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## Human Rights Council Thirty-first session

Agenda item 2

**Annual report of the United Nations High Commissioner  
for Human Rights and reports of the Office of the  
High Commissioner and the Secretary-General**

### **Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: detailed findings\***

#### *Summary*

This present document contains the detailed findings of the comprehensive assessment conducted by the Office of the United Nations High Commissioner for Human Rights (OHCHR) into allegations of violations and abuses of human rights and violations of international humanitarian law in South Sudan since the outbreak of violence in December 2013. It should be read in conjunction with the report of the United Nations High Commissioner for Human Rights on the assessment mission to South Sudan submitted to the Human Rights Council at its thirty-first session (A/HRC/31/49).

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## Glossary

ARCSS	Agreement on the Resolution of Conflict in South Sudan
AU	African Union
BANFMU	Bangladeshi Forces Marine Unit
CEAWC	Committee for the Elimination of the Abduction of Women and Children
COI	Commission of Inquiry
CPA	Comprehensive Peace Agreement
CSO	Civil Society Organizations
HCSS	Hybrid Court of South Sudan
HRD	Human Rights Division
IDP	Internally Displaced Person
IGAD	Intergovernmental Authority on Development
ILO	International Labor Organization
JEM	Justice and Equality Movement
JIU	Joint Integrated Unit
LRA	Lord's Resistance Army
MDF	Maban Defense Forces
NGO	Non-Governmental Organization
NPSSS	National Prison Services of South Sudan
NSS	National Security Service
NSCC	New Sudan Council of Churches
OHCHR	United Nations Office of the High Commissioner for Human Rights
PoC	Protection of Civilians
PSC	Peace and Security Council
ROSS	Republic of South Sudan
SAF	Sudan Armed Forces
SGBV	Sexual and Gender-Based Violence
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SPLM/A-IO	Sudan People's Liberation Movement/Army in Opposition
SSDF	South Sudan Defence Forces
SSLA	South Sudan Liberation Army
SSNPS	South Sudan National Police Service
SSHRC	South Sudan Human Rights Commission
TGoNU	Transitional Government of National Unity
UNHCR	United Nations High Commissioner for Refugees

UNIFEM	United Nations Development Fund for Women
UNMISS	United Nations Mission in the Republic of South Sudan
UNOSAT	United Nations Operational Satellite Applications Programme
UNPOL	United Nations Police
UPDF	Uganda People's Defence Force
WFP	World Food Programme

## Part 1

### Executive Summary

1. Since the outbreak of violence in December 2013 and through most of 2014, the United Nations (UN) and the African Union (AU) have documented brutal violations and abuses of human rights committed by the Government and the Sudan People's Liberation Movement/Army-in Opposition (SPLM/A-IO) forces, together with allied militia, which may amount to war crimes and/or crimes against humanity if established in a court of law. The UN and AU reporting found that Government and opposition forces and their allied militia have killed civilians, raped women and girls, pillaged and destroyed civilian property such as houses, humanitarian infrastructure, medical facilities including hospitals, and schools. In addition, it was alleged that both sides targeted places of refuge, including churches, hospitals, and UN bases.

2. A country some five years old has had more than two years of war, in which more than one and a half million people have been internally displaced and forced into harsh and dangerous living conditions. Thousands more have sought safety and shelter from their own government and opposition forces and allied militia, finding refuge within UN compounds. According to the United Nations Mission in South Sudan (UNMISS), more than 201,000 IDPs are currently protected in six UNMISS bases across South Sudan.<sup>1</sup> In addition, more than 600,000 are living in refugee camps in Uganda, Kenya and Ethiopia.<sup>2</sup> As a result of these displacements, most parts of the country face severe food insecurity and possible famine.<sup>3</sup>

3. Extreme violence in the spring of 2015 triggered the adoption in July 2015 of United Nations Human Rights Council's resolution A/HRC/29/13, "A Mission by OHCHR to Improve Human Rights, Accountability, Reconciliation and Capacity in South Sudan," in which the Human Rights Council requested the High Commissioner to present a full report at the Council's 31st session. In accordance with this mandate, the High Commissioner established the OHCHR Assessment Mission to South Sudan (the assessment team), based in Juba. The mission was mandated with a number of tasks, most importantly, "to undertake a comprehensive assessment of allegations of violations and abuses of human rights, with a view to ensuring accountability and complementarity with the African Union Commission of Inquiry."

4. Since the Council resolution in July 2015, there have been important political developments. In August 2015, the parties signed a peace agreement that was intended to halt the fighting, put in place the machinery for establishing a transitional government and create accountability and reconciliation mechanisms.<sup>4</sup> The transition period, which should

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<sup>1</sup> As of 14 January 2016, the estimated number of civilians seeking safety in six Protection of Civilians sites located on UNMISS bases is 201,257 including 122,293 in Bentiu, 27,950 in Juba UN House, 47,791 in Malakal, 2,289 in Bor, 700 in Melut and 234 in Wau.

<sup>2</sup> More than two million people have been displaced by the conflict - 1.6 million internally and 642,199 in refugee camps in neighbouring countries (see UN Doc. S/2015/902).

<sup>3</sup> See "South Sudan: Hundreds of thousands face critical food shortage," (ICRC Press Release, 11 December 2015).

<sup>4</sup> See "Agreement on the Resolution of the Conflict in the Republic of South Sudan" signed in August by South Sudanese President Salva Kiir, Sudan People's Liberation Movement in Opposition (SPLM in Opposition) leader Riek Machar, and Pagan Amum, the representative of the former detainees.

have started in November 2015, was delayed several times by the failure of the parties to agree on key security arrangements. In late December 2015, an advance team from the SPLM/A-IO arrived in Juba to commence the preparations for the transition period. Despite repeated violations of the cease-fire that came into effect on 29 August, both sides continued to reiterate their commitment to the implementation of agreement.

5. In terms of accountability, the peace agreement provides for the establishment of a hybrid tribunal under the auspices of the African Union, with the authority to try genocide, war crimes, crimes against humanity and other serious crimes. The transitional government, once established, is also required to create, within six months, a truth and reconciliation commission to establish a record of violations of human rights since the start of the conflict and a compensation and reparations authority.

6. In October 2015, the African Union released its ground-breaking Commission of Inquiry report. The Commission of Inquiry, which covered the period from the start of the conflict until September 2014, concluded that serious violations of human rights and international humanitarian law, as well as human rights abuses had been committed by all parties, in particular with regard to the right to life, freedom from torture, sexual violence, destruction of property and violations against children, including the recruitment and use of children in hostilities.<sup>5</sup>

7. This assessment report identifies patterns of violations and abuses South Sudanese have endured since December 2013, particularly targeted killings of civilians, sexual and gender-based violence, mass pillage and destruction of civilian objects. To complement existing reports, it focuses especially on violations of international law committed in 2015 in the states of Unity, Upper Nile and Western and Central Equatoria.

8. The time frame for the assessment was extremely limited and the constraints formidable, including the lack of any meaningful cooperation from the government and its armed forces, lack of access to conflict areas and serious witness protection concerns. Nevertheless, the assessment team did confirm that the patterns of violations of international human rights and humanitarian law, as well as human rights abuses identified in the earlier UN and AU reports in 2014 have continued unabated throughout 2015, including following the signing of the peace agreement in August.

9. Since the beginning of the conflict, the warring parties have sought to prevent the peacekeeping forces of the UN Mission in South Sudan (UNMISS) from moving freely around the country to protect civilians, despite a mandate from the Security Council to do so. As a consequence, UNMISS had no access to the southern part of Unity State until November 2015, meaning that the local civilian population could not be effectively protected from the violent campaign government forces launched in the spring of 2015, while they already faced malnutrition, disease and hunger.

10. The government's counter insurgency offensive in the spring of 2015 in Unity State was carried out with the apparent purpose of spreading terror among civilians including widespread sexual and gender based violence and apparently led to the abduction of women and girls and indiscriminate attacks, on villages some of which involving massive looting of property, including thousands upon thousands of cattle.

11. Throughout this conflict, sexual and gender-based violence has been widespread. In 2015 in Unity state, as documented by the Assessment Mission, the breadth and depth of the crimes against women and girls is alarming.

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<sup>5</sup> Final report of the African Union Commission of Inquiry on South Sudan, 15 October 2014.

12. Both parties have made commitments related to accountability for the violations committed during the conflict. Despite repeated assurances to the UN, including from the Head of State, the Government did not provide the assessment team with any information on, or evidence of, national investigations into the conflict-related violence. There appears to be little political will to explore issues of truth, justice and accountability, notwithstanding the formal acceptance of these requirements in the peace agreement. In the period covered by this report, justice has clearly not gained much ground in South Sudan.

13. This report also explores South Sudan's history of war, inter-communal violence and abuse, without any form of accountability or meaningful reconciliation. The complex inter-tribal narratives and the shifting alliances and general unpredictability of political relations in South Sudan cannot be merely understood through easy assumptions about ethnicity and tribalism. The root causes of the violence are also moored in the divisions within the political and military movements and consequent unresolved tensions following the split in the military movement in the 1990s.

14. The High Commissioner hopes that this report will be viewed as an opportunity to truly acknowledge the suffering of the people of South Sudan, and that, even more importantly, its presentation to the Human Rights Council will contribute to a genuine process of accountability, truth and reconciliation, as well as guarantees of non-recurrence for the thousands of victims and their families who have suffered immeasurably over the course of the last two and a half years. Failure to address the deeply engrained disregard for human life will only generate the risk that such violations will continue to be repeated.

## **I. Establishment of the OHCHR Assessment Mission to South Sudan**

### **A. Mandate**

15. The OHCHR Assessment Mission for South Sudan was set up by the High Commissioner following the adoption of resolution A/HRC/29/13 by the Human Rights Council in July 2015. An advance team deployed to Juba, South Sudan, in October 2015 and the full assessment team became operational in November 2015. The resolution requested OHCHR to undertake a comprehensive assessment of allegations of violations and abuses of human rights, with a view to ensuring accountability, to monitor and report on the human rights situation and to engage with the Government, in particular to make recommendations for technical assistance and capacity building and on ways to improve the situation of human rights in the country.

16. The resolution further asked OHCHR to assess the effectiveness of steps taken by the Government of South Sudan on a number of benchmarks including accountability for human rights violations and abuses, steps taken to investigate, arrest and prosecute perpetrators of human rights violations and abuses, including targeted killings, rape and other forms of sexual violence, steps taken to prevent violence against children, the recruitment of children into the armed forces, arbitrary detention and to increase democratic space for civil society and media.

17. The terms of reference for the assessment mission (Appendix I) outline the time frame, methodology, standards of proof and other key aspects of this assessment. The mandate to carry out a comprehensive assessment was interpreted as the collection of information on the human rights situation, including on specific violations and abuses, from both primary and secondary sources, in order to evaluate specific trends and patterns of violations and abuses and identify the alleged perpetrators. The assessment looked at



violations and abuses attributed to both State actors and non-State armed groups, including the SPLM/A-IO which continued to be in de facto control of some parts of the country.

18. The Human Rights Council resolution did not set out a temporal scope for the assessment. However its preamble referred to human rights violations committed since the outbreak of violence on 15 December 2013. In this context, the team, subject to considerable constraints, carried out an assessment of alleged violations and abuses of human rights committed from 15 December 2013 through 31 December 2015, with a special emphasis on those violations and abuses that were committed after the departure of the African Union Commission of Inquiry (AU COI) in September 2014. The assessment mission did not re-examine violations set out in the AU COI report, nor those alleged in the reporting of UNMISS in 2014.<sup>6</sup>

19. The assessment mission took into consideration contextual and other relevant information that, while falling outside the time frame, helped in providing a better understanding of the current crisis, particularly the legacy of violence that has had a profound impact on the civilian population.

20. With regard to the geographical scope, while the human rights situation in the country as a whole was assessed, because of the nature of the conflict and the limited time available, the assessment focused on conflict-affected states, Unity and Upper Nile, as well as states previously unaffected by fighting but that have seen an increase in insecurity and pockets of violence in 2015, in particular Western and Central Equatoria.

## **B. Methodology**

21. Extensive documentation of violations of international law is already available for the period covered by the OHCHR Assessment Mission. The assessment team undertook a desk review of existing material, including UNMISS public reports and the report of the AU COI on South Sudan that was released in October 2015. In addition, the team examined official documents of the Government, reports by other UN entities and agencies including the UN Panel of Experts on South Sudan, international NGOs, national civil society organizations and reports of the United Nations Special Procedures and treaty bodies.

22. In the course of its work, the assessment team received and gathered information from many sources including the parties to the conflict, as well as United Nations personnel, national civil society organizations, international NGOs, human rights defenders and other professionals. Further, the United Nations' Operational Satellite Applications Programme (UNOSAT) provided invaluable analysis on satellite imagery.

### **1. Protection of victims and witnesses**

23. While, the team placed emphasis on collecting first-hand testimony of victims and witnesses of violations and abuses, identifying and protecting victims and witnesses and other potential sources of testimony during an on-going internal armed conflict was challenging. Though some victims and witnesses could be located within the Protection of Civilians sites (POCs) in UNMISS compounds, many victims and witnesses had been displaced into harsh and dangerous living conditions, far away from towns and villages, or transport hubs.

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<sup>6</sup> See, e.g., UNMISS, "Conflict in South Sudan: A Human Rights Report," 8 May 2014.

24. In line with UN policy on information sensitivity, classification and handling, information provided by witnesses and other confidential material collected are classified as strictly confidential.<sup>7</sup> Details which could reveal the identity of victims or witnesses such as names, dates and places have been omitted in order to ensure victims, witnesses and their families' safety and security.

25. In total, 121 confidential interviews were conducted. Most of the testimonies came from victims and witnesses that had experienced extensive trauma and terror, with many constantly being displaced by renewed violence and having no safe haven. Building trust through strict confidentiality and ensuring adequate protection measures were in place, particularly when children were involved, was essential to creating a secure environment in which victims and witnesses could recount their experiences.

26. With regard to sexual and gender-based violence, the assessment team interviewed women individually and held group discussions and meetings with several women representing particular ethnic groups in UNMISS POCs as part of the information gathering process. Beyond violations of a sexual and gender-based nature, women spoke to the team about the impact of the conflict on livelihoods, family and societal relations, sexual and reproductive health and general insecurity.

## **2. Fear of reprisals, harassment, intimidation and other abuses**

27. Since the outbreak of the conflict in late 2013, civil society activists, human rights defenders, humanitarian actors, journalists and print media, and even UN staff members have been the subject of threats, intimidation, harassment, detention and, in some instances, death by the Government. Notwithstanding such an environment, many witnesses showed enormous courage by reaching out and making a contribution to the work of the Assessment Mission. The assessment team exercised extreme caution in communicating with sources inside the country.

## **3. Risk of re-traumatization**

28. Since late December 2013, a number of inter-government bodies (the UN, the AU and IGAD) have undertaken extensive interviewing of victims and witnesses to the conflict. In addition, international NGOs and local and international media have also covered the crisis, interviewing victims of violations or abuses. The continuing trauma suffered by thousands of civilians since the outbreak of violence in December 2013 made the assessment team sensitive to the risks of re-traumatization through repeated interviewing and appropriate measures were taken in this regard. The assessment team was conscious of the fact that in South Sudan there is limited counseling or psychosocial support available to victims and witnesses, however whenever possible and as necessary, victims and witnesses were directed towards existing services.

## **4. Verification and evaluation of information**

29. The OHCHR mandate was primarily to undertake a human rights assessment. Although the assessment was not expected to undertake in-depth investigations, the amount of verified information it collected enabled the team to use the standard of proof commonly used for human rights investigations, i.e. the standard of "reasonable grounds

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<sup>7</sup> The UN's policy with regard to archiving and classification of documents can be found at ST/SGB/2007/6.

to believe.”<sup>8</sup> There are “reasonable grounds to believe” that an incident or pattern of violations or abuses, some of which may amount to violations of international law, occurred when there is a credible body of information, consistent with other information, indicating their occurrence. This standard of proof is sufficiently high to call for a judicial investigation into violations and abuses of international human rights and humanitarian law as well as international crimes.

30. The OHCHR assessment team received allegations which linked individual alleged perpetrators to specific violations or abuses or to pattern of violations or abuses. In some instances, there is sufficient information to warrant criminal investigations of individual alleged perpetrators so as to assess their criminal responsibility and establish whether, by acts or omissions, they may be responsible directly or have command responsibility under international humanitarian law. Considering the importance of this information for its mandate, in particular in ensuring accountability, OHCHR has recorded this information. For reasons of witness protection, individual names have not been included in this present report, and are retained on a strictly confidential basis by OHCHR. In other instances, there was insufficient information regarding perpetrators. Though credible information exists that a violation or abuse may have occurred, further investigation would be required to draw meaningful conclusions as to who was responsible. During the assessment, the team received information concerning individuals with alleged responsibility for violations and abuses.

## **C. Challenges and Constraints**

### **1. The Government of South Sudan**

31. The Government established a standing national human rights task force, led by the Ministry of Foreign Affairs, as the main counterpart for the OHCHR Assessment Mission. The task force comprised most government departments, including the Ministries of Defense and Justice as well as representatives from the Office of the President. Over the course of the assessment, the assessment team made a series of written requests, for documents and meetings with key government actors, to the task force. Though it provided some documentation, particularly on the applicable law, regrettably the task force did not meaningfully cooperate with the assessment team. What was most unfortunate was the failure to disclose the findings of a Presidential-ordered investigation into alleged human rights violations committed by state actors since December 2013.<sup>9</sup> The report of the investigation was presented to the President in December 2014 but has not been made public. In February 2015, the President had informed a senior UN human rights official that the report would be publicly released.

<sup>8</sup> See the updated edition of the OHCHR publication “Commissions of inquiry and fact-finding missions on international human rights and humanitarian law: guidance and practice” available at [http://www.ohchr.org/Documents/Publications/CoI\\_Guidance\\_and\\_Practice.pdf](http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf).

<sup>9</sup> On 24 January 2014, President Kiir established an “investigation committee on human rights abuses,” led by Justice John Wuol Makec. It was mandated to look into “abuses allegedly committed by government security agents and the rebels of Riek Machar Teny that occurred following the December 15, 2013, attempted coup throughout, the period of conflict in Juba, Jonglei (Bor), Unity (Bentiu), and Upper Nile (Malakal) States.” See Republican Order No.06/2014, 24 January 2014.

**2. SPLM/A-IO**

32. Despite requests to meet SPLM/A-IO representatives in Juba, no such meeting was granted.

**3. Environment**

33. The size of the country and the lack of any transport infrastructure presented formidable challenges in travel and access. A country that is the size of France and Belgium combined, with one state, Jonglei, the size of Wales, has almost no paved roads outside its capital Juba. In addition, the volatile security situation in South Sudan, with an ongoing non-international armed conflict still persisting in parts of the country, meant that the assessment team was unable to move around freely and thus was not able to have access to many victims and witnesses. In particular, stringent requirements imposed by the Government on UN movement in some parts of the country hindered the assessment team from accessing areas as safety assurances were not granted.<sup>10</sup> Despite these hindrances, the assessment team was able to travel to conflict-affected states in areas under Government control as well as areas under the control of SPLM/A-IO.

## **II. Legal Framework**

34. The assessment mission has conducted its work within the relevant international legal framework, namely international human rights law, international humanitarian law and international criminal law. The Government of South Sudan is obligated at all times to respect, protect and fulfill the human rights of all persons within its territory and subject to its jurisdiction. Human rights standards must be respected by armed groups that exercise de facto control over territory, when their conduct affects the human rights of persons under their control.

35. In addition, in the context of an armed conflict, the conduct of all parties is governed by the relevant provisions of international humanitarian law. The conflict between Government forces, i.e., SPLA forces, and militias and armed youth acting under Government's control or instructions, and opposition forces, armed militia and armed youth acting under their control or instruction is a non-international armed conflict. All parties to this conflict are obligated to respect Common Article 3 of the Geneva Conventions, which sets forth minimum standards for the proper treatment of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat,' Additional Protocol II, which provides for more detailed protection of victims of non-international armed conflicts, and the rules of customary international law applicable in non-international armed conflicts.<sup>11</sup>

36. In addition, domestic laws are also applicable, including provisions of the Transitional Constitution of South Sudan and relevant national criminal laws. The SPLA is specifically bound by the rules set forth in the SPLA Act of 2009, and in the SPLA Code of Conduct.

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<sup>10</sup> For example, the assessment team was not granted flight safety assurances by the Government to travel to Mundri in Western Equatoria, the scene of alleged human rights violations or abuses by state actors.

<sup>11</sup> South Sudan became a state party to the Geneva Conventions of 1949 and Additional Protocols I & II on 25 January 2013.

## **A. International Humanitarian Law**

### **1. Scope**

37. International humanitarian law regulates the conduct of parties to the armed conflict by protecting those who do not or no longer directly participate in hostilities and by regulating the means and methods of warfare with the aim of restricting the use of armed force “to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy.”<sup>12</sup>

38. Each party to a non-international armed conflict, including armed opposition groups, is responsible for ensuring the full respect of applicable international humanitarian law. International humanitarian law applies across the whole territory of South Sudan.

### **2. Common Article 3**

39. All parties to South Sudan’s non-international armed conflict are obliged to respect the minimum standards of humane treatment set forth in Common Article 3 to the Geneva Conventions of 1949. Under Common Article 3, persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ are specifically protected from violence, murder, torture, mutilation, cruel treatment, outrages upon personal dignity such as humiliating and degrading treatment, hostage-taking, and extra-judicial convictions and executions.

40. The obligations set forth in Common Article 3 apply when the threshold of non-international armed conflict is reached; in South Sudan, this period dates to December 2013.

### **3. Additional Protocol II**

41. South Sudan is a state party to Additional Protocol II, which imposes additional legal obligations, rights, and responsibilities in non-international armed conflicts when the non-required threshold for its application is reached. With respect to those armed conflicts, Additional Protocol II provides specific protections for individual civilians and the civilian population and also prohibits certain acts against those persons. The proscribed acts include the targeting, abduction, or terrorizing of civilians, forced displacement, collective punishment, pillage, and starvation. Additional Protocol II also prohibits, among other things, outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, as well as the recruitment and use of child soldiers.

42. Additional Protocol II became applicable to the conflict between South Sudan’s Government and Opposition forces when the SPLM/A-IO forces were operating under responsible command, and exercised such control over a part of its territory as to enable them to carry out sustained and concerted military operations which occurred as early as December 2013.

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<sup>12</sup> Sassòli, M., Bouvier, A., Quintin A. (eds), *How Does Law Protect in War?* (3rd edn., Geneva: ICRC, 2011), Vol. I, at 1.

#### 4. Customary International Humanitarian Law

43. Alongside applicable treaty provisions, the parties to South Sudan's non-international armed conflict are also bound to comply with applicable customary international humanitarian law, including with the over-arching IHL principles of distinction, proportionality, precaution, as well as the prohibition on unnecessary suffering.

#### B. International Human Rights Law

44. Regardless of whether South Sudan is at peace or in conflict, the Government bears an obligation to protect and promote human rights. Apart from its obligations under customary international human rights law, South Sudan has also assumed human rights treaty obligations. Since gaining independence, South Sudan has acceded to several international human rights treaties: Convention Against Torture (CAT), Convention Against Torture – Optional Protocol, Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child on 30 April 2015, and has further accepted the 'individual complaint procedure' under CEDAW-Optional Protocol and inquiry procedure under Article 20 of CAT. In addition, South Sudan remains bound by customary international law and by the rights enshrined in the international human rights treaties ratified by its predecessor State by virtue of rule of 'automatic succession' to treaties.<sup>13</sup>

45. The position that, concerning international human rights treaties, a successor state is subject to automatic succession is based on the purposes and principles of the UN; the objectives and purposes of human rights and humanitarian treaties;<sup>14</sup> the special character

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<sup>13</sup> While the general rule of succession to treaties is that of 'clean slate' i.e. the successor state has a choice to become bound by treaties of its predecessor state, owing to their special nature human rights treaties are an exception to this general rule. The 1978 Vienna Convention on Succession of States (VCSS) in Respect of Treaties provides for the continuity of obligations in respect of *all* treaties that were binding on the predecessor state. The VCSS covers mostly succession of colonial states on gaining independence which is not the case in South Sudan. The distinction made in the Convention between newly independent and other successor States is important because while the 'clean slate' rule applies to newly independent States, the principle of continuity of treaty obligations applies to other successor States.

<sup>14</sup> Treaties of humanitarian character enjoy a special place in international law because: i) they are considered as treaties under which obligations are owed primarily and directly to individuals, not other states, ii) often provide for direct access of individuals to international redress mechanisms, iii) compliance with humanitarian treaties is immune to the principle of reciprocity, iv) create public orders between groups of states rather than web of bilateral obligations, viii) special rules of reservation apply to humanitarian treaties. In his separate opinion in *Application of the Genocide Convention* case, Judge Shahabuddeen stated that "It is possible that such a juridical mechanism is furnished by drawing on the above-mentioned argument and proposing more generally that the effectuation of the object and purpose of such treaties, inclusive of the desideratum of avoiding operational gaps, will support a construction being placed upon them to the effect that they constitute the expression of a unilateral undertaking by existing parties to treat successor States as parties with effect from the date of emergence into independence" (ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996, Separate Opinion of Judge Shahabuddeen, Page 637). He also observed that "It is difficult to appreciate how the inevitability of such a break in protection could be consistent with a Convention the object of which was "on the one hand . . . to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality" (pg., 635).

of human rights treaties; treating human rights as part of doctrine of acquired rights.<sup>15</sup> This can be supported by state practice as most of the successor States have indeed confirmed their wish to be bound by the multilateral treaties ratified by their predecessor State from the date of their independence.

46. The human rights treaty bodies have adopted a series of general statements in support of the position of automatic succession.<sup>16</sup> The UN Human Rights Committee has supported the position of automatic succession in its General Comment 26, stating: "... once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession..."<sup>17</sup> Theory of automatic succession was repeatedly emphasized and confirmed by the Committee.<sup>18</sup> The Committee has insisted that reports by the successor states cover events since their independence, notably highlighting this in its concluding observations.<sup>19</sup>

47. In the context and scope of its latest examination of Sudan, the Committee upheld this, indicating that: "In the light of the forthcoming examination of the fourth periodic report of Sudan (July 2014) by the Committee and given that South Sudan became independent in July 2011, the latter's obligations under the Covenant were considered by the Committee during the 109th session (October 2013) The Committee decided that a letter should be sent to the State party, recalling that in light of its general comment No.26

<sup>15</sup> See Publications of the Permanent Court of International Justice, Collection of Advisory Opinions, series B, No. 6, *Settlers of German Origin in Territory ceded by Germany to Poland*, Page 36: "Private rights acquired under existing law do not cease on a change of sovereignty."

<sup>16</sup> Most importantly, in 1994 the 5th meeting of chairpersons of human rights treaty bodies declared that "...successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.": UN Doc. E/CN.4/1995/80 at 4.

<sup>17</sup> Human Rights Committee, General Comment No. 26: Continuity of obligations, 8 September 1997.

<sup>18</sup> For instance: After the conclusion of its 45th session, the UN Human Rights Committee requested special reports with regard to specific issues from Bosnia-Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) noting "that all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant." At its session in March/April 1993, the Human Rights Committee declared that "all the people within the territory of a former State party to the Covenant remained entitled to the guarantees of the Covenant, and that, in particular, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan and Uzbekistan were bound by the obligations of the Covenant as from the dates of their independence." Accordingly, the Committee also requested for submission of state reports within one year: UN Doc. A/49/40, par. 49. Further, the Human Rights Committee reminded Azerbaijan that although that State had declared itself bound by the Covenant through a declaration of accession "it would have been correct for it to have regarded itself as succeeding to the obligations of the Covenant as a member State of the former Soviet Union". Similarly, even without Kazakhstan clarifying its status, the Committee treated Kazakhstan as having become a party to the Covenant by way of succession and it listed the country as such in its annual reports: In a footnote in its annual report the Committee pointed out that "although a declaration of succession has not been received, the people within the territory of the State – which constituted part of a former State party to the Covenant - continue to be entitled to the guarantees enunciated in the Covenant in accordance with the Committee's established jurisprudence.": UN Doc. A/59/40 (vol. I) Annex I, noted.

<sup>19</sup> See, for example, Concluding observations on the initial report of Armenia: UN Doc. CCPR/C/79/Add.100, Concluding observations on the initial report of Kyrgyzstan: UN Doc. CCPR/CO/69/KGZ, and Concluding observations on the initial report of Uzbekistan: UN Doc. CCPR/CO/71/UZB.

on issues relating to continuity of obligations to the International Covenant on Civil and Political Rights, the people of South Sudan remain under the protection of the Covenant. On that basis, in a letter dated 1 November 2013, the Committee invited South Sudan to submit an initial report under article 40, paragraph 1 (a), of the Covenant.”<sup>20</sup>

## C. International Criminal Law

### 1. War Crimes

48. With respect to non-international armed conflict, war crimes may, for example, include certain violations of the rules governing the conduct of hostilities and abuses against protected persons. In accordance with international jurisprudence, war crimes in non-international armed conflict may include serious violations of Common Article 3, of relevant provisions of Additional Protocol II, and of customary international law.<sup>21</sup>

### 2. Crimes Against Humanity

49. Pursuant notably to customary international criminal law, inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health, if committed as part of a widespread or systematic attack against a civilian population, may constitute crimes against humanity.<sup>22</sup> Crimes against humanity are generally defined as the commission of certain inhumane acts such as murder, torture, or sexual violence committed as part of a widespread or systematic attack.

50. Inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health, if committed as part of a widespread or systematic attack against a civilian population, may constitute crimes against humanity.

51. A crime against humanity is committed, when a civilian population is the object of an attack that is ‘widespread or systematic’. The two conditions are disjunctive, meaning that it is not required for the attack to satisfy both. The population against whom the attack is directed is considered civilian if it is predominantly civilian in nature. The presence of individuals within the civilian population who do not come within the definition of civilians does not deprive the population of its civilian character.<sup>23</sup>

52. The term ‘widespread’ generally refers to the large-scale nature of the attack and the number of victims.<sup>24</sup> However, an attack may also be considered widespread by the

<sup>20</sup> Report of the Human Rights Committee, A/69/40 (Vol. I), Page 12, Para. 75.

<sup>21</sup> ICTY jurisprudence, which ruled that violations of customary humanitarian law constitutes war crimes, even though the dispositions do not contain any explicit reference to criminal liability. “Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind” and they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts” ICTY, Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para.129.

<sup>22</sup> See notably Rome Statute, Art. 7.

<sup>23</sup> Judgment, *Naletilić and Martinović* (IT-98-34), Trial Chamber, 31 March 2003, par. 235; Judgment, *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998, para. 582; Judgment, *Jelisić* (IT-95-10-T), Trial Chamber, 14 December 1999, para. 54.

<sup>24</sup> Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, Katanga, 30 September 2008, paras. 394-397.



“cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>25</sup>

53. The concept of a ‘systematic’ attack refers to the organized nature of the acts of violence and the improbability of their random occurrence.<sup>26</sup> This would in principle be reflected in the non-accidental repetition of similar criminal conduct following a regular pattern.<sup>27</sup>

54. Not only state officials but also members of organized armed groups may commit crimes against humanity.<sup>28</sup>

### 3. Modes of Individual Criminal Liability

55. As a matter of international law as reflected in the jurisprudence of international criminal tribunals and under the Rome Statute of the International Criminal Court (ICC Statute), individual criminal responsibility may attach not only to those who (in)directly perpetrate international crimes but also, in certain situations, to military and civilian superiors who are (otherwise) responsible for international crimes. With respect to alleged international crimes committed in the South Sudanese conflict, individual responsibility can be established based on different modes of liability.

56. The first mode of liability is individual criminal responsibility, which may apply, for instance, with respect to persons who directly perpetrated international crimes, as well as to persons who indirectly perpetrated international crimes, such as through ordering, inducing, soliciting, assisting, or otherwise supporting the commission of those crimes.<sup>29</sup>

57. The second relevant mode of liability is command or superior responsibility, under which a military or civilian superior may be held responsible regarding international crimes of persons under his or her command or control, because he or she failed to take measures to prevent, repress, investigate, or punish the crimes.<sup>30</sup> Accordingly, with respect to South Sudan, individual criminal liability may attach for those exercising a command and control position even if they are not members of the primary parties to the conflict, the SPLA and the SPLM/A-IO. In some circumstances, individual commanders or superiors may be legally responsible for acts perpetrated by members of affiliated militias or private individuals.

<sup>25</sup> Judgment, Blaškić (IT-95-14), Trial Chamber, 3 March 2000, para. 206; Judgment, Kordić and Čerkez (IT-95-14/2-T), Trial Chamber, 26 February 2001, para. 179 ; Judgment, Kordić and Čerkez (IT-95-14/2-A), Appeals Chamber, 17 December 2004, para. 94.

<sup>26</sup> Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, Pre-Trial Chamber I, ICC-01/04-01-/07, 30 September 2008, paras. 394-397

<sup>27</sup> Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, Katanga, Decision on the confirmation of charges, paras. 394-398.

<sup>28</sup> Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 90-93.

<sup>29</sup> A framework for analysing individual criminal responsibility is found in Rome Statute, Art. 25.

<sup>30</sup> This definition of command responsibility is set forth in Articles 86 & 87 of AP I, as well as in Rome Statute, Art. 28. The ICTY and ICTR have held that command responsibility is an applicable principle of customary international law in NIAC. See ICTY, *Hadžihasanović and Others case*, a decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16 July 2003, Paras. 20 and 31. See also ICTR, *Kayishema and Ruzindana*, Judgment, 21 May 1999, Para. 209 (at para 213, this case held that civilian commander may be held liable under theory of commander liability). See also in ICTY, *Mucic and al.*, Judgment, 16 November 1998, Para. 354.

58. For individual criminal liability to attach under international criminal law the requisite superior-subordinate relationship does not require a formal military rank; it may exist de jure in a military system or de facto within the command structure of state or non-state armed forces.<sup>31</sup>

## **D. Domestic Law**

### **1. Transitional Constitution**

59. South Sudan's Transitional Constitution of 2011 stipulates that, with respect to the people of South Sudan, all organs of the Government (including the armed forces) shall respect, uphold and promote the following non-derogable rights and protections: (i) the right to life; (ii) prohibition against slavery; (iii) prohibition against torture; (iv) the right of non-discrimination on the basis of race, sex, religious creed; and (v) the right to fair trial.<sup>32</sup> The Transitional Constitution specifically prohibits any infringement of this specific set of rights during a state of emergency.<sup>33</sup>

### **2. Legislation & Internal Regulations**

60. South Sudan's Penal Code Act of 2008 includes standard criminal provisions prohibiting inter alia: murder; bodily injury and intimidation; kidnapping, abduction and violations of personal liberty; offences related to rape and other sexual offences; armed robbery; and damage to or destruction of property.

61. South Sudan's Geneva Conventions Act of 2012 stipulates that any person who, while in South Sudan, commits or otherwise aids and abets any breach of the relevant Geneva Conventions or Protocols,<sup>34</sup> is guilty of an indictable offense and subject to imprisonment.<sup>35</sup> The Child Act of 2008 specifies that the minimum age for conscription or recruitment into armed groups in South Sudan is 18 years and that children shall not be used in any military or paramilitary activities.<sup>36</sup>

62. The Government armed forces are also subject to the provisions of the SPLA Act and the SPLA's Rules & Regulations, both issued in 2009. Under the SPLA Act, personnel that commit the offence of mistreating a detainee under their charge will be tried by a competent court martial and be subject to imprisonment.<sup>37</sup> The Rules & Regulations further proscribes the following actions, categorized as "Major Disciplinary Offences:" (i) assaulting or insulting prisoners of war; (ii) verbal or physical conduct that denigrates, humiliates or shows hostility against others based on race, gender, religion, or social origin; (iii) unlawful detention of individuals; (iv) committing or attempting to commit any act that is cruel, indecent, and unnatural.<sup>38</sup>

63. On 14 August 2013, the SPLA issued a General Punitive Order underscoring the prohibition on the recruitment and use of child soldiers and mandating administrative

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<sup>31</sup> See ICTR, *Kayishema and Ruzindana*, Judgment, 21 May 1999, Paras. 218 and 222; ICTY, *Mucic and al.*, Judgment, 16 November 1998, Para. 354.

<sup>32</sup> Bill of Rights, Part II, The Transitional Constitution of the Republic of South Sudan (2011).

<sup>33</sup> Article 188(a), The Transitional Constitution of the Republic of South Sudan (2011).

<sup>34</sup> Geneva Convention of 1949, I-IV; Additional Protocols of 1977, I & II.

<sup>35</sup> Sections 6-8, Geneva Conventions Act (2012).

<sup>36</sup> Section 31, Child Act (2008). The exclusion of persons who have not attained 18 years of age from military activity is further codified in Article 17 of the Transitional Constitution (2011) and Section 22 of the SPLA Act (2009).

<sup>37</sup> Section 77, SPLA Act (2009).

<sup>38</sup> Section 30, SPLA's Rules and Regulations (2009).

action upon evidence of any violation of this rule.<sup>39</sup> On 26 May 2015, the Government of South Sudan issued a Ministerial Order reminding all members of the SPLA to refrain from deliberate attacks against civilians, rape and sexual violence, and the use of child soldiers.<sup>40</sup>

### 3. Negotiated Agreements

64. The January 2014 Cessation of Hostilities agreement<sup>41</sup> enumerated a list of prohibited actions and the principal parties subsequently reaffirmed their commitment to refrain from these acts in the August 2015 peace agreement.<sup>42</sup> The prohibitions agreed to by the parties include inter alia: (i) acts of sexual and gender-based violence;<sup>43</sup> (ii) attacks or acts of violence, hostility of intimidation against the civilian population;<sup>44</sup> (iii) actions that impede humanitarian access or the protection and free movement of civilians;<sup>45</sup> (iv) recruitment or use of child soldiers by armed forces or militias;<sup>46</sup> (v) mobilization, redeployment, or movement of forces inconsistent with the signed agreements.<sup>47</sup>

## III. Contextual analysis – Historical Background to the Conflict

### A. Introduction

65. The cause of the conflict is widely seen as a power struggle between ruthless military men exploiting ethnic hatred, especially between Dinka and Nuer. But this would minimize the role that long-running political disputes, shifting alliances, chronic violence and the economic and political marginalization of people and places outside of the capital Juba has played in life in South Sudan.<sup>48</sup>

66. As highlighted below, occasionally, attempts have been made to reconcile differences, engaging communities and religious leaders to little or no avail. There is a noticeable cycle of violence and destruction, followed by a period of calm, with a series of conciliatory meetings, only to be followed by further violence. What is most striking about the past is the chronic failure to ensure a modicum of accountability for serious human rights violations and abuses, with grants of amnesty or immunity being the norm.

67. Three historic peace agreements and their implications for the current crisis are examined: the 1972 Addis Ababa Agreement, which brought the first civil war in the

<sup>39</sup> Punitive Order: Child Protection and the Release and Reintegration of Children Associated with the SPLA, Office of the Chief of General Staff, SPLA.

<sup>40</sup> Ministerial Order No. 02/2015.

<sup>41</sup> The Agreement on Cessation of Hostilities Between the Government of the Republic of South Sudan (GRSS) and the Sudan People's Liberation Movement/Army in Opposition (SPLM/A-IO) was signed on 23 January 2014 under the auspices of IGAD by Hon. Nhial Deng Nhial (GRSS) and Gen. Taban Deng Gai (SPLM/A-IO).

<sup>42</sup> The Agreement on the Resolution of the Conflict in the Republic of South Sudan, 17 August 2015.

<sup>43</sup> Art. 1.7.2, Peace Agreement (2015); Art. 3.2, CoH Agreement (2014).

<sup>44</sup> Art. 1.7.5, Peace Agreement (2015); Art. 3, CoH Agreement (2014).

<sup>45</sup> Art. 1.7.1, Peace Agreement (2015); Art. 4, CoH Agreement (2014).

<sup>46</sup> Art. 1.7.3, Peace Agreement (2015); Art. 3.4, CoH Agreement (2014).

<sup>47</sup> Art. 1.7.4, Peace Agreement (2015); Art. 1.2, CoH Agreement (2014).

<sup>48</sup> For more details on the history of the region and historic causes of conflict, see 'South Sudan - A Slow Liberation,' Edward Thomas, Zed Books, 2015; 'Sudan: Race, Religion, and Violence,' Jok Madut Jok, One World Publications, 2007; 'The Root Causes of Sudan's Civil Wars – Peace or Truce (African Issues),' Douglas H. Johnson, 2012.

South to an end; the Wunlit Peace and Reconciliation Conference of 1999, which opened the way for reconciliation of the two wings of the SPLA; and the 2005 Comprehensive Peace Agreement (CPA), which ushered in the process leading to independence for South Sudan in 2011.<sup>49</sup>

## **B. Patterns of State Violence**

68. Over the nineteenth century, the muddy flood plains of Greater Bahr al-Ghazal and Greater Upper Nile, and the green zones, hills and arid zones of Greater Equatoria became colonial provinces and, in the process, the borders of today's South Sudan were drawn, bringing together peoples speaking several dozen languages. Southern Sudan's foreign rulers brought roads, river traffic and urban markets to the country. But their rule was also based on violence, exploiting the rural population for food, labour and other commodities, and exporting slaves and ivory. Southern Sudan's merchants and administrators built up armies and sometimes turned ethnic communities into militias, to manage this system.

69. After 1930, following a period of 'pacification,' southern Sudan witnessed a relatively brief period of peace which, however, was based on a policy of deliberately isolating southern Sudanese societies from those of northern Sudan, and emphasizing differences within southern Sudan. Colonial authorities organized the diverse societies of southern Sudan into tax-paying tribes, headed by state-appointed chiefs – circumventing the rich democratic traditions of many of these societies. They used pass laws to limit the movement of people and goods between different areas, and chief's conferences to negotiate problems between different groups. This 'closed districts policy' was intended to prevent southern Sudan's participation in the nationalist movement that was developing around Khartoum. However, by limiting the growth of its industrial economy it also planted the seeds that led to Southern Sudan becoming one of the least developed areas of Africa.

### **1. Sudan's independence and the return to violence**

70. The end of the 'closed districts policy' brought southern Sudan into uneasy, then violent, confrontation with the central government. After the Second World War, colonial authorities decided that southern Sudan and its peoples should be integrated into new political structures in Khartoum. These new political structures brought together representatives from the developed core of Sudan, and from places like southern Sudan, that had almost no investment in infrastructure, health or educational services, and no modern economy. Southern Sudanese political leaders argued that federal arrangements were needed to manage the integration of cultures and economic systems, and politicians from northern Sudan promised to consider federalism once independence was achieved. However, they rejected it when Sudan's independence was secured in 1956. Many southern Sudanese politicians saw this rejection as a prelude to further reverses for the peoples of the south.

71. Sudanese nationalist leaders, drawn from the bureaucratic and commercial beneficiaries of the state centered at Khartoum, invested little in southern Sudan's development, seeking instead to impose a unified national identity based around idealized versions of Arab and Muslim culture on the whole of Sudan. Arab and Muslim culture

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<sup>49</sup> All were discussed in detail in Juba in 2014 in a series of talks - 'Juba Lectures 2014: Negotiating peace in South Sudan—Historical agreements and their lessons for the future,' Juba University - Rift Valley Institute Lecture Series.

had been repressed in southern Sudan, as part of the isolation policy of the 1930s and 1940s. Southern Sudanese perceptions of Arab and Muslim culture were still coloured by the nineteenth century slave trade. At the outset of independence, the central government's development plans for southern Sudan focused notably on disseminating Arab and Muslim culture through a programme of school and mosque building across the south.

## 2. Southern Sudan's first civil war: 1955 - 1972

72. In 1955, unrest spread through southern Sudan's small urban population and, in August that year, several hundred soldiers of the Southern Corps of the Sudanese army rose in mutiny after some of them were ordered to transfer to northern Sudan. The harsh repression of that mutiny led to several years of insecurity in the countryside. As it became clear that southern Sudanese politicians were not able to secure their federalist demands through political processes, the insecurity became a civil war that lasted from 1955 to 1972.

73. Over decades of fighting, south Sudan's decentralized and under-armed rebel forces gradually unified under the name Anyanya, armed themselves and extended their authority over sections of the rural population. Anyanya's political objective was independence for southern Sudan but, in the early 1970s it came to the negotiating table.

## 3. The 1972 Addis Ababa Agreement

74. The first civil war shaped a succession of political crises and regime changes and, in 1972, a new military regime in Khartoum signed the Addis Ababa peace agreement intended to address and appease concerns of the southern Sudan liberation and secession movement.<sup>50</sup> The agreement, also known as the Addis Ababa Accord, granted regional autonomy for southern Sudan, and an amnesty for criminal acts committed during the rebellion. The Southern Regional Government was established in 1972. It was the first time that southern Sudan had an elected, representative government backed by a measure of popular consent. But, like almost all previous governments, the Southern Regional Government was not able to extract an adequate surplus by taxing southern Sudan's subsistence economy, and it depended instead on grants from the central government. These grants financed a bureaucratic payroll and some modest economic development activities. Politics was skewed by competition to get on the payroll, and many politicians built and managed ethnic constituencies to argue their case for government posts.

## 4. The second civil war: 1983 - 2005<sup>51</sup>

75. As a result of the 1972 peace deal many Anyanya soldiers were incorporated into the Sudan Armed Forces. After 1975, some of them took part in a succession of minor mutinies which had little success until 1981, when the central government began signaling its intentions to abrogate the peace agreement, abolish the Southern Regional Government and orient the country in a direction likely to preclude the mainly non-Muslim Southern Sudanese from participation in government.<sup>52</sup>

<sup>50</sup> 'Addis Ababa Agreement on the Problem of South Sudan,' 27 February 1972.

<sup>51</sup> The second civil war allegedly claimed the lives of 1.3 million people. See Millard Burr, *A Working Document: Quantifying Genocide in The Southern Sudan 1983-1993* (Washington, D.C.: U.S. Committee for Refugees, October 1993), p. 2.

<sup>52</sup> In 1983 the President of Sudan declared Sudan an Islamic state under Shari'a law, including the southern region.

76. Opposition to these changes spread across southern Sudan. Much of the opposition came from guerrilla groups calling themselves Anyanya-2, who linked local struggles to their demand for independence.

77. In 1983, mutinies spread as the central government abolished the Southern Regional Government. A group of southern Sudanese military officers fled abroad with their commands, and set up the Sudan People's Liberation Movement/Army (SPLM/SPLA). The SPLA proposed a socialist transformation of the whole Sudan, rather than Southern secession. Many southern Sudanese rebels joined the new movement.

#### **5. Anyanya-2 and the SPLA, and the genesis of intra-southern conflict**

78. Anyanya-2 and SPLA leaderships immediately clashed. Anyanya-2's leaders called for independence, while the SPLA, under John Garang, called for a united Sudan. Garang won the leadership and Samuel Gai Tut, the most senior Anyanya-2 leader, was killed. The Anyanya-2/SPLA split was sometimes explained in ethnic terms as Garang's origins lay in the Dinka communities of Bor, and Gai Tut was from the Lou Nuer communities of Akobo. Although Nuer and Dinka people fought on both sides of the Anyanya-2/SPLA conflict, Samuel Gai Tut's killing pitted a Dinka leader against a Nuer one.

79. Ethnic tensions within the rebel movement captured the attention of the central government, which hoped to create ethnic militias to maintain control in the recently-discovered oilfields that lay in predominantly Nuer areas of Upper Nile. The central government supported a group of Nuer commanders in Anyanya-2 to deploy their forces against the Dinka recruits who had to pass through Nuer territory to reach training camps abroad. Anyanya-2 allegedly killed a number of Dinka recruits and the SPLA's response led to the devastation of the predominantly Nuer areas of the Ethiopian border. The ethnic tensions fostered by the split were largely resolved after 1985 when Anyanya-2 joined forces with the SPLA to fight another group of militias – from northern Sudan – which the central government had sent into the oilfields. By 1988 Anyanya-2 was largely incorporated into the SPLA. Nonetheless, the memories of this founding split in the SPLA have shaped many of the crises that came after it.

80. The SPLA mobilized a huge force and controlled most southern Sudanese territory within a few years of its founding. Its strategy was to seize control of the state through a conventional war aiming to defeat the enemy through territorial control. It postponed political, social and economic transformation of southern Sudanese societies until after victory and it subjected its young recruits and the civilian population in areas that it controlled to harsh discipline. In 1991, the SPLA split into two factions.

81. The 1991 split reflected differences at the top of the movement over internal democracy, independence, and the realignment of the movement in the post-Cold War order. The dissident faction, led by Riek Machar and Lam Akol, expected to rally the entire movement to their cause, but failed to do so. Unable to gain the momentum needed to unseat John Garang, Riek Machar adopted a strategy of militarily defeating John Garang's faction, starting with an attack on his largely undefended home area, Bor. The dissident faction did not have enough soldiers to mount the attack so it recruited untrained personnel for the operation and mobilized many former Anyanya-2 commanders. Unable to build a political constituency for his political objectives, Riek Machar created instead an ethnic constituency of young Nuer cattle-keepers from the embattled pasturelands of Upper Nile and Jonglei states. These improvised, local groups were collectively known as the 'White Army.'

82. Although massacres by young, armed, undisciplined cattle-keepers had long been a feature of Southern Sudan's history of violence, the 1991 Bor attack stood out for

several reasons. First, the extreme nature of the violence, according to reports, with an estimated two thousand civilians, primarily Dinka, killed.<sup>53</sup> Second, their new access to weapons made them a less predictable feature of southern Sudan's wars as heavily armed cattle-keepers now used automatic weapons to loot for cattle. Similar armed youth movements appeared in Dinka areas of Bahr al-Ghazal. Thirdly, the Bor attack represented a breakdown in economic and social relationships not only between Nuer and Dinka people, but also within Nuer people as it disrupted complex local arrangements for sharing water and pastures, which precipitated inter-communal conflict between the Lou and Jikany sections of the Nuer people. Fourth, the memory of the Bor attack would be invoked by Riek Machar's enemies as a means of limiting his political ambitions.

83. After the 1991 attack, the military situation in the predominantly Nuer areas of Greater Upper Nile fragmented. Riek Machar's dissident faction formally proposed independence, to be achieved through political and military cooperation with the central government – which from the start apparently provided military supplies that allowed Machar and his allies to fight the SPLA. Many former Anyanya-2 commanders formed their own militias in the Nuer heartlands, allowing the central government to manage a militia war across Southern Sudan and its northern borderlands, coordinating militia supplies through the military intelligence branch of the Sudanese army. Militias were often associated with specific ethnic communities or sections, but did not necessarily fight for the interests of the ethnic communities or sections that their leaders belonged to.

## **6. Stalemate and diplomacy**

84. In the 1990s, the different parties turned to politics and diplomacy. Garang's SPLM developed alliances with other Sudanese political forces and with regional and international powers, and held its first National Convention in 1994. Riek Machar signed the 1997 Khartoum Peace Agreement, which included a provision for southern self-determination and which led to new political processes in southern Sudan's garrison towns, under central government control. But new political processes did not lead to peace in the Greater Upper Nile, where political leaders had made costly alliances with the central government against the SPLA. Partly as a result of pressure from Nuer constituencies, Riek Machar withdrew from the Khartoum Peace Agreement in 2000 and in January 2002, he and John Garang signed the Nairobi Declaration on Unity and Integration, immediately merging their forces.

85. The SPLA was able to incorporate undefeated adversaries and to negotiate peace while new oil revenues created financial incentives for peace shared by all parties to the conflict in Greater Upper Nile. In 2002, the Khartoum central government and the SPLM began the talks that led to the 2005 Comprehensive Peace Agreement (CPA).

## **7. The 2005 Comprehensive Peace Agreement**

86. The CPA ended the conflict between the SPLA and the central Sudanese government, and largely ended the relationship between the military intelligence of the Sudanese Armed Forces and the South Sudanese militias they had supported. The CPA established the Government of Southern Sudan, funded from a share in South Sudanese oil revenues, and made the SPLM into a ruling party and the SPLA into a constitutionally recognized army.

<sup>53</sup> Amnesty International, "Sudan: A continuing human rights crisis," AI Index: AFR 54/03/92 (London: Amnesty International, April 15, 1992), p. 17. See also "Civilian Devastation: Abuses by All Parties in the War in Southern Sudan," Human Rights Watch, 1993.

87. However, it did not end the civil war within southern Sudan, between these militias and the SPLA. This south-south civil war had brought most of the conflict deaths in southern Sudan and many armed young civilians had been operating at the margins of this internal civil war, transforming production systems and social relationships with their weapons. The CPA largely left the resolution of this conflict to the new Government of Southern Sudan.

#### **8. The 2006 Juba Declaration**

88. John Garang died in 2005. South Sudan's nascent political processes were strong enough to manage the leadership succession peacefully. Salva Kiir became president and appointed Riek Machar as his deputy. President Kiir played an instrumental role in ending the war between the militias and the SPLA. The 2006 Juba Declaration on Unity and Integration between the SPLA and the South Sudan Defence Forces absorbed the vast majority of militias into the SPLA and provided an amnesty for all criminal acts committed during hostilities. The process was relatively smooth and quick, and financed by a dramatic expansion of the payroll. Official figures indicated that about 40 per cent of government expenditure went on the army and internal security.<sup>54</sup> Dealing with armed civilians was a bigger challenge. In 2005 and 2006, the government attempted to carry out coercive disarmament campaigns in Jonglei State which were unsuccessful.<sup>55</sup> A 2008, presidential order requiring the SPLA and state governments to carry out disarmament of civilians across South Sudan also achieved little.<sup>56</sup>

#### **9. The dominance of the SPLM**

89. Southern Sudan faced many security challenges in the run-up to its secession from Sudan. While the vast military payroll dealt with the threat from militias, it did not address the risks posed by armed civilians. Also, the attention given to security problems detracted attention from the equally urgent need for political development. In 2005, at the outset of the CPA, SPLM nominees were appointed to 70 per cent of legislative and executive posts. In the 2010 elections, the SPLM's stake rose to about 90 per cent.

90. Unsuccessful candidates for SPLM nomination stood as independents in the elections. Almost all of them lost and, in restive peripheries, many took to mutiny which led to new arms flows to places like Jonglei, which were still being convulsed by massive campaigns of violence led by armed civilians. These mutinies were an indication of the SPLM's failure to manage local nomination processes that were vital to local peace-building efforts.

#### **10. Factions within the SPLM**

91. President Kiir brought many people from his own community into his circle, including some whose political origins lay in the National Congress Party, the ruling party in Khartoum. For President Kiir loyalists, secession was the main political objective, and they eclipsed the strongest supporters of John Garang, who wanted to use the opportunities of the CPA. Riek Machar, in turn, developed a set of political objectives and a patronage system that sometimes appeared to rival that of the president. The

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<sup>54</sup> South Sudan Statistical Yearbook 2010, at pg.159.

<sup>55</sup> See, e.g., "Civilian disarmament in South Sudan A legacy of struggle," Saferworld, Feb. 2012; "Disarmament – Déjà Vu Recommendations for Peaceful Civilian Disarmament in Jonglei," Saferworld, 2012.

<sup>56</sup> "Shots in the Dark: The 2008 South Sudan Civilian Disarmament Campaign," The Small Arms Survey, 2009.



SPLM's second national convention took place in 2008. President Kiir reportedly hoped to remove Riek Machar from his post as vice-president. But the 2008 convention decided against any major changes.

92. After South Sudan became independent in 2011, the peripheral mutinies continued and the tensions between elite factions intensified. The resolution of a brief, post-secession war with Sudan, in September 2012, exposed the internal crisis within the SPLM. Many in the SPLM agreed that the movement lacked direction.

93. In the first quarter of 2013, a number of events suggested the onset of major change. In January 2013, many senior officers were unexpectedly put on the reserve list. In April 2013, Riek Machar was relieved of most of his vice-presidential powers, including his leadership of the national reconciliation process.<sup>57</sup> In June 2013, President Kiir fired two senior ministers and in July 2013, the entire cabinet along with the SPLM secretary-general.<sup>58</sup>

#### **11. The crisis of 2013**

94. Subsequently, President Kiir began a tour of state-level secretariats of the SPLM while Machar declared his intention to contest the presidential elections. The party's political bureau was deadlocked and the SPLM's National Liberation Council was convened in December 2013 to debate the crises within the party. However, after a heated speech from the president who invoked the memory of the 1991 Bor massacre, Machar and his associates did not attend further meetings.<sup>59</sup>

95. On 15 December, shootings occurred in the garrison of the presidential guard in Juba, apparently pitting Nuer and Dinka elements of the guard against each other. Violence spread into massacres across the town, reportedly carried out by Government forces. The events of December 2013 prompted a mutiny largely led by Nuer army officers in Jonglei who controlled the state capital of Bor within three days of the fighting in Juba.

### **C. Relationships between Nuer and Dinka Peoples**

96. While the recent conflict in South Sudan is often seen as primarily an ethnic clash between Nuer and Dinka, and the December 2013 Juba killings can only reinforce this account, the long history of their relationship provides complexity to the narrative.

#### **1. Nuer and Dinka cultures and livelihoods**

97. Nuer and Dinka people have closely related languages and cultures and their traditional pastoralist practices are very similar. Neither of the two peoples has ever functioned as coherent political entity, with unified leaderships or political objectives. Nuer people have fought on different sides of every one of southern Sudan's civil wars – as have the Dinka. Nuer and Dinka social organization traditionally served the need of the pastoralist economy, not state politics.

98. Nuer and Dinka are also loosely organized around age-groups and gender – and around specialisms, such as mediation, or defence, or livestock handling. Neither Nuer nor Dinka had coercive authorities – leaders were mediators and communicators. Their

<sup>57</sup> UN Doc. S/2013/366, 20 June 2013.

<sup>58</sup> UN Doc. S/2013/651, 8 November 2013.

<sup>59</sup> UN Doc. S/2014/158, 6 March 2014.

justice systems were based on restorative justice, and around community responsibility for the offences of individuals. These justice systems were able to deal with the inter-community problems, such as those arising out of youth traditions of cross-border cattle raids.

99. Nuer and Dinka societies traumatically encountered the modern world, over more than a century of violent state formation, and the features of their society have been deeply influenced by that experience. Sectional differences and raiding patterns of the past have been intimately misused by powerful armies for many decades.

## **2. The Southern Regional Government and ethnic competition for posts**

100. From 1972-1983, Southern Sudan had its first experience of self-government when it was administered by southern Sudanese politicians for the first time. It was difficult for these political leaders to aggregate different interests into political constituencies. Few people lived in towns and most people worked in the subsistence economy. Political leaders tended to improvise constituencies out of ethnic communities, even though few of these communities had unified political objectives. Regional self-government led to competition over the ethnic distribution of official posts, and this led to competition between Dinka, Nuer and Equatorian people.

## **3. The 1991 split and Nuer-Dinka relations**

101. Alongside this political competition, the regional government of the 1970s had to deal with a series of mutinies by separatists calling for Southern independence, many of which were led by Nuer officers in Greater Upper Nile. The founding of the SPLA was marked by violent disagreements about leadership positions and political objectives, often configured around ethnicity. Ethnic tensions between Nuer and Dinka elements within the SPLA were brought to the fore in the 1991 split. Riek Machar and other leaders used Nuer people as an ethnic constituency and pitted them against the Dinka constituency of the SPLA/M mainstream. The split within the southern rebels was resolved between 2000 and 2006, but memories of the massacres and assassinations brought about by the split still shaped relationships between political leaders. President Kiir's speech to the National Liberation Council in December 2013 invoking memories of the 1991 split appeared as one of the most compelling signs of the start of the crisis.

## **D. The Search for Reconciliation and Justice in South Sudan History<sup>60</sup>**

### **1. Reconciliation and agency**

102. Born and raised in a society pervaded by armed conflict and political crises, the vast majority of people in South Sudan wants peace and is actively seeking out ways in which their history of violence might be transformed. Traditional justice has offered obvious starting points for people seeking to resist the violent, militarized political processes that have dominated South Sudan for so much of its recorded history, promote accountability, reconcile adversaries and bring them into peaceful political processes, and redress past wrongs both during and after conflict.

103. South Sudanese people have experiences of adjudicating among various objectives – such as accountability and reconciliation, a problem further complicated by the fact that

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<sup>60</sup> For analysis of the various attempts to reconcile communities and ensure lasting peace, see 'Local Peace Processes in Sudan and South Sudan,' Jacqueline Wilson, United States Institute of Peace, 2014.

government intelligence services and armed groups have also invoked these traditions and sometimes transplanted them into political contexts that are very different from those in which they arose. This section seeks to describe South Sudan's historical experiences of trying to come to terms with conflict, and the role of South Sudanese traditional justice in this history.

## **2. Definitions**

104. To this end, it is worth noting that 'traditional justice,' 'indigenous justice,' or 'customary law' are often used interchangeably. 'Traditional justice' is organized by 'chiefs' or 'traditional authorities' and redress is a community act, sometimes accompanied by ritual. As such, the aim of 'traditional justice' is seen as restorative and in opposition to the retributive aim of statutory criminal law.

105. However, there is no unified, coherent system of traditional justice, shared by South Sudan's dozens of ethnic communities. Not all systems of traditional justice have restorative aims. The justice systems of the pre-colonial Shilluk and Zande kingdoms used the death penalty for some offences. Other systems of traditional justice did not make the restorative and retributive aims of justice into a dichotomy – when crimes were committed, penalties were imposed on the perpetrator's community, with the aim of promoting accountability and reconciliation. Many of these systems of traditional justice evolved in highly democratic cultures, such as the Nuer and Dinka pastoralist cultures, and they do not always function effectively in authoritarian cultures.

106. Traditional justice responds dynamically to social and economic change, and is shaped and distorted by conflict. South Sudan's conflicts have brought new understandings of property, marriage and social relations, and new expectations of the state, which are inevitably reflected in traditional justice. Traditional courts today are recognized by the constitution and law, and their decisions can be appealed in the statutory courts. The chiefs or traditional authorities who organize traditional courts today are not relics of an ancient social order, or authentic representatives of ethnically-bounded communities. For over a century, chiefs have been government functionaries and their numbers have increased very rapidly since 2005. The judicial roles of chiefs were mostly improvised by colonial authorities. Before colonialism, most South Sudanese societies did not have chiefs with judicial roles but organized themselves with the help of mediators and experts in consensus-building.

## **3. Restorative justice**

107. Many South Sudanese versions of customary law address criminal responsibility in a way which seeks to combine the restorative and retributive aims of justice. In the case of a homicide, a customary court will try individual perpetrators. But once the perpetrator of a homicide admits guilt, the court begins to situate that guilt in a network of relations between the victim, the perpetrator, and their families and kinship groups. Elders from the perpetrator's family negotiate compensation, reintegration and reconciliation with the victim's family. The perpetrator's family pays compensation, which is an acknowledgement of responsibility and a means for the community to address the shame that the crime has brought. But, through this participation in a complex public process aimed at restitution, the perpetrator avoids the penal sanctions of imprisonment that are associated with criminal law in other societies.

## **4. Immunities and amnesties**

108. Twentieth-century Sudan had another important way for perpetrators to avoid penal sanctions – the immunity granted to many officials acting under orders. Immunity for state officials can be traced as far back as the 1899 Sudan Penal Code. Officials were

exempted from prosecution and punishment because of their function – because they acted on behalf of the state.<sup>61</sup>

109. The Sudanese governments also periodically declared unconditional amnesties for crimes committed during the country's long wars. Unconditional amnesties exempted people from prosecution and punishment for acts committed in wartime.

110. For example, officials who committed crimes during the 1958-1964 military dictatorship were amnestied after it fell. The 1972 Addis Ababa agreement brought a negotiated end to the first civil war, and it extended dramatically the scope of immunity, providing a general amnesty for acts 'done in connection with mutiny, rebellion or sedition in the Southern Region.'<sup>62</sup> A special tribunal was envisaged for cases meeting the condition of 'connection with mutiny,' although it never held a session. Both civil and criminal proceedings were nullified by the amnesty.

## **5. 1994 – A new kind of reconciliation conference**

111. The inter-sectional Nuer war saw the spread of a new kind of reconciliation conference, following patterns that are still evident today. The conferences were sponsored by senior military commanders. They brought together two communities who were defined by ethnicity and made them the subjects of reconciliation (that is, peace was made between communities, not between communities and armed groups).

112. The conferences were managed by the New Sudan Council of Churches (NSCC), a coordination body established in 1989 to work in areas outside government control, who brought together chiefs, spiritual leaders, women leaders and church leaders, along with government and military representatives. These conferences adapted some of the truth-seeking and truth-telling approaches associated with traditional justice and used some of the sacrificial ritual of traditional justice – but they did not use the traditional remedies of transferring wealth in cattle from perpetrator to victim communities. Instead of remedies, they provided amnesties. Peace conferences were able to provide remedies for one crime – abduction – by offering to reunite abductees with their birth families, if they wanted reunion. They led to agreements on security and also on access to natural resources – disruption of such access often was the trigger for conflicts.

## **6. The Wunlit process of 1998-1999**

113. The 1994 Akobo Peace Agreement was the first such reconciliation meeting. The most successful series of reconciliation meetings came a few years later – the Wunlit process of 1998 and 1999, the most serious and far-reaching attempt to address the divisions between Nuer and Dinka on the west bank of the Nile, which were seen as one of the conditions for ending the second civil war.<sup>63</sup> The peace process began in 1998, when a group of Dinka and Nuer elders travelled to Kenya, with NSCC support, to discuss the possibilities for peace. The peace conference, in 1999, was sponsored by Salva Kiir, then second-in-command of the SPLA, with the support of Riek Machar, at that time on the side of the central government. The conference led to an agreement on voluntary returns for abductees, courts to deal with problems in areas where the two communities bordered each other and police to deal with inter-communal problems. The

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<sup>61</sup> For amnesty provisions in current national law, see the section on Justice and Accountability.

<sup>62</sup> Protocols on Interim Arrangements, Chapter III, Article 1, Addis Ababa Agreement (1972).

<sup>63</sup> For further information on the Wunlit peace process, see 'Local Peace Processes in Sudan, A Baseline Study,' Mark Bradbury, John Ryle, Michael Medley, Kwesi Sansculotte-Greenidge, Rift Valley Institute, 2006.

1999 Wunlit Agreement also included a general amnesty and no compensation for losses or wrongs.

114. The Wunlit Agreement remains a reference point for peace-making because it was a ‘people-to-people’ process – an attempt to circumvent political and military leaderships by mobilizing local communities and churches. Ordinary Dinka and Nuer people adamantly rejected the notion that they were involved in an ethnic war against each other and identified the role of political and military leaderships in prolonging violence. However, the Wunlit Agreement remained largely unimplemented. Nonetheless, Wunlit became an ideal for dozens of other peace meetings between different ethnic communities, in part because it foregrounded the role of ordinary people in the search for peace.

115. The ‘people-to-people’ approach spread across the deeply fragmented Greater Upper Nile. It was also taken up in Greater Bahr al-Ghazal, where the population is predominantly Dinka, and along the borders around Abyei, in meetings between southern and northern ethnic communities. After the 2005 CPA was signed, the peace conference format continued to be used. In many areas of South Sudan, where armed civilians and SPLA mutineers had continued to fight, peace conferences were used in places like Jonglei to try and limit the spread of violence. Many communities used the format of the peace conference to resolve internal tensions which had arisen between members of communities who had fought on different sides, or between those who had stayed in their home areas and those who had returned from displacement.

116. Despite their strength, people-to-people processes have one major weakness. Parties to reconciliation are usually ethnic communities; peace conferences were not able to address directly the need for peace between civilians and combatants. Instead, local reconciliation conferences frequently declared an amnesty for past crimes, which favors combatants over noncombatants.

## **7. The peace processes of the central government in Khartoum**

117. The central government in Khartoum also undertook peace and transitional justice initiatives in South Sudan. Often, these initiatives were linked to the politics of regional peace processes, or emerged in response to criticism of the deteriorating human rights situation. ‘Peace From Within’ was one such initiative. The term was associated with the 1997 Khartoum Peace Agreement which led to the establishment of the Coordinating Council of Southern States. Seeking to extend its influence over rural communities devastated by violence, the Coordinating Council sometimes adapted the format of the chief-led reconciliation conference, organized by government officials and security services, and bringing together communities defined by ethnicity. ‘Peace From Within’ did little to end the violence in Nuer areas and retrospective assessments of the initiative are often very negative, but, the precedents set for government involvement in the ‘people-to-people’ reconciliation conference format deserve attention at a time when such involvement is being repeated.

## **8. The peace processes of the central government in Khartoum: CEAWC**

118. Another complex precedent is the Committee for the Elimination of the Abduction of Women and Children (CEAWC).<sup>64</sup> In the 1990s, both the SPLM and the Khartoum government were under domestic and international pressure to address the human rights violations and the lack of a viable peace process. From the start of the war, the central

<sup>64</sup> See also ‘Local Peace Processes in Sudan and South Sudan,’ US Institute of Peace, 2014.

government had recruited militias from the Arabic-speaking, Muslim pastoralist communities of Darfur and Southern Kordofan, to fight in Dinka areas of Bahr al-Ghazal. These militias were given the task of maintaining free-fire zones along roads and railways and were paid in plunder.

119. Accordingly, they adopted a strategy of killing, looting and abducting to clear these zones. Militarized or criminalized young men from Darfurian and Kordofanian cattle pastoralist groups abducted thousands of mainly Dinka children and adults. From the early 1990s, a committee of Dinka chiefs worked on their own initiative to find abducted people, negotiate their release from abductors and return them to their families. The Dinka Chiefs Committee (DCC) gained access to international resources later in the 1990s, when slavery had attracted international attention. For many South Sudanese and for influential audiences in the UN and US, this was a reminder of slave trade which ended in the early twentieth century.

120. The government responded by setting up a committee to investigate allegations of slavery in 1996. In 1999, the Ministry of Justice established the Committee for the Eradication of Abduction of Women and Children (CEAWC). In 2002, after more international pressure, a new presidential decree strengthened CEAWC's mandate giving it prosecutorial powers that matched the Attorney-General's. CEAWC also had powers to make restitution for one class of serious crimes – abduction or enslavement – by returning abductees to their homes and compensating them. CEAWC combined restorative and retributive approaches to justice. Some of its officials saw it as Sudan's first experiment in transitional justice – an attempt to address a legacy of widespread human rights violations. Like the local reconciliation initiatives associated with 'Peace From Within,' CEAWC may provide precedents for government-led initiatives in South Sudan today.

121. CEAWC denied that the state bore responsibility for abduction and immediately relinquished its prosecutorial powers, invoking the reconciliatory traditions of customary law. While CEAWC did use its mandate to remedy abduction by returning abductees to their places of origins, the process was problematic as CEAWC's 'Joint Tribal Committees' – made up of Dinka, Rizeigat and Misseriya representatives – would identify South Sudanese children and adults in Rizeigat or Misseriya villages and return them to Dinka areas. Tribal committees sometimes invoked customary law to argue that children and women had no capacity to choose between staying in the north and going south and, as a result, some were forcibly returned or married. For CEAWC's tribal committees, restorative justice sometimes meant the reconstruction of a coercive patriarchal order, perhaps one more coercive than that existing before the war. The experience of CEAWC showed how central governments may instrumentalize restorative justice traditions in customary law in order to circumvent other approaches to justice.

## **9. The 2005 CPA, reconciliation and distributive justice**

122. The 2005 CPA did not build on any of the positive or negative precedents for reconciliation. It contained a single article calling for 'a comprehensive process of national reconciliation' which, however, never took place.<sup>65</sup> Many participants in the CPA negotiations viewed its provisions for national reconciliation as a coded amnesty clause.

123. In addition, the CPA contained no provisions for retributive or restorative justice, though it paid a great deal of attention to distributive justice, i.e., the way that societies share benefits and burdens. The CPA acknowledged that a major cause of Sudan's civil wars was the enormous inequality in wealth and power between the cultural and

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<sup>65</sup> Power Sharing Protocol, Article 1.7, Comprehensive Peace Agreement (2005).

economic heartland of the state – centred on the northern Nile valley and integrated into the global economy – and Sudan’s vast, diverse and disconnected peripheries. It prescribed wealth-sharing as a remedy for this history of inequality, meaning that a much larger proportion of central government revenues would be allocated to poorer regions. The CPA saw inequality in spatial, rather than social terms and sought to improve the prospects of underdeveloped regions through transfers of government resources.

124. The CPA’s distributive justice was costly: between 2005 and 2011, forty percent of the budgeted revenues of Sudan’s central government were transferred to its regions. However, this experiment failed because government resources were concentrated in the capital Juba, through the SPLA payroll which was used to co-opt the SPLA’s former adversaries.

## **10. The role of the church**

125. Church participation in reconciliation had begun in the 1970s with the World Council of Churches playing a key mediating role in the Addis Ababa agreement. During the second civil war, relations between South Sudanese churches and the SPLA were relatively weak. In 1989, the NSCC was founded, operating in SPLA-controlled areas. In 1991, after the split in the SPLA, the NSCC brokered a prisoner release between the two SPLA factions. After 1994, the Presbyterian Church of Sudan (a member of the NSCC) played a leading role in organizing the Nuer peace conference in Akobo. In 1997, at a meeting in Kejiko near Yei in Central Equatoria, the SPLA gave a mandate to the NSCC to pursue reconciliation efforts. The Church was seen as the body best equipped to resist pressures from armed movements. It also had trained personnel and an infrastructure across South Sudan, as well as the ability to mobilize international funds.

126. The 2005 CPA changed the nature of churches’ participation in reconciliation. Although the CPA’s proposals for national reconciliation between northern and southern Sudan remained a dead letter, political leaders asked for forgiveness and called for reconciliation. New government institutions, such as the National Peace and Reconciliation Commission, were established. Although churches still played a role in managing reconciliation conferences, the government and other international actors began to participate in the management of reconciliation efforts too. The proliferation of actors in the field of reconciliation was not always successful. Crises in Jonglei State between 2007 and 2013 saw massive loss of life that reconciliation conferences and nationally-appointed commissions were apparently unable to mitigate.

127. In 2012, Riek Machar was given the task of leading national reconciliation efforts – an increasingly contested space in South Sudanese politics. This contestation became readily apparent in April 2013, when President Kiir issued a decree which relieved then-Vice President Machar of most of his powers and suspended the National Reconciliation Conference that Riek Machar was due to organize. A few days later, the president established the Committee for National Healing, Peace and Reconciliation, dominated by church leaders.

## **11. Gender and reconciliation**

128. No peace can be achieved without women – but in order to make the most of women’s contribution, reconciliation processes need to move away from formulae and pay careful attention to local realities. Women’s organizations, many of them formed in refugee camps, have sometimes been able to use their local knowledge and connections decisively to bring about local reconciliation in many ways, marriage traditions being one of the most important, as South Sudanese societies are exogamous – that is, people marry from outside their social group. Often this leads to women marrying across ethnic

divides thus connecting different social groups, raising multilingual children, and bringing a sense of extraversion and fluidity to the group they join.

## 12. Patriarchy and Militarisation

129. Women's experiences of conflict are influenced by societal gender relations and are directly related to the status of women within a particular society.<sup>66</sup> This is especially true for conflict-related sexual violence. The position of women in South Sudan has largely been determined and influenced by an amalgamation of decades of conflict and iniquitable cultural norms and practises.<sup>67</sup>

130. South Sudan is a highly patriarchal and militarised society. Decades of conflict have created an environment where small arms and various weapons are easily accessible. Many fire arms are in the hands of private individuals and most civilians have experienced armed conflict or inter-communal violence, with many males having engaged in armed combat at one point in their lives. This combination of factors contributes to a highly insecure society where armed violence as a regular occurrence poses women, and children with multiple threats.

131. The patriarchal nature of the society means that a woman's role in South Sudan is largely defined through her relationships to male relatives and community members, and her marital status or the prospects of marriage.<sup>68</sup> A great deal of importance is placed on marriage in South Sudanese society and for some of the more than sixty tribes a central component of this is dowry or bride wealth that is exchanged for a bride – usually cattle or other livestock. The cattle exchanged can number anywhere from 30 to 300 and requires the contribution of family, clan and community members. In case of divorce or dissolution of marriage, cattle must be returned.<sup>69</sup> This makes women inextricably linked to their original family, clan and community as well as their new (marital) family.

132. Child and early marriage are also prevalent in South Sudan. Women and girls do not participate in decisions concerning their marriages. Male relatives – fathers, brothers and uncles, undertake the arrangements for them.<sup>70</sup> In many instances, women encounter and endure abuse in their marriages with little to no recourse to preventative or remedial action.<sup>71</sup> Early marriage result in high levels of illiteracy and low numbers of enrolment of adolescent girls in school thus further limiting the options available for an alternative to young women and girls within the patriarchal society.<sup>72</sup> The current conflict has worsened the prospects of young women. The assessment team interviewed several young girls whose studies were interrupted by the conflict. Others had never been to school while many living in the POC sites were not taking up the few education opportunities provided by humanitarian agencies for IDPs.

133. Polygyny, the most common form of polygamy, in which one man has multiple wives, is frequently practised in South Sudan with the effect that women have even less

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<sup>66</sup> United Nations, "Analytical study focusing on gender-based and sexual violence in relation to transitional justice," Report of the Office of the United Nations High Commissioner for Human Rights, 30 June 2014 - A/HRC/27/21, para 5.

<sup>67</sup> AU COI, p. 30 para 79.

<sup>68</sup> Stern, O. (2011). "This is how marriage happens sometimes: Women and marriage in South Sudan", in Hope, Pain and Patience. Bubenzer, F. and Stern, O (Eds).

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> In South Sudan the overall literacy rate for females is 16%. UNICEF, Annual Report 2014 – South Sudan, See: [http://www.unicef.org/about/annualreport/files/Sudan\\_Annual\\_Report\\_2014.pdf](http://www.unicef.org/about/annualreport/files/Sudan_Annual_Report_2014.pdf).



agency and fewer options available on how they conduct their lives. It further entrenches and normalises patriarchal, social, political and economic power and the system through which men control resources and instruments of coercion. The competition for resources within these unions is rife and in a society where women are valued less than men and children, a woman's existence is generally uncertain.<sup>73</sup>

134. Given the significance of marriage in South Sudan, women bear the responsibility to uphold the good name of a family. A woman who does not fulfil her expected role faces a great deal of stigma. Women often bear the highly unequal consequences of divorce, adultery and sexual violence such as rape, especially when this results in pregnancy.<sup>74</sup> The national legal framework has a disproportionate negative impact on women through the criminalisation of adultery. While men are permitted to marry many wives, women accused of adultery receive harsh punishments within the household or through local justice mechanisms by lashing and or incarceration.

135. While South Sudanese sometimes refer to the absence of SGBV during the civil wars with the north, and emphasise the current prevalence as unprecedented,<sup>75</sup> there is evidence that points to the contrary and suggests that thousands of women were victims of rape and sexual assault by both military personnel and civilians alike. Sexual violence during the Sudan civil wars was characterised by widespread and often brutal rape, abduction, sexual slavery and forced sexual favours. During the wars against the Khartoum government, fighters pursued a policy whereby women's contribution to the liberation struggle was through reproduction and not necessarily in the battlefield; this led to very many instances of sexual violence.<sup>76</sup> All fighting sides regardless of affiliation carried out the violations.<sup>77</sup> The SPLA acknowledged the issue and undertook a reform process in 1991, aimed at curbing sexual violence within its ranks through the development of an internal code of conduct that stipulated the death penalty for any military officer found guilty of sexual abuse.<sup>78</sup>

136. The legacy of sexual violence, at the individual and community level, has been compounded by the largely irresponsive and weak rule of law system in South Sudan that in practice denies access to justice for victims, and that fails to hold perpetrators to account, thus enabling the cycle of violence against women to continue.

## Part 2

### IV. Overview of Alleged Violations and Abuses of Human Rights and Violations of International Humanitarian Law

#### A. Introduction

137. Since the outbreak of the South Sudan crisis in December 2013, the human rights situation of the population has sharply and dramatically deteriorated. As successive reports of the High Commissioner for Human Rights, UNMISS, the AU and international

<sup>73</sup> See 'Women's security in South Sudan: Threats in the Home', HSBA, Small Arms Survey, 2012.

<sup>74</sup> Stern, O. (2011).

<sup>75</sup> Assessment team interviews, on file.

<sup>76</sup> Jok, J. M. (1999). Militarization and gender violence in South Sudan. *Journal of Asian and African studies*, 34(4), 427-442.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

organizations have documented, there have been numerous, repeated incidents and patterns of serious and systematic violence against civilians, in many cases in circumstances in which people were targeted due to their ethnic origin. Many civilians have reportedly been attacked and killed by armed groups, including Government forces in their homes, as well as in places of shelter, including churches, mosques, hospitals, and in government facilities. Tens of thousands have been killed, and over two million South Sudanese have been displaced from their homes, more than 1.5 million of them within the country.

138. Serious violations of international humanitarian law, gross violations of international human rights law and human rights abuses have been perpetrated by all parties to the conflict including attacks against civilians, rape and other crimes of sexual violence, arbitrary arrest and detention, abduction and deprivation of liberty, disappearance, including enforced disappearance and attacks on UN personnel and peacekeeping facilities. As early as May 2014, the UN Secretary-General advised the Security Council that there were reasonable grounds to believe that crimes against humanity had been committed.<sup>79</sup>

139. The following contains a summary of the primary violations that have taken place in 2013 and 2014, based on existing research, including the recent joint report of the High Commissioner and UNMISS, “The State of Human Rights in the Protracted Conflict of South Sudan” (‘Joint Report’).<sup>80</sup>

## **B. Killings**

140. Civilians have borne the brunt of the conflict that started in December 2013. UNMISS and the AU COI documented numerous incidents of direct targeting of civilians and members of the armed forces who had been disarmed or placed “hors de combat” by detention at the time of their killing.

141. These reports describe how civilians were singled out on the basis of their ethnicity, and shot on the streets, in their homes, while seeking sanctuary in churches and hospitals, and in official and unofficial places of deprivation of liberty. Women and children were not spared from the violence: women and young girls were taken from their homes and places of refuge and raped, often multiple times. Many of them were killed afterwards.

142. Both parties to the conflict have committed violations against civilians. The killings of Nuer civilians and disarmed security personnel in Juba and their Dinka counterparts in Bor in December 2013 remain vivid in the memory of the respective communities. Similar extreme violence occurred in Bentiu and Malakal between the end of December 2013 and January 2014.

143. The overwhelming majority of civilian casualties appear not to be the result of actual combat operations, but rather the result of deliberate attacks on civilians. In December 2013, in Bor Nuer opposition fighters chased after and shot at civilians fleeing into the bush and across rivers, in an apparent attempt to kill as many as possible and to

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<sup>79</sup> Secretary-General's Briefing to the Security Council on South Sudan, 12 May 2014.

<sup>80</sup> For more detail, see UNMISS Human Rights Report, 8 May 2014; UNMISS ‘Attacks on Civilians in Bentiu and Bor, April 2014 (published January 2015); Report of the High Commissioner and UNMISS, “The State of Human Rights in the Protracted Conflict of South Sudan, December 2015;” AU COI Report and Human Rights Watch reporting for that period.

terrorize them into abandoning their homes or prevent them from reaching places of safety.

144. In town centers and around strategically important counties, the pattern was often one of attack, withdrawal, and counter-attack. Those in control of an area would seek out to kill and displace civilians who, because of their ethnicity, were suspected of supporting the opposing side. Malakal, for example, changed hands six times in the period between December 2013 and April 2014. In the course of these periods, SPLA forces, mainly of Dinka and Shilluk ethnicity, targeted Nuer civilians while SPLM/A-IO targeted Dinka and Shilluk residents of the town. Civilians in the surrounding counties were also targeted during the retreat of fighters. In January 2014, Baliet County, located between Nassir, a main stronghold of the Nuer opposition, and Malakal, saw numerous advances and retreats by Nuer armed forces and White Army Youth, leaving a “path of destruction” in their wake.

### **1. Killings in Juba, December 2013**

145. The crisis began in December 2013 in Juba, with a deep rift within the SPLM arising during the SPLM convention on 15 December 2013. While the causes of the crisis are disputed, UNMISS and others have documented allegations of deliberate killings of Nuer civilians and of disarmed or detained Nuer soldiers by SPLA and other associated security forces between the evening of 15 and 20 December 2013 in Juba. Security forces identified Nuer through their facial scars, the language they spoke and the communities they lived in.

146. The killing of between 200 to 400 Nuer men rounded up and detained at the Joint Operations Centre of the police in Gudele, an eastern neighborhood of Juba stands out among these incidents. The national police informed UNMISS in early 2014 that it was investigating that incident.

147. Another gruesome incident happened the same night in the Juba neighborhood of Newsite, underlining the organized manner in which individuals were targeted and killed based on their ethnicity. Dinka speaking soldiers rounded up around 200 Nuer men and brought them to huts for interrogation. While some of the men returned from the questioning, most did not. As witnesses stated they heard gunshots, it is assumed those men were killed. According to UNMISS about eight men survived this incident, possibly because they could not be clearly identified as Nuer. UNMISS found that Dinka members of all parts of the security forces were implicated in the violence, in particular SPLA and the national police, but also the National Security Service (NSS), the Wildlife Service, the national prison service, and the Fire Brigade. Within about two days after the crisis started, about 10,000 civilians mainly of Nuer origin had sought protection next to UNMISS bases in Juba. By the end of January 2014, they numbered 38,650. They remained at risk of targeting by security forces whenever they moved out of the UNMISS bases to collect livelihood items.

### **2. Killings in Bor, December 2013**

148. Shortly after the start of the mass killings in Juba, Nuer segments of the SPLA in Bor under the command of General Peter Gadet turned against Dinka soldiers, government officials and the Dinka civilian population, in similar waves of raids and killings of civilians. UNMISS estimated that about fifty-six prison officials loyal to the Government were killed in an attack on the Bor Prison. A number of civilians also died in

Bor town as well as during fighting in payams south of Bor.<sup>81</sup> UNMISS verified the burial of around 525 bodies in two mass graves in Bor. Furthermore, it found the figure provided by local government officials, of 2,007 casualties in Bor County, a “reasonable estimate.” Most of those casualties were Dinka, even though an undetermined number of Nuer bodies were buried by opposition forces before they departed from Bor town in January 2014.

149. In addition, UNMISS received accounts by witnesses of attacks on civilians fleeing Bor town. Victims either died by gunshot wounds, or they drowned in the Nile while opposition fighters would shoot at them. More than 80,000 residents of Bor County, mainly Dinka, but also Shilluk and Anuak, fled across the Nile to Minkamman, in Awerial County, Lakes State. Another 20,000 Dinka fled from other counties in Jonglei into Eastern Equatoria State.

### **3. Killings and massive destruction in Malakal and Bentiu**

150. A few weeks into the crisis both parties to the conflict conducted similar raids through neighborhoods of Malakal. Individuals and communities were targeted based on their ethnicity and their perceived loyalties. SPLA soldiers looked for Nuer residents of Malakal; in turn, ‘White Army,’ searched for members of the Dinka and Shilluk communities in Malakal after they had taken control of the town on 15 January 2014.

151. During those searches, armed men looted and extorted money and belongings from the families living in those homes. When UNMISS visited Malakal in late January, it found a scene of destruction and looting. During patrols in February 2014, UN staff saw dead bodies lying on the streets. UNOSAT imagery taken on 18 January and again on 15 March 2014 indicate the destruction of 9,878 residential and related structures in Malakal town, i.e. “fully 22 percent of the State capital.”<sup>82</sup> In meetings with UNMISS, representatives of both Government and opposition forces acknowledged that violations and abuses had happened during the fighting in Malakal.

152. In Bentiu, within a few days of the beginning of the crisis, Nuer armed elements allegedly killed dozens of Dinka civilians, disarmed Dinka soldiers and foreign oil workers of the Greater Pioneer Operation Company (GPOC). While UNMISS was not able to confirm evidence of human remains, it did see signs of excavation at Unity barracks and large blood stains within the GPOC. When government forces retook Bentiu and Rubkona, they killed Nuer civilians and captives, again using language and facial scars as an identifier. According to witnesses, Justice and Equality Movement (JEM) militia from Darfur and Dinka armed youth participated in the killings and acts of sexual violence on behalf of the Government. On 10 January, UNMISS saw a civilian being killed by SPLA outside the UNMISS base, and observed around twenty dead bodies on a patrol on the road between Bentiu and Rubkona. Satellite imagery from 15 and 18 January 2014 showed massive destruction in Rubkona, with almost 4,000 structures burned.

### **4. Killings in places of refuge: Churches, mosques, hospitals and UN compounds**

153. Even places that enjoy special protection under international law and in the eyes of the community, such as churches, mosques, and hospitals, were not spared from attack. This suggested there were no barriers to the parties to the conflict’s desire to kill those

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<sup>81</sup> A payam is the second-lowest administrative division, below counties.

<sup>82</sup> UNMISS, Conflict in South Sudan - A Human Rights Report (8 May 2014), para 153.

deemed an enemy. Places of refuge thus more often than not turned into veritable traps for civilians.

154. In Malakal, both government and opposition armed forces raided churches and the Malakal Teaching Hospital in search of members of the opposing ethnicity during periods when they were in control of the town, killing and abducting civilians sheltering there. In January 2014, around 4,000 civilians had sought protection at the Malakal Presbyterian Church. Government soldiers came looking for persons of Nuer descent, and UNMISS received reports of at least two murders of civilians, including a pastor, at the hands of the SPLA, at the Church. The AU COI collected witness accounts that in mid-January, government soldiers looked for individuals of Nuer descent in Malakal Teaching Hospital, taking those identified out of the compound and shooting them at the shore of the river Nile, dumping their bodies into the water.

155. On 18 and 19 February 2014, opposition fighters entered Malakal Teaching Hospital, where about 3,000 persons were seeking protection, in addition to patients receiving treatment there. Witnesses told UNMISS that attackers belonging to the Nuer 'White Army' went round the hospital demanding money and valuables, and beat or shot those who did not have anything to give. They targeted specifically Dinka and Shilluk persons and allowed Nuer persons to leave the hospital. The premises were looted and partially burned. When UNMISS visited the hospital two days later, it counted 15 decomposing bodies lying in the compound. Survivors told UNMISS that many dead bodies had been thrown into the nearby Nile river

156. In Bor, following fighting and raids by the newly formed opposition under Major General Peter Gadet against the Dinka population, in January 2014 UNMISS discovered the bodies of eighteen women, with throats slashed and gunshot wounds, in the vicinity of St. Andrew's Episcopal Church and another fifteen women and men in the Bor Hospital. Eleven of them were found dead in their hospital beds. UNMISS received reports the attackers were of Nuer origin and opposition forces controlled the town during the relevant time of the attacks on the hospital and church. On 17 April 2014, in Bor, an angry mob of armed pro-government supporters attacked the UNMISS base, where thousands of IDPs were seeking protection, killing at least 47 civilians.

157. Some of the most serious abuses committed during the conflict took place when armed groups, affiliated with opposition forces overran and took control of Bentiu and neighboring Rubkona on 15 April 2014. Hundreds of civilians who had sought refuge in a mosque in the neighbourhood of Kalibalek, in the Bentiu Hospital, and in the Kalibalek market were pursued and subsequently killed by armed groups affiliated with opposition forces. At the mosque, the attackers extorted money and valuables from the civilians before shooting indiscriminately into the crowd. An UNMISS team visiting the mosque a week later found broken windows and 185 bullet casings inside and outside the building, with a concentration around the main doorway from where the shooting most likely happened. Reportedly, SPLMA-IO forced some of the survivors to help carry about 200 bodies from the mosque to be dumped into a water drainage trench.

158. On the morning of 15 April 2014, Nuer opposition fighters arrived at the Bentiu Hospital, started calling names of government officials and shot and killed several individuals of Dinka ethnicity they appeared to recognize. Reportedly, they also fired through the closed door into a staff room where Nuer medical personnel was hiding and killed at least four persons. During that period, Darfuri civilians were allegedly also targeted by opposition forces, possibly to take revenge for the support by JEM to the prior government offensive. Later during that week, they gathered around 80 men, mainly of Darfuri and Nubian ethnicities outside the hospital and forced them to walk towards the cemetery area at the back of the hospital. Two men who resisted were shot. The fighters told the others to run for their lives – some of them with their hands tied at the back - and

shot at them while they were trying to save themselves. Based on credible witness accounts, UNMISS concluded that at least 19 civilians were killed at the Bentiu Hospital and about 287 civilians at the mosque.

159. On 29 October 2014, opposition forces engaged government forces in heavy fighting around Rubkona and the UNMISS compound. After government forces withdrew, opposition fighters attacked the Bentiu Catholic Church in different groups. One group of fighters accused those seeking refuge – all Nuer civilians – of siding with Dinka and proceeded to beat them. Fourteen men were separated and reportedly led along the road leading to Bentiu cemetery where they were shot and killed.

### C. Sexual and gender-based violence

160. The AU COI report found that there were reasonable grounds to believe that rape had been committed against civilians in 2014 and that the crime was widespread or systematic in nature.<sup>83</sup> In its reports, UNMISS also found that SGBV, together with killings and other violations, may amount to crimes against humanity.<sup>84</sup>

161. The UNMISS and AU report described pervasive and widespread sexual and gender-based violence against mostly women and girls, by all parties to the conflict in South Sudan. Allegations of rape, sexual assault, abduction of women and girls and sexual slavery were documented in virtually all conflict-affected regions.<sup>85</sup> While some assaults may be attributable to general lawlessness, the sheer number of allegations and the brutality of the violations suggest that rape and other forms of sexual violence were widespread or systematic, committed with impunity and perpetrated to instil terror within civilian communities perceived to support an opposing side.<sup>86</sup>

162. Human rights experts from the UN and AU established key aspects of sexual and other gender-based violence in conflict. Reports noted that sexual violence took place both during military attacks and systematic searches in residential areas by armed forces. Women and girls seeking refuge in churches, mosques and hospitals were also victims of sexual violence. Extreme levels of brutality characterised the violations and often resulted in the death of the victim(s). Information provided to the UN and AU stated that girls as young as five years old were allegedly raped. Abductions and sexual slavery further characterised actions by the parties to the conflict, targeting women in general, but young girls in particular (usually those unmarried or without children).

163. Victims and survivors of sexual violence included women and girls from a variety of ethnic groups and communities; in some instances, women and girls were targeted because of their ethnic identity.<sup>87</sup> Women from Ethiopia, Kenya and Uganda were also targeted because of their foreign nationality.<sup>88</sup> Pregnant and elderly women and women

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<sup>83</sup> AU COI Report, para 809.

<sup>84</sup> UNMISS, "Conflict in South Sudan: A Human Rights Report," 8 May 2014, para 8.

<sup>85</sup> United Nations: Report of the Secretary General on conflict related sexual violence, UN Doc., S/2015/203, 23 March 2015.

<sup>86</sup> See *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY, 2001, IT-96-23-T & IT-96-23/1-T, for jurisprudence on systematic use of sexual and gender based violence in conflict. Available at [http://www.icty.org/x/cases/kunarac/tjug/en/010222\\_Kunarac\\_Kovac\\_Vukovic\\_summary\\_en.pdf](http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf).

<sup>87</sup> UNMISS, "Conflict in South Sudan: A Human Rights Report," 8 May 2014, p. 49.

<sup>88</sup> UNMISS, "Conflict in South Sudan: A Human Rights Report," 8 May 2014, p. 50.

with disabilities were not spared and there were some reports of boys and men being raped, particularly in acts perpetrated by JEM fighters.<sup>89</sup>

164. Women remained vulnerable to sexual violence even after they reached an UNMISS POC site. Lack of sufficient food and the need for firewood forced them to risk their safety outside the POC site.<sup>90</sup> Furthermore, women were vulnerable to domestic violence and sexual abuse inside POC camps.<sup>91</sup> Women who suffered sexual violence are subject to stigma within the community, and at home. This may have resulted in considerable underreporting of incidents of sexual violence and often prevented women from seeking lifesaving medical attention.

#### **D. Violence against children and the recruitment of child soldiers**

165. The extent of violations and suffering inflicted on children during the two and a half-year conflict in South Sudan, as revealed by reports from the UN and the AU COI, tells a story of unspeakable brutality and vulnerability. Children have been deliberately killed by the parties to the conflict, abducted, forcefully displaced, and separated from their families. They have been forced to witness gross violations or abuses inflicted upon their relatives. Boys have been recruited as soldiers by both parties to the conflict, regardless of their age, and girls have been targeted for sexual violence. Their suffering has been compounded by the dire humanitarian situation.

166. Since December 2013, the UN has received reports of 159 incidents of sexual violence affecting 702 children.<sup>92</sup> Incidents have been attributed to both SPLA, SPLM/A-IO and respective affiliated armed groups and include acts by individuals and groups of soldiers, who reportedly raped girls in a systematic manner.

167. According to UN reports, for the period from January to December 2014, recruitment and use of boys in hostilities affected 617 individuals, a sharp increase from the 121 children in 2012 and 163 in 2013.<sup>93</sup> By September 2015 UNICEF reported that 15,000 to 16,000 boys have been recruited or used as soldiers since the inception of the conflict. However, the magnitude of child recruitment by all parties to the conflict has only partially been documented due to considerable constraints in reaching the areas where children were recruited and deployed, the sensitivity of the subject, and the security of the children themselves.

168. The UN documented through direct observation and information the recruitment by, and presence of, children among SPLA troops from the early phases of the conflict. It is believed that as of December 2013, the SPLA formed new alliances and mergers with various armed groups that had been forcefully recruiting children before the conflict started, and that some of these children were readily redeployed in areas where new conflict was unfolding.<sup>94</sup> A spate of abductions and systematic forced recruitment of

<sup>89</sup> Ibid.

<sup>90</sup> AU COI report, para 663, p. 195.

<sup>91</sup> AU COI report, para 662, p. 195.

<sup>92</sup> UNICEF, MRM – the Crisis in South Sudan, 22 October 2015.

<sup>93</sup> Annex I to the Secretary-General's Annual Report on Children and Armed Conflict covering December 2013 lists the Sudan People's Liberation Army (SPLA) and the SPLA in Opposition for recruitment, use, killing and maiming of children; the 'White Army' is listed as for recruitment and use of children. See, Report of the Secretary-General on children and armed conflict in South Sudan dated 15 May 2014 (A/68/878-S/2014/339).

<sup>94</sup> UN Doc, S/2014/884, para 18, 21.

children by SPLA-affiliated forces in Upper Nile State has been reported beginning in December 2014.<sup>95</sup>

169. From the beginning of the conflict, the SPLM/A-IO, in cooperation with the largely Nuer ‘White Army,’ mobilized thousands of children from cattle camps. The UN has documented recruitment and use of children in hostilities by SPLM/A-IO, particularly in Unity State. In one case, reports indicate that in June 2014 the SPLM/A-IO commander in Unity State issued directives to local county commissioners to gather 1,200 conscripts among the youth in each county.<sup>96</sup> According to UN reports, several counties in Unity State - Guit, Koch, Leer, Mayendit, Mayom, Panyijar and Rubkona - complied with the directive.<sup>97</sup> There were also indications that SPLM/A-IO forcefully recruited children from schools. According to the UN, in December 2013 in Rubkona, 413 school children were forcefully recruited and later used in actual combat in Bentiu in April and May 2014.<sup>98</sup>

### **E. Violations of the freedoms of opinion and expression, and of peaceful assembly**

170. Violations of the freedom of opinion and expression, of peaceful assembly, as well as arbitrary arrest and detention of journalists, media workers or other individuals or groups perceived to be in opposition to the Government have been an issue of great concern in South Sudan since independence. The Government, and in particular the National Security Service (NSS), has attempted, with some success, to suffocate debate and opposition, resulting in alarm and fear among the population.

171. The joint report of the High Commissioner for Human Rights and UNMISS, “The State of Human Rights in the Protracted Conflict of South Sudan” (‘Joint Report’) highlights a number of cases from 2013 of NSS intimidation, harassment, arrest and detention of individuals. These cases include the closure of media outlets, confiscation of newspapers and media equipment, arrests and detention of journalists, including UN national staff members, and the NSS’ alleged involvement in the killings of journalists.

172. The concerns highlighted in the Joint Report are confirmed by the findings of the assessment team, which were sourced through confidential interviews with a broad array of national actors. Recent cases confirm a continued trend of repression of any opposing voice by civil society. At least seven journalists were killed in 2015 and none of the incidents, to the knowledge of the assessment team, has so far been investigated.

173. In August 2015, President Kiir made a statement threatening journalists who are reporting ‘against their country.’ During a press encounter at Juba airport, on 16 August 2015, while heading for the peace talks in Addis Ababa, he dismissed complaints about the lack of press freedom in his country. He stated that “the freedom of press does not mean that you work against your country. And if anybody among them does not know this country has killed people, we will demonstrate it one day on them.”<sup>99</sup>

<sup>95</sup> United Nations, Report of the Secretary-General on South Sudan, 26 April 2015, S/2015/296, paras 12 & 43, and Report of the Secretary-General on children and armed conflict, 5 June 2015; A/69/926-S/2015/409, para 161.

<sup>96</sup> Id, para 24.

<sup>97</sup> Id, para. 24.

<sup>98</sup> Id, para 25.

<sup>99</sup> See Committee to Protect Journalists, Alerts, 17 August 2015.



174. On 21 October 2015, it was reported that President Kiir had ordered Juba University to dismiss Dr. Luka Biong Deng, who quickly left the country, after he organised a debate on the Government's proposal to create 28 states, in which panellists challenged the Government's legal authority to do so.

175. Recent cases that support the trends include that of journalist Clement Lochio, who was feared dead after he was reportedly arrested and detained by security agents in Eastern Equatoria on 31 August 2015.<sup>100</sup> On 21 October 2015, it was reported that President Salva Kiir ordered Juba University to dismiss Dr. Luka Biong Deng after he organised a debate on the Government's proposal to create 28 states. In November 2015, a journalist informed the assessment team that "[m]any media outlets are intimidated. They could be closed down for a day, a month, forever."

176. On 29 December 2015, it was reported that journalist Joseph Afandi of the El Tabeer newspaper was being held without charge at the NSS headquarters in Juba. He had been arrested by plain clothes NSS agents following an article he had written criticising the Government's economic policy. According to NGO reports, he was released on 19 February without charge.<sup>101</sup> The editor-in-chief of El Tabeer newspaper, Michael Wazir, resigned from his position after he was allegedly harassed by NSS agents.<sup>102</sup>

177. On 28 November 2015, NSS agents were involved in the arrest and detention of fourteen civil society activists, men and women, in Wau, Western Bahr el-Ghazal state. The activists were arrested for holding a press conference in which they suggested that the security situation was dangerous and getting worse. The State Governor accused them of supporting the SPLM/A-IO and threatened to take legal action against them. He also demanded that they issue a public statement withdrawing their earlier statement or be banned from operating, and announced that the representatives were prohibited from leaving the state. Seven of them were eventually released on 1 December, as were the remaining representatives on 2 and 8 December. Their release came after they issued a public letter of apology.

## **F. Unlawful and arbitrary detention and conditions in places of detention**

178. In South Sudan, detention by the State has been generally defined by its arbitrariness.<sup>103</sup> Prolonged pre-trial detention, absence of judicial oversight and detention for acts not constituting a crime under national or international law, as well as the comingling of children with adult detainees have been widespread.<sup>104</sup>

179. Since independence in 2011, there have been no safeguards against arbitrary detention by government actors, whether for members of the political opposition, civil

<sup>100</sup> See - [http://reliefweb.int/sites/reliefweb.int/files/resources/protection\\_trends\\_paper\\_no\\_6\\_jul-sep\\_2015\\_final.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/protection_trends_paper_no_6_jul-sep_2015_final.pdf).

<sup>101</sup> "Journalist released without charge," Urgent Action, Amnesty International, 22 February 2015 (UA: 22/16 Index: AFR 65/3480/2016 South Sudan).

<sup>102</sup> <https://www.cpj.org/2016/01/south-sudan-arrests-journalist-newspaper-ceases-pu.php>.

<sup>103</sup> In 2011, the Security Council explicitly mandated UNMISS to assist the government in reducing arbitrary detention and improving conditions of detention.

<sup>104</sup> See Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, UN Doc. A/HRC/28/49 (27 March 2015), para. 38.

society and media or for persons accused of crime.<sup>105</sup> The situation has only further deteriorated since the outbreak of the current conflict.<sup>106</sup>

180. As stated in the Joint Report, there has been frequent detention of civilians by the SPLA, with no basis in the law,<sup>107</sup> and unlawful detention by the NSS for reasons related to national security.<sup>108</sup> NSS holds detainees with no judicial oversight. Access to family and legal counsel has been either refused or delayed, with detainees often not held in regular places of detention.<sup>109</sup>

181. Persons investigated for ordinary crimes often remain in prolonged pre-trial detention, waiting for some form of legal process, for months, if not years.<sup>110</sup> The lack of judicial review renders any meaningful challenge to detention illusory. The administration of justice in conflict areas is non-existent, as judicial personnel fled these areas after December 2013, and detention and court structures, however dilapidated in 2013, are in worse repair.<sup>111</sup> Even in states less affected by violence, the lack of judicial personnel, the political influence on law enforcement and judiciary compromising their independence, and the role of customary courts have only increased the prevalence of arbitrary detention.<sup>112</sup>

<sup>105</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 96.

<sup>106</sup> Ibid - Report on the human rights situation in South Sudan, A/HRC/28/49, 9 March 2015, para 36-40; United Nations, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, A/HRC/27/74, 19 September 2014, para 44-62.

<sup>107</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 111-112, 118; United Nations, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, A/HRC/27/74, 19 September 2014, para 60-62.

<sup>108</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 111-117.

<sup>109</sup> Ibid.; United Nations High Commissioner for Human Rights, Report on the human rights situation in South Sudan, A/HRC/28/49, 9 March 2015, para 37.

<sup>110</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 103; See also United Nations High Commissioner for Human Rights, Report on the human rights situation in South Sudan, A/HRC/28/49, 9 March 2015, para 36-40; United Nations, Report of the Secretary-General on South Sudan, S/2015/902, 23 November 2015, para 42.

<sup>111</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 99, 123; United Nations, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, A/HRC/27/74, 19 September 2014, para 44.

<sup>112</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 106-110. United Nations High Commissioner for Human Rights, Report on the human rights situation in South Sudan, A/HRC/28/49 (9 March 2015), para 36; United Nations, Report of the Secretary-General on South Sudan, S/2014/821, 18 November 2014, para 47.

## V. Human rights situation in specific states in 2015

### A. Unity State

*"We were born during war. Our children were born during war. We don't want to hear a bullet again. We don't need war"*<sup>113</sup>

#### 1. Background

182. Unity State has been the subject of continuous fighting since the beginning of the conflict in South Sudan. The state is of great economic and symbolic importance because of its vast oil resources and also as a predominantly Nuer state, in a conflict that has pitted the two dominant tribes, Dinkas and Nuers, against each other.

183. The strategy of "tactical withdrawal" adopted by both sides has often left civilians to face the brunt of the violence. In other instances civilians have been deliberately prevented by both sides from fleeing imminent attacks, making them even more vulnerable to violence.<sup>114</sup>

184. As a result of the continuous fighting and violence, the state has the highest number of displaced persons in the country. In November 2015, OCHA estimated that at least 559,099 people had been displaced in the state.<sup>115</sup> Before the start of the Government's Spring 2015 offensive, the UNMISS POC site hosted 52,908 IDPs. As of June 2015 (two months into the offensive), that figure had risen to 78,308. As of late 2015, the UNMISS POC compound alone housed more than 122,000 displaced persons, a significant increase since April 2015.

185. In January 2016, the Office of the Deputy Humanitarian Coordinator in South Sudan issued a report stating that from the end of the rainy season in 2014 to the end of the rainy season in 2015 in Unity state (approximately November to November), there were an estimated 10,553 civilian deaths, 7,165 of which were due to violence as well as 829 deaths from drowning, 890 persons abducted and 1,243 persons 'lost' whilst fleeing.<sup>116</sup>

186. The team conducted three missions to Unity State, visiting Bentiu, Leer and Nyal, and met with representatives from the Government and opposition. The assessment team received first-hand accounts from over 60 survivors, witnesses and other sources.

#### *Spring 2015 Offensive*

187. In late April 2015, the Government launched a multi-prong attack to capture the territories under the control of the opposition. Backed by armed youth groups mainly from the Bul Nuer and Jagei Nuer, the government's military offensive swept through

<sup>113</sup> Witness statement on file.

<sup>114</sup> Before the opposition attack on Bentiu in April 2014 it was reported that civilians who wanted to go to the UNMISS base to seek protection were prevented from doing so by SPLA checkpoints at the river that connects Bentiu to Rubkona where the base is located. As a result civilians were left vulnerable to attacks in the town as the SPLA withdrew, and the civilians left behind were accused of being "Dinkas" and executed.

<sup>115</sup> OCHA - [http://reliefweb.int/files/resources/South\\_Sudan\\_Humanitarian\\_Snapshot\\_09Nov2015.pdf](http://reliefweb.int/files/resources/South_Sudan_Humanitarian_Snapshot_09Nov2015.pdf).

<sup>116</sup> 'Crisis Impacts On Households in Unity State, South Sudan, 2014-2015,' The Office of the Deputy Humanitarian Coordinator in South Sudan, January 2016.

opposition-controlled areas in the southern and central counties with surprising speed, destroying villages, crops and killing and raping civilians.<sup>117</sup>

188. In what appears to be a carefully planned and coordinated offensive, one group of attackers moved south from Bentiu into the central counties of Koch, Guit and Leer, whilst another group deployed from neighboring Lakes state and attacked the southern counties of Mayendit and Panyijar, forcing most opposition forces to flee to the bush.

189. The SPLA campaign has continued in southern and central Unity throughout much of 2015 with devastating impact on civilians living in the area.<sup>118</sup> In what has been described as a “scorched earth” policy that deliberately targeted civilians, the SPLA, backed by armed militia, killed civilian men, women and children, beat and raped women and girls, burned civilian homes, looted property including household items and tens of thousands of livestock.<sup>119</sup>

190. In its June 2015 flash report on the Greater Upper Nile, UNMISS noted a “level of cruelty that suggests a depth of antipathy that exceeds political differences.”<sup>120</sup> In the same month UNICEF issued a press statement detailing disturbing allegations of children being raped and killed.<sup>121</sup> The data collected by UNICEF on grave violations against children<sup>122</sup> also showed a sharp increase in reported violations, particularly in May 2015.<sup>123</sup> The South Sudan Protection Cluster reported that at least 1,000 civilians were killed in southern and central Unity in the period from April to September 2015, while another 80 deaths were reported in September and October.<sup>124</sup>

191. While the intensity which marked the first months of the offensive decreased in the latter part of the year, the suffering inflicted on the civilian population continued in the form of destruction of means of livelihood and forced displacement. Information collected from victims and witnesses, as well as observations by the assessment team during missions to the affected areas, suggests that villages were systematically razed to the ground by Government forces in what the assessment team has concluded was a deliberate policy aimed at starving the opposition and its alleged supporters, and depriving them of accommodation or material support, consequently forcing their displacement. By looting, destroying homes, crops, and personal property, including

<sup>117</sup> Government forces attacked from three fronts: from Mayom moving into Mayom and Rubkona counties (first front); from Bentiu moving into Guit, Koch and Leer counties (second front); and from Lakes State into Mayendit and Panyijar counties (third front) (Flash UNMISS Human Rights Report on the Escalation of Fighting in Greater Upper Nile, April/May 2015).

<sup>118</sup> See UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015. Small arms survey update (July 2015), p.3, IGAV MVM (39).

<sup>119</sup> See final report of the Panel of Expert on South Sudan established pursuant to Security Council resolution 2206 (2015, pg. 37).

<sup>120</sup> UNMISS Flash Human Rights Report on the Escalation of Fighting in Greater Upper Nile, April/May 2015, June 2015.

<sup>121</sup> “Unspeakable violence against children in South Sudan” – UNICEF chief, Statement by UNICEF Executive Director Anthony Lake on brutal violence against children in South Sudan, 17 June 2015 ([http://www.unicef.org/media/media\\_82319.html](http://www.unicef.org/media/media_82319.html)).

<sup>122</sup> UNICEF is mandated by Security Council resolution 1612 to collect and report on the six grave violations against children in several countries including South Sudan. The six grave violations are: killing and maiming of children; recruitment or use of children as soldiers; sexual violence against children; attacks against schools or hospitals; denial of humanitarian access for children; abduction of children.

<sup>123</sup> 1195 children affected by violations in April 2015 compared to 4213 in May 2015 (UNICEF MRM updates, December 2015).

<sup>124</sup> Protection Situation Update: Southern and Central Unity (April – September 2015); Protection Situation Update: Southern and Central Unity (September-October 2015).

cattle and food, the SPLA forced an entire population to move out of their villages and towns in search of safety and protection.

192. Many civilians fled to the bush and to nearby swamps whilst others sought refuge in Bentiu, at the UNMISS POC site. However, the majority of the displaced were unable to make their way to the site, which takes days to reach on foot along dangerous roads. Tens of thousands of people were also displaced to Nyal and surrounding villages in the southern county of Panjiyar.

## 2. Killings

193. The SPLA campaign in southern and central Unity in 2015 was no exception to its approach of attacks in 2014. In most instances of attacks, the opposition forces offered little or no resistance and reportedly fled in advance of the SPLA offensive. With the opposition in hiding, the attacks were largely directed against civilians, mostly women and children, the elderly and the disabled. The attacks described to the assessment team indicate a pattern of civilians being directly targeted, often based on the perception that they supported the armed opposition group.

194. Almost all the people interviewed by the assessment team recounted a relative or friend who was deliberately targeted and killed in an attack. Several witnesses also reported that their family members and friends were killed because they were unable to flee in time or were pursued and killed in hiding places. Many others were chased from the villages into swampy and bushy areas where they were shot at, and sometimes killed by the attackers.

195. The village of Gandor in Leer County, for example, was repeatedly attacked by a mix of SPLA soldiers and armed youth groups in May, August and November 2015 respectively. In the August attack, a witness described how government forces backed by armed youth groups, with rocket-propelled grenades, AK-47s and light machine guns shelled the entire village before the armed youth embarked on massive destruction and looting. One witness recounted that she saw a pregnant woman being shot in the back as she fled the attackers. The witness himself was shot in the leg as he tried to help another victim escape.

196. In the village of Biek, in Koch County, which was attacked in October 2015, a woman reported that she lost her 20-year-old sister and brother-in-law when their home was invaded by SPLA soldiers. Her sister was shot and killed inside her hut while the brother-in-law was killed as he fled from the attackers. According to the witness, as the attackers debated whether to kill her also, one of them asked that she be spared so that she could “take care of the children of the dead relatives.”

197. At the end of October, Pilling, in Leer County was attacked by a mix of SPLA soldiers and armed youth mostly from the neighboring county of Koch. One woman described how the attackers shot and killed her husband in her presence. According to the witness, the assailants later locked up her grandfather in a storage room and burned him alive. The attackers spared her life but beat her severely.

198. In a similar incident during an SPLA attack in the village of Maal in Mayendit County at the end of November 2015, a woman reported that her 80-year-old father-in-law was burnt alive in a hut together with the family’s goats. She said she could hear him screaming for help inside the burning hut but she was prevented by the soldiers from rescuing him.

199. In an attack on Tharuop, a village in Leer, in October, a man told the assessment team that his elderly wife was ruthlessly beaten by armed men in civilian clothing, affiliated with the SPLA, from Koch, who accused her of being the mother of a rebel. The

men killed the woman with two gun shots. They then pointed their weapons at him pondering whether to kill him as well. The armed men spared his life. One of them remarked before leaving “we will leave you to suffer.”

200. These examples are just some of several dozen similar accounts from attacks in villages across Leer, Koch and Mayendit counties in southern Unity state in which civilians were deliberately and systematically targeted by the SPLA and affiliated militia.

#### *Children*

201. The information collected by UNICEF from Unity State shows a steep increase in verified violations against children following the April 2015 offensive.<sup>125</sup> These figures prompted UNICEF to issue a statement in June 2015, highlighting the killing and maiming of children, rape and forced recruitment.<sup>126</sup> The Protection Cluster in South Sudan reported that out of eighty people killed in southern and central Unity in September and October at least fifty-seven were children, twenty-nine of whom drowned while trying to flee from attacks.<sup>127</sup>

#### *Detention and killing of civilians in Leer town*

202. The assessment team received credible reports from several sources about an incident that occurred in Leer town, on or around 22 October 2015. According to witnesses and other credible sources, approximately 60 cattle-keepers suffocated after being detained in a container in the compound of the former Catholic Church in Leer town, which was used by the Leer County Commissioner and the SPLA at the time. According to witnesses and other credible sources, the cattle keepers, who were mostly from the surrounding villages of Leer town were requested by the SPLA and local authority officials to take their cattle to Leer for protection. All the cattle keepers were eventually detained by the SPLA and their cattle confiscated. The men were reportedly tied together with pieces of clothing and led to the compound where they were locked in a steel container with no windows. At least one child was also detained.

203. The assessment team spoke to witnesses who said they saw the men being rounded up and brought to the location of the container. Others reported that people including relatives who came to look for their family members went to the Catholic Church compound and saw the container being guarded by an SPLA soldier. According to credible information all men died within one or two days of being detained, with the exception of one survivor. Several individuals interviewed by the team said that some of their relatives saw the dead bodies in the container but were not allowed to take them and bury them, while others said they went to collect the bodies of their deceased relatives after they had been dumped in a nearby area.

204. In November, the team visited the alleged dumping ground and confirmed the presence of human remains. A list of the names of the alleged victims was also provided to the team by a credible source. While the cause of death could not be fully established, there are reasonable grounds to believe that the detention of the civilians in the container occurred, and that the detainees died while in detention. The extent of criminal liability

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<sup>125</sup> In March 2015, 1,793 children were affected by grave violations in Unity state, in May 2015 that same figure was 4,213. Of the 6 violations, killing represented 40% of the reported incidents in May followed by rape at 18% (UNICEF MRM data May 2015).

<sup>126</sup> “Unspeakable violence against children in South Sudan” – UNICEF chief, Statement by UNICEF Executive Director Anthony Lake on brutal violence against children in South Sudan, 17 June 2015 ([http://www.unicef.org/media/media\\_82319.html](http://www.unicef.org/media/media_82319.html)).

<sup>127</sup> Protection Situation Update: Southern and Central Unity (September-October 2015).

for those persons responsible for the detention of the cattle keepers warrants further investigation to establish if there had been an intention to kill the detainees or if their death was the result of extreme negligence and cruel and inhumane treatment.<sup>128</sup>

### 3. Sexual and gender-based violence

205. In addition to the documented pattern of deliberate attacks and killing of civilians, is the widespread use of sexual and other forms of SGBV, such as rape, seemingly with the purpose to terrorize the civilian population, and as a result of the lawlessness that has ensued in parts of central and southern Unity. In the majority of the attacks on villages that the assessment team documented, rape or gang-rape was also reported. In some instances, abductions of women were also reported. The Protection Cluster in South Sudan reported over fifty cases of rape in the period September 2015 to October 2015 in southern and central Unity, in addition to 1,300 rapes reported in the period April 2015 to September 2015.<sup>129</sup> Moreover, in May 2015, UNICEF recorded 46 verified cases of rape or grave sexual violence against boys and girls in Unity state.<sup>130</sup> While all these incidents could not be independently verified by the assessment team, they are consistent with information collected by the assessment team from survivors of rape, witnesses and other sources and appear to be part of a wider strategy of carrying out attacks that are aimed at civilians.

206. Alarming, some of the women that the assessment team spoke to reported that, for them, the situation had deteriorated in 2015 and that sexual violence and rape had become worse. The assessment team found that the trends and patterns of SGBV identified and documented by both the AU COI and UNMISS remained consistent. The assessment team heard testimony validating claims that all parties to the conflict were involved in acts of SGBV, with the increased presence of criminal or bandit elements also raping, beating and killing women as a result of the lawlessness that dominates several parts of southern and central Unity state. SPLA and state-sponsored attacks by allied youth groups enabled the emergence of opportunistic gangs and criminals to attack people and steal and rape for their own purposes.

207. Young girls and young women continued to be the primary targets of sexual violence. The team found that rape and gang-rape were the primary forms of sexual violence reported both in the course, and aftermath of attacks on villages. Interviewees described the brutality with which rapes, gang-rapes and beatings were perpetrated. The assessment team received accounts of abductions of women and girls and cases of sexual slavery.

208. Several reports on the ongoing conflict have made mention of the security risks faced by both women and men in areas around the UNMISS POC site. Protection actors have reported that a significant number of women and girls who ventured outside the camps in search of food between January and February 2015 were raped by SPLA soldiers.<sup>131</sup> These incidents have continued throughout 2015.<sup>132</sup>

<sup>128</sup> It is well established jurisprudence by the UN Human Rights Committee that any death in custody needs to be promptly thoroughly and independently investigated. See, e.g., Communication No. No. 2054/2011 Mamatkarim Ernazarov v. Kyrgyzstan.

<sup>129</sup> Protection Situation Update: Southern and Central Unity (April – September 2015); Protection Situation Update: Southern and Central Unity (September-October 2015).

<sup>130</sup> UNICEF May 2015.

<sup>131</sup> Protection Cluster South Sudan: Protection Trends South Sudan, No. 6, November 2015, p. 8.

<sup>132</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 41.

*Rape and sexual violence during attacks*

209. The assessment team received information that the armed militias, mainly comprising of youth from Mayom or Koch who carry out attacks together with the SPLA commit violations under an agreement of “do what you can and take what you can.”<sup>133</sup> Most of the youth therefore also raided cattle, stole personal property, raped and abducted women and girls as a form of payment. One woman noted that the identity of her rapists had become known to her after community members apprehended two men associated with SPLA, who came to rob her village. After raping the woman and her neighbor, the attackers went to other houses where they killed two villagers.

210. Many witnesses also narrated attacks by armed men in civilian clothing with SPLA soldiers as they made their way to the UNMISS POC site fleeing attacks in their villages between October and early December 2015. In one harrowing account, a mother of four children told of how she was separated from the group she was walking with because they could not keep up, as she walked from Guat Payam to Bentiu. When she reached Rier in Tharjath payam, she encountered a group of soldiers and armed civilians who accused her of lying about where she was coming from. The men proceeded to strip her naked and five soldiers raped her at the roadside in front of her children. She was then dragged into the bush by two other soldiers who raped her and left her in the bush and when she eventually returned to the road side, her children, aged between two and seven, were missing. At the time of the drafting of this report her children were still missing.

211. Women explained that, because they stay behind in villages to care for elderly parents and relatives or tend to the fields and crops and protect their property, they are further exposed to SGBV. In other cases, women took precautionary actions, hiding in the forests and nearby marshes during the day, and emerged only at night to sleep.

212. The assessment team spoke to several survivors of rape as well as people who had witnessed their family members or neighbors being raped. One woman described how, during an attack on her village in Koch in October 2015, after killing her husband, the SPLA soldiers tied her to a tree and forced her to watch as her fifteen year old daughter was raped by at least ten soldiers. The soldiers told her “you are a rebel wife so we can kill you.” In another incident a mother reported that she witnessed her 11-year old daughter and the daughter’s 9-year old friend being gang-raped by three soldiers during an attack in Koch in May 2015. In another incident, an 18 year old girl explained to the team how, during an attack on Gandor in Leer County in early October, she ran and hid in a nearby river but was caught by some of the soldiers. She tried to resist at first but was beaten and raped twice by one SPLA soldier who then handed her over to two armed men in civilian clothing who raped her as well. She returned to her home after the incident and learned that her three sisters and mother had also been raped. The survivor’s mother explained that she had also been caught by soldiers in the attack and taken to a nearby location where she had been raped by at least ten soldiers.

213. The assessment team recorded dozens of testimonies like this of women and girls being raped and gang-raped by SPLA soldiers and their allied militias during attacks. The prevalence of cases of rape, including of girls as young as nine, suggests that its use in the conflict has become an acceptable practice by SPLA soldiers and affiliated armed militias. One woman explained to the assessment team how she was beaten by two young armed men during an attack on her village in Leer, a soldier intervened and told them “why are you beating the old woman, if you find a young woman you rape her but don’t beat the old lady.”

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<sup>133</sup> Small arms survey update (July 2015).



*Abductions and sexual slavery*

214. In addition to rape and sexual violence in the course of attacks, several women reported having been abducted or witnessing other women being abducted. In some reported incidents women were taken to help carry looted items for the SPLA and affiliated militias, and released after they arrived at the destination, usually Leer or Koch town. Several women also spoke of being taken as “wives” by soldiers and kept in barracks or “where the soldiers sleep.” The assessment team received first-hand accounts from at least three women who were abducted, kept forcefully by soldiers and raped repeatedly. One woman explained to the assessment team how she was abducted with twenty-seven other women from a village in Leer during an attack by SPLA in October. She reported being made to carry looted items to Koch where she and the other women were then “shared” amongst the soldiers as “wives.” She lived with her abductor for one week and was forced to carry out duties such as cooking, cleaning and fetching firewood. She also explained that she was raped by three other men, besides the one who took her as his “wife.” She further reported that those who tried to resist being raped were beaten and gang-raped by SPLA soldiers. She was released after a week together with at least fifty women after the intervention of a local community leader.

215. The assessment team also received several witness statements from family members or neighbors who witnessed women or girls being taken away after the attacks. In some cases, the women returned after a few days and reported that they had been raped in captivity, and in other cases their whereabouts remain unknown. One father recounted how, when his village in Leer was attacked in the beginning of October, him and his 16 year old daughter ran in different directions. His daughter and five women were abducted by the soldiers and made to carry looted items to Leer town. The five women returned explaining that they had been released after reaching Leer town and after being gang-raped by the soldiers. His daughter however was not released and he has not heard from her since.

216. One particularly disturbing episode narrated to the assessment team was of a six year old girl from Koch County who was killed by armed men sometime in the middle of November 2015. The mother of the girl explained that after an attack by a large number of SPLA soldiers on her village in the morning, she returned from her hiding place in the forest to prepare to move to the Bentiu POC site with her children. She went to the water point and left her four children behind with some neighbors. She later returned to find her six year old daughter had been shot and killed by SPLA soldiers who had returned to the village. Her neighbors explained that one of the soldiers had wanted to take the child, saying she was beautiful, while his colleagues had argued that the child was too young and not the age (of girls) that they wanted. A quarrel ensued amongst the soldiers and the little girl was shot and killed in the midst of it.

217. The practice of soldiers keeping women and girls in barracks and forcing them to work and act as “wives” has also been reported by international media.<sup>134</sup> The exact number of women and girls that have been abducted remains unclear, however what is clear is that, during SPLA attacks, women and girls were considered a commodity and were taken along with civilian property as the soldiers moved through the villages. One

<sup>134</sup> ‘Reliving the rape camps of South Sudan's civil war,’ Al Jazeera, 29 September 2015 <http://www.aljazeera.com/indepth/features/2015/09/reliving-rape-camps-south-sudan-civil-war-150929121909936.html>; South Sudan: women and girls raped as ‘wives’ for government-allied fighters, The Guardian, 28 September 2015, <http://www.theguardian.com/global-development/2015/sep/28/south-sudan-women-girls-raped-as-wives-for-government-allied-fighters>.

witness described seeing about twenty young girls being marched away by SPLA soldiers after an attack on her village in Leer County. Another woman from a payam in Leer County explained how she and seven other women were taken to a place in another payam that appeared to be some kind of SPLA base. The eight women from Leer were marched together with approximately forty other women from different villages close to her own. Once they reached their destination the women were made to cook for the soldiers. The soldiers then selected ten young women from amongst the group and subsequently raped them. This woman was able to escape the captivity because of an ambush by SPLM/A-IO that forced the SPLA soldiers and their captives to flee.

218. In October 2015, UNMISS human rights monitors interviewed a number of women who were being kept in cattle camps in Koch County. They reported that, in addition to undertaking chores such as cooking and cleaning for soldiers, they were also used as cattle keepers. The women mentioned that there were several abducted girls present in the camps, most likely subjected to sexual slavery.

219. On the basis of the information collected, the assessment team found that in 2015 there are reasonable grounds to believe that sexual and gender-based violations in southern and central Unity State were largely perpetrated by members of the SPLA and other individuals or groups associated with them. Witnesses stated that these acts were carried out as a way to denigrate and punish women (and families) perceived to be supporting the armed opposition. In addition to the SPLA, witnesses referred to armed militia youth – operating alongside or under the command of the SPLA. They described them as armed men “who do not have uniforms.” On many occasions the armed youth groups moved around in large numbers. Some women the assessment team spoke to also mentioned that attacks were committed by masked men who, again, did not wear uniforms. They reasoned that the men were most likely known to them and their own communities and were trying to avoid being identified.

#### *Victims and Survivors*

220. Consistent with existing reports and documents, the assessment team found that young girls and young women in southern and central Unity were the main targets of armed groups carrying out acts of SGBV. Witnesses, survivors and observers alike, remarked that young women of child-bearing age were the primary targets. One stated that “if the soldiers did not find any young girls they would take lactating mothers regardless of when the woman had given birth.” This happened on multiple occasions when armed youth groups affiliated with the SPLA, would harass and beat the villagers. Another witness explained that the women were selected on the basis of age and this further determined distribution amongst the soldiers. She stated that “if you looked fresh or smart (young or good looking), about ten men would rape the woman; the older women were raped by about seven to nine men.”

221. The above statement confirms that when young girls and young women were not available in large numbers, older and/or married women were raped; no one was spared. SGBV perpetrated in southern and central Unity demonstrated that any pre-existing cultural and societal norms of protection of the most vulnerable of becoming victims of SGBV were not applicable during this conflict. The assessment team confirmed that women sometimes got caught up in attacks and violations because of their assumption that, if they were married or older, they would not be harmed and therefore stayed behind. Pregnant and breast-feeding women also wrongly believed they were safe owing to cultural practices that dissuade men from sleeping with their wives while breast-feeding. A victim explained to the assessment team that, eight months pregnant, she was gang-raped by six armed civilians speaking Nuer. She thought that, because she was heavily pregnant, she would not be harmed.

222. One young woman told members of the assessment team how she managed to escape rape. The witness explained that she was with a group of women on the way to the UNMISS POC site when they encountered some SPLA soldiers. As she was young, the soldiers targeted her with the intention to rape her but she was spared because she took a small baby from one of the other women.

*Brutal nature of sexual violence*

223. Many witnesses and first-hand accounts provided to the assessment team emphasized the brutality of SGBV perpetrated against women and girls in southern Unity. Women narrated horrific and disturbing stories concerning the suffering experienced and witnessed at the hands of SPLA soldiers and associated militia. One woman explained how, eight months pregnant, she was severely beaten to the point that she began to hemorrhage and had a miscarriage. She added that she was then forced to immediately carry heavy goods from her village in one payam to another in Leer County.

224. Other women described being beaten with sticks and gun butts. One woman explained that her beating lasted more than one hour, “the men told me to lie down and when I refused they beat me and all three forced themselves on me.” Others showed members of the assessment team injuries sustained as a result of sexual assault. The assessment team also received information that showed the ruthlessness meted out against women who resisted being raped. In various instances, witnesses and other survivors narrated how attackers simply killed women who resisted or even showed signs of their inability to withstand continued abuse in the case of gang rapes. For example several women survivors in Koch County openly stated during an interview that “all the women present here have been raped by the SPLA and those who refused were shot.” Some women also alleged that victims were killed for looking directly at their rapists.

*Impact of sexual violence on victims and survivors*

225. In narrating their experiences of sexual violence, some expressed anger and grief. On one occasion an older woman became physically ill as she recalled events that had taken place; the interview was immediately stopped. Some survivors and witnesses gave testimonies of women being raped in front of their family members, or in front of their neighbors and friends, resulting not only in physical harm to the victim but also additional psychological trauma.

226. Of concern during the work of the assessment team was the continued lack of health services for women who had experienced SGBV. Continued fighting and insecurity has led to the evacuation of humanitarian organizations providing crucial services – such as medical and other services - and had a negative impact on the ability of women to access basic health-care services, let alone dedicated care for victims of rape, or psycho-social services. Two women the assessment team spoke with noted how the long walk to the POC site, plus the time elapsed since their rapes, had worsened the pain they were in and expressed their urgent need for medical attention.

#### **4. Recruitment and use of children in hostilities**

227. The widespread recruitment and use of boys in armed forces and groups in Unity state by both SPLA and SPLM/A-IO has also been reported by the UN, AU COI and international non-governmental organizations.<sup>135</sup> The assessment team received numerous

<sup>135</sup> “We Can Die Too,” Recruitment and Use of Child Soldiers in South Sudan,” Human Rights Watch, 14 December 2015.

testimonies of boys being abducted and taken to the SPLA barracks in Bentiu to be forcibly conscripted. Yet, because the team did not have access to the SPLA barracks, it was not able to verify these reports. However, during a visit to both Bentiu and Leer, the assessment team observed young boys wearing SPLA uniforms and carrying guns. In Leer, the assessment team saw at least one child soldier, armed and in uniform in the compound of the County Commissioner.

228. Credible sources reported they saw eleven child soldiers in Koch in December 2015 and were told by the County Commissioner that they could only be released by an order from Juba. Moreover, the assessment team was able to speak to children in Leer town who spoke of regular recruitment of boys by the SPLA in the area. The children reported that boys were recruited to work for the SPLA for a few days at a time from the different cattle camps. The younger children were made to milk the cows of the military whilst the older children were placed in the trenches around battle fronts.

## **5. Destruction and looting of civilian property**

229. Reports received from victims and witnesses regarding the SPLA offensive in Unity in 2015 indicate that government forces and their allied militias systematically burned homes and entire villages and looted property. In most instances shelters were deliberately burned after household items, clothes and food had been looted. Many people who had fled their villages ahead of the attacks later returned to find their homes completely burnt or empty. In some instances food stocks and seeds stored in huts that could not be taken had been burnt.

230. The patterns of systematic burning of homes and property, which had also occurred in 2014, suggest a deliberate strategy to deprive the civilians living in the area of any form of livelihood or material support.

231. Satellite imagery allowed the team to corroborate the testimonies of the systematic destruction of towns and villages across southern and central Unity.<sup>136</sup> For example in Leer County, imagery confirmed that there was widespread destruction of multiple huts and other structures in the Leer town area between 8 and 31 October 2015.<sup>137</sup> The imagery indicated that these structures were, almost certainly, deliberately burnt, as indicated by scorching and no indications of wildfires. UNOSAT also detected that there was a large increase in the total number of damaged structures located in the northern Leer County, including in villages like Padeah, Pilling and Thonyor from August to November 2015. Similarly imagery obtained for Gandor, also in Leer County from May to December 2015, indicated that around 674 structures, constituting about 75% of structures in the area, were destroyed. This information is consistent with information the team received from interviews on multiple attacks in Gandor during this period.<sup>138</sup>

232. The SPLA attacks were also characterized by the massive looting of livestock, in particular cattle. Cattle, being one of the central wealth indicators for many ethnic groups in the area, became the primary objective of the attackers during the military offensive. For many of the allied militias who fought alongside the SPLA, this was an opportunity to loot and increase their cattle herds. In most cases, the looted cattle was taken to areas controlled by the SPLA, particularly Koch, Mayom, Leer and Bentiu.

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<sup>136</sup> See UNOSAT: Report on South Sudan in Support of the UN Office of the High Commissioner for Human Rights (January 2016).

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

233. During a visit to Leer County in early December 2015, the assessment team observed a large number of cattle in the town even though the town itself appeared to be deserted.<sup>139</sup> In contrast, there was a near absence of cattle and livestock in most of the outlying small villages in the area which were fully populated and under the control of the opposition. According to a number of people interviewed by the assessment team, most of the cattle in Leer had been stolen from them during the military offensive. Some witnesses reported that they had voluntarily taken their cattle to Leer as they had been assured of protection by the local authorities but had ended up losing it when the attacks had begun.

## 6. Forced Displacement

234. The repeated attacks on civilians and the destruction of homes and crops during the offensive resulted in the widespread forced displacement of civilians living in the affected areas. This is evident in the number of people who have fled central and southern unity to the UNMISS POC site in Bentiu, as well as to Nyal town and nearby islands in Panyijar which are under the control of the opposition. Over 122,000 people have sought refuge in the UNMISS compound. In November 2015 alone, it was estimated that 4,000 newly displaced arrived at the POC site.<sup>140</sup> In Nyal, local authorities reported that between 54,000 to 80,000 people had arrived in the town in search of humanitarian assistance.<sup>141</sup> In addition to the tens of thousands of people who had fled to the POC sites, a large number of the displaced have been hiding in swamps outside villages that have been destroyed.

## 7. Attacks on humanitarian facilities and denial of humanitarian assistance

235. At the beginning of April 2015, there were seventy-three humanitarian partners present in Unity State. By June, owing to the upsurge of violence, the number had fallen drastically to forty-two, with partners having to evacuate their staff from the region. Humanitarian workers, in particular national staff have also been killed in the course of the fighting. In the period from April to October 2015, at least 13 humanitarian workers were killed in Unity State alone.<sup>142</sup> Aid actors informed the assessment team that the situation had not improved in spite of the signing of the peace agreement in August 2015.<sup>143</sup>

236. The April 2015 offensive in Unity State was also characterized by the targeting, and destruction of humanitarian facilities and offices of aid organizations, as well as drugs, medical equipment, and educational materials.<sup>144</sup> For example, in the attack on Leer town in the first week of October 2015, the ICRC compound and the MSF hospital were looted and destroyed. As a result, the two organizations were forced to evacuate all their staff.<sup>145</sup> Similar incidents took place in Nyal and Koch which were attacked in May

<sup>139</sup> UNOSAT satellite imagery obtained by the Assessment team – detected that the number of cattle visible in the area of Leer town greatly increased between 8 and 31 October 2015 – see UNOSAT: Report on South Sudan in Support of the UN Office of the High Commissioner for Human Rights (January 2016, at pg. 5).

<sup>140</sup> UNMISS and UNICEF figures.

<sup>141</sup> 54,000 IDPs were registered in the latest registration by WFP in September 2015, however NGOs in Nyal estimated that the current figure of IDPs were around 80,000.

<sup>142</sup> Protection Situation Update: Southern and Central Unity (September-October 2015).

<sup>143</sup> Assessment team interviews with UNMISS and humanitarian actors in Bentiu, November/December 2015.

<sup>144</sup> See UNMISS Flash Human Rights Report on the escalation of fighting in Greater Upper Nile April/May 2015 – 29 June 2015, pg. 8.

<sup>145</sup> South Sudan: ICRC forced to withdraw from Leer County following threats and looting, 5 October

2015. In Nyal, the SPLA forces attacked the only clinic in the town, and looted equipment and the entire stock of drugs. In Koch, the local health facility was overrun and vandalized by SPLA forces, and its equipment pulled out and destroyed.<sup>146</sup>

237. As a result of the insecurity and the Government's refusal to provide access, from October to November 2015, no humanitarian assistance was provided to the displaced population in the area, in particular Leer County. An assessment conducted by humanitarian actors in October 2015 found that 30,000 people in Unity State faced the threat of famine if humanitarian assistance was not immediately provided.<sup>147</sup>

238. Humanitarian organizations have made repeated attempts to resume the delivery of aid to the local population. Some progress was made in early December when MSF and the ICRC were able to resume limited operations in Leer. Nevertheless, the environment for humanitarian operations continued to deteriorate as a result of violence in the area and wilful obstruction by the parties to the conflict. Many people interviewed by the assessment team reported that the continuing violence and insecurity prevailing in the region prevented them from reaching assistance. On several occasions food aid drops in villages were reported to have been immediately followed by attacks from the warring parties.

## 8. Role of ethnic militia and other actors

239. The assessment team collected numerous testimonies from many witnesses and victims which identified SPLA soldiers as those responsible for the attacks in the Unity offensive conducted in 2015. Many witnesses and victims indicated that they identified the SPLA soldiers by their distinctive uniforms, weapons and the tanks and amphibian vehicles they drove. The SPLA forces in Unity State belong to the SPLA Division IV which has its headquarters in Rubkona, just outside Bentiu. A majority of Nuer soldiers in this Division are believed to be from the Bul Nuer tribe.

240. In the vast majority of reported attacks, victims and witnesses identified SPLA soldiers as operating jointly with militia and armed youth groups from neighboring counties, namely Bul Nuer and Jagei Nuer fighters from Mayom and Koch counties respectively and, in some instances, youth groups from Mayendit.

241. The government's offensive strategy in Unity State relied heavily on the active participation of Bul Nuer fighters. In mid-June 2015, approximately 8,000 armed youth from Mayom were observed marching southwards past the Bentiu POC site, allegedly to join the offensive.<sup>148</sup> The Bul Nuers currently dominate the state's administration, politically and militarily. Most of them previously belonged to the South Sudan Liberation Army (SSLA), a predominantly Bul Nuer armed group which was integrated into the SPLA in 2013 and reportedly joined the fighting in Unity State once the crisis broke out.

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2015, <https://www.icrc.org/en/document/south-sudan-conflict-leer-looting-icrc-forced-withdrawal>; South Sudan: Trapped by Violence in Unity State, MSF, 30 October  
<http://www.msf.org/article/south-sudan-trapped-violence-unity-state> ; Thousands receive food rations in southern Unity state: ICRC, Sudan Tribune, 22 December,  
[http://www.sudantribune.com/spip.php?iframe&page=imprimable&id\\_article=57466](http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=57466).

<sup>146</sup> UNMISS Flash Human Rights Report on the escalation of fighting in Greater Upper Nile April/May 2015 – June 2015.

<sup>147</sup> FAO, WFP and UNICEF press statement 22 October 2015 "UN calls for immediate access to conflict-affected areas to prevent catastrophe in South Sudan."

<sup>148</sup> Small Arms Survey Update (July 2015); Unity 18; See also, UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015 pg. 7.

242. Since the outbreak of the conflict in December 2013, hatred towards the Bul Nuer by the other Nuer tribes has significantly increased because of the former's perceived support for the government. The Government's use of the SSLA and the Bul Nuer youth deepened intra-tribal enmities and historic divisions between the Bul Nuer and other Nuer tribes in Unity State, which date back to the intra-Nuer conflicts during the second civil war in Sudan between 1983 and 2005.<sup>149</sup> These divisions are largely rooted in the tradition of cattle raiding. In the April 2015 offensive, the Bul Nuer fighters were reportedly promised a share in the spoils of war taken from southern and central Unity in the form of cattle.<sup>150</sup> This may explain why a majority of the cattle seized in the SPLA offensive were reportedly taken to Mayom, where most of the Bul Nuers come from.

243. In some instances the youth groups, particularly from Koch, were reported to have carried out attacks on their own but the information gathered by the assessment team suggests that the majority of attacks may have been supported and directed by local government officials. Numerous testimonies from witnesses and victims indicated that local government officials from Koch, Leer, Mayendit and Mayom counties may have been involved in planning and ordering attacks during the offensive.

244. According to credible sources, most of the allied youth groups were not being paid by the SPLA. Rather, they collaborated in the military offensive with the understanding that they would be rewarded with looted cattle and abducted women.

245. With regard to the human rights violations and abuses committed during the SPLA 2015 Spring offensive, information gathered by the assessment team from credible sources indicated that the SPLM/A-IO offered little or no resistance to the SPLA, and in most instances fled to the bush in advance of the SPLA attacks. There is insufficient information as to the extent of alleged human rights violations or abuses committed by SPLM/A-IO or its affiliated militia in Unity during these attacks.

## **B. Upper Nile State**

### **1. Background**

246. Since December 2013, Upper Nile State has been the scene of some of the heaviest fighting between the SPLA and opposition forces who vied over control of the state capital Malakal and counties between Malakal and Nassir.<sup>151</sup> By October 2014, violence in Upper Nile had displaced 274,700 persons.<sup>152</sup>

247. In early 2015, Upper Nile remained volatile, with SPLA advances into Longochuk County and clashes in Manyo, Renk, Maban and Nassir counties, though, by March 2015, civilians had cautiously started returning to Malakal. In April 2015, fighting resumed after the defection of Major General Johnson Olonyi, a commander of a Shilluk militia awaiting integration with the SPLA.<sup>153</sup>

248. Prior to his defection, Olonyi had fought on behalf of government forces against the mainly Nuer opposition, with units stationed on the west bank of the Nile, Malakal,

<sup>149</sup> See previous section in this report, Contextual Analysis, as well as the final report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2206 (2015) pg. 19.

<sup>150</sup> See HSBA – Small Arms Survey – The conflict in Unity State – describing events through 1 July 2015, pg. 1.

<sup>151</sup> UNMISS, Conflict in South Sudan, A Human Rights Report (8 May 2014), para 151-160, 175 – 185.

<sup>152</sup> South Sudan Crisis: Situation Report #60, OCHA, 6 Nov., 2014.

<sup>153</sup> UN Doc., S/2015/655, para 20.

and Pigi County, Jonglei.<sup>154</sup> This alliance broke down after a series of confrontations - on 1 April, 2015, Olonyi's Deputy was killed on his way to Akoka County where inter-communal violence had broken out between Shilluk and Dinka, supported by SPLA-affiliated militia.<sup>155</sup> On 21 April, Olonyi's men and Dinka bodyguards of the Upper Nile Governor clashed in Malakal town, leading to a brief takeover of Malakal by Olonyi's forces.

249. Aware of the increasing tension between Olonyi's forces and Dinka militia, and fearful of renewed targeting of ethnic communities, Shilluk and Dinka residents of Malakal sought safety in the UNMISS POC site. In the first week of April 2015, approximately 4,500 Shilluk arrived in the POC site, followed by Dinka from Malakal and Jonglei later that month.<sup>156</sup> Other Shilluk fled across the river to the west bank of the Nile, controlled by Olonyi's militia, and further into Sudan or other parts of South Sudan.

250. Between May and July 2015, the SPLA and Olonyi's forces fought over control of Malakal and the oilfields close to Melut.<sup>157</sup> While Olonyi announced the official merger of his militia with the SPLM/A-IO at a press conference in Nairobi on 1 July, fighting between his forces and the Government had already occurred from April onwards.

251. On 15 May 2015, Olonyi captured Malakal from Government forces,<sup>158</sup> followed by an offensive from the Nile on the town of Melut, with a view to taking the Paloich oilfields. His forces initially prevailed in taking over Melut but were repelled by SPLA reinforcements two days later. The SPLA regained control of Malakal on 25 May 2015. On 27 June 2015, Olonyi's forces captured Malakal town a second time. After the SPLA retook control of Malakal on 6 July 2015, it launched attacks against Olonyi's positions in villages on the west bank of the Nile.

252. At the time of the signing of the peace agreement in August 2015, the government held Malakal and most other towns as well as counties on the east bank of the Nile. Olonyi's forces under the SPLM/A-IO banner held the territory to the west of the Nile, while Nuer forces in the SPLM/A-IO held counties to the south of the Sobat river and in the east, with the exception of Nasir town. This effectively segmented the control of Upper Nile State along ethnic lines.

253. Instances of fighting after the signing of the peace agreement led to further displacement of civilians, including those who had sought safety from previous attacks. By the end of 2015, 308,310 civilians remained displaced in Upper Nile, with approximately 45,000 IDPs in the UNMISS POC site in Malakal and another 20,000 in Wau Shilluk.<sup>159</sup> IDPs were also scattered in rural areas, often out of reach of human rights observers and humanitarian agencies.<sup>160</sup>

<sup>154</sup> Major General Olonyi's militia, known as "Agwelek" was established in 2009, against the background of Shilluk grievances over what they perceive as Dinka intrusion on their traditional land. In 2011, an agreement was signed to integrate the Agwelek into the SPLA, a process still pending completion at the time the crisis broke out in 2013. Small Arms Survey, *Pendulum swings: The rise and fall of insurgent militias in South Sudan*, Issue Brief 22 (November 2013) at <http://www.smallarmssurveysudan.org/fileadmin/docs/facts-figures/south-sudan/HSBA-Conflict-Upper-Nile-April-2015.pdf>.

<sup>155</sup> UN Doc., S/2015/296, para 13.

<sup>156</sup> UN Doc., S/2015/296, 13 April 2015, para 13.

<sup>157</sup> UN Doc., S/2015/655, para 21.

<sup>158</sup> IGAD Violation 40, Summary of Latest Reports of Violations of the Cessation of Hostilities Agreement -Reporting Period: 1-27 May 2015, 29 May 2015.

<sup>159</sup> South Sudan Protection Cluster, *Protection Trends South Sudan*; No 6, July-September 2015, p. 11,



254. In November and December the assessment team carried out two missions to Upper Nile, visiting Maban County, Malakal, Melut, Wau Shilluk and Tonga. It spoke with victims and witnesses and held meetings with representatives from the government and the opposition, and other stakeholders among local communities, civil society and international organizations. In its evaluation of the situation it also reviewed reports from credible sources.

255. The information received confirms that, in the course of 2015, parties to the conflict continued to target communities on the basis of their ethnicity and apparent allegiances. The defection of Major-General Johnson Olonyi led in particular to targeting of the Shilluk population in Malakal and attacks on, and forced displacement of, Dinka communities from Pigi County, Jonglei State. Even though violence during the 2015 military campaign was less pronounced than in prior periods, the assessment team received reports of unlawful killings, attacks on civilians and their property, sexual violence, forced displacement, as well as civilian casualties and destruction of civilian property due to failure to take precautions to protect civilians from harm during hostilities. Violations continued even where fighting decreased. In Malakal town, the assessment team found the prevailing environment of harassment and assaults on civilians had had a severe impact on the freedom of movement of the displaced population.

## 2. Killings

256. As indicated in the High Commissioner – UNMISS Joint Report, in 2015, civilians in Malakal continued to be at risk of being killed based on their perceived ethnic affiliation.<sup>161</sup> When Olonyi's forces captured Malakal in May 2015, civilians reported extrajudicial killings of Dinka residents at checkpoints manned by Shilluk militia.<sup>162</sup> Once the SPLA gained the upper hand in Malakal, IDPs around the POC site reported several incidents of killing of Shilluk IDPs close to the site gates by the SPLA. In one incident on 25 May 2015, witnesses stated that the SPLA separated three Shilluk men from IDPs of other ethnicity and killed them. Witnesses also reported that, on the same day, after questioning them about the whereabouts of Olonyi's forces, the SPLA killed at least nine Shilluk women collecting firewood.

257. On 1 July 2015, opposition forces shot deliberately into part of the UNMISS POC site in Malakal which houses Dinka IDPs, killing one and injuring eight of the IDPs.

258. In July and September 2015, the SPLA conducted attacks on military positions of Olonyi in villages on the west bank of the Nile opposite Malakal. While there was apparently no permanent presence of civilians in those villages due to previous fighting, witnesses told the assessment team that many individuals remained close to the village to tend to their fields and returned regularly to look after their belongings and elderly or sick relatives. Witnesses reported that elderly persons who were left behind were killed during SPLA attacks.

259. One source informed the assessment team that, after an attack in July 2015, he returned to his village Obwa to look for civilians left behind and found the bodies of a blind, elderly woman as well as a deaf man, with gunshot wounds, in their huts. Another witness reported that he was in his village of Ditang on 2 September 2015 when he saw

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Table 2.

<sup>160</sup> South Sudan Protection Cluster, Note on Upper Nile, June – August 2015, pg. 3-4, on file.

<sup>161</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para. 48.

<sup>162</sup> UN Doc., S/2015/655), para 47; UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para. 48.

SPLA helicopter gunships and amphibian tanks crossing the river. He and several others crossed a tributary of the Nile to the west bank. When he noticed his children were missing, he returned to Ditang to look for them. There, he reported seeing the bodies of six dead women on the banks of the river. He also stated he saw two boys of about seven years of age hanging from a tree.

260. In the following months, the SPLA maintained positions in the villages opposite of Malakal town and regularly patrolled the area. The assessment team learned of several cases of civilian casualties, for example the killing in September 2015 of a fifteen year old boy and his uncle who were shot in their fields while harvesting. Two civilians were also killed and one injured during a separate incident on 27 September 2015.<sup>163</sup> One witness reported to the assessment team the discovery of dead bodies with gunshot wounds on the islands or the river shore between Malakal and Wau Shilluk.

261. The assessment team also learned of an attack by Shilluk forces on Atar Island, Pigi County in Jonglei State in June 2015. Shilluk commanders had accused the Dinka community of hiding fighters and munitions to attack the Shilluk positions in Pigi. During that attack on Atar Island, numerous civilians were killed. Witnesses told the assessment team they found six young men and one woman with their hands tied with ropes made of soft grass. Some had allegedly been shot, some cut to pieces with pangas (local sickles).

262. Following that attack, the remaining Dinka community from Atar decided to flee to Malakal. Witnesses stated Shilluk fighters followed them into the forest and attacked them. One attack happened about half a day walking distance from Atar. The attackers started shooting when the group had settled down to rest and search for food. Thirteen civilians were killed, five of them women. One elderly man was found dead, hacked to death. His hands were tied with bandages. When the group tried to bury his body, they were attacked again and ran away through the forest, reaching Malakal a month later.

263. Civilians were also killed and injured due to indiscriminate attacks and the proximity of military barracks to civilian objects. During the offensive by Olonyi's forces on Melut on 19 May 2015, heavy fighting between SPLA and Olonyi's forces during the first night concentrated around the UNMISS base. More than one thousand civilians who sought refuge inside the POC site and several hundred more gathering around the gates were caught in the cross-fire. Stray bullets and approximately twenty artillery shells landed inside the UNMISS POC site, killing nine IDPs and injuring eleven.<sup>164</sup> It has not been possible to establish who launched the shells that caused the casualties. Witness accounts suggest that both sides failed to take sufficient precautions to prevent harm to civilians: despite indications of an imminent attack, the SPLA remained in its barracks close to the UNMISS base, failed to set up defensive positions, and deployed around the UNMISS base when the attack started. Both forces used direct and indirect fire, increasing the chances of munitions entering the UNMISS base. Further casualties during this attack on Melut were reported among the population of Ditoma 1 and 2, two informal IDP settlements housing about 20,000 Dinka displaced from Baliet and Pigi counties. According to a Ditoma community leader, ten civilians living in Ditoma were killed and two seriously injured by cross-fire in May.

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<sup>163</sup> IGAD Violation 50, Summary of Latest Reports of Violations of the Permanent Ceasefire Investigated and verified by the IGAD Monitoring and Verification Mechanism in South Sudan, 29 October 2015.

<sup>164</sup> UN Doc., S/2015/655, para 21; IGAD reported eight civilian deaths and "some sixteen" injured. IGAD Violation 40, Summary of Latest Reports of Violations of the Cessation of Hostilities Agreement -Reporting Period: 1-27 May 2015 (29 May 2015);

### 3. Sexual and gender-based violence

264. As was reported in the UNMISS and various media reports, SGBV has been a key feature of the conflict dynamics in Upper Nile State from the onset. As in Unity State, sexual and gender-based violations in Upper Nile State followed armed clashes and took on an ethnic dimension where usually women belonging to the tribes of opposing forces were targeted. Given the shift in allegiances of the warring parties, civilians in IDP settlements and UNMISS POC sites live surrounded by armed groups, be it SPLA or the SPLM/A-IO, resulting in pervasive insecurity for women.

265. The assessment team received allegations of abductions, sexual assault, rape, beatings, disappearances and killings of women in Malakal. These incidents largely took place as women and girls left the confines of protection sites in pursuit of livelihood activities. These acts appear to have been perpetrated primarily by the SPLA in Malakal, as well as affiliated armed groups.

266. In Maban County, the assessment team received allegations of the rape of four girls during clashes between SPLA and SPLM/A-IO in Liang in April 2015. The team also heard reports of sexual assaults of elderly women at the hands of armed opposition forces in Pigi County, Jonglei State, which is close to the border with Upper Nile.

267. The assessment team was informed about reports of abductions and rape of women during the fighting in May, June and July 2015, with most allegations pointing to the SPLA as being responsible. Allegations were also made of Dinka militia associated with the Government in sexual assault cases; these claims will require further exploration.

#### *Abductions, rape and killings of women in and around Malakal*

268. Between April and December 2015, protection actors documented numerous allegations of abductions, rapes, killings and disappearance of (mostly Shilluk) women from areas outside the UNMISS POC site as well as on the roads and pathways from the POC site to Malakal.<sup>165</sup>

269. A woman explained to the assessment team that, at the end of November 2015, a close relative left the UNMISS POC site to collect firewood in the morning and did not return in the evening. The following day the body of a woman was found in an abandoned house in Malakal town. The woman explained that neighbours in the POC site identified the body as her missing relative and that she was found naked (wearing only her underwear), on a bed with her neck twisted. This description suggests the victim was raped prior to her death.

270. Credible sources informed the assessment team that, during fighting in Malakal Town on 25 May 2015, twenty-four women from the Shilluk community sought protection from the fighting in the SPLA base at Ayat Company. The SPLA detained several of the women who were repeatedly raped.

271. Rapes reportedly occurred when women left the UNMISS POC site to pursue various livelihood activities.<sup>166</sup> One woman narrated how she and other Shilluk women encountered five SPLA soldiers on their way from the UNMISS POC site in Malakal to the riverside. The soldiers called on the women to stop, but they ran back towards the site. One of them returned to the UNMISS POC site only after two days and informed the witness that she had been abducted and raped by the soldiers.

<sup>165</sup> South Sudan Protection Trends, No. 6, July – September 2015.

<sup>166</sup> South Sudan Protection Trends, No. 6, July – September 2015.

272. Another witness described how she fled the scene of a rape, afraid that had she been discovered, she would also have been sexually assaulted. She added that the only time she ever ventured to town was soon after her arrival at the UNMISS POC site from Wau Shilluk in August 2015. While her friends had informed her that it was unsafe to go into town she felt she had to take the risk in order to supplement the rations provided by the humanitarians in the POC site. As she approached the town, she heard the voice of a woman coming from a building in the area close to the airport, screaming that she had been captured. She then noticed a group of women running away from that building.

273. One of the risk-mitigation strategies developed by the community and protection agencies was for women to go out of the UNMISS POC site in groups. This, however, did not deter assailants or guarantee safety. In fact, as a witness explained, “some women return, but others never come back.” Another source informed the assessment team that, on 28 September 2015, her mother and four companions left the UNMISS POC site to collect firewood from Marajak Forest, close to Malakal Town. The interviewee’s mother and her cousin separated from the rest of the group and have not been seen or heard from since then. No bodies have been found.

#### *Victims of SGBV*

274. As in other parts of the country, women belonging to the ethnic group of a military adversary faced increased risk of being targeted with sexual violence. Following the defection of Olonyi, Shilluk women would become targets of sexual harassment, threats, rapes, gang-rapes and related killings, particularly at the hands of the SPLA in Malakal. One Shilluk source emphasised that rapes, abductions and killings of women were “intentional acts perpetrated along tribal lines.” However, from discussions with groups of women and interviews with witnesses and sources, it was evident that the risks of SGBV were a daily reality for all women within the POC site. One Dinka woman explained that “a woman is a woman to a soldier. A soldier is a soldier; they don’t have their wives here with them so if you go on the wrong way you can be targeted.” Women thus factored this risk into their decisions to move out of the POC site. It was noted that Nuer women barely ventured out of the POC site while Dinka women went out if they were guaranteed protection through family connections or friendship with SPLA soldiers in Malakal Town. Victims of SGBV specifically included young women and girls.

#### *Impact of SGBV*

275. One of the most notable impacts of the continued SGBV in and around Malakal is the fear and paralysis it has instilled in the community, particularly women. It was evident during most of the discussions that women live in a state of perpetual insecurity and feel compelled to take great risks. The assessment team spoke to a displaced woman who noted: “Women are suffering a lot. When we go to town, we may fall into the hands of the soldiers, be raped and abandoned; those who try to resist would be killed.” Because of this fear she no longer ventured to town to collect firewood and greens but would rather stay closer to the UNMISS POC site. She had noted that SPLA soldiers generally followed women’s movements with a view to assaulting them.

276. One interviewee noted that, although the SPLA eventually gave permission for the IDPs to move from Wau Shilluk to the UNMISS POC site, they still faced considerable risks, as women and children travelled by boat at night to cross the river and gathered at UNMISS Bangladesh Force Marine Unit (BANFMU), where they waited for the peacekeepers to collect them in the morning and escort them to the UNMISS POC site. On the night of her crossing in August 2015, one witness recalled that, while they were waiting for the peacekeepers, some women in her group were captured, sexually assaulted and killed by SPLA soldiers.

277. A woman from Obwa, a village opposite Malakal town on the west bank of the Nile, informed the assessment team that she had fled her village after SPLA attacks in July 2015. She explained that, prior to the attack, SPLA soldiers would come to her village in search of opposition fighters. In the course of their patrols, they would harass women. She added that, in some cases, they would attempt to first befriend the women but, if they resisted, the soldiers would use force, rape them and/or kill them.

278. Women who had been spared the violence had heard about rapes and abductions of young women who would then be forced to marry their aggressors. One interviewee emphasized the social impact of pregnancies as a result of rape within the community, especially in the overcrowded setting of the UNMISS POC site where there was little privacy and information travelled rapidly. As many of the victims' husbands were in the bush while the women lived in the POC site, there was a risk of increased domestic violence as family members discovered that married women had become pregnant in the absence of their husbands.

279. A related challenge was the reluctance of women to disclose or report SGBV or seek assistance for any health issues resulting from the violence. Several interviewees observed the tension between reporting and seeking medical assistance and the fears women faced as a result of the stigma and societal pressures associated with being a survivor of SGBV. One respondent stressed how the responsibility for the rape was invariably placed on the woman: "they cannot report because they [are ashamed], if it is known that they have been raped, the society will think that [they are] not ideal women." Another woman who had gone out of the POC site and was threatened by Government soldiers but managed to escape unharmed explained that her brother blamed her for the incident when she had reported it to him. Failure to report SGBV meant health risks, such as HIV and sexually transmitted infections could not be mitigated with early reporting and seeking health services. The consistent lack of accountability or prosecution for perpetrators of SGBV has also made women reluctant to report.

280. The pattern of harassment and violence against women has taken its toll on the displaced population in Malakal. Many IDPs living in the UNMISS POC site in Malakal reported to the assessment team that they never left the site. This is especially true for the Nuer population, but also for most Shilluk IDPs and even some Dinka women. In early December 2015, Malakal town remained largely deserted, with the exception of SPLA soldiers and their families and the few civilians providing services for them. The restrictions in movement and continued insecurity also had an effect on family life. IDPs in Malakal, Wau Shilluk and Melut shared with the assessment team their concern about their separation from close family members and broader kinship networks. IDPs from Pigi County at the UNMISS POC Malakal site told the assessment team they had not had news from their relatives displaced to Korway payam, inside Pigi, since they were separated in July 2015.

#### **4. Restrictions in freedom of movement and arbitrary detention**

281. Since 2013, Malakal has changed hands from Government to opposition forces eleven times, which resulted in different segments of the population being displaced multiple times. Civilian authorities left Malakal town in April 2015 and only gradually returned, starting with the County Commissioners in October 2015. On 18 December 2015, the caretaker Governor arrived in Malakal. This placed the control of the town between April and December firmly in the hands of the SPLA, affiliated militia and police forces which had joined the SPLA. With the exception of a few families of SPLA soldiers, as of December 2015, there was no permanent presence of civilians in Malakal town, even though a small market and some restaurants operated during the day. The assessment team observed small clusters of SPLA soldiers along the road from the airport

and on the road leading from the UNMISS POC site to the boat docking station. Many of the incidents of detention reported to the assessment team happened on that road, the paths leading through the forest next to the road or the river banks of the Nile.

282. The assessment team found that civilian men and women faced different risks as they moved through SPLA checkpoints and patrolling areas. Shilluk men were suspected of affiliation with Olonyi's armed group and were thus at risk of detention, disappearance and killing. SPLA soldiers also suspected Shilluk women of spying for the opposition, harassed them as "wives of Shilluk soldiers," and occasionally held them for questioning. The assessment team learned of numerous reports that male Shilluk IDPs moving from the POC site to Malakal town or the river banks were taken away by the SPLA or simply never returned to the POC site after leaving it. Several witnesses said they managed to escape during SPLA checkpoints or patrols while others remained detained. One IDP reported he was among a group of Shilluk men walking, in early October 2015, through the forest on a path parallel to the road leading from an UNMISS marine unit to the UNMISS POC site. A group of six SPLA soldiers stopped them and took away the fish and vegetables they carried. When they ran away, the soldiers shot several times in the air and chased them. When the group arrived at the UNMISS POC site, one of the men was missing. The witnesses assumed he had been killed.

283. Women who took the risk to leave the UNMISS PoC site to collect firewood and edible leaves they planted at the river banks as well as Shilluk men ventured to the Nile to undertake their traditional task of fishing were routinely subjected to abusive searches and prohibited from transporting food from the POC site in Malakal to the west bank of the Nile.

284. One female witness told the assessment team that she travelled with a group in July 2015 from Wau Shilluk to the UNMISS POC site in Malakal. SPLA soldiers taunted Shilluk women who wore signs of mourning, such as white beads around their right ankle or their neck, as widows of Shilluk soldiers. During the search at the assembly place close to the docking station in Malakal, they singled out these women, ordered them to lie down, threatened and slapped them, despite the presence of UNMISS peacekeepers as escorts. On 27 September 2015, the SPLA threatened to detain a group of Shilluk men travelling within a larger group of 271 IDPs towards Malakal. This was ultimately avoided as the men returned to Wau Shilluk. Several civilians in Wau Shilluk told the assessment team they were afraid to make that journey from across the Nile due to reports of abusive behaviour by the SPLA. Credible sources reported to the assessment team that Shilluk men were frequently held up by SPLA on their way between the Malakal POC site and the river. In some instances, the soldiers would question and beat the IDPs and then release them.

285. As of December 2015, inhabitants of the villages opposite Malakal said they had been unable to take care of their property and their fields closer to the village, as the SPLA was present in their villages. Their movement was also restricted by the fear of encounters with SPLA patrols which, as reported above, sometimes ended with civilians being killed.

## **5. Destruction and looting of civilian property**

286. In the aftermath of the hostilities in Melut in May 2015, the town and the Ditoma IDP settlements, including NGO compounds and the MSF clinic were looted.<sup>167</sup> The

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<sup>167</sup> See Medecins sans Frontieres, South Sudan: MSF resumes activities in Melut amid challenges to access the population in parts of Upper Nile state, 29 June 2015 <http://www.msf.org/article/south-sudan-msf-resumes-activities-melut-amid-challenges-access-population-parts-upper-nile>.

assessment team received information that both parties conducted such lootings during their respective control of the town. The assessment team visited Melut town on 1 December 2015. Despite the time lapse since the incident, signs of looting, destruction and occupation of abandoned houses were visible in several residential areas; many compounds looked abandoned, while a small number had newly built or repaired fences.<sup>168</sup> The team could not verify whether the original owners had returned to those compounds, or they were occupied by others.

287. Displaced persons from the villages opposite Malakal and officials with the opposition stated that the SPLA burned huts in Awarjock, Leilo, Obwa and Ditang during and after its offensive against Olonyi's positions in those villages in September 2015. The assessment team was unable to access the affected villages to verify the extent of the destruction. UNOSAT satellite imagery from 15 August 2015 and 15 September 2015 shows extensive destruction in Awarjock and some parts of Leilo as well as the destruction of individual huts in Ditang and Obwa. The assessment team could not determine which of the destroyed area was part of infrastructure used by the opposition for military purposes and which were civilian objects.

## 6. Denial of humanitarian access

288. In July 2015, the Government prohibited river and air access to Wau Shilluk, by then hosting a population of almost 20,000 displaced persons.<sup>169</sup> Due to insecurity of travel along the river, which had effectively become a frontline, humanitarian workers had not been able to reach the west bank of the Nile since March 2015.<sup>170</sup> After UN Under-Secretary-General for Humanitarian Affairs raised concerns about rising malnutrition with the Government, the situation improved in early August 2015 when food drops were scheduled from the air.<sup>171</sup> Yet, only in October 2015 were humanitarian agencies able to resume regular services between Malakal and Wau Shilluk and re-establish programs for the displaced community in Wau Shilluk. In a meeting with the assessment team in December 2015, the SPLA Commander in Malakal stated that he was apprehensive of food distributions in Wau Shilluk, as he believed any such assistance would end up in the hands of the opposition forces.

289. After retaking Malakal on 6 July 2015, the SPLA placed tight controls on the movement of the Shilluk population between Malakal and Wau Shilluk.<sup>172</sup> Hunger drove much of the displaced population, mainly women and children, towards the UNMISS POC site in Malakal.<sup>173</sup> Within weeks, the population of the POC site in Malakal had

<sup>168</sup> Al Jazeera published 15 pictures taken in the aftermath of the incident, some of which show the destruction of property. See: <http://www.aljazeera.com/indepth/inpictures/2015/06/battle-melut-humanitarian-sanctuary-south-sudan-150615100935139.html>.

<sup>169</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 35.

<sup>170</sup> South Sudan Protection Cluster, Protection Situation Update: Upper Nile State (1 June-20 August 2015), 27 August 2015.

<sup>171</sup> Under-Secretary-General Stephen O'Brien Briefing to the Security Council on the Humanitarian situation in South Sudan (25 August 2015).

<sup>172</sup> South Sudan Protection Cluster, Protection Situation Update: Upper Nile State (1 June-20 August 2015), 27 August 2015, p. 2; South Sudan Protection Cluster, Protection Trends: No. 6, July – September 2015, p. 13; see also Meeting SPLA Commander, on file.

<sup>173</sup> South Sudan Protection Cluster, Protection Situation Update: Upper Nile State (1 June-20 August 2015), 27 August 2015, p. 1.

increased to more than double its capacity, putting a huge strain on the ability of the humanitarian agencies to keep up with the basic needs of the displaced population.<sup>174</sup>

## **7. Recruitment and use of children in hostilities**

290. The assessment team received reports of recruitment of boys by both parties to the conflict. According to UNMISS, Major-General Johnson Olonyi's militia, then with the Government, conducted forced recruitment of a significant number of children in Shilluk communities on the west bank of the Nile.<sup>175</sup> Sources confirmed to the assessment team that loyalty along ethnic lines is used to pressure families to "volunteer" one child among their offspring. One source stated that children as young as 14 were being recruited. The assessment team received information on large numbers of children, some of them younger than 15, being recruited in Maban County through the Mabanese Defence Forces, a local militia affiliated with the SPLA, for enlisting into the SPLA ranks.

## **C. Central Equatoria**

### **1. Background**

291. In December 2014, SPLA soldiers from the 2nd Division in Central Equatoria State defected to the opposition. In response, during the course of 2015, SPLA units, including a Commando unit, deployed to the area around Wonduruba payam. The assessment team learned from credible sources that the SPLA units deployed to Wonduruba in January 2015, and again in July 2015, were part of a special commando unit, composed of Dinka from Bahr el-Ghazal, apparently operating outside the normal chain of command, and reporting directly to Juba.

292. On 10 September 2015, the SPLA clashed with armed groups in the area of Katigiri and Mankaro, villages in the Wonduruba area, with the SPLA proceeding to kill civilians and burn and loot civilian property.<sup>176</sup> The attacks led to the displacement of almost the entire civilian population of Wonduruba payam. Many stayed for weeks in the forest, too afraid to approach the town centers where the SPLA was present. Others made their way to IDP settlements in Lainya, Koda and Juba. On 20 September 2015, the Central Equatoria State Advisor visited Wonduruba to investigate the incidents. The SPLA gave assurances to the civilians they could safely return to their villages.

293. During December 2015 the assessment team received reports of attacks against civilians moving between the forest, their fields, and their homes. As of 31 December, the SPLA commando unit had remained deployed in Wonduruba payam.

294. The assessment team spoke with witnesses and state authorities from the affected area and visited IDP settlements in Juba and Koda. In its evaluation of the situation it also reviewed reports from credible sources.

### **2. Killings**

295. Witnesses informed the assessment team that, in September 2015, the SPLA detained two civilian cattle-keepers to question them about the presence of opposition

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<sup>174</sup> UNICEF and WFP Reach Thousands Of People In South Sudan Stranded Without Humanitarian Assistance For Months, WFP Press Release, 26 August 2015 <https://www.wfp.org/news/news-release/unicef-and-wfp-reach-thousands-people-south-sudan-stranded-without-humanitarian-as>

<sup>175</sup> UN Doc., S/2015/296, 29 April 2015, para 12; High Commissioner.

<sup>176</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 26.



fighters in the area. On 10 September, the SPLA took the two young men on a search to locate the base of the SPLM/A-IO opposition. The SPLA was ambushed twice on the way, losing a number of their soldiers. One villager said the bodies of the two detained cattle-keepers were found at the site of the ambush, with their hands and legs tied with ropes. One victim had a gunshot wound to the chest, the other in the forehead. They assumed the SPLA shot dead the two youth in anger at the ambush. As in Western Equatoria, the relation of defected soldiers and the SPLM/A-IO is not always clear. In this case, the officer publicly declared he would join the opposition.

296. After this clash, SPLA arrived in the villages of Wonduruba Centre, Katigiri, Mengele, Mankaro, and Mire. In Wonduruba centre, they reportedly engaged in random shooting. Most of the civilian population had fled to the forest, in fear of reprisals, leaving behind elderly and physically impaired men and women who, according to witnesses, were found shot dead after the attack.

297. The assessment team learned from witnesses and credible sources that civilians were killed by SPLA soldiers when they returned to their villages in search of food or missing relatives. For example, villagers found the body of one woman who had been shot while trying to retrieve some beans from her field. On two separate occasions the SPLA shot and killed young men who had returned to their village to retrieve personal belongings, accusing them of being rebels.

298. The assessment team spoke with a family who reported that two male family members had returned to Mondikolo village at the end of September to search for food. During the day, the family heard gunshots. When their relatives did not return to their hiding place in the forest, some family members went at night to look for them. They found the two men shot dead and believed SPLA soldiers were responsible.

299. On 16 October 2015, SPLA soldiers shot towards a group of three women who had gone to collect food in Kaya, Mengele village. A 40-year-old woman died, while the other two escaped. On 25 October 2015, two adult brothers and a woman walking with them were detained by a SPLA soldier in Logili, on their way from Mere Kolong to Wonduruba centre. According to witnesses, the soldier brought them to the SPLA barracks where the brothers were reportedly executed and their bodies dumped on the side of the road. The woman was allegedly kept in the SPLA barracks though this could not be verified.

### **3. Abductions**

300. Credible sources informed the assessment team about allegations of abductions. On 16 September 2015, a 28-year-old woman was abducted and raped by an SPLA soldier of Toposa ethnicity, about 6 km from Wonduruba Centre. On 11 October, a 21-year-old woman and her two small children were allegedly abducted in the vicinity of a village where the SPLA had recently set up barracks. They had been on the way to the family farm to collect food. Witnesses told the assessment team that in October three women had gone missing in Mondikolo village, including a 49-year old blind woman. The witnesses assume they were abducted by the SPLA; if they had been killed, their bodies would have been found.

### **4. Destruction of civilian property and looting**

301. In addition to UN reporting, other credible sources reported widespread looting of shops, offices and private homes in Wonduruba Centre, Mankaro, Mengele and

Katigiri.<sup>177</sup> Witnesses from Mondikolo informed the assessment team they found their village razed to the ground and the local dispensary looted a few days after an attack on their village on 10 September 2015. Witnesses from Katigiri reported that roofs, solar panels, furniture and electrical appliances were looted from public buildings, including Katigiri Primary Health Care Centre and Katigiri Primary School. School material and medicines had also been looted. One witness alleged that in early November 2015 at least six homes were burnt in Katigiri and the school vandalized.

## **5. Forced displacement**

302. Since the outbreak of violence in September 2015, thousands of civilians had fled the affected villages for fear of further attacks. Approximately 11,000 arrived in Lainya, between September and October, where they sheltered in churches and schools and received humanitarian assistance. The assessment team was informed that due to the presence of SPLA units there not everyone felt safe in Lainya.

303. Because of those fears, many families stayed in the forest for several weeks. Due to hunger, civilians ultimately were compelled to leave the forest, moving to Lainya or Juba. The harsh conditions took a particular toll on children and the elderly. One woman who arrived in Juba after walking through the forest for a month told the assessment team that several children died of exposure during the journey. As of end of 2015, Wonduruba centre and other villages in the payam remained deserted. As of January 2016, young men in particular have remained hiding in the forest.

## **D. Western Equatoria**

### **1. Background**

304. Until recently, Western Equatoria had remained largely untouched by the conflict. Western Equatoria is inhabited by several distinctive tribes including the Zande, Moro, Avokaya and Baka. For decades, Western Equatorians have felt marginalized by the SPLM, under-represented in the national government and oppressed by the SPLA. Traditionally, Dinka pastoralists from northern states migrated to Western Equatoria during the dry season in search of pastures. Most of these cattle keepers were armed and perceived to be favored by the Dinka-dominated national government in Juba. Chief among complaints made were incidents of civilian abuse by SPLA soldiers deployed to the state.

305. During the current conflict, tensions intensified towards the end of 2014 when Dinka cattle herders from conflict-affected Lakes and Jonglei states brought thousands of cattle to Western Equatoria without returning to their states at the start of the rainy season. The local communities lost confidence in the SPLA's ability to protect them, both because they perceived the SPLA to be Dinka-dominated and therefore supporters of the cattle keepers, and because there were indications that high-ranking SPLA and national government officials had their cattle herds in Western Equatoria.

306. In the course of 2014 the Western Equatoria experienced several clashes between Dinka pastoralists from Lakes State and host communities in Mvolo and Mundri West

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<sup>177</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, para 26; State Government.

Counties.<sup>178</sup> By the end of 2014, tensions between the Dinka cattle keepers and local population had risen significantly and led to the deterioration of the security situation.

307. Grievances by the Western Equatorians related to the perceived dominance of Dinka civilians and SPLA in the state, led to the formation of ‘armed defence groups.’ As these groups grew bolder in their operations, the SPLA also expanded its presence and control in the state. The national government was quick to label the activities of the armed defence groups as a “rebellion,” whilst state officials, including the Governor, presented it as insecurity linked to the migrating Dinka pastoralists. While the grievances of the armed groups have largely remained focused on local issues of tribal and political marginalization, some of them claim to have formed alliances with the opposition SPLM/A-IO whilst others have declared an open rebellion against the central government.<sup>179</sup> In November 2015, the SPLM/A-IO reported that two of its military commanders were killed when the government launched airstrikes with helicopter gunships against an armed group in Mundri.<sup>180</sup>

308. In Western Equatoria, the SPLA 6th Division is headquartered in Maridi, with one brigade in Yambio, one in Mundri and battalions in almost every county.

309. In Maridi, in June 2015, Western Equatoria authorities stated publicly that the operation of the SPLA commandos brought from outside to quell disturbances in the county, was authorized by higher authorities from Juba, without their consent. The commandos reportedly did not recognize the authority of the State Government or the local SPLA command.

310. In its evaluation of the situation in Western Equatoria, the assessment team considered numerous reports from credible sources. The team also conducted a visit to Yambio in December 2015 and met with government officials, representatives of civil society and UN actors. Consistent with previous reports, the team received information on killings, assault and harassment of civilians, arbitrary detention, sexual and gender based violence, and the destruction and looting of civilian property. The visit to Yambio took place after the assessment team was denied security clearance by authorities to conduct a four-day mission to Mundri West and East.

## 2. Killings

311. Following the killing of two SPLA soldiers on 21 May 2015 by unknown assailants, on 22 May, the local SPLA contingent in Mundri West began harassing civilians. During the day the situation rapidly deteriorated. The County Executive Director, who had arrived at the site of the incident with Mundri West County Commissioner to investigate the killing of the two SPLA soldiers, was shot and killed by an SPLA soldier. Reports received by the assessment team confirmed that in Mundri town for three days, the SPLA looted, destroyed property and, injured and killed civilians, including children. SPLA soldiers also surrounded the county prison and opened fire on prison officers, causing the death of one and injuring another. Sources also reported that children and adults drowned whilst trying to escape, and their bodies were seen floating in

<sup>178</sup> UN Doc. S/2014/708, para 22. A major incident in Mundri West on 2 August 2014 led to the displacement of nearly 3,000 villagers.

<sup>179</sup> For example two armed groups, the Revolutionary Movement for National Salvation, REMNASA, and the South Sudan People’s Patriotic Front (SSPPF) announced in recent months their affiliation with the Opposition. See - <http://reliefweb.int/report/south-sudan/south-sudan-s-rebel-remnasa-merges-splm-io>.

<sup>180</sup> Sudan Tribune, SPLM/A-IO two top commanders killed by government forces in Mundri air raids, 27 November 2015. See: <http://www.sudantribune.com/spip.php?article57189>.

the Yei river. Estimates of civilian deaths ranged from between 60 and 110 individuals.<sup>181</sup> The assessment team received information that, to-date, no list of casualties has been prepared by state officials.

312. In Maridi, violence broke out on 8 June 2015, a day after an attack by unknown assailants on a Dinka cattle camp triggered a retaliatory raid in the town by Dinka pastoralists armed with guns and machetes, resulting in the death of civilians, including a headmaster and students from a local school. Several witnesses reported seeing Dinka students armed and in military uniforms attacking their fellow classmates and other civilians. Humanitarian actors reported that at least 9 civilians had been killed.<sup>182</sup> However, information from other credible sources suggests a higher number of casualties. UNMISS was able to gather a list of at least 15 persons killed during the incidents which had not been reported by local officials. On 25 June 2015, SPLA Commandos from Juba arrived in Maridi, and then moved to Kwanga, where, according to credible sources, they started shooting, killing one youth and injuring another.

313. Following the violence, an UNMISS human rights team visited Mundri West town and met with the SPLA commander of the area. The commander admitted that the military lost control over some of the soldiers involved in the killing of civilians. He pledged to conduct investigations into the incident and bring to justice those responsible for the violence. However, to date, UNMISS has not received any indication that anyone has been held accountable for the incident.<sup>183</sup>

314. In Mundri West and Mundri East, renewed tensions in September and October 2015 also resulted in attacks by the SPLA on civilians. In one instance, following an ambush on a SPLA convoy on 16 September 2015 in which nine SPLA soldiers were reportedly killed, SPLA forces killed civilians and looted and destroyed property in the town.<sup>184</sup> Three civilians were reportedly killed by the soldiers according to information received.

315. In Yambio, the assessment team received reports of several people who were killed in various parts of the county and town by SPLA and armed groups between August and December 2015. The assessment team was not able to independently verify to what extent civilians were affected by these clashes. On 21 August 2015, the Speaker of the State Legislative Assembly, James Bage Elisa, was ambushed and killed in Gangura payam, near Yambio Town.

316. In November 2015, the Government launched aerial attacks with gunship helicopters on the camp of an 'armed defence group' in the Mundri West County. Reports on the casualties vary greatly, and it is not clear if civilians were among those killed. Various media sources reported that the airstrikes targeted an armed group that may have been affiliated with the opposition SPLM/A-IO. The airstrikes reportedly resulted in the killing of two opposition generals together with a large number of fighters of the armed group.<sup>185</sup> The assessment team was, however, not able to independently verify if this attack had involved civilians as the Government denied access to the area for security

<sup>181</sup> Sudan Tribune, SPLM/A-IO two top commanders killed by government forces in Mundri air raids, 27 November 2015. See: <http://www.sudantribune.com/spip.php?article57189>.

<sup>182</sup> South Sudan Protection Cluster, Protection Trends South Sudan N. 5 – April-June 2015, July 2015

<sup>183</sup> UNMISS/OHCHR joint report - the State of Human Rights in the Protracted Conflict of South Sudan – December 2015, pg. 24.

<sup>184</sup> South Sudan Protection Cluster, Protection Trends South Sudan N. 6 – July-September 2015, November 2015.

<sup>185</sup> Sudan Tribune, SPLM/A-IO two top commanders killed by government forces in Mundri air raids, 27 November 2015. See: <http://www.sudantribune.com/spip.php?article57189>.

reasons. An IGAD Ceasefire Monitoring team dispatched to Mundri in December 2015 was also prevented by the Government from visiting the location where the airstrikes had taken place for the same reasons.<sup>186</sup>

### 3. Arbitrary arrests and detentions

317. In Maridi, following the outbreak of violence in June 2015, SPLA Commandos from Juba detained more than thirty youth. The men were later transferred to Juba and detained without access to legal counsel or their families. Media sources reported that thirty-three were released in early September without being charged.<sup>187</sup>

318. Following his removal from office by the Government, on 16 August 2015, the former Governor of Western Equatoria State, Joseph Bakosoro, was arrested and detained in Juba by the SPLA intelligence unit. Mr. Bakosoro was released on 21 August without charge.<sup>188</sup> On 22 December 2015, Mr. Bakosoro was re-arrested after being summoned for questioning by the NSS. By the end of January 2016, Mr. Bakosoro had not been charged with an offense and had not been allowed access to counsel.

### 4. Destruction of civilian property and looting

319. Information collected by the assessment team indicated that the SPLA looted and destroyed private and public property during the escalation of violence in Mundri town in May 2015. On 22 May 2015, the Mundri Prison's warehouse was looted of all food, medication and weapons. On 24 May 2015, fifteen motorcycles belonging to one NGO were stolen by armed men in military uniforms, believed to be SPLA soldiers. The incidents in Mundri West and East in September and October 2015 also saw the SPLA carry out extensive looting of houses and shops.

320. Between July and December 2015, in Yambio, destruction of property and looting had been a major feature of the insecurity in the town. Between 7 and 10 December 2015, the Ikpiro, Hai Tarawa, Asanza 1 and Asanza 2 neighborhoods of the town were targeted for destruction when government forces clashed with an armed youth group in Yambio town. Humanitarian agencies reported that more than 200 huts were destroyed and several hundred others looted.<sup>189</sup> In the aftermath of the violence, the state government identified and retrieved looted property from homes of suspects, including the military barracks, for return to the rightful owners. People also reported having to pay SPLA soldiers in order to ensure that their shops in the Yambio market would not be looted.<sup>190</sup>

### 5. Forced displacement

321. The May 2015 incidents in Mundri town triggered the displacement of about 30,000 people to the surrounding areas.<sup>191</sup> Further displacement ensued with the violence

<sup>186</sup> IGAD letter to JMEC. See: <http://jmecsouthsudan.org/uploads/CTSAMM%20V056%20-%20FREEDOM%20OF%20MOVEMENT%20MUNDRI.pdf>.

<sup>187</sup> Radio Tamazuj, SPLA army to release 33 detained Maridi youth today, 4 September 2015. and the Assessment team meeting, WES I 01, on file.

<sup>188</sup> See - Sudan Tribune, South Sudan president dismisses four state governors, 16 August 2015: <http://www.sudantribune.com/spip.php?article56074>.

<sup>189</sup> UNHCR, South Sudan Operational Update 1/2016.

<sup>190</sup> South Sudan Protection Cluster, Protection Trends South Sudan N. 6 – July-September 2015, November 2015.

<sup>191</sup> South Sudan Protection Cluster, Protection Situation Update – Mundri West and East Counties, Western Equatoria State, 13 December 2015.

in Maridi in June 2015, when about 22,000 people fled the town.<sup>192</sup> The humanitarian Protection Cluster reported that, by June 2015, the violence in the eastern counties of Western Equatoria had resulted in the displacement of 75,000 people.<sup>193</sup>

322. Over the summer months, the consequence of the violence resulted in the civilian population fleeing to surrounding forests or villages and towns some distance away.<sup>194</sup> While attempts were made by the local authorities to reassure civilians, many people were still afraid to return and remained in the bush. In Mundri East County, when fighting between armed groups and SPLA flared up again in September 2015, the residents in Jambo, Lanyi, and Lui fled in anticipation of SPLA reprisals.<sup>195</sup> Furthermore, between 4 and 6 October 2015, following an armed attack on SPLA barracks in Mundri town, raids by SPLA soldiers triggered the displacement of the population within the town and in surrounding villages. The total displacement after these incidents was estimated to affect about 50,000 people.<sup>196</sup> In mid-October 2015, UNMISS established a Temporary Operating Base (TOB) in Mundri West, between the town and the SPLA barracks, to respond to the insecurity, and to reports that civilians were being harassed and targeted by SPLA forces.

323. The violence in Yambio also resulted in more displacement of civilians. By 1 August 2015, hundreds of civilians had arrived at the UNMISS compound in search of refuge and protection. In November 2015, an estimated 93,276 people had been displaced across the whole state.<sup>197</sup> The fighting in Yambio town from 7 to 10 December 2015 also prompted most of its inhabitants to flee. About 5,000 people sought protection in an NGO compound located next to the UNMISS base and humanitarian agencies reported a total displacement of 10,000 people.<sup>198</sup>

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<sup>192</sup> IRNA report, Maridi and Ibba Counties, Western Equatoria State, 2-5 July 2015.

<sup>193</sup> South Sudan Protection Cluster, Protection Trends South Sudan N. 5 – April-June 2015, July 2015.

<sup>194</sup> IRNA report, Mundri West and Mundri East Counties, Western Equatoria State, 4-10 June; IRNA report, Maridi and Ibba Counties, Western Equatoria State, 2-5 July 2015.

<sup>195</sup> South Sudan Protection Cluster, Protection Situation Update – Mundri West and East Counties, Western Equatoria State, 13 December 2015.

<sup>196</sup> Id.

<sup>197</sup> OCHA, Humanitarian Snapshot, November 2015.

<sup>198</sup> UNHCR, South Sudan Operation Update 1/2016.

## Part 3

### VI. Principal findings of OHCHR Assessment Mission to South Sudan

324. The following section summarizes the principal findings established by the OHCHR Assessment Mission as a result of its evaluation of information in its possession, including UNMISS human rights reports, the AU COI report and UNOSAT satellite imagery that helps inform its assessment of human rights violations and abuses, as well as violations of international humanitarian law during the course of 2015. As previously documented by UNMISS and the AU COI, from December 2013 into 2014, gross violations and abuses of international human rights law and serious violations of international humanitarian law have been perpetrated in South Sudan by all parties to the conflict. Some of the individuals responsible for the abuses and violations, if established before a court of law, may have committed crimes amounting to war crimes and/or crimes against humanity.

325. Given the breadth and depth of allegations, their gravity, consistency, recurrence throughout the period under review, and the similarities in their modus operandi, there are reasonable grounds to believe that gross violations of international human rights law, human rights abuses, serious violations of international humanitarian law and international crimes have been committed during 2015, with the government being the primary perpetrator. If established before a court of law, many of these alleged violations and abuses may also amount to, depending on the circumstances, war crimes and/or crimes against humanity.

326. The allegations contained within this report should be promptly, thoroughly, independently and impartially investigated and prosecuted, and those responsible, directly or as commanders or superiors, should be held to account.

#### A. Crimes against Humanity

327. The information gathered by the assessment team strongly suggests the occurrence of a widespread or systematic attack against the civilian population in 2015 in Unity State. The violence that occurred was defined both by its scale and method. The violations described in this report were not random, accidental or isolated acts of violence, but rather required a level of preparation that the assessment team believes is revealed through the patterns of violent conduct by the SPLA, affiliated militia and county commissioners. In addition, the assessment team concludes, given the totality of the circumstances, it may be inferred that such attacks were part of a plan or policy to attack the civilian population.

328. From April 2015 through December 2015, there were distinct patterns of large-scale violence against the civilian populations, primarily an identifiable group, Nuer civilians, their property and livelihoods. This was characterized by repeated SPLA incursions towards civilian towns, villages and payams where Nuer civilians were displaced, many killed and raped, their property destroyed and goods and cattle looted. The widespread, deliberate destruction of civilian property was confirmed by UNOSAT satellite imagery.

329. These assaults took place over a long period of time, from April through December and in a large geographical area, and all apparently orchestrated by the SPLA. Particularly important is the scale and type of violations. Thousands of civilians have

been displaced, with consequent famine-like conditions resulting. The displaced civilian population in the UNMISS POC site in Bentiu significantly increased over the period under review, from almost 53,000 in April to 122,000 in December. Thousands more were displaced to southern parts of the state. As referenced earlier in this report, according to UN reporting, the consequence of the violence has been an estimated 7,165 violent civilian deaths, 829 drownings, 890 civilians abducted and 1,243 'lost' whilst fleeing.

330. In addition to killings, the assessment team gathered information that indicated patterns of large scale sexual and gender-based violence was apparently perpetrated by the SPLA and affiliated militia on the civilian population. A large amount of looting occurred including large scale theft of cattle, an important commodity in South Sudan.

331. In 2015 the Unity offensive saw an increase in the level of organization and coordination of violent acts against the population. Substantial state military resources were apparently deployed to fight the opposition. Beginning in April 2015, the SPLA coordinated with affiliated militia from the Bul Nuer tribe as well as with local government officials, county commissioners, many of them Bul Nuers. In mid-June 2015, thousands of Bul Nuer youth were seen leaving Bentiu and heading south.

332. The patterns of violations and targeting of an identifiable group suggest a level of preparation that was probably orchestrated through a plan or policy to attack a civilian population. The violations described in this report suggest a possible underlying objective to destroy, persecute or weaken members of an ethnic group associated with the opposition. Much of the violence was orchestrated in the areas around Leer. In addition, the attacks were apparently perpetrated in an organised manner – large numbers of SPLA and associated militia and state officials (county commissioners) allegedly displaced, killed, raped, destroyed and looted. Information provided to the assessment team indicates this was allegedly led by military authorities, in close coordination with county commissioners. The violations followed a regular pattern making it improbable that the acts could occur randomly. Moreover, despite public reporting by UNMISS and Human Rights Watch on the violence, the Government either tolerated or failed to take any action to protect the population or punish perpetrators, which suggests it may have been condoning and thereby possibly encouraging such violent acts.

333. The spreading of state violence to Central and Western Equatoria states in 2015 bore many of the hallmarks of the its 2015 offensive in Unity state – the SPLA allegedly moving into civilian areas where there was perceived members of opposition forces, displacing, killing, looting and destroying. But, to-date, though the patterns of violence are similar, the gravity or scale of the violence has apparently not been as large-scale or systematic as it was in Unity state. Nevertheless, there appears to be a methodical type of violence committed by SPLA soldiers of moving into territory that allegedly supports opponents to the regime, and displacing, killing, looting and destroying civilian property, as confirmed by UNOSAT satellite imagery in Central Equatoria. In Central Equatoria, the violence resulted in thousands of displaced civilians. Similar to Unity state, the information gathered by the assessment team suggests a plan or policy to attack any civilian population.

334. The violations would be consistent with the underlying political objective of the Government to destroy and weaken the opposition and areas under their control including local communities perceived to be their supporters. In addition, the attacks use significant amounts of state military resources and are perpetrated in an organised manner– displace, kill and destroy civilian property – which suggests this is carried out pursuant to a plan. And as in Unity state, the Government has taken no steps to protect the local civilian population and punish perpetrators, which strongly suggests it was condoning and thereby encouraging such violent acts.



## B. Killings

335. The killing of civilians is a violation of international human rights law, namely the prohibition on the arbitrary deprivation of the right to life. Article 6 (1) of ICCPR states that every human being has the inherent right to life that no one shall be arbitrarily deprived of it. The United Nations Human Rights Committee has stressed that the right to life constitutes “a supreme right from which no derogation is permitted.”<sup>199</sup> The Committee also considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The prohibition on arbitrary deprivation of life is also part of customary international law and was also recognized by the Committee in its General Comment No. 24 as a peremptory norm or *jus cogens*, signalling that it cannot be overridden by other norms.<sup>200</sup>

336. The deliberate targeting and killing of civilians in a non-international armed conflict is a serious breach of Additional Protocol II<sup>201</sup> and listed as a war crime in the statutes of several international criminal courts.<sup>202</sup> Certain methods of killing civilians, such as burning them alive in their homes, also indicate serious violations of Common Article 3 to the Geneva Conventions, which explicitly prohibits cruel treatment and murder of all kinds. The assessment team has identified a pattern of SPLA and SPLM/A-IO “tactical withdrawals” that leave local populations vulnerable to retribution from opposing forces. Given the considerable dangers arising from the military operations, safety measures should have been undertaken to avoid, or in any case reduce to a minimum, incidental losses.

337. On the basis of the available facts, the assessment team concludes that both sides have demonstrated a consistent disregard to protect civilians. This finding is consistent with a broader and intensely troubling feature of the armed conflict in South Sudan: based on the facts collected by the assessment team, the civilian death toll from December 2013 through December 2015 is attributable primarily to the direct targeting of civilians by armed actors, rather than to incidental losses arising from cross-fire.

338. Under international humanitarian law, the warring parties are required to accord special protection to certain categories of civilians, including children and women.<sup>203</sup> The assessment team has identified an extensive body of information that indicates that both sides have failed to comply with this obligation. The sources of this information include UNICEF findings regarding the extensive rape and killing of children in Unity and, assessment team documentation of alleged abductions and killings of women in Unity, Upper Nile, and Central Equatoria.

339. The available facts also suggest that forces from both the SPLA and SPLM/A-IO have played a role in armed attacks of UNMISS POC sites. Attacks on humanitarian personnel and installations are proscribed under international humanitarian law and, if

<sup>199</sup> Human Rights Committee, General Observation No.6: Article 6 (Right to life), para.1.

<sup>200</sup> CCPR/C/21/Rev.1/ Add.6, para. 10).

<sup>201</sup> AP II, Art. 13.

<sup>202</sup> Rome Statute Art. 8(2)(e). Note that, although South Sudan is not party to the Rome Statute, the International Criminal Court could still acquire jurisdiction over such war crimes if the situation is referred by the United Nations Security Council. See also Statute of the International Tribunal for Rwanda.

<sup>203</sup> AP II, Art. 4(3).

established before a court of law, depending on the circumstances, may amount to war crimes.<sup>204</sup>

### C. Deaths in detention

340. The assessment team received reports of mass deaths in Leer resulting from the detention of men in a container by SPLA forces, in coordination with the acting Leer County Commissioner. The detention gives rise to violations of international human rights law first and foremost of the right to life, and also the failure to protect the life of the individuals in detention, including investigating the cause of their death and prosecuting those found responsible. Moreover, the conditions of detention leading to the death of these individuals amount to torture and other cruel, inhuman and degrading treatment. Regardless of whether the detained men were civilians or fighters, the SPLA was bound by Article 5 of AP II, as well as by its own internal regulations, to ensure that the physical health of individuals detained pursuant to the conflict was not endangered.<sup>205</sup> In addition, the Government has obligations under international human rights and domestic law to ensure any detention is lawful and that persons detained are treated humanely.

341. Civilian government officials, including County Commissioners, that participate in hostilities are also bound by the rules of international humanitarian law and are subject to prosecution for war crimes they commit, order, solicit, induce, aid, abet or otherwise assist.<sup>206</sup>

342. It is not relevant whether the deaths were intended or arose from extreme negligence; the conduct violated international humanitarian law even if the deaths arose from an omission or failure to prevent, rather than by deliberate acts.<sup>207</sup> Under domestic law, SPLA personnel that mistreat detainees have committed a criminal offense and are subject to prosecution and punishment by a martial court.<sup>208</sup> If implicated, the acting Leer County Commissioner could be subject to prosecution under the South Sudanese Penal Code or under international criminal law for serious violations of the Geneva Conventions.<sup>209</sup>

### D. Starvation of Civilian Populations

343. Conduct that leads to the starvation of the civilian population may amount to a violation of the right to life under the ICCPR. In addition, the so-called ‘scorched earth’ policy is an impermissible method of warfare under international humanitarian law. The practice of razing entire villages by burning down homes while pillaging and destroying resources constitutes a deliberate deprivation of objects indispensable to the survival of the civilian population. This conduct is clearly prohibited by Article 14 of Additional

<sup>204</sup> See *Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para. 129), ruled that war crimes in non-international armed conflicts may include serious violations of common article 3, of relevant provisions of AP II and of customary international law; see also Rome Statute, Art. 8(2)(e)(iii).

<sup>205</sup> AP II, Art. 5(2), 5(3); SPLA Rules and Regulations, Appendix A, Sec. 77.

<sup>206</sup> See discussion of individual criminal responsibility *infra* Part 1, III.

<sup>207</sup> See AP II, Art. 5(2)(e).

<sup>208</sup> SPLA Act (2009), Chapter VIII, Sec. 77.

<sup>209</sup> Article 8(2)(c) of the Rome Statute defines “violence to life and person, in particular murder of all kinds” of civilians and detained combatants as a serious violation of Common Article 3 to the Geneva Conventions.

Protocol II, which forbids the starvation of civilians as a method of combat. The assessment team and UNMISS received numerous reports of crop burning, cattle raiding, and looting and destruction of food storage. The malnutrition observed in Unity County in the aftermath of such incidents illustrates the indispensability of those resources for vulnerable communities.<sup>210</sup>

## E. Discrimination and Targeting on the Basis of Ethnicity

344. Armed groups affiliated with both the SPLA and SPLM/A-IO have reportedly singled out civilians on the basis of ethnicity— Nuer, Dinka, Shilluk, or Darfuri—as targets for violence or mistreatment. This discriminatory treatment is a violation of international human rights law, namely the right to equality and non-discrimination as well as a violation of both Common Article 3 and the fundamental guarantees set forth in Article 4 of Additional Protocol II.<sup>211</sup>

345. Depending on the circumstances, such pattern of discriminatory attacks based on ethnicity, if established in a court of law, may amount to war crimes and/or crimes against humanity.<sup>212</sup>

## F. Sexual and Gender-based Violence

346. The rape, including gang-rape, of women is a serious violation of international human rights law. Sexual violence is prohibited notably through the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

347. Rape committed in connection (nexus) with an armed conflict breaches international humanitarian law and may amount to a war crime giving rise to individual criminal liability.<sup>213</sup> Additional brutality or humiliation accompanying rapes may constitute outrages upon personal dignity and cruel treatment and give rise to additional liability for those deemed responsible.<sup>214</sup>

348. The assessment team findings suggest that rape has been an element of an intentional strategy for terrorizing and punishing the civilian population. If a court of law concludes these rapes of civilians were widespread or systematic in nature, these offenses may further amount to the crimes against humanity of rape and sexual violence.<sup>215</sup> Where

<sup>210</sup> See IPC Report, 22 October 2015. IPC released a report stating that 30,000 people were estimated to be experiencing Catastrophe (IPC Phase 5) food security outcomes in Unity state's Leer, Guit, Koch and Mayendit counties. The people who fled to the bush during the intensification of violence between April–June are most affected.

<sup>211</sup> See Art. 26, ICCPR, Art. 2 (3) of ICESCR; CA3(1); AP II, Art. 4(1).

<sup>212</sup> As defined in Article 7 of the Rome Statute.

<sup>213</sup> AP II, Art. 4(2)(e); See also Furundžija case in 1998 and Kunarac case in 2001, the International Criminal Tribunal for the former Yugoslavia, See also Rome Statute, Art. 8(2)(e)(vi).

<sup>214</sup> Rome Statute, Art. 8(2)(c)(i) and Art. 8(2)(c)(ii).

<sup>215</sup> See “rape” constitutes a crime against humanity under the Statutes of the International Criminal Tribunals for the former Yugoslavia (Article 5(g)) and Rwanda (Article 3(g)); see also Art. 7(1)(g) of the Rome Statute. Note that reports by both the AU COI and UNMISS found reasonable grounds to conclude that crimes against civilians in South Sudan were committed in a “widespread or systematic” manner. See Report of The African Union Commission of Inquiry on South Sudan, 2014, para. 809; UNMISS Report, May 8 2014, para 8.

the victims of sexual violence were targeted, humiliated, or tortured on basis of their ethnicity, the crime against humanity of persecution is also applicable.<sup>216</sup>

349. The abduction of women in Unity State to serve as “wives” to soldiers may amount to sexual enslavement<sup>217</sup> which, if established in a court of law and depending on the circumstances may constitute a war crime and a crime against humanity.<sup>218</sup>

## **G. Violations relating to the deprivation of liberty**

350. The assessment team documented patterns of arbitrary arrest and detention by government security forces and abductions by associated militia in Juba and Unity State. Some of these violations were facilitated by the extensive powers of arrest and detention provided for by the National Security Act. Such cases of arbitrary detention are in violation of the State’s obligations under international human rights law as well as provisions of national law, including provisions of the Transitional Constitution of South Sudan. Abductions by associated militia also constitute human rights violations or abuses.

## **H. Crimes against Children**

351. The assessment team has received reports of recruitment and use of child soldiers in Bentiu, Leer, Malakal, and Renk, and in some circumstances directly witnessed children in uniform. If, as alleged, forces affiliated with the SPLA and the SPLM/A-IO recruited boys younger than fifteen, then those parties have violated Additional Protocol II.<sup>219</sup> SPLA is also bound by applicable international human rights law, and South Sudan’s domestic law, which set a more restrictive standard, i.e. the prohibition of the recruitment of soldiers under the age of 18.

## **I. Destruction and Looting of Property**

352. Civilian property is protected under international human rights<sup>220</sup> and international humanitarian law. The deliberate destruction of such protected property when there is no military necessity may amount to a war crime in non-international armed conflict.<sup>221</sup> The extensive destruction of residential structures in Malakal between January and March 2014 is an example of damage that appears not to have been justified by military necessity. The number, extent, and frequency of hut burnings across Unity State by the SPLA and associated militia throughout 2015 also lead to questioning any military necessity in carrying out such attacks.

353. The assessment team also documented numerous accounts of cattle raids. These raids violated the Additional Protocol II provision proscribing pillage and—given the

<sup>216</sup> Rome Statute, Art. 7(1)(h).

<sup>217</sup> See for example : ICTY, Kunarac et al, Trial Chamber, Judgment, 22 February 2001, para 539: The Trial Chamber found that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person

<sup>218</sup> All enslavement—sexual or otherwise—is specifically prohibited in non-international armed conflict, per Additional Protocol II AP II, Art. 4(2) (f).

<sup>219</sup> AP II, Art. 4(3) (c).

<sup>220</sup> See Art. 17, ICCPR, “...arbitrary or unlawful interference with his privacy, family, home.”

<sup>221</sup> Articulated in Rome Statute, Art. 8(2)(e)(xii), which reflects a point of customary international law.

reliance of the affected communities on cattle as currency—in some instances further violated the provision prohibiting the deliberate starvation of civilian populations.<sup>222</sup>

354. The prohibition on pillage extends to property belonging to private persons, as well as to property belonging to communities or the state.<sup>223</sup> The alleged “do what you can, take what you can” arrangement, by which armed youth groups in Unity apparently derived their compensation from pillaged goods rather than from salary, constitutes a form of organized pillage—conduct which falls within the prohibition in Article 4 of Additional Protocol II.

## **J. Terrorizing and Punishment of Civilian Populations**

355. As detailed above, killings and acts of violence (physical or sexual) committed against civilians constitute serious violations of human rights and international humanitarian law. If it were to be established by a court of law that such acts are committed (or threatened to be committed) with the intent of terrorizing the civilian population, those responsible may additionally have violated Article 13(2) of Additional Protocol II.

## **K. Violations of freedom of opinion and expression and of assembly**

356. Since the outbreak of violence in December 2013, the Government and its national security apparatus has attempted, with some success, to suppress debate and opposition resulting in fear among the population. Prior to 2015, the Government had closed media outlets, confiscated newspapers and media equipment, arrested and detained journalists, including UN national staff. This pattern of harassment continued into 2015. Seven journalists have been killed in 2015. Journalists have been detained without charge. Media houses, such as The Citizen have been closed. In August the President made a statement that was perceived as a veiled threat of violence against journalists. Political opponents such as the former governor of Western Equatoria have been detained by the national security apparatus without access to the courts or a lawyer. Civil society actors in Wau were detained for expressing concern with state violence, and only released on the condition they publicly apologize for exercising their freedom of expression.

357. Attacks on the freedom of opinion and expression and peaceful assembly, as well as arbitrary arrests for exercising these rights violate the State’s obligations under international human rights as well as provisions of the national law, including provisions of the Transitional Constitution.

## **L. Organization of the Relevant Authorities and Armed Actors**

358. Following South Sudan's independence in 2011, the SPLA became the new republic's standing army and President Kiir its Commander-in-Chief. As of end of 2015, the SPLA was estimated to have over 100,000 soldiers, although the total figure is uncertain because of affiliated militia and armed youth groups. It is divided into eight divisions, with sector, division, brigade and battalion commanders, plus a Commando unit and Presidential Guard.

<sup>222</sup> AP II, Art. 4(2) (g), Art. 14.

<sup>223</sup> See Commentary to Geneva Conventions IV, Art. 33, upon which AP II, Art. 4(2) (g) is based.

359. In addition to the SPLA standing army, the government has apparently used a diverse range of armed groups. These groups are a combination of national security officers, militia and tribal youth. Leadership of these forces is often through local political and military leaders, including county commissioners (many of whom also hold rank within the SPLA). The local political leaders have been significantly involved in the mobilization of local youth and militia elements, working with military leaders to implement the war strategy and oversee forces and resources.

360. Armed youth, ranging in age from young children in their teens to adults, are an important component of military operations for both the government and SPLM/A-IO, and are often organized on the basis of tribal identity and drawn from specific geographical areas.

361. Opposition forces are a combination of standing army elements of the SPLA which defected, and tribal youth groups, including the so-called ‘White Army,’ which is an amalgamation of Nuer sub-groups from Jonglei State. In 2015, further defections from the government to the opposition occurred, largely Shilluk SPLA forces in Upper Nile. Despite these defections, in 2015, the opposition has largely been on the defensive, failing to launch any major offensive in the country and holds no major urban areas.

## VII. Justice and Accountability

*“The government feels secure, that nothing will be done to them.”<sup>224</sup>*

### A. Government and Opposition responses to conflict-related violence

#### 1. Introduction

362. States have an obligation to investigate promptly, thoroughly, independently and impartially any allegations of human rights violations or abuses, prosecute and punish those responsible, ensuring victims have an adequate and effective remedy for such violations, as well as guarantees of non-recurrence.<sup>225</sup> In addition, South Sudan is party to international treaties that provide for an obligation to investigate allegations of violations of international law and to prosecute alleged perpetrators.<sup>226</sup>

363. Over the course of the conflict both sides have made repeated commitments to protect civilians, end the violence and punish perpetrators. A full list of commitments related to accountability can be found in Appendix II.

#### 2. The Government

364. On 24 January 2014, President Kiir announced the establishment of an ‘investigation committee on human rights abuses,’ mandated to investigate human rights abuses committed by both parties to the conflict.<sup>227</sup>

<sup>224</sup> Witness statement on file.

<sup>225</sup> The Universal Declaration of Human Rights, see also International Covenant on Civil and Political Rights; See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>226</sup> The Convention against Torture and the Geneva Conventions and its Additional Protocols.

<sup>227</sup> Presidential Order 06/2014 (24 January 2014).

365. On 16 May 2014, President Kiir stated he would try perpetrators for the human rights violations and abuses committed since the conflict began. He said he would “not protect anybody, and I have instructed the investigation committee led by Justice (John) Wuol Makec to see that all these people who committed crimes must be punished, if need be, with death.”<sup>228</sup> The Government informed UNMISS and the UN Assistant Secretary-General for Human Rights that the investigation committee report, a consolidation of three separate reports, covering the SPLA, police and NSS, had been presented to the President on 2 December 2014.

366. In February 2015, President Kiir made assertions to a senior UN human rights official that he would release the consolidated national investigations report. On 24 February 2015, President Kiir issued Republican Order No. 6/2015, granting amnesty to “all those waging war against the State” who report to Government-controlled areas to take advantage of the offer. The order placed no conditions on the extent of the amnesty, leading to the inference that it was a ‘blanket’ amnesty that would prevent legal proceedings against all suspects, without distinction, on condition that they report to Government-controlled areas between 24 February and 31 March 2015, when the offer expired. There was no meaningful response from the SPLM/A-IO.

367. The Head of the Assessment Mission met with the Minister of Defence, the General Chief of Staff and the Governor of Unity State to discuss the alleged violations committed by SPLA forces in Unity State and elsewhere. All denied giving orders to displace, kill or rape civilians and refuted the earlier reported allegations made by UNMISS and AU COI. The officials admitted that during the conflict some civilians had been killed in “cross-fire” between the SPLA and SPLA-IO.

368. The Governor of Unity State informed the Head of the Assessment Team that, following allegations of SPLA violations by Human Rights Watch, in the summer of 2015 the SPLA had undertaken an investigation and produced a report.<sup>229</sup> The Governor promised he would provide the report to the assessment team. It was however not provided. In addition, the Governor stated that many of the allegations of violations by the SPLA were fabricated by persons residing in UNMISS POC sites and by UNMISS language assistants.

369. With regard to the events unfolding in Wonduruba, Central Equatoria State, described above, a senior state government official informed the assessment team that he had confirmed the accounts of civilians that violence had been committed by the SPLA in, and around Wonduruba, in September 2015.

### 3. The Opposition

370. In August 2014, Riek Machar, in an interview with The Africa Report, claimed his forces were conducting an investigation into the killings in Bentiu in April 2014. He stated, “we are also investigating the incidents which happened, the issue of Bentiu, which was highlighted. Now it has boiled down to a squad of ten people. So we are locating them one by one.”<sup>230</sup> Machar had “given instructions to Peter Gadet, who is the commander in the area, to locate the ten and in particular that guy who had a machine

<sup>228</sup> See <http://www.aa.com.tr/en/rss/329575--kiir-vows-to-try-people-involved-in-s-sudan-crimes>.

<sup>229</sup> “They Burned it All,” Human Rights Watch, 22 July 2015.

<sup>230</sup> “South Sudan's people are forced to fight this war - Riek Machar,” The Africa Report, 11 August 2014. See <http://www.theafricareport.com/East-Horn-Africa/south-sudans-people-are-forced-to-fight-this-war-riek-machar.html>.

gun.”<sup>231</sup> A report would be published and “we will provide it to the African Union commission of inquiry.”<sup>232</sup> No such report was provided to the AU COI.

371. In February 2015, SPLM/A-IO representatives stated that it was committed to investigating the alleged atrocities by its forces in Bentiu in April 2014 and throughout the country. SPLM/A-IO head of external relations, Dhieu Mathok Diing, in an interview with local media, stated that “we have formed an investigation committee,” and “the investigations are in Bentiu town alone because there were reported massacres in different areas in South Sudan.”<sup>233</sup> Some five months later, in July 2015, Machar informed the same local media that the SPLM/A-IO had not actually established a committee. He stated, “honestly, before we could form a committee, the [UNMISS] investigation came out on this subject, and we already know who committed these crimes...so if there is a court we will be ready to help.”<sup>234</sup>

372. There is no evidence or available public information of any genuine Government accountability efforts, or the results of those efforts, to investigate, prosecute and punish violations.

## **B. Capacity and competence of the judicial system**

373. As this report highlights, much of the violence in this conflict appears to have been caused by the SPLA and SPLM/A-IO. Notwithstanding the proposed creation of a hybrid court, discussed below, to prosecute perpetrators, it is unlikely the hybrid court have the capacity to prosecute the thousands of possible suspects. This raises the question regarding what role, if any, there is for the national justice system of South Sudan. Does the legal system have the competence and capacity to independently and impartially investigate, prosecute, and adjudicate the violations and abuses of human rights and violations of international humanitarian law described in this and other reports?

### **1. Role of the National Justice System**

#### *Capacity and competence*

374. Assisting the Republic of South Sudan in strengthening its institutions of justice was a major plank of the state-building mandate given to UNMISS in 2011 by the UN Security Council.<sup>235</sup> Since then, the lack of capacity and competence in South Sudan to independently and impartially investigate, prosecute, and adjudicate serious crime has been well documented by both the High Commissioner, UNMISS and international human rights organizations.<sup>236</sup> In previous reports to this Council, the High Commissioner

<sup>231</sup> Id.

<sup>232</sup> Id.

<sup>233</sup> “SPLA-IO rebels begin investigation into April 2014 Bentiu massacre,” Radio Tamazuj, 25 February 2015.

<sup>234</sup> “Riek Machar admits SPLM/A-IO never investigated Bentiu massacres,” Radio Tamazuj, 8 July 2015.

<sup>235</sup> See UN Doc. S/RES/1996 (2011), para. 3 (c) (“...developing its capacity to provide security, to establish rule of law, and to strengthen the security and justice sectors”).

<sup>236</sup> See, e.g., Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, UN Doc. A/HRC/28/49 (27 March 2015), Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, UN Doc. A/HRC/27/74 (19 September 2014); ‘Incidents of Inter-communal violence in Jonglei State,’ UN Mission in South Sudan, June 2012; and, ‘Report on the 8 February 2013 attack on Lou Nuer pastoralists in Akobo West Sub-County, Jonglei State,’ April 2013, UN Mission in South



had raised concerns regarding the profound deficits in the South Sudanese justice system.<sup>237</sup> These include the lack of fair trial and due process rights, arbitrary detention, and lack of independence among prosecutors and judges, the lack of access to legal counsel, legal aid, the application of the death penalty and the uncertain jurisdiction of customary courts.<sup>238</sup>

375. In addition to concerns regarding the fairness and effectiveness of the ‘legal process,’ there is also a deficit in ‘legal tools,’ including access to copies of laws in force and a corresponding understanding of how to apply them. There is little administrative support for legal actors and much of the judicial infrastructure is dilapidated. According to the former Inspector General of the South Sudan Police, seventy per cent of police officers, who are primarily former SPLA soldiers, are illiterate, without the necessary skills to undertake basic criminal investigations and maintain investigation records.<sup>239</sup>

376. The lack of independence of South Sudanese prosecutors and judges has also been identified by international human rights organizations as a major concern with the judicial system.<sup>240</sup> It is not clear whether state authorities have ever undertaken prompt, thorough, independent, and impartial investigation and prosecution of any serious crime. For example, the assessment team was informed by credible sources that there is no memory of the police in Juba effecting an arrest for murders taking place in the capital, including the killing of prominent journalists.

377. These challenges have only been exacerbated by the conflict. There have been no prosecutors or judges in the conflict-related areas since December 2013. The Chief Justice of South Sudan informed a senior UN official that there were only two prosecutors in Central Equatoria, “a state the size of Switzerland.”<sup>241</sup> The consequence is that serious cases are often addressed by traditional customary courts, which are not equipped to meet international fair trial and due process standards and often act outside their jurisdiction. In addition, these customary courts often impose unlawful detention, even for minor offences, and harsh penalties on women.<sup>242</sup>

378. In addition to concerns related to capacity, competence, lack of independence and presence, the other major challenge faced by international actors providing technical assistance has been the issue of language and the legal process. Though English is the official language of the country and the legal system, the overwhelming majority of actors in the system of administration of justice – police, prosecutors and judges – and citizens, including victims, witnesses and defendants do not speak English. In Juba, the lingua franca is “Juba Arabic.” Outside Juba, the language spoken is that of the respective tribes present in the territory. Throughout South Sudan, official documents of the police and the

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Sudan; ‘Ending the Era of Injustice,’ Human Rights Watch, 10 Dec. 2014.

<sup>237</sup> See e.g., Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, UN Doc. A/HRC/28/49 (27 March 2015), Report of the United Nations High Commissioner for Human Rights on the situation of human rights in South Sudan, UN Doc. A/HRC/27/74 (19 September 2014).

<sup>238</sup> Id.

<sup>239</sup> Meeting between former Inspector General for Police and UN Assistant Secretary-General for Human Rights, February 2015. Note on file.

<sup>240</sup> “Ending the Era of Injustice,” Human Rights Watch, 10 Dec. 2014.

<sup>241</sup> Meeting between Chief Justice and UN Assistant Secretary-General for Human Rights, February 2015. Note on file.

<sup>242</sup> For an analysis of local justice systems in local counties in South Sudan, see ‘Challenges of Accountability - An Assessment of Dispute Resolution Processes in Rural South Sudan,’ The South Sudan Law Society, March 2013. see also ‘Local Justice in Southern Sudan,’ United States Institute of Peace and the Rift Valley Institute (24 September 2010).

courts are in Arabic or “Juba Arabic”, and similarly for court proceedings because most legal actors were trained in Sudan.<sup>243</sup>

379. Where there is a functioning judicial process in place, court procedures, though by law intended to be adversarial, are often a mix of common law, Shari’a and civil law.<sup>244</sup>

380. Even if there were the capacity and legal skills to undertake criminal investigations and prosecutions of the violations referenced in this report, the capacity of prisons in the country to hold persons in pre-trial detention or those convicted is very limited. All state prisons are dilapidated and do not provide a safe, secure or humane environment. Prison security in these prisons is porous and prisoners are able to escape from custody without difficulty.

381. The national law of South Sudan contains provisions which could, theoretically, be used to investigate and prosecute the most serious crimes documented in this report, including murder, recruitment or use in hostilities of children, deprivation of liberty, rape and other forms of sexual violence and persecution on the basis of ethnicity. The State’s obligation to respect, uphold and promote human rights is enshrined in the Bill of Rights of the 2011 Transitional Constitution.

382. Article 9 (2) stipulates that “the rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.” Individual articles commit the government to uphold the preservation of life and human dignity (Article 11), the guarantee of personal liberty (Article 12) and freedom from slavery (Article 13). The rights to life and the physical integrity of an individual are also protected by national criminal law in several provisions of the Penal Code Act of 2008, including murder, kidnapping, rape and other sexual offences, damage or destruction of property, and offences related to hate speech and incitement to violence.

383. With regard to children, South Sudan’s domestic legislation codifies many international and regional human rights standards on child rights and protection: the Penal Code Act of 2008 and the Child Act of 2008 both criminalize child abduction and child trafficking. The Child Act provides for enforcement when it states, “The Government shall take concrete measures to protect children from all forms of abuse and to ensure that any child who becomes the victim of abuse, as set out in this section shall be accorded appropriate treatment and rehabilitation” (Art. 22).

384. One aspect of the national legal framework that raises concern is Section 43 and 44 of Code of Criminal Procedure Act. Contained within Chapter VI, Restrictions on Initiating Criminal Cases, Section 43, “Cases Involving Public Servants,” restricts the prosecution of public servants for certain Penal Code offences.<sup>245</sup> Section 44, ‘Trials of Offences Against the Government,’ states that “[n]o person shall be brought to trial...without a previous written (italics added) sanction of the President or of the person whom he or she authorizes to give such sanction; provided that the President of the Supreme Court of Southern Sudan, by order, constitutes a Special Court for the trial of any person accused under the above mentioned sections of the Penal Code or any other Law.”<sup>246</sup> These sections, though lacking clarity, appear to provide immunity to state actors for criminal activity, and would be inconsistent with international human rights standards.

<sup>243</sup> In December 2015, the assessment team monitored a series of legal proceedings in Juba.

<sup>244</sup> Id. Cases monitored by the assessment team in Juba witnessed the parties being examined directly by the judge, with prosecution and defense counsel often remaining silent.

<sup>245</sup> Section 43, Code of Criminal Procedure Act 2008, Chapter VI.

<sup>246</sup> Section 44, Code of Criminal Procedure Act 2008, Chapter VI.

385. The Government has previously issued pardons for offences against the State. In a series of “pardons” (amnesties) issued in 2010 and 2013, President Kiir pardoned “rebels” and “militias,” and “other armed groups.”<sup>247</sup>

## 2. Past Government responses to serious crime

386. In addition to the deficits highlighted above, the Government has repeatedly exhibited unwillingness to enforce laws which could be used to hold to account those responsible for killings, abductions, rapes and other serious crimes that occurred post-CPA up until the beginning of the crisis in December 2013. Prior to independence, the most serious attack on civilians took place in 2009, in Akobo and Pibor (Jonglei State), in which it was alleged 1,000 civilians were killed by armed youth.<sup>248</sup>

387. In the period since independence, several thousand civilians, including women and children, have been killed or abducted, and property extensively destroyed.<sup>249</sup> These crimes occurred mainly in the context of retaliatory attacks and cattle raiding in Jonglei State, with perpetrators enjoying total impunity from the criminal justice system. This is despite the fact that many of those responsible were reportedly known to local officials.

388. With regard to the killings and abductions that occurred in Jonglei from 23 December 2011 to 4 February 2012,<sup>250</sup> a Presidential Order was issued in March of that year, establishing an “Investigation Committee on Jonglei State Crisis.” There is no record of its activities or any public report of its findings. According to UNMISS, the Committee was never sworn in.<sup>251</sup>

389. In February 2013, further violence between ethnic groups occurred, resulting in the killing of approximately 118 civilians, including women, children and the elderly.<sup>252</sup> UNMISS issued a public report on these events and urged the Government to investigate and punish perpetrators.<sup>253</sup>

390. There appears to be strong political and cultural reasons for the failures to prosecute inter-communal violence. In the context of murders, rapes and abductions in Jonglei in 2011 through 2012, UNMISS highlighted that: “[p]art of the reason for this is the fact that cattle raids and the acts which accompany them are often portrayed, including by government, police and judicial officials as “legitimate” traditional, cultural practices, rather than criminal offences to be prosecuted.”<sup>254</sup>

<sup>247</sup> Presidential Orders 21/2010, 22/2010 and 06/2013.

<sup>248</sup> See International Crisis Group, *Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan*, 23 December 2009.

<sup>249</sup> ‘Incidents of Inter-communal violence in Jonglei State,’ UN Mission in South Sudan, June 2012; and, ‘Report on the 8 February 2013 attack on Lou Nuer pastoralists in Akobo West Sub-County, Jonglei State,’ April 2013, UN Mission in South Sudan.

<sup>250</sup> An UNMISS investigation determined almost 900 civilians had been killed. See ‘Incidents of Inter-communal violence in Jonglei State,’ UN Mission in South Sudan, June 2012, at pg.i.

<sup>251</sup> Report on the 8 February 2013 attack on Lou Nuer pastoralists in Akobo West Sub-County, Jonglei State,’ April 2013, UN Mission in South Sudan at pg.16.

<sup>252</sup> Id.

<sup>253</sup> Id.

<sup>254</sup> Incidents of Inter-communal violence in Jonglei State,’ UN Mission in South Sudan, June 2012, at pg. 28.

## C. Accountability and the Peace Agreement

### 1. Background

391. On 19 August 2015, under the stewardship of IGAD, the parties to the conflict signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan, establishing a Transitional Government of National Unity (TGNU).<sup>255</sup> Chapter V of the agreement, ‘Transitional Justice, Accountability, Reconciliation and Healing,’ contains provisions for the establishment of three transitional justice bodies to “independently promote the common objective of facilitating truth, reconciliation and healing, compensation and reparation.”<sup>256</sup> These are the Commission for Truth, Reconciliation and Healing, an independent hybrid judicial body, to be known as the Hybrid Court for South Sudan (HCSS), and the Compensation and Reparation Authority. The Agreement commits the TGNU to “fully cooperate and seek the assistance of the African Union, the United Nations and the African Commission on Human and People’s Rights to design, to implement and to facilitate the work of the agreed transitional justice mechanisms provided for in this Agreement.”

392. For truth-seeking mechanisms to be effective there must be political will to allow and actively support an inquiry into past violations and abuses; the violent conflict must have come to an end; and, there must be interest on the part of victims and witnesses to have such process undertaken and cooperate with it. Genuine and broad based consultations as well as needs assessment should be conducted to inform the efforts aimed at truth, reparations and reconciliation.

393. The hybrid judicial court, the HCSS, is to be established by the African Union Commission “to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period.”<sup>257</sup> Unlike the two other bodies being established, Chapter V did not explicitly provide a time frame for the establishment of the HCSS.

#### *Hybrid Court for South Sudan (HCSS)*

394. The Peace Agreement did not determine the seat of the HCSS, stating this would be a decision left to the Chairperson of the AU Commission<sup>258</sup> although the language of the text of the Agreement implies it could be based in South Sudan. Under the heading, ‘Jurisdiction Mandate Supremacy,’ the Agreement states the “[t]he HCSS shall be independent and distinct from the national judiciary in its operations, and shall carry out its own investigations: The HCSS shall have primacy over any national courts of RSS (Republic of South Sudan).”<sup>259</sup> In addition, the Agreement states the “HCSS shall leave a permanent legacy in the State of South Sudan Upon completion of its HCSS Mandate.”<sup>260</sup>

395. With regard to ‘Personnel and Appointment Procedures,’ the Agreement provides for the appointment of South Sudanese judges, though all other legal actors must be

<sup>255</sup> Agreement on the Resolution of the Conflict in the Republic of South Sudan (19 August 2015).

<sup>256</sup> See Section 1.3 of Chapter V, Agreement on the Resolution of the Conflict in the Republic of South Sudan.

<sup>257</sup> See Section 3.1.1 of Chapter V, Agreement on the Resolution of the Conflict in the Republic of South Sudan.

<sup>258</sup> Id at Section 3.1.3 of Chapter V.

<sup>259</sup> “The HCSS shall leave a permanent legacy in the State of South Sudan Upon completion of its HCSS Mandate.” See Section 3.2.2, Chapter V.

<sup>260</sup> Id at Section 3.5.6, Chapter V.

selected from other African States.<sup>261</sup> The Agreement suggests the court would lead on criminal investigations, though it is unclear whether the South Sudan National Police would play a role.

396. On 26 September 2015, the AU Peace and Security Council (PSC) adopted a decision regarding the AU COI report, in which it reiterated its “conviction of the need to promote an African solution to the challenges at hand, as opposed to a “one-size-fits-all remedy,” packaged as universal.”<sup>262</sup> The PSC supported the creation of a hybrid tribunal on the basis it was an “African-led and Africa-owned legal mechanism.”<sup>263</sup> The PSC requested the Chairperson of the Commission “to take all necessary steps towards the establishment of the HCSS, including providing broad guidelines relating to the location of the HCSS, its infrastructure, funding and enforcement mechanisms, the applicable jurisprudence, the number and composition of judges, privileges and immunities of Court personnel and any other related matters.”<sup>264</sup> In the context of criminal accountability, the PSC Communique also stated there was a role for traditional customary processes.<sup>265</sup>

## 2. Chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan

397. There are concerns with aspects of Chapter V that relate to the seat of the court, the appointment of judges from South Sudan, the entity that would lead the criminal investigations and the possible role of traditional customary processes in ensuring accountability for gross human rights violations, human rights abuses and serious violations of international humanitarian law, including those amounting to international crimes.

398. Basing the HCSS in South Sudan could be advantageous because it would be close to victims and witnesses. However, there are serious security concerns for legal actors.<sup>266</sup> South Sudan and Juba in particular, have experienced widespread lawlessness, including killings and violence. Though Chapter V implies the HCSS would have the lead in investigations, it is not clear whether the South Sudan police would have a role. As referenced earlier, much of the police are illiterate and investigation tools are modest at best. There are gaps in criminal procedures and the legal process. Moreover, there is no system in place to protect victims and witnesses, court infrastructure is dilapidated and prisons, also derelict, are insecure environments.

399. The majority of judges in South Sudan were educated and trained in Sudan. Though the official language is English, the common language of the courts and in official documents is Arabic. Judicial processes, though formally common law, are in practice a mixture of common law, Shari‘a and civil law. The judges of South Sudan have no experience in adjudicating complex cases or crafting legal reasoning in relation to international crimes. In addition, there have been reports of intimidation of judges (and lawyers) by state actors.<sup>267</sup>

<sup>261</sup> Id at Section 3.3.2, and 3.3.5, Chapter V.

<sup>262</sup> See Communique of 547<sup>th</sup> meeting of the Peace and Security Council (26 Sept. 2015) (‘the Communique’).

<sup>263</sup> See id, at para. 22 (ii) (a).

<sup>264</sup> Id.

<sup>265</sup> “[A]n appropriate role should be fashioned for traditional justice and conflict resolution mechanisms, to be established in relationship with formal accountability processes.” See para. 22 (ii) (b), ‘the Communique.’

<sup>266</sup> See ‘Ending the Era of Injustice,’ Human Rights Watch, 10 Dec., 2014.

<sup>267</sup> See ‘Ending the Era of Injustice,’ Human Rights Watch.

400. For decades, traditional customary processes have played the major role in dispute resolution among civilians in South Sudan. Traditional customary processes are explicitly referenced in the Transitional Constitution as a source of law.<sup>268</sup> The vast majority of South Sudanese use such processes to resolve civil and criminal cases, including serious crime. In some instances, traditional customary processes have played a role in addressing violations committed during serious inter-communal violence. Outcomes are primarily moored in principles of forgiveness and reconciliation, as opposed to individual criminal responsibility.<sup>269</sup>

401. Nevertheless, given the breadth and depth as well as type of the crimes alleged in this report, it seems highly improbable traditional customary processes are fit for purpose – those responsible, possibly in the thousands, are primarily SPLA soldiers and SPLM/A-IO fighters. Moreover, there has been considerable sexual violence perpetrated in this conflict, a type of violation that traditional customary processes do not provide for adequate redress in line with international standards. Finally, there are no due process and fair trial guarantees and little oversight of customary decisions by the formal judicial processes.<sup>270</sup>

402. This naturally raises the question; in light of the deficiencies of traditional customary processes, and given that the HCSS will only investigate and prosecute a limited number of senior political and military leaders, there is a need to identify complimentary means to ensure accountability for the large number of suspects. One possibility is the creation of a specialized judicial structure within the national judiciary that would be responsible for the investigation, prosecution and adjudication of violations and abuses amounting to international crimes.

403. Building on UN experiences and lessons learned from Kosovo and Timor Leste, consideration should be given to include international prosecutors and judges, supported by international investigators, to serve in the national judicial system, alongside their existing counterparts, and operating under existing laws and procedure.<sup>271</sup> Of course, considerable challenges would remain, stated above, with regard to witness protection and the safety of judicial actors, in addition to the problem of a dilapidated prison system and the current application of the death penalty. In addition, various provisions of the local procedure code would need amending to conform to international fair trial and due process standards.

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<sup>268</sup> The Transitional Constitution of the Republic of South Sudan, 2011, Part 1, V.

<sup>269</sup> See 'Local Justice in Southern Sudan.' USIP/Rift Valley Institute, 2010.

<sup>270</sup> See 'Article 14: Right to equality before courts and tribunals and to a fair trial, General Comment 32,' UN Human Rights Committee, UN Doc., CCPR/C/GC/32, 23 August 2007 ("recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts," at para.24).

<sup>271</sup> See, e.g., Regulations UNMIK 2000/6, 2000/34, 2000/64 and 2001/2, allowing for the appointment of international judges and prosecutors to the local judiciary. OHCHR Rule of Law Tools for Post-Conflict States Rule-of-law tools for post-conflict States, "Maximizing the legacy of hybrid courts."

### 3. Capacity building and technical assistance

404. The UN and international donors have been engaged in capacity-building in South Sudan since 2005. The priority areas for reform have been institutions of criminal justice, with a focus on police, prosecutors, judges and prisons, as well as training on combatting sexual and gender-based violence. International police and prison experts have been co-located, co-mentoring their national counterparts for more than a decade. However, despite the considerable human and financial capital expended, there was modest success in all of these areas. Some members of that same police force were implicated in the killings of civilians in December 2013.

405. Following the outbreak of violence in December 2013, in May 2014, the Security Council amended the peacekeeping operation's mandate, re-prioritizing the focus to the protection of civilians, human rights monitoring and investigation, creating the conditions for delivery of humanitarian assistance and supporting the implementation of the Cessation of Hostilities Agreement.<sup>272</sup> Capacity-building support was suspended.

406. More than two years on from the beginning of the conflict, there is considerable pressure from the Government for the international community to return to providing capacity-building support. Given the findings in this report, that in 2015, state actors primarily bore the greatest responsibility for the violations of both international human rights law and international humanitarian law in the face of a weakened opposition force it is not timely to re-introduce UN assistance in the form of training and other support to government entities.

407. Supporting any capacity building activities to government entities would implicitly condone the violations contained in this report. Capacity building to the transitional authorities could be viable on the basis that the TGNU commits to ending the violence against the civilian population, to the removal of perpetrators from TGNU structures, including the SPLA and the security services, and demonstrates a commitment to cooperate with the Hybrid Court for South Sudan.

408. If those commitments are made, the High Commissioner would encourage exploring technical support to aspects of Chapter V of the Peace Agreement, including assistance to consultations as well as a needs assessment to inform efforts aimed at truth, justice, reparations and reconciliation.

409. Such support needs to take account of the fact that there has been wide-spread displacement and destruction throughout much of the country, which has severely weakened and transformed communities and local government structures. Much of the population is deeply traumatized by the years of violence. Initiatives related to reconciliation, including awareness-raising and a national consultation process need to take this into account.

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<sup>272</sup> UN Doc. S/RES/2155 (2014).

## Part 4

### VIII. Conclusions

410. Since mid-December 2013, gross violations and abuses of international human rights law and serious violations of international humanitarian law have been perpetrated in South Sudan. This has included killings and other attacks against civilians, rape and other sexual violence, arbitrary arrest and detention, deprivation of liberty, abduction and violations of child rights including recruitment and use in hostilities. All parties to the conflict are responsible for violations of international law. In 2015, however, state actors, primarily bore the greatest responsibility for the violations of both international human rights law and international humanitarian law in the face of a weakened opposition force.

411. The government's military offensive in Unity State, resulted in the spread of terror among civilians including killings, widespread sexual and gender based violence and pillaging of property. In addition to conflict-related violence, the Government increasingly suppressed freedoms of expression and other democratic rights.

412. The Government's failure to produce the reports of its investigations into violations committed in 2013 and 2014, or to undertake any investigations leading to prosecutions of the allegations of violations of international humanitarian and human rights law and human rights abuses, raises questions as to its commitment to ensuring accountability.

413. The legacy of violence and revenge, lack of political will, the patterns of violations documented in this report, and the impunity enjoyed by perpetrators, will require far reaching reforms in relation to governance, the security apparatus and the judicial system in order to provide respect and protection for human rights and prevent similar violations from occurring again.

414. The lasting and only viable solution to protect and promote human rights in South Sudan is to dismantle the apparatus of violence and holding to account those responsible for the immense suffering of the population. While reconciliation processes may be an essential part of the peace efforts, the failure to ensure accountability, including the failure to expeditiously establish the Hybrid Court for South Sudan and the other measures under Chapter V of the peace agreement will undoubtedly contribute to new cycles of violence.

### IX. Recommendations

415. The High Commissioner reiterates the recommendations made in previous reports to the Human Rights Council which remain largely unimplemented and remain valid.

416. Recognizing the urgent need to bring an end to the extensive human rights violations and abuses and violations of international humanitarian law in South Sudan, and to provide for justice and accountability, the High Commissioner appeals to all sides of the conflict to promptly cease hostilities and support the establishment of the Transitional Government of National Unity, in order to move towards a State based on respect for human rights and the rule of law.



417. Accordingly the High Commissioner recommends that all parties to the conflict:

(a) Immediately desist from violations of international human rights law and international humanitarian law, and abuses of human rights, in particular those amounting to crimes under international law, specifically attacks on civilians, killings, rape and sexual and gender-based violence, arbitrary detention, abductions and widespread looting.

(b) Declare and ensure that violations of international human rights law and international humanitarian law, and abuses of human rights will not be tolerated; and that those suspected of such acts will be removed from duties pending investigation, or will not be appointed.

418. The High Commissioner recommends that the Transitional Government of National Unity:

(a) Ensure that all individuals in South Sudan who suffered violations or abuses of their rights are in time afforded an effective remedy.

(b) Ensure that all individuals responsible for orchestrating the violence in South Sudan, namely the political and military leadership of the parties to the conflict, are not part of the TGNU and those alleged to commit/have committed violations and abuses are precluded from running for elections.

(c) Institute a comprehensive vetting programme compliant with due process standards as a matter of priority to remove from, and prevent the recruitment into State services (including SPLA, law enforcement and the national security services) of individuals, especially at senior levels, on whom there are reasonable grounds to believe that they have been involved in violations of international human rights law, international humanitarian law, or abuses of human rights.

(d) Take steps to stop and prevent violations and abuses of the rights of children, including through actively preventing and combatting recruitment and use of children in hostilities by parties to the conflict.

(e) Take effective action to eliminate sexual and gender-based violence, including through implementing a gender-sensitive protection and reporting mechanism, and through providing redress, rehabilitation services and access to justice for victims.

(f) Respect and promote the role of civil society, including by ensuring that freedoms of opinion and expression and of peaceful assembly are guaranteed and ensure the protection of human rights defenders and journalists.

(g) In relation to other transitional justice measures referenced in Chapter V of the Peace Agreement, support genuine consultations, including through public education programmes so that there is informed participation by victims, civil society women's groups and all stakeholders, as well as needs assessment to inform the efforts aimed at truth, reparations, reconciliation and guaranteeing non-recurrence.

(h) In relation to criminal justice accountability measures:

(i) Extend full cooperation and support to the Hybrid Court by assisting its investigations and complying with its rulings.

(ii) Consider the establishment of a specialized judicial structure within the South Sudan courts to focus on violations and abuses amounting to

international crimes, supported by specifically appointed judges, prosecutors, lawyers and law enforcement officials, with the possibility of embedding international legal actors to work with South Sudanese officials. Its jurisdiction would be complementary to that of the Hybrid Court.

419. **The High Commissioner recommends that the African Union Commission:**

- (a) **Swiftly establish the Hybrid Court for South Sudan.**
- (b) **Establish a designated unit in the hybrid court that provides support to victims and witnesses, including of sexual violence, with special measures adopted in the case of children, and ensures their safety and security before, during and after the proceedings.**
- (c) **Create a designated unit within the hybrid court dedicated to awareness-raising on the role, functions and processes of hybrid court, including regarding sexual violence crimes, and promote victim's full participation in the pre-trial, trial, sentencing and reparations phases.**

420. **The High Commissioner recommends that the Human Rights Council:**

- (a) **Continue to monitor developments in South Sudan and to that end, consider the establishment of a dedicated mechanism on South Sudan to report on progress towards accountability and the human rights situation.**
- (b) **Encourage relevant special procedures to visit South Sudan.**
- (c) **Share a copy of this report with the General Assembly and the Security Council for deliberation.**

421. **The High Commissioner recommends that the International Community considers applying a phased approach to the provision of technical assistance to State institutions, based on progress in the establishment of the Transitional Government of National Unity and, in the meantime, consider providing some support to civil society organizations and the South Sudan National Human Rights Commission.**

422. **The High Commissioner recommends that the Security Council:**

- (a) **Remains seized of the matter of criminal accountability for serious violations of international humanitarian law and gross violations and abuses of international human rights that have been perpetrated by all parties to the non-international armed conflict.**
- (b) **Consider expanding the sanctions regime by imposing a comprehensive arms embargo on South Sudan.**
- (c) **Failing the expeditious establishment of the Hybrid Court, consider referring the matter to the International Criminal Court.**

## **Annex I**

### **TERMS OF REFERENCE**

#### **OHCHR COMPREHENSIVE ASSESSMENT MISSION ON SOUTH SUDAN**

##### **(Human Rights Council-mandated)**

#### **1. Mandate and reporting obligations**

In its resolution A/HRC/29/13 “A Mission By OHCHR to Improve Human Rights, Accountability, Reconciliation and Capacity In South Sudan”, adopted in July 2015, the United Nations Human Rights Council requested the UN High Commissioner for Human Rights to among other things:

Urgently undertake a Mission to engage with the Government of the Republic of South Sudan and to monitor and report on the situation of human rights and to undertake a comprehensive assessment of alleged violations and abuses of human rights, with a view to ensuring accountability and ensuring complementarity with the African Union Commission of Inquiry on South Sudan.

The Council requested the High Commissioner to present an oral update at its thirtieth session (September 2015) and to present a full report in an interactive dialogue at the Council’s 31st session (March 2016).

In accordance with this mandate, the UN High Commissioner for Human Rights established the OHCHR Assessment Mission to South Sudan (OAMSS), based in Juba.

#### **2. Timeframe**

While the resolution itself does not specify a time period for the assessment, its preamble refers to atrocities committed since the outbreak of violence on 15 December 2013. In this context, the OAMSS will carry out a comprehensive assessment of alleged violations and abuses of human rights committed from 15 December 2013 to date, with greater emphasis on those that are continuing and/or have serious repercussions to this day. The OAMSS will also take into consideration any contextual and other relevant information that may fall outside this time frame but that may provide a better understanding of events and that may be pertinent in understanding continuing human rights violations and abuses.

#### **3. Legal Framework**

The mandate of the OAMSS requires it to monitor and report on the situation of human rights and to undertake a comprehensive assessment into alleged violation and abuses of human rights. The legal framework that underlies the assessment will comprise of all obligations assumed by South Sudan under international human rights treaties and those applicable under customary international law. Although a non-state actor cannot formally become party to human rights treaties, it is now increasingly accepted that non-state groups exercising de facto control over a part of the State’s territory must respect certain human rights obligations of persons in that territory. During the period covered by the comprehensive assessment, there existed an internal armed conflict, making necessary the application of international humanitarian law, in particular provisions of the Geneva Convention relevant to non-international armed conflicts, to measure the conduct in the conflict of both the Government and non-state armed groups.

#### **4. Methods of Work**

In order to carry out a comprehensive assessment of alleged violations and abuses of human rights by all parties, the OAMSS will conduct a desk review of existing documents and information, including reports from UNMISS, the government, civil society actors and other relevant sources. The OAMSS will also collect and document victims' testimonies and the accounts of survivors, witnesses and alleged perpetrators on key emblematic cases and incidents with the view of ensuring accountability.

The OAMSS may as well seek information from other relevant sources such as satellite images, authenticated video and photographic material and official documents. In analysing the information collected, it will seek to corroborate facts and accounts to meet the agreed standard of proof (see below).

The assessment is not intended to prove anything beyond reasonable doubt, but rather to identify and analyse the scale of violations, detect patterns, and identify alleged perpetrators as well as potential leads or sources of evidence. In line with the resolution, the assessment will be conducted with a focus on how best to ensure accountability for alleged violations and abuses committed in the course of the conflict. In this regard, the concept of accountability will be comprehensively reflected in the work of the OAMSS, including assessing the effectiveness of steps already taken by the Government to ensure accountability for human rights violations and abuses. Information from the comprehensive assessment may serve as a reference tool for accountability mechanisms set out in the August 2015 Peace Agreement.

In carrying out its work, the OAMSS will be guided at all times by the principles of independence, impartiality, objectivity, transparency, integrity and "do no harm."

#### **5. Witnesses Protection**

The OAMSS will take appropriate steps to address witness and victim protection concerns. The Team will carry out a protection assessment, in line with OHCHR methodology and shall adopt procedures and methods of work aimed at protecting such persons during and after its work. The assessment will be carried out taking into account UNMISS' Human Rights Division strategies for witness and victim protection.

The Government of South Sudan also has an obligation to protect victims and witnesses and others in South Sudan who will be in contact with the OAMSS, and it will be requested to make an undertaking that no such person shall, as a result of such contact, suffer harassment, threats, acts of intimidation, ill-treatment or reprisals.

#### **6. Confidentiality of information**

The OAMSS will adopt and fully comply with clear policies on confidentiality and do no harm principles, including by not disclosing the names of individuals in its public reports as appropriate, and on the informed consent of sources in accordance with OHCHR methodology. The Team will make sure that such standards are well understood by individuals and organizations it comes into contact with. At the end of its work, the OAMSS will archive all its confidential material in accordance with standard UN procedures for strictly confidential material.

#### **7. Standard of Proof**

Though this undertaking was an assessment, nevertheless, consistent with past practices

the OAMSS will base its findings on a “reasonable grounds to believe” standard of proof.<sup>273</sup> There are reasonable grounds to believe that an incident or pattern of violations or crimes occurred if the OAMSS has obtained a reliable body of information, consistent with other information, indicating their occurrence. This standard of proof may be sufficiently high to call for judicial investigations into violations of international humanitarian and human rights law as well as international crimes. With regard to assessing information that identifies alleged individuals to have been involved in the violations, the OAMSS will comply with the standards that require a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of violations or abuses.

#### **8. Contact with the Media**

All media inquiries should be channelled through the OHCHR Communications Section, who will, in consultation with the OAMSS and others as appropriate, determine the appropriate response. A media advisory will be put out before the team deploys to Juba.

#### **9. Cooperation with the Government of South Sudan**

As set out in resolution 29/13 the OAMSS will engage with the government and make recommendations for technical assistance, capacity building and ways to improve the human rights situation in the country with the view of providing support to the country to fulfil its human rights obligations. The resolution also calls on the Government of South Sudan to cooperate fully with the OHCHR in the implementation of the resolution, including by facilitating visits and access to the country and by providing relevant information. Such cooperation will involve freedom of movement throughout the territory; unhindered access to all places and establishments; freedom to meet and interview representatives of national, local and military authorities, community leaders, non-governmental organizations and other institutions, and any such person whose testimony is considered necessary for the fulfilment of its mandate as well as free access to all sources of information, including documentary material and physical evidence.

#### **10. Cooperation with UNMISS and other stakeholders**

The OAMSS will work closely with the United Nations Mission in South Sudan (UNMISS), in particular the Human Rights Division which has a mandate to monitor, investigate and report on violations and abuses of human rights. The cooperation will include sharing information on key incidents and trends and in identifying stakeholders for the OAMSS to engage with. The OAMSS will further engage with other relevant UN actors in South Sudan including the humanitarian country team as well as civil society entities, and consider the full range of information available from these sources in fulfilment of its mandate.

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<sup>273</sup> See the updated edition of the OHCHR publication “Commissions of inquiry and fact-finding missions on international human rights and humanitarian law: guidance and practice” available at [http://www.ohchr.org/Documents/Publications/CoI\\_Guidance\\_and\\_Practice.pdf](http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf).

## Annex II

### Chronology of “Accountability” Commitments Made by the Parties

- On 23 January 2014, in the Cessation of Hostilities Agreement (CoH) signed between the Government of South Sudan and the Sudan People’s Liberation Movement/Army (in Opposition) (SPLM/A), both parties to the conflict undertook to “refrain from any acts of rape, sexual abuse and torture as prohibited by applicable national, continental and international instruments.”<sup>274</sup> In addition, the parties agreed to end: attacks or acts of violence, hostility of intimidation against the civilian population; actions that impede humanitarian access or the protection and free movement of civilians; recruitment or use of children in hostilities by armed forces or militias; and, mobilization, redeployment, or movement of forces inconsistent with the signed agreements. Re-commitments were made on 9 May 2014<sup>275</sup> and 9 November 2014.<sup>276</sup>
- The Agreement on the Resolution of the Conflict in the Republic of South Sudan, signed in August 2015, contained commitments to undertake a permanent ceasefire and refrain from “prohibited actions” that had been previously agreed to in the CoH Agreement of 23 January 2014.<sup>277</sup>

### Government

- SPLA - UNICEF Revised Action Plan to end violations committed against children (signed 12 March 2012, and subsequently extended).<sup>278</sup>
- On 24 January 2014, President Kiir established an ‘investigation committee on human rights abuses,’ mandated to investigate human rights abuses committed by both parties to the conflict.<sup>279</sup>
- During President Kiir’s meeting with the UN High Commissioner for Human Rights, Ms. Navi Pillay and the Secretary-General’s Special Advisor on the Prevention of Genocide, Mr. Adama Dieng on 30 April 2014, the President stated the Government was conducting investigations into the Juba killings in December 2013, and that those responsible would be held accountable and severely punished.<sup>280</sup>
- Regarding 17 April 2014 attack on the UNMISS POC in Bor, both Jonglei State and national Government authorities, including President Kiir, condemned the attack and vowed to bring those responsible to justice. The President indicated in late April 2014 that

<sup>274</sup> <http://southsudan.igad.int/attachments/article/250/cessation%20of%20hostilities.pdf>.

<sup>275</sup> ‘Agreement to Resolve the Crisis in South Sudan.’

<sup>276</sup> ‘Rededication and Implementation Modalities for the Cessation of Hostilities.’

<sup>277</sup> See Chapter II, 1.7, Agreement on the Resolution of the Conflict in the Republic of South Sudan (17 August 2015).

<sup>278</sup> [http://www.unicef.org/appeals/files/MRM\\_22\\_Oct.pdf](http://www.unicef.org/appeals/files/MRM_22_Oct.pdf).

<sup>279</sup> Presidential Order 06/2014 (24 January 2014).

<sup>280</sup> “South Sudan on verge of catastrophe,” Opening remarks by UN High Commissioner for Human Rights, Press conference in South Sudan, Juba, 30 April 2014: “I welcome... the investigations the Government says it is undertaking into the mass killings of civilians in Juba in mid-December which set off the escalation of ethnic-based revenge killings that have ensued over the four and a half months since then.”

(<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14550&LangID=E>).

the Government was conducting investigations and that those responsible would be held accountable.<sup>281</sup>

- On 16 May 2014, President Kiir stated he would try perpetrators for the atrocities committed since the conflict began. He said he would “not protect anybody, and I have instructed the investigation committee led by Justice (John) Wuol Makec to see that all these people who committed crimes must be punished, if needs be, with death.”<sup>282</sup>
- In August 2014, the Government responded to UNMISS Human Rights Division’s 8 May 2014 report – “formation of investigations committee of human rights abuses headed by former Chief Justice, to investigate abuses and turn those found to have committed abuses for prosecution;” “direction of each minister responsible for particular organized forces to form an investigation committee to investigate into abuses that might have been committed by some members of his or her forces and share the result of such investigation with the Investigation Committee of Human Rights Abuses.”<sup>283</sup>
- The national campaign “Children, Not Soldiers,” aimed at ending and preventing the recruitment and use of children in hostilities by Government forces by 2016 launched by the Government and the UN Special Representative for Children and Armed Conflict and UNICEF (6 March 2014); Though formally launched in 6 March 2014, the campaign was officially launched at the national level by the Government of South Sudan on 29 October 2014.<sup>284</sup>
- On 10 September 2014, military orders were issued by the acting SPLA Chief of General Staff to reinforce the previous order prohibiting the recruitment and use of children in hostilities and the occupation and military use of schools.<sup>285</sup>
- Joint Communique of the government and the Special Representative of the Secretary-General on Sexual Violence in Conflict on addressing conflict-related sexual violence. (11 October 2014).<sup>286</sup>
- In February 2015, in a meeting with the UN Assistant Secretary-General for Human Rights, President Kiir promised to release the national investigations report into human rights abuses.
- On 24 February 2015, the President Kiir issued Republican Order No. 6/2015, granting amnesty to “all those waging war against the State” who report to Government-controlled areas to take advantage of the offer. The order placed no conditions on the extent of the amnesty, leading to the inference that it was a ‘blanket’ pardon that would prevent legal proceedings against all persons, without distinction, on condition that they report to Government-controlled areas between 24 February and 31 March 2015, when the offer expired. There was no meaningful response from the SPLA-IO.<sup>287</sup>

<sup>281</sup> UN Mission to South Sudan (UNMISS), Attacks on Civilians in Bentiu & Bor April 2014, 9 January 2015, available at:

[http://www.ohchr.org/Documents/Countries/SS/UNMISS\\_HRDJanuary2015.pdf](http://www.ohchr.org/Documents/Countries/SS/UNMISS_HRDJanuary2015.pdf)

<sup>282</sup> See <http://www.aa.com.tr/en/rss/329575--kiir-vows-to-try-people-involved-in-s-sudan-crimes>.

<sup>283</sup> Republic of South Sudan response, 11 August 2014. Copy on file with OHCHR.

<sup>284</sup> See Report of the Secretary-General on children and armed conflict in South Sudan, S/2014/884, 11 December 2014.

<sup>285</sup> See Report of the Secretary-General on children and armed conflict in South Sudan, S/2014/884, 11 December 2014.

<sup>286</sup> <http://www.un.org/sexualviolenceinconflict/joint-communique/joint-communique-of-the-republic-of-south-sudan-and-the-united-nations-on-the-prevention-of-conflict-related-sexual-violence>. See also, Report of the Secretary-General on South Sudan, S/2014/821, 18 November 2014.

<sup>287</sup> Republic of South Sudan, Republican Order No. 6/2015.

- On 26 May 2015, the Ministry of Defence and Veterans' Affairs issued a Ministerial Order, No. 2/2015, requesting SPLA to "refrain from deliberate attacks against civilians; sexual violence, rape; use of child soldiers." "Sector commanders and division commanders are reminded that they are responsible for the conduct of those soldiers under their command. They shall be held accountable if they do not take punitive measures..." In addition, "GOSS is required to search for and punish anyone who has committed or ordered certain "grave breaches" of the laws of war." Such persons "may be held individually accountable for war crimes through the process of law."
- SPLA Army spokesperson, Col. Philip Aguer informed the media that it had launched investigations into allegations contained in a Human Rights Watch report accusing its forces of killing civilians in Unity state (23 July 2015).<sup>288</sup>
- On 31 July 2015, the Ministry of Defence sent a letter to the South Sudan Human Rights Commission (SSHRC) responding to their letter, "Accusations of Massive Violations of War Crimes and Crimes Against Humanity by the SPLA Forces," dated 24 July 2015. The Minister of Defence stated the concerns expressed by SSHRC would be "passed to SPLA Chief of General Staff for necessary measures."<sup>289</sup>
- The SPLA has said it is willing to form a team to investigate the Wonduruba killings in which the army is accused of attacking civilians (18 September 2015).<sup>290</sup>
- In November 2015 during a meeting with a US delegation of members of Congress, President Kiir "assured the delegation that his government is committed to justice and accountability, and those accused of human rights violations will be held accountable."<sup>291</sup>

### **The Opposition**

- UN Assistant Secretary-General for Human Rights spoke with SPLM/A-IO commanders in the field, seeking, and receiving their commitments to comply with international humanitarian law (January 2014).
- On 29 April 2014, in a meeting with the UN High Commissioner for Human Rights and the Secretary-General's Special Advisor on the Prevention of Genocide, Riek Machar asserted that the SPLM/A-IO was conducting its own investigation into allegations of abuses in Bentiu.<sup>292</sup>
- The SPLM/A-IO commitment agreement with the UN Special Representative for Children and Armed Conflict, to end violations and abuses against children (9 May 2014).<sup>293</sup>

<sup>288</sup> See <http://www.sudantribune.com/spip.php?article55792>.

<sup>289</sup> Copy of exchange of letters on file with OHCHR.

<sup>290</sup> See <http://www.thenationmirror.com/news/south-sudan-news/1431-spla-to-investigate-wunduruba-attacks>.

<sup>291</sup> "President Salva Kiir Mayardit Welcomed U.S Members of Congress to the Republic of South Sudan," Press Release, Office of the President, 11 November 2015.

<sup>292</sup> See supra, "South Sudan on verge of catastrophe," Opening remarks by UN High Commissioner for Human Rights, Press conference in South Sudan, Juba, 30 April 2014. ("We were unfortunately not able to visit Bentiu on this visit, but we discussed the attack there with Dr. Machar, since the mass killings in Bentiu were carried out by forces associated with the SPLA in Opposition which he leads. He assured us that he is carrying out his own investigation into what happened and that he will do his utmost to stop his forces from committing similar revenge attacks on civilians")

<sup>293</sup> See <https://childrenandarmedconflict.un.org/press-release/parties-to-conflict-south-sudan-renew-commitment>. See also, Report of the Secretary-General on children and armed conflict in South



- In August 2014, Riek Machar, in an interview with The Africa Report, claimed his forces were conducting an investigation into the killings in Bentiu in April 2014.<sup>294</sup> He stated, "...we are also investigating the incidents which happened, the issue of Bentiu, which was highlighted. Now it has boiled down to a squad of ten people. So we are locating them one by one." Machar had "given instructions to Peter Gadet, who is the commander in the area, to locate the ten and in particular that guy who had a machine gun." A report would be published and "we will provide it to the African Union commission of inquiry."
- Unilateral communique by SPLM/A-IO on Preventing Conflict-related Sexual Violence - "Communique of the Sudan People's Liberation Movement and Sudan People's Liberation Army (SPLM/SPLA) on preventing Conflict-Related Sexual Violence in South Sudan," issued by the Chairman of the SPLM/SPLA, Riek Machar (18 December 2014).<sup>295</sup>
- On 29 January 2015, during a meeting on the margins of the African Union Summit in Addis Ababa, the UN Assistant Secretary-General for Human Rights received guarantees from Riek Machar that he would raise the issue of accountability with SPLM/A-IO Commanders.
- In February 2015, SPLM/A-IO representatives stated that it was committed to investigating the alleged atrocities by its forces in Bentiu in April 2014 and throughout the country. SPLM/A-IO head of external relations, Dhieu Mathok Diing, in an interview with local media, stated that "we have formed an investigation committee," and "the investigations are in Bentiu town alone because there were reported massacres in different areas in South Sudan."<sup>296</sup>
- Some five months later, in July 2015, Machar informed the same local media that the SPLM/A-IO had not actually established a committee. He stated, "honestly, before we could form a committee, the investigation [by the UN] came out on this subject, and we already know who committed these crimes...so if there is a court we will be ready to help."<sup>297</sup>
- On 31 October 2015, 53 SPLM/A-IO Commanders signed undertakings that establish and reinforce individual and command responsibility for preventing sexual violence. Those who signed the undertakings include Lieutenant General John Buth Teny, Commander of the SPLA-IO Pagak operational base, 4 Major Generals, 6 Brigadier Generals, 9 Colonels, 11 Lt. Colonels and 22 Majors.<sup>298</sup>

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Sudan, S/2014/884, 11 December 2014.

<sup>294</sup> "South Sudan's people are forced to fight this war - Riek Machar," The Africa Report, 11 August 2014. See <http://www.theafricareport.com/East-Horn-Africa/south-sudans-people-are-forced-to-fight-this-war-riek-machar.html>.

<sup>295</sup> <http://www.un.org/sexualviolenceinconflict/press-release/south-sudan-united-nations-special-representative-welcomes-spla-io-action-plan-to-combat-rape-in-war-and-undertakings-by-commanders>.

<sup>296</sup> "SPLA-IO rebels begin investigation into April 2014 Bentiu massacre," Radio Tamazuj, 25 February 2015.

<sup>297</sup> "Riek Machar admits SPLM-IO never investigated Bentiu massacres," Radio Tamazuj, 8 July 2015.

<sup>298</sup> <http://reliefweb.int/report/south-sudan/un-envoy-welcomes-spla-io-action-plan-combat-sexual-violence-conflict>.



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