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ARTICLE

International Criminal Law and Customary Law for Punishment of the Perpetrators of International Crimes in South Sudan

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Abstract

The article examines how to address the report of the African Union Commission of Inquiry on South Sudan, which accuses the Government of South Sudan and the rebels of committing "crimes against humanity" and violating "international humanitarian law" in the war of December 2013. The Commission recommends "an Africa-led, Africa-owned, Africa-resourced legal mechanism, under the aegis of the African Union and with support from the United Nations, to bring those with the greatest responsibility at the highest level to accountability" in a court. Second, the Agreement on the Resolution of the Conflict in the Republic of South Sudan asked for establishing a hybrid court in South Sudan to investigate and prosecute the perpetrators of "genocide, crimes against humanity and war crimes". The Cabinet of South Sudan approved, in its resolution on 29 January 2021, the establishment of the court. On the other hand, the Government of South Sudan rejected accountability for the perpetrators of international crimes in its resolution at the Transition Justice Conference and recommended "amnesty" for those admitting the commission of international crimes in Juba, Malakal, Bor and Bentiu. The research findings show that amnesty threatens peace and security because customary law rejects amnesty. Its implementation generates systematic vengeance from the clan of those killed. The research recommends the establishment of a hybrid court that adopts the complementarity principle in compatibility with the African customary law of blood compensation. The authoritative national criminal courts in South Sudan omit capital punishment on the grounds that (a) killer(s) pay(s) blood compensation, *apok* or *cot*, to the survivors of (a) killed person(s) with 51 cattle. The payment changes the penalties of life imprisonment, which international criminal law imposes on the perpetrators of international crimes and the death penalty, which African criminal law imposes on the confirmed killer(s). Finally, the tribunal imposes 10-year terms of imprisonment on the confirmed perpetrators of international crimes.

Keywords South Sudan; war crimes; international crimes; crimes against humanity; amnesty; accountability; African customary law; blood compensation

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INTRODUCTION

This research examines how to address the obligation of the international criminal law that dictates accountability for perpetrators which states "most serious crimes of concern to the international community as a whole must not go unpunished".[1] The international community reckons crimes of genocide, crimes against humanity, war crimes and aggression as crimes of concern that must not be left unpunished in a competent court. The African Union (AU) Commission of Inquiry on South Sudan reported that the Government of South Sudan and the rebels committed "crimes against humanity" and violated "international humanitarian law" in war, December 2013 (AU Commission of Inquiry on South Sudan 2014).

In pursuit of not leaving the perpetrators unpunished in an authoritative and competent tribunal, the Commission recommended "an Africa-led, Africa-owned, Africa-resourced legal mechanism, under the aegis of the African Union with support from the United Nations to bring those with the greatest responsibility at the highest level to accountability" in a court (AU Commission of Inquiry on South Sudan 2014).

In compliance with the Commission recommendation, Article 3.3.1.3.1.1 of the Agreement on the Resolution of the Conflict in the Republic of South Sudan accepts the establishment of an international tribunal, the Hybrid Court for South Sudan,[2] with jurisdiction to investigate and prosecute the perpetrators of crimes of "genocide, crimes against humanity and war crimes".[3] In pursuance of this recommendation, the Executive Cabinet of South Sudan approved, in its resolution on 29 January 2021, the establishment of the Criminal Hybrid Court for South Sudan.

Contrary to these remedial recommendations, the Government of South Sudan organized the Transitional Justice Conference in the capital city, Juba, and the conference resolution recommended "amnesty" (Radio Tamazuj 2023) to the perpetrators of the alleged international crimes who admit the commission of the crimes against humanity and war crimes during the war in Juba, Malakal, Bor, Bentiu, Akobo, Pibor and other locations within South Sudan in December 2013 (Radio Tamazuj 2023).

The research findings divulge that amnesty, instead of punishment for the perpetrators of the alleged international crimes, threatens peace and security in South Sudan in two ways. First, amnesty is not a precedent remedy in South Sudan's customary law. Doing so generates a reaction from the clan of (a) killed person(s) with its associated ethnic or tribal communities to advocate the inevitable and systematic vengeance of blood feuds. Under the blood feud, the clan, ethnic group or tribe of (a) killed person(s) targets the clan, ethnic group or tribe of the killer(s) and

[1]The preamble of the International Criminal Court (ICC) Rome Statute (which was done at Rome on 17 July 1998, and in force on 1 July 2002) states, "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished". See International Criminal Court (2011).

[2]Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2015, retrieved 2 August 2023 (https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf).

[3]Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2018, Art. 3.2.1.

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lethal violence resurrects and recycles from season to season among the national institutions of ethnic, tribal and clan communities. Second, the systematic vengeance of killing from the clan, tribe or ethnic group of the killed person(s) against the clan, ethnic group or tribe of the killer(s) displaces the civilian population from their traditional residential places and generates dire humanitarian conditions for the internally displaced persons.

The research supports the establishment of a tribunal, the Hybrid Court for South Sudan, to punish the perpetrators of international crimes during the war. Such tribunal adopts three approaches as remedies that reconcile amnesty with punishment in its jurisdiction. First, the adoption of the complementarity principle of international criminal law is recommended.[4] To permit the African customary law of blood compensation compatibility with international criminal law, the authoritative national criminal courts in South Sudan omit capital punishment on the grounds that (a) killer(s) pay(s) blood compensation, a mixture of cows and oxen, known in Nilotic customary law as *apok*[5] or *cot*[6] to (a) killed person(s) (Wild, Jok, and Patel 2018). The number of cattle for the compensation of (a) killed person(s) ranges from 10 among the Collo, 31 for the Dinka and 51 among the Nuer after the establishment of South Sudan.

Second, the research recommends uniformity in paying 51 cattle as blood compensation to the victims of (a) killed person(s). Such payment changes both penalties of life imprisonment, which international criminal law imposes on the perpetrators of international crimes and the death penalty, which African criminal law imposes on the confirmed killer(s).

Finally, the tribunal imposes 10-year terms of imprisonment on the confirmed perpetrators of international crimes and then peace and security recycle in political, economic and social institutions in the territorial sovereign State, South Sudan.

WAR AND COMMISSION OF INQUIRY ON SOUTH SUDAN

Theoretically, a war that infringes the prohibitions in international humanitarian law and other instruments of international law compels the United Nations (UN) Security Council (UNSC) to issue a resolution under Chapter VII of the UN Charter. The resolution requests the UN Secretary-General to establish an International Commission of Inquiry. The Secretary-General mandates that the Commission investigate whether the parties in war violate international humanitarian law and international human rights law, identify the perpetrators, and bring them to criminal accountability in an authoritative court.[7]

The visible and disturbing disastrous humanitarian conditions on international television screens during the war in South Sudan satisfied the observers, particularly the AU, that serious violations of international humanitarian law and international

[4]Article 1 of the Statute of the ICC states "shall be complementary to national criminal jurisdictions" (International Criminal Court 2011:2).

[5]In Dinka language.

[6]In Nuer language.

[7]UNSC Resolution 1564 compelled the UN Secretary-General to establish an International Commission of Inquiry on Darfur on 18 September 2004.

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law amounting to frustration and defeating of Article 3(f) of the objectives of the AU law might have been committed in war. In compliance with Article 9(d) of its function, the Assembly of the AU, at its 411th meeting in Banjul, The Gambia, mandated the establishment of the Commission of Inquiry on South Sudan. The Assembly requested the Chairperson of the Commission of Peace and Security Council of the AU, in consultation with the Chairperson of the African Commission on Human and Peoples' Rights and others relevant to establish a Commission of Inquiry on the South Sudan State.

The mandate of the Commission of Inquiry focuses on investigating human rights violations and other abuses committed during the armed conflict in South Sudan and presents recommendations on the best ways and means to ensure accountability of the perpetrators.[8]

According to Article 4(h), the mandated institutions established the Commission of Inquiry on South Sudan, which comprised publicists with high moral character[9] as international law demands. The current legal provisions in international law require members of "high moral character"[10] as a prerequisite for any competent person to assume a position in the institutions relevant to international law.[11] On 15 October 2014, the publicists from the AU Commission of Inquiry on South Sudan (2014) reported that the Government of South Sudan and its belligerent fighting forces of rebels committed grave "crimes against humanity" and violation of "international humanitarian law", during their military war in December 2013.

Depending on its investigation, the Commission recommended subsequently the establishment of "an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union with support from the United Nations to bring those with the greatest responsibility at the highest level to accountability" in a neutral criminal court (AU Commission of Inquiry on South Sudan 2014).

Within the context of these recommendations, the research investigates the report of the Commission of Inquiry on South Sudan *vis-à-vis* the "crimes against

[8]Peace and Security Council of the African Union Communiqué, 411th meeting at the level of Heads of State and Government, in Banjul, The Gambia, 30 December 2013, on South Sudan. PSC/AHG/COMM.1(CDXI)-Rev.1. Retrieved 2 August 2023 (https://oau-aec-au-documents.uwazi.io/en/document/v97scis2gcmhou8fq7611yvi?page=2).

[9]The Commission includes Olusegun Obasanjo, Former President of the Republic of Nigeria; Sophia A. B. Akuffo, Judge, Supreme Court of Justice and former President of the African Court on Human and Peoples' Rights; Mahmood Mamdani, Professor, Executive Director, Makerere Institute of Social Research, Makerere University, Kampala, Uganda and Herbert Lehman Professor of Government, Columbia University; Bineta Diop, President of Femmes Africa Solidarité and African Union Chairperson's Special Envoy on Women, Peace and Security; Pacifique Manirakiza, Professor, University of Ottawa and Member of the African Commission on Human and Peoples' Rights (AU Commission of Inquiry on South Sudan 2014:9–10).

[10]Article 28(2) of International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976; following Article 49, Articles 34 and 52(1) of the American Convention on Human Rights: the "Pact of San José, Costa Rica" signed at San José, Costa Rica, 22 November 1969; Article 31(1) of the African Charter on Human and Peoples Rights, adopted 27 June 1981, Organization of African Unity Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

[11]Article 52(1) of the American Convention on Human Rights, ibid.; Article 31(1) of the African Charter on Human and Peoples Rights, ibid.

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humanity" and "war crimes" which fall within the discipline of international humanitarian law and international law, and contrasts them with the report of the Commission and independent collection of relevant data from the cities of violence: Juba, Bor, Malakal and Bentiu. This may provide sufficient proof beyond reasonable doubt that the warring parties have committed crimes against humanity and war crimes.

Origin of Crime Against Humanity and Definition

Present legal instruments have not convened an international conference to sign a treaty on crimes against humanity to ensure its consensual definition. Despite this, most publicists of international law trace the sources of its origin. Some scholars limit its origin to the racial setting in which the civilian population of European Armenians experienced systematic murder, extermination, imprisonment and deportation by the Ottoman Empire in 1915 (Douglas 1976), neglecting consideration of the systematic murder, extermination and enslavement of the African civilian population in the present Democratic Republic of Congo by Leopold II of Belgium.[12]

The exclusion of the European institutions to condemn and recognize the mistreatment of the African civilian population that has experienced conditions similar to the crime against humanity[13] constitutes a denial of the Africans from justice of apology in favour of the European Armenians. However, from this juncture, the united notion of crime against humanity emanated, evolved and developed under international customary law. Next to this recognition of the crimes against humanity, the Statutes of the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda create *bona fide* legal jurisdictions to the crimes against humanity.

Indeed, the definition of the crime against humanity by the ICC triggers the latest consensus among the States Parties in the international legal system. Article 7 of the ICC lists specific acts that may constitute a "crime against humanity". It defines it as "means any of the following acts, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" involving murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; and rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

The definition of war crimes is important to establish its conformity or discrepancy to the report of the AU Commission of Inquiry on South Sudan with limited scope.

[12]The regime of Leopold II of the Congo Free State committed systematic atrocities against the civilian population, such as forced labour, torture, murder, kidnapping and the amputation of the hands of men, women and children after the failure of those to provide the required quota of rubber to his business.

[13]Article 7 of the ICC Rome Statute; see International Criminal Court (2011).

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Definition of War Crimes

For Rousseau ([1895] 1762), "Man was born free, and everywhere he is in chains." It is *bona fide* that a human being is born free and remains free; however, the chains of his or her freedom spring or emanate from the compliance with freedom itself. Freedom is an interdependent, interrelated and indivisible right with the freedom of others. Article 5 of the Vienna Declaration and Programme of Action defines that "All human rights are universal, indivisible, and interdependent and interrelated"[14] everywhere at any time in the same manner.

The universal compliance and adherence of sane and natural persons to Article 5 of the Vienna definition of human rights chains the individuals' freedom to exercise their freedoms of war, fight and violence against belligerents within the limited scope of the customs of warfare. Recognition of human sanctity and dignity in customs of warfare is a global agenda without a provision in international law that attempts to eradicate or diminish it, but it is a general practice accepted as law by the civilized political, social and economic communities.

Article 38(1)(b) of the International Court of Justice conforms to the significance of the customs in addressing and resolving disputes notwithstanding; Article 38(1)(c) expressly upholds the necessity of customs to exhibit general principles of law recognized by the civilized nations. The term "civilized nations" is controversial, but it depends on the nations' experiences that constitute best the civilized nations from uncivilized nations.

Taking no notice and reckon to the customs of warfare in war generates the classification of such nation(s) as an uncivilized nation(s) with subsequent war crimes, which dictate punishment.[15] Article 8(2) of the ICC Statute offers a collective definition from the Geneva Conventions; nonetheless, since the violence in South Sudan is not of international armed conflict but national, it excludes other definitions and takes the relevant definition to it as a national conflict, and particularly for the ICC Statute (International Criminal Court 2011:6–7), "war crimes" means:

> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character within the established framework of international law, namely, any of the following acts:
>
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
> (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as

[14]Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[15]In *The Prosecutor v. Dusko Tadić* (IT-94-1), on 11 November 1999, Trial Chamber II found Tadić guilty of violating the laws or customs of war.

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they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, (b), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) Killing or wounding treacherously a combatant adversary;
(x) Declaring that no quarter will be given;
(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xii) Destroying or seizing the property of an adversary unless the necessities imperatively demand such destruction or seizure of the conflict;
(xiii) Employing poison or poisoned weapons;
(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xv) Employing bullets which expand or flatten in the human body, such as bullets with a hard envelope which does not cover the core or is pierced with incisions.

Definition and Commission Report

It is significant to contrast the definition of crimes against humanity with a report of the AU Commission. The AU Commission of Inquiry on South Sudan (2014:212) reports that it "heard and received reports from witnesses and survivors of rape, gang rape, murder, killing, sexual assault, torture, and cruel, inhuman and degrading treatment as well as abductions, sexual slavery, disappearances and targeting of foreign women". The AU Commission of Inquiry on South Sudan (2014:212) concludes that it is uneasy to "verify these allegations". For Kostenko and Rudin (2018), criminal law has many outstanding issues and conflicting opinions concerning the procedural order of evidence verification.

What remains unanswered in the discipline of international criminal law is how to ensure consensus on the verification procedures for criminal allegations. Article 51(1) of the ICC Statute conditions that the rules of procedure and evidence shall

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enter into force upon adoption by a two-thirds majority of the Assembly of States Parties members. The reservation from some States' Parties from rules of procedure and evidence in criminal law emanates from conflicting interests. For instance, the war in South Sudan is not ideological violence but from the divided ethnic groups, the Dinka and the Nuer. Under ethnic war, it makes it difficult to obtain trustful, creditable and reliable testimonies from witnesses in courts.

In Africa, ethnicity plays a significant role, negatively or positively. The negative part comes from the violence between two warring ethnic groups. For instance, Human Rights Watch (2008) reported that in Kenya, an ethnic Kalenjin councillor addressed a rally in the town of Soi and promulgated that, if elected, he would "remove the roots" of the local Kikuyu ethnic group from the area "so there would be only one tribe there". Post-elections 2007, many Kikuyu were killed but accused and charged William Ruto, the current President of Kenya.

In case law, the Trial Chamber of the ICC terminated the case of two defendants, William Samoei Ruto and Joshua Arap Sang. The Chamber, concluding that in consideration of the requests of Mr Ruto and Mr Sang that the Chamber finds that there is "no case to answer", dismissed the charges against both the accused and entered a judgment of acquittal. The Chamber also considered the opposing submissions of the prosecutor and the legal representative of the victims and received further submissions during the hearings held from 12 to 15 January 2016. Based on the evidence and arguments submitted to the Chamber, Presiding Judge Chile Eboe-Osuji and Judge Robert Fremr, the majority agreed that the charges would be vacated and the accused would be discharged immediately.[16]

The decision of the Trial Chamber of acquittal implies that there is no trustful, reliable and credible evidence from submissions of the legal representative of the victims, which relies very much and mostly on the account and narratives of present witnesses in the authoritative court.

Trust, Reliability and Credibility in Criminal Law

Criminal law places judges in a dilemma of trust, credibility and reliability regarding the witnesses during their testimonies in front of them in competent courts of authoritative regimes. Theoretically, witnesses in accountability or punishment often may have none of the three rudimentary traits comprising trust, credibility and reliability to receive facts from them.

In criminal law, trust is not limited to property, but it embodies the responsibility of a person in society as an identical person trusted with the authority to act in compliance with the law and report trusted information about the conduct of other individual natural persons(s) that contravene(s) the unlawful act by law. It refers to the trust of individuals, governments and international bodies to the facts and data or information from them. Fact is a social, cultural, political, economic and civil property entrusted upon individuals by law to hold and develop for the benefit of the people, regardless of religious, ethnic, national, racial, colour, language, tribe, region and gender backgrounds.

[16]*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 5 April 2016.

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Credibility, however, refers to information free of probability and tenability but offers and furnishes plausible facts of substantial documentary evidence to the local, national and international governmental systems. Giannelli (1978) observes that, in most criminal trials, guilt and innocence are easily established when the jury decides which witnesses provide credibility and which do not. Reliability refers to an informative source with consistent evidence free of uncertainty but worthy of fact(s) for investigation and ends with truth.[17]

The presence of probability from the information and the reports received from witnesses of war events persuades the AU Commission of Inquiry on South Sudan (2014:212) to conclude that it is difficult to "verify these allegations" which may constitute crimes against humanity and war crimes in the national armed conflict between the rebels and the government.

Article 15 of the International Criminal Statute (International Criminal Court 2011:9) stresses the significance of reliable information to the Prosecutor of the ICC. It states, "The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate."

Suspicion of the credibility and reliability of the reports obtained from witnesses creates two categorical legal camps for the South Sudanese nationals; first, the camp for the advocates of amnesty[18] and second, the camp for advocates of accountability.[19] The former urges amnesty for the perpetrators that admit criminal guilt of violation of international humanitarian law, and the latter requests the indictment of the suspects and their punishment as perpetrators of criminal offences in an authoritative judicial court(s) with jurisdiction to try crimes against humanity and war crimes. The advocates argue that international criminal law denies amnesty, but it imposes indictment and punishment on the guilty persons.

The advocates of amnesty provide pseudo remedies in contrast to the reports of the international crimes embodying the crimes against humanity and war crimes in South Sudan. International criminal law does not offer amnesty for crimes against humanity or war crimes. This is illustrated by two cases.

First, Tomoyuki Yamashita, formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was arraigned before a United States Military Commission and charged with unlawfully disregarding and failing to discharge his duty as Commander in complete charge of the affairs to control the acts of members of his command by permitting them to commit "war crimes". The essence of the case for the prosecution was that the accused knew or must have known of the acts of his soldiers and permitted the systematic, widespread crimes committed in the Philippines by troops under his command, which included murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial, and/or that he did not take

[17]Case law: *Emmert v. Hearn*.

[18]The Transitional Justice Conference recommends amnesty to those who admit their crimes against humanity and war crimes (Radio Tamazuj 2023).

[19]The Executive Cabinet of South Sudan approved, in its resolution on 29 January 2021, the establishment of the Criminal Hybrid Court for South Sudan.

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the steps required of him by international law to find out the state of discipline maintained by his men and the conditions prevailing in the prisoner-of-war and civilian internee camps, under his command in Philippine territorial and sovereign islands.[20]

Second, the defence team of Dominic Ongwen, former Commander of the Ugandan Lord's Resistance Army, raised concerns about Ongwen's mental health as well as his fitness to stand trial, insanity under Article 31(1)(a) of the Rome Statute (a first at the ICC) (International Criminal Court 2011:16), mitigation in sentencing based on diminished mental capacity, duress (also a first), and the cumulative effects of mental health and duress. These defence claims could not provide trustworthy, reliable and credible legal data to remedy the accused from these international crimes. Referring to the case, *the Prosecutor v. Ongwen*, the ICC charged Dominic Ongwen with 70 counts of war crimes and crimes against humanity allegedly committed in northern Uganda.[21] The ICC concluded that the allegation of the Prosecutor carried substantial evidence and definitive proof that Dominic Ongwen was in command of the Lord's Resistance Army by the second half of 2005, and then he would face criminal accountability for the command responsibility[22] in the charges of war crimes[23] and crimes against humanity,[24] without reference to the provision of amnesty to him.

AMNESTY IN LAW

Criminal offences of murder, massacre, rape and others, which sometimes occur during times of violence, create equivocal binaries in national institutions of the international community. Amnesty advocates stress the importance of issuing an amnesty on the perpetrators of criminal offences that might have been committed during wartime for three reasons. First, retrieving the cases for the punishment of perpetrators of crimes during wartime recycles disputes, and lethal violence may probably be resurrected. Second, accountability interferes and disrupts the implementation of the provisions of the permanent peace agreement. Third, witnesses that testify in a criminal tribunal court in accountability may sometimes have none of the three rudimentary traits of trust, credibility and reliability to receive facts from them.

[20]*United States v. Tomoyuki Yamashita*, Case No. 21, Trial of General Tomoyuki Yamashita, United States Military Commission, Manila (8 October–7 December 1945), and the Supreme Court of the United States (judgments delivered 4 February 1946). See also Bassiouni (1992).

[21]*The Prosecutor v. Dominic Ongwen*. ICC-02/04-01/15.

[22]Article 7(3) of the ICTY Statute: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." 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 (International Tribunal for the former Yugoslavia), adopted 25 May 1993 by UNSC resolution 827 (1993), retrieved 2 August 2023 (https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-tribunal-prosecution-persons-responsible).

[23]Articles 2 and 3 of the war crimes in the ICTY Statute, ibid.

[24]Article 5 of the crimes against humanity in the ICTY Statute, ibid.

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Apuuli (2022) writes about decreeing amnesty to the perpetrators of international and national crime, claiming that holding them accountable for mass crimes through prosecutions may not end the violence. Persons often commit crimes due to politics, so addressing the causes of political violence through promoting reconciliation may be the alternative answer.

Conversely, the domestic advocates of criminal accountability in South Sudan deny amnesty. Instead of punishing the perpetrators of the alleged international crimes, amnesty threatens peace and security in South Sudan in two ways. First, amnesty is not a legal remedy in South Sudan's customary law. Its implementation in traditional authority's economic, social and political settings generates a reaction from the clan of (a) killed person(s) with its associated ethnic or tribal communities to advocate the inevitable vengeance of a blood feud. Under the blood feud, the clan, ethnic group or tribe of (a) killed person(s) plans and targets the clan, ethnic group or tribe of the killer(s), and lethal violence resurrects and recycles from season to season among the national institutions of ethnic, tribal and clan communities (Evens 1985).

Second, amnesty constructs and generates a systematic vengeance of killing and lynching from the clan, tribe or ethnic group of the killed person(s) against the clan, ethnic group or the tribe of the killer(s) and that displaces civilian population from their traditional residential locations with the following dire humanitarian conditions for the internally displaced persons (Human Rights Watch 2014).

Furthermore, international criminal law itself does not recognize amnesty. Its doctrine urges criminal accountability and punishment of the perpetrators of international crimes to comply with four obligations of criminal theories, which deny amnesty and impose indictment, investigation and subsequent punishment against the confirmed perpetrators beyond a reasonable doubt in a court. First, in its preamble, the Statute of the ICC states "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" (International Criminal Court 2011:1).

Second, amnesty frustrates the teleological obligation that human conduct or a government policy towards nationals must be judged following the standard of good effect it produces when it exercises it concerning the customary societal norms, and their violations or infringements dictate an authority in effective control of power to punish the perpetrator(s) effectively.

Third, amnesty ignores the deontological obligation that coerces the authority in charge of affairs in a sovereign territorial State to punish the perpetrator(s) of criminal offences for two virtual reasons:

(1) The law dictates and requires it;
(2) The underlying obligation is that such law is morally good and naturally with the standardized weight of recognition in itself and its entirety (MacDonald and Beck-Dudley 1994; Tunick 1992).

Fourth, amnesty denies the achievement of five reasons for punishments to rational and sane natural persons:

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(1) Retribution, a form of penalty that imposes appropriate punishment on a defendant for the satisfaction of the audience, listeners, a society (Miethe and Lu 2005:3).
(2) Deterrence, a persuasive procedure of punishment to nationals or citizens and potential offenders and re-offenders to conform to the regulatory rules and laws.
(3) Rehabilitation refers to a sort of punishment which the legal body exercises with the intent to reform an offender or a prisoner to thrash, defeat, conquer and rout the barriers, which influence offenders to commit a crime.
(4) Incapacitation deals with the physical punishment of an offender primarily. It retains, prevents, keeps or transfers a criminal away from society through house arrest, execution according to the death penalty and incarceration (Demleitner 2014:23).
(5) Furthermore, restoration conduct represents a specific kind of punishment that urges the offender to amend an injury or a victim and the community in which the crime was committed or responsibility was omitted (McEvoy and Mallinder 2012).

Case Law and Rule 159

International criminal law denies amnesty and compels the punishment of the perpetrators of crimes against humanity and war crimes. In case law, *Tiu Tojin v. Guatemala*, the Inter-American Court of Human Rights declared that the State must investigate the facts that gave rise to the violations in this case and identify, prosecute and, where appropriate, punish those responsible for criminal offences. In the other category, amnesty comes from Rule 159 of the international humanitarian law, which coerces the authorities in power to grant amnesty after the cessation of hostilities. It is a conditional amnesty for persons not participating in a non-international armed conflict or those deprived of liberty.

Rule 159 exempts the suspects and sentenced person(s) for crimes against humanity and other international crimes from amnesty. Punishment represents an international and standardized obligation for serious crimes, but amnesty to a suspect represents oblivion of crimes. Amnesty originates from the Greek word *amnesia*, meaning forgetfulness (Plate 2016). The authority in charge of the State enacts it as a decree prescribing official forgetfulness for one or more categories of criminal and civil offences and rescinds any penal consequences (Valarezo 2019).

This definition indicates that the provision of amnesty from the resolution of the Transitional Justice Conference in Juba, South Sudan, to the perpetrators of the alleged international crimes that admit the commission of crimes against humanity and war crimes during the war in 2013 onward (Radio Tamazuj 2023) is in contradiction with the obligation of international criminal law.[25] It represents forgetfulness to the reports of the AU Commission of Inquiry on South Sudan that accuses the Government of South Sudan in charge of affairs in Juba and rebels in

[25]The preamble of the ICC Statute states, "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished" (International Criminal Court 2011:1).

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control of the cities of Bor, Malakal and Bentiu and grave violations of international humanitarian law were committed against the civilian population and *hors de combat*.

AU Commission Report

In its long and comprehensive report, the AU Commission of Inquiry on South Sudan (2014:223–4) reported the following acts of international concern that cannot be left unpunished:

> 790. . . . [W]ar crimes were committed in Juba, Bor, Bentiu and Malakal.
>
> 791. Indiscriminate killings of civilians as a war crime were committed in Juba. Indeed, unlawful killings of civilians or soldiers who were believed to be *hors de combat* were committed by element of security forces of the Government. These attacks resulted in massive killings in and around Juba. The people killed were either found during the house to house search or captured on roadblocks.
>
> 792. . . . [W]ar crimes of rape and torture were committed against civilians in and around Juba. The evidence on record also point[s] to security forces of the government being involved.
>
> 793. . . . [The] war crime of forced enlisting of children in the army [was] committed.
>
> 794. . . . [W]ar crimes were committed in Bor town through indiscriminate killings of civilians by the SPLA/IO [Sudan People's Liberation Army – in Opposition] and White Army forces allied to Dr. Riek Machar. In one incident indiscriminate killings were committed by forces allied to the Government forces at the Governor's Office in Bor. These crimes were committed by soldiers led by Col. John Ajak.
>
> 795. . . . [W]ar crimes in relation to massive and indiscriminate attacks against civilian property were carried out in Bor town. Visible evidence of torched nonmilitary objectives like houses, market place, administration houses, hospital, form the basis to believe that these crimes were committed.
>
> 796. War crimes were believed to have been committed by Government soldiers in Malakal Teaching Hospital through the killings of civilians by some of the soldiers within the SPLA. The civilians killed were Nuers who had sought shelter at the hospital at night. About six Nuers were killed on diverse dates between 22nd January and 17th February 2014. Some others men women and children were selected, gathered and taken to the river where they were killed.
>
> 797. Government soldiers were also involved in the killings in Hay Saha, a neighbourhood in Malakal town, where at least 3 civilians not participating in the combats were killed.

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> 798. After Malakal was captured by rebels on February 18, 2014 there were killings of civilians of Shiluk ethnicity committed by the rebels at Malakal Hospital. Around 35 people were killed.
>
> 799. [A]round 20th February 2014, rebel fighters frequently came to St. Josephina Bakhita Catholic Church at Hai Saha, where they used to come and loot from women and abduct them. On or around 20th February 2014, the rebel soldiers also came and selected 7 youths among the group seeking refuge and killed them in the streets. These were all Shilluks.
>
> 800. Rapes were also committed against women by rebel forces at the Malakia Catholic Church between 18th and 27th February 2014.
>
> 801. In Malakal, serious bodily injuries were inflicted on at least five civilians with scars. These equally amount to war crimes.
>
> . . .
>
> 803. In Bentiu, the Commission heard the testimony of incitement to violence through broadcasts from Bentiu FM when it was taken over by the opposition, who broadcast in Nuer exhorting Nuer men to rape Dinka women, accusations that government forces killed civilians in Leer by opposition forces and counter-accusations by the Acting Governor that Nuer youths, led by Peter Gadet, were responsible for attacks after the cessation of hostilities agreement and that Peter Gadet was recruiting children under 14 years old . . .

It is worth underlining that those responsible for recruiting and conscribing a child in a guerrilla movement or any military combat must face justice rather than amnesty. Conscription of an innocent child that does not comprehend the objective(s) of war is in contravention of the international law obligation that dictates nations to protect a child. Article 27(1) of the UN Convention on the Rights of the Child urges that "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".[26] Conscription and enticement of a child into military conduct does not require amnesty. It constitutes mental, spiritual, moral and social persecution of a child, which most competent international criminal tribunals punish.

Among the criminal counts in case law regarding the former President of Liberia, Charles Ghankay Taylor are the recruitment, conscription or enlisting children under 15 years into armed forces or groups or using them to participate in military hostilities actively.[27] Furthermore, the protection of a child from the possible risk of persecution as an obligatory pursuit appears in case law that compels the Court in

[26]UN Convention on the Rights of the Child, adopted 20 November 1989 by UN General Assembly Resolution 44/25.

[27]*The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, 26 September 2013.

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the United Kingdom to admit an appeal against the deportation of a minor or a child with the anonymous name JA from the United Kingdom to Nigeria.[28]

For the prevalence of justice, instead of its miscarriage, the Government of South Sudan must refrain from the mobilization of the advocates for amnesty that deny indictment and punishment of the suspects that might have committed international crimes in Bentiu, Juba, Malakal, Bor, Akobo Pibor and other sites within South Sudan in a competent court.

In his message, which denies amnesty implicitly, the UN High Commissioner for Human Rights (UNHCR) Representative, Volker Türk, presented a paper titled "Conference on Sustaining Momentum for Transitional Justice in South Sudan" to the organized government conference under the title, Conference for Transitional Justice in South Sudan. Türk cautioned and urged the international community and the South Sudanese nationals to heed and take into account accountability of the perpetrators of the international crimes in South Sudan. For him, accountability of the suspected perpetrators of crimes against humanity, war crimes and other criminal offences of an international nature deters most of the multitude of challenges that continue to plague and haunt the people of South Sudan, such as unceasing armed violence, shrinking civic and political space and pervasive and entrenched impunity (UNHCR 2023).

Impunity and Law

Theoretically, non-compliance of the executive pillar in a nation-State with the constitutional provisions is common conduct universally.[29] The same constitution notwithstanding provides a victim with a right to file a lawsuit impugning the executive authority in the judiciary.[30] Moreover, the judicial review issues an injunction that protects the constitutional provisions from the infringement of the executive organ.[31] The authority that ignores compliance with constitutional and international obligations and the necessity of the judicial review of its acts represents impunity. The advocates of amnesty in South Sudan for the perpetrators of international crimes such as crimes against humanity and war crimes represent impunity.

Jok (2023) defines the conduct of impunity in public institutions as an act that a superior authority in national institutions applies in a working relationship against the subordinate(s) in denial of their constitutional rights, which aid in achieving the administration of justice. It refers to denying a victim's right to justice and redressing their complaints within the limited scope of the constitutional obligations

[28]JA (Anonymity direction made), Appellant and the Secretary of State for the Home Department, Respondent. [2016] UKUT 560.

[29]President Donald J. Trump's "Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen [to the United States]." See Trump White House Archives (2017).

[30]Case law: *Eblal Zakzok et al., Plaintiffs v. Donald J. Trump, as President of the US, et al., Defendants*.

[31]Ibid. Judge Theodore David Chuang of the United States District Court, District of Maryland Case 8:17-cv-00361-TCD, Document 219, filed 17 October 2017, pages 1–91 blocks President Donald Trump's Executive Order that banned Muslims from seven countries the entry into the United States for 90 days stressing that the Executive Order violates "this fundamental constitutional principle".

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and judicial review in law. Its adoption in national institutions may generate possible crimes of genocide, crimes against humanity and war crimes. In case law testimony in the Courtroom of The Hague, the last former Prime Minister of former Yugoslavia, Ante Markovic, accused President Slobodan Milosevic of impunity.[32]

PUNISHMENT OF THE PERPETRATOR(S) OF INTERNATIONAL CRIMES

The majority of the South Sudanese nationals and other international human rights agencies advocate for criminal punishment and press the government of South Sudan vehemently to comply with three obligations (Amnesty International 2022). First, the recommendation of the AU Commission of Inquiry on South Sudan (2014:300) urges for "an Africa-led, Africa-owned, Africa-resourced legal mechanism, under the aegis of the African Union with support from the United Nations to bring those with the greatest responsibility at the highest level to accountability" in a court.

Second, Article 3.3.1.3.1.1 of the Agreement on the Resolution of the Conflict in the Republic of South Sudan recognizes the recommendation and accepts the establishment of a criminal Hybrid Court for South Sudan[33] with jurisdiction to investigate and prosecute the perpetrators of crimes of "genocide, crimes against humanity and war crimes".[34] Third, Resolution No. 29/01/2021 of the Executive Body, the Council of Ministers of the Republic of South Sudan, urged the Minister of Justice and Constitutional Development in the Republic of South Sudan to establish a criminal tribunal, the Hybrid Court for South Sudan.

It is incumbent upon the Government of South Sudan to honour its three legal obligations. Failing to comply otherwise with these three binding obligations constitutes dishonour of obligations and the automatic subsequent miscarriage of justice to the victims of the crimes against humanity and war crimes in South Sudan. The Government of South Sudan needs to adhere to criminal accountability mechanisms. Theoretically, in their jurisdictions, the ICTY and the International Criminal Tribunal for Rwanda[35] adopt international mechanisms of accountability for investigating and prosecuting the suspects and perpetrators of international crimes of genocide, crimes against humanity and war crimes.

The mechanisms comprise the scope of limitation, where and when international law, international human rights law and international humanitarian law experience serious violation.[36] Taking into primary account the report of the AU Commission

[32]*Prosecutor v. Slobodan Milosevic*, witness Ante Markovic, 15 January 2004.

[33]Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2018.

[34]Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2018; Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2015, Art. 3.2.2.

[35]The ICTY shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 under the provisions of the present Statute. The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II to it of 8 June 1977.

[36]Ibid.

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on the atrocities committed in the major cities in South Sudan, such as in Juba, Malakal, Bor, Bentiu, Akobo, Pibor and in other peripheries within South Sudan territories, provokes a debate and triggers an international obligation for the establishment of the Hybrid Court for South Sudan.

It is not the first time that the AU has established an international criminal tribunal. In the case of law for the accountability of the perpetrators of international crimes, which involved the former President, Hissène Habré of Chad, the international criminal tribunal, known as the Extraordinary African Chambers, with universal jurisdiction was established.[37] Its establishment originated from an agreement between the AU and Senegal to try perpetrators of international crimes committed in Chad from 7 June 1982 to 1 December 1990.[38]

Within the same legal procedure, the AU must urge the Government of South Sudan to comply with its two obligations. The first obligation is implementation of Article 3.3.1.3.1.1 of the Agreement on the Resolution of the Conflict in the Republic of South Sudan that it had signed with its former rebels, the Sudan People's Liberation Movement-in-Opposition (SPLM/IO). Both signatories to the Agreement accept the establishment of the international tribunal, the Hybrid Court for South Sudan[39] with jurisdiction to investigate, indict and prosecute the perpetrators of serious crimes, "genocide, crimes against humanity and war crimes".[40]

The second obligation is implementation of the Council Ministers' resolution of 29 January 2021 that urges establishing the criminal Hybrid Court for South Sudan. Compliance with these two paves the way for the AU to agree with the Government of South Sudan to establish a Hybrid Court for South Sudan with a mandate that complies with its recommendation that focuses on bringing those South Sudanese soldiers "with the greatest responsibility at the highest level to accountability" to an authoritative, independent court (AU Commission of Inquiry on South Sudan (2014:300–1).

It is of great significance to demonstrate that the preamble of the ICC cautions the international community that the establishment of the ICC does not mean the transfer of criminal cases from the domestic courts to international court(s) but "shall be complementary" (International Criminal Court 2011:1). Moreover, it repeats in Article 1 that the ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions, and its provisions govern the court.

In compliance with the principle of complementarity of the ICC, the Government of Rwanda, in cooperation with the international bodies, established an Organic Law of 26 January 2001, which set up the "Gacaca jurisdictions".[41] These

[37]Universal jurisdiction was adopted on 16 June 1993 and addressed the repression of grave breaches of the Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 8 June 1977.

[38]*Prosecutor v. Hissène Habré*; case number 135.

[39]Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2015, Art. 3.2.2.

[40]Agreement on the Resolution of the Conflict in the Republic of South Sudan, Addis Ababa, 17 August 2018, Art. 3.2.1.

[41]Four categories of genocide perpetrators were established by the Organic Law of 30 August 1996; these categories categorized people according to the role played by each person in the conception and execution of the 1994 tragedy. An Organic Law of 19 June 2004 reclassified the categories and reduced them to three in number.

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jurisdictions ensured prosecutions and trials of perpetrators and accomplices that aimed not only for simple punishment but also for the reconstitution of the Rwandan society which had been constructed and left decaying by the predecessor bad leaders that prompted the population to exterminate one part of that society. Also, it is important to provide for penalties allowing convicted prisoners to amend themselves.[42]

It is necessary to establish a complementary criminal court in South Sudan with a mandate to bring those responsible for the commission of international crimes to justice.

Complementarity and South Sudan Constitutional Law

The absence of unified legal mechanisms from the Government of South Sudan in power to prosecute the suspects as perpetrators of the international crimes in the South Sudan civil war of December 2013 is a woeful and distressing factor in protecting humanity in the country. Notwithstanding, the resolution of the South Sudan Council of Ministers on 29 January 2021 about establishing the Hybrid Court for South Sudan indicates that serious crimes of concern to the international community were committed in the civil war of December 2013.

Tabling and contemplating on the case of establishing a criminal tribunal in the Council of Ministers for the punishment of the perpetrators of crimes against humanity and war crimes and issuing a resolution for its establishment are a *bona fide* referential and potential victory of the universal criminal justice system. "Barbarians"[43] and villains that violate the law will be prosecuted domestically but in an independent criminal court.

Expressively, the fact that the Government of South Sudan can admit establishing an independent criminal tribunal body to investigate and prosecute those responsible for the commission of crimes against humanity and war crimes represents paving the way for a legal mechanism. It legally conforms to Article 1 of the ICC Statute (International Criminal Court 2011:2), defined as "complementary to national criminal jurisdictions"; nevertheless, its establishment in South Sudan generates a conflict of laws. McClean and Ruiz Abou-Nigm (2016) define conflict of laws as the presence of part of the legal system, with cases manifesting cross-border elements in nature and carrying legal facts of universal and international norms.

There are emasculating and irreconcilable provisions between the ICC Statute and the current South Sudan Constitution of 2011, revised 2021, and consequently interdicts or debars the application of the complementarity and, automatically, the hypothesis becomes incongruous, pseudo and irrelevant. First, Article 1 of the Rome Statute stresses conditionally that the ICC shall be complementary to national jurisdictions, but the provisions of its Statute govern the jurisdiction and functioning of the court (McClean and Ruiz Abou-Nigm 2016). South Sudan is not Party to 123 States Parties to the Rome Statute of the ICC (International Criminal Court 2023); so that it adopts its provisions in legal accountability against

[42]Ibid.

[43]*Mukesh v. State for NCT of Delhi* (Nirbhaya case). Justice R. Banumathi describes the systematic conduct of rape with subsequent murder as "barbaric" crimes, which shake society's conscience.

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the alleged individual South Sudanese soldiers for international crimes, neither its current Constitution of 2011 nor that revised after the Peace Agreement on the Resolution of the Conflict, 2021, bestows provisions which conform to the ICC.

Consider two particular instances of the inconsistency of the ICC Statute with the national Constitution of South Sudan. First, Article 3(1) of the South Sudan Constitution, 2011, revised in 2021, asserts the supremacy of the Constitution as a law of the land.[44] In contrast, Article 21 of the ICC Statute attests to its supremacy in national laws.[45] Second, Section 206 of the South Sudan Penal Code Act, 2008 prescribes the death penalty for the offences of murder[46] in contradiction with Article 77 of the ICC Statute, which repudiates the death penalty and imposes imprisonment following the level of gravity of an offence committed (International Criminal Court 2011:38).

The general inconsistency of the South Sudan national Constitution with the principle of complementarity of international criminal law does not completely bar the adoption of complementarity in the jurisdiction of the criminal courts in South Sudan State. In cognizance of South Sudan customary law, it makes it possible for the Hybrid Court for South Sudan to complement the national penal laws of the Republic of South Sudan.

Hybrid Court and Customary Law Penal Code

Establishing the tribunal, the Hybrid Court for South Sudan, to punish the perpetrators of international crimes during the war is possible when such tribunal adopts three approaches as criminal remedies that reconcile international criminal law with African customary law. First, the application of the complementarity principle derives from the ICC Statute.[47] International criminal law imposes imprisonment rather than the death penalty on the perpetrators of the concerned crimes to qualify the compatibility of the African customary law of blood compensation.[48]

Section 6(2) of the South Sudan Penal Code Act, 2008 states, "In applying this Act, Courts may consider the existing customary laws and practices prevailing in the specific areas." In cognizance to the African customary law embodying the Dinka and Nuer ethnic groups in South Sudan, it omits the application of capital punishment on the perpetrators of murder, massacre, homicide and manslaughter on the condition that a criminal court orders (a) killer(s) to pay a good number of cattle; oxen, cows (Evans-Pritchard 1951) or money (MacCormack 1973)[49] as

[44]See Interim National Constitution of the Republic of the Sudan, 2005. Retrieved 2 August 2023 (https://www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf).

[45]According to Article 4(2) of the Rome Statute, the Court shall have international legal personality (International Criminal Court 2011:2); in Article 21(1)(a) and (b), the Court applies Statute, elements of crimes, applicable treaties, principles and rules of international law (International Criminal Court 2011:13).

[46]For the death penalty in South Sudan's criminal code, see South Sudan Penal Code Act, 2008.

[47]According to Article 1 of the Statute, the ICC shall be complementary to national jurisdictions, but its provisions govern the jurisdiction and functioning of the Court (International Criminal Court 2011:2).

[48]Article 77 of the ICC Statute rejects the death penalty and imposes imprisonment (International Criminal Court 2011:38).

[49]In Africa, the Zulu, Bemba, Bahima and Bairu ethnic groups decree blood compensation.

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"blood compensation" to the victims of (a) killed person(s) (Dundas 1921; Gluckman 1965:205, 215)[50] in order to resume peace and security among themselves in the land (Kane 2014).[51] Also, Section 206 of the South Sudan Penal Code Act, 2008 states that whoever causes the death of another person – (a) intending to cause death; or (b) knowing that death would be probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause, commits the offence of murder, and upon conviction be sentenced to death or imprisonment for life provided that, if the nearest relatives of the deceased opt for customary blood compensation, the Court may award it in place of death, a sentence with imprisonment for a term not exceeding 10 years.

Second, the authoritative Criminal Courts in South Sudan omit capital punishment on the grounds that (a) killer(s) pay(s) blood compensation, a composition of cows and oxen, known in Nilotic customary law as *apok* among the Dinka and *cot* among the Nuer ethnic group to the victims of (a) killed person(s). The number of cattle for the blood compensation of (a) killed person(s) ranges from 10 among the Collo, 31 for the Dinka and 31 among the Nuer.

Third, the research recommends uniformity in paying 51 cattle as blood compensation to the victims of (a) killed person(s). Such payment changes both penalties of life imprisonment, which the international criminal law imposes on the perpetrators of international crimes and the death penalty, which the African criminal law imposes on the confirmed killer(s). Finally, the Hybrid Court, as a criminal tribunal, imposes 10-year terms of imprisonment on the confirmed perpetrators of international crimes, and then peace and security recycle in political, economic and social institutions in the sovereign territorial State of South Sudan.

Wilson (2014) observes that the Dinka ethnic group in South Sudan values harmony and good social, economic, political and cultural relations. In their social tradition, violence is reserved mostly as a defensive weapon, a view consistent with the normative Dinka concept of their vocabulary term, *cieng*. For them, *cieng* "puts 'human' values like dignity and integrity, honour and respect, loyalty and piety, and the power of persuasiveness at its core".

Essentially, the term *cieng* in Dinka involves many concepts. It fundamentally implies the recognition of and compliance with the Bill of Rights, right to life, right to freedom, right to liberty, right to dignity and right to non-discrimination in all social, economic and political conducts. Deng defines *cieng* as social standards for ideal human relations that promote peace and security among the Dinka ethnic community, region and international communities (Twining 2013).

CONCLUSION

There is no consensus among the South Sudanese on the mechanism(s) for the accountability of the perpetrators of the crimes against humanity and war crimes in

[50]Ukamba, Kikuyu and Chagga ethnic groups apply blood compensation to the killed persons.

[51]Among the Dinka and Nuer customary laws, blood feuds, particularly avenging the wrongful death of a person's kin by killing the murderer, killing from relatives or by receiving 31 cows as compensation from the murderer's relatives and giving them to the victims of the killed persons constitute a final remedy for the crime of murder and new coexistence resumes.

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South Sudan. The AU Commission of Inquiry on South Sudan reported that the belligerent warring parties committed crimes against humanity and war crimes during their battles in Juba, Malakal, Bor, Bentiu and other locations, such as Pibor, Akobo and different places at the peripheries.

First, the AU Commission recommends an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the AU with support from the UN to bring those with the greatest responsibility at the highest level to accountability.

Second, Article 3.3.1.3.1.1 of the Agreement on the Resolution of the Conflict in the Republic of South Sudan provides a mechanism that recommends the establishment of an international tribunal, the Hybrid Court for South Sudan, with jurisdiction to investigate and prosecute the perpetrators of crimes of genocide, crimes against humanity and war crimes.

Third, the Executive Cabinet or the Council of Ministers of South Sudan approved in its resolution of 29 January 2021 the establishment of the criminal Hybrid Court for South Sudan; however, this mechanism contradicts itself with the Government of South Sudan's resolution of the Transitional Justice Conference in the capital city, Juba. The resolution of the Conference recommended amnesty to the perpetrators of the crimes against humanity and war crimes, under the condition that they admit their criminal guilt during the war in Juba, Malakal, Bor, Bentiu, Akobo, Pibor and other locations within South Sudan in December 2013 and beyond.

The research finding unfolds that amnesty rather than punishment for the perpetrators of the alleged international crimes threatens peace and security in South Sudan from two perspectives. First, South Sudan customary law denies amnesty for the serious crimes of murder, massacre, forced disappearance, rape and others of the concerned nature to humanity. Provision of amnesty generates a reaction from the clan of (a) killed person(s) with its associated ethnic or tribal communities to advocate systematic and series of vengeance of a blood feud. Under a blood feud, the clan, ethnic group or tribe of (a) killed person(s) targets the clan, ethnic group or tribe of the killer(s), and lethal violence recycles from season to season among the national institutions of ethnic, tribal and clan communities.

Second, amnesty creates dire humanitarian conditions for internally displaced persons. The recycled vengeance of killing from the clan or ethnic group of the killed person(s) against the clan, ethnic group, or tribe of the killer(s) displaces the civilian population from their traditional residential places. The research suggests the establishment of a criminal tribunal, the Hybrid Court for South Sudan, for the punishment of the perpetrators of crimes against humanity and war crimes, as detailed comprehensively in the report of the AU Commission of Inquiry on South Sudan. Such tribunal adopts three procedures as a remedial resolution that reconcile amnesty with punishment in its jurisdiction:

(1) Adopting the complementarity principle of the ICC Statute to permit the compatibility of the African customary law of blood compensation with international criminal law that denies capital punishment. The authoritative national Criminal Courts in South Sudan omit capital punishment on the confirmed perpetrators of murder on the grounds that (a) killer(s) pay(s) blood compensation, a mixture of cows and oxen known in Nilotic customary law as apok and cot among Nuer to (a) killed person(s).

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(2) The number of cattle for the compensation of (a) killed person(s) ranges from 10 among the Collo, 31 for the Dinka and 31 among the Nuer; nonetheless, the research recommends uniformity in payment of blood compensation to the victims of (a) killed person(s) to 51 mixtures of cows, oxen and bulls. The payment changes penalties of life imprisonment, which the international criminal law imposes on the perpetrators of international crimes and the death penalty, which the African criminal law imposes on the confirmed killer(s).
(3) Finally, the tribunal imposes 10-year terms of imprisonment on the confirmed perpetrators of international crimes and then peace and security recycle in political, economic and social institutions in the territorial sovereign State, South Sudan.

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TRANSLATED ABSTRACTS

Abstracto

El artículo examina cómo abordar el informe de la Comisión de Investigación de la Unión Africana sobre Sudán del Sur, que acusa al Gobierno de Sudán del Sur y a los rebeldes de cometer "Crímenes contra la humanidad" y violar el "derecho internacional humanitario" en la guerra de diciembre de 2013. La Comisión recomienda "un mecanismo legal liderado por África, de propiedad de África y con recursos de África, bajo la égida de la Unión Africana y con el apoyo de las Naciones Unidas, para que aquellos con la mayor responsabilidad al más alto nivel rindan cuentas" en una Corte. En segundo lugar, el Acuerdo sobre la Resolución del Conflicto en la República de Sudán del Sur pide el establecimiento de un Tribunal Híbrido en Sudán del Sur para investigar y enjuiciar a los autores de "genocidio, crímenes de lesa humanidad y crímenes de guerra". El Gabinete de Sudán del Sur aprobó, en su resolución del 29 de enero de 2021, el establecimiento de la Corte. Por otro lado, el Gobierno de Sudán del Sur rechaza la responsabilidad de los perpetradores de crímenes internacionales en su resolución de la Conferencia de Justicia de Transición y recomienda "amnistía" para quienes admitan la comisión de crímenes internacionales en Juba, Malakal, Bor y Bentiu. Los resultados de la investigación muestran que la amnistía amenaza la paz y la seguridad porque el derecho consuetudinario rechaza la amnistía. Su implementación genera una venganza sistemática del clan de los asesinados. La investigación recomienda el establecimiento de una Corte Híbrida que adopte el principio de complementariedad en compatibilidad con el Derecho Consuetudinario Africano de compensación de sangre. Los tribunales penales nacionales competentes en Sudán del Sur omiten la pena capital con base en que (un) asesino(s) paga(n) compensación de sangre, apok o cot, a los sobrevivientes de (a) persona(s) asesinada(s) con 51 cabezas de ganado. El pago cambia las penas de cadena perpetua, que impone el derecho penal internacional a los autores de crímenes internacionales, y la pena de muerte, que impone el derecho penal africano a los asesinos confirmados. Finalmente, el Tribunal impone penas de prisión de 10 años a los autores confirmados de crímenes internacionales.

Palabras clave Sudán del Sur; crímenes de guerra; crímenes internacionales; crímenes de lesa humanidad; amnistía; rendición de cuentas; derecho consuetudinario africano; indemnización por sangre

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Abstrait

L'article examine comment aborder le rapport de la Commission d'enquête de l'Union africaine sur le Soudan du Sud, qui accuse le gouvernement du Soudan du Sud et les rebelles d'avoir commis des "crimes contre l'humanité" et d'avoir violé le "droit international humanitaire" lors de la guerre de décembre 2013. La Commission recommande "un mécanisme juridique dirigé par l'Afrique, appartenant à l'Afrique et financé par l'Afrique, sous l'égide de l'Union africaine et avec le soutien des Nations Unies, pour amener ceux qui ont la plus grande responsabilité au plus haut niveau à rendre des comptes" dans un tribunal. Deuxièmement, l'Accord sur la résolution du conflit en République du Soudan du Sud demande la création d'un tribunal hybride au Soudan du Sud pour enquêter et poursuivre les auteurs de « génocide, crimes contre l'humanité et crimes de guerre ». Le Cabinet du Soudan du Sud a approuvé, dans sa résolution du 29 janvier 2021, la création de la Cour. D'autre part, le gouvernement du Soudan du Sud rejette la responsabilité des auteurs de crimes internationaux dans sa résolution de la Conférence sur la justice transitionnelle et recommande « l'amnistie » pour ceux qui admettent la commission de crimes internationaux à Juba, Malakal, Bor et Bentiu. Les résultats de la recherche montrent que l'amnistie menace la paix et la sécurité parce que le droit coutumier rejette l'amnistie. Sa mise en œuvre génère une vengeance systématique du clan des personnes tuées. La recherche recommande la création de la Cour hybride qui adopte le principe de complémentarité en compatibilité avec le droit coutumier africain de l'indemnisation du sang. Les tribunaux pénaux nationaux faisant autorité au Soudan du Sud omettent la peine capitale au motif qu'un (des) tueur (s) paie (nt) une indemnité de sang, apok ou cot, aux survivants d'une (des) personne (s) tuée (s) avec 51 bovins. Le paiement modifie les peines d'emprisonnement à perpétuité, que le droit pénal international impose aux auteurs de crimes internationaux et la peine de mort, que le droit pénal africain impose au(x) meurtrier(s) confirmé(s). Enfin, le Tribunal impose des peines de 10 ans d'emprisonnement aux auteurs confirmés de crimes internationaux.

Mots clés Soudan du Sud; crimes de guerre; crimes internationaux; crimes contre l'humanité; amnistie; responsabilité; droit coutumier africain; indemnisation du sang

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抽象的

本文探讨了如何应对非洲联盟南苏丹调查委员会的报告,该报告指责南苏丹政府和叛军在 2013 年 12 月的战争中犯下“危害人类罪”并违反“国际人道主义法”。委员会建议“建立一个由非洲主导、非洲所有、非洲提供资源的法律机制,在非洲联盟的支持下并在联合国的支持下,在最高层追究那些负有最大责任的人的责任”。法庭。 其次,《解决南苏丹共和国冲突协议》要求在南苏丹设立混合法院,调查并起诉“种族灭绝罪、反人类罪和战争罪”的肇事者。 南苏丹内阁在2021年1月29日的决议中批准设立法院。 另一方面,南苏丹政府在过渡时期司法会议决议中拒绝追究国际罪行实施者的责任,并建议对那些承认在朱巴、马拉卡勒、博尔和本提乌犯下国际罪行的人进行“大赦”。 研究结果表明,特赦威胁和平与安全,因为习惯法拒绝特赦。 它的实施引起了被害者部落的系统性报复。 研究建议设立混合法院,采用与非洲血液赔偿习惯法相一致的补充原则。 南苏丹权威的国家刑事法院免除死刑,理由是凶手向拥有 51 头牛的被害人的幸存者支付血液补偿金、apok 或 cot。 这笔付款改变了国际刑法对国际犯罪者判处的无期徒刑和非洲刑法对已确认的凶手判处的死刑。 最后,法庭对已确认的国际罪行实施者判处十年监禁。

关键词： 南苏丹、战争罪、国际罪行、危害人类罪、大赦、问责、非洲习惯法 血偿.

خلاصة

تتناول المقالة كيفية معالجة تقرير لجنة التحقيق التابعة للاتحاد الأفريقي بشأن جنوب السودان ، التي تتهم حكومة جنوب السودان والمتمردين بارتكاب "جرائم ضد الإنسانية" وانتهاك "القانون الإنساني الدولي" في حرب ديسمبر 2013. وتوصي المفوضية "بآلية قانونية تقودها أفريقيا ، ومملوكة لأفريقيا ، ومزودة بموارد من أفريقيا ، تحت رعاية الاتحاد الأفريقي وبدعم من الأمم المتحدة ، لتقديم أولئك الذين يتحملون أكبر قدر من المسؤولية على أعلى مستوى للمساءلة" في محكمة. ثانيا ، يطالب اتفاق حل النزاع في جمهورية جنوب السودان بإنشاء محكمة مختلطة في جنوب السودان للتحقيق مع مرتكبي "الإبادة الجماعية والجرائم ضد الإنسانية وجرائم الحرب" ومقاضاتهم. ووافق مجلس وزراء جنوب السودان في قراره بتاريخ 2021/1/29 على إنشاء المحكمة. من ناحية أخرى ، ترفض حكومة جنوب السودان مساءلة مرتكبي الجرائم الدولية في قراراها الصادر عن مؤتمر العدالة الانتقالية ، وتوصي "بالعفو" عن أولئك الذين يعترفون بارتكاب جرائم دولية في جوبا وملكال وبور وبانتيو. تظهر نتائج البحث أن العفو يهدد السلم والأمن لأن القانون العرفي يرفض العفو. ويولد تنفيذه انتقاما منهجيا من عشيرة القتلى. يوصي البحث بإنشاء المحكمة المختلطة التي تتبنى مبدأ التكامل بما يتوافق مع القانون العرفي الأفريقي لتعويض الدم. تلغي المحاكم الجنائية الوطنية الرسمية في جنوب السودان عقوبة الإعدام على أساس أن (أ) القاتل (القتلة) يدفعون تعويضات الدم ، أبوك أو سرير ، للناجين من (أ) قتيل (أشخاص) مع 51 رأسا من الماشية. يغير الدفع عقوبات السجن المؤبد ، التي يفرضها القانون الجنائي الدولي على مرتكبي الجرائم الدولية وعقوبة الإعدام ، التي يفرضها القانون الجنائي الأفريقي على القاتل (القتلة) المؤكدين. أخيرا ، تفرض المحكمة أحكاما بالسجن لمدة عشر سنوات على من ثبت ارتكابهم جرائم دولية.

الكلمات المفتاحية جنوب السودان; جرائم حرب; جرائم دولية; جرائم ضد الإنسانية; عفو; محاسبة; قانون عرفي أفريقي; تعويضات الدم; ال المفتاحية: جنوب السودان; جرائم حرب; جرائم دولية; جرائم ضد الإنسانية; عفو; محاسبة; قانون عرفي أفريقي; تعويضات الدم خلاصة

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Kuel Jok enrolled at the Department of World Cultures as a member of the teaching staff at the University of Helsinki from 2007 to 2012. In 2012, Dr Jok left Europe for Africa and joined the University of Juba. In 2014, he was appointed Deputy Vice-Chancellor at Rumbek University, South Sudan, teaching there for four years. In 2018, Dr Jok enrolled at Gretsa University in Nairobi, Kenya, as a professor teaching criminology and linguistics; however, in 2020, he was appointed as a Deputy Vice-Chancellor at Dr John Garang Memorial University, South Sudan, and remains there holding the position and teaching constitutional and criminal law. Professor Jok has published books and articles in prominent academic publishing institutions.

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