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Law on trial in unfinished wars: The prosecution of Riek Machar and the stalled peace in South Sudan

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Summary: *This article interrogates whether criminal prosecution can meaningfully contribute to peace and justice in contexts where violence persists and political authority remains unsettled. Focusing on the ongoing prosecution of Riek Machar in South Sudan, the article situates the trial within the longer constitutional and political history of Sudan and South Sudan, characterised by unfinished war, militarised governance and fragile peace settlements. Drawing on international criminal law doctrine, transitional justice scholarship and comparative post-conflict jurisprudence, it argues that while criminal accountability is normatively indispensable, it is structurally insufficient when operating in isolation. The article concludes by advancing a repair-centred framework that reconceptualises law not merely as punishment, but as institutional reconstruction, relational repair and structural transformation.*

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Key words: *international criminal law; transitional justice; South Sudan; Riek Machar; complementarity; hybrid courts; peace versus justice; transformative justice; reparations*

1 Introduction

On 22 September 2025, the first Vice-President of the Republic of South Sudan, Dr Riek Machar, appeared before a televised special court in Juba to answer charges that included treason, murder, terrorism and crimes against humanity.[1] In one sense, the scene was an ordinary instance of criminal procedure; in another it was remarkable. A serving principal of a subsisting power-sharing government stood accused before a court constituted by the very President with whom he was meant to be sharing power. While the peace agreement that bound them both remained only partially implemented, many South Sudanese were displaced by ongoing insecurity, and a devastating war raged across the northern border in Sudan. The prosecution, therefore, poses a question at once doctrinal and political: Can criminal law contribute meaningfully to peace and justice where the violence it addresses has not fully ended and where political authority itself remains contested?

This article argues that criminal accountability, though normatively indispensable, is structurally insufficient when it operates in isolation under conditions of unfinished war, ongoing violence and political instability. Law of this kind does not operate in a vacuum. It is embedded within a contested political order that shapes what prosecution can accomplish and what it is likely to signify. Read against that order, the Machar prosecution places on trial not only the accused, but the legitimacy, institutional capacity and normative adequacy of law itself. That is the sense in which, in unfinished wars, law is on trial.

The argument is conceptual and theoretical rather than empirical. It offers no new fieldwork and, importantly, does not purport to adjudicate Machar's guilt or innocence, which is neither possible nor appropriate in this forum. This restraint does not minimise the gravity of the human rights violations that attend the conflict; on the contrary, the analysis treats the documented record of unlawful killings, indiscriminate aerial bombardment of civilian areas, conflict-related sexual violence and arbitrary detention as the very stakes

1 See Human Rights Watch 'South Sudan: Ensure due process, fair trials of opposition' 15 September 2025; 'South Sudan court rejects ex-VP's bid to halt murder and treason trial' *BBC News* 24 September 2025.

that make the question of accountability urgent, and it foregrounds that record in the analysis that follows. The trial remained ongoing at the time this article was submitted, and no verdict had been delivered; nothing in the analysis turns on its eventual outcome. It uses the prosecution instead as an analytical lens through which to examine a general problem in international and comparative law: the relationship between criminal accountability and durable peace in states where violence is ongoing and governance is unstable.

In so doing, the article makes three contributions. First, it identifies a temporal and structural mismatch between the transitional paradigm, which imagines justice as following a completed conflict, and the reality of unfinished war, in which prosecution proceeds while the conflict continues and the institutions expected to deliver justice remain fragile or captured. Second, it shows, through comparison with the international and hybrid tribunals of the past three decades, that criminal accountability tends to achieve its aims only when embedded within wider processes of truth-telling, reparation and structural reform, its isolation being a recurring cause of disappointment. Third, it advances a repair-centred framework that reconceives law not merely as punishment but as institutional reconstruction, relational repair and structural transformation, and sketches what such a reorientation would require in South Sudan.

The article proceeds in nine further parts. Part 2 develops the conceptual frame, arguing that the standard transitional paradigm misfits the condition of unfinished war and drawing on the critique of legalism and the peace-versus-justice debate. Part 3 traces the historical foundations of militarised governance from the Sudanese civil wars to independence. Part 4 examines the 2013 war, the Revitalised Peace Agreement and the transitional justice architecture it established but did not deliver. Part 5 analyses the Machar prosecution and its doctrinal questions, including command responsibility, joint criminal enterprise, immunity and the contested choice of forum. Part 6 sets out why prosecution is structurally insufficient in conditions of ongoing violence. Part 7 draws lessons from comparative post-conflict jurisprudence. Part 8 situates the analysis within the regional shadow of the war in Sudan. Part 9 develops the repair-centred framework. Part 10 concludes the article.

2 Unfinished war and the limits of the transitional paradigm

Transitional justice emerged as a field organised around a characteristic temporal assumption: that a society is moving from a

period of violence or repression towards a more peaceful and rights-respecting order, and that the task of justice is to reckon with the past so that the transition can proceed.[2] The paradigm presupposes a threshold, a point of transition after which the violence in question belongs to the past and recovery may begin. Where that threshold has been crossed, the paradigm is apt. The difficulty arises where it has not. In conditions of unfinished war, the very premise of the transitional paradigm is absent: There is no settled 'after' from which to look back, because the conflict persists, the political settlement is provisional and the institutions expected to administer justice are themselves objects of the ongoing struggle for power.

Two bodies of scholarship help to specify what is at stake. The first is the critique of legalism in transitional justice, which cautions against treating criminal trials as a self-sufficient response to mass violence and calls instead for a broader understanding that situates law within its social and political conditions.[3] According to this view, the tendency to equate justice with prosecution can obscure the structural and relational dimensions of harm that trials are ill-equipped to address, and can invest in courtroom expectations that no court could satisfy. The second is the long-running debate over peace versus justice, which examines the consequences of pursuing prosecution during, rather than after, armed conflict. The pragmatist strand of that debate warns that ill-timed or selective prosecutions may entrench conflict, harden the positions of those with most to lose, and undermine the very settlements on which durable peace depends, while the principled strand insists that impunity is corrosive and that accountability carries expressive and preventive value.[4]

The argument developed here does not resolve that debate in the abstract, because its resolution depends on context. It contends, rather, that the condition of unfinished war sharpens the pragmatist's concern without vindicating impunity. Prosecution that proceeds while war continues, and which is controlled by one party to the conflict, is peculiarly vulnerable to instrumentalisation, becoming a means of eliminating a rival under colour of law. Yet,

2 RG Teitel *Transitional justice* (2000); RG Teitel 'Transitional justice genealogy' (2003) 16 *Harvard Human Rights Journal* 69; NJ Kritz (ed) *Transitional justice: How emerging democracies reckon with former regimes* (1995).

3 K McEvoy 'Beyond legalism: Towards a thicker understanding of transitional justice' (2007) 34 *Journal of Law and Society* 411.

4 J Snyder & L Vinjamuri 'Trials and errors: Principle and pragmatism in strategies of international justice' (2003-2004) 28 *International Security* 5; L Vinjamuri & J Snyder 'Law and politics in transitional justice' (2015) 18 *Annual Review of Political Science* 303; and, for the principled case, P Akhavan 'Beyond impunity: Can international criminal justice prevent future atrocities?' (2001) 95 *American Journal of International Law* 7.

the answer cannot be to abandon accountability, which would ratify the impunity that has fuelled successive cycles of violence. The way through is to widen the concept of justice itself, so that accountability is understood as one component of a larger repair rather than as its entirety, as the transformative justice literature has sought to do in moving beyond a narrow transitional template towards a justice that foregrounds local agency, prioritises process over predetermined outcomes, and confronts the unequal structures that produce and reproduce violence.[5]

Recent scholarship has pressed precisely this difficulty. A growing body of work questions the 'paradigmatic transition' that underwrites the field, arguing that the assumption of a clean movement from war to peace fits few contemporary conflicts and disables transitional justice where violence recurs or never stops, and a parallel literature examines criminal accountability pursued during, rather than after, armed conflict and the ways in which judicial intervention can be drawn into the strategies of the warring parties.[6] At the regional level, the African Union Transitional Justice Policy of 2019 has consolidated an African-owned and deliberately holistic conception of transitional justice, integrating accountability, truth, reparation, institutional reform and guarantees of non-recurrence, and drawing expressly on African traditional justice and on socio-economic rights.[7] This article builds on these interventions, but identifies a gap they leave open: None supplies a worked account of what justice should positively require, institutionally and relationally, in a state where politically driven violence is unfinished and where the institutions expected to

5 P Gready & S Robins 'From transitional to transformative justice: A new agenda for practice' (2014) 8 *International Journal of Transitional Justice* 339; W Lambourne 'Transitional justice and peacebuilding after mass violence' (2009) 3 *International Journal of Transitional Justice* 28; and, for the distinction between legal, rectificatory and distributive dimensions of post-conflict justice, R Mani *Beyond retribution: Seeking justice in the shadows of war* (2002).

6 On the critique of the 'paradigmatic transition' and the difficulty of transposing the transitional template to settings without a settled 'after', see DN Sharp 'Emancipating transitional justice from the bonds of the paradigmatic transition' (2015) 9 *International Journal of Transitional Justice* 150; DN Sharp *Re-thinking transitional justice for the twenty-first century: Beyond the end of history* (2018); and C Bell 'Transitional justice, interdisciplinarity and the state of the "field" or "non-field"' (2009) 3 *International Journal of Transitional Justice* 5. On criminal accountability pursued during, rather than after, armed conflict, see M Kersten *Justice in conflict* (2016); and W Lambourne 'Psychosocial justice and the transformative turn in transitional justice' (2026) 30 *The International Journal of Human Rights* 213.

7 African Union Transitional Justice Policy (adopted 12 February 2019), which sets out a holistic, African-owned conception of transitional justice encompassing criminal accountability, truth, reparations, reconciliation, institutional reform and guarantees of non-recurrence, and which expressly integrates socio-economic justice, the reform of state institutions and recourse to African traditional justice systems.

deliver justice are themselves objects of the conflict. That gap is what the repair-centred framework developed below is designed to fill.

A further consideration situates the enquiry within its African setting, which is also the setting of this *Journal*'s readership. The continent has developed its own normative and institutional responses to the relationship between accountability and political order, and those responses are marked by a productive ambivalence. On the one hand, the African Charter on Human and Peoples' Rights (African Charter) guarantees the right to a fair trial, and the African Union (AU) has repeatedly asserted the value of African-owned, and frequently hybrid or regional, mechanisms of accountability in preference to externally imposed ones.[8] On the other hand, the same institutional milieu has produced instruments that would shield serving senior officials from prosecution, most conspicuously the immunity accorded to sitting heads of state and senior officials under the Malabo Protocol, a provision that expresses a continental anxiety about the destabilising potential of prosecuting incumbents.[9] The South Sudan case sits precisely within this ambivalence, and the analysis that follows treats it not as a local peculiarity but as a sharp instance of a continental problem.

This conceptual frame governs the analysis that follows. It treats the Machar prosecution neither as a straightforward vindication of the rule of law, nor as a mere political manoeuvre to be dismissed, but as a case that exposes the limits of the transitional paradigm and the need to reconceive law's role where violence is yet to end. To see why the paradigm misfits South Sudan so acutely, it is necessary first to understand how deeply militarised governance is rooted in the country's constitutional and political history.

3 Historical foundations: Militarised governance from Sudan to South Sudan

The predicament of law in contemporary South Sudan is not an accident of recent politics; it is the inheritance of more than half a century of war, the ongoing insecurity, and of the forms of authority that war produced. The first Sudanese civil war, from 1955 to 1972,

8 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) art 7; and, on the politics of African-owned accountability, SMH Nouwen & WG Werner 'Doing justice to the political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941.

9 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (adopted 27 June 2014) art 46A *bis*.

arose from unresolved constitutional questions concerning the terms on which the southern regions would be governed within an independent Sudan, questions of federalism, of the place of religion in public life, and of the distribution of power and resources between centre and periphery.[10] The Addis Ababa Agreement of 1972 suspended rather than settled these questions, granting a measure of regional autonomy that later unravelled. When war resumed in 1983, it did so on terrain already shaped by militarisation, and the second civil war, which lasted until 2005, entrenched the primacy of armed movements over civilian institutions across the south.

The Comprehensive Peace Agreement of 2005 ended that war and set South Sudan on the path to the independence it achieved in July 2011.[11] Independence, however, did not dismantle the structures that decades of war had built. The Sudan People's Liberation Movement and its army remained the central institution of the new state, and the machinery of civilian governance, courts, an independent civil service, a functioning fiscal apparatus, remained comparatively underdeveloped. The state that emerged in 2011 was, in a precise sense, a military-political order in which access to power and to the revenues of the state was mediated through armed factions and their leaders.

Scholars of South Sudan's political economy have described this order as a militarised, neo-patrimonial system in which loyalty is purchased and coercion organised through a 'political marketplace', after independence largely financed by oil revenue.[12] When the price of loyalty exceeded the revenue available to pay for it, the system became, in De Waal's words, insolvent, and elite competition turned violent.[13] This matters because it locates the sources of conflict not in the culpable acts of individuals alone, but in a structure of governance that generates violence recurrently: A justice that individualises guilt while leaving that structure intact addresses a symptom rather than the disease. At the same time, customary institutions, the chiefs and elders who carry much of the everyday work of dispute resolution,

10 DH Johnson *The root causes of Sudan's civil wars: Peace or truce* (2011); OH Rolandsen & MW Daly *A history of South Sudan: From slavery to independence* (2016).

11 Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (9 January 2005).

12 A de Waal 'When kleptocracy becomes insolvent: Brute causes of the civil war in South Sudan' (2014) 113 *African Affairs* 347; A de Waal *The real politics of the Horn of Africa: Money, war and the business of power* (2015); C Pinaud 'South Sudan: Civil war, predation and the making of a military aristocracy' (2014) 113 *African Affairs* 192.

13 De Waal (2014) (n 12).

retained real authority even as the central state militarised, a point that matters when the repair-centred framework is developed.[14]

4 The 2013 war, the Revitalised Agreement, and a peace that did not end the war

The political breakdown between President Salva Kiir and former Vice-President Riek Machar in December 2013 converted elite competition into open war. The fighting that began in Juba spread rapidly along lines that were both political and ethnic, and it produced atrocities and mass displacement on a scale that the AU's own commission of inquiry documented in detail.[15] The commission recommended, among other measures, the establishment of an accountability mechanism with African and international participation, a recommendation that shaped the transitional justice architecture subsequently agreed.

That architecture took form in the Agreement on the Resolution of the Conflict in the Republic of South Sudan of 2015 and, after further fighting, in the Revitalised Agreement of 2018.[16] The Revitalised Agreement sought to restore a power-sharing government and, in its chapter V, to establish three transitional justice mechanisms: a Commission for Truth, Reconciliation and Healing; an independent Hybrid Court for South Sudan with AU involvement to try serious crimes; and a Compensation and Reparation Authority.[17] The design paired accountability with truth-telling and material redress and, in this respect, it reflected the comparative lessons that transitional justice scholarship had by then absorbed.

The agreements should, however, be read more broadly than their three headline mechanisms. Chapter V situates the Commission, the Court and the Reparation Authority within a wider commitment to accountability, reconciliation and healing, and the agreements as a whole tie transitional justice to guarantees of non-recurrence pursued through institutional reform: a permanent constitution under chapter VI, and the reform of the judicial, security and financial institutions of the state. Chapter II, in particular, provides for transitional security

14 C Leonardi *Dealing with government in South Sudan: Histories of chiefship, community and state* (2013).

15 African Union Commission of Inquiry on South Sudan 'Final report' (Addis Ababa, 15 October 2014). The Commission was chaired by former Nigerian President Olusegun Obasanjo.

16 Agreement on the Resolution of the Conflict in the Republic of South Sudan (17 August 2015); Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) (12 September 2018).

17 R-ARCSS (n 16) ch V.

arrangements, the unification of forces and a Strategic Defence and Security Review, the instruments through which security sector reform and the demilitarisation of politics were to be achieved.[18] Read in this fuller register, and alongside the African Union Transitional Justice Policy, the settlement already contemplated much of what a repair-centred approach demands, including the vetting of personnel and the reconstruction of institutions, and not merely the prosecution of individuals. Its failure, thus, was one of implementation rather than of design.

Implementation, however, lagged far behind design. Security sector reform and the demilitarisation of politics, the reforms most directly aimed at the structural sources of violence, remained largely unrealised, and elections were repeatedly postponed. Of the three chapter V mechanisms, the Commission for Truth, Reconciliation and Healing and the Compensation and Reparation Authority received enabling legislation only in late 2024, while the Hybrid Court, the forum specifically envisaged for crimes against humanity and war crimes, had not been established at all.[19] The Court's fate is telling: nearly a decade after it was first agreed, and despite draft statutes and repeated donor readiness to fund it, it remained unestablished, and observers have reported sustained political reluctance towards a mechanism feared to reach the incumbent leadership.[20] The consequence was a peace agreement that ended neither the war structures nor the impunity it had been designed to address. It is against this background of a transition that had not transitioned that the prosecution of Riek Machar must be understood.

18 Beyond the three ch V mechanisms, the 2015 and 2018 agreements provide for broader institutional reform as a guarantee of non-recurrence, including a permanent constitution and the reform of the judicial, security and financial institutions of the state: R-ARCSS (n 16) chs II and VI, ch II setting out the transitional security arrangements and the Strategic Defence and Security Review that frame security-sector reform. The African Union Transitional Justice Policy (n 7) likewise treats vetting and institutional reform as integral elements of non-recurrence.

19 On the trajectory of the ch V mechanisms and the non-establishment of the Hybrid Court, see International Centre for Transitional Justice 'South Sudan' (country page and analyses, 2024-2025); and International Crisis Group 'A trial for South Sudan's frail peace' (Q&A, 27 November 2025).

20 On the repeated postponement of the Hybrid Court and reported political reluctance towards it, see 'South Sudan in bid to create Hybrid Court again' *The East African* 13 October 2024, recording that the political leadership has been resistant to transitional justice on the ground that it would reopen old wounds; and Amnesty International *The African Union's abandoned commitment to justice in Africa* (2022). Where such motives are noted, they are attributed to those sources.

5 The prosecution of Riek Machar

The immediate occasion of the prosecution was the Nasir incident of early March 2025, in which an armed force drawn from the Nuer 'White Army' overran a government garrison in Nasir, Upper Nile State, killing a large number of soldiers, and during whose aftermath a United Nations (UN) aircraft was fired upon and a crew member killed.[21] On 26 March 2025 the government placed Machar under house arrest, and on 11 September 2025 the Minister of Justice announced the conclusion of investigations and the indictment of a group of individuals, several of them detained, including Machar. The charges announced against him and his co-accused included murder, treason, conspiracy, destruction of public property and military assets, terrorism or terrorism financing.[22] The accused appeared before a special court in Juba which, in September 2025, dismissed defence objections and ruled that it possessed jurisdiction to try the case.[23]

The prosecution cannot be assessed apart from the wider human rights record of the conflict from which it arises, a record central to this *Journal*'s concerns. Following the Nasir attack, government forces conducted sustained aerial bombardment of opposition-held areas of Upper Nile and neighbouring states. Human Rights Watch documented the use of improvised air-dropped incendiary weapons in at least four attacks in Nasir, Longechuk and Ulang counties, which killed at least 58 people and which, it concluded, may amount to war crimes.[24] The United Nations Commission on Human Rights in South Sudan subsequently found that government forces had carried out widespread and systematic attacks on civilians, including indiscriminate and disproportionate aerial bombardment of homes and medical facilities, conflict-related sexual violence, and the forcible recruitment of children.[25] Local sources further alleged

21 Human Rights Watch (n 1); International Centre for Transitional Justice 'South Sudan charges VP Machar with treason, murder over military attack' (2025); J Henry 'The risky trial of Riek Machar' JusticeInfo.net 2 October 2025, https://www.justiceinfo.net/en/150462-the-risky-trial-of-riek-machar.html (accessed 30 April 2026).

22 International Crisis Group (n 19); *BBC News* (n 1).

23 As above.

24 Human Rights Watch 'South Sudan: Incendiary bombs kill, burn civilians' (9 April 2025), documenting at least four attacks in Nasir, Longechuk and Ulang counties in which improvised air-dropped incendiary weapons killed at least 58 people and which, it stated, may amount to war crimes; and Human Rights Watch 'World report 2026: South Sudan' (2026).

25 UN Human Rights Council, Commission on Human Rights in South Sudan 'Report of the Commission on Human Rights in South Sudan' 27 February 2026, A/HRC/61/25; Office of the UN High Commissioner for Human Rights 'UN inquiry finds South Sudan's political and military leaders are driving the country towards a full-scale war and mass atrocity crimes' Press release, 27 February

that an examination centre was struck during the national secondary school examinations, an allegation that remains unverified.[26] A careful analysis must distinguish these registers of evidence: Findings by established monitors carry an authority that unverified local allegations do not, and the article treats them accordingly.

The conduct of foreign forces raises a distinct question of responsibility. Uganda deployed troops in support of the government, and the same commission found that joint bombardments by South Sudanese and Ugandan forces had struck civilian-populated areas, predominantly affecting Nuer communities, a finding Uganda rejected.[27] That Uganda intervened at the invitation of the host government does not dissolve the accountability question. Consent may bear on the lawfulness of a foreign presence, but it does not license violations of international humanitarian law; a state remains responsible for the conduct of its forces abroad, as the International Court of Justice (ICJ) affirmed in the *Armed Activities* case,[28] and the inviting government may for its part incur responsibility for aiding or assisting wrongful acts. The distribution of responsibility between inviter and invitee, therefore, is a proper object of any accountability process, and its neglect is one measure of the selectivity that besets prosecution pursued by one party alone.

At the time of writing this article, the trial remained ongoing and no verdict had been delivered.[29] Proceedings before the special court opened on 22 September 2025 at Freedom Hall in Juba and continued into 2026, with prosecution witnesses testifying. The analysis advanced here does not depend on that outcome; its concern is not whether Machar is ultimately convicted or acquitted,

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2026. The Commission was established under Human Rights Council Resolution 31/20.

26 'School hit by airstrike during CSE exams in Jonglei' *Radio Tamazuj* 2025, reporting that an examination centre was struck during the national examinations. The report is an allegation by local sources and, when this article was submitted, had not been the subject of any independent judicial finding.

27 On the Ugandan deployment, undertaken at the invitation of the government of South Sudan under a bilateral security arrangement, see UN Commission on Human Rights in South Sudan (n 25), which found that joint aerial bombardments by South Sudanese and Ugandan forces targeted civilian-populated areas predominantly affecting Nuer communities, a finding Uganda rejected. On state responsibility for the conduct of forces on another state's territory, and the limits of consent, see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) ICJ Reports 2005, 168; and, on complicity through aid or assistance, art 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001).

28 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (n 27). On the responsibility of the inviting state for aiding or assisting wrongful acts, see art 16 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (n 27).

29 International Crisis Group (n 19). At the time of writing, the trial remained ongoing and no verdict had been delivered.

but the conditions under which a prosecution of this kind can be received as justice rather than as a continuation of political conflict by other means.

The prosecution raises several doctrinal questions that warrant careful examination, even though a domestic court applying South Sudan domestic laws is not bound by the categories of international criminal law. The first concerns modes of liability. A case that attributes to Machar responsibility for acts physically carried out by the White Army must rest on some theory connecting him to those acts, whether a form of command or superior responsibility, familiar from international criminal law as liability for failure to prevent or punish the crimes of subordinates over whom one exercises effective control, or a theory of common design analogous to joint criminal enterprise.[30] Each theory carries a heavy evidentiary burden, requiring proof of effective control or of a shared criminal purpose and a contribution to it, and each becomes contentious where the relationship between a political leader and a loosely organised armed movement is precisely what is in dispute.

The choice between these theories is consequential, since superior responsibility and a common purpose theory place the evidentiary weight on very different relationships, the former on effective command over the perpetrators, the latter on a shared criminal design and the accused's contribution to it. In a domestic prosecution conducted amid active conflict, the way this evidentiary question is resolved will be read, inevitably, through the lens of the political struggle in which both prosecutor and accused are participants.

The second question concerns the legal characterisation of the crimes and the adequacy of the domestic legal basis. Reporting on the proceedings suggested some fluidity in the labels attached to the conduct, with references to crimes against humanity and to war crimes, even though South Sudan's Penal Code does not itself codify international crimes and the domestic legislation implementing the Geneva Conventions had not been squarely invoked.[31]

The difficulty is more than presentational. The charges were reported to have been brought under South Sudan's Penal Code Act

30 On superior responsibility, see art 28 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, and *Prosecutor v Delalić & Others* (*Čelebići*) IT-96-21-T, ICTY Trial Chamber (16 November 1998); on joint criminal enterprise, see *Prosecutor v Tadić* IT-94-1-A, ICTY Appeals Chamber (15 July 1999).

31 On the reported shift in characterisation and the questions it raises about the domestic legal basis, see *JusticeInfo.net* (n 21).

2008 and the Anti-Money Laundering and Counter Terrorist Financing Act 2012, neither of which codifies crimes against humanity or war crimes, while the Geneva Conventions Act 2012, which might have furnished a domestic basis for war crimes liability, does not appear to have been invoked.[32] To the extent that the proceedings attached international crime labels to conduct for which the statute book supplies no corresponding offence, the prosecution is exposed to a serious objection grounded in the principle of legality, *nullum crimen sine lege*, protected by the African Charter and the International Covenant on Civil and Political Rights (ICCPR) alike. Where the gravest labels lack a secure statutory foundation, the prosecution's expressive claim to vindicate the rule of law is weakened by the very instrument through which it is advanced.

The immunity objection repays attention, because it operates on two planes that the proceedings tend to conflate. The first is domestic and constitutional: whether the transitional constitution confers on a serving first Vice-President immunity from prosecution, a question of South Sudan law on which the special court ruled against the accused. The second is the trajectory of international law, which has moved against official position as a defence to grave international crimes, exemplified by the Special Court for Sierra Leone's holding that the office of a sitting head of state did not bar prosecution before an international court.[33] Yet, that trajectory coexists uneasily with the AU's move to shield incumbents through the Malabo Protocol,[34] and with the concern that prosecuting a sitting principal of a power-sharing government may unravel the settlement on which it depends. The immunity question in the Machar case, therefore, cannot be answered by doctrine alone; it reflects an unresolved tension, within international and African law alike, between accountability and the fragility of transitional political orders.

The third and most significant question concerns the forum and its legitimacy. Machar's defence contended that the special court was constitutionally improper, both because the peace agreement reserved the trial of crimes against humanity to an AU-supported hybrid court rather than a tribunal established by the President, and because a serving first Vice-President enjoyed immunity. The court

32 See JusticeInfo.net (n 21); and, on the statutory instruments reportedly relied upon, MAW Deng 'South Sudan's Vice-President on Trial: The case's potential consequences for the restoration of peace' International Journal of Constitutional Law Blog (ICONnect) (web blog), 7 February 2026, https://www.iconnectblog.com/south-sudans-vice-president-on-trial-the-cases-potential-consequences-for-the-restoration-of-peace/ (accessed 30 April 2026).

33 *Prosecutor v Charles Taylor (Decision on Immunity from Jurisdiction)* SCSL-2003-01-I, Appeals Chamber (31 May 2004).

34 Malabo Protocol (n 9) art 46A *bis*.

dismissed these objections and affirmed its jurisdiction.[35] These are not merely technical pleas; they go to the heart of the concern that animates this article. Where the forum trying a principal opponent of the President is established and controlled by the President's government, and the peace agreement invoked to legitimise the state had designated a different, jointly constituted forum for exactly these crimes, the prosecution risks appearing as an exercise of power rather than of law. The doctrine of complementarity was designed for a different configuration, but the worry it expresses, that domestic proceedings may be shaped by the interests of those who control them, is acutely present here.[36]

None of this establishes that Machar is innocent, or that the conduct at Nasir should go unaddressed. The government's position, that a lethal assault on a military garrison and the alleged firing on a UN aircraft demand accountability and that no office should place its holder above the law, is a serious one, and the analysis here neither dismisses it nor presumes bad faith.[37] The point is narrower and more structural: The circumstances of the prosecution, its forum, its timing and its control, place the legitimacy of the process in question, and that question cannot be answered by the criminal law alone. To see why, it is necessary to directly examine the limits of prosecution in conditions of ongoing violence.

6 Law in contexts of ongoing violence: The structural insufficiency of prosecution

Prosecution undertaken during a fragile ceasefire, and by one party against another, is exposed to three related pathologies. The first is

35 International Crisis Group (n 19); *BBC News* (n 1).

36 On complementarity and its politics, see art 17 of the Rome Statute (n 30); and SMH Nouwen *Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan* (2013).

37 The government's case is set out in the Minister of Justice's announcement of the charges on 11 September 2025 and in the prosecution's opening statement before the special court: see 'Dr Riek Machar and seven others to face trial over Nasir attack, Justice Ministry confirms' *Catholic Radio Network* 11 September 2025, reporting the Minister's account that the assault killed the garrison commander, more than 250 soldiers and UN aviation personnel, and his confirmation that the case would proceed to trial; 'Prosecutors unveil gruesome charges against Machar, co-accused over Nasir incident' *Eye Radio* 30 September 2025; and 'Witness in Machar trial names alleged killer of Gen Majur' *Radio Tamazuj* 25 November 2025, recording the prosecution's case that the attack killed a member of a UN helicopter crew. On the prosecution's rejection of the plea of immunity, see 'Machar in the dock: South Sudan justice system goes on trial' *The East African* 26 September 2025; and on the President's framing of the trial as a matter of legal accountability, see 'Riek Machar on trial in South Sudan: Is it tribal or political?' *African Arguments* 17 November 2025. The Nasir incident and the charges are introduced in part 5 above (nn 21-23), and the special court's ruling on immunity is noted at nn 23 & 35.

instrumentalisation, the use of criminal process as a continuation of political conflict by other means, in which the label of the accused as terrorist or traitor performs the work of delegitimising a rival. The second is selectivity, the prosecution of the crimes of one side while the comparable conduct of the other goes unexamined, which converts the language of universal accountability into an idiom of 'victor's justice'.[38] The third is destabilisation, the risk that prosecuting a principal of a power-sharing government will collapse the settlement that prosecution was, ultimately, meant to secure. Each of these risks has been widely observed in the scholarship on the timing of international justice, and each is present in the case of South Sudan.[39]

These pathologies bear directly on the fairness of the process, and fairness is not a peripheral concern but a condition of prosecution counting as justice at all. Independent observers have raised substantial due process concerns about the Machar proceedings, including prolonged detention without charge and questions about access to counsel and about the impartiality of the forum.[40] The right to a fair trial is guaranteed by both the African Charter and ICCPR, and it is not a formality that may be traded away for expediency in a politically charged case.[41] Where the procedural legitimacy of a prosecution is compromised, even a substantively warranted process forfeits the expressive and rule-affirming value that is its principal justification, and is likely to deepen rather than to dissolve the grievances that sustain conflict.

Judicial independence: These fair trial concerns converge on the independence of the tribunal, which is not a technicality but a precondition of legitimate adjudication. The African Charter obliges state parties both to guarantee the right to a fair trial and to ensure the independence of the courts, and an independent and impartial tribunal is equally fundamental to ICCPR.[42] A court established by

38 V Peskin 'Beyond victor's justice? The challenge of prosecuting the winners at the International Criminal Tribunals for the former Yugoslavia and Rwanda' (2005) 4 *Journal of Human Rights* 213.

39 Snyder & Vinjamuri (2003-2004) (n 4); Vinjamuri & Snyder (2015) (n 4); and, on how criminal intervention amid ongoing conflict can be captured by warring parties, A Branch *Displacing human rights: War and intervention in northern Uganda* (2011); T Allen *Trial justice: The International Criminal Court and the Lord's Resistance Army* (2006).

40 Human Rights Watch (n 1).

41 Art 7 African Charter; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14.

42 Arts 7 & 26 African Charter, the latter obliging state parties to guarantee the independence of the courts; art 14 ICCPR (n 41); UN Basic Principles on the Independence of the Judiciary (1985); and, on the due process concerns raised in the present proceedings, Human Rights Watch (n 1).

presidential act to try the President's principal rival, and operating within an executive dominated by one party to the conflict, faces an acute structural difficulty in satisfying that standard, whatever the personal integrity of the individual judges. Institutional safeguards, security of tenure, transparent appointment, protection from executive direction and, in a setting as polarised as that of South Sudan, a mixed or hybrid composition, are what allow a tribunal to be seen to decide according to law rather than to the interests of those who constituted it. Their absence does not establish that any particular ruling is wrong, but it deprives the proceedings of the appearance of independence on which their acceptance as justice depends.

Beyond these risks of timing and control lies a deeper limitation intrinsic to the criminal form. Criminal trials individualise guilt. They identify a defendant, attribute specified acts to that defendant, and calibrate punishment accordingly. This is a genuine strength, for it resists the collective attribution of blame to entire communities and insists on personal responsibility. However, as important as that individuality is, it is also a limitation, because the violence in South Sudan is mostly generated by a structure, the militarised political marketplace and the unresolved conflicts over land and authority that sustain it, which no individual conviction can dismantle.[43] A trial may remove a person from the 'political marketplace'; it cannot abolish the marketplace. Where the sources of violence are systemic, prosecution that is not accompanied by structural reform tends to produce symbolic rather than transformative outcomes and may even intensify conflict by removing one competitor while leaving the incentives to violence in place.

This is the point at which the critique of legalism and the transformative justice literature converge with the political economy of South Sudan. Justice conceived narrowly in terms of prosecution addresses what Mani describes as the legal dimension of post-conflict justice, namely, the punishment of perpetrators.[44] It nevertheless neglects both the rectificatory dimension, which concerns the repair of harm suffered by victims, and the distributive dimension, which concerns the transformation of the structural injustices underlying the violence.[45] A comparable warning emerges from Mamdani's reflection on the South African transition. He distinguishes a victor's justice, modelled on Nuremberg, from a survivor's justice aimed at reforming the political order to enable former enemies to coexist.

43 De Waal (2014) (n 12); Pinaud (n 12).
44 Mani (n 5).
45 As above.

He nevertheless criticises the celebrated settlement for addressing political perpetrators while leaving underlying structural injustices, particularly those concerning land, substantially untouched.[46]

The implication is not that accountability is dispensable. Impunity for grave crimes is itself a driver of recurrence, and the expressive and preventive functions of accountability retain their force.[47] The implication is rather that accountability is a necessary but insufficient component of justice in conditions of unfinished war and ongoing insecurity, and that its isolation, its pursuit apart from truth, reparation and structural reform, is precisely what tends to make it fail on its own terms. That proposition is not merely deduced; it is borne out by the comparative record of the tribunals of the past three decades.

7 Comparative post-conflict jurisprudence

The international and hybrid tribunals established since the early 1990s offer a comparative record against which to test the claim that prosecution requires embedding. The International Criminal Tribunal for the former Yugoslavia (ICTY) developed much of the modern doctrine of individual criminal responsibility, including joint criminal enterprise, and showed that individualised international accountability was achievable.[48] Yet, its contribution to reconciliation was contested, and it coincided with, rather than substituted for, the region's wider reconstruction; the lesson most commentators drew was that prosecution alone could not carry the burden of social repair.

The Special Court for Sierra Leone, a hybrid institution, secured the landmark conviction of a former head of state, Charles Taylor, advancing the principle that the highest office confers no immunity for grave crimes.[49] It is instructive for a further reason: It unfolded alongside a Truth and Reconciliation Commission, so that prosecution and truth-telling operated in tandem, and it confronted the tension between accountability and negotiated peace that the earlier Lomé amnesty had exposed.[50] The hybrid model it pioneered, pairing international legitimacy with national ownership, is directly relevant

46 M Mamdani 'Beyond Nuremberg: The historical significance of the post-apartheid transition in South Africa' (2015) 43 *Politics & Society* 61.
47 Akhavan (n 4).
48 *Prosecutor v Tadić* (n 30).
49 *Prosecutor v Charles Taylor* (Judgment) SCSL-03-01-T, Special Court for Sierra Leone (18 May 2012).
50 CC Jalloh 'Special courts and truth commissions' in CC Jalloh *The legal legacy of the Special Court for Sierra Leone* (2020) 306.

to the forum question in South Sudan, whose peace agreement had itself envisaged a hybrid court.

Rwanda, after the 1994 genocide, illustrates both the necessity and the limits of prosecution at scale. The International Criminal Tribunal for Rwanda (ICTR) prosecuted senior figures, while the domestic Gacaca courts processed hundreds of thousands of cases through a participatory, community-based procedure.[51] Gacaca showed that transitional justice can be located within communities rather than only in distant courtrooms, but it drew sustained criticism for procedural shortcomings and for an asymmetric focus that left the crimes of the victors comparatively unexamined, a caution directly pertinent to the risk of selective justice in South Sudan.

South Africa's transition is the paradigmatic instance of prosecution subordinated to a different logic. Its Truth and Reconciliation Commission offered amnesty in exchange for full disclosure, prioritising truth and a negotiated settlement over punishment, and has been defended as restorative rather than retributive justice.[52] Subsequent reassessments, however, have emphasised that the settlement's success in managing the political transition was accompanied by its failure to address the structural inequalities inherited from apartheid, particularly those relating to land and the economy. Mamdani attributes this failure to a conception of justice focused on political perpetrators rather than on transforming the underlying social order.[53]

The International Criminal Court (ICC)'s experience in Africa adds a cautionary layer directly germane to forum. Studies of its interventions in Uganda and Sudan show how prosecution launched into ongoing conflict can be absorbed into the strategies of the warring parties, each branding its opponents as enemies of humanity while presenting itself as a friend of international justice, and how the expectation that complementarity would catalyse credible domestic proceedings has largely gone unrealised.[54] The resulting disenchantment has strengthened an African preference for regionally owned, hybrid mechanisms combining international standards with local legitimacy, exactly what South Sudan's peace agreement encoded when it designated a hybrid court for the gravest crimes. That is why the choice of forum in the Machar case

51 P Clark *The Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (2010).
52 D Tutu *No future without forgiveness* (1999).
53 Mamdani (n 46); and, on the distinction between legal, rectificatory and distributive justice that this critique tracks, Mani (n 5).
54 Nouwen (n 36); Nouwen & Werner (n 8); Branch (n 39).

is not a technicality but a question of whether accountability can be received as justice at all.

Across these cases a consistent lesson emerges. Criminal accountability has contributed to peace and to a sense of justice where it has been embedded within broader truth, reparation and reform processes, and where questions of forum, sequencing and even-handedness have been credibly managed. Where it has stood alone, or been perceived as selective or as an instrument of the victor, it has tended to disappoint, and sometimes to inflame. This comparative record supplies the warrant for the repair-centred framework developed below. Before turning to it, the analysis must take account of a factor that constrains any accountability process in South Sudan from beyond its borders: the war in Sudan.

8 The regional shadow of Sudan

South Sudan's stability, and the fate of any justice process within it, cannot be assessed in isolation from the war that erupted in Sudan in April 2023 between the Sudanese Armed Forces and the Rapid Support Forces. That war has generated one of the world's gravest displacement crises, and its effects reach directly across the border.[55] Large numbers of people, including returning South Sudanese, have crossed into an already overstretched South Sudan, adding humanitarian strain to a state with little fiscal room to absorb it.

The economic transmission has been at least as consequential. South Sudan remains heavily dependent on oil revenue that reaches export markets through pipelines running across Sudan, and the disruption of that infrastructure by the war has sharpened the fiscal crisis of a state whose stability has long rested on its capacity to finance the political marketplace.[56] When the resources that sustain elite bargains contract, the incentives to resolve competition through violence intensify, a dynamic that a prosecution of a principal opponent, undertaken at such a moment, is likely to aggravate.

Regional insecurity, thus, does more than form a backdrop. It shapes the conditions under which accountability is attempted, narrowing the fiscal and political space for the compromises a durable

55 On the scale of displacement and the return movements into South Sudan, see United Nations High Commissioner for Refugees 'South Sudan situation: Operational updates' (2024-2025).

56 On the dependence of political order on oil-financed patronage, and the vulnerability that follows when that finance contracts, see De Waal (2014) (n 12); De Waal (2015) (n 12).

settlement requires, and increasing the likelihood that a high-stakes prosecution will be read, by its target and his constituency, as an existential threat to be resisted by force. Any framework for justice in South Sudan, therefore, must be robust to a regional environment that is itself unfinished, and should avoid staking peace on a single institutional act whose destabilising potential the regional crisis magnifies.

9 Towards a repair-centred framework: Law as institutional reconstruction, relational repair and structural transformation

If prosecution alone is structurally insufficient in conditions of unfinished war, the constructive task is to specify what a sufficient conception of justice would include.

It is worth distinguishing at the outset two conceptions upon which this article draws but does not simply restate. Transitional justice, in its dominant form, is organised around a transition: It is time-bounded, oriented to reckoning with a past assumed to be over, and delivered through a familiar set of mechanisms, prosecutions, truth commissions and reparations, that mark the passage from violence to a new order. Restorative justice is a philosophy of justice as the repair of harm and the restoration of relationship among victim, offender and community, characteristically realised through encounter and dialogue rather than through punishment. Each is indispensable, and each is incomplete for present purposes: The transitional frame presupposes the settled 'after' that unfinished war denies, while the restorative frame, powerful at the level of the encounter, does not by itself reach the institutions and structures whose failure produces violence in the first place.

The repair-centred approach proposed here synthesises these resources but reconceives their object. Repair, on this account, is not a discrete project with a terminus, a court to be concluded or a commission to be wound up, but an ongoing orientation of a wounded society: a sustained public work, embedded across institutions and everyday life, of rebuilding the capacities of people and communities to live together and of making the state answerable to them. Thus understood, justice is not exhausted by verdicts or by reconciliation ceremonies alone; it extends to the steady provision of functioning services, security and redress through which rights are actually enjoyed, and it has no natural end point, because the conditions of a shared life must be continually maintained. This conception is not invented from nothing. It gathers the

transformative turn in transitional justice scholarship and the holistic, non-recurrence-centred model of the AU Transitional Justice Policy, and it grounds them in an African relational ethic. Its contribution is to draw these strands into a single framework and to apply it to the aparadigmatic condition of unfinished war, and specifically to South Sudan, a society deeply wounded by one of the longest civil wars in Africa, where the standard sequence of transition, reckoning and recovery has never been available.[57]

This article proposes a repair-centred framework built on three integrated pillars: institutional reconstruction, relational repair and structural transformation. The framework does not displace criminal accountability; it re-situates it as one element within a wider architecture of repair and, in doing so, it responds directly to the failures traced in the comparative record.

The first pillar, institutional reconstruction, treats law less as an instrument of punishment than as a means of building institutions capable of delivering justice impartially over time. In the South Sudanese context, this means completing and operationalising the chapter V mechanisms as a connected system rather than as isolated gestures: a credibly independent court for the gravest crimes, ideally the hybrid court the peace agreement envisaged, whose mixed composition would address the legitimacy deficit that a purely domestic and executive-controlled tribunal cannot escape; a truth and reconciliation process capable of establishing a shared historical record; and a reparation authority able to make redress tangible.[58] The choice of forum is not a formality. It is the difference between a process that can be received as justice and one that will be received as the continuation of factional struggle. Concretely, this means enacting and operationalising the outstanding elements of chapter V as a connected system rather than in isolation: standing up the Commission and the Reparation Authority whose enabling laws were passed in 2024, constituting the hybrid court with the mixed composition the agreement envisaged, and pairing these with justice sector reform, an independent and adequately resourced judiciary and prosecution service insulated from executive direction, so that ordinary as well as extraordinary justice becomes credible.

57 On restorative justice as the repair of harm and the restoration of relationship, see n 59 below. On the transformative turn beyond the transitional template, see nn 5 & 6. On the holistic, African-owned and non-recurrence-centred model drawn on here, see the African Union Transitional Justice Policy (n 7).

58 On reparations as a central rather than peripheral element of post-conflict justice, see P de Greiff (ed) *The handbook of reparations* (2006). On the ch V mechanisms, see R-ARCSS (n 16) ch V.

The second pillar, relational repair, draws on restorative justice and ubuntu relational ethics to address the dimension of harm that criminal trials characteristically miss: the rupture of relationships among people who must nonetheless continue to share a common life. Restorative approaches understand justice as the repair of harm and the restoration of relationship rather than as the mere infliction of punishment,[59] and an ubuntu ethic, in which personhood is constituted through relationship and the restoration of broken relationship is itself a demand of justice, grounds that orientation in African moral thought rather than importing it wholesale from elsewhere.[60] Relational repair also directs attention to the customary institutions through which South Sudanese communities have long resolved disputes, engaged critically, with due regard to their own hierarchies and exclusions, within a relationship of complementarity with formal justice.

Understood more fully, relational repair extends beyond the reconciliation of individuals to the restoration of the capacities of families and communities to care for their members, to resolve disputes and to transmit belonging, capacities that South Sudan's wars have damaged as surely as they have harmed individuals. A repair-centred framework, therefore, treats the rebuilding of family and community capabilities as an object of justice in its own right, engaging the customary and relational practices through which such rebuilding occurs critically rather than either romantically or dismissively.

A capabilities perspective, concerned with what people and the collectivities they form are actually able to do and to be, brings that object into view.[61] So understood, relational repair is not a soft supplement to prosecution but a distinct register of justice, directed at the social fabric that prosecution cannot by itself mend, and pursued through the customary and communal institutions in which South Sudanese repair actually takes place.

This critical posture has a specific and pressing content where gender is concerned. Customary forums in South Sudan, like customary institutions elsewhere, can entrench patriarchal norms;

59 H Zehr *Changing lenses: A new focus for crime and justice* (1990); J Braithwaite *Restorative justice and responsive regulation* (2002).

60 MB Ramose *African philosophy through ubuntu* (1999); T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532; Tutu (n 52).

61 On the capabilities approach and its bearing on collective and familial functioning, see MC Nussbaum *Women and human development: The capabilities approach* (2000); and, on ubuntu, the sources at n 60.

they have at times treated compensation between families as a sufficient response to sexual violence, subordinated the testimony and interests of women, and afforded them limited standing before predominantly male authorities. Given that conflict-related sexual violence has been a documented feature of the present war, a repair-centred framework cannot romanticise these forums. Their engagement must be conditioned on compliance with human rights standards, the equal participation and protection of women, and the retention of formal criminal accountability for gender-based violence, which cannot be bargained away in the name of reconciliation. So qualified, customary and relational processes can complement formal justice; unqualified, they would reproduce the very injustices that justice must repair.[62]

The third pillar, structural transformation, follows from the political economy set out earlier. Because the violence is generated by a militarised political order and by unresolved conflicts over land and authority, durable justice requires reforms that alter that order: security sector reform and the demilitarisation of politics, so that access to power ceases to run through armed factions; and land reform and measures addressing the distributive injustices that recur as proximate causes of local violence.[63] This is the transformative dimension that distinguishes a repair-centred framework from a merely additive combination of mechanisms. It insists that justice must reach the structures that produce violence, not only the individuals who enact it. In concrete terms, this points to the security sector reform that chapter II already prescribes, the unification of forces, the demilitarisation of politics and civilian oversight through which access to power might cease to run through armed factions, and to measures addressing the land and boundary disputes and the predatory management of oil revenue that recur as proximate and structural drivers of violence. These are the reforms aimed most directly at the sources of harm, and their absence is why prosecution alone changes so little.

Two clarifications guard the framework against predictable misreadings. First, it does not advocate prioritising community-based or restorative processes over formal accountability, or formal

62 On the gendered hierarchies and exclusions of customary authority in South Sudan, see Leonardi (n 14). On conflict-related sexual violence as a documented feature of the current violence, see UN Commission on Human Rights in South Sudan (n 25). The African Union Transitional Justice Policy (n 7) insists that customary and traditional mechanisms conform to human rights standards, including the equal rights of women and accountability for gender-based violence.

63 Gready & Robins (n 5); Mani (n 5); on land and boundary disputes as persistent drivers of local conflict, see Leonardi (n 14).

accountability over structural reform. The model is conjunctive: formal accountability and relational repair and structural transformation, each necessary and none sufficient alone. To read the argument as a case against prosecution would be to mistake it entirely, for the claim that accountability is insufficient in isolation raises, rather than lowers, what a just response demands. Second, the framework does not romanticise customary authority or community, both of which can reproduce exclusion and inequality; it advocates critical complementarity, in which formal and customary, national and local, are held in a mutually checking relationship.

The framework also speaks to sequencing. It does not require prosecution to be indefinitely deferred until peace is secured, which may risk perpetuating impunity, nor does it require prosecution to proceed immediately regardless of the consequences. It suggests, rather, that the credibility and timing of accountability depend on the parallel construction of the institutions and reforms that allow prosecution to be received as justice rather than factional victory. A jointly constituted hybrid court, in particular, can serve as a legitimacy device, insulating accountability from the appearance of executive capture and signalling that no party stands above the law, while truth-telling and reparation proceed alongside it and structural reform is set in motion. The flaw in the present configuration is not that accountability is being pursued, but that it is pursued in isolation, through a forum whose composition invites the very suspicion of instrumentalisation that deprives it of legitimacy.

Applied to the present moment, the framework reframes the question posed by the Machar prosecution. The pertinent question is not whether Machar is guilty, nor even whether he should be tried, but whether accountability is pursued within a credible architecture of institutional reconstruction, relational repair and structural transformation, or whether it stands alone as an isolated act of prosecutorial power amid unfinished war. The former can convert accountability into justice; the latter risks converting law into one more weapon in a conflict it was meant to end.

10 Conclusion

In contexts of unfinished war, law itself is on trial. The prosecution of Riek Machar tests not only the conduct of an individual, but the institutional capacity, normative adequacy and political legitimacy of the legal order that undertakes it. Because the trial was still underway when this article was submitted, its verdict lay beyond the reach of the analysis. The argument does not depend on whether

Machar is convicted or acquitted, but on the conditions under which accountability can amount to justice at all. This article has argued that criminal accountability, while normatively indispensable, is structurally insufficient when it operates in isolation under such conditions, and that its isolation, its separation from truth, reparation and structural reform, and its vulnerability to instrumentalisation, selectivity and destabilisation, is a recurring source of failure rather than an incidental flaw.

The transitional paradigm presupposes an 'after' that South Sudan has not reached. Its peace agreement restored a power-sharing government without ending the war structures or the impunity it was meant to address, and its transitional justice mechanisms were designed but not delivered. A prosecution conducted by one party to the conflict, before a forum it controls, and at a moment when the regional crisis in Sudan has sharpened the incentives to violence, cannot by itself carry the weight of justice; the comparative record confirms that accountability has served peace where embedded, and disappointed where it has stood alone.

The way forward proposed here is neither to abandon accountability nor to inflate it, but to widen the conception of justice within which it operates. A repair-centred framework, integrating institutional reconstruction, relational repair and structural transformation, and grounded in African relational ethics as much as in international criminal law, offers a more adequate account of what justice requires where war is unfinished. Its significance is not confined to South Sudan: Across a continent where the standard post-conflict template has repeatedly met protracted and recurrent conflict, reconceiving law as reconstruction, repair and transformation rather than as punishment alone speaks to a wider predicament. Durable peace will require embedding criminal accountability within that broader work, and understanding law not merely as a verdict upon the past, but as an instrument for building a shared future.