37 above) 59-86

<sup>63</sup> (n 59 above)

<sup>64</sup> (n 58 above) para 2-7

<sup>65</sup> UNMISS (n 59 above) para 40

July 2013. 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.<sup>66</sup>

In response to the ongoing conflict, the UN Security Council approved the quick deployment of about 6,000 peacekeeping troops in December 2013 to assist in nation-building operations, in addition to the 7,600 soldiers that were already in the country.<sup>67</sup> In an unusual step in May 2014, the Security Council authorized the use of force by UN forces to change the mission's mandate from nation-building to the protection of civilians.<sup>68</sup> It was reported that UNMISS Protection of Civilians (POC) sites sheltered almost 35,000 people in its facilities on 21 December 2013, just six days after the conflict began. By 23 December 2013, a total of about 81,000 individuals were displaced by the violence.<sup>69</sup>

Since reprioritizing safety, the UN Mission in the Republic of South Sudan (UNMISS) has been at the helm of monitoring, investigating, verifying, and reporting human rights and international law violations in South Sudan.<sup>70</sup> In 2016, the United Nations approved the deployment of an additional 4,000 troops as part of a regional security force.<sup>71</sup>

Kiir signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) with Machar in August 2015, under fear of international sanctions and after many rounds of talks facilitated by the Intergovernmental Authority on Development (IGAD).<sup>72</sup> To lay the groundwork for elections, the ARCSS proposed an ambitious post-conflict transition period that included reforms to the security, governance, and justice sector and established transitional justice mechanisms such as the HCSS and the adoption of a Constitution.<sup>73</sup> Machar returned to Juba in April 2016 and was re-sworn in as Vice President after spending more than two years outside the country.<sup>74</sup> However, within months the ARCSS collapsed in July 2016 when government and opposition forces fought each other for four days in Juba, displacing tens of thousands of people once again.<sup>75</sup> As a result, Machar fled the country but was placed under house arrest in Pretoria, South Africa, under an agreement between the

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<sup>66</sup> (n 58 above) para 41

<sup>67</sup> United Nations Mission in the Republic of South Sudan (UNMISS) 'Online Fact Sheet' <https://peacekeeping.un.org/en/mission/unmiss> (accessed 28 August 2021)

<sup>68</sup>(n 62 above)

<sup>69</sup> UNMISS Report (n 58 above) para 49

<sup>70</sup> United Nations Mission in South Sudan (UNMISS) 'Interim Report on Human Rights: Crisis in South Sudan' 15 December-31 January 2014 <https://unmiss.unmissions.org/documents?page=4> (27 August 2021)

<sup>71</sup> N Arenas-García 'The UNMIS in South Sudan: Challenges & Dilemmas. Institute of Studies on Conflicts and Humanitarian Action' (2010) 5

<sup>72</sup> L De Vries & M Schomerus 'South Sudan's civil war will not end with a peace deal' (2017) *Peace Review*, 29(3), 333-340.

<sup>73</sup> Resolution of the Conflict in the Republic of South Sudan (ARCSS) 2015

<sup>74</sup> (n 68 above) 333-340

<sup>75</sup> M Gebremichael, AA Kifle, & A Kidane 'South Sudan Conflict analysis and Insight.' August 2018, Institute for Peace and Security Studies Addis Ababa University, August Vol 2, 1-14

South African government, President Salva Kiir, South Sudan's neighbours and critical international states.<sup>76</sup>

Following the July 2016 crisis, the number of armed groups increased. As a result, violence spread throughout the country, submerging previously peaceful regions such as the *Equatoria* region in the south, marking them with the widespread commission of serious international crimes.<sup>77</sup> Armed groups also began targeting individuals based on their ethnic origins from the outset of the conflict, committing rape and sexual assault, destroying property, plundering towns, and recruiting children into their ranks.<sup>78</sup>

In 2017 and 2018, a series of ceasefires were negotiated and subsequently violated by the two sides and other parties.<sup>79</sup> Following almost five years of civil conflict, Kiir and Machar took part in June 2018 in talks mediated by Uganda and Sudan.<sup>80</sup> Later that month, Kiir and Machar signed the Khartoum Declaration Agreement, which contained a ceasefire and a commitment to discuss an end-of-war power-sharing arrangement.<sup>81</sup> Kiir and Machar signed a definitive ceasefire and power-sharing deal to 'revitalize' the ARCSS, culminating in the signing of R-ARCSS in August 2018 despite occasional breaches in the following weeks. Following this accord, the government and Machar's opposition group and numerous other rebel factions signed a peace deal to end the civil war.<sup>82</sup>

The deal, dubbed the Revitalized Agreement on the Resolution of the South Sudanese Conflict (R-ARCSS), featured a new power-sharing system and restored Machar to the position of Vice President.<sup>83</sup> Machar returned to South Sudan in late October 2018 for a national peace celebration commemorating the end of the civil conflict. However, allegations of ongoing assaults and breaches, along with the breakdown of numerous prior peace agreements, raised worries about the fragile ceasefire viability.<sup>84</sup>

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<sup>76</sup> P Fabricius 'Pretoria places Machar under 'house arrest' 14 December 2016 Institute of Security Studies (ISS) <https://issafrica.org/iss-today/pretoria-places-machar-under-house-arrest> (accessed 28 August 2021)

<sup>77</sup> (n 70 above) 1-14

<sup>78</sup> DH Johnson 'Briefing: the crisis in South Sudan. African Affairs' (2014) 113(451), 300-309.

<sup>79</sup> (n 78 above)

<sup>80</sup> C Mwakideu 'Uganda and Sudan begin mediation talks in South Sudan's conflict' *Deutsche Welle (DW)* <https://www.dw.com/en/uganda-and-sudan-begin-mediation-talks-in-south-sudans-conflict/a-44386274> (accessed 28 August 2021)

<sup>81</sup> (n 73 above) 300-309

<sup>82</sup> T Maphasa 'Finding Peace in Uncertain Times: South Sudan and the Revitalised Peace Process' September 2020 Occasional Paper

<sup>83</sup> SA Onapa 'South Sudan power-sharing agreement R-ARCSS: The same thing expecting different results' (2019) *African Security Review*, 28(2), 75-94.

<sup>84</sup> (n 77 above) 75-94.



The situation in South Sudan quickly escalated into a full-blown humanitarian emergency. At the end of the six-year civil conflict,<sup>85</sup> it was estimated that 400,000 people were murdered, and another roughly four million were internally displaced.<sup>86</sup> More than two million have fled to neighbouring countries such as Ethiopia, Kenya, Sudan, and Uganda in a desperate bid for safety.<sup>87</sup> It is believed that 85 per cent of IDPs, mostly women and children, have fled to UNMISS Protection of Civilians (POC) camps, which house approximately 180 0000 people in search of safety.<sup>88</sup>

Overall, South Sudan's independence has been defined by prolonged intertribal conflict fuelled by political competition for control of the country's oil and mineral resources, factional infighting, nepotism, and patronage within government and impunity for grave human rights violations.<sup>89</sup>

### 2.3 Classification of the civil war

South Sudan's civil war is classified as a non-international armed conflict per the Geneva Conventions' common article 3, the 1977 Additional Protocol II and customary international law on non-international armed conflicts.<sup>90</sup> According to the International Committee of the Red Cross (ICRC), the Geneva Conventions distinguishes two types of armed conflicts: international armed conflicts between two or more states; and non-international armed conflicts involving government troops and armed non-governmental organizations.<sup>91</sup> The laws governing the conduct of war are founded on a precarious balancing of humane principles and military necessity.<sup>92</sup> These two fundamental concepts give rise to other fundamental principles, namely the principles of distinction. This notion compels the parties to an armed conflict to make distinctions between fighters and civilians and between military and civilian objects.<sup>93</sup> Under the proportionality principle, attacks on legitimate military targets are forbidden if the attack may reasonably be expected to result in excessive civilian harm.<sup>94</sup> The South Sudan

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<sup>85</sup> United Nations Office of the High Commissioner for Refugees (UNHCR) <https://www.unhcr.org/south-sudan-emergency.html> (accessed 28 August 2021)

<sup>86</sup> (n 85 above)

<sup>87</sup> A Mawadza, & S Carciotto 'South Sudan: A young country divided by civil war' (2017) Scalabrini Institute For Human Mobility In Africa 56(7), 1-17.

<sup>88</sup> International Organization for Migration (IOM) South Sudan 'Lessons Learned from South Sudan Protection of Civilian Sites 2013–2016' [https://doc.rero.ch/record/306072/files/08-If\\_We\\_Leave\\_We\\_Are\\_Killed.pdf](https://doc.rero.ch/record/306072/files/08-If_We_Leave_We_Are_Killed.pdf) (accessed 29 August 2021)

<sup>89</sup> United Nations Commission on South Sudan 'United Nations Human Rights Council Transitional justice and accountability: a roadmap for sustainable peace in South Sudan' 7 October 2020 (A/HRC/45/CRP.4)

<sup>90</sup> Article 3 of the 1949 Geneva Conventions, Art. 1 of Additional Protocol II

<sup>91</sup> International Committee of the Red Cross 'How is the Term Armed Conflict Defined in International Humanitarian Law?' (2008) <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> (accessed 28 August 2021)

<sup>92</sup> Convention with Respect to the Laws and Customs of War by Land and its Annex, Regulations Respecting the Laws and Customs of War on Land

<sup>93</sup> International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 Entry into force: 26 January 1910

<sup>94</sup> (n 86 above)

parties to the conflict have targeted civilians indiscriminately, recruited child soldiers, and raped them.<sup>95</sup> It is clear from the above that all parties to the conflict disregarded their obligations to maintain a clear distinction between civilian and military objects at all times.<sup>96</sup> Therefore, the principles of respect for humanity and military necessity governing non-international armed conflict apply to the civil war in South Sudan.<sup>97</sup>

For a conflict to be classified as a non-international armed conflict, it has to satisfy the following criteria: Firstly, the hostilities must reach a minimum level of intensity.<sup>98</sup> The length of the conflict, the large number of displaced people fleeing the conflict, the Security Council's involvement, and the high death toll are all indicators that the intensity criteria for South Sudan civil war have been met. Similarly, fighting and other forms of violence have continued since then, justifying the designation of the situation as a non-international armed conflict.<sup>99</sup>

Secondly, at least one side must be a non-state armed group that demonstrates a particular level of organization to qualify as a party. Government forces are presumed to meet organizational characteristics.<sup>100</sup> South Sudan's civil war parties included Government troops and opposition forces commanded by a legitimate commander who undertook consistent and coordinated military operations for six years at the necessary intensity as required by Additional Protocol II.<sup>101</sup> As far as the organization went, both the SPLA and the SPLM/A-IO were well-prepared and armed from the start, contributing to the conflict's quick escalation.<sup>102</sup> Similarly, the National Salvation Front (NAS) passed organizational standards because it mainly comprises SPLA-IO defectors.<sup>103</sup> Its purported involvement in hostilities demonstrates that it can organise and carry out military operations and challenge government power.<sup>104</sup>

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<sup>95</sup> United Nations General Assembly 'Report of the Commission on Human Rights in South Sudan' 23 February 2018 Human Rights Council Thirty-seventh Session Agenda item 4 (A/HRC/37/71)

<sup>96</sup> United Nations General Assembly 'Report of the Commission on Human Rights in South Sudan' 25 February-22 March 2019 Human Rights Council Fortieth session (A/HRC/40/69)

<sup>97</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

<sup>98</sup> Geneva Academy Rulac 'Non international armed conflict ' <https://www.rulac.org/classification/non-international-armed-conflicts> (accessed 8 September 2021)

<sup>99</sup> (n 89 above) para. 16

<sup>100</sup> (n 91 above)

<sup>101</sup> Geneva Conventions art 3 & Protocol II art 1(1).

<sup>102</sup> Final report of the Panel of Experts on South Sudan submitted pursuant to resolution 2521 (2020) (S/2021/365) [EN/AR]

<sup>103</sup> International Crisis Group, "Salvaging South Sudan's Fragile Peace Deal", 13 March 2019; IISS Armed Conflict Database, South Sudan <https://www.crisisgroup.org/africa/horn-africa/south-sudan/270-salvaging-south-sudans-fragile-peace-deal> (accessed 9 September 2021)

<sup>104</sup> Military and Security updates, 2018, 2019; "South Sudan army, NAS rebels clash near RDC border", Sudan Tribune, 8 February 2019.

## 2.4 Legal Framework Applicable

Numerous legal regimes apply to South Sudan's civil war, including international human rights law, international criminal law (ICL), and international humanitarian law; however, this dissertation I focuses exclusively on (ICL) and those that intersect with ICL. The above areas of law are inextricably linked. They occasionally overlap in terms of the issues they address. Still, collectively they establish requirements for governments, non-state entities, and their agents during times of conflict and impose penalties on both the state and the individual who fail to meet those minimum standards.

Similarly, it is necessary for ensuring that perpetrators of international crimes are held accountable under the appropriate accountability mechanisms.<sup>105</sup> As a result, international criminal law is the only legal framework suitable for examining the nature of the violations. Given the broad and systematic character of many of the violations and evidence of coordination and preparation. Violations such as crimes against humanity (murder, rape, and other acts of sexual violence) and crimes against humanity, as well as enforced disappearance and incarceration, all amount to what may constitute international crimes.<sup>106</sup> One of the regimes that intersect with ICL is international customary law which is discussed below.

### 2.4.1 Customary international law

International law regulates internal conflict at two different levels: customary law; and treaty law. Due to this interplay, specific treaty provisions have gradually become part of customary international law.<sup>107</sup> According to Henckaerts, customary international law is a collection of unwritten standards derived from commonly recognized or usual practices governing armed conflict.<sup>108</sup> It is universally applicable – regardless of treaty law – and is based on extensive and almost constant State practice recognized as law (*Opinio Juris*).<sup>109</sup> Such that, all Geneva obligations apply *erga omnes*—that is, to all signatories and humanity as a whole—regardless

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<sup>105</sup> DR Mekonnen & JL Pretorius 'Prosecuting the main perpetrators of international crimes in Eritrea: possibilities under international law. *Journal for Juridical Science*, (2008) 33(2), 76-108.

<sup>106</sup> (n 58 above)

<sup>107</sup> Article 1 of the Conventions requires that signatories and their nationals 'respect and., ensure respect" for the Conventions "in all circumstances.' See International Military Tribunal at Nuremberg, Judgment and Sentences, Oct. 1, 1946,

reprinted in 41 AM. J. INT'LL. 172, 248-49 (1947) [hereinafter Military Tribunal].

<sup>108</sup> JM Henckaerts 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) *International Review of the Red Cross*, 87(857), 175-212.

<sup>109</sup> (n 101 above) 175-212

of alleged necessity, reciprocity, or reprisals.<sup>110</sup> In South Sudan, Customary International law is vital as it covers gaps and the absence of explicit treaty provisions applicable to the civil war.<sup>111</sup>

In terms of its treaty obligations, South Sudan is a state party to the four 1949 Geneva Conventions and their two Additional Protocols as of 12 June 2014.<sup>112</sup> Accordingly, the actors of the civil war in South Sudan, namely: the Sudan People's Liberation Movement (SPLM), Sudan People's Liberation Movement/Army-in-Opposition (SPLM/A-IO) and the National Salvation Front (NAS), are required to adhere to Common Article 3 of the 1949 Geneva Conventions. In addition, it establishes minimum standards for the proper treatment of non-combatants and Additional Protocol II, which protects victims of non-international armed conflicts.<sup>113</sup>

The International Court of Justice (ICJ) authoritatively held that common Article 3 of the 1949 Geneva Conventions reflects customary international law in the *Nicaragua* case.<sup>114</sup> The same is true for article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>115</sup> and the core of Additional Protocol II of 1977 in non-international armed conflict.<sup>116</sup>

Customary international law is also crucial in deciding who should be deemed an actor in South Sudan's civil conflict. In practice, customary international law is essential in evaluating whether NAS and SPLA-IO fulfilled Protocol II's criterion of territorial control requirements. One could deduce that NAS operations are covered by Common Article 3 and customary rules applicable to non-international armed conflicts. As a result, NAS perpetrators are susceptible to prosecution for common Article 3 breaches and violations of customary law represented in common Article 3.<sup>117</sup> From the above, customary international law protects essential freedoms for all participants regardless of whether they are citizens of a state, country, or belligerent

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<sup>110</sup> J Paust 'The importance of customary international law during armed Conflict' (2006) ILSA Journal of International & Comparative Law, 12(2), 601-606.

<sup>111</sup> (n 93 above)

<sup>112</sup> South Sudan: International treaty status <https://www.icj.org/cijlcountryprofiles/south-sudan/south-sudan-introduction/south-sudan-international-treaty-status/> (accessed 24 July 2021)

<sup>113</sup> International Committee of the Red Cross (ICRC) 'Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Conflict not of an international character.

<sup>114</sup> ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*, Judgement of 27 June 1986, Merits; online: <http://www.icj-cij.org>

<sup>115</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954

<sup>116</sup> Prosecutor v Dusko a/k/a Dule Decisions on the Defence motion for interlocutory Appeal on Jurisdiction 2 October 1995 para 96

<sup>117</sup> (n 95 above)

that has signed a treaty enshrining such rights.<sup>118</sup> The following section will now look at how the international criminal law regime applies to South Sudan.

## 2.4.2 International Criminal law

Specific categories of international human rights and humanitarian law violations may constitute international crimes under international criminal law. For example, the Rome Statute<sup>119</sup> and Geneva Conventions define international crimes encompassing war crimes, genocide, aggression, and crimes against humanity.<sup>120</sup>

The criminal culpability for international crimes extends to the direct perpetrators of a crime and those who directed, planned, or permitted the crimes to occur.<sup>121</sup> Roht-Arriaza argues that states are vested with the primary duty of investigating and prosecuting these international crimes.<sup>122</sup> According to Cassese,<sup>123</sup> international criminal law requires that perpetrators of international crimes be held individually accountable, including military commanders and civilian officials who order the commission of such crimes.<sup>124</sup> The Rome Statute's preamble states that the role of the ICC jurisdiction is only to supplement the authorities of national criminal courts, and it does not intend to replace it. Every state should exercise its criminal jurisdiction against individuals responsible for international crimes. The ICC comes in only when domestic courts are unable or unwilling to act.<sup>125</sup>

Under ICL, a military commander can be held liable for crimes committed by forces under his effective command and control or failing to exercise proper control over such parties.<sup>126</sup> In its 2018 report, the UN Commission in South Sudan found that several commanders from the SPLA, SPLA-IO, NAS, as well as two governors of states and a county commissioner, committed, planned, ordered, aided and abetted killings, arbitrary detention, torture or cruel, inhuman or degrading treatment, and enforced disappearance of individuals detained during the civil war.<sup>127</sup> This was based on the fact that parties to the conflicts military hierarchies

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<sup>118</sup> D Murray 'How International Humanitarian Law Treaties Bind Non-State Armed Groups. *Journal of Conflict and Security Law*' (2015) 20(1), 101-131.

<sup>119</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, art 5, 6, 7

<sup>120</sup> Open Society Foundations Fact Sheet on International Crimes [https://www.justiceinitiative.org/uploads/cf498f48-0f30-453a-9e4e-36701512f646/mx-factsheet-icl-20160603\\_0.pdf](https://www.justiceinitiative.org/uploads/cf498f48-0f30-453a-9e4e-36701512f646/mx-factsheet-icl-20160603_0.pdf) (accessed 1 August 2021)

<sup>121</sup> article 28 of the Rome Statute

<sup>122</sup> N Roht-Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) *Calif. L. Rev.*, 78, 449.

<sup>123</sup> A Cassese 'International criminal law' (2003a) Oxford: Oxford University Press.

<sup>124</sup> I Marchuk 'Fundamental Concept of Crime in International Criminal Law' (2015) Springer.

<sup>125</sup> (n 117 above)

<sup>126</sup> (n 112 above) art 28

<sup>127</sup> (n 88 above) para 534-539

operated effectively in issuing, transmitting, and enforcing commands.<sup>128</sup> Given the evidence of working lines of communication and repeating troop behaviour patterns, there are reasonable grounds to believe that commanders were aware of or had reason to be aware of the activities of the soldiers under their charge.<sup>129</sup> However, the frequency of the infractions and the lack of examples of punishment demonstrate that the commanders failed to take reasonable preventative or punitive measures.<sup>130</sup>

Similarly, it was established that in several instances, the same individuals committed, planned, commanded, and aided and abetted the atrocities.<sup>131</sup> According to OHCHR, perpetrators of international crimes are not absolved of criminal culpability because they acted on superior instructions since orders to commit such crimes are illegal.<sup>132</sup> Similarly, a civilian leader who is aware of or consciously disregards information indicating that subordinates under their adequate supervision and control are committing crimes will incur criminal liability.<sup>133</sup>

It is vital to understand how international crimes committed in South Sudan are to be assigned criminal culpability. Similarly, investigating grave crimes committed during South Sudan's civil conflict requires categorizing these violations to determine whether they constitute international crimes and, if so, which international criminal categories they fall. The following section discusses this.

## 2.5 International crimes

South Sudan's civil war has resulted in many instances of egregious human rights abuses and grave breaches of humanitarian law committed by both the SPLA and SPLA IO and its allies, for which they may incur criminal liability on an individual basis.<sup>134</sup> This subsection will now discuss international crimes, namely war crimes, genocide, aggression, and crimes against humanity deemed to have been committed in the South Sudan civil war.

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<sup>128</sup> UNMISS 'Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile' April/ May 2015 <https://unmiss.unmissions.org/documents?page=4> ( 27 August 2021)

<sup>129</sup> (n 114 above) para 105

<sup>130</sup> (n 120 above) 534-539

<sup>131</sup> UNMISS (n above 123) 534-539

<sup>132</sup> Office of the High Commission for Human Rights (UNOHCHR) 'Attributing individual Responsibility for violations of international human rights and humanitarian law in the United Nations Commission of Inquiry Fact finding missions and other investigations' (2015) <https://ohchr.org/Documents/Publications/AttributingIndividualResponsibility.pdf> (accessed 31 August 2021)

<sup>133</sup> (n 125 above) 20

<sup>134</sup> AUCISS (n 19 above) 88-771

## 2.5.1 War Crimes

The Rome Statute defines war crimes as severe violations of the laws and customs applicable to international and non-international armed conflict.<sup>135</sup> In contrast to genocide and crimes against humanity, war crimes may be perpetrated against a wide variety of victims, including combatants and non-combatants, depending on the nature of the crime. Protected persons in non-international armed conflicts include those who have surrendered their weapons and those who have been declared "hors de combat" owing to sickness, wounds, incarceration, or other reasons.<sup>136</sup> There is credible evidence that both SPLA-IO factions and linked armed organizations targeted civilians, primarily based on perceived political or ethnic affiliation, and murdered, abducted, raped, and sexually abused them. Additionally, they plundered and destroyed villages, obstructing humanitarian aid delivery and murdering humanitarian personnel. They are also responsible for enlisting children in the armed forces.<sup>137</sup>

### 2.5.1.1 Elements of the Crime

In contrast to genocide and crimes against humanity, war crimes must always occur during an armed conflict.<sup>138</sup> Therefore, the crimes committed in South Sudan constitute war crimes within the meaning of Article 8 of the Rome Statute and as severe breaches of common Article 3 of the four 1949 Geneva Conventions.<sup>139</sup> They are divided into different categories: war crimes against persons requiring protection, war crimes against those providing humanitarian assistance and peacekeeping operations, war crimes against property and other rights and prohibited methods/means of warfare.<sup>140</sup>

War crimes contain two main elements:

A contextual factor: the conduct occurred during and related to an international/non-international armed conflict.

A mental element: intent and awareness about both the individual act and the contextual aspect.

#### A. Interpretation of War Crimes:

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<sup>135</sup> ICC Statute, Article 8 (cited in Vol. II, Ch. 44, § 3).

<sup>136</sup> E Hays 'War crimes in internal armed conflicts' (2008) p 14

<sup>137</sup> (n 127 above) 771-779

<sup>138</sup> ICC Statute, Article 8

<sup>139</sup> Article 8 of the Rome Statute, common Article 3 of the four 1949 Geneva Conventions

<sup>140</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art. 35(1).

**a) Acts or omissions.**

War crimes may take the form of either actions or omissions. Unlike crimes against humanity, which involve performing prohibited actions on a massive or systematic scale, any grave breach of international humanitarian law is a war crime.<sup>141</sup>

**b) Perpetrators.**

They are committed by members of the armed forces or civilians against members of the armed forces, civilians, or protected objects of the opposing side, as shown by laws, military manuals, and case law.<sup>142</sup>

**c) Mental element.**

The *Delalić* case has established that war crimes are breached knowingly, i.e., purposefully (*dolus directus*) or carelessly (*dolus incognitus*) (*dolus eventualis*). The specific mental component varies according to the nature of the offence.<sup>143</sup> During the South Sudan civil war, war crimes were committed on a large scale, and the next section will go into more depth about some of these crimes.

### **2.5.1.2 Examples of war crimes committed in the South Sudan civil war:**

The conflicting parties to the South Sudan civil war used harsh tactics, including targeting and killing civilians in their homes, hospitals, and the United Nations Protection of Civilians (POC) sites.<sup>144</sup> Additionally, the parties attacked and killed humanitarian workers and blocked humanitarian aid distribution.<sup>145</sup> They devastated cities and vast swaths of rural areas, displacing millions of people and forcing thousands to seek shelter in POC camps.<sup>146</sup> Thus, the consideration of war crimes is essential for determining the magnitude and severity of the crimes and the possibilities for accountability for those crimes. The government of South

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<sup>141</sup> ICRC Customary Law 'Rule 156. Serious violations of international humanitarian law constitute war crimes.'

<sup>142</sup> K Dörmann 'Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary' (2003) Cambridge University Press pp. 34–37 and 391–393

<sup>143</sup> *Delalić* case, Case No. IT-96-21-T, Judgment, ICTY Trial Chamber II, 16 November 1998, §§ 437 and 439

<sup>144</sup> UNMISS 'Report on attack on civilians in Bor and Bentiu April 2014' <https://unmiss.unmissions.org/documents?page=5> (accessed 15 August 2021)

<sup>145</sup> United Nations Office of the High Commissioner for Human Rights (UN OHCHR) South Sudan: UN condemns killing of one aid worker and attack against humanitarian convoy in Unity State 23 May 2021 <https://reliefweb.int/report/south-sudan/south-sudan-un-condemns-killing-one-aid-worker-and-attack-against-humanitarian> (accessed 16 July 2021)

<sup>146</sup> (n 138 above)



Sudan bears the primary responsibility for investigating, prosecuting, and punishing such crimes and compensating victims.<sup>147</sup>

### **a) The Prohibition Against Targeting Civilians**

According to Fleck, civilians who are not actively involved in hostilities are not lawful targets.<sup>148</sup> Thus, parties to the conflict need to clearly distinguish between civilians and combatants as directly targeting and launching attacks on civilians constitute a war crime.<sup>149</sup>

The UNMISS recorded that both sides to the conflict targeted civilians regularly during the war in South Sudan, both as direct targets and as victims of indiscriminate attacks. The civilians that were targeted were not participating in hostilities.<sup>150</sup> For example, the killings of Nuer civilian males in Juba and the targeting of the Dinka in Bor and Malakal were based on their ethnic origins.<sup>151</sup> Similarly, armed groups killed approximately 50 individuals from the Nuer community seeking refuge in a UN facility in Bor in April 2014.<sup>152</sup> In large cities — Bor and Malakal in Upper Nile being the most severe - combat occurred through residential areas without regard for civilians.<sup>153</sup> Rural regions, like Baliet County, also saw violent clashes inside and between communities.<sup>154</sup> In addition, armed elements often invaded villages and individual tukuls with the express purpose of targeting civilians, particularly the most vulnerable people who were unable to escape.<sup>155</sup>

### **a) Violence aimed at spreading terror among the civilian population**

The civilian population and specific individuals must not be subjected to acts or threats of violence with the primary objective of instilling fear in the civilian population.<sup>156</sup>

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<sup>147</sup> Human Rights Watch 'South Sudan: Killings, Rapes, Looting in Juba Arms Embargo, Additional UN Sanctions Needed' 15 August 2016 <https://www.hrw.org/news/2016/08/15/south-sudan-killings-rapes-looting-juba> (accessed 15 August 2021)

<sup>148</sup> D Fleck (ed.) 'The Handbook of Humanitarian Law in Armed Conflict' (1995) 120 Oxford: Oxford University Press

<sup>149</sup> Article 13, Additional Protocol II to the Geneva Conventions. Article 3, Universal Declaration of Human Rights; Common Article 3(a), Geneva Conventions; Rules 1 and 7,

International Committee of the Red Cross, Customary International Humanitarian Law, vol. 1: Rules (2009).

<sup>150</sup> United Nations Mission in the Republic of South Sudan (UNMISS) 'Conflict in South Sudan: A Human Rights Report' 8 May 2014 <https://unmiss.unmissions.org/conflict-south-sudan-human-rights-report-8-may-2014> (accessed 16 July 2021)

<sup>151</sup> Human Rights Watch 'South Sudan: Ethnic Targeting, Widespread Killings' 16 January 2014

<https://www.hrw.org/news/2014/01/16/south-sudan-ethnic-targeting-widespread-killings> (accessed 15 August 2021)

<sup>152</sup> (n 143 above)

<sup>153</sup> (n 144 above) 1-62

<sup>154</sup> (n 145 above) 1-62

<sup>155</sup> UNMISS (n 143 above) 1-62

<sup>156</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977

UNMISS reported that both government and opposition troops perpetrated acts of violence with the primary objective of instilling fear among the civilian population.<sup>157</sup> Human Rights Watch reported that on 15 December 2013, organized groups of government security forces, mainly the SPLA (Dinka government security personnel), used heavy weapons to target and murder Nuer men in Juba within 24 hours of this first battle.<sup>158</sup> Thousands of armed Nuer then joined the Riek-led resistance to avenge the murder and other atrocities committed in the city against the Nuer people.<sup>159</sup> This trend was seen across Juba, with identical techniques observed in many areas, implying structure and preparation.<sup>160</sup> As of 22 April, about 32,000 civilians fled their homes in search of safety at UNMISS PoC sites in Juba out of fear of being attacked and killed.<sup>161</sup>

Similarly, UNMISS observed that opposition troops invaded large population centres like Bor and Malakal town. They captured and killed some of the remaining Dinka residents and burnt the markets by 31 December 2013.<sup>162</sup> In Malakal, opposition troops were conducting house-to-house searches and followed civilians into rural areas who attempted to flee the killings in Malakal town.<sup>163</sup> The dread of returning to large cities was so intense that many died of thirst while hiding in the wilderness.<sup>164</sup> The atrocities committed by opposition troops during their assaults on towns and villages and their endless chase of people into the jungle indicate that such operations were conducted in part to terrify the civilian population.<sup>165</sup>

#### **b) Destruction of civilian property**

Attacks against civilian targets and attacks not aimed at a particular military goal are prohibited under international law. Plundering a town or location is a war crime, the same holds for damaging or taking an enemy's property unless the situation requires such destruction or seizure of the battle.<sup>166</sup>

UNMISS Satellite imagery revealed the devastating degree to which civilian areas were destroyed, leaving South Sudan civilians homeless and vulnerable to attacks, food insecurity

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<sup>157</sup> (n 143 above) para 271

<sup>158</sup> Human Rights Watch (n 144 above)

<sup>159</sup> Human Rights Watch 'South Sudan's New War Abuses by Government and Opposition Forces' 7 August 2014 <https://www.hrw.org/report/2014/08/07/south-sudans-new-war/abuses-government-and-opposition-forces> (accessed 31 August 2021)

<sup>160</sup> (n 152 above)

<sup>161</sup> (n 153 above)

<sup>162</sup> (n 143 above) 272

<sup>163</sup> (n 155 above) para 273

<sup>164</sup> (n 155 above) para 274

<sup>165</sup> (n 151 above)

<sup>166</sup> Article 22(2)(e) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind

and illnesses.<sup>167</sup> According to Human Rights Watch's report, between April and June 2015, government forces and allied fighters committed scores of killings, rapes, and widespread burning and pillage of civilian property during a military offensive in Unity State that resulted in forced displacement.<sup>168</sup> Additionally, military forces often utilized artillery and heavy weaponry in rural and urban areas, wreaking havoc on towns and villages across Bor, Leer, Rubkona, and Malakal.<sup>169</sup> The offensive's intentional attacks on civilians and their property amount to war crimes, and the murders and rapes constitute crimes against humanity. Moreover, it is clear from the above that the damage caused was purposefully inflicted.

### **c) Attacks on personnel and objects involved in a peacekeeping mission**

Directing an attack against personnel and objects engaged in a peacekeeping mission according to the United Nations Charter and civilian objects is prohibited and constitutes a war crime.<sup>170</sup> On 19 December 2013, two UNMISS Indian peacekeepers and civilians were shot and killed as an estimated 2,000-armed youth of Lou Nuer ethnic origin surrounded the UNMISS base in Akobo.<sup>171</sup> They also opened fire on South Sudanese civilians from the Dinka ethnic group who had sought refuge inside the compound earlier. UNMISS troops stationed within the facility came under continuous attack while attempting to initiate dialogue with the attackers.<sup>172</sup> UNMISS believes that organized armed groups planned and carried out these attacks in part. Thus, there are reasonable grounds to infer that both sides to the conflict violated the ban on attacks on personnel and objects engaged in peacekeeping missions and committed related war crimes.<sup>173</sup>

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<sup>167</sup> The Independent 'UN images reveal 18,000 destroyed structures in South Sudan region'

<https://www.independent.ie/world-news/un-images-reveal-18000-destroyed-structures-in-south-sudan-region-35603716.html> (accessed 31 August 2021)

<sup>168</sup> Human Rights Watch 'They Burned it All: Destruction of Villages, Killings, and Sexual Violence in South Sudan's Unity State' <https://www.hrw.org/report/2015/07/22/they-burned-it-all/destruction-villages-killings-and-sexual-violence-unity-state> (accessed 31 August 2021)

<sup>169</sup> (n 154 above)

<sup>170</sup>. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI article 51 also see [1] ICC Statute, Article 8(2)(b)(iii) and (e)(iii)

<sup>171</sup> UNMISS 'UNMISS issues preliminary account of Akobo base attack' 20 December 2013

<https://reliefweb.int/report/south-sudan-republic/unmiss-issues-preliminary-account-akobo-base-attack> (accessed 31 August 2021)

<sup>172</sup> (n 164 above)

<sup>173</sup> UNMISS (n 143 above) 275-277

#### **d) Attacks on hospitals, medical units, and personnel**

Attacking hospitals and facilities intended to shelter the wounded, ill, and civilians from the consequences of hostilities is banned and constitute a war crime to the degree that they do not constitute a military objective.<sup>174</sup> Yet, according to reports by Doctors without Borders, opposition troops launched attacks on hospitals, including Malakal Teaching Hospital and Bor State Hospital.<sup>175</sup> Similarly, armed militias or organizations have repeatedly blocked the delivery of humanitarian aid by obstructing transit routes and interfering with the distribution.<sup>176</sup> Between 2013 and 2018, 126 humanitarian workers, the majority of whom were South Sudanese, were killed in ambushes while providing critical assistance to people throughout South Sudan.<sup>177</sup>

They have also used food as a weapon of war.<sup>178</sup> There are thus reasonable grounds to suspect that opposition forces violated the ban on hospital assaults and committed associated war crimes.<sup>179</sup>

### **2.5.2 Crimes Against Humanity**

After World War II, crimes against humanity were included in a treaty in the 1945 Nuremberg Charter for the first time.<sup>180</sup> Since the 1990s, several international treaties have codified crimes against humanity, including the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>181</sup> the Statute of the International Tribunal for Rwanda (ICTR),<sup>182</sup> and the Rome Statute.<sup>183</sup> According to Article 7 of the Rome Statute, crimes against humanity include any act committed as part of a widespread or systematic attack on any civilian population with knowledge of the attack.<sup>184</sup> They are often achieved due to state policy, but non-state armed organizations or paramilitary forces may also commit them.<sup>185</sup> According to Murray, crimes

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<sup>174</sup> Article 27 of the 1899 Hague Regulations also see 1949 Geneva Convention I, Article 19, 21 and 22

<sup>175</sup> Medecins sans Frontieres 'South Sudan conflict: violence against healthcare' [https://msf.lu/sites/default/files/msf-south\\_sudan\\_conflict-violence\\_against\\_healthcare.pdf](https://msf.lu/sites/default/files/msf-south_sudan_conflict-violence_against_healthcare.pdf) (accessed 31 August 2021)

<sup>177</sup> (n 168 above)

<sup>178</sup> H Barry 'Starving Out the Enemy: Withholding food aid as a tactic of war in South Sudan' (2017) Mapping Politics, 8(2).

<sup>179</sup> (n 171 above)

<sup>180</sup> United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945

<sup>181</sup> Statute of the International Tribunal. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.

<sup>182</sup> Statute of the International Criminal Tribunal for Rwanda, 8th November 1994 (UN Doc S/RES/955(1994), Annex, (1994) 33 ILM 1598), OXIO 139.

<sup>183</sup> (n 112 above)

<sup>184</sup> Article 7 of the Rome Statute t

<sup>185</sup> Rome Statute ( n 176 above )

against humanity are an umbrella category of crimes that virtually protect civilian populations in times of war and peace.<sup>186</sup>

Crimes against humanity, unlike war crimes, may be committed in peacetime, and, unlike genocide, they are not always perpetrated against civilians based on their affiliation or identity.<sup>187</sup> They include murder, torture, extermination, enslavement, deportation; imprisonment; torture, persecutions and other inhumane acts listed in paragraph 3.<sup>188</sup>

In the *Galic* case,<sup>189</sup> the ICTY convicted a Bosnian Serb commander for crimes against humanity for acts that were ostensibly war crimes. Schabas notes that this decision may have the unintended effect of making all war crimes involving civilian suffering and harm criminal as crimes against humanity.<sup>190</sup> In addition, the ICTY Statute requires that the attack be committed in the context of an armed conflict; however, in the *Tadic* case, the ICTY has held that under customary international law, a connection with an armed conflict is not required.<sup>191</sup> Similarly, the ICTR Statute requires that the attack have discriminatory elements.<sup>192</sup> At the ICC, the attack need not be discriminatory. However, the crime of persecution requires that the act amounting to persecution be carried out on discriminatory grounds.<sup>193</sup>

### 2.5.2.1 Elements for crimes against humanity

The legal threshold for crimes against humanity is very high. According to Kozak,<sup>194</sup> the *mens rea* component for crimes against humanity necessitates that the accused must have: 1) the intent to do any act or acts; 2) knowledge of the attack on civilians, and 3) knowledge that his activities are a part of that attack.<sup>195</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Kunarac, Kovac and Vukovic*<sup>196</sup> added that in addition to the statutory requirement of an armed conflict, the following sub-elements are necessary:

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<sup>186</sup> AR Murray 'Does International Criminal Law Still Require a Crime of Crimes: A Comparative Review of Genocide and Crimes against Humanity' (2011) Goettingen J. Int'l L., 3, 589.

<sup>187</sup> (n 179 above) 589

<sup>188</sup> Article 7 of Rome Statute

<sup>189</sup> *Galic*, ICTY Trial Chamber Judgment, 1T-98-29, 5 December 2003, para. 151.

<sup>190</sup> A Schabas 'The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone' (2006) Cambridge university press.

<sup>191</sup> *Duško Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, 141

<sup>192</sup> (n 174 above)

<sup>193</sup> (n 112 above)

<sup>194</sup> Kozak, I. (2014). *Mens Rea Elements of Crime against Humanity in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*. Rev. Comp. L., 19, 33.

<sup>195</sup> (n 158 above)

<sup>196</sup> *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY IT-96-23 and IT-96-23/1, Appeals Chamber, Judgement, 12 June 2002; available on <http://www.icty.org>

**(i) A physical element: The attack must be directed against any civilian population.**

In the *Muthaura* case, the ICC Pre-Trial Chamber stated that the term any civilian population has generally been interpreted to mean groups identifiable by nationality, ethnicity, or other distinguishing features.<sup>197</sup> This means the civilian population targeted may include a group defined by its (perceived) political affiliation.<sup>198</sup> During the South Sudan civil conflict, most of these attacks targeted civilians based on their ethnic background and political affiliation.<sup>199</sup>

The Human Rights Watch documented how government and aligned fighters attacked 40 villages in opposition-controlled parts of southern Unity, killing at least 232 civilians and injuring many more.<sup>200</sup> They also looted and burned homes, used rape as a weapon of war against at least 120 women and girls, and ordered civilians to flee their villages.<sup>201</sup> Similarly, opposition troops rushed into rural communities and attacked civilians of Dinka, Shilluk and Darfurian ethnicity.<sup>202</sup> They also targeted neighbourhoods, churches, and hospitals where people from various ethnicities gathered to murder, beat, or rob them.<sup>203</sup> During these attacks, the commission of these crimes happened repeatedly. This implies that the resistance forces were organized and led by higher-ups.<sup>204</sup>

**(ii) A contextual element: The attack must be 'widespread or systematic.'**

In *Prosecutor v. Ndindiliyaman, Nzuwonemeye et Sagahutu*,<sup>205</sup> the term widespread refers to the large scale nature of the attack and the number of victims. In contrast, the term system refers to the organized nature of the acts of violence and the improbability of their random occurrence.<sup>206</sup> In Juba, thousands of people were harmed, with many being murdered and many more forced to IDP camps in search of safety.<sup>207</sup> Across several areas, security

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<sup>197</sup> ICC, *Prosecutor v. Muthaura, Kenyatta, and Ali*, "Decision on the Confirmation of charges", ICC-01/09-02/11-382-Red, 23 January 2012, para. 110.

<sup>198</sup> (n 190 above) para 110

<sup>199</sup> UNMISS (n 143 above) para 269

<sup>200</sup> Human Rights Watch 'South Sudan' <https://www.hrw.org/world-report/2019/country-chapters/south-sudan#> (accessed 13 September 2021)

<sup>201</sup> OHCHR 'UN demands justice for civilians deliberately and ruthlessly targeted in attacks in South Sudan' <https://peacekeeping.un.org/en/ohchr-un-demands-justice-civilians-deliberately-and-ruthlessly-targeted-attacks-south-sudan> (accessed 12 September 2021)

<sup>202</sup> (n 192 above)

<sup>203</sup> (n 194 above)

<sup>204</sup> (n 191 above)

<sup>205</sup> *Prosecutor v. Augustin NDINDILIYIMANA, François-Xavier NZUWONEMEYE et Innocent SAGAHUTU*, Case No. ICTR-00-56-A, Judgement (AC), 11 February 2014, para. 260:

<sup>206</sup> (n 197 above) para 260

<sup>207</sup> (n 143 above) para 288

personnel used identical methods and targeted similar victims.<sup>208</sup> Moreover, the attackers were composed of members of different state security forces, implying that their acts and brutality were planned, deliberate, and directed by superior-level policy instructions.

Similarly, the attacks were carried out using State resources such as heavy weapons and tanks. UNMISS reported that a facility in *Gudele* was used to imprison and subsequently kill hundreds of *Nuer* men.<sup>209</sup> Indicating this could not have happened without previous planning, coordination, and some degree of awareness from top security sector officials.<sup>210</sup> Opposition forces have also targeted civilians in *Jonglei*, Upper Nile, and the Unity States.<sup>211</sup>

According to the UN's Special Representative on Sexual Violence in Conflict, thousands of women and children were gang-raped, taken as sexual slaves, abducted and forced into marriages.<sup>212</sup> They were also subjected to murder, forced pregnancy, forced abortion, and mutilation of sexual organs, mostly against children.<sup>213</sup> Both government opposition forces committed these as part of their military tactics from 2013 to 2018.<sup>214</sup>

**(iii) A mental element: The perpetrator knows the attack.<sup>215</sup>**

According to Murray, crimes against humanity require proof that the individual possesses knowledge of the broader context of the crimes for a successful prosecution to result.<sup>216</sup> The criterion of knowing the attack implies that the perpetrator must have known or intended that the action was part of a widespread or systematic attack against a civilian population.<sup>217</sup> The acts committed by the parties to the conflict meet the standard set out in article 7(1) of the Rome Statute because there is evidence that the crimes were committed as part of the parties to the conflict's organization policy, were systematic and were directed against civilian populations, with knowledge of the attack.<sup>218</sup> The evidence gathered by the UN Commission

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<sup>208</sup> (n 185 above) 61

<sup>209</sup> (n 199 above) para 288

<sup>210</sup> As above

<sup>211</sup> (n 198 above) para 290

<sup>212</sup> United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict 'South Sudan'

<sup>213</sup> (n 204 above)

<sup>214</sup> D Cone 'Refugees International 'Still in Danger: Women and Girls Face Sexual Violence in South Sudan Despite Peace Deal' October 17, 2019 <https://www.refugeesinternational.org/reports/2019/10/15/still-danger-women-girls-face-sexual-violence-south-sudan-peace-deal> (31 August 2021)

<sup>215</sup> OHCHR 'South Sudanese individuals can be prosecuted for war crimes and crimes against humanity even in other countries, say UN human rights experts' <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24312&LangID=E> (accessed 31 August 2021)

<sup>216</sup> Murray (n 179 above) 589.

<sup>217</sup> *Prosecutor v Kunarac et al.*, Case No. IT-96-23/1-A (Judgment of 12 June 2002) ICTY para 102 & 140

<sup>218</sup> United Nations Mission in the Republic of South Sudan (UNMISS) 'Conflict in South Sudan: A Human Rights Report' 8 May 2014 <https://unmiss.unmissions.org/conflict-south-sudan-human-rights-report-8-may-2014> (accessed 16 July 2021)

on South Sudan confirmed that the parties to the conflict killed, assaulted/battered, tortured, raped, arbitrarily detained, recruited children and launched indiscriminate attacks on civilians.<sup>219</sup>

Finally, there is evidence that a deliberate attempt was made to hide and destroy evidence of crimes, such as corpses.<sup>220</sup> Grave breaches, including murder, marred government troops into Bentiu and Rubkona in early January 2014. Once again, population centres were destroyed as victims were targeted deliberately by various armed factions, implying preparation and cooperation.<sup>221</sup>

Based on the description of the components of war crimes and crimes against humanity, the crimes committed by the parties to the conflict satisfy the Rome Statute's definition of what constitute these crimes, and thus, individuals should bear equal criminal culpability. The crime of Genocide is discussed below.

### **2.5.3 The Crime of Genocide**

Since the civil war began in 2013, civilians in South Sudan have been targeted based on their ethnic background.<sup>222</sup> Even though the African Union concluded in a 2015 report that it had reasonable grounds to believe that no crime of genocide had been committed in South Sudan.<sup>223</sup> The United Nations classified the violence as on the verge of or possible genocide.<sup>224</sup> In November 2016, the UN Special Adviser on the Prevention of Genocide cautioned that all the indicators point to the rise of ethnic hate and the targeting of people evolving into genocide.<sup>225</sup> In February 2017, he reiterated this warning.<sup>226</sup> Yet, at the time of writing this study, there was no investigation into the crime of genocide in South Sudan.

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<sup>219</sup> Human Rights Watch 'South Sudan: Civilians Killed, Tortured in Western Region Provide Justice for Army Abuses in Western Regions' 24 May 2016 <https://www.hrw.org/news/2016/05/24/south-sudan-civilians-killed-tortured-western-region> ( 10 September 2021)

<sup>220</sup> (n 213 above)

<sup>221</sup> UNMISS Human Rights Report (n 212 above)

<sup>222</sup> LS Shulika & N Okeke-Uzodike 'Inter-ethnic conflict in South Sudan: a challenge to peace. conflict trends' 2013 (3), 24-30.

<sup>223</sup> AU Commission of Inquiry on South Sudan, Final Report of the African Union Commission of Inquiry on South Sudan, 298 (15 Oct. 2014), 88-771

<sup>224</sup> United Nations News 'Possibility of genocide in South Sudan is 'all too real,' Ban warns in opinion piece <https://news.un.org/en/story/2016/12/548002-possibility-genocide-south-sudan-all-too-real-ban-warns-opinion-piece> ( accessed 12 September 2021)

<sup>225</sup> United Nations Office Special Adviser on the Prevention of Genocide 'Media Briefing by A Dieng, United Nations Special Adviser on the Prevention of Genocide on his visit to South Sudan' (2016)

<sup>226</sup> (n 219 above)



### 2.5.3.1 Definition of the Crime of Genocide

The Crime of Genocide is defined in Article 2 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and Article 6 of the Rome Statute of the International Criminal Court (ICC).<sup>227</sup> It refers to acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.<sup>228</sup>

South Sudan is not a state party to the Genocide Convention.<sup>229</sup> However, it should be noted that the ICJ has repeatedly stated that the Convention embodies principles that are part of general customary international law.<sup>230</sup> Furthermore, in the judgment of *Croatia v Serbia*, the ICJ also expressly noted that the Convention was intended to confirm obligations that already existed in customary international law.<sup>231</sup> This means that whether South Sudan has ratified the Genocide Convention, it is bound as a matter of law by the principle that genocide is a crime under international law and that it thus must investigate, prevent and punish it.

### 2.5.3.2 Elements of the Crime of Genocide

Article II of the Genocide Convention contains a narrow definition of the crime of genocide, which includes two main elements:<sup>232</sup>

**A mental element:** the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"; and

**A physical element** includes the enumerated exhaustively of the following acts: Killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. It also includes imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.<sup>233</sup>

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<sup>227</sup> Article 6 of the Rome Statute of the International Criminal Court (ICC)

<sup>228</sup> ICTR article 2 (2)

<sup>229</sup> UN Treaty collection [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4) (accessed 12 September 2021)

<sup>230</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007 (I), pp. 110-111, para. 161.

<sup>231</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, p. 45, para. 95.

<sup>232</sup> UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

<sup>233</sup> (n 226 above)

Kreb is of the view that the most challenging thing to ascertain in Genocide crimes is the intent.<sup>234</sup> Luban added that to qualify as genocide, offenders must demonstrate an intention to physically eliminate a national, ethnic, racial, or religious group.<sup>235</sup> Cultural destruction is insufficient, as is the aim to scatter a people merely.<sup>236</sup> This specific intent, or *dolus specialis*, is what distinguishes genocide from other crimes.<sup>237</sup> Without provable intent, a group or individual can still be guilty of 'crimes against humanity or 'ethnic cleansing,' but not genocide.<sup>238</sup> Additionally, the case of *Bosnia and Herzegovina v. Serbia and Montenegro* has equated intent with the presence of a State or organizational plan or program, even though the international definition of genocide omits that aspect.<sup>239</sup>

In the landmark judgement, *Prosecutor v. Jean-Paul Akayesu*, the Chambers of the International Criminal Tribunal for Rwanda (ICTR) found the perpetrator guilty of genocide because he knew or should have known that the act committed would destroy, in whole or in part, a group.<sup>240</sup> Genocide can also be committed against only a part of the group if that part is identifiable.<sup>241</sup>

According to Henley, the issue of whether the actions done in South Sudan constituted genocide has sparked considerable global debate since the scenario in South Sudan was eerily like and had preconditions comparable to those observed in Rwanda.<sup>242</sup> Henley opines that all the crimes perpetrated during the South Sudan civil conflict are elements of ethnic cleansing but do not necessarily amount to acts of genocide by definition. However, he cautions that genocide does not occur instantly.<sup>243</sup>

Nevertheless, numerous ideas associated with genocide have developed, which I shall discuss in more detail below.

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<sup>234</sup> C Kreb 'The International Court of Justice and the Elements of the Crime of Genocide.' (2007) *European Journal of International Law*, 18(4), 619-629.

<sup>235</sup> D Luban 'Calling genocide by its rightful name: Lemkin's word,' *Darfur, and the UN report.* (2006) *Chi. J. Int'l L.*, 7, 303. Also see A Jones 'Genocide: A comprehensive introduction' (2016) Routledge.

<sup>236</sup> (n 229 above) 303

<sup>237</sup> Genocide Convention (n 226 above)

<sup>238</sup> (n 230 above)

<sup>239</sup> Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 Feb. 2007.

<sup>240</sup> *Prosecutor v. Jean-Paul Akayesu (Appeal Judgment)*, ICTR-96-4-A, International Criminal Tribunal for Rwanda (ICTR), 1 June 2001

<sup>241</sup> (n 231 above)

<sup>242</sup> I Henley 'South Sudan Crisis, the Potential for Genocide, and Its Relevance in the International Community' (2017) 1-12

<sup>243</sup> (n 236 above) 1-3

### 2.5.3.3 Ethnic Cleansing

South Sudan is undergoing ethnic cleansing.<sup>244</sup> This is evidenced by incidents of hate speech and threats directed against non-Dinkas.<sup>245</sup> According to Pinuad,<sup>246</sup> there is no international legal definition for ethnic cleansing, generally regarded as the forcible expulsion of a particular population from a region to homogenize it ethnically.<sup>247</sup> Bell-Fialkoff notes that the term is not recognized as a separate crime under international law.<sup>248</sup> The term "ethnic cleansing" has been used in Security Council and General Assembly resolutions. It has been recognized in ICTY rulings and indictments, but it did not form one of the charges as there was never a definition given.<sup>249</sup> MacKinnon argues that although the words genocide and ethnic cleansing are not identical in terms of their components, there are features of both that overlap to the point that ethnic cleansing is used as a euphemism for genocide.<sup>250</sup>

From the above, it seems that ethnic cleansing has been prevalent since the civil war began; alarming signs of approaching genocide include a rise in hate speech and deterioration of relations among 64 tribal ethnic groups.<sup>251</sup>

### 2.5.3.4 Genocidal Rape

According to Amnesty International, since December 2013, hundreds of South Sudanese women and children have been victims of sexual violence, including rape, gang rape, sexual slavery, genital mutilation, torture, castration, and forced nudity.<sup>252</sup> These acts of sexual violence are startling in their scope and severity and will have long-lasting physical, psychological, and societal consequences on women and children.<sup>253</sup> The acts are part of a recurring, systematic element of their military tactics with an ethnic undertone to scatter and

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<sup>244</sup> United Nations Human Rights Council, Report of the Commission on Human Rights in South Sudan 7, 17 (6 Mar. 2017); UN: 'Ethnic Cleansing Under Way' in South Sudan, *Al Jazeera* (1 December 2016)

<sup>245</sup> OHCHR UN human rights experts says international community has an obligation to prevent ethnic cleansing in South Sudan <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20970&LangID=E> (accessed 12 September 2021)

<sup>246</sup> C Pinaud 'Genocidal Rape in South Sudan: Organization, Function, and Effects' (2020) 667-694 *Human Rights Quarterly*, 42(3)

<sup>247</sup> (n 240 above)

<sup>248</sup> A Bell-Fialkoff. 'A brief history of ethnic cleansing' (1993) *Foreign Affairs*, 110-121.

<sup>249</sup> United Nations (UN) Office on Genocide Prevention and the Responsibility to Protect 'Ethnic Cleansing' <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml> (accessed 12 September 2021)

<sup>250</sup> CA MacKinnon, *Genocide's Sexuality*, 46 *Nomos, Political Exclusion and Domination* (2005) 315; B Lieberman 'Ethnic Cleansing versus Genocide?' in *The Oxford Handbook of Genocide Studies* (2010) 42, 44)

<sup>251</sup> (n 244 above) 42-44

<sup>252</sup> Amnesty International 'South Sudan: Sexual violence on a massive scale leaves thousands in mental distress amid raging conflict' 24 July 2017, <https://www.amnesty.org/en/latest/news/2017/07/south-sudan-sexual-violence-on-a-massive-scale-leaves-thousands-in-mental-distress-amid-raging-conflict/> (accessed 12 September 2021)

<sup>253</sup> (n 247 above)

create terror among women and children from specific ethnic groups.<sup>254</sup> The suffering and damage endured by women and children as a consequence of gang rape are horrific.<sup>255</sup> Since the historic *Akayesu* trial at the ICTR, genocidal rape has been acknowledged as a means of committing genocide.<sup>256</sup>

According to Pinaud, rape constitutes a crime against humanity when committed as part of a large-scale or systematic assault on any civilian population.<sup>257</sup> In contrast, rape is an act of genocide when it is done to eliminate a national, ethnic, racial, or religious group in whole or in part.<sup>258</sup> Pinaud asserts that both the SPLA and SPLA-IO and affiliated militias committed genocidal rape against civilians through mass rape in Unity and Central Equatoria.<sup>259</sup> The acts were perpetrated with the express purpose of annihilating groups designated by the perpetrators.<sup>260</sup> Thus, genocidal rape is meant to physically and psychologically destroy a group and prevent its regeneration.<sup>261</sup>

These genocidal rapes killed, dehumanized, damaged reproductive capabilities, uprooted, traumatized, and degraded target populations, thus eroding their moral, material, and demographic regeneration prospects.<sup>262</sup> Moreover, these acts mainly were perpetrated against non-Dinka's and, therefore, might be seen as genocidal. There is thus a considerable indication that the rapes committed may have been genocidal. While not all the atrocities perpetrated in South Sudan qualify the threshold of genocide, they unquestionably come under the category of crimes against humanity, war crimes, and ethnic cleansing. The following section will discuss the crime of aggression.

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<sup>254</sup> United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict. 18 May 2021 <https://www.un.org/sexualviolenceinconflict/> (accessed 18 August 2021)

<sup>255</sup> (n 249 above)

<sup>256</sup> Prosecutor v. Jean-Paul Akayesu (n 178 above)

<sup>257</sup> (n 251 above)

<sup>258</sup> International Criminal Tribunal for Rwanda (ICTR) Statute, arts. 2,3 (1994), quoted in Doris E. Buss, Rethinking 'Rape as a Weapon of War' 17 Feminist Legal Stud. 150 (2009).

<sup>259</sup> Pinaud (n 240 above)

<sup>260</sup> (n 243 above)

<sup>261</sup> (n 245 above)

<sup>262</sup> As Above

## 2.5.4 Crime of Aggression

Aggression was established as a 'Crime Against Peace' in article 6 of the London Charter of the International Military Tribunal.<sup>263</sup> In June 2010, at the Rome Statute Review Conference in Kampala, Uganda State Parties to the Rome Statute agreed to modify the Statute to include the crime of aggression.<sup>264</sup> As of November 2019, Botswana remains the only African country to have ratified and implemented the Kampala Amendments on the Crime of Aggression.<sup>265</sup> Aggression is defined as the planning, preparation, initiation, or execution, by a person with effective control over or direction of a State's political or military action, of an act of aggression that, by its nature, gravity, or scale, constitutes a manifest violation of the United Nations Charter.<sup>266</sup>

Acts of Aggression include military force by a State against another State's sovereignty, territorial integrity, or political independence, or any other acts inconsistent with the United Nations Charter.<sup>267</sup> These actions may include invasion, military occupation, annexation by force, and blockade of ports or coastlines.<sup>268</sup> According to Mauro, aggression is a crime of leadership as the suspect must effectively exert control over or direction of a state's political or military activity.<sup>269</sup> As per Mauro, this does not include non-governmental players such as organized armed organizations engaged in armed conflicts and private economic operators.<sup>270</sup> However, academics such as O'Connell, Niyazmatov, and Milanovic, question whether anyone will ever be punished for the crime of aggression as described in the Rome Statute.<sup>271</sup>

### 2.5.4.1 Elements of the Crime of Aggression

According to Clark, for acts to qualify as acts of aggression, the perpetrator in a position of authority must have planned, prepared, initiated, or executed the act.<sup>272</sup> Similarly, the State should use armed force against the sovereignty, territorial integrity, or political independence

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<sup>263</sup> Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280:

<sup>264</sup> Resolution RC/Res.6 of the Review Conference of the Rome Statute, Annex 1 Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 11 June 2010

<sup>265</sup> J Nwayo 'Activation of the Crime of Aggression: African States the missing link!' <https://www.kpsrl.org/blog/activation-of-the-crime-of-aggression-african-states-the-missing-link> (accessed 13 September 2021)

<sup>266</sup> Rome Statute of the International Criminal Court articles 8 bis 1 and 2.

<sup>267</sup> K Ambos 'The crime of aggression after Kampala' (2010) German YB Int'l L., 53, 463.

<sup>268</sup> (n 262 above) 463

<sup>269</sup> M Politi 'The ICC and the Crime of Aggression, Journal of International Criminal Justice' (2012) 285-286

<sup>270</sup> (n 264 above) 285-286

<sup>271</sup> M Milanovic 'Aggression and Legality: Custom in Kampala, Journal of International Criminal Justice' (2012) Vol. 10 p. 166 & ME O'Connell & M Niyazmatov 'What Is Aggression? Comparing the Jus Ad Bellum and the ICC Statute, Journal of International Criminal Justice' (2012) Vol. 10 p. 191.

<sup>272</sup> RS Clark 'Negotiating provisions defining the crime of aggression, its elements and the conditions for ICC exercise of jurisdiction over it' (2009) European Journal of International Law, 20(4) 1103-1115.

of another State.<sup>273</sup>The perpetrator must be aware that the use of armed force was inconsistent with the UN Charter.<sup>274</sup> Trials against individuals deemed to have committed crimes of aggressions are included in the Nuremberg and Tokyo Tribunals' jurisprudence.<sup>275</sup> For example, the Nazi Party Chancellery leader Rudolf Hess was the only defendant convicted solely of conspiracy to commit crimes against peace.<sup>276</sup> Simultaneously, the International Military Tribunal for the Far East condemned 23 convicts for the waging of aggressive war, including Hideki Tōjō.<sup>277</sup> Since 1946, there have been no domestic or international prosecutions for suspected aggression crimes, but the Security Council has decided that South Africa and Israel have committed such crimes.<sup>278</sup>

Based on the criteria and definition of aggression outlined above, it would be difficult to prove that acts of aggression occurred during the South Sudanese civil war, given that it was a non-international conflict that engaged the SPLA against SPLA-IO troops and other armed organizations. Similarly, no military force was used by South Sudan against the sovereignty, territorial integrity, or political independence of another State.<sup>279</sup> Thus it does not constitute acts of aggression within the meaning of article 8 of the Rome Statute.

However, there have been incidents that might be classified as acts of aggression, although they happened before the 2013 civil war.<sup>280</sup> These include the Heglig dispute between Sudan and South Sudan in 2012 and the March 2008 fighting in Abyei between Arab militia and the SPLM in the disputed oil-rich Abyei area on the north-south frontier.<sup>281</sup>

Acts of aggression are generally difficult to assess. May puts it better when he says the concept of aggressiveness is both too broad and too narrow.<sup>282</sup> It's too broad since using force against state sovereignty isn't always deemed aggression when using force for humanitarian intervention. It is excessively restricted since sub-state entities, including terrorist groups, may behave like states.<sup>283</sup> Thus, documentation of aggressive crimes during the civil war is scant.

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<sup>273</sup> (n 217 above) 1103-115

<sup>274</sup> (n 267 above)

<sup>275</sup> GR Watson 'The changing jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (2002) *New Eng. L. Rev.*, 37, 871.

<sup>276</sup> *Judicial Decisions: International/Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 275-76 (1947)

<sup>277</sup> AS Comyns-Carr 'The Tokyo war crimes trial. *Far Eastern Survey*' (1949) 18(10), 109-114.

<sup>278</sup> CM Mobeche, 'Crimes of aggression: A historical outline and an evaluation of the current state of the law' 2003 (Master's thesis).

<sup>279</sup> Rome Statute of the International Criminal Court articles 8 bis 1 and 2.

<sup>280</sup> NA Check & T Mdlongwa 'Challenges with nation-building in Africa-the Heglig oil conflict and crises of identity and belonging in South Sudan' (2017) *Africa Insight*, 47(2), 65-76.

<sup>281</sup> (n 275 above) 65-76

<sup>282</sup> L May 'Aggression and Crimes Against Peace' (2008) 356 Cambridge University Press

<sup>283</sup> (n 277 above) 356

As a result, the HCSS's mission is limited to trying individuals accused of grave crimes, including genocide, crimes against humanity, and war crimes discussed in Chapter 4 of this study.

### **3. Conclusion**

To summarize, parties to the South Sudan civil war committed war crimes and crimes against humanity, classified as grave crimes under the Rome Statute. Evidence indicates that civilian populations were intentionally targeted based on their ethnic identification through killings, abductions, imprisonment, and sexual violence. The parties have thus routinely violated international law's notion of combatants, non-combatants, and civilians under international law. As determined by the African Union, there are reasonable grounds to believe that genocide has been committed in South Sudan. The same is true for the crime of aggression. However, the UN has on numerous occasions issued a sharp warning that ethnic cleansing is underway in South Sudan.

All in all, the scale and severity of South Sudan's civil war, the fragile economic condition, the intentional refusal of humanitarian aid, and the indiscriminate shelling and targeting of ethnic groups testify to the gravity of the civil war situation. Unless impunity is addressed and perpetrators of grave crimes are brought to justice, South Sudan's viability as a new nation-State will be jeopardized if not already been. Moreover, South Sudan has an obligation under international law to investigate, prosecute, punish, or extradite offenders and provide reparations to victims. The next chapter discusses these obligations.

# CHAPTER 3

## INTERNATIONAL OBLIGATION OF SOUTH SUDAN TO ADDRESS INTERNATIONAL CRIMES

### 3.1 Introduction

The previous chapter established that the parties to the conflict in South Sudan committed serious crimes under international law, which should meet the threshold for war crimes and crimes against humanity. The State has a legal obligation to rectify international crimes under international law, international customary law, and various United Nations soft laws. This is important to bring perpetrators of international crimes to justice and provide victims of these crimes with truth, justice, and reparations. This chapter considers South Sudan's obligations under international law. The first section of this chapter addresses South Sudan's obligations to investigate, prosecute, and punish the perpetrators of international crimes and guarantee, protect, and remedy the victims of war crimes and crimes against humanity. The second section discusses how South Sudan has complied with those obligations by investigating and punishing perpetrators through prosecutorial and non-prosecutorial means such as the *Terrain* case and the launching of investigative committees. Finally, the last part of this chapter discusses the issue of amnesties in South Sudan. The last section will conclude.

### 3.2 South Sudan's Obligations under international law

#### 3.2.1 Duty to investigate perpetrators of international crimes

South Sudan is a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),<sup>284</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention),<sup>285</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention on Torture),<sup>286</sup> and several UN soft laws which incorporate the principle to investigate, prosecute and punish perpetrators of international crimes.<sup>287</sup> These treaties put a positive obligation on South Sudan to investigate, prosecute and punish international crimes as part of providing the

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<sup>284</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

<sup>285</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) Publication Date 12 August 1949 75 UNTS 287

<sup>286</sup> (n 280 above)

<sup>287</sup> UN General Assembly, 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: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147



victims of those violations their right to a remedy.<sup>288</sup> The Geneva Conventions and Additional Protocol I impose a general obligation on States to investigate and punish all violations of the Conventions, not simply those deemed grave breaches or war crimes.<sup>289</sup> Tan asserts that investigating international crimes is vital to a state's obligation to uphold, preserve, and enforce international law and advance accountability efforts and protect victims' rights to remedy.<sup>290</sup>

Similarly, the Rome Statute states that every State should exercise its criminal jurisdiction against persons responsible for international crimes.<sup>291</sup> However, under the principle of complementarity, the ICC can only intervene when a state is unable or unwilling to investigate and prosecute the perpetrators of such crimes.<sup>292</sup> South Sudan has not ratified the Rome Statute and<sup>293</sup> did not make a declaration recognizing the ICC's jurisdiction over crimes committed in South Sudan since 15 December 2013 under article 12(3) of the Rome Statute.<sup>294</sup> However, even though the ICC has limited jurisdiction over individuals in South Sudan. It could initiate an investigation into crimes committed in South Sudan if the UN Security Council (UNSC) make a referral to the ICC in terms of article 13b or if the South Sudanese Government requested the court's involvement in line with article 15 of the Rome Statute.<sup>295</sup>

Article 13(b) of the Rome Statute empowers the UNSC to exercise its jurisdiction according to Chapter VII of the UN Charter, even if it concerns a non-state party or its citizens.<sup>296</sup> These will not be peculiar to South Sudan since the UNSC has previously referred two cases involving non-state actors to the ICC: the Darfur, Sudan crisis in 2005 and Libya in 2011.<sup>297</sup> Both cases included acts amounting to war crimes and crimes against humanity.<sup>298</sup> Similarly,

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<sup>288</sup> (n 272 above)

<sup>289</sup> A Cohen & Y Shany 'Beyond the grave breaches regime: the duty to investigate alleged violations of international law governing armed conflicts' (2011) *Yearbook of International Humanitarian Law*, 14, 37-84.

<sup>290</sup> AM Tan 'The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an International Accountability Problem' (2016). *NYUJ Int'l L. & Pol.*, 49, 181.

<sup>291</sup> Preamble of the Rome Statute

<sup>292</sup> Article 17 (1) B, article 1 Rome Statute

<sup>293</sup> Human Rights Watch 'Q & A: Justice for War Crimes in South Sudan' 24 August 2020  
<https://www.hrw.org/news/2020/08/24/qa-justice-war-crimes-south-sudan> (5 August 2021)

<sup>294</sup> Article 12 (3) Rome Statute

<sup>295</sup> N Dyani-Mhango 'South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir. (2017) *Wash. Int'l LJ*, 26, 535.

<sup>296</sup> B Aregawi 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals. *Conflict Trends*' (2017) (2), 27-32. Also see Article 13 (b) of the Rome Statute

<sup>297</sup> (n 291 above) 536

<sup>298</sup> R Schuerch 'The Security Council Referral Power Under Article 13 (b) Rome Statute' in *The International Criminal Court at the Mercy of Powerful States*' (2017) 169

South Sudan can do a self-referral as was done by the Democratic Republic of Congo (DRC),<sup>299</sup> and Uganda.<sup>300</sup>

South Sudan vowed to undertake investigations into alleged abuses. Still, it neglected to do so on several occasions, and when it did, the findings of those investigations were never made public, and the offenders were never brought to justice.<sup>301</sup> For example, in 2018, President Kirr established an investigative Committee in the Spike of Sexual Violence in *Bentiu*.<sup>302</sup> According to Amnesty International, the Committee completed its inquiry in Juba, Bentiu, and the surrounding districts in May 2019.<sup>303</sup> However, the report's conclusions have not been made public, and no court procedures have been initiated based on the findings of this investigation.<sup>304</sup>

Similarly, the leadership in South Sudan is known for promoting people sanctioned by the UNSC of severe crimes.<sup>305</sup> For example, Major Marial Chanuong Yol Mangok, commander of President Salva Kiir's presidential guard, was sanctioned by the UNSC in 2015 for overseeing the execution of ethnic Nuer civilians when fighting broke out in Juba in December 2013.<sup>306</sup> Yet, in May 2017, he was promoted to commander of the Ground Forces and later as Chief of Army Operations, Training, and Intelligence in December 2017.<sup>307</sup> Similarly, Malek Reuben Riak Rengu was listed on 13 July 2018 for, amongst others, planning, directing, or committing acts involving sexual and gender-based violence in South Sudan.<sup>308</sup> Nevertheless, in September 2018, he was appointed as the Deputy Minister of Defence and Veteran Affairs.<sup>309</sup>

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<sup>299</sup> International Criminal Court (ICC) 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' 29 January 2004 Press Release [https://www.icc-cpi.int/pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord\\_s+resistance+army+\\_lra\\_+to+the+icc](https://www.icc-cpi.int/pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc) (accessed 7 October 2021)

<sup>300</sup> International Criminal Court (ICC) 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' 19 April 2004 Press Release <https://www.icc-cpi.int/pages/item.aspx?name=prosecutor+receives+referral+of+the+situation+in+the+democratic+republic+of+congo> (accessed 7 October 2021)

<sup>301</sup> (n 18 above) 30

<sup>302</sup> Médecins Sans Frontières/Doctors without Borders (MSF) 'South Sudan: 125 women and girls seek emergency assistance at MSF's clinic in Bentiu after horrific sexual violence' 3 December 2018 <https://msf.or.ke/en/magazine/south-sudan-125-women-and-girls-seek-emergency-assistance-msfs-clinic-bentiu-after-horrific> (accessed 15 October 2021)

<sup>303</sup> (n 18 above) 27

<sup>304</sup> Amnesty International (n 297 above) 27

<sup>305</sup> UN imposes sanctions on six South Sudan military commanders DW <https://www.dw.com/en/un-imposes-sanctions-on-six-south-sudan-military-commanders/a-18556990> (accessed 17 October 2021)

<sup>306</sup> United Nations Security Council 'Marial Chanuong Yol Mangok' <https://www.un.org/securitycouncil/sanctions/2206/materials/summaries/individual/marial-chanuong-yol-mangok> (accessed 15 October 2021)

<sup>307</sup> 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

<sup>308</sup> United Nations Security Council 'Malek Reuben Riak Rengu' <https://www.un.org/securitycouncil/content/malek-reuben-riak-rengu> (accessed 15 October 2021)

<sup>309</sup> (n 295 above) 32

The UN Commission on South Sudan has on several occasions stated that investigations into international crimes committed in South Sudan are critical for ensuring the victims' right to justice.<sup>310</sup> This can only be done by conducting practical, quick, comprehensive, and impartial inquiries and prosecuting and punishing those found accountable for those crimes. In terms of realising this obligation, South Sudan has a long way in adherence to its international obligation to investigate.<sup>311</sup> The obligation to prosecute is discussed below.

### 3.2.2 Duty to Prosecute perpetrators of international crimes

Roht-Arriaza asserts that the obligation to prosecute and extradite originates from Grotius' idea *aut dedere aut judicare*- (extradite or prosecute).<sup>312</sup> It ensures that those who commit international crimes are prosecuted and extradited to ensure that war victims receive justice and compensation.<sup>313</sup> According to Glanville, crimes against humanity and war crimes are now widely regarded as a peremptory norm (*jus cogens*).<sup>314</sup> Ahmed and Quayle added that recognising an international crime as *jus cogens* entails the obligation to prosecute and punish.<sup>315</sup> These standards generate *erga omnes* responsibilities or those due to the world community.<sup>316</sup> The International Court of Justice established *erga omnes* duties in international law with its dicta in the *Barcelona Traction case*.<sup>317</sup> The court distinguished in this decision between a state's *erga omnes* duties to the international community, in whose protection all states have a legal interest and a state's obligations to another state.<sup>318</sup> This view is supported by the Trial Chamber's conclusion in the *Furundžija* case at the International Criminal Tribunal for the former Yugoslavia (ICTY) that every State is entitled to investigate, prosecute, punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.<sup>319</sup> Similarly, the ICTY decided in *Blaškić* that domestic courts of any

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<sup>310</sup> (n 78 above) para 16

<sup>311</sup> Rome Statute's art 1, art 5, art 89 and art 90

<sup>312</sup> N Roht-Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 449 California Law Review

<sup>313</sup> Article 49 of the First Geneva Convention; Article 50 of the Second Geneva Convention; Article 129 of the Third Geneva Convention; Article 146 of the Fourth Geneva Convention; Article 85 of the Additional Protocol I.

<sup>314</sup> L Glanville 'The responsibility to protect beyond borders. Human Rights Law Review 12(1): 1–32. Also see Vienna Convention on the Law of Treaties' (2012), (UN 1969, art. 53).

<sup>315</sup> A Ahmed & M Quayle 'Can genocide, crimes against humanity and war crimes be pardoned or amnestied?' (2009) 15-20 Amicus Curiae

<sup>316</sup> A Memeti & B Nuhija 'The concept of erga omnes obligations in international law' (2013) 14 New Balkan Politics

<sup>317</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*; Second Phase, ICJ 5 February 1970, available at: <https://www.refworld.org/cases,ICJ,4040aec74.html> [accessed 7 October 2021]

<sup>318</sup> (n 311 above)

<sup>319</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, Trial Chamber, 10 December 1998, para. 156.

state have a 'customary law responsibility to prosecute or extradite those accused of severe violations of international humanitarian law.'<sup>320</sup>

The challenge with prosecuting individuals through the South Sudan judicial system is that the system is fundamentally flawed since a severe lack of independence plagues the civilian justice system.<sup>321</sup> Prosecutors obey executive directions and do not investigate significant offences in the absence of such directives.<sup>322</sup> Human Rights Watch revealed in its report that since the start of the civil war, no top generals and politicians had faced successful prosecution for severe crimes in civilian courts.<sup>323</sup> Furthermore, the military tribunals used to try military personnel are not independent. The President supervises the formation of martial courts for high-ranking commanders and can ratify or reject judicial verdicts.<sup>324</sup> They also lack the authority to punish troops for crimes against civilians. Since 2013, the Terrain case, which was tried in a military court, has been the sole case dealing with severe crimes committed against civilians in the context of the South Sudan civil war.<sup>325</sup> In terms of the commitment to prosecute international crimes. South Sudan has fallen short of this commitment in two ways: first, by failing to enhance the judicial system, and second, by purposefully delaying the creation of the HCSS, as explained in Chapter 4 of this dissertation.

According to the Rome Statute, effective prosecution must be secured by implementing steps at the national level and by expanding international cooperation.<sup>326</sup> For instance, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Conventions I) requires South Sudan to seek individuals suspected of committing or ordering the commission of such grave violations and bring such individuals before its tribunals. It may also send such individuals for trial to another High Contracting Party.<sup>327</sup> While this obligation is essential under international law, Zgonec-Rozej and Foakes view that the Genocide Convention does not include this obligation. Still, it does stipulate that the perpetrators of Genocide must be prosecuted in a domestic court whose territory the crime was committed or by a competent international court.<sup>328</sup> As a result, there is only a treaty-

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<sup>320</sup> Tihomir Blaškić, Case No. IT-95-14-AR, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 29.

<sup>321</sup> (n 18 above)

<sup>322</sup> (n 331 above) 5

<sup>323</sup> Human Rights Watch, Ending the Era of Injustice: Advancing Prosecutions for Serious Crimes Committed in South Sudan's New War, 11 December 2014

<sup>324</sup> (n 318 above)

<sup>325</sup> Amnesty International (n 18 above) 19-20

<sup>326</sup> Rome Statute, Preamble

<sup>327</sup> Art. 49 of the First Geneva Convention; Art. 50 of the Second Geneva Convention; Art. 129 of the Third Geneva Convention; Art. 146 of the Fourth Geneva Convention.

<sup>328</sup> M Zgonec-Rozej & J Foakes 'International criminals: Extradite or prosecute?' (2013) (p. 16). London: Chatham House.

based obligation for *aut dedere aut judicare* for grave breaches related to genocide and crimes against humanity.<sup>329</sup>

In cases concerning torture, the International Court of Justice (ICJ) examined the question of whether a State is bound by the Convention against Torture (CAT) to prosecute and extradite a perpetrator of international crimes in *Belgium v Senegal*.<sup>330</sup> In this case, Belgium contended that Senegal violated the obligation *aut dedere aut judicare* outlined in Article 7 of the CAT and under customary international law by failing to prosecute or extradite Mr Habré for war crimes and crimes against humanity allegedly committed during his presidency.<sup>331</sup> In conclusion, the ICJ determined that Senegal was in violation of its CAT obligations and that the prosecution of Habré should commence immediately.<sup>332</sup> What is important to note from this case is that the court made it clear that Senegal had the duty to prosecute and the option to extradite. In support of this decision, Ventura and Baiesu opined that the judgment represented a watershed moment in the ICJ's understanding of human rights treaties and the justiciability of *erga omnes* responsibilities.<sup>333</sup> While this case establishes a significant precedent for immunity, Ani contends that it demonstrates that justice for crimes committed by incumbent leaders is only possible when the leader's political support dwindles.<sup>334</sup> He argues that the HCSS will have difficulty prosecuting warring leaders who encouraged, organized, and ordered war crimes against humanity in the South Sudan civil war. As a result, victims in South Sudan will have to wait until the leaders lose political support to seek justice.<sup>335</sup>

South Sudan will face many challenges in prosecuting war crimes; however, it can learn from previous accountability mechanisms set up in Sierra Leone and Rwanda. According to Møse, since the International Criminal Tribunal for Rwanda (ICTR) began hearing cases in 1997, it has prosecuted 50 defendants, including a prime minister, several ministers and other leaders.<sup>336</sup> Twenty-five defendants have also been sentenced, with three being acquitted.<sup>337</sup>

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<sup>329</sup> (n 296 above)

<sup>330</sup> Questions relating to the Obligation to Prosecute or Extradite, *Belgium v Senegal*, Judgment, ICJ GL No 144, ICGJ 437 (ICJ 2012), 20th July 2012, United Nations [UN]; International Court of Justice [ICJ]

<sup>331</sup> (n 308 above)

<sup>332</sup> (n 309 above)

<sup>333</sup> Ventura, Manuel J. and Baiesu, Victor, *The ICJ's Senegal v. Belgium Judgment and the Obligation to Prosecute or Extradite Alleged Torturers: The Case of Al Bashir and the ICC* (June 11, 2019). Sharon Weill, Kim Thuy Seelinger & Kerstin Bree Carlson (eds), *The President on Trial: Prosecuting Hissène Habré* (Oxford, Oxford University Press, 2020), pp. 295-308

<sup>334</sup> NC Ani 'Implications of the African Union's stance on immunity for leaders on conflict resolution in Africa: The case of South Sudan and lessons from the Habré case' (2018) 18 *African Human Rights Law Journal* 438-462

<sup>335</sup> (n 312 above) 462

<sup>336</sup> E Møse 'Main Achievements of the ICTR. *Journal of International Criminal Justice*' (2005), 3(4), 920-943.

<sup>337</sup> (n 330 above) 920-943

In addition, the Tribunal handed ground-breaking decisions on genocide during its first mandate (1995–1999), including *Akayesu* and *Kambanda*.<sup>338</sup>

It is evident from the above that South Sudan's judicial system for prosecuting international crimes committed during the war is significantly hampered and urgently requires reform. As a result, South Sudan has failed to satisfy its commitment. As a result, the HCSS remains the only realistic alternative for victims of international crimes perpetrated during the South Sudan civil conflict. The obligation to punish is assessed below.

### 3.2.3 Obligation to Punish perpetrators of international crimes

The Rome Statute states that the most heinous crimes of concern to the world community as a whole must not go unpunished.<sup>339</sup> The Great Lakes Pact protocols require South Sudan to ensure that international crimes are not left unpunished and effectively provide their punishment through national legislative and constitutional measures following articles 7 and 8 of the Rome Statute.<sup>340</sup> Accordingly, South Sudan is required to take the appropriate steps under its constitutions and impose adequate sanctions for those who commit genocide, war crimes, or crimes against humanity.<sup>341</sup> As a state party to the CAT,<sup>342</sup> South Sudan is legally required to implement measures to prevent torture and punish all offenders.<sup>343</sup> Acts of torture committed during South Sudan's civil war have been widely documented.<sup>344</sup> According to Amnesty International, between February 2014 and July 2017, at least 24 individuals detained without trial for suspected opposition-related activities were subjected to ill-treatment, possibly amounting to torture, and died in detention; to date, none of the perpetrators has been brought to account.<sup>345</sup> On the issue of command responsibility, article 146 of the Geneva Convention IV states that the penalties to be imposed will also be applied to those who commit or order the commission of a grave violation, establishing the joint responsibility of the act's author and the man who directs its commission.<sup>346</sup>

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<sup>338</sup> (n 327 above)

<sup>339</sup> Rome Statute Preamble

<sup>340</sup> International Conference on the Great Lakes Region Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination 29 November 2006

<sup>341</sup> (n 334 above)

<sup>342</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment CAT-OP - Optional Protocol of the Convention against Torture 30 Apr 2015 (a)

<sup>343</sup> (n 305 above)

<sup>344</sup> TK Kuer 'An Analysis of The Right Against Torture in South Sudan' unpublished PhD thesis, University of Nairobi 2017 241

<sup>345</sup> Amnesty International 'South Sudan: Arbitrary Arrests, Torture Of Detainees Despite Repeated Promises' 4 September 2018 <https://www.amnesty.org/en/latest/press-release/2018/09/south-sudan-arbitrary-arrests-and-torture-of-detainees-despite-repeated-promises/> ( 17 August 2021)

<sup>346</sup> (n 285 above)

Thus, the obligation to punish serves as an essential tool in the fight against impunity for international crimes. South Sudan must strengthen its prosecutorial capabilities to do this. This commitment is critical for deterrence, ensuring that the law is respected and compensating victims, as detailed below.

### **3.2.4 Obligations to respect, protect rights and provide remedies to victims of international crimes**

International law imposes an obligation on States to provide remedies and reparation for victims of international crimes.<sup>347</sup> In particular, article 8 of the Universal Declaration of Human Rights (Universal Declaration),<sup>348</sup> article 2 (1) (3) of the ICCPR,<sup>349</sup> and article 1 of the African Charter on Human and People's Rights (ACHPR),<sup>350</sup> affirm South Sudan's obligations to address victims' rights, respect and protect the listed rights, and provide remedies if such rights are infringed.<sup>351</sup> According to paragraph 1 of the Van Boven/Bassiouni Declaration of Fundamental Principles of Justice for Victims of Crime and Abuse of Power, the term victims means individuals or groups of individuals who have suffered harm, such as physical or mental injury, emotional distress, economic loss or substantial impairment of their fundamental rights.<sup>352</sup> Both the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination have stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of abuses to provide appropriate reparation to victims.<sup>353</sup> Reparation can involve compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.<sup>354</sup> These include providing compensation to victims or their families and taking effective measures to prevent future recurrences of such violations.<sup>355</sup> In the *Katanga* case, the International Criminal Court's Trial Chamber II awarded individual and collective reparations to 297 victims of crimes committed by *Germain Katanga* on 24 February 2003 during an attack on the village of Bogoro in the Democratic Republic of the Congo's (DRC) *Ituri* district.<sup>356</sup> The Chamber emphasized

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<sup>347</sup> article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) - external site, article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) - external site and article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

<sup>348</sup> The United Nations. (1948). Universal Declaration of Human Rights.

<sup>349</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

<sup>350</sup> African Charter on Human and Peoples' Rights. African Union. 1981 Banjul: African Union.

<sup>351</sup> (n 344 above)

<sup>352</sup> Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, General Assembly, A/RES/40/34, 96 Plenary Meeting, (29 Nov 1985).

<sup>353</sup> UN Human Rights Committee General Comment No 31 (paragraphs 15 – 20), UN Committee on the Elimination of Racial Discrimination General Recommendation No 26

<sup>354</sup> (n 347 above)

<sup>355</sup> (n 349 above)

<sup>356</sup> *The Prosecutor v. Germain Katanga ICC-01/04-01/07*

that reparations are meant to obligate individuals guilty for major crimes to compensate victims for the harm they have caused. It added that reparations must be meaningful to victims and that, to the degree practicable, victims get reasonable, adequate, and fast compensation.<sup>357</sup>

In summary, South Sudan is expected to provide victims with sufficient, effective, timely, and appropriate remedies consistent with their international commitments. To do this, legislation outlawing such crimes must be enacted. The duty to enact laws is described in further detail below.

### 3.2.5 Obligation to enact legislation

Additionally, the instruments mentioned above require governments to adopt criminal penalties to guarantee that war crimes and crimes against humanity are prosecuted in domestic tribunals.<sup>358</sup> For instance, article 2 of the CAT requires governments to adopt effective legislative, administrative, and judicial measures to prohibit torture in all situations;<sup>359</sup> article 5 requires states to establish jurisdiction over the crime of torture, and articles 7 and 8 require conditions to prosecute or extradite torturers.<sup>360</sup> In *Belgium v. Senegal*, the International Court of Justice decided that a state's failure to enact appropriate laws to implement the CAT impairs that state's commitment to prosecuting.<sup>361</sup> The state's commitment to outlaw torture and establish jurisdiction over it must be executed immediately upon accession to the convention, providing the state with the appropriate legal instruments to pursue this sort of offence.<sup>362</sup> South Sudan has not incorporated major international crimes such as genocide, crimes against humanity, and war crimes into domestic law.<sup>363</sup> In 2016, the Ministry of Justice submitted a bill amending the Penal Code to address these offences. Still, rights groups expressed grave reservations as international crimes were defined in inconsistent ways with international law.<sup>364</sup> Additionally, the proposed law lacked measures dealing with torture, enforced disappearance, and the inapplicability of amnesties and immunities.<sup>365</sup>

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<sup>357</sup> (n 342 above)

<sup>358</sup> First Geneva Convention art 49; Second Geneva Convention art 50; Third Geneva Convention art 129; Fourth Geneva Convention art 146; see CAT art 7; Protocol on Sexual Violence art 3(4); Protocol on Genocide art 9(1).

<sup>359</sup> (n 3321 above)

<sup>360</sup> (n 322 above)

<sup>361</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Reports 2012, paras 75–77

<sup>362</sup> (n 351 above)

<sup>363</sup> Amnesty International 'Do you think we will prosecute ourselves? No prospects for accountability in South Sudan - South Sudan 8 October 2019 <https://reliefweb.int/report/south-sudan/do-you-think-we-will-prosecute-ourselves-no-prospects-accountability-south-sudan> (accessed 13 August 2021) 10

<sup>364</sup> Amnesty International and 8 other civil society organisations (CSOs), Observations and Recommendations on the Penal Code (Amendment) Bill, 2016 (Open Letter, 1 February 2016).

<sup>365</sup> (n 359 above)



South Sudan is required to uphold its obligations to contribute to a genuine process of accountability for the thousands of victims and their families who have suffered immeasurably during the civil war—failing to action against impunity for the profoundly ingrained disregard for the right to life fuels a cycle of violence.<sup>366</sup> For this dissertation to truly analyze South Sudan's commitments, it is necessary to examine what South Sudan has done to comply with its international obligations.

### 3.3 The Status of South Sudan's compliance with its international obligations

#### 3.3.1 Prosecutorial means: The Terrain case

As mentioned in this study, the *Terrain* case remains the only South Sudan civil war case. However, this case was tried in a military court, which convicted ten government soldiers in September 2018 for murdering a journalist and raping humanitarian workers at the Terrain hotel in July 2016.<sup>367</sup> Terrain, a residential complex in Juba, was overrun by government troops on 11 July 2016 after four days of battle between government and opposition troops in Juba, South Sudan's capital.<sup>368</sup> Following that, a horrific spree of looting, torture, rape, and one murder occurred against civilians in the Terrain hotel.<sup>369</sup> The assailants were members of various military groups, including the elite Presidential Guard, the National Security Service (NSS), and ordinary SPLA divisions.<sup>370</sup> The Government leaders and the SPLA subsequently initiated a court-martial to hold perpetrators of the attack accountable. Following a series of arrests, a special court-martial started in May 2017. It ended 16 months later with ten soldiers being convicted and sentenced for murder, rape, and other crimes committed during the Terrain complex assault.<sup>371</sup>

The trial was mainly a result of pressure from foreign countries demanding justice for their citizens.<sup>372</sup> This case marked a rare example of SPLA soldiers being held to account for crimes committed against civilians in the context of war. According to McCrone, the SPLA court-martial set a critical precedent for future justice and accountability in South Sudan by holding

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<sup>366</sup> ( n 47 above)

<sup>367</sup> F McCrone 'War Crimes and Punishment the Terrain Compound Attack and Military Accountability in South Sudan, 2016–18' (2019)

<sup>368</sup> (n 356 above) 3

<sup>369</sup> (n 356 above)

<sup>370</sup> (360 above) 3-5

<sup>371</sup> (357 above)

<sup>372</sup> Amnesty International 'Do you think we will prosecute ourselves? No prospects for accountability in South Sudan - South Sudan 8 October 2019 <https://reliefweb.int/report/south-sudan/do-you-think-we-will-prosecute-ourselves-no-prospects-accountability-south-sudan> ( accessed 13 August 2021)

SPLA troops responsible for internationally recognized war crimes, including sexual violence.<sup>373</sup> Amnesty International noted that even though this case was unprecedented in South Sudan, it raised many essential questions on fair trial guarantees.<sup>374</sup> Similarly, under South Sudanese law, military tribunals lack the authority to prosecute instances of crimes against humanity and war crimes. Per international tradition, these offences should have been prosecuted in civilian tribunals.<sup>375</sup> Similarly, the government revealed the degree of judicial capacity and political will to hold its soldiers accountable for violence against civilians, directly impacting the country's present transitional phase towards peace.<sup>376</sup>

While the Terrain court-martial found several of the alleged assailants guilty, the commanders escaped punishment, calling into doubt the SPLA's military command and control structure. This will be detrimental to future proceedings before the HCSS.<sup>377</sup> Under Additional Protocol, I to the Geneva Conventions of 1949,<sup>378</sup> the Rome Statute,<sup>379</sup> and the Statutes of the ICTY and ICTR,<sup>380</sup> the doctrine of command responsibility states that a superior bears criminal responsibility for failing to prevent unlawful conduct committed by their subordinates. As mentioned in Chapter 2 of this study, international criminal law is based on the concept of free human agency, which implies that the accused can act under the legally and ethically desirable norm and is aware that he will be held accountable if he violates that norm.<sup>381</sup> Based on the above, South Sudan is obliged to implement command responsibility by holding commanders responsible. Apart from the issue of command responsibility, the trial also saw several limits connected to military courts' lack of independence, most notably the President's influence over the creation of martial tribunals for high-ranking officers and the power to confirm or reject their final rulings.<sup>382</sup> In addition, the President's disregard for international law is seen in exercising his executive power over the judiciary and granting amnesties inconsistent with international law. The issues of amnesties are discussed below.

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<sup>373</sup> (n 360 above) 3-6

<sup>374</sup> (n 364 above) 19-20

<sup>375</sup> (327 above)

<sup>376</sup> Amnesty International (328 above)

<sup>377</sup> H van der Wilt '*Command Responsibility*'. obo in International Law. doi: (2013)

<sup>378</sup> Article, 86(2) of Additional Protocol I to the Geneva Conventions of 1949

<sup>379</sup> Article 28 (a)(i) of the Rome Statute

<sup>380</sup> ICTY Statute, Art. 7(3); ICTR Statute, Art. 6(3); Statute of the Special Court for Sierra Leone SCSL Statute, Art. 6(3)

<sup>381</sup> (n 440 above) para 57

<sup>382</sup> Additional Protocol I, Article 86(2); ICC Statute, Article 28 ICTY Statute, Article 7(3) .

## 3.3.2 Non-Prosecutorial means

### 3.3.2.1 Amnesties

According to Mallinder, amnesties refer to legal measures that either prevent criminal prosecution and, in some cases, civil actions against specific individuals or categories of individuals for specified criminal conduct committed before the amnesty's adoption; or retroactively invalidate pre-existing legal liability.<sup>383</sup> They are usually implemented to ease political transitions and encourage fighters to disarm, demobilize, and reintegrate as an agreement between the incumbent Government and opposition groups or rebel forces.<sup>384</sup> While amnesties may be beneficial, they also risk granting impunity to perpetrators of international crimes.<sup>385</sup>

In *Prosecutor v. Kondewa*,<sup>386</sup> the Special Court for Sierra Leone (Special Court) distinguished two types of amnesties, namely blanket amnesties and conditional amnesties. Conditional amnesties intended to persuade rebel troops to abstain from revolt may require that the benefits conferred be lost by a recipient who retakes up weapons.<sup>387</sup> For example, the Amnesty Committee of South Africa's Truth and Reconciliation Commission recommended conditional amnesty, requiring public revelation of crimes and delicts linked to grave human rights abuses before granting amnesty.<sup>388</sup> In comparison, Blanket amnesties relieve broad categories of severe human rights violators of prosecution and civil responsibility without requiring recipients to fulfil preconditions, including those demanding complete revelation of information regarding the offences covered by the amnesty.<sup>389</sup> These limitations emphasize tensions between nations' obligations to pursue international crimes and amnesty's role in avoiding prosecutions.<sup>390</sup>

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<sup>383</sup> L Mallinder 'Amnesty and International Law' (2018)

<sup>384</sup> Office of the United Nations High Commissioner for Human Rights. (2009). Rule-of-law tools for post-conflict states: amnesties.

<sup>385</sup> (n 330 above)

<sup>386</sup> *The Prosecutor v. Moinina Fofana, Allieu Kondewa* Special Court for Sierra Leone case No. SCSL-2004-14-AR72(E), Decision on lack of jurisdiction/abuse of process: amnesty provided by the Lomé Accord (25 May 2004), Separate Opinion of Justice Robertson, para. 15

<sup>387</sup> (n 379 above) para. 15.

<sup>388</sup> Truth and Reconciliation Commission of South Africa, Report of the Amnesty Committee, vol. 6, sect. 1, chap. 5, 1

<sup>389</sup> G Meintjes and JE Méndez 'Reconciling amnesties with universal jurisdiction' (2000) International Law Forum, vol. 2, No. 2 76.

<sup>390</sup> L Mallinder 'Amnesty and International Law' (2018)

As seen above, customary international law prohibits states from granting amnesties for crimes under international law with exceptions.<sup>391</sup> International law prohibits amnesties that exclude prosecution of anyone who may be legally liable for war crimes, genocide, crimes against humanity, or severe human rights violations, including gender-specific offences.<sup>392</sup> If they make it more difficult for victims to get an adequate remedy, including compensation, or if they limit victims' and societies' access to information about human rights and humanitarian law violations.<sup>393</sup>

Since the civil war began in 2013, President Kirr has issued six blanket amnesties to encourage SPLA-IO members, including Riek Machar, to cease hostilities.<sup>394</sup> In addition, President Kirr announced on 24 February 2014 that all those waging war against the State would be granted unconditional amnesty if they reported to government-controlled regions by 31 March 2015 with no limitations concerning allegations of crimes against humanity, war crimes or genocide.<sup>395</sup> These unconditional amnesties absolved individuals of wartime crimes.<sup>396</sup> Similarly, it involved the integration of non-state players into the SPLA, thus expanding impunity.<sup>397</sup> In an accord reached on 2 April 2016, the President also extended amnesty to the SPLM/A in Gbudue and Maridi States.<sup>398</sup> On 16 November 2016, the President announced another amnesty for the 750 SPLM/A soldiers in the DRC who wished to return.<sup>399</sup> The individuals who now hold senior positions in the Transitional Government are the same individuals who, under the provisions of the peace agreement, should be brought before the HCSS.<sup>400</sup>

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<sup>391</sup> See the jurisprudence of the Special Court for Sierra Leone, the jurisprudence of the InterAmerican Court of Human Rights, the jurisprudence of the African Commission on Human and Peoples' Rights

<sup>392</sup> International Covenant on Civil and Political Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>393</sup> (n 276 above)

<sup>394</sup> (n 331 above) 22

<sup>395</sup> Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: detailed findings Human Rights Council Human Rights Council Thirty-first session 10 March 2016, para 366

[https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A-HRC-31-CRP-6\\_en.doc](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A-HRC-31-CRP-6_en.doc)

<sup>396</sup> Republican Order No. 6/2015 in, Assessment mission Report by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: detailed findings, March 2016, para. 366

<sup>397</sup> (N Benson, President Kiir of South Sudan Grants Blanket Amnesty to Rebels - BaretaNews 2021)

<https://www.bareta.news/president-kiir-of-south-sudan-grants-blanket-amnesty-to-rebels/> (accessed 29 September 2021)

<sup>398</sup> UN Commission on South Sudan 'Transitional justice and accountability: a roadmap for sustainable peace in South Sudan' 5 October 2020 UN Human Rights Council 27 February-24 March 2017 A/HRC/34/63 , para 60

<sup>399</sup> (n 391 above) para 60-61

<sup>400</sup> (n 392 above) para 60-62

Amnesty for war crimes, genocide, crimes against humanity, or egregious breaches of human rights, including gender-specific offences, is prohibited under international law.<sup>401</sup> As a result, the President supports impunity by pardoning war criminals and crimes against humanity.

According to Scharf, while amnesties may help facilitate peace, they are often criticized for breaching international law's obligation to prosecute and punish offenders, especially when given to high-level offenders of international crimes.<sup>402</sup> Likewise, the African Commission on Human and Peoples' Rights in the case of *Zimbabwe Human Rights NGO Forum v Zimbabwe* determined that the ban of amnesties that result in impunity for grave human rights abuses has evolved into a norm of customary international law and violated the African Charter.<sup>403</sup> This case concerns a clemency order which excluded from its scope murder, robbery, rape, indecent assault, statutory rape, theft, possession of weapons, and any other offence involving fraud or dishonesty.<sup>404</sup> The CAT, of which South Sudan is a state party, also enshrines the prohibition of amnesties.<sup>405</sup> Thus, by granting these blanket amnesties regularly, the President violates South Sudan's international obligations and jeopardizes victims' rights to truth, justice, and reparations.<sup>406</sup>

Apart from granting amnesties, President Kirr has often defended political and military leaders accused of violating or orchestrating international law, including those sanctioned by the UNSC for suspected international crimes.<sup>407</sup> This demonstrates the government's lack of political will to hold the most heinous offenders accountable. The investigative committees set up to investigate serious crimes are discussed below.

### 3.3.2.2 Investigative Committees

Between 2013 and 2018, President Kirr established several investigative committees to investigate the 2013 crisis in Juba, the February 2016 attack on UNMISS Camp in Malakal,<sup>408</sup> and the June 2016 violence in Wau.<sup>409</sup> While these investigating committees were established with the best intentions, an Amnesty International study demonstrates that they lacked

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<sup>401</sup> United Nations, Rule of Law Tools for Post-Conflict States: Amnesties, 2009, HR/PUB/09/1, pp 11

<sup>402</sup> MP Scharf 'Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti' (1996). *Tex. Int'l LJ*, 31, 1.

<sup>403</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication No. 245/2002) [2006] ACHPR 73; (25 May 2006)

<sup>404</sup> (n 397 above)

<sup>405</sup> Article 4

<sup>406</sup> (n 399 above)

<sup>407</sup> CoHRSS, Final report of the CoHRSS, 6 March 2017, para. 63.

<sup>408</sup> 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.

[https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_34\\_63\\_AEV%20-final.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_34_63_AEV%20-final.pdf) (accessed 10 October 2021)

<sup>409</sup> Republic of South Sudan, Report of the Investigation Committee on Wau Incident of 24th – 26th June 2016.

impartiality and independence. The President selects committee members, the committee directives and findings are kept secret, and once submitted to the President's Office, seldom see the light of day. Moreover, when they do, their results generally overlook government-sanctioned crimes.<sup>410</sup>

Additionally, the investigations were not intended to hold suspects of alleged crimes accountable but rather to suggest steps to avoid recurrence. Thus government-initiated and administered committees have not prosecuted those responsible for significant incidents or injustice for victims of crimes, except for the Terrain investigation.<sup>411</sup> Investigations alone are insufficient; they must be followed by prosecutions of suspected international law violators and the fulfilment of victims' rights to truth, justice, and compensation.

As a result, the committees cannot be regarded genuine efforts to prosecute offenders and compensate victims. Furthermore, the leadership has shown reluctance to ensure accountability for past crimes by denying crimes committed by state security forces, promoting individuals accused of atrocities and subject to international sanctions, and actively fighting the operationalization of HCSS.<sup>412</sup>

### **3.4 Conclusion**

This chapter established South Sudan's obligations to investigate, prosecute, and punish perpetrators of crimes against humanity and war crimes and defend victims' rights to truth, justice, and compensation. From the above, it is apparent that the Government of South Sudan has struggled to meet its commitments under international law. It is also apparent that, given the constraints confronting the South Sudanese judiciary, there are no prospects for accountability in South Sudanese courts for victims of international crimes committed during the civil conflict. The government's persistent inability to address infractions and abuses adds considerably to the country's violent cycle. The HCSS remains the sole avenue for accountability for victims of international crimes, as detailed in Chapter 4 below.

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<sup>410</sup> Amnesty International (n 331 above)

<sup>411</sup>(n 381 above)

<sup>412</sup> As above

# CHAPTER 4

## THE HYBRID COURT OF SOUTH SUDAN (HCSS) AS AN ACCOUNTABILITY MEASURE FOR INTERNATIONAL CRIMES

### 4.1 Introduction

As mentioned in this study, South Sudan suffers from widespread and systematic impunity and a lack of political will to investigate, prosecute and punish perpetrators of war crimes and crimes against humanity committed during the country's civil war from 2013-2018.<sup>413</sup> The United Nations, African Union, Rights Groups and the international community have repeatedly urged for accountability for international crimes by establishing the Hybrid Court of South Sudan (HCSS).<sup>414</sup> The 2015 Agreement for the Resolution of the Conflict in the Republic of South Sudan (ARCSS) and the 2018 Agreement on the Resolution of Conflict in South Sudan (R-ARCSS) include a comprehensive transitional justice procedure.<sup>415</sup> Chapter V of the R-ARCSS establishes the Hybrid Court of South Sudan (HCSS) to confront the legacy of past violence and provide reparation, truth and justice to victims of the civil war.<sup>416</sup>

The first section of this Chapter provides an overview of the Hybrid Court of South Sudan (HCSS). Section two sets the groundwork for considering the planned HCSS's potential by analyzing the HCSS's nature, scope, and challenges. Finally, the third section will examine how the international community may contribute to the HCSS's success by ensuring that the perpetrators of international crimes are held accountable. The Last section will conclude.

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<sup>413</sup> African Union Commission of Inquiry on South Sudan (AUCISS) 2014. Final Report. Addis Ababa, 15 October 2014 991

<sup>414</sup> Amnesty International 'A Way Forward for the Hybrid Court for South Sudan An Open Letter to H.E. Mme. Nkosazana Dlamini-Zuma, Chairperson of the African Union Commission, from South Sudanese and International Non-Governmental Organizations'

<sup>415</sup> Intergovernmental Authority on Development (IGAD)' Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS)' 12 September 2018. Addis Ababa, IGAD

<sup>416</sup> Chapter V, the (R)-ARCSS

## 4.2 Overview on the Development of the Hybrid Court of South Sudan (HCSS)

The concept of establishing a Hybrid Court to prosecute the most severe crimes committed during the South Sudan civil war initially surfaced in the recommendations of the African Union Commission of Inquiry's 2014 report.<sup>417</sup> The report proposed the creation of an Africa-led, Africa-owned, and Africa-resourced legal mechanism under the auspices of the African Union and with the support of the international community to hold those with the most significant responsibility accountable at the highest level.<sup>418</sup> It was subsequently included in the 2015 ARCSS and then the 2018 R-ARCSS.<sup>419</sup>

The Government of the Republic of South Sudan, the SPLM-IO, and other parties initially agreed in the ARCSS that the HCSS will prosecute individuals criminally liable for international crimes from 15 December 2013 until the end of the transitional period.<sup>420</sup> In September 2015, the African Union Peace and Security Council (AUPSC) authorized the AUC Chairperson to take all necessary steps toward the establishment of the HCSS, including providing broad guidelines on the HCSS's location, infrastructure, funding, and enforcement mechanisms, applicable jurisprudence, the number and composition of HCSS members.<sup>421</sup> The AU chairperson then delegated coordination of the process to the AU Office of the Legal Counsel (OLC).<sup>422</sup> Within the AUC, official talks on the HCSS's operationalization began in March 2016, which led to the Development of the draft Memorandum of Understanding (MOU) and the Statute of the HCSS.<sup>423</sup> In early October 2016, the OLC notified the United Nations of its willingness and capability to create the court, estimating that it would operationalize by the fourth quarter of 2019.<sup>424</sup>

The HCSS is designed to prosecute those who have committed international crimes, including genocide, crimes against humanity, and war crimes.<sup>425</sup> While the African Union Commission (AUC) is responsible for creating the HCSS, the R-ARCSS require the South Sudanese government to enact the necessary legislation, implying that the court would be a joint effort.<sup>426</sup>

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<sup>417</sup> (n 406 above) para 1148

<sup>418</sup> (n 406 above) pp 300 para 1148

<sup>419</sup> (n 359 above)

<sup>420</sup> R-ARCSS (n 408 above)

<sup>421</sup> African Union '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 also see article 5.3.1.2 of R-ARCSS.

<sup>422</sup> (n 401 above) para. 63.

<sup>423</sup> Amnesty International 'Do you think we will prosecute ourselves' 8 October 2019 <https://reliefweb.int/report/south-sudan/do-you-think-we-will-prosecute-ourselves-no-prospects-accountability-south-sudan> (10 October 2021) pp 30-33

<sup>424</sup> (n 416 above) 30-33

<sup>425</sup> Article 5.3.1.1 of the R-ARCSS

<sup>426</sup> O Owiso 'The proposed hybrid court for South Sudan: Moving South Sudan and the African Union to action against impunity. African Journal on Conflict Resolution,' (2018) 18(2), 87-113.



While article 125 of the 2011 Transitional Constitution of the Republic of South Sudan (TCoSS) guarantees the judiciary's independence,<sup>427</sup> the executive branch continues to meddle with prosecutorial and judicial authorities, jeopardizing procedural fairness and judicial independence.<sup>428</sup>

Given the absence of credible, impartial, and independent domestic investigations and prosecutions of international crimes, the HCSS is thus the most feasible alternative for advancing effective accountability.<sup>429</sup> As it has the potential to foster public confidence in the transitional justice process, strengthen the South Sudanese justice system, and put an end to the pervasive culture of impunity.<sup>430</sup>

### **4.3 The challenges and status of implementation of the Hybrid Court of South Sudan (HCSS)**

After years of delay, the South Sudanese government announced on 29 January 2021 that it had approved the establishment of the HCSS,<sup>431</sup> along with the Commission for Truth, Healing, and Reconciliation (CTHR) and the Compensation and Reparations Authority (CRA).<sup>432</sup> The move was welcomed by Moussa Faki Mahamat, chairperson of the African Union Commission (AUC), who pledged to work with the government to establish the court.<sup>433</sup> However, as of the time of writing, there is no evidence of any real action taken to implement the HCSS other than forming a task force.<sup>434</sup>

In February 2021, the Revitalised Transitional Government of National Unity (RTGoNU) instructed the Ministry of Justice and Constitutional Affairs (MoJCA) to serve as the line ministry and focal point for implementing the HCSS.<sup>435</sup>

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<sup>427</sup> The Transitional Constitution of the Republic of South Sudan (TCoSS), 2011, article 125

<sup>428</sup> (n 370 above)

<sup>429</sup> 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.aspxpara](http://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspxpara). 109

<sup>430</sup> Amnesty International 'South Sudan: Looking for justice: recommendations for the establishment of the hybrid court for South Sudan' 13 October 2013 <https://www.amnesty.org/en/documents/afr65/4742/2016/en/> (accessed 10 October 2021), pp 4

<sup>431</sup> Human Rights Watch 'South Sudan: African Union Disappoints on Justice Rights Groups Urge AU to Deliver on Commitments for Accountability' 5 August, 2021 <https://www.hrw.org/news/2021/08/05/south-sudan-african-union-disappoints-justice> (accessed 10 October 2021)

<sup>432</sup> (n 425 above)

<sup>433</sup> African Union 'Press Release Statement by H.E. Mr. Moussa Faki Mahamat, Chairperson of the African Union Commission, on African Union Hybrid Court of South Sudan' <https://au.int/en/pressreleases/20210130/statement-he-mr-moussa-faki-mahamat-chairperson-african-union-commission> (accessed 11 October 2021)

<sup>434</sup> (n 427 above)

<sup>435</sup> 'Report on the Status of Implementation of the Revitalised Agreement on the Resolution of the Conflict (R-ARCSS) in the Republic of South Sudan' by H.E. Major. General C TAI GITUAI (rtd) Interim Chairperson of the Reconstituted Joint Monitoring and Evaluation Commission (RJMEAC) 1st January to 31st March 2021 <https://reliefweb.int/report/south-sudan/rjmec-report-status-implementation-revitalised-agreement-resolution-conflict-1> (accessed 11 October 2021)

The MoJCA established a task force to oversee the regular execution of Chapter V, Chapter VI, and Judicial Reform, including the HCSS.<sup>436</sup> It emphasized, however, that it is awaiting the AU's submission of a revised MOU on the HCSS, as it was presented under the previous administration and the outdated peace deal, namely the ARCSS of 2015.<sup>437</sup> On 23 April 2021, the African Union Peace and Security Council (PSC) in its Communiqué on the 990th PSC meeting urged the R-TGoNU to expedite the HCSS, to end impunity, promote justice for victims of human rights violations and abuses, and laying the groundwork for lasting peace and reconciliation in South Sudan.<sup>438</sup> Additionally, it urged the AUC to continue assisting with the implementation of Chapter V of the R-ARCSS.<sup>439</sup>

From the above, there is no clear timeline for the court's operationalization, no coordination between the African Union and the Government of South Sudan, and the key documents (MOU and Draft Statute are yet to be signed and implemented by the Government of South Sudan.<sup>440</sup> The South Sudanese entrusted the AU to ensure that justice is served and that the AU contributes to eradicating the culture of impunity on the continent.<sup>441</sup> The AUC's inability to deliver justice for South Sudan's innumerable atrocity victims creates uncertainty about the continental body's dedication to accountability for international crimes.<sup>442</sup>

Even if the HCSS represents a glimpse of hope for proper accountability, South Sudan's leadership has increasingly and openly questioned the need for justice in the country.<sup>443</sup> They urged the United States of America (USA) and the United Kingdom (UK), who are co-signatories to the peace deal, to re-examine their support for the HCSS.<sup>444</sup> They claim that it would undermine attempts to reconcile South Sudan by fostering hatred and hostility among the country's people.<sup>445</sup> This demonstrates a lack of political will on the part of the leadership.<sup>446</sup> Diing asserts that these views have permeated the populace by fuelling fears that the establishment of the HCSS will spark another civil war in South Sudan.<sup>447</sup> This

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<sup>436</sup> (n 429 above) para 45

<sup>437</sup> (n 428 above) para 44-45

<sup>438</sup> (n 414 above) para 63

<sup>439</sup> AU Communiqué (n 414 above)

<sup>440</sup> N Tut Pur 'A Glimmer of Hope for South Sudan's Victims The Government Approves War Crimes Court, Other Measures' Human Rights Watch <https://www.hrw.org/news/2021/01/31/glimmer-hope-south-sudans-victims> (accessed 7 October 2021)

<sup>441</sup> Owiso (n 420 above) 87-113

<sup>442</sup> (n 18 above)

<sup>443</sup> S Kiir and R Machar 'South Sudan Needs Truth, not Trials,' New York Times op-ed, 7 June 2016, <https://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html> (accessed 10 October 2021)

<sup>444</sup> (n 434 above)

<sup>445</sup> (n 435 above)

<sup>446</sup> CoHRSS, Final report of the CoHRSS, 20 February 2019, para. 115.

<sup>447</sup> AA Diing 'The Hybrid Court in South Sudan could be a recipe for further conflict' (2021). Africa at LSE.

widespread fear and scepticism surround the government's or opposition forces' and allies' ability to allow the court to function effectively.<sup>448</sup>

The failure to sign the MOU and domesticate the draft statute sends a message to the perpetrators that they will not be held accountable, as the government may not intend to establish the court.<sup>449</sup> The HCSS is anticipated to bolster and complement the existing justice system. Given its emphasis on prosecuting the most serious offences, the HCSS is intended to address the impunity gap. Prosecutions will necessitate a robust and independent court and independent prosecutors and investigators capable of functioning independently of political intervention.<sup>450</sup> The HCSS's jurisdiction is assessed below.

#### **4.4 Jurisdiction of the HCSS**

The OHCHR defines hybrid courts as combining national and international authorities to try offenders accused of grave crimes such as war crimes or crimes against humanity.<sup>451</sup> They are designed to address the judiciary's systemic flaws in post-conflict contexts, such as insufficient legislation, poor governance, lack of access to justice and case-law reporting. While hybrid courts will not address all these concerns, they can improve accountability and contribute positively to nation-building.<sup>452</sup> South Sudan exemplifies this situation; hence, the proposed HCSS as a court that aims to redress past atrocities and provide justice to victims independent of South Sudan's judiciary operations and with the power to carry out its investigations.<sup>453</sup> The HCSS precedence over the national court in South Sudan is thus the best means of prosecution for international crimes.<sup>454</sup> Like the International Criminal Tribunals for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (Special Court) and International Criminal Tribunal for Rwanda (ICTR), the HCSS will combine domestic and international law elements and be composed of personnel from South Sudan and abroad.<sup>455</sup>

The HCSS has extensive temporal jurisdiction over individuals bearing responsibility for violations of international law and applicable South Sudanese law committed between 15 December 2013 and until the end of the transitional period.<sup>456</sup> The court's subject matter jurisdiction extends to genocide, war crimes, crimes against humanity, sexual crimes, gender-

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<sup>448</sup> (n 441 above)

<sup>449</sup> (n 440 above) para 115

<sup>450</sup> CoHSS (n 440 above)

<sup>451</sup> United Nations High Commissioner for Human Rights 'Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts' (2008) 234

<sup>452</sup> (n 445 above)

<sup>453</sup> R-ARCSS, article 5.3.2.2

<sup>454</sup> (n 391 above)

<sup>455</sup> (n 423 above), pp 4-6

<sup>456</sup> Article 5.3.1.1 of R-ARCSS

based crimes, and other serious crimes under international law and South Sudanese law.<sup>457</sup> According to Owiso, restricting the HCSS's jurisdiction limits it from prosecuting crimes committed before the civil conflict, like violence in Jonglei State. He notes, however, that this could have been a concession to the political transition and possibly done to avoid straining the court's already limited resources.<sup>458</sup>

The court has the authority to order property or proceeds of crime forfeited to the state or restored to their rightful owners. This authority is in addition to the court's power to order restitution.<sup>459</sup> The court's mandate is to leave a 'permanent legacy' in South Sudan, consistent with the UN's position that any hybrid court must address the legacy it would leave in the country.<sup>460</sup> In this context, legacy refers to the court's enduring impact on the country's rule of law.<sup>461</sup> For the HCSS to ensure accountability and national legitimacy, there is a need for it to adhere to international fair trial standards and incorporate best practices from previous hybrid and *ad hoc* courts, such as the ICTR, ICTY, and Special Court for Sierra Leone.

Additionally, it must be victim-centred. Finally, the court's makeup is also critical for national legitimacy and ownership. This is explored in further detail below.

#### **4.5 The composition of the HCSS**

When it comes to the composition of the HCSS judges and employees, both the ARCSS and the R-ARCSS peace accords mandates that most HCSS judges come from African countries other than South Sudan.<sup>462</sup> According to Watchowski, the inclusion of qualified South Sudanese judges is critical to enhancing the court's national legitimacy.<sup>463</sup> It is also essential for improving capacity building, knowledge and skill transfer to South Sudanese judges and ensuring the improvement of the domestic judicial system following the dissolution of the HCSS.<sup>464</sup>

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<sup>457</sup> Article 4 and 5 of the Hybrid court for South Sudan's draft Statute

<sup>458</sup> Owiso (n 420 above) 87-113

<sup>459</sup> (n 452 above)

<sup>460</sup> R-ARCSS article

<sup>461</sup> Juba Monitor 'The Hybrid Court for South Sudan (HCSS)' <https://www.jubamonitor.com/the-hybrid-court-for-south-sudan-hcss/> (accessed 10 October 2021)

<sup>462</sup> R-ARCSS article 5.3.3.2

<sup>463</sup> E Watchowski 'The Hybrid Court of South Sudan: Progress towards Establishment and Sustainable Peace' (2017) *Loy. U. Chi. Int'l L. Rev.*, 15, 117

<sup>464</sup> (n 457 above) 117

Similarly, to ensure fairness, impartiality, and objectivity, the R-ARCSS requires that the prosecutors, defence counsel, and registrar come from African countries other than South Sudan.<sup>465</sup> Owiso believes that the exclusion of South Sudanese nationals from the prosecution team puts the ownership and the HCSS legacy into question.<sup>466</sup> There is a need to review the provision to include South Sudanese nationals in the prosecution team.<sup>467</sup> The R-ARCSS is silent about the appointment of support staff; however, the outstanding issues on the court should be clarified in the court's operationalization documents by the AU. On the appointment of support staff for prosecutors and the defence. Owiso asserts whilst R-ARCSS makes it apparent that the AU is responsible for appointing judges, prosecutors, duty defence counsel, and the registrar, it is ambiguous regarding who should nominate additional workers and investigators.<sup>468</sup> This allows the government to take the lead on these selections, which might discredit judicial processes and risk the witness's safety. The Memorandum of Understanding and any subsequent legislation should expressly vest the AU with accountability for these selections.<sup>469</sup>

Concerning the HCSS's seat, the 2018 R-ARCSS empowers the AU chairperson to select the HCSS's seat, which may be in South Sudan or another African country.<sup>470</sup> According to Watchowski, South Sudan is the preferred location for the court because it improves witness, victim, and public access, increases public visibility, increases international staff members' understanding of South Sudan's culture, and strengthens the court's legitimacy in South Sudan.<sup>471</sup> However, the country's growing violence poses a security concern to victims, witnesses, and court officials. Additionally, until charged or convicted by the HCSS, those accountable for crimes who retain positions of authority may harm witnesses, court workers, or court proceedings.<sup>472</sup>

The AU's commitment to ensuring the development of the HCSS has been confronted with numerous challenges and has been mainly overshadowed by efforts to resurrect the defunct ARCSS.<sup>473</sup> Since the signing of the R-ARCSS, public pressure from foreign states, government partners and AU to establish the court appears to have waned. The international community exerts some influence over the South Sudanese authorities and hence has a

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<sup>465</sup> (n 458 above)

<sup>466</sup> Owiso (n 420 above)

<sup>467</sup> PI Labuda 'The Special Criminal Court in the Central African Republic Failure or Vindication of Complementarity?' (2017) *Journal of international Criminal justice*, 15(1), 175-206.

<sup>468</sup> (n 404 above) 33

<sup>469</sup> (n 405 above)

<sup>470</sup> R-ARCSS art 5.3.1.3

<sup>471</sup> E Watchowski 'The Hybrid Court of South Sudan: Progress towards Establishment and Sustainable Peace.' (2017) *Loy. U. Chi. Int'l L. Rev.*, 15, 117.

<sup>472</sup> Watchowski (n 417 above)

<sup>473</sup> (n 414 above)

significant role in establishing the HCSS. Therefore, they must be involved to continue to advocate for and support the operationalization of the HCSS.<sup>474</sup> The next session discusses the role of the international community.

#### **4.6 The Role of the regional and International Community towards the operationalization of the Hybrid Court or *ad hoc* court**

Considering the South Sudanese government's lack of interest in establishing the HCSS, all actors with leverage over South Sudan's government leaders should reaffirm and amplify calls for the HCSS establishment.<sup>475</sup> Pressure from the AU, the UN, and foreign governments, including those in the East African region, is critical to ensuring that competent national authorities in South Sudan sign the Memorandum of Understanding (MOU) with the AU and enact legislation necessary for the establishment and operationalization of the HCSS.<sup>476</sup> While waiting for the HCSS operationalization, the international community has a significant role to play. For instance, the UN Human Rights Council, through the UN Commission on South Sudan, must guarantee that evidence is preserved so that it can be utilized during the HCSS proceedings. Similarly, the international community, including the United States, and the United Kingdom, should continue to provide financial support to assure the HCSS's operationalization. Furthermore, the African Union Peace and Security Council (AU PSC) can assess the status of the implementation of the HCSS by South Sudan and make further recommendations. The following sections go into detail about the AU, UN, and international community's roles.

##### **4.6.1 African Union Peace and Security Council**

The African Union Peace and Security Council (AU PSC) plays a significant role as the AU body responsible for addressing impunity for international crimes in conflict situations in Africa.<sup>477</sup> Suppose South Sudan does not establish the HCSS within the timeframe proposed by the African Union. In that case, the PSC has the authority to unilaterally establish an *ad hoc* court under the AU Constitutive Act<sup>478</sup> and the Protocol Relating to the Establishment of the PSC as part of its mandate to promote peace, security, and stability and to guarantee the protection of life and property in Africa.<sup>479</sup> Article 7(b) requires the PSC to undertake peace

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<sup>474</sup> (n 384 above)

<sup>475</sup> (n 376 above)

<sup>476</sup> Amnesty International (n 376 above)

<sup>477</sup> AU Communiqué (n 414 above) para 63

<sup>478</sup> Article 4(o) of its Constitutive Act

<sup>479</sup> Article 3 of the PSC Protocol

making and peace-building functions to resolve conflicts where they have occurred.<sup>480</sup> The entrenched impunity in South Sudan is a key factor fuelling the cycle of violence. Accountability will need to feature prominently as a measure to provide redress to victims, bring peace and prevent future violence.<sup>481</sup> Similarly, the African Union's Transitional Justice Policy states that where national courts lack the capacity and confidence of affected communities, steps should be taken to utilize special courts, extraordinary chambers, or hybrid courts.<sup>482</sup> Article 3(h) of the African Union Constitutive Act acknowledges and protects victims' rights to truth, justice, and restitution and therefore requires the African Union to take practical steps to bring perpetrators of grave human rights abuses in South Sudan to justice.<sup>483</sup>

As mentioned earlier, the AUCISS has previously concluded that the government has committed war crimes and crimes against humanity.<sup>484</sup> This decision puts the potential applicability of Article 4(h) of the Constitutive Act in South Sudan squarely in view. Article 4(h) establishes the AU's authority to intervene in a member state upon the Assembly's resolution in the event of grave circumstances, including war crimes, genocide, and crimes against humanity.<sup>485</sup> While the word 'intervention' has historically been used to refer to 'armed intervention,' it may be construed to permit the formation of an *ad hoc* tribunal.<sup>486</sup> At the same time, little hope can be put in the implementation of article 4 (h) given the AU's reluctance to use it in comparable circumstances and its stance on maintaining its member states' sovereignty, political independence, and territorial integrity. Nevertheless, it is a viable alternative that should be preserved.

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<sup>480</sup> Article 7 (b) of the PSC Protocol also see Articles 3(c) ad 6(e) of the PSC Protocol

<sup>481</sup> Amnesty International 'Do you think we will prosecute ourselves?' No prospects for accountability in South Sudan' 8 October 2019 <https://reliefweb.int/report/south-sudan/do-you-think-we-will-prosecute-ourselves-no-prospects-accountability-south-sudan>

<sup>482</sup> African Union, Transitional Justice Policy, February 2019 [https://au.int/sites/default/files/documents/36541-doc-au\\_tj\\_policy\\_eng\\_web.pdf](https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf) (accessed 19 October 2021)

<sup>483</sup> Article 3(h) of the African Union Constitutive Act

<sup>484</sup> (n 369 above)

<sup>485</sup> Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000

<sup>486</sup> (n 376 above) 35

## 4.6.2 UN Human Rights Council

The Human Rights Council plays a significant role in South Sudan through the Commission of Human Rights (CoHRSS), established in March 2016.<sup>487</sup> The Commission's duty is to ascertain and report the facts and circumstances surrounding purported international crimes to eliminate impunity and promote accountability in South Sudan.<sup>488</sup> Since its establishment, the commission has recorded and published detailed findings on international crimes in South Sudan to hand it over to the chief prosecutor of the HCSS proceedings.<sup>489</sup> In 2018 the Commission found that more than 40 South Sudanese officials may have committed crimes against humanity; these included military generals and state governors suspected of raping and murdering people and recruiting juvenile troops.<sup>490</sup> The report identified individuals suspected of planning, ordering, facilitating, and abetting international crimes and human rights violations and adopted command responsibility as a legal framework for establishing military and political leaders' criminal liability.<sup>491</sup> According to Musila, this framework assigns responsibility to individuals identified for instituting legal action through South Sudan's hybrid court.<sup>492</sup> Until the HCSS investigative arm is wholly established and practical, the Commission needs to continue collecting and preserving evidence of severe crimes perpetrated by the South Sudan leaders since December 2013. The Commission warned in 2017 that substantial evidence is being lost every day as witnesses are killed or disappear, and the whereabouts of displaced witnesses becomes unknown.<sup>493</sup> In addition, physical evidence degrades, and documentaries and other similar evidence are lost, concealed, or destroyed.<sup>494</sup>

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<sup>487</sup> Human Rights Council Resolution adopted by the Human Rights Council on 23 March 2016 - 31/20. Situation of human rights in South Sudan 27 April 2016 A/HRC/RES/31/20

<sup>488</sup> (n 480 above)

<sup>489</sup> (n 482 above)

<sup>490</sup> (n 391 above) para 60-61

<sup>491</sup> (n 483 above) para 60-61

<sup>492</sup> G Musila 'Instituting Accountability for Human Rights Violations in South Sudan' 26 October 2018 Africa Center for Strategic Studies <https://africacenter.org/spotlight/instituting-accountability-for-human-rights-violations-in-south-sudan/> (accessed 21 July 2021)

<sup>493</sup> UN Commission South Sudan 'Report of the Commission on Human Rights in South Sudan' 27 February-24 March 2017 A/HRC/34/63

<sup>494</sup> (n 432 above) para 92



### 4.6.3 International community Support

International, regional, and domestic leaders from the United Nations, the United States and the United Kingdom, and South Sudanese nongovernmental organizations have continuously pressed the government and rebel factions to establish the HCSS and other transitional justice mechanisms.<sup>495</sup> In 2015, the US government committed USD 5 million to the African Union to establish the HCSS.<sup>496</sup> However, after several years of inactivity on the AU, the US State Department stated in July 2021 that an unused US\$3.65 million allocation would not be renewed.<sup>497</sup> The move to reclaim the funds reflects growing dissatisfaction with the South Sudanese government, which has said that the court is excessive.<sup>498</sup> Moreover, it also shows a degree of discontent with the African Union (AU). The AU has the power to establish the court; however, it has been hesitant to proceed without the support of South Sudanese leaders.<sup>499</sup>

South Sudanese officials have also gone to great lengths to resist the establishment of the HCSS, even employing a US lobbying company to try to prevent its establishment.<sup>500</sup> The ARCSS and the R-ARCSS rule out the prospect of immunity and bar anybody arrested or convicted by a court from serving in government.<sup>501</sup> The current stalemate undercuts the notion of African solutions to African challenges and risks signalling that the AU is incapable or unwilling to exercise leadership in areas critical to the people it serves.<sup>502</sup> Additionally, the African Union's Transitional Justice Policy (AUTJP) would be undermined unless the AU works to advance accountability in South Sudan.<sup>503</sup> At this stage, it may require constant international, regional, and local pressure to overcome the Governments resistance to establish the HCSS.<sup>504</sup> In the future, it will be in the best interest of the victims of the war for the international community, including non-governmental organizations, to continue to demand justice for war crimes and crimes against humanity committed in the South Sudan civil war.<sup>505</sup>

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<sup>495</sup> JR McAllister 'South Sudan promised to investigate civil war atrocities. Why hasn't that happened?' *The Washington Post* 6 October 2021

<sup>496</sup> R Gramer & C Lynch 'U.S. Quietly Gives Up on South Sudan War Crimes Court: Six years after Washington gave \$5 million to set up a war crimes court, nothing has happened' *Foreign Policy* 20 July 2021 <https://foreignpolicy.com/2021/07/20/south-sudan-war-crimes-court-state-department-africa-biden-human-rights/> (accessed 11 October 2021)

<sup>497</sup> (n 489 above)

<sup>498</sup> (n 434 above)

<sup>499</sup> (n 435 above)

<sup>500</sup> (n 433 above)

<sup>501</sup> (n 435 above)

<sup>502</sup> Gramer et al (n 489 above)

<sup>503</sup> African Union Transitional Justice Policy Framework (AUTJP) Addis Ababa Ethiopia Adopted February 2019

<sup>504</sup> (n 434 above)

<sup>505</sup> As above

## **4.7 Conclusion**

South Sudan's government bears the primary responsibility for investigating, prosecuting and punishing those responsible for war crimes and crimes against humanity perpetrated during the country's civil war. As demonstrated in this dissertation, significant judicial reform is required in South Sudan to strengthen the domestic court system's independence and ensure that it is consistent with international norms. Given the South Sudanese legal system's lack of independence, the HCSS is the most urgent and viable avenue for criminal accountability and victim justice. Parallel to the development of the HCSS and domestic justice system changes, alternative criminal accountability measures outside of South Sudan should be pursued by the AU, UN and other members of the international community.

# CHAPTER 5

## RECOMMENDATIONS AND CONCLUSION

### 5.1 Conclusion

As established in this study, serious crimes have been committed by government and opposition forces in South Sudan since the start of the civil war. If established before the South Sudanese Hybrid Court (HCSS), these crimes should amount to war crimes and crimes against humanity.<sup>506</sup> Even if the civil war ended in September 2018, South Sudan's peace remains threatened by staggering levels of localized violence, retaliatory killings and attacks, humanitarian catastrophe, severe economic position, and cattle raiding. These acts threaten to destabilize the country further and jeopardize prospects for accountability and sustainable peace.<sup>507</sup> In addition, impunity for international crimes established in this study has grown at alarming levels due to the Government's unwillingness to prosecute and hold the perpetrators and their superiors accountable.<sup>508</sup>

For South Sudan to address the issue of accountability, it needs to meet its international obligations by investigating, prosecuting and punishing those guilty of war crimes and crimes against humanity committed during the civil war. Although the civilian and military justice systems cannot address accountability for these crimes, this lack of capacity does not absolve the South Sudanese government of the primary responsibility for managing such crimes and promoting accountability through the HCSS.<sup>509</sup> South Sudan's Government should thus place a premium on responsibility for major crimes, as eradicating impunity for international crimes against humanity is critical for future deterrence.

South Sudan's credibility as a new sovereign State would be endangered unless the issue of accountability for international crimes is addressed and perpetrators of serious crimes under international law are brought to justice. Therefore, the international community, particularly the African Union (AU), United Nations (UN), must act swiftly to maintain pressure on the South Sudanese government and the AU to quickly establish the HCSS and other accountability measures outlined in Chapter 5 of the R-ARCSS.

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<sup>506</sup> (n 217 above) 88-771

<sup>507</sup> (n 24 above)

<sup>508</sup> (n 18 above) 22

<sup>509</sup> (n 400 above)

Due to the absence of the HCSS, critical evidence is lost every day when witnesses are killed or vanish, leaving their locations unknown.

Similarly, given the absence of credible, impartial, and independent domestic investigations and prosecutions of international crimes. The HCSS's creation is critical to securing justice for war victims. The absence of the HCSS, combined with the domestic legal system's complete inability to prosecute perpetrators of international crimes, violates South Sudan's international obligations to ensure victims' rights to truth, justice, and restitution and victims' final opportunity for justice.<sup>510</sup> Given the above, this study makes recommendations to the UN, AU, and the international community below.

## **5.2 Recommendations**

As a state emerging from civil war and yet experiencing the negative consequences of the civil conflict in the shape of a deadly localized conflict, South Sudan urgently necessitates international support and intervention since the country's level of violence has increased significantly. Civilians in South Sudan are at risk of gang rape, forced displacement, and abductions due to the lack of accountability mechanisms. While the international community has urged South Sudan to implement the R-ARCSS, it has not exerted sufficient pressure on South Sudanese officials to address international crimes by establishing the HCSS.<sup>511</sup> Thus, the recommendations in this dissertation are three-fold and directed to the South Sudanese government, the African Union, and the United Nations as follows:

### **5.2.1 Government of South Sudan**

The study recommends that the Government of South Sudan:

- a) Fully implement the Hybrid Court of South Sudan (HCSS) as provided in Chapter V of the R-ARCSS. Sign the MOU on the Establishment of the Hybrid Court, adopt the HCSS Draft Statute, and expedite the court's operationalization with the African Union's support.
- b) Adhere to its international legal obligations to investigate, prosecute, and punish those responsible for international crimes perpetrated during the civil war.
- c) Provide victims with sufficient, adequate, timely, and appropriate remedies consistent with their international commitments.

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<sup>510</sup> (n 324 above)

<sup>511</sup> (n 478 above)

- d) Restrict or desist from appointing officials who are alleged to have committed serious crimes under international law, including those listed by the UNSC.
- e) Reform the judiciary to strengthen the domestic justice system's autonomous capacity to build public confidence in the judiciary and combat impunity.
- f) Finalize the Penal Code's incorporation of international crimes and ensure that the definitions of the crimes are consistent with international law.
- g) Consider ratifying the Rome Statute creating the ICC and declaring the ICC's jurisdiction over crimes committed in South Sudan since 15 December 2013.

### **5.2.2 African Union Peace and Security Council (PSC)**

The study recommends that the PSC convene to discuss and assess the Government of South Sudan's implementation status of the HCSS. It should also issue a Communique urging the South Sudanese government to take immediate steps toward the HCSS establishment and for the AU to update on the creation of the HCSS from its side. If the Government does not sign the MoU and adopt the HCSS Statute within the PSC stipulated time. The PSC should consider creating an *ad hoc* tribunal for South Sudan as per the AU Constitutive Act and the Protocol Relating to the Establishment of the PSC (PSC Protocol).

### **5.2.3 African Union Commission**

The study recommends that the AUC Office of the Legal Council update the HCSSMOU, draft Statute, update and issue a report on the progress made from the AUC point on the HCSS establishment. It should clarify outstanding issues on the HCSS through a clear roadmap. Finally, it should give South Sudan a deadline or ultimatum. The Government must sign the MOU and adopt the HCSS Statute, failing which the AU will proceed unilaterally to establish an *ad hoc* tribunal.

### **5.2.3 United Nations Security Council (UNSC)**

The study recommends that if investigations and prosecutions are not initiated soon before independent, impartial, and competent courts, the UNSC should consider referring the situation of South Sudan to the International Criminal Court (ICC) or establishing an *ad hoc* court under Chapter VII of the UN Charter.

### **5.2.4 United Nations**

The study further recommends that the United Nations strengthen its influence on the South Sudanese government to sign the MOU and pass the HCSS Statute immediately. It should further endorse the AU's ultimate formation of an *ad hoc* tribunal for South Sudan if the South Sudanese government does not sign the MoU and pass the legislation by an AU-imposed deadline. Similarly, it should urge member nations to exercise their jurisdiction over international crimes committed in South Sudan under the concept of universal jurisdiction. Finally, it should also guarantee that the UN Commission of Human Rights mandate in South Sudan is renewed to collect and preserve evidence of severe crimes perpetrated since 2013 for the HCSS or *ad hoc* tribunal's use.

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