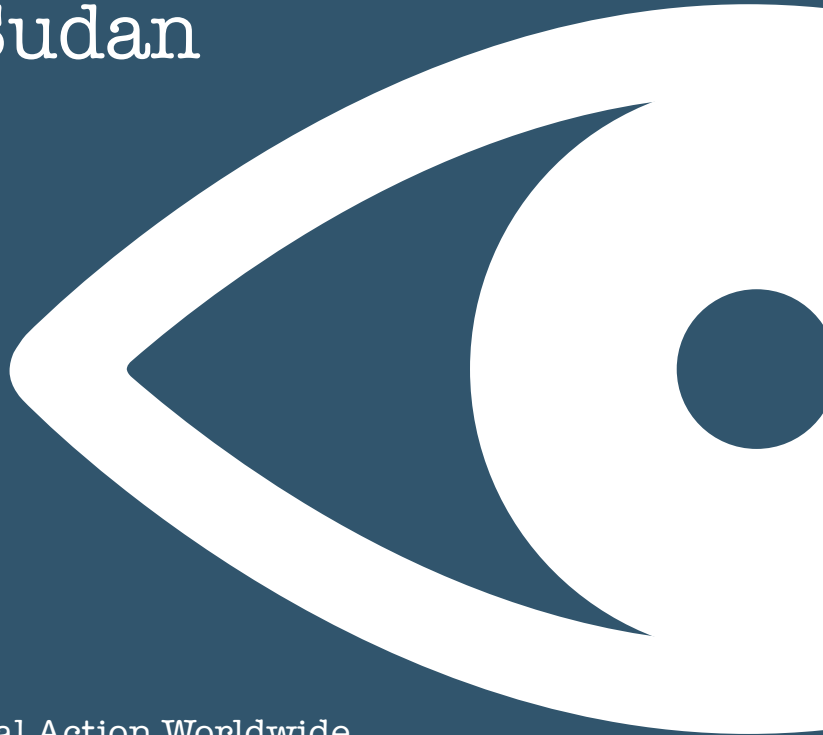


War Reparations and Litigation: Accountability for Sexual Violence Committed by Security Forces in South Sudan



A report by Legal Action Worldwide
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War Reparations
and Litigation:
Accountability for
Sexual Violence
committed by Armed
Men in Uniform in
South Sudan

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#2

This report was prepared by Legal Action Worldwide (LAW) and commissioned by the Nuhanovic Foundation.

Legal Action Worldwide (LAW)

LAW is an independent, non-profit organisation comprised of a network and think tank of prominent human rights lawyers and advisors. It provides innovative legal assistance to the least represented people, especially women and children, in fragile and conflict-affected states. LAW mobilises domestic, regional and global legal expertise to improve access to justice and obtain redress for people suffering from human rights violations and abuses.

Main objectives:

! Improving Access to Justice & Obtaining Legal Redress

! Increasing Legal Responsibility and Accountability

! Reforming Legislation, Policy and Practice

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The Nuhanovic Foundation (NF)

The Nuhanovic Foundation (NF) was established in the Netherlands in 2011 by Professor Liesbeth Zegveld and other leading litigators and specialists in the field of accountability and remedies for violations of international humanitarian law. NF assist war victims who seek access to justice to obtain a remedy in the form of reparation, restitution or compensation. Their network of victim organizations, lawyers and academics offers a platform that shares experiences and knowledge in the field of war remedies. NF maintain a specialized and searchable database with legal instruments, case law, and academic writings on the right to remedy and reparations. They provide funds for investigations and legal representations in negotiations and litigation.

This report is available at www.nuhanovicfoundation.org. You are welcome to share it. Please acknowledge The Nuhanovic Foundation's authorship.

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Glossary

CEDAW	Convention on the Elimination of Discrimination Against Women
CPA	Comprehensive Peace Agreement in South Sudan
Gender Based Violence (GBV)	Violence that is directed against a person on the basis of gender, including sexual violence
IASC	Inter Agency Standing Committee, primary mechanism for co-ordination of humanitarian assistance
ICGLR	International Conference on the Great Lakes Region
ICRC	International Committee for the Red Cross
IGAD	Intergovernmental Authority on Development
NPA	South African National Prosecution Authority
SALC	South African Litigation Centre, a South African NGO
SEA	Sexual Exploitation and Abuse
SOFA	Status of Force Agreement between host country and peacekeeping force
SOP	Standard Operating Procedures
SPLA	Sudan People's Liberation Army
SPLM/A	Sudan People's Liberation Movement Army
TCC	Troop Contributing Countries
UJ	Universal Jurisdiction
UNAMID	United Nations- African Union Mission in Darfur
UNMISS	United Nations Mission in South Sudan
UNDP	United Nations Development Programme



Introduction

The report reproduced in this booklet is the result of a project initiated by Legal Action Worldwide and co-sponsored by the Nuhanovic Foundation. The project comprised two stages. The authors first gathered information on the increased practice of conflict-related sexual violence in South Sudan since December 2013, by means of formal meetings in Juba with fourteen local and international NGOs and UN agencies, and a number of telephone interviews with organizations outside Juba. They also undertook a desk review of relevant information provided by various monitors and commentators on South Sudan.

The second stage consisted in hosting a roundtable in Nairobi in January 2015, which brought together national, regional and international legal experts working on accountability for sexual violence perpetrated by security forces in the East and Horn of Africa.

Reflecting the focus of stage 1 of the project, the report begins with a brief sketch of the historical setting in which the most recent wave of violence has broken out in South Sudan. Ethnic, political, cultural and socio-economic factors all play a role in this multi-faceted conflict. Weak separation between political and military domains and a pervasive culture of impunity offer very poor soil in which to embed robust judicial structures aimed at restraining and punishing actors associated with the security forces.

The report identifies the categories of perpetrators committing these crimes in S.Sudan and attempts to give an account of the conditions faced by victims and the scale of the problem. Obtaining accurate statistics is however extremely difficult: victims generally fear to report what has happened to them to the authorities, while the UN Mission for the protection of women in S.Sudan has been understaffed and unable to overcome many logistical challenges posed by the destruction of infra-structure during the ongoing conflict. Consequently the UN's figures appear significantly to understate the real scale of the problem.

Finally, the authors explain the limits of Sudan's formal and customary legal systems in responding to sexual violence and in providing redress to victims, and identify gaps in the various prevention programs that have been set up. Meanwhile, declining trust in the S.Sudanese government has lead foreign donors to redirect funds formally aimed at strengthening the formal justice system, towards bolstering and trying to harmonize the customary system. However, according to the authors 'it must be acknowledged that the customary system's focus on consensus and conflict mitigation is not easily

reconcilable with principles of survivors' rights and accountability for the perpetrator in SGBV cases.

In Part 2 of the report the full minutes of the Nairobi roundtable meetings are presented. These discussions provide insights into the ongoing, multi-dimensional problems confronting those working for the establishment or implementation of effective legislative and judicial responses to the scourge of conflict-related sexual violence. The

The customary system's focus on consensus and conflict mitigation is not easily reconcilable with principles of survivors' rights and accountability for the perpetrator in SGBV cases.

participants discussed ways to make maximum use of local, regional and international mechanisms for combatting impunity. These included the use of trans-national and universal jurisdictions allowing foreign States to take action against perpetrators before foreign courts.

The minutes of the roundtable conclude with a set of recommendations (see ch.7). Recommendation 7.1 (c) is that 'a centralized database of research and information would be an invaluable resource for local, regional and international legal actors.' It should include a mapping of useful cases, reports and other materials. It is in this area that the Nuhanovic Foundation has made its greatest contribution to the work

on conflict-related sexual violence in the Horn of Africa. In addition to sponsoring the roundtable in Nairobi in Jan. 2015, and sending its Head of Research to participate in the meeting, the Nuhanovic Foundation has been steadily building up an open-access database of relevant cases, reports and legal instruments. Recognizing that some data can only be gathered by internal NGO's or individual activists within Sudan, the Nuhanovic Foundation has also provided financial assistance to the Darfuri human rights lawyer and activist Mohammed Badawi, enabling his team to conduct a survey among women victims of sexual violence in IDP camps so as to better understand the geographical and numerical scope of this terrible phenomenon.

The NF's expanding database of cases and legislative developments will help to facilitate an assessment of how best to conduct strategic litigation against corporations, security forces or individual defendants who have been implicated in the practice of sexual violence in the context of conflicts in the Horn of Africa (recommendation 7.4). The information gathered on the database also has the potential to contribute to capacity building among legal personnel and investigators on the ground (recommendation 7.5), by providing an overview of developments.

Executive Summary

Sexual and gender-based violence (SGBV), particularly conflict-related sexual violence (CRSV), has increased in South Sudan following the outbreak of conflict in December 2013.¹ After visiting the country in October 2014, the UN Secretary General's Special Envoy on Sexual Violence in Conflict, Hawa Zainab Bangura, stated that the levels of sexual violence she witnessed there were the highest she had seen.² Recent reports have indicated that the commission of sexual offences has become a significant feature of the current conflict,³ and has been used as a military tactic in all ten states.⁴ Actors working on the ground report that government and rebel forces, militias and unidentified armed men in uniform are involved in the commission of these offences.⁵ The May 2014 United Nations Mission in South Sudan (UNMISS) Human Rights Report stated that there is evidence that acts of sexual violence committed in the context of the conflict may amount to crimes against humanity.⁶

Formal justice systems in South Sudan are weak, concentrated in urban centres and do not enjoy the widespread trust of the South Sudanese population. This has been exacerbated by the reluctance of international donors and organisations to fund government-sponsored institutions, following allegations by the UN that the South Sudanese government is complicit in war crimes and crimes against humanity.

¹ United Nations Security Council, Report of the Secretary General on Conflict-Related Sexual Violence (23 March 2015) S/2015/203; Office of the Special Representative of the Secretary General on sexual violence in conflict, *Press Release: UN Special Representative of the Secretary-General on Sexual Violence in Conflict Concludes First Mission to South Sudan with Agreement with Government* (13 October 2014)

² W. Wudu, 'Horrible Sexual Violence in South Sudan, UN Envoy Says', Voice of America, October 2014, <http://www.voanews.com/content/south-sudan-women-children-sexual-violence-united-nations/2482221.html>

³ UN News Centre, 'South Sudan at 'crossroads' as it seeks to combat sexual violence, says UN official', 20 October 2014, http://www.un.org/apps/news/story.asp?NewsID=49123#.VEk_tvmUe4k

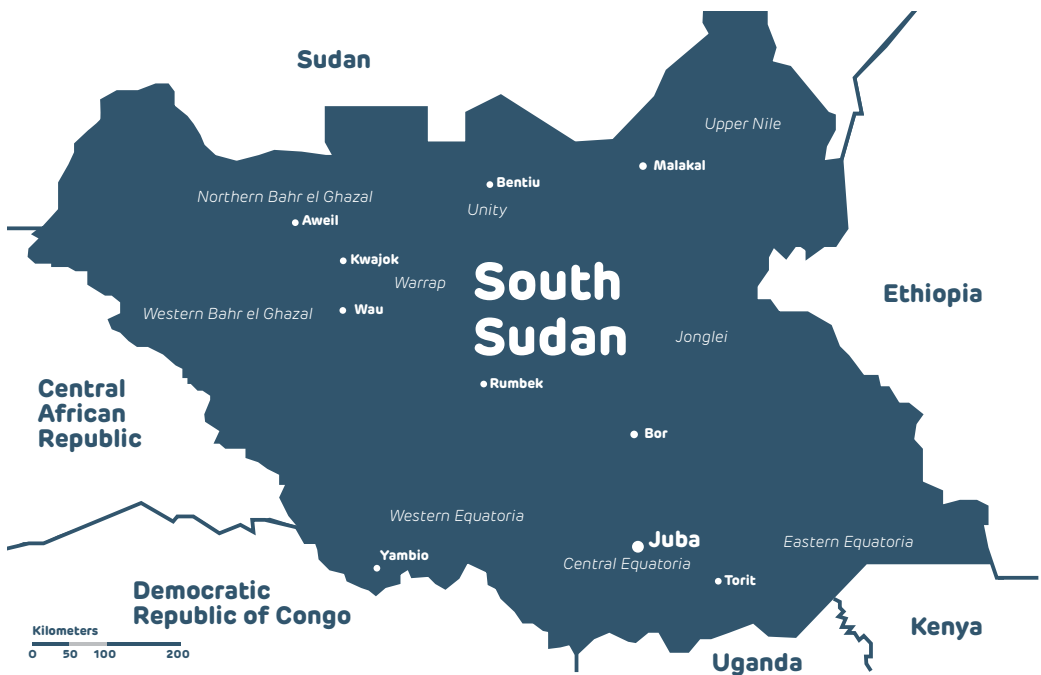
⁴ Above n 1, para. 49.

⁵ UNMISS, 'Conflict in South Sudan: A Human Rights Report', 21 February 2014, <http://unmiss.unmissions.org/Portals/unmiss/%20Press%20Releases/May%202014/14%20-%2005%20HR%20report%20.pdf>

⁶ Ibid.

Customary justice systems are used to resolve the majority of disputes and have remained resilient throughout decades of conflict, but favours a conciliatory, consensus-based approach that in many cases fails to uphold the rights and needs of the survivor and ensure accountability for perpetrators. The failure of both legal systems to deliver effective, enforceable and fair justice in sexual violence cases has contributed to an environment in which impunity for such crimes is common. Legal interventions aimed at providing legal redress and accountability for sexual crimes in South Sudan have been extremely limited.

This report reviews sexual and gender-based violence being committed as part of the conflict in South Sudan, the gap that exists in terms of formulating a justice-focused response to this violence, and opportunities for increasing access to legal redress for survivors and reducing impunity for perpetrators.



Key Recommendations

- Improve national and regional coordination through:
 - i. The establishment of a domestic legal aid network;
 - ii. The establishment of a regional legal aid network; and
 - iii. A centralised database for research and mapping of existing cases and research for human rights and legal networks.
- Provide technical expertise to draft a Sexual and Gender-Based Violence Bill which comprehensively defines and criminalises all forms of SGBV and provides instructions on issues including burdens of proof, admissibility, how to evaluate evidence and aggravating factors.
- Develop advocacy and implementation plans on the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Joint Communique issued by the government and the UN Special Representative on sexual violence in conflict and the anticipated SGBV Bill.
- Undertake strategic litigation on sexual violence including through taking a class action in national courts, extraterritorial litigation, and casework/advocacy using special UN mechanisms.
- Build the skill set of female lawyers to assist SGBV survivors and challenge government bodies through measures including roundtables, training and ongoing mentoring to better enable them to assist survivors of SGBV;
- Undertake high level advocacy with the UN, AU and donors on the best ways forward for addressing SGBV in South Sudan.

Please see page 55 for a full list of Recommendations.

Methodology

The information gathered for this report has been attained by LAW's legal team through:

- Formal meetings in Juba with fourteen local and international NGOs and UN agencies;
- Four telephone interviews with local NGOs;
- A desk review of relevant information;
- An expert roundtable comprising of national, regional and international legal experts held by Legal Action Worldwide (LAW) and the Nuhanovic Foundation in January on 2015 on accountability for sexual violence perpetrated by security forces in the East and Horn of Africa. South Sudan was one of the geographical focuses. The full minutes of the roundtable are included in this report.

In gathering this information, the principles below were followed:

- **Openness and transparency** – the purpose of the interviews and how information received will be used must be made clear to all interviewees;
- **Reliability and independence** – LAW made every effort to verify information collected and conclusions arrived at and seek to confirm its findings with a variety of sources;
- **Publicity/public access** – Legal aid providers, partners and other stakeholders were made aware of the report's preliminary findings and invited to incorporate comments and revisions as appropriate;
- **Broad participation** – The report sought to interview as wide as possible a range of relevant stakeholders and beneficiaries, in addition to the legal aid providers.

CONTEXT: OVERVIEW

Since December 2013, the scale and severity of sexual violence in South Sudan has increased with the escalating conflict between the Sudan People's Liberation Army (SPLA) and the Sudan People's Liberation Movement/Army (SPLM/A) in Opposition. The United Nations has stated that this violence is being committed by both the SPLA and the SPLM/A in Opposition and may amount to war crimes and crimes against humanity.⁷ The conflict has resulted in the breakdown of social and justice systems, and exacerbated an already pervasive culture of impunity. This both encourages perpetrators to continue committing acts of sexual violence, and prevents survivors from gaining access to justice and support. Very few legal interventions have been undertaken to address this ongoing crisis.

1. The Conflict

The long-standing conflict in South Sudan has persisted in spite of both the 2005 Comprehensive Peace Agreement (CPA) and South Sudan gaining independence in 2011.⁸ A number of conflicts in South Sudan predate its independence, and continue to contribute to the instability and prevalence of sexual violence. The outbreak of conflict in December 2013 between the Sudan People's Liberation Army and the Sudan People's Liberation Movement/Army in Opposition has given rise to a significant increase in human rights violations and new challenges in ensuring rule of law and access to justice.

This most recent conflict began in late 2013 as a political dispute between President Salva Kiir and the deposed Vice-President, Riek Machar. In July 2013 Kiir dismissed Machar from the office of Vice-President. Fighting broke out on 15 December 2013

⁷ UNSC, Statement by the President of the Security Council (24 March 2015) S/PRST/2015/9, p.2; UNMISS, Conflict in South Sudan: A Human Rights Report (8 May 2014)

⁸ See International Crisis Group, Sudan and South Sudan's Merging Conflicts, Crisis Group Africa Report No.223 (29 January 2015)

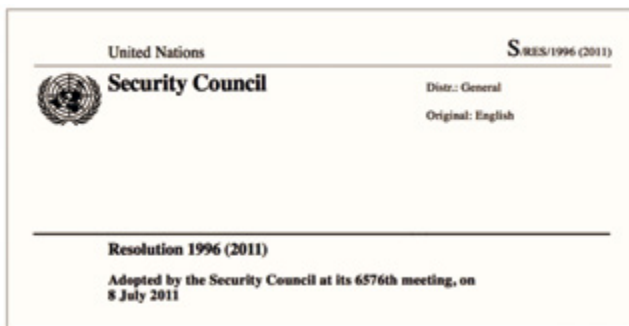
between soldiers loyal to President Kiir and those loyal to Machar, now referred to as the 'SPLM/A in Opposition,' and on 17 December 2013 President Kiir accused Machar of an attempted coup. The fighting rapidly escalated into a brutal conflict primarily affecting the Unity, Upper Nile and Jonglei states.

The conflict has largely been perceived as ethnic in nature; Kiir and the SPLA are seen to represent the interests of the Dinka, whilst Machar and the SPLM/A in Opposition to represent the interests of the Nuer. International Crisis Group report that in December 2013 there were systematic inter-ethnic killings between the Dinka and Nuer, which started in Juba and quickly spread throughout Unity state.⁹

Ethnicity, however, is just one element of a complicated and multi-faceted conflict, rooted in two decades of civil war in Sudan and in which political, cultural and socio-economic factors play significant roles. The failure to resolve grievances from previous conflicts, a proliferation of arms, conflict over natural resources, lack of economic development, a pervasive culture of impunity and a lack of separation between the political and military spheres are all factors which have contributed to the current crisis, which at present shows no signs of an imminent resolution.¹⁰

Ethnicity as well as political, cultural and socioeconomic factors all play significant roles in this conflict.

United Nations Mission in the Republic of South Sudan



⁹ International Crisis Group, Sudan and South Sudan's Merging Conflicts, Crisis Group Africa Report No.223 (29 January 2015) p.10

¹⁰ See Deng, DK, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (March 2013); International Crisis Group, Sudan and South Sudan's Merging Conflicts, Crisis Group Africa Report No.223 (29 January 2015); Care International, 'From Crisis to Catastrophe: Joint Agency Briefing Note', 6 October 2014

The UN Security Council established the United Nations Mission in the Republic of South Sudan (UNMISS) on 8 July 2011 through Resolution 1996 (2011). UNMISS was mandated to consolidate peace and security and to help establish conditions for development.

Following the outbreak and escalation of the December 2013 conflict, the Security Council redefined the mandate of UNMISS, removing its focus on state-building and giving it a new mandate with an exclusive focus on:

1. The protection of civilians;
2. Human rights monitoring;
3. Supporting humanitarian assistance efforts;
4. Supporting the implementation of the Cessation of Hostilities Agreement.¹¹

Resolution 1996 (2011) also increased the number of troops, and authorised UNMISS to use all necessary means to perform its mandate.¹²

"In particular, UNMISS would need to put on hold any operational and capacity-building support to either party that may enhance their capacity to engage in conflict, commit human rights violations and abuses and undermine the Addis Ababa negotiations process."

- UN Security Council, Report of the Secretary-General on South Sudan, 6 March 2014

In May 2014, UNMISS stated in their human rights report that there were reasonable grounds to believe that both government and opposition forces had committed war crimes and crimes against humanity.¹³ Following these allegations most international aid operations suspended activities in South Sudan that were not of a purely humanitarian nature.

¹¹ United Nations, "UNMISS Background", <http://www.un.org/en/peacekeeping/missions/unmiss/background.shtml> (accessed 15 July 2014).

¹² Ibid.

¹³ UNMISS, Conflict in South Sudan: A Human Rights Report, (8 May 2014) para.274



2. Sexual and Gender Based Violence

The scale and severity of sexual and gender based violence (SGBV), particularly conflict-related sexual violence (CRSV) has increased significantly since the outbreak of the December 15 conflict.¹⁴ The primary perpetrators of this violence are men known to the survivor and armed men in uniform. Offences committed by men known to the survivor are mainly domestic violence, rape including marital rape, sexual assault, forced marriage and girl child compensation.¹⁵ The SPLA and SPLM/A in opposition, militias aligned to both armed groups and unidentified uniformed men are reported to have committed rape, gang rape, sexual slavery, abduction, castration, forced nudity and forced abortions.¹⁶ CRSV has been committed against both men and women in South Sudan.¹⁷ This report will focus on sexual violence against women and girls, as there is insufficient information and data available on sexual violence against men and boys. It is known, however, that such violence occurs and may be common.

CONFLICT-RELATED SEXUAL VIOLENCE

*'The term "conflict-related sexual violence" refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence of comparable gravity perpetrated against women, men or children with a direct or indirect (temporal, geographical or causal) link to a conflict. This link to conflict may be evident in the profile of the perpetrator, the profile of the victim, the climate of impunity or State collapse, any cross-border dimensions or violations of the terms of a ceasefire agreement.'*¹⁸

¹⁴ United Nations Security Council, Report of the Secretary General on Conflict-Related Sexual Violence (23 March 2015) S/2015/203 para. 48

¹⁵ This was discussed by Linda Akur, a South Sudanese Advocate and Angelina Del Seeka from End Impunity at the Roundtable on Increasing Accountability for Sexual Violence discussed in this report, and can also be found in reports such as Human Rights Watch, 'This Old Man Can Feed Us: You Will Marry Him', March 2013; Norwegian Peoples Aid, "Gender-based Violence and Protection Concerns in South Sudan," pp. 31-34; 'Girl child compensation' refers to the informal settlement of a murder case whereby a girl is given by the family of the murderer to the family of the murdered to compensate for the loss of life.

¹⁶ Above n 1, para. 49

¹⁷ United Nations Security Council, Report of the Secretary General on Conflict-Related Sexual Violence (23 March 2015) S/2015/203 para.48

¹⁸ United Nations Security Council, Report of the Secretary General on Conflict-Related Sexual Violence (23 March 2015) S/2015/203 para.

Whilst all forms of SGBV appear to have risen since December 2013, the most dramatic increase has been in sexual violence perpetrated by armed men in uniform. According to the UN Secretary General, sexual violence has been used as a military tactic in all ten states of South Sudan since the outbreak of the conflict.¹⁹ UN Special Representative of the Secretary General (SRSG) on sexual violence in conflict, Zainab Hawa Bangura, stated in a press release in October 2014 that 'there are... grave concerns of sexual violence perpetrated along ethnic lines with attacks fuelling reprisals and a cycle of recrimination and revenge.'²⁰

UNMISS has a mandate to collect and document on CRSV through Women Protection Advisors (WPAs) working on the ground. At present, there are seven WPAs in South Sudan who lack the geographical capacity and resources to comprehensively investigate instances of CRSV. Underreporting is systematic, and according to the UN Secretary General, sexual violence is 'trivialised by law enforcement officials and the community, with survivors often forced to marry perpetrators as a "remedy".²¹ Outside urban areas medical, psychosocial and legal services are almost non-existent,²² leaving little incentive for survivors to speak to anyone about their experiences.

*The UN Secretary General stated in his March 2015 report on conflict-related sexual violence that in South Sudan in 2014 '167 incidents of conflict-related sexual violence affecting 236 persons were documented, including 75 incidents affecting 116 minors. Women and girls were targeted in 95 per cent of these cases.'*²³

¹⁹ Above n 1, para. 49

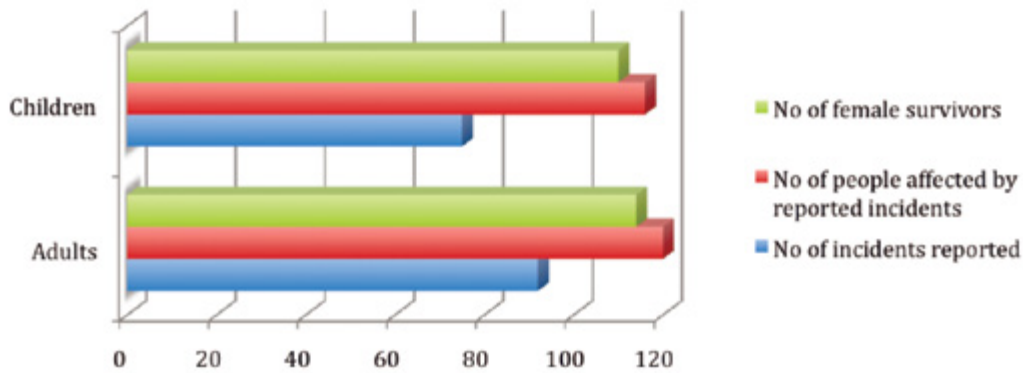
²⁰ Office of the Special Representative of the Secretary General on sexual violence in conflict, Press Release: UN Special Representative of the Secretary-General on Sexual Violence in Conflict Concludes First Mission to South Sudan with Agreement with Government (13 October 2014); See also United Nations Security Council, Report of the Secretary General on Conflict-Related Sexual Violence (23 March 2015) S/2015/203 para. 48

²¹ Above n 1, p 48.

²² Ibid

²³ Above n 1, para 48

Statistics from March 2014 Report of UN Secretary General on Conflict-Related Sexual Violence



The figures collected by the UN Secretary General's report of March 2015 on conflict related sexual violence most likely vastly under-represent the real rates of CRSV in South Sudan. The UN Secretary General acknowledged in his October 2014 report that 'sexual violence during and in the wake of conflict continues to be dramatically underreported because of the risks, threats and trauma faced by those who come forward.'²⁴

The UN Secretary General reports that other factors such as 'forced disarmament, the circulation of illegal arms, mass displacement, cattle raiding, inter-communal violence and food insecurity have increased the vulnerability of women and girls to sexual violence.'²⁶ UN agencies warn that 24,000 women are currently at risk of sexual violence, with internally displaced people being particularly vulnerable.²⁷

“The bodies of women and children are the battleground of this conflict.”

- SRSg Zainab Hawa Bangura²⁵

²⁴ 24 Ibid, para 5

²⁵ Office of the Special Representative of the Secretary General on sexual violence in conflict, *Press Release: UN Special Representative of the Secretary-General on Sexual Violence in Conflict Concludes First Mission to South Sudan with Agreement with Government* (13 October 2014)

²⁶ United Nations Security Council, *Report of the Secretary General on Conflict-Related Sexual Violence* (23 March 2015) S/2015/203 para. 48

²⁷ Office of the Special Representative of the Secretary General on sexual violence in conflict, *Press Release: UN Special Representative of the Secretary-General on Sexual Violence in Conflict Concludes First Mission to South Sudan with Agreement with Government* (13 October 2014)

2.1 Perpetrators

According to the UN Secretary General's report on sexual violence in conflict and the UN Mission in South Sudan,²⁸ the main groups of perpetrators committing CRSV are the SPLA and SPLM/A in opposition, militias and unidentified men in uniform.²⁹

Government Security Forces

The UN Secretary General highlighted that 'sexual violence perpetrated by State actors or armed groups associated with the State remains of grave concern in... South Sudan.'³⁰ UNMISS reported in 2014 that perpetrators of sexual violence include members of the South Sudanese army and the national police service.³¹ In the period between December 15 and May 2013 UNMISS reports that 27 cases of SGBV were documented in the Central Equatoria State alone. Of these, 22 incidents were attributed to Government security forces. These included 14 incidents of rape and gang-rape, one attempted rape and four cases of sexual slavery.³²

SPLM/A in Opposition

The UN Secretary General and the Special Representative on sexual violence in conflict report that the SPLM/A in Opposition continue to commit sexual violence on a similar scale and of similar severity to that committed by government security forces.

Other militias and unidentified men in uniform

Reports indicate that women and girls leaving UN protection of civilian sites for water, firewood or to travel to markets have been harassed, raped and gang raped by soldiers and 'unidentified uniformed men.'³³ Youths and armed cattle keepers also perpetrate sexual violence.³⁴ The UN Secretary General also identified members of the South Sudan National Police Service, the Justice and Equality Movement, and

²⁸ Above n 1; above n 5.

²⁹ United Nations Security Council, *Report of the Secretary General on Conflict Related Sexual Violence* (23 March 2015) S/2015/203 paras. 48-50

³⁰ United Nations Security Council, *Report of the Secretary General on Conflict Related Sexual Violence* (23 March 2015) S/2015/203 para. 8

³¹ UNMISS, *Conflict in South Sudan: A Human Rights Report* (21 February 2014)

³² UN report: *Conflict-related sexual violence in South Sudan*

³³ United Nations Security Council, *Report of the Secretary General on Conflict Related Sexual Violence* (23 March 2015) S/2015/203 para. 49

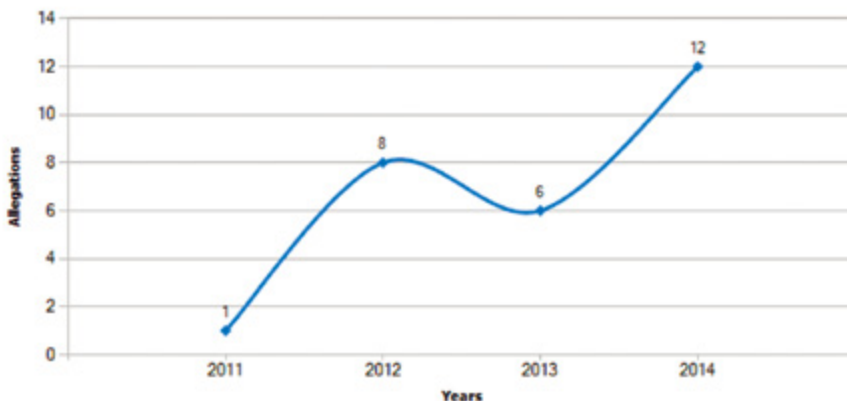
³⁴ United Nations Security Council, *Report of the Secretary General on Conflict Related Sexual Violence* (23 March 2015) S/2015/203 para. 49

deserters from the SPLA as perpetrators of sexual violence.³⁵

UNMISS

Actors working on the ground report that the presence of UNMISS is of vital importance in protecting civilians and curbing the rates of sexual violence.³⁶ However, the Mission is resource constrained, lacking in human capital and faces enormous logistical challenges due to lack of roads and infrastructure and ongoing conflict. There have been reports that UNMISS has failed to protect civilians from sexual violence; allegations stemming mainly from its inability to guarantee protection to IDPs congregated within its camps, or those in areas close to UN bases.³⁷

UNMISS forces have themselves have also been involved in cases of SEA. In 2007, allegations SEA against UNMISS prompted the establishment of a taskforce to monitor cases of SEA involving international staff.³⁸ Figures collected indicate that allegations against UNMISS personnel are increasing, as indicated by the graph below.³⁹



Allegations of SEA against all categories of UNMISS personnel⁴⁰

³⁵ United Nations Security Council, *Report of the Secretary General on Conflict Related Sexual Violence* (23 March 2015) S/2015/203 para. 50

³⁶ This was stated on three occasions by local NGOs during a field mission to Juba in April, 2015.

³⁷ K. Allen, 'South Sudan: Women raped under the noses of UN forces', BBC, 10 June, <http://www.bbc.com/news/world-africa-27765898>

³⁸ IRIN, 'Sudan: Task force to address sexual abuse and exploitation', 21 February 2007, <http://www.irinnews.org/report/70292/sudan-task-force-to-address-sexual-abuse-and-exploitation> (accessed 14 July 2014).

³⁹ <https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsforAllCategoriesofPersonnelPerYearSexualExploitationandAbuse.aspx>

⁴⁰ Graph taken from: <https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsforAllCategoriesofPersonnelPerYearSexualExploitationandAbuse.aspx>

3. Access to Justice

3.1 Formal Legal System

South Sudan has not yet established a formal justice system that provides accessible and predictable access to justice for its civilians.⁴¹ The formal justice sector disintegrated following the outbreak of conflict in December 2013. Local sources, including legal providers, report that there are no courts routinely hearing cases in Lakes, Unity or Upper Nile.⁴² Accessibility of the formal justice system throughout the remaining states is restricted to very few areas, which are urban and financially secure.⁴³

In 2014 the international community restricted its funding to purely humanitarian programmes, following allegations by the UN that the South Sudanese authorities may have committed war crimes and crimes against humanity.⁴⁴ Following this funding restriction, efforts to strengthen the capacity of the government to adopt and enforce laws, maintain an effective police force and oversee prisons and detention centres have been largely stopped.⁴⁵ The result of these developments has been a further breakdown of formal law, increasing impunity for SGBV and a justice sector with insufficient capacity to respond to this crisis.

3.2 Customary Legal System

Most cases and disputes continue to be resolved through customary legal systems.⁴⁶ Customary legal systems are resilient, trusted by communities and capable of resolving a high volume of disputes through a consensus-based and conciliatory approach. However, these systems provide limited protections to vulnerable populations such as women, refugees and internally displaced people (IDPs), and minority

⁴¹ Deng, DK, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (March 2013) p. 1

⁴² Presentation made at roundtable on accountability for sexual violence in South Sudan, 26 January 2015; See below for full roundtable minutes.

⁴³ Conversation with employee from IRC, 2 April 2015; presentation made at roundtable on accountability for sexual violence in South Sudan, 26 January 2015.

⁴⁴ UNMISS, *Conflict in South Sudan: A Human Rights Report*, (8 May 2014) para.274

⁴⁵ Conversation with employee from IDLO, 3 April 2015

⁴⁶ D. Deng, 'Challenges for Accountability', March 2013, South Sudan Law Society, Pact and USAID.

groups and may 'serve to reinforce patriarchal power structures in local societies.'⁴⁷ The customary legal system is also ill equipped to mediate disputes between the government and civilians who complain of human rights violations at the hands of the state, due to the system's focus on consensus and agreement. The asymmetrical power dynamic between formal and customary governance structures, including the inability of customary courts to enforce decisions relating to the government, would further frustrate attempts to hold the government to account through customary mechanisms.

Customary courts are often conducted in open public spaces, attended by mostly male community members, and presided over by male elders.⁴⁸ Women who do seek justice and speak out in front of their community about sexual and gender based violence that they have experienced are subject to stigmatization and may even be vulnerable to physical abuse.⁴⁹ A study, which reviewed customary law in South Sudan by UNDP, states that in some

circumstances, a survivor of rape must marry the perpetrator.⁵⁰ Displaced and minority women are particularly disadvantaged by this system because their elders have very little bargaining power in comparison to the major tribes. To date, it appears that legal interventions aimed at increasing the access of vulnerable and minority women to justice through the formal legal system have been limited.

The customary legal system provides limited protection for vulnerable populations such as women, refugees and internally displaced people.

⁴⁷ Deng, DK, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (March 2013) p. 13

⁴⁸ Deng, DK, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (March 2013) p. 2

⁴⁹ United Nations Security Council, *Report of the Secretary General on Conflict Related Sexual Violence* (23 March 2015) S/2015/203 para. 48; Deng, DK, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (March 2013) p. 2

⁵⁰ UNDP, 'In Search of a Working System of Justice for a New Nation: Ascertainment of Customary laws- volume II'.

4. Current Gaps in Addressing Sexual and Gender-Based Violence

The demand for activities that strengthen the justice sector's ability to respond to sexual and gender-based violence (SGBV) in South Sudan far outweighs the capacity of existing service providers. This is for numerous reasons, including the shift in focus by donors and the international community from state building to humanitarian response, the small number of local actors working in the justice sector and the sheer volume of SGBV and other human rights violations occurring in the country. A handful of organisations have activities that either address strengthening the justice and rule of law sector or that respond to cases of SGBV. However, there is limited intersection between these two types of projects.

Please see Annex I for a mapping of the organisations currently undertaking activities in the areas of rule of law/ access to justice and SGBV response.

4.1 Gaps in SGBV response

There are currently two main streams of SGBV prevention programmes operating in South Sudan: response services and awareness raising. Since the outbreak of

There are very few international projects currently focused on increasing the capacity of the formal courts, either in general or specifically in relation to SGBV.

conflict in December 2013, mechanisms have been established to respond to SGBV in five IDP camps and in Aweril, Nimule and Juba. However, these sites only house approximately 10% of the displaced population.⁵¹ In other counties in crisis-affected areas, SGBV services are limited to awareness raising, which does not assist those already subjected to SGBV.⁵² It is also clear that there are extremely limited legal interventions occurring in this field, in terms of either legal services for the survivor or proactive legal action aimed at preventing such offences in the first place, such as the development of laws, policies or functional legal institutions.

⁵¹ GBV Sub-Cluster inputs for the South Sudan events at UN GA in September 2014

⁵² Ibid.

4.2 Gaps in approach to rule of law

International donors' shift in focus from capacity building to purely humanitarian assistance has been accompanied by a pronounced reluctance to give any assistance to governmental institutions, including formal justice institutions such as the courts and the judiciary. One effect of this has been that many international actors are now focused on engaging with the customary justice system, rather than the formal courts. These projects have focused predominantly on ascertaining and documenting the customary law, a project lead by the UNDP, and providing training to elders intended to ensure their decision making procedures are in line with international human rights and procedural fairness standards.

While such projects are important and may contribute to meaningful harmonisation of the formal and customary systems, it must be acknowledged that the customary system's focus on consensus and conflict mitigation is not easily reconcilable with principles of survivors' rights and accountability for the perpetrator in SGBV cases. The UNDP's own ascertainment of the customary law states that under certain circumstances a survivor of rape must marry the perpetrator.⁵³

At present, it appears possible to conclude that the formal rather than the customary system is best placed to respond to SGBV cases in a manner that best protects the rights and needs of the survivor. However, there are very few international projects currently focused on increasing the capacity of the formal courts, either in general or specifically in relation to SGBV cases. Given the limited choices available to survivors, this is an obvious gap and a significant obstacle to the pursuits of justice and accountability for perpetrators.

4.3 Activities undertaken to address these gaps

On 8 September 2014, the government of Norway hosted a roundtable on SGBV response in South Sudan. Attendees at the roundtable included representatives of states, UN organisations, the International Committee of the Red Cross/ Crescent (ICRC) and NGOs. The purpose of the roundtable was to 'contribute to greater awareness of the current situation in South Sudan, and to a strengthened humanitarian response and accountability to affected populations' with regards to SGBV. The roundtable included a discussion on how to reduce impunity for perpetrators of sexual violence. Whilst all participants welcomed the discussion, a number of

⁵³ Above n 50, p 17.

participants pointed out that it was long overdue since the increase and escalation in the rates of sexual violence since the outbreak of conflict in December 2013. According to the government, 'there has been too little progress overall in prioritising protection and SGBV in the humanitarian response' to the South Sudan conflict, and the discussion at the roundtable confirmed that position. It further stated that, 'responding to SGBV has not been a priority in the humanitarian country team and the extreme logistical and other challenges are not facilitating a proper SGBV response'.

Participants at the roundtable agreed that SGBV and other protection measures must be prioritized in the planning processes, logistics and funding of humanitarian response. UNMISS plays an important coordinating role in ensuring this priority is acknowledged and acted upon.

Several participants pointed to the need for national capacity in the justice sector and for reinforcing the capacity of the national human rights commission. Finally, it was agreed that parties to the conflict, donors, the UN and troop contributing countries (TCCs) all bear some responsibility for preventing and responding to ongoing allegations of sexual violence, though it is unclear whether the legal basis of this responsibility or the possibility of accountability were touched upon.

Opportunities: Roundtable Minutes

On 26 and 27 January 2015, LAW and the Nuhanovic Foundation held an expert roundtable to identify creative ways to address sexual violence in South Sudan, Darfur and Somalia. Minutes relevant to South Sudan context have been included below.

5. Accountability of Domestic Actors

5.1 Context and legal system

Presenter: Linda Tyego (Advocate, South Sudan)

Sexual violence in South Sudan is widespread. Systematic rape is commonly used as a weapon of war. Under the South Sudan Penal Code, rape is punishable by 14 years imprisonment and a fine payable by the perpetrator. However, this punishment is not adequately enforced. Marital rape is legalized under the Penal Code. The Penal Code does not explicitly criminalise sexual harassment, but does contain a provision in section 250 that criminalises 'acts intended to insult the modesty of a woman', making it punishable by two years imprisonment and a fine. These types of acts should be more effectively defined and criminalized, because such behaviour can evolve into more serious sexual violence. Domestic violence is common in South Sudan and is not effectively addressed by the law. Underage marriage is also common, and parents have legal rights to sell their daughters or to give them away as gifts. This is the case because there is no legal right conferred on the girl to resist such a procedure, even though it is known to be common. Forced marriage may also occur when to widows who are seen to be 'inherited' by the male relatives of their deceased husbands.

At present in South Sudan, levels of sexual and gender-based violence (SGBV) are higher in regions that are not under government control. Tribal conflict is one of the primary factors driving up the rates of SGBV. Most SGBV cases go unreported for numerous reasons, including fear of being blamed for the incident, of being mistreated by family, of having to marry the perpetrator and of being unable to find a husband.

The presenter ended with a discussion on what needs to be done to reduce the rates of sexual violence in South Sudan.

- ➔ Firstly, rules and policies aimed at enforcing legal prohibitions on sexual violence should be incorporated into all government institutions.
- ➔ Secondly, lawyers, judges and prosecutors must be trained in the law relating to sexual offences.
- ➔ Finally, women's groups need to be empowered.

Questions and Discussion

If militias from South Sudan cross the border into Sudan and commit crimes, can they be tried by Sudan? Under South Sudanese law, people who commit crimes across the border must be tried in South Sudan. However, many of the South Sudanese militias who commit crimes across the border are doing so because they are mobilized or have the tacit approval of the South Sudanese government and are therefore unlikely to be prosecuted. If nationals of another country commit a crime within Sudan, the Sudanese criminal procedure law differentiates between two types of offences: those that are criminalised in the home country of the alleged perpetrator and those that are not. The law states that if the act is criminalised in the other state, it should be prosecuted there; if it is not criminalised in the other country, then it should be prosecuted in Sudan.

Are private prosecutions possible? Yes.

Who are the main perpetrators of sexual violence? Sexual violence is primarily committed by two groups of people: men known to the survivor and armed men in uniform.

What is being done to uphold the rule of law in South Sudan? The situation in South Sudan is similar to that in Sudan: it is very difficult to bring cases, especially against government forces; permission from relevant authorities must be granted; beginning prosecution is an extremely long procedure; and there is very limited awareness of how to access the formal justice system. It is also very difficult to challenge government action due to the security risk involved.

Is the South Sudanese conflict tribal or political? It is complicated. It began as a political dispute but there are many factors at play, including tribal tensions.

What is the role of UNMISS role in protecting civilians? It is very difficult for peacekeepers to protect civilians in South Sudan. In South Sudan, there are allegations that UNMISS has not done enough. However, it is also known that if UNMISS is not present in a certain area, people are killed. In UNAMID, it is clear that the peacekeepers themselves need protection. President al-Bashir has said he may refuse to extend the mandate of the peacekeepers. It must be asked what the effect of this would be.

Is it possible in any of the jurisdictions to take an anonymous public interest case against the government for abuses committed against civilians? There are provisions in the South Sudanese Child Act which allow witnesses to remain anonymous in certain offences involving children. However, to the knowledge of the South Sudanese attendees, these have never been applied in practice. In Darfur, it is possible for witnesses to remain anonymous. Since 2013, no details relating to sexual violence cases involving children have been made public.

5.2 Innovative strategies to strengthen domestic legal system and institutions

PRESENTATION ONE: Strategies employed in Kenya, Samwel Mohochi (Mohochi and Company Advocates)

The first presenter discussed innovative legal strategies to address sexual violence committed by the security forces in Kenya. Kenya has high levels of sexual violence and remains a highly tribal and patriarchal society. Rape is rarely reported. The first time sexual violence was discussed publicly by doctors and lawyers was 1999 at a medical-legal conference. The conference led to the creation of a taskforce which produced a report inclusive of recommendations on how to better address sexual violence in Kenya. These recommendations included the establishment of gender units within the police, training of police and other actors on how to handle sexual violence cases, severely punishing police officers for failing to effectively investigate cases and establishing an office of a Special Rapporteur on sexual violence. Most of these recommendations are yet to be fully implemented.

Another strategy put into place for addressing sexual violence came after the post election violence of 2007, which involved many allegations of sexual violence, in the form of a joint inquiry into the violence by civil society and the police. However, many NGOs pulled out of the process, alleging that the police were using it to sanitise their record of abuse.

In the last fifteen years, rates of sexual violence have remained the same. Policing and security operations have increased, often at the expense of measures aimed at protecting human rights. At least two security operations carried out in Nairobi since 2006 have involved allegations of sexual violence by the Kenyan authorities. The strategy employed by civil society after these operations is to provide medical and legal services to the survivors and to conduct legal advocacy highlighting violations of the Constitution and international law.

The debate surrounding the Kenyan Sexual Offences Bill, which was passed in 2010,

was extremely challenging in terms of the arguments mounted by those who opposed its passage.

These included that African women 'said no when they meant yes' and that the criminalisation of sexual harassment would constitute a serious impediment to men trying to find a wife. The Sexual Offences Bill originally contained a section that made it a crime to make false allegations of rape, which represented a serious threat to survivors wishing to report a crime. However, this section has now been repealed.

Ultimately, the most important strategy in addressing sexual violence in Kenya has been the development of a comprehensive legal and policy framework which is cross-cutting through all relevant sectors. This framework includes:

- ➔ The domestication of relevant international instruments;
- ➔ The Sexual Offences Bill;
- ➔ A National Policy on Gender and Development;
- ➔ Guidelines to inform service provision and training manuals for practitioners, including medical, psychosocial and legal support staff;
- ➔ Guidelines to outline who can be held accountable and for what;
- ➔ Guidelines for the medical management of sexual violence;
- ➔ Development in forensic capabilities of Criminal Investigations Departments;
- ➔ A framework through which the Department of Public Prosecutions can gazette private lawyers from sexual violence NGOs to prosecute sexual violence cases on behalf of the government.

PRESENTATION TWO: Strategies employed in Somalia, Nerida Nthamburi (LAW)

The second presenter concentrated on innovative legal interventions to increase accountability currently being employed in Somalia. The presenter outlined three objectives underpinning work being undertaken in Somalia: increasing the capacity of governments to uphold human rights; improving the capacity, quality and integrity of justice institutions; and expanding legal services for marginalized communities. In achieving these objectives, it is important for civil society organisations to use what is already available within the community being targeted, including leaders in the field and existing institutions. Projects currently underway in Somalia include the drafting of the Sexual Offences Bill, Female Genital Mutilation Bill and the ratification of the Convention on the Elimination of Discrimination against Women. It is important that for any act of drafting legislation or ratifying a convention, it is accompanied by an enactment and implementation plan, including the drafting and adoption of policies and guidelines for relevant actors. These actors will gener-

ally include legal, judicial, prosecutorial and medical actors, along with relevant civil society organisations.

In the context of sexual violence, the implementation of legislation particularly targeting SGBV offences is important. The impact of such legislation should be to ensure all reporting and investigation systems and procedures are survivor-centred, to place positive obligations on public officials to implement the laws, and ultimately increase the number of successful prosecutions of SGBV.

In regards to violations committed by the security forces, it is possible to increase accountability and bring about change by engaging with the bodies responsible for their actions. This includes the government of the territory in which the security force operate, the peacekeeping mission present, the UN and international donors. These activities are currently being undertaken in Somalia with positive results.

Access to legal redress may be increased by providing support to legal aid providers and other legal actors such as lawyers, investigators, prosecutors and the judiciary. Activities that may be conducted in this area include specialised training for SGBV responders, the establishment of one-stop medico-legal response centres, advocating for an increase in the number of female investigators and prosecutors and increased engagement with customary legal systems. The presenter used examples of strategies that have been employed to increase the capacity of legal actors in Somalia, including the production of a report on legal aid providers in Somalia identifying challenges and making recommendations on how to practically address these challenges including the establishment of the first Somali legal aid network, strengthening the referral pathway between SGBV response providers and ensuring appropriate oversight bodies are in place.

It is possible to change behaviour by undertaking strategic casework. This may range from civil litigation to criminal prosecution to complaints lodged with relevant domestic, regional or international bodies such as the UN Human Rights Committee, African Commission on Human and People's Rights and the East African Court of Justice. The aim of such casework is to establish important legal precedents, effect changes in legislation or policy and to directly provide legal redress to affected individuals and communities. Finally, legal advocacy can be an effective way to increase pressure and create changes in law, policy and practice.

Projects currently underway in Somalia include the drafting of the Sexual Offences Bill, Female Genital Mutilation Bill and the ratification of the Convention on the Elimination of Discrimination against Women.

PRESENTATION THREE: Strategies employed and attitudes towards justice in South Sudan,

Anonymous

The current conflict in South Sudan began in December 2013. It began as a political dispute within the Sudan Peoples Liberation Movement (SPLM) and quickly spread throughout the country. It escalated because of numerous underlying factors and the initial political dispute was only the trigger. These underlying factors include the lack of separation between the political and military spheres, a culture of impunity and a failure to address past violations and violence.

There is little to no access to justice through the formal justice system, especially for sexual violence. This is because of a lack of political will as well as difficulties presented in the context of conflict. For example, in January 2014, one hundred people were arrested and detained in a military compound; several months later, the compound was invaded by opposition forces and all of the detainees escaped. Incidents like this are common.

Another option for accessing some kind of justice from within South Sudan is the possibility of a reconciliation process. This issue has been highly politicised. Riek Machar and John Garang discussed the possibility of reconciliation before the adoption of the Comprehensive Peace Agreement (CPA) in 2005. However, after the adoption of the CPA and the attainment of independence in 2011 there was a conscious decision to defer the question of reconciliation. All options for addressing ongoing human rights abuses now come from outside South Sudan.

These options are as follows:

AU Commission of Inquiry into South Sudan: The AU Commission of Inquiry into South Sudan (AUCISS) is mandated to investigate human rights abuses and other violations of international law and to provide recommendations on the best means via which to ensure accountability and access to justice. The Commission published a report in June 2014 which did not make concrete conclusions. However, there are rumours that a strong final report will be issued which will include a list of names of those responsible for abuses going to the highest levels of government.

This report will be considered at the AU Summit in 2015.

Intergovernmental Authority on Development (IGAD) mediation in Addis: The IGAD discussions have focused on a number of different issues, one of which is the establishment of a Truth Commission, the mandate of which would be to document and report on human rights violations over different periods of history. This would be a non-judicial process which would aim to provide some measure of accountability.

On 25 August 2014, IGAD held a summit in Addis Ababa with the warring parties and other stakeholders. A protocol on resolving the ongoing crisis was signed by the South Sudan government and other IGAD member states but not by any non-government party to the conflict.

Independent tribunal: Discussions are currently under way regarding whether a criminal tribunal should be established. AUCISS may include recommendations on how this would work in practice. Outstanding issues for determination include whether such a tribunal would have international involvement or whether it would be a wholly national process.

Agreement in Arusha: In January 2015, three factions of the SPLM signed a reunification agreement in which they make some mention of accountability for war crimes committed since December 2013.

South Sudanese Perceptions of Justice: A study has recently been completed on South Sudanese perceptions of justice, reconciliation and accountability. The core question underlying the study was what the people most affected by the South Sudanese conflict think needs to be undertaken to address the legacy of violence and to reduce the culture of impunity. The study describes the results of a survey conducted throughout South Sudan but targeting the areas most directly affected by the conflict since December 2013. The results of this study are currently unpublished.

Policy considerations: There is a gap between demand for accountability and mechanisms that supply it, with very little being done to service that demand. How to address that disparity involves important policy considerations, including how to broach the subject of accountability without raising expectations, how to ensure institutions are gender inclusive, and in the context of sexual violence, how to identify the optimal outcomes for survivors. The presenter in this session offered the assessment that it has become clear that national systems are unable to provide systems of accountability and access to justice on their own. The formal system is not sufficiently functional, and the customary system does not effectively deal with violations of human rights. Obtaining access to justice for survivors requires international involvement.

Questions and Discussion

Several Committees have been formed to address the violations in South Sudan.

What has the effect of these been? These Committees have had little effect. One was established under the Supreme Court of Justice. It produced a report which was submitted to the President. Nothing has been heard since. The military produced its

own report into allegations of violence, but this has not been made public and there has been no suggestion that it will be. With regards to the many different forums in which the conflict is being addressed, forum shopping is a significant concern. Involved actors will engage most with the forum they perceive to be most beneficial to their own interests. The agreement in Arusha in January 2015 has had the effect of buying the negotiators more time, as they have made a small number of concessions that will allow the discussions to continue indefinitely.

Have efforts been made to establish transitional justice mechanisms in South Sudan?

This has been discussed but nothing has been established to date. Any attempts at transitional justice would have to be modest, targeted and manageable and should commence from 1992, when the current government was first established. However, the parameters of any such mechanism have not been discussed in South Sudan. The South Sudanese people are split between those who strongly favour reconciliation and those who favour retribution. It is unclear how these two groups can be brought together. A further issue that must be considered is that of timing. Many people think that conversations about transitional justice or reconciliation are premature, given that South Sudan is still at war. However, there are activities that can and should start now: the documentation of crimes, the preservation of evidence. The strategy to date has been to focus on key individuals, to build demand for local strategies and to create space to have a conversation about these issues. It is important to make determinations about certain issues now. For example, the issue of victor's justice is a real concern in South Sudan. It is difficult to imagine any post-conflict government being fair or accountable. Civil society should already be having conversations about how to address this.

Has the ability to gazette private lawyers to act as prosecutors for cases relating to sexual violence in Kenya improved access to justice for survivors? This has been suggested in the Somali context but met with significant opposition. At the height of the election violence in Kenya there was a near total collapse of the state. The police were not able to function effectively and cases were not referred to them fast enough. Many of the cases that alleged police abuse were not investigated at all. In general, there were over 5000 cases relating to the election violence that were commenced and then closed due to lack of evidence. The government did not have the capacity to deal with these cases itself. In cases involving sexual violence which were prosecuted, there were always complaints about the quality of the prosecution.

The office of the DPP is empowered under Kenyan law to gazette lawyers to prosecute criminal cases. After large numbers of allegations of sexual violence committed during the post election violence surfaced, institutions like FIDH, COVAW and other women's NGOs were invited to submit names of lawyers capable of prosecuting sex-

ual violence cases. It is unclear if this in itself has contributed to an increase in the ability of survivors of sexual violence to access justice.

It is clear however that in recent years, sentences for SGBV have increased, probably because the legal infrastructure surrounding such cases has improved in general, and the gazettement of private lawyers to hear such cases is part of this improvement. One of the reasons it is advantageous to involve NGOs in the prosecution of offences is because they will often have been involved from the beginning: they may have been the first responders, involved in providing medical services, documented the crimes committed and collected the evidence. This allows for effective and efficient prosecutor-led investigations into these crimes.

Another participant compared this to the situation in South Sudan, in which many if not most criminal cases are brought by private lawyers for profit. The state in South Sudan has effectively abdicated its responsibility to prosecute. This has had a negative impact on the overall ability of the South Sudanese people to access justice. However, there may be an intermediate solution. Not all cases should be prosecuted by private lawyers. However, it may be beneficial to have that option available if certain criteria are met. It may also serve as an incentive for the government to better train and support public prosecutors.

Could the strategies used in Somalia work in Sudan/ South Sudan? Is it possible to ensure that there is ownership of such strategies by local communities? In Somalia, it was important that all stakeholders were included in the planning of all activities from the beginning. These stakeholders include civil society groups, traditional and religious leaders and different government agencies. The movement comes from the community itself. In Puntland, for example, religious elders released a Fatwa prohibiting FGM before drafting of the Sexual Offence Bill commenced. In all regions, key stakeholders have been involved in the drafting process of the Sexual Offence Bills and the implementation plans. It is possible to transfer this strategy to other contexts.

Comment on female police officers, prosecutors and judges. One participant pointed out that although having more women in the police and judiciary may be an effective strategy for increasing women's access to justice, it must also be considered that placing women in these positions exposes them to significant danger. For example, in Afghanistan, many women were hired to join the police force to improve the situation for female Afghani civilians. Of these women police officers, 60% were physically or sexually assaulted. Another participant discussed the need for more female judges in Somalia. There is currently one female judge in Mogadishu, but she is unable to hear important cases because she is harassed and discriminated against, both by the authorities and customary leaders. She mainly hears minor cases which

do not draw attention to her There are many qualified and intelligent women in Somalia who should be allowed to join the judiciary.

Comment on best practice strategies for reporting and investigation allegations of sexual violence. In most fragile and conflict-affected states, survivors of sexual violence will be afraid to file a complaint with the police. The best practice model is therefore to allow civil society organisations to file complaints on behalf of the survivors. A law allowing this was recently implemented in Burundi. Further, it is important to ensure that there is appropriate oversight given to the implementation of all new laws and policies. In Burundi, a great deal of money was allocated to security sector reform, including the drafting of new policies and for the provision of trainings. However, it was realised after some time that these had very little impact if there was no oversight. Civil society organisations should play a significant role in providing that oversight.

Concluding observations: The study undertaken on perceptions of truth and justice in South Sudan is very interesting as it allows legal interventions to be tailored to the perceptions and wishes of local communities. It would be interesting to know whether similar surveys have been conducted in other regions. Another interesting consideration is how might societies in which there is very little rule of law encourage or move towards criminal investigations. It is unclear whether the ICC has the capacity to make a difference in these countries. Other options may need to be explored. This includes the collection and documentation of evidence now for possible prosecutions at a future time. However, in these countries there is very little capacity to collect or analyse forensic evidence. Options for addressing this issue must be considered. For example, it may be possible to collect evidence in one state and send it to another state to be stored and analysed. Finally, it is important to address the question of how women in the legal sector can be empowered to undertake their duties in the face of low capacity, lack of trust in the formal justice system by survivors and serious security threats. This will require building the capacity of public prosecutors and judges as well as private legal actors and NGOs.

5.3 Customary mechanisms,

Frederique van Drumpt, Cordaid

The South Sudanese customary system is very broad and contains many different elements and interpretations. Overall, it does not provide strong protections for women, but this is a very general observation. Some elements of the customary system could be viewed as pro-women. Considering that 80% of cases are dealt with through the customary courts, there is a strong incentive to strengthen the system that currently exists, or at least use it as a referral system, rather than to concentrate solely on the formal system.

It is important to find points of engagement between the formal and customary systems. At present, there is confusion and contention about how these interact. This is made more complicated by the fact that there are many different types of customary law. In some areas, customary actors say they always refer sexual violence cases to the formal courts. However, this does not happen everywhere. Customary law also recognises witchcraft, and cases that try women for this 'offence' are inherently unjust and discriminatory.

Customary and statutory justice systems: The presenter shared perceptions from South Sudanese actors of the relationship and tensions between the formal and customary systems. Some actors commented on the strengths of the customary system: for example, customary authorities are better equipped to enforce judgments, the customary system includes a focus on the survivor as well as the perpetrator; and the customary courts are more familiar and accessible to the majority of South Sudanese people. Some actors in South Sudan however, including those from the customary governance system, pointed to the flaws in the customary law, including that it not follow procedural fairness rules and that those distributing justice could not be challenged.

When developing projects focusing on the customary system, the presenter warned against focusing on due process for all people rather than a target group. Projects designed specifically to assist women obtain legal services, for example, may have a detrimental effect on procedural fairness standards by providing one group with legal representation while refusing it to male defendants, who are more likely to be accused of the crimes. This can have the effect of encouraging women to make false claims of sexual violence and men not having legal representation..

Questions and Discussion

In South Sudan, customary law review centers were established to bring customary law in line with the Constitution. Are these or can these be successful? There does not seem to be any progress made on attempts to streamline formal and customary law, or in codifying the customary law. One participant said that in South Sudan, it would be very difficult to do this given the differences in the customary systems between the regions. Another participant said that in Sudan, it is important to write down the customary law. In recent years, there has been increased competition between the formal and customary law. This also has to do with breakdowns in communication and information about the spheres in which each may operate. Community leaders feel increasingly threatened by the formal law. Young people are more informed about the formal system, and because of this there is some forum shopping when initiating a legal case. This is particularly obvious in land disputes. If a local chief divides up land in a way that is to the detriment of one person, they may then go to the formal courts to attempt to obtain a more favourable judgment. This creates more conflict.

Can cross-clan customary mechanisms be used to facilitate wider, nation-wide reconciliation processes? These mechanisms are well-suited to resolving bilateral disputes between clans but have not developed in a way that would make them suitable for resolving politically and socially complicated nation-wide conflicts.

If traditional leaders are better able to enforce judgments, has any consideration been given to involving them in an enforcement capacity in the formal legal system? This would be problematic and may be seen as hiring people to act as vigilantes. The ability of customary leaders to enforce judgments stems from the fact that there is significant community pressure to comply with judgments made through the customary system. This pressure does not exist in the formal system but it is an area that should be focused on.

Closing remarks In societies where the customary system is used to resolve the vast majority of complaints, it seems necessary to engage with it in some way. If it is used to address serious criminal offences, how can this engagement be used to ensure that human and women's rights are taken into account and upheld? One way may be to involve women in customary mechanisms. This does not happen in any of the countries currently being focused on but has happened in other contexts. Another strategy may be to identify a champion elder who advocates for women's and human rights issues. Another may be to establish Community Oversight Boards that link elders to paralegals and therefore to the formal legal system.

5.4 African regional mechanisms

PRESENTATION ONE: African Union mechanisms,

Elizabeth Deng (Amnesty International)

The first presenter in this session discussed different regional mechanisms that can or could be established in the African context, focusing on the Commission of Inquiry in South Sudan but also addressing other mechanisms.

AU Commission of Inquiry on South Sudan: The first of these mechanisms is the AU Commission of Inquiry on South Sudan. Though this was discussed in a previous session, the presenter in this session focused on the procedure involved in establishing the Commission and the challenges with this process. The Commission was set up by the AU Peace and Security Council soon after the outbreak of violence in December 2013. This initially inspired much optimism. However, it was not until March 2014 that Commissioners were sworn in, despite the obvious urgency of the situation, which was a disappointment to many people. Initially, the Commission was given a three-month mandate: from March until June 2014. An interim report was submitted in June 2014, which did not make any conclusions. It was not until the end of August that investigators actually arrived in South Sudan. These investigators included an expert on sexual violence. However, while the experts were highly qualified in appropriate fields, it was widely agreed that it took too long for them to be deployed.

A final report was submitted to the AU in October, but has not yet been released. A great deal of advocacy is being undertaken to ensure the report is made public. The UN has recently called on the AU to release the report. There is general optimism about its quality and content. The government generally did not cooperate with the investigators and writers of the report but made some attempts at doing so in the final days that investigators were in the country, including by allowing them into an area in which people had been massacred to conduct investigations there. The Chair of the Commission, former Nigerian President, Olusegun Obasanjo, has made statements about accountability including that no South Sudanese leader can claim innocence and that nothing can move forward until justice is done and seen to be done. This is seen as a positive sign by many observers. However, there is a concern that the report will not be published. It is believed by some that the threat of publishing the report is being used as leverage in the ongoing political negotiations. There is also a fear that releasing the report may disrupt negotiations, for example by releasing the names of people to be prosecuted, which may involved politicians

and others involved in the talks. It may therefore provide a disincentive to pursue peace.

Possibility of hybrid court: In May 2014, UN Secretary General, Ban Ki Moon made comments indicating he supported the establishment of a hybrid court to address the atrocities in South Sudan, similar to the court established in Senegal. The AU Commission then released a statement saying it also supported the establishment of a hybrid court. However, numerous people are of the opinion did not necessarily enjoy the support of all of the Commissioners.

Other ad hoc mechanisms: Numerous other mechanisms can be established at the regional level to look further into certain contexts. In Mali and the Central African Republic, for example, human rights monitors were sent in. In Darfur, an AU High Level Panel was established, which produced a comprehensive report and recommendations that were not implemented. AU Special Rapporteurs may also make visits to certain places and produce reports. FIDH has recommended that the AU identify a permanent mechanism to deploy monitors to conflict, though this has not yet received traction.

All of these mechanisms are difficult to utilise in South Sudan, as South Sudan has not deposited its letter of accession to African Charter with the African Union. AU bodies are therefore prevented from making visits to South Sudan in an official capacity. At the AU session in April and May 2014, a resolution was adopted on 'the Situation of Women and Children in Armed Conflict.' The Special Rapporteur on Women and IDPs and Refugees is also writing a special report on this issue which may be utilised by actors in the field.

PRESENTATION TWO: International Conference on the Great Lakes Region, Deirdre Clancy (UN Monitoring Group on Somalia and Eritrea)

The second presenter discussed the International Conference on the Great Lakes Region (ICGLR). This conference produced a voluminous set of texts including new instruments which were ratified by states including Sudan and South Sudan. The framework contains the most progressive approach to addressing allegations of SGBV that has been seen any region, though the provisions are legally ambiguous and there has to date been little implementation of the ground. The Pact Framework consists of interlocking legal frameworks and instruments, including a special committee on international crimes with investigative powers. The Pact must be signed in its entirety- it is not possible to sign individual instruments. By signing the Pact, the

presidents of Sudan and South Sudan are therefore signing treaties designed to hold people accountable for war crimes.

The Pact was developed over a period of 10 years and ratified in 2008. The UN, AU and civil society organisations were all deeply involved. The long gestation period for the Pact gave many people the opportunity to be involved, to the extent that large sections of the instruments were drafted by members of civil society. The core element of the pact is the Dar es Salaam Declaration, which consists of four legally binding instruments, a political element and the Special Reconstruction and Development Fund. The specific Protocols within the Pact include a Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children. All of the protocols that make up the Pact include a strong focus on gender violence and discrimination between the sexes. The many cogs that come together to create the Pact means that it is extremely comprehensive but also hugely ambitious, multidisciplinary and difficult to implement.

The Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children:

- ➔ Is also relevant to situations in which violations are committed outside the territory of a country.
- ➔ Defines SGBV very broadly and clearly defines it as an international crime. In fact, it defines it so broadly that there is debate about whether the definition should be considered international best practice.
- ➔ Requires that states remove all statutes of limitations. However, there are complicated legal issues with this.
- ➔ Contains a comprehensive set of measures relating to the investigation and prosecution and sexual offences and compensation to be given to survivors.
- ➔ Provides for modified procedures to take into account the emotional state and need for anonymity of victims.
- ➔ Focuses on the treatment of offenders, which is an area not included in other international instruments focusing on SGBV. It recognises a broad range of acts that can be subject to criminal penalty, covers extradition matters and urges maximum sentences.
- ➔ Comes with model legislation is attached, which includes provisions on elements such as committees that oversee how claims are processed and mechanisms to ensure the safety and security of survivors.
- ➔ Mandates the recreation of a regional facility to for training police, judicial officers and others who handle cases of sexual violence.

The establishment of the regional facility in particular indicates that the state

parties of the Pact see SGBV as a collective concern, rather than an individual state concern.

SGBV is also a key element of the international crimes committee set up by the Pact to oversee and monitor allegations of war crimes and crimes against humanity. This committee can also establish national committees to inquire into allegations of the commission of international crimes and suggest other special measures such as the deployment of a response team. The committee was approached to look further into crimes committees in Southern Kordofan and Blue Nile but this was extremely political and eventually unsuccessful.

There are some gaps in the focus given to SGBV within the Pact; primarily that the focus is on response rather than on working with men and prevention; that issues of state immunities are not dealt with; and that issues of amnesty are not dealt with. Otherwise, it is a very comprehensive framework.

The question then is how this framework can be used. Firstly, many of the treaties included in the Pact are directly applicable within member states and are in force. Secondly, the model legislation for criminalising SGBV can be used in member and other states. Finally, these treaties have been relied on by the African Commission in interpreting law.

PRESENTATION THREE: The African Commission, Mohamed Badawi (African Centre for Justice and Peace Studies)

The next presenter discussed the African Commission, with a focus on six cases between 2010 to 2013 on the situation in Sudan. The presenter said that since the referral of al-Bashir to the ICC, the Sudanese government has been increasingly responsive to local mechanisms. Before the referral, the Sudanese government tended to ignore petitions made to the African Commission. However, it has now decided that it is more politically viable to cooperate with the African Commission while ignoring the arrest warrant issued by the ICC. The police currently arrest people for collaboration with the ICC but not with the African Commission.

In one of the six cases taken to the Commission, a human rights activist was accused of collaboration with ICC, was detained and raped by security agents. The other five cases do not involve sexual violence, but do relate to people opposing the Sudanese government. Local courts in Sudan are unable to hear such cases. The African Commission accepted the cases because there is a general denial of access to the courts where there are allegations of human rights violations by the Sudanese government.

The African Commission is one of the only tools that can be used to promote access to justice in the context of Sudan. However, it has certain drawbacks: it is extremely slow, disorganised and may on occasion even lose information and submissions. However, the Commission should be used alongside advocacy to push the Commission to make decisions faster and ensure that they are implemented.

Questions and Discussion

What was the case selection process for the cases submitted to the African Commission relating to the situation in Sudan? Legal organisations have turned to the African Commission for all allegations of human rights abuses by the government because there is no other option. The ICC case is not achieving results and the local system is not available.

In South Sudan, are there tradeoffs between justice and peace? The culture of impunity in South Sudan is well known. The result of this culture is continued perpetration of violations of humanitarian and human rights law. There is an argument currently that the report by the AU Commission of Inquiry should not be released because it names prominent political figures as perpetrators of abuses, and this would be detrimental to the peace process. However, the participant answering this question believes that there can be no peace when there is impunity and the most credible way to threaten impunity at present would be to publish the report. The participant disagrees that the named individuals are necessary for peace. On the contrary, if people who have perpetrated international crimes have participated in the peace process, it would be better to exclude them from continued involvement now.

Could the ICGLR play a mediation role? What clout does the review committee of the Great Lakes Pact have? To date, the ICGLR has been more engaged with micro issues, for example the return of refugees in the Democratic Republic of the Congo. It was also very successful in its operations in Kenya after the post election violence. In that instance, it played a responsive role it was the first to arrive in the region and the first to seriously address the issue. The Pact is an interesting and comprehensive package but doesn't have political prowess. At this stage, it should be considered a secondary mechanism that can be used to bolster legal frameworks and support engagement with political processes.

Are there still advantages in taking cases over abuses committed in Sudan to the African Commission when the government has so little will to change its behaviour? The Sudanese government does not significantly change its behaviour as a result of cases taken to the Commission. It can also seem as though taking a case to the Commission entails a lot of work with little reward. However, at the very least, taking

cases to the Commission raises attention about certain issues and keeps in conflict in Sudan on the regional agenda. There was also one case where the Sudanese government agreed to release people identified by the Commission from prison. However, generally, the Commission should be seen as a tool for advocacy and standard setting, rather than a mechanism that can be used to prevent ongoing violations and abuses.

Are hybrid courts a viable option for South Sudan? There is a real risk that states will see a hybrid court as an attack on their sovereignty. This was the reaction by many people in Sudan when the situation in Darfur was referred to the ICC. It will therefore be important to carefully consider what kind of hybrid court should be established. It is a viable option if this is negotiated effectively.

5.5 International legal framework

PRESENTATION ONE: International Human Rights and Humanitarian Law, Irene Nyakagere Thomas (Pan African Lawyers Association)

The first speaker focused on the international legal instruments relevant to the commission of SGBV in conflict. Focus was given to the Declaration on the Elimination of Violence Against Women. This instrument is currently only a Declaration, which cannot confer legal obligations, but may become a convention. It requires states not to commit SGBV and to adopt positive measures to prevent and punish violence against women. Another relevant instrument is the Optional Protocol to the Convention on the Elimination of Discrimination Against Women, which emphasizes the role of the state to prevent violence against women and prosecute those responsible, whether that violence is committed as a public or private act.

Other relevant instruments include the International Covenant of Civil and Political Rights (ICCPR) and its first Optional Protocol, the Convention Against Torture and the African Charter. Each of these instruments effectively, though not explicitly, prohibit SGBV. If states have signed the first optional protocol to the ICCPR, then individuals from those states can submit complaints alleging violations of the treaty to the UN Human Rights Council. The African Commission and the African Court also have an advisory jurisdiction. This could potentially be a tool that could be used from the lawyers from Somalia, Sudan and South Sudan to request opinions on certain actions by the governments in each state. Most international legal instruments do not specifically focus on sexual violence, though they can be interpreted to prohibit it. Lawyers working in these areas could therefore advocate for

a new instrument that explicitly prohibits SGBV, or to push for the ratification of CEDAW and its optional protocol.

PRESENTATION TWO: Legal Framework Applicable to Sexual Exploitation and Abuse (SEA) Committed by Security Actors, Elizabeth Deng (Amnesty International)

Sexual exploitation can be defined as any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including profiting monetarily, socially or politically from the sexual exploitation of another. Sexual abuse is the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

The need for a framework addressing and criminalizing SEA was brought forefront in 2002 following allegations of widespread SEA committed against of refugee and internally displaced women and children by humanitarian workers and peacekeepers in West Africa. In 2003, the UN Secretary-General released a bulletin on Special Measures for Protection from SEA, which applies to humanitarian workers, peacekeepers and other representatives of the international community. Under the Bulletin, SEA constitutes an act of serious misconduct and is grounds for disciplinary measures including summary dismissal. Acts of SEA may include trading sex for food and other non-monetary items or services, verbal sexual abuse, forced prostitution and forced nudity as well as more obvious examples of rape and sexual slavery. Under international criminal law, SEA will usually constitute rape and therefore may also constitute torture or cruel, inhuman and degrading treatment, a crime against humanity or a war crime.

Jurisprudence from the Special Court of Sierra Leone (SCSL) touches on the issue of SEA. The Revolutionary United Front and the Armed Forces Revolutionary Front used sexual violence designed to destroy entire communities, including gang rape, rape with weapons and other objects, rape in public, forced rape between family members, forced nudity and so forth. Forcing women to undress in view of the public and forcing sexual abuse between family members were decided to constitute outrages upon the personal dignity of civilian women as a war crime.

The Inter-Agency Standing Committee (IASC), the primary mechanism for coordination of humanitarian assistance, has developed core principles to be incorporated into agency codes of conduct, including:

- ➔ Codes of conduct of national armed forces, foreign forces
- ➔ Code of Conduct for Blue Helmets:
- ➔ African Union Commission Code of Conduct for peacekeepers

Each of these codes of conduct define and prohibit SEA. Despite this legal framework, there are numerous difficulties in ensuring protocols prohibiting SEA are effectively incorporated and mainstreamed in peacekeeping missions and other security structures. The power differentials at play in a military occupation, peacekeeping mission or in police custody can also affect the independence and impartiality of the judicial process. The judge may be reluctant to rule against powerful or government forces and may have the same fear of reprisal as survivors who report the offence. There are also significant difficulties arising from the immunity of peacekeeping forces in local courts. There may also be jurisdictional difficulties. For example, extensive sexual violence committed by the JEM rebels in Sudan has been documented. However, Sudan is unlikely to assist in prosecuting the rebels in Sudanese court.

The UN Due Diligence Policy on UN support to non-UN Security Forces may be helpful for actors who want to advocate for greater accountability within security forces, including peacekeeping forces, supported by the UN. The policy provides that UN support cannot be provided if there are substantial grounds to believe that the security forces are committing serious violations of international law. In such circumstances, the UN must take measures to try to change the behavior of the security forces; and if this is not effective, must withhold support. Certain groups have used this policy to advocate that the UN refuses support to international or domestic forces who are engaged in such abuses and who have not taken measures to address this.

5.6 Domestic accountability for violations of international law

PRESENTATION ONE: Civil case in the United States, Allison White (Ballard Spahr)

The Torture Victim Protection Act (TPVA) and the Alien Tort Statute (ATS) are federal laws in the US that allows a civil claim to be brought in a federal court for international crimes committed abroad. The presenter in this session focused on the TPVA, which provides a civil remedy for two international law torts: torture and extrajudicial killing. The law gives redress where these crimes were committed by defendants who acted under apparent authority or under the 'color of law' of a foreign nation. The perpetrator under the TVPA must be a natural person, rather than a state or a corporation.

According to US jurisprudence, to constitute torture, an act must cause severe physical or mental pain or suffering and be intentionally inflicted on that individual for a specific purpose, such as punishment obtaining information, intimidating them, coercing them or 'for any reason based on discrimination of any kind.' Courts have generally held that an individual can be secondarily liable under a "command" liability theory for aiding and abetting in violations of the TVPA.

Challenges to bringing a case under the TPVA include: whether the defendant is immune due to being a state official; the 'political doctrine' question, whereby the court cannot intervene in a question that may be considered political; whether the case would be better dealt with in another forum under the 'forum non conveniens' doctrine; whether the act was committed within the last ten years, as required by the Act; whether local remedies in the territory the crime occurred in have been exhausted; and importantly, whether the defendant can be considered to have 'minimum contact with the US'.

'Minimum contact' will be most easily established where the defendant is present within the United States. It also may be established in other circumstances, though these are poorly defined within the Act and subsequent jurisprudence. In one case, *Ahmed v. Magan*, the Court awarded \$15,000,000 under the ATS and TVPA despite a jurisdictional challenge based on the fact that the defendant was outside the jurisdiction. The court issued this ruling because the defendant was a permanent resident of the US. However, numerous cases have been dismissed due to the court finding that it did not have personal jurisdiction over defendants who were outside the country.

PRESENTATION TWO: Universal Jurisdiction,

Adam Hundt (Deighton Pierce Glynn Solicitors)

Universal jurisdiction (UJ) is the term used to describe laws that give a court jurisdiction over crimes committed outside the territory in which it operates. Crimes that trigger international jurisdiction vary from state to state but are informed by international criminal law, codified in the Rome Statute. Under the Rome Statute, Article 7(1)(g) provides that rape and other sexual violence of comparable gravity constitute crimes against humanity, and Article 8(2)(b) and 8(2)(e) provide that rape and sexual violence may also constitute grave breaches of the Geneva Conventions. Prohibitions of torture and cruel, inhuman and degrading treatment are also included in the African Charter.

Under UK law, torture is defined under Section 134 of the Criminal Justice Act as the intentional infliction of severe pain or suffering on another, where it is either performed as part of a person's official duties or where it is done with the consent or acquiescence of a public official. The offence can be committed "in the UK or elsewhere", regardless of the nationality of the accused. Unlike the rules under the TPVA, there is no requirement that the defendant have any connection with the UK, though the prosecutor may decide there is little to be gained from commencing a case against someone outside the territory. Domestic UK jurisprudence increasingly supports the position that rape and sexual violence is, or at least can be, a form of torture. The UK is a state party to the Convention Against Torture (CAT), as are Somalia and Sudan. CAT imposes a duty on state parties to either prosecute those who have committed torture or to extradite them to a more appropriate jurisdiction for prosecution.

The UK has UJ over a small number of serious offences under the Geneva Conventions Act and the Criminal Justice Act. These offences include war crimes, genocide and crimes against humanity. Under these UJ laws, the UK has a duty to prosecute people who are alleged to have committed or ordered these crimes. The legislation also provides that police should investigate even if the suspect is not in the country. These laws were not really utilised before the arrest of General Pinochet of Chile in 1998. Though numerous cases have been taken under UJ laws in recent years, there has only been one successful UJ case in UK history: a conviction of an Afghan mujahadeen military commander for torture and hostage taking in 2005. This case was politically viable to take and to win at that time. Other cases present a more significant political challenge.

There are two UJ cases currently underway. The first is against Colonel Kumar Lama, a former Nepalese army officer charged with torture allegedly committed during Nepal's civil war. This case is currently going through the appeals process.

The other case is that of Prince Nasser bin Hamid al-Khalifa. Prince Nasser was due to visit London to attend the 2012 Olympics. A dossier of evidence was sent to the DPP asking him to investigate allegations that the Prince had committed torture Bahrain. The fact that the allegations related to his personal and direct commission of torture made the case more viable, as it was not necessary to prove a chain of command. Initially, the DPP refused to investigate on the basis that Prince had state immunity. This gave the lawyers on the case the opportunity to challenge that concept.

A Bahraini activist brought a case in the High Court challenging the Prince's immunity. The activist had suffered torture in Bahrain, though not by the Prince himself. There were many procedural problems with the case, including extreme difficulty in serving papers on the Prince. This alone took about a year. Eventually, just before the hearing, the DPP agreed that the Prince did not have immunity. The Judge on the case recorded the DPP's agreement that the immunity did not exist, so that a judgment now exists on which arguments against the existence of such an immunity may rely.

There are significant obstacles to the use of UJ laws in the UK. Due to recent changes in the law, all issuances of arrest warrants and all prosecutions require the consent of the Attorney General. For members of current governments, the UK may also issue 'special mission' immunity, which provide that the holder of the visa cannot be subject to prosecution in UK territory.

There are other opportunities for promoting accountability even where attempts to take UJ cases fail. It is possible, for example to refer cases to the Home Secretary to ensure that the person the allegations are made against is excluded from the UK for immigration purposes. If the UK government is complicit in the abuses, a civil case may be brought against it. It may also be possible to bring a civil claim against UK companies whose employees commit claims abroad.

Questions and Discussion

Can a case under the TVPA and ATS be taken against members of a current administration? It depends on which member of government. Current heads of state and some ministers will not be able to be held liable in a human rights lawsuit. However, once they leave office, they may be sued for abuses committed while they were in power. The other hurdle is that the member of the foreign government has a sufficient connection to US territory, which generally requires them to be present in the jurisdiction. This is less likely for current members of foreign administrations.

Under UJ laws in the UK, the requirement that the suspect be present within the territory to actually arrest them presents a hurdle. Is it possible to extradite someone to the UK for the purpose of prosecuting them? Has the UK ever sent investigators outside the country? It is unclear whether the UK could legally extradite people to the UK to face trial for crimes committed outside the UK. This requires more research. However, it is very unlikely the UK would do it even if it could for political reasons. The UK can and does send investigators outside the UK. How likely it is to do this in practice depends on whether or not the case has received significant publicity and attention.

In the UK, if an individual perpetrator cannot be tried, can their commander be tried in their place? Yes, if you can establish that the commander had an official connection to the conduct that forms the basis of the allegation. Even if such a connection is established, the complicity of the commander will not be automatic, as the commander could mount an effective defence. However, if you can provide that the conduct happens regularly and the commander knew or should have known about it, he or she should be able to be held responsible.

When will a state actor have immunity? State actors generally have immunity for acts committed in their official capacity. However, it is possible to argue that offences such as sexual violence cannot have been committed in an official capacity and are therefore not subject to the immunity. This question is complicated and political. Courts are generally unwilling to adjudicate on the actions of other states.

Why is it easier to challenge corporations than government officials? It is easier because they do not have immunity laws to protect them. However, they are also not considered capable of committing a criminal offence. This means that only civil compensation claims can be taken against corporations, rather than criminal prosecutions.

How did the Bahraini activist in the Prince Nasser case have standing when he wasn't himself tortured by the Prince? The court was satisfied that he had a close enough interest to the actions of the Prince to justify giving him standing: he had been tortured in Bahrain for anti-government activity; he remained active in Bahraini politics; and his family was still there and at risk of being tortured. The lawyer for the defendant did not challenge the activist's standing to bring the case.

If a prosecution is ongoing and the suspect escapes but later returns, will the prosecution be able to continue? This depends on the internal systems and policies of the police.

5.7 Criminal accountability for violations of international law

Presentation Two: Domestic Prosecutions, Angela Mudukuti (Southern African Litigation Centre)

The first speaker in this session focused on the case of *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (the “Zimbabwe torture case”). The facts of that case occurred in the run up to the 2002 elections in Zimbabwe. The election was between the ruling party and the Movement for Democratic Change (MDC). Government supporters raided the MDC Headquarters, rounded up those who supported or were suspected of supporting the MDC and subjected them to torture. Many of these people then fled to South Africa.

The Southern African Litigation Centre (SALC), which took the case, collected a dossier of evidence supporting these allegations from doctors and lawyers who provided services to the victims on the ground. The document put together by SALC for the South African National Prosecuting Authority (NPA) argued that these violations were widespread and systematic and therefore constituted torture. Under the South African Implementation of the Rome Statute of the International Criminal Court (ICC Act), a person may be tried for crimes against humanity committed outside state territory as long as the perpetrator is present in South Africa. The dossier argued that as Zimbabwean officials traveled regularly to South Africa, South African courts had jurisdiction to try the crimes they allegedly committed. Originally, the NPA decided not to investigate the case, presumably because of the political sensitivities involved. SALC challenged this decision by the NPA through judicial review. This challenge eventually went to the Constitutional Court, which ruled that the NPA must begin an investigation. Because SALC had collected the evidence immediately following the allegations of torture, all relevant evidence was in South Africa and readily available to the NPA.

This case was taken strategically; the evidence was overwhelming and readily available and it will be used to develop important precedent within South Africa. It was also a creative method of ensuring some form of accountability in Zimbabwe. Zimbabwe is not a signatory to the Rome Statute and does not have an independent judiciary willing to make decisions against the government, leaving very little opportunities for legal redress within the country. This case took eight years and was heard by three courts. There is now solid precedent set for the investigation of crimes against humanity committed in a foreign territory within South Africa.

This case is also useful because it demonstrates how the civil and criminal law can be used effectively to initiate the investigation of offences. In South Africa, legal organisations can submit evidence to the prosecutorial authorities to prompt an investigation, and any decision made by those authorities not to investigate despite the existence of that evidence can be called through judicial review. This strategy can be employed elsewhere. It is also a good example of civil society bodies working

together to collect evidence on the ground and then use that evidence for the purpose of pushing for a case to be heard.

To improve accountability for international crimes, it is also necessary to work with countries that demonstrate political will to ensure such crimes are tried. This includes working with state parties to the Rome Statute to ensure it is effectively domesticated into their national law.

Multiple security forces and militias involved in this conflict are supported and trained by third party States.

6. Accountability of International Actors

6.1 Legal obligations and strategies to ensure accountability of peacekeepers and bilateral forces

PRESENTATION ONE: Overview of abuses by and accountability of foreign actors,

Dierdre Clancy (UN Monitoring Group for Somalia and Eritrea)

The first presenter in this session introduced this topic by discussing the different ways in which foreign actors may have legal responsibilities for their actions within the states in which they operate. For example, multiple security forces and militias are supported and trained by third party states. There are also security forces present and operating in these countries independently from the peacekeeping forces there, including for example Ethiopian forces in Somalia. These forces may have a constant presence in the country or may cross the border periodically to deal with certain issues.

Another issue is the presence of private security companies operating within these states. In many conflict and post conflict contexts, the weakness of police and other security actors create a vacuum that is frequently filled by such companies. In some instances, this may amount to mercenary activity. These companies generally if not always insert immunity clauses into their contracts with the host government. It is very difficult to hold them accountable. Questions of the most appropriate jurisdiction in which to do so may also arise. For example, it could be asked whether the government of the host state has any residual legal responsibility to ensure private security actors within its territory.

One instrument to look to when considering strategies for engaging with security actors including peacekeepers is the UN Human Rights Due Diligence Policy for UN Support to Non-UN Security Forces. This was discussed in an earlier presentation. It does not ensure accountability as such but it can make a difference by applying pressure to create behavioural change.

PRESENTATION TWO: Legal Framework Applicable to Peacekeepers and Bilateral Forces, Moses Sande (LAW)

The second presenter in this session discussed the role of peacekeepers and bilateral forces in Somalia, Darfur and South Sudan. In Somalia, there have been allegations against both the African Union Mission in Somalia (AMISOM) and bilateral forces for committing sexual violence; in Darfur, the UN Mission in Darfur (UNAMID) recently conducted investigations into an alleged mass rape of Dafuri women which many, including the UN, have stated were not independent or impartial; and in South Sudan, there have been allegations by INGOs and NGOs that the UN Mission in South Sudan (UNMISS) has failed to protect the civilians under its control. It is therefore relevant to examine both the legal obligations on peacekeepers not to commit sexual violence and their role in responding to allegations that have been made.

The presenter began with a brief overview and history of peacekeeping operations. When the UN began deploying peacekeepers in the 1950s, operations were characterised by three guiding principles: the requirement for consent from the host country, the impartiality of the peacekeeping troops and the non-use of force except in self defence or in defence of the mandate. Peacekeeping operations have now developed from operations designed to observe, verify and report to operations with a more assertive role in both 'enforcing' the peace and engaging in political and state-building activities. Most peacekeeping operations are now multinational and multi-disciplinary, and include a focus on building the rule of law and promoting respect for human rights. All such operations must be approved by the UN Security Council pursuant to Chapter Seven of the UN Charter.

The laws applicable to peacekeeping missions differ from the laws applicable to bilateral forces which invade a country without the permission of that country's government. Invading forces are subject to IHL, ICL and international human rights law, though the extent to which IHRL applies is subject to debate. In some circumstances, the applicable rule of IHL will be those that apply in occupied territories. These legal frameworks will also apply to peacekeeping forces. However, an internal legal framework will also apply to these operations, consisting of the Status of Force Agreement (SOFA) between the host country and the peacekeeping force, Memorandums of Understanding (MOUs) between the international organization and the troop contributing country, Standard Operating Procedures (SOPs) and various policies and Codes of Conduct.

The SOFA describes the relationship between the peacekeeping force and the host

state. It specifies that the peacekeeping force will respect all local laws and regulations, but gives noncivilian members of the peacekeeping force immunity in local courts for criminal matters, providing instead that allegations against military personnel must be investigated and prosecuted by the troop contributing country. Military personnel also have immunity from civil claims arising out of activities carried out in the line of duty. Conduct not carried out in the line of duty should be heard by a Standing Claims Commission established for that purpose. In reality, however, in most if not all UN peacekeeping missions, that Commission has not yet been established. The MOUs reiterate these obligations and duties and are signed by each troop and police contributing country. The SOPs set out pre-deployment requirements, the duties of the military police, rules relating to the establishment of Boards of Inquiry and may include a Code of Conduct. The UN and the AU also have specific policies relating to certain areas, including the prohibition of sexual exploitation and abuse.

These instruments set out a procedure for the investigation of allegations of crime or misconduct against peacekeeping personnel. The presenter discussed this procedure in the context of AMISOM. Generally, allegations are initially subject to a Board of Inquiry (BoI) at the contingent level. If the offence requires further investigation, the matter is then referred to AMISOM Headquarters, which will also establish a BoI. This BoI produces a report which should be sent to the Head of Mission and the Peace Operations Support Divisions (PSOD). These bodies will then make a recommendation about whether the allegation should be investigated and prosecuted by the Troop Contributing Country (TCC). If recommended, the TCC should investigate the allegations and report back to AMISOM on the progress of those investigations. In reality, this process is followed within AMISOM but the TCCs rarely report back on the progress of cases. It is also uncommon that sexual offences are referred through the AMISOM system, at least partly because there is no mechanism through which Somali civilians can lodge complaints within the AMISOM structure.

Both the AU and the UN have policies specifically relating to the prohibition of SEA. The UN Secretary-General has released a Bulletin on Special Measures for Protection from SEA, and the UN has produced a 'Comprehensive strategy on assistance and support to victims of SEA by United Nations staff and related personnel'. The Code of Conduct for UN peacekeepers has also recently been updated to include a specific prohibition of SEA. AMISOM has also adopted a Policy on Prevention and Response to SEA. As the internal legal frameworks for peacekeeping operations provide that troop members must be tried under their own laws, the domestic law of each TCC is also relevant. This includes military codes, criminal codes and the constitution of each state. IHL and ICL apply to sexual violence which constitutes war crimes, and ICL applies to sexual violence committed as a crime against humanity.

Relevant human rights treaties signed by each TCC will apply in most cases. Domestic and international law also prohibit torture. Sexual violence has now been found to be a form of torture by human rights courts in the African, Inter-American and European systems as well as the International Criminal Tribunals of Rwanda and the former Yugoslavia.

PRESENTATION THREE: Responsibility and Accountability of Troop Contributing Countries (TCCs) and International Organisations,

Clare Brown (LAW)

The final presenter discussed the legal framework applicable to the bodies responsible for peacekeeping operations, including both the troop-contributing country and the international organisation responsible for their deployment. According to Article 3 of the Draft Articles on the Responsibility of International Organisations for Internationally Wrongful Acts, every international wrongful act by an international organization entails the legal responsibility of that operation. 'Internationally wrongful acts' in this context refers to grave breaches of the Geneva Conventions or other serious violations of international law. The next question which must be considered is what happens when an agent of a state is placed at the disposal of an international organization, as happens in the case of peacekeepers. Article 7 of the Draft Articles provides that the act of a body placed at the disposal of another international organization shall be considered an act of the latter organisation if the organisation exercises effective control over that conduct. International jurisprudence generally holds that effective control should be determined by 'factual control' over 'specific conduct', determined on a case-by-case basis. The fact that an international organization is legally responsible for certain conduct does not mean however that they can be held legally accountable. Under Article 105 of the UN Charter, the UN and all UN staff members acting in an official capacity enjoy 'all privileges and immunities' necessary to fulfill the purpose of the organisation. Section 18 Convention on the Privileges and Immunities of the United Nations further provides that this includes immunity from all legal process. Article 40 of the African Charter and the General Convention on the Privileges and Immunities of the Organisation of African Unity give the same immunity to the AU. However, the AU statute does not include the limitation that the immunity must be necessary for the organisation to fulfill its purposes. This indicates that there may be room to argue that UN peacekeeping personnel have limited immunity. It could be asked whether having immunity in local courts for allegations involving sexual violence is necessary

for the peacekeeping force to fulfill its mandate.

Another potential avenue for challenging the immunity would be to argue that the survivors of abuse by peacekeeping forces have a right to a remedy under international law. The UN Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide that all victims of such violations should have 'equal access to an effective judicial remedy'. However, it does not state who this remedy should be provided by. Bodies that may provide remedies include national courts, Standing Claims Commissions, human rights courts and international tribunals. Where domestic courts have no jurisdiction and international bodies do not have the means to order and enforce remedies, as in many conflict-affected states, it may be argued that the UN has the legal obligation to provide the remedy as it is the only organization capable of doing so.

This point was argued in the Dutch case of *Mothers of Srebrenica v the UN*. The case was brought by relatives of three men who were working for Dutchbat, the Dutch peacekeeping force that formed part of the UN peacekeeping force in the 1992-1995 Bosnian war. The men were Bosnian Muslims who had sought shelter, along with thousands of others, in the UN compound when Bosnian Serb forces overran Srebrenica on 11 July 1995. The Muslim families in the compound fell under the protection mandate of the UN peacekeepers. On 13 July 1995, the Dutch peacekeepers forced hundreds of Muslim families out of the compound. The three men, along with thousands of others, were then murdered by the Bosnian Serb army. The women originally brought the case against the UN on the grounds that the UN had effective control over the troops when they made the decision to force the families out of the compound, which was a violation of their responsibilities under international and domestic law. The UN claimed its absolute immunity under the UN Charter. This argument was accepted by the court.

The women then brought a case against the Dutch government, arguing that it too had responsibility for the actions of the troops. On this occasion, they were successful. The court ruled that even though Dutchbat was working under the UN, senior military and government officials in The Hague also had effective control over their actions at the time they forced the men and boys out of the compound. This decision was arrived at for a variety of reasons, including that the commanders in Holland had the ability to change the behaviours of the troops on the ground, but did not do so. The court held that both the UN and the Dutch government could be held to have effective control over the same troops at the same time.

The presenter also discussed the ongoing US case of *Georges et al v. UN*, originally heard in the District Court, Southern District of New York (Manhattan) USA. In *Georges et al v. UN*, a case was brought against the UN for negligently causing a

cholera outbreak during a peacekeeping mission in Haiti. The case was brought by a group of victims, represented by the Institute for Justice and Democracy in Haiti. The basis of the case was that those affected would be denied a remedy unless the UN provided one, and that the right to a remedy is provided for under international law. The peacekeeping mission in Haiti has not established a Standing Claims Commission, meaning that there is no mechanism through which those affected can claim compensation. The UN claimed immunity from suit. The District Court in the US agreed to hear the case. However, in January 2015, it upheld the UN's immunity from suit. The Institute of Justice and Democracy in Haiti is currently appealing this decision.

Questions and Discussion

Could a case against the TCC be taken to the African Commission or one of the treaty bodies? An allegation could be made that where a country fails to effectively prosecute credible allegations of human rights abuses, it violates its duties under both the agreement with the peacekeeping mission to which it belongs and under international law. It may be possible to make this case through a submission to the African Commission or the CEDAW or CAT treaty bodies.

Is it possible to use the law of the TCC to compel them to send a report on the progress of the case back to the peacekeeping mission to which it belongs? The obligation to send a report on the progress of the case to the mission is contained in the SOMA, not in the domestic law of the TCC. However, it may be possible to argue within the TCC that the state is breaching its private and public international law obligations.

If peacekeeping missions made under Chapter Seven aim to assist a country in rebuilding, why did UNMISS change its mandate to exclude a capacity building function? The peacekeeping mission in South Sudan is now limited to providing purely humanitarian assistance, pursuant to UN Security Council Resolution 2155 (2014). It no longer provides development assistance. The point was made that UN peacekeeping missions cannot assist the countries they operate in on a long-term basis unless they also provide capacity building, assistance and security to civil society, which was inadvertently and significantly affected by this change in mandate.

Comment on AU peacekeeping missions. In the context of Somalia, the overlap and interplay between the mandates of the UN and the AU present a specific challenge. AMISOM is the body mandated with peacekeeping tasks, including accountability for alleged abuses committed by troops. The UN Mission in Somalia (UNSOM) remains the body mandated to work on statebuilding. Issues of accountability and access to justice are included in this mandate. The number of AU peacekeeping

missions will increase in the future. The relationship of these missions to the UN Mission in the country must be better defined. Best practices in this respect should be subject to further research and advocacy.

Is the UN policy on SEA effectively enforced? A report is currently being conducted into the effectiveness of the UN's zero tolerance policy on sexual violence. This report will be made public soon. In Somalia, the UN's policies on SEA do not bind the AU, which has its own policy. No UN personnel in Somalia have had accusations of SEA made against them. However, the policy requires the UN to have a community reporting structure, which is not yet in place. AMISOM has a code of conduct on SEA in place. However, the code is non-comprehensive and does not clearly specify roles for implementing the policy or consequences for if it is breached.

There is also no independent reporting mechanism, making it near impossible for survivors of sexual abuse to access the investigation process. LAW is having discussions with AMISOM the week of 2 February 2015 to discuss amending and improving these policies and procedures.

Is there a problem with people who are accused of SGBV offences being rotated out of their place in the contingent before they can respond to these claims? Many positions are posted for a maximum duration of one year. The Force Commander and Deputy Force Commander for example can only be posted in one location for a year and then must be rotated out as a requirement of duty under their own military laws. The Mission does not have the power to keep these positions in one place. In instances where another state bilaterally invades a country, such as the case of Kenya or Ethiopia in Somalia, which laws apply - particularly in circumstances where their presence does not amount to an occupation? Certain laws of IHL apply where the invading force can either be said to be occupying the territory or where it has a certain level of 'effective control' over an area. However, more extensive research needs to be done to determine the parameters of this legal framework.

Closing remarks One of the most important considerations in terms of ensuring that survivors of SGBV including SEA allegedly committed by peacekeeping operations is to ensure that an independent complaint mechanism exists through which survivors can make complaints in a safe and anonymous way. These independent complaints mechanisms must be established in peacekeeping missions which have not yet done so. In terms of the investigation of complaints, this is the joint responsibility of the TCC and the UN or AU Mission. Clearer distinctions must be made between the roles of each body and each must be subjected to proper oversight. Oversight mechanisms do not yet exist in a meaningful sense in AU missions and further thought must be given to who could play this role. Finally, more research needs to be undertaken on certain elements of the applicable legal framework to bilateral forces who do not have an agreement with the government of the host country.

6.2 Legal obligations and strategies to ensure accountability of donors

PRESENTATION ONE: Strategies for Engaging with Donors, Nyagoah Tut (Amnesty International)

The first presenter in this session discussed strategies for engaging with donors who fund security forces in these regions. To begin with, it is important to attain a level of clarity in terms of what their level of involvement is in the country in question. Donor accountability means that they themselves are aware of what their involvement in the country means on the ground, taking action where this involvement results in human rights abuses and taking positive actions to ensure international laws and standards are complied with. Government agencies are accountable to the state government, and the state government is responsible for explaining its actions to the host country.

Accountability can be promoted within these government structures in a variety of ways. They could be held legally accountable in their own courts or international forums. Legal accountability may include contractual accountability, whereby legal action is taken against donor agencies for breaching the terms of their contract with the host government. It could also include taking civil action against agencies for violating their own internal control systems or domestic or international law. Financial accountability refers to the use and allocation of donor finances.

It is much easier to hold donor agencies accountable in their own country than within the host country. The presenter gave the example of human right abuses committed by the US in South Sudan. There is very little ability or capacity of actors on the ground to challenge these abuses. It is unlikely that the US as a state could be challenged in South Sudanese courts. Individuals from US agencies will generally have immunity.

It is possible in some countries to bring legal action against the state agency in their own courts. There is a case proceeding through the UK courts at the moment challenging the actions of the Department for International Development in the UK for providing funding to a villagisation project in Ethiopia in which many people were forcibly displaced from their homes, women were subjected to sexual violence and some people were killed.

For engagement with donors that does not amount to legal action, it is important for the organisation engaging with the donor to first decide what they want the result of that action to be. The end objective must be identified: whether it is to sus-

pend funding, to change the behaviour of the security forces, to provide reparations to survivors of abuses or to change the focus of the donor. It is important to first pressurise the government to enter into bilateral discussions so that these issues can be raised and the reaction of the donor and their willingness to engage can be ascertained.

Presentation Two: Strategic Casework, **Adam Hundt (Deighton Pierce Glynn Solicitors)**

The second presenter discussed the possibility of taking cases against donors for violating their domestic and international legal obligations, with a focus on the UK. The presentation covered legal obligations on the state and on private companies. With regards to the obligations on the state, the Overseas Security & Justice Assistance Guidance (OSJA) applies to all government departments. This policy requires an assessment of the human rights implications of assistance given to third party states, and requires ministerial approval if there is a significant risk that funding will contribute to serious violations of international humanitarian or human rights law. The state also has clear obligations when granting arm export licenses under the Consolidated Arms Export Criteria (CAEC). However, in 2014 this policy was amended to remove the passage, "An export licence will not be issued if the arguments for doing so are outweighed.... by concern that the goods might be used for internal repression."

Under UK law, the doctrine of legitimate expectation holds that if a person has a legitimate expectation that an administrative decision will be made in a certain way, that person may seek judicial review of the decision if it is decided in another way without reasons or explanation. Legitimate expectations can be set by public statements and policy. The existence of the OSJA policy creates a legitimate expectation that UJ funding will not be put towards activities with a significant risk of violating international law. Breaching that policy may therefore constitute a breach of administrative law.

A case is currently underway in the UK challenging a decision by the UK government to provide training to Sudanese security forces. The government in that case argued that the training was confined to human rights issues. However, this is inconsistent with evidence received on what the training actually involved. Judicial review is being undertaken on the grounds that the funding violates the OSJA policy and therefore frustrates the legitimate expectation that the funding will be allocated in a certain way without explanation or Ministerial approval. This case is ongoing. Other laws may be used to encourage accountability of donor bodies in the UK. This includes s417(5)(b) of the Companies Act 2006, which requires company directors

to 'have regard' to such matters as 'the impact of the company's operations on the community and the environment'. Vicarious liability and common law negligence can be used to bring claims against UK-based private companies whose employees commit crimes whilst posted abroad. This is the type of claim brought against G4S for the allegedly negligent hiring of a person with clear mental health issues who opened fire on his colleagues when in Iraq. It may be possible to use these laws to take a case against private security contractors in Mogadishu, depending on the existence and nature of allegations against such companies.

Third State Responsibility: Under the principle of third state responsibility for breaches of international humanitarian law, all states have a duty to ensure that other states uphold the principles of IHL. Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that a state will be legal responsible for an internationally wrongful act if they provide aid or assistance to another state committing such an act, where:

- a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- b) The act would be internationally wrongful if committed by that State.

The UK Government has accepted in legal proceedings that the Draft Articles are reflective of customary international law. However, it is difficult to persuade a domestic Court to enforce the principle of third state responsibility, both because domestic courts are reluctant to enforce customary international law generally and because it is seen to represent a threat to the principle of state sovereignty. The case of *Belhaj*, decided in 2014, may indicate some loosening in the courts' traditional strictness in this area.

OECD complaints: A final strategy for increasing donor accountability is to use the OECD complaints process. This does not have a legal enforcement mechanism. However, it can be used for the purpose of advocacy and to change corporate company behaviour. The OECD guidelines for multi-national companies state that firms should respect human rights in every country in which they operate, and have appropriate due diligence processes in place to ensure that rights are upheld in practice. Complaints can be submitted by civil society organisations to National Contact Points (NCPs) within each country. The NCP will either accept or reject the complaint. If accepted, the case will proceed to either mediation between the parties or a decision by the NCP, which may include recommendations to be implemented by each party. These recommendations are not binding.

Questions and Discussion

In the case challenging UK assistance to the UK security forces, is the argument being made that the UK should stop funding the forces altogether or that the nature of the funding be changed? The lawyers in the case are not presenting an alternative. They are simply challenging the funding as it is currently being given. The argument being made by the UK government is that the training is to ensure that the troops comply with international law. However, this does not match the nature of training given on the ground, according to evidence and testimony collected. The argument is therefore that the funding of the trainings currently being given is unlawful.

The due diligence guidelines that apply to DfID and the FCO require that a human rights assessment be carried out, but do not specify what will constitute a breach of that assessment and what action must be taken in the case of a breach. Did this cause any difficulties? The government defendants in the case do not contest that they can continue funding notwithstanding the existence of serious human rights regulations. They accept that the policy prevents this. Rather, they argue that the funding does not contribute to human rights violations and in fact contributes to the reduction of such violations by the Sudanese army. The applicability or enforceability of the policy is therefore not contested.

Comment on OECD complaints: One participant agreed that at first glance OECD complaints may seem toothless. However, in situations where there are very few if any other options for accessing redress, they may present a very useful option. The focus on mediation and agreement is non-threatening to companies and may result in better outcomes for the victims than a more confrontational approach.

6.3 Strategic casework through UN mechanisms

Presenter: Samwel Mohochi (Mohochi and Company Advocates)

This session discussed how UN mechanisms could be used to increase accountability for sexual violence by state actors. Certain international instruments, including the Convention Against Torture, Committee for the Elimination of Discrimination Against Women, International Covenant for Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, have committees that monitor their implementation. State parties to each of these instruments are expected to submit a report describing their progress on implementing the instrument on a periodic basis. Further, if state parties have signed Optional Protocols indicating their acceptance, these committees may also receive complaints from individuals from within their territories. However, even where states have not signed such Protocols, it may still be possible to strategically engage with certain UN mechanisms to ensure certain issues are addressed.

For example, Kenya signed the Convention Against Torture (CAT) in 1997 and submitted its initial report to the Committee on the Convention Against Torture in 2007. Civil society organisations within Kenya had real concerns about the complicity of Kenyan authorities in conduct amounting to torture. However, Kenya had not signed the Optional Protocol that would have allowed for complaints to be submitted from individuals within the state. The strategy employed by civil society was to compile and submit a shadow report to the one submitted by the state. The report was developed by 18 NGOs, included accounts of nine separate incidents of torture gathered from the Kenyan courts and went for over 800 pages. It dealt with every article under the CAT and compared the accounts they had received to the version of events presented by the state.

When these reports were submitted, a half a day was set aside for the presentation of the report and input from relevant stakeholders. State parties and non-state parties are allowed to participate in these sessions. The rest of the report was reviewed in private session where the main issues were not brought to the public domain. This results in a lack of transparency. For determinations or recommendations by UN mechanisms to be effective in practice, they must be followed with targeted legal advocacy and negotiations with the government on how the recommendations may be implemented.

Questions and Discussion

What is the best way to engage with these mechanisms? If a Special Rapporteur or independent expert is due to visit a country or submit a report, NGOs should cooperate to develop a shadow report, make a joint submission or undertake panel side discussions to coincide with a visit or event.

However, it was pointed out that where the mandate of a UN special mechanism is politically sensitive, the government in question may intervene to block visits and events and may reject the findings of a report. In the case of Kenya, the Kenyan government rejected the findings of the Committee Against Torture's report and threatened to contain or crack down on activists assisting with the production of such reports. Two human rights defenders were killed in 2009. It is extremely important to do a lot of advocacy around activities supporting or contributing to special mechanisms, as this will reduce the ability of most governments to block or interfere with the NGO undertaking those activities. The UN must also produce a periodic report (UPR) outlining the measures it is undertaking to ensure human rights defenders to cooperate with it to produce reports and documents are adequately protected.

Comment on using UN mechanisms where other forums cannot be utilised. In 2013, LAW and its partners filed a complaint with the UN Human Rights Committee against Canada regarding the construction of settlements and selling of confiscated land in Bil'in village in the occupied Palestinian territories. The villagers being represented in the case first took the case in the Israeli courts. However, Israeli courts refuse to rule on the legality of Israeli settlements and the case was dismissed. The villagers then tried to sue the Canadian corporations involved in the construction on and appropriation of the confiscated land in Canadian courts. This case was dismissed on the grounds of forum non conveniens- that Israel, rather than Canada, was the appropriate forum for the case to be taken in. As both Israeli and Canadian jurisdictions refused to hear the case, there were no domestic options left for the villagers.

However, Canada is a state party to the ICCPR, which has extra-territorial application. LAW and its partners submitted a complaint to the Human Rights Council, which is the treaty body overseeing implementation of the ICCPR. The case is still being heard. It demonstrates where such mechanisms may be particularly useful in the face of limited alternatives.

6.4 Legal advocacy

Presentation One: Advocacy in South Sudan, Angelina Daniel Seeka (End Impunity Organization)

The first presenter discussed legal advocacy strategies employed to address sexual violence in South Sudan. The presentation began with an overview of the context of sexual violence in South Sudan. Such violence includes rape and sexual exploitation and abuse as well as early marriage and the giving of girls as compensation or gifts. The conflict that began in December 2013 has caused the levels of sexual violence to rise significantly. There is very little access to justice. In South Sudan, to address these issues it is important to work with relevant Ministries, such as the Ministries of Justice and Gender and Social Welfare. It is also important to operate through the media, for example by engaging frequently with journalists, running radio programmes and through social media. The presenter also discussed grassroots advocacy for the purposes of educating the community on their rights and obligations, including by visiting women in prison and working with women groups and civil society. UNMISS also has a Human Rights Division which can be engaged on issues relating to women and access to justice.

It is also possible to conduct advocacy with international actors. For example, in South Sudan, the presenter's organization has met with the High Commissioner of Human Rights and Advisor for Secretary on Genocide. The Security Council visited South Sudan in 2014 and civil society organized an online petition focusing on sexual violence to coincide with this visit. In South Sudan, it is very difficult to make any impact on government practice or policy. Legal advocacy undertaken by civil society is more likely to result in increased media attention given to sexual violence, increased services provided to survivors, more support for legal actors and more targeted engagement by the international community. UN Resolution 2155 (2014) on UNMISS, for example, stresses the "urgent and crucial need to end impunity in South Sudan and to bring to justice perpetrators of such crimes", which is in part a result of the legal advocacy on this issue that was conducted during their visit. Public interest litigation may be possible in South Sudan.

Challenges in successfully communicating these messages include a lack of commitment from donor agencies to commit resources to provide technical support to civil societies and government in addressing these issues; lack of political will; lack of Parliamentary will to ratify relevant international treaties; lack of enforcement of domestic laws to protect women and children; lack of access to rural areas and a lack of capacity amongst legal actors. Though the presenter did not have an opportunity to go through the recommendations made by the represented organization in full, these

recommendations were provided and are discussed here. They are as follows:

General:

- Establish a fast track legal process to hear sexual violence cases
- Establish a legal aid system;
- Engage women in peace negotiations;
- Train police officers in the receipt of complaints and investigation of sexual violence;
- Develop the family law to protect women;
- Provide trainings to traditional leaders on women's issues;
- Encourage Churches, mosques and other religious institutions to engage with the community on eradicating sexual violence.

GBV Protection Sub-Cluster:

- Include continuous legislative review in the 2015 workplan, and legal members should provide technical assistance on drafting new laws;
- Consider joint activity with child protection sub cluster;
- Hold a special session with Constitutional review commission and South Sudan Human Rights Commission on the inclusion of the prohibition of SGBV in the constitution;
- Increase the availability of information on the existing legal protections from SGBV ;
- Produce training and outreach material in Arabic and local languages.

Ministry of Gender:

- Develop a roadmap for the implementation of CEDAW;
- Develop specific SGBV legislation.
- Begin development of the family law to better protect women.

Parliament

- Ratify and enforce the Maputo protocol, Rome statute and all other human rights treaties pending before parliament;
- Pass implementation plans for CEDAW and CRC;
- Pass comprehensive legislation criminalising SGBV.

Donors

- Provide resources for technical assistance to civil society, Parliament and key ministries to revise and develop laws to combat all forms of SGBV;
- Assist Government to determine where and how resources could better be allocated to combat SGBV;
- Support the special protection units of South Sudan National Police Services (SSNPS), Public prosecutors and the judiciary.

PRESENTATION TWO: Strategies used in Somalia, Roisin Mangan (LAW)

The second presenter described advocacy as the most overused term but most underused tool to address human rights violations. The term 'advocacy' is widely misunderstood and is used out of context the majority of the time. Advocacy has been mentioned continuously throughout the roundtable as an important strategy. However, legal advocacy cannot be added as an afterthought to a given project; it requires a well thought-out strategy with clear targets, objectives and a detailed action plan.

In the context of Somalia, there are two different types of legal advocacy that can be undertaken: that focusing on the individual and that focusing on systematic change. Individual advocacy refers to efforts taken to change the situation of one person to protect his or her own rights or improve individual services. Systemic advocacy aims to change laws, policies or procedures applicable to entire groups of people. Before an advocacy strategy is developed, target identification or 'power analysis' needs to be undertaken. This includes asking questions such as: who are the decision makers? Where are the decisions happening? How are they taking place? This will determine the targets for advocacy endeavours, including both target individuals and systems. Overall and specific objectives then need to be identified. This requires taking into account the circumstances and situation surrounding the issue, as well as examining the skills and tools one has and which one needs to gain. After these factors have been considered, an advocacy strategy should be developed.

In Somalia, there are four main areas in which advocacy is being undertaken: engagement with donors; engagement with AMISOM; engagement with Somali National Army and Police and drafting of Sexual Offences Bills. Position papers, high level panel discussions and bilateral and public consultations are tools used as points of engagement for each of these targets.

The presenter ended with the following recommendations:

- Identify target group;
- Establish an advocacy strategy;
- Always positively engage with the targets- never use hostile language;
- Work with partners on the ground; and
- Ensure messages are harmonised.

PRESENTATION THREE: Using Sanctions Regimes for Legal Advocacy Purposes,

Dierdre Clancy (UN Monitoring Group for Somalia and Eritrea)

The presenter in this session discussed the sanctions regimes in Somalia, Sudan and South Sudan, with a particular focus on Somalia. The sanctions regimes in each of these countries have a particular scope. On the basis of this scope, groups and individuals may be identified for targeted sanctions such as asset freezes. This is not a judicial exercise but it does need to follow rules of due process in terms of deciding who should be targeted and explaining the reasons for that decision. If used in the correct way, it can create some measure of accountability for perpetrators of international crimes in these countries.

The presenter then described the sanctions regime in Somalia. This regime was established in 1992 and is the oldest in the world. The initial regime consisted of an embargo on arms dealing with Somalia. In 2008, its mandate was expanded to include targeted sanctions against listed individuals and entities. The basis on which people can be sanctioned includes those who have committed serious violations of international humanitarian or international human rights law. However, only four people in Somalia have been sanctioned for these reasons. It is useful to compare the regime in Somalia to the one currently operating in the DRC, where sanctions are frequently placed against people on the basis that they assist in the recruitment of child soldiers or commit serious violations of international law targeting women and children, including the commission of SGBV. The DRC regime began with a more traditional focus on members of armed groups and developed to include this expanded mandate.

The Monitoring Group for Somalia and Eritrea, which oversees the sanctions regime, has a wide mandate in terms of which violations of international law to focus on. Violations that could trigger sanctions include obstruction of humanitarian aid and all violations of international law which target civilians. The first of these categories has been used to identify and sanction individual members of Al-Shabaab. The second is what could be used to sanction perpetrators of SGBV, but to date this has not been focused on.

Sanctions regimes are overseen by Monitoring Groups who carry out in depth investigations into the situation on the ground. The mandate of these groups goes beyond a commission of inquiry, as sanctions regimes have tangible and punitive effects on individuals. The standard of proof required by the Monitoring Groups is between a civil and criminal standard. These groups operate by producing reports on the situation in Somalia as it relates to the arms embargo and sanctions regimes, including by describing ongoing violations of international human rights and hu-

manitarian law. As well as naming individuals and entities to be subject to sanctions, these reports can make other recommendations on how the issues outlined in the report may be addressed. Reports by these groups are issued as UN Security Council documents. It is therefore possible for the Monitoring Group to make any recommendation it would be appropriate for the Security Council to make. This includes requesting that the Security Council expands mandates where appropriate. For example, in response to ongoing violations of the Somali charcoal sanctions the UN Security Council developed a new Chapter VII power enabling states to search vessels where there were “reasonable grounds” to believe that they were carrying Somali charcoal. Monitoring Groups may also prepare confidential cases to share with the UN Security Council. The Security Council will then decide whether to sanction the individual or corporations according to the case.

It is possible for civil society to engage with these groups to ensure that recommendations are appropriately made and targeted. For example, civil society worked with the Monitoring Group for Somalia and Eritrea to ensure that the Security Council made recommendations on how AMISOM should respond to allegations of SGBV. The Monitoring Group has relied extensively on cooperation from NGOs and civil society to carry out their mandate. This engagement is also important for the Monitoring Group to understand when sanctions regimes are going to have a positive impact, and when they are going to do harm. There are also thematic sanctions regimes, which may be used to target abuses across regions. Two that are relevant to the current context are the sanctions regime on children in armed conflict and that on sexual violence in armed conflict.

Questions and Discussion

How does the Monitoring Group for Somalia and Eritrea engage with the government? The Monitoring Group ensures it provides as much visibility on its work within the government as possible, including directions of investigations and findings made, unless these would compromise the security of the people they were working with. There is a difficult balance between investigating corruption and working with or advising the government. In recent times, there have been increasing requests for the Group to provide advice to the government on anticorruption issues, and three of the team are now to be based in Mogadishu 20% of the time. This provides an opportunity for more positive engagement but also presents complications in terms of independence and ongoing investigations. It is therefore important that the Group has a mix of diplomatic and investigative capacity.

Which groups can be sanctioned? Both states and non-state entities can be sanc-

tioned. The understanding is that the sanctions have to be practically implementable, meaning that the individuals or entities sanctioned must be able to be targeted and sanctions must be able to be imposed. It is possible to sanction companies. Sanctions are, however, dependent on political will. For example, despite many detailed piracy investigations, no pirate has ever been sanctioned.

7. Recommendations

7.1 Improve national and regional coordination

a. Establish a domestic legal aid network

Implementing group: National legal organisations

No coordination mechanism currently exists where South Sudanese legal aid providers can share information or learn from similar experiences in comparable jurisdictions and security, logistical and political considerations render it extremely difficult for legal aid providers across the country to meet. Legal aid providers consulted to date have indicated that a Network that addresses these gaps would be extremely welcome in South Sudan.

b. Establish a regional network

Implementing group: National and regional legal organisations

The conflicts in the East and Horn of Africa are closely intertwined. Given the interconnected nature of the conflicts, and the similarities in the types of abuses occurring, it is clear that lawyers working on access to justice issues in these regions would benefit from closer engagement and collaboration. Legal actors should coordinate messages and strategies around strategic casework and legal advocacy. It is also important that legal actors share lessons learned from their experiences of drafting and implementing law and policy, and of engaging with customary systems in each region. An annual roundtable, which brings together local, regional and international actors, would provide an initial mechanism through which legal actors could collaborate.

c. Create a centralised database for research and mapping

Implementing group: National legal organisations

A centralised database of research and information would be an invaluable resource for local, regional and international legal actors. A mapping of useful cases, reports and other materials that currently exist should be undertaken as a first step.

7.2 Develop a law and policy package to address SGBV and CRSV

Legislation relating to SGBV in South Sudan is piecemeal and does not conform to international standards. The need for comprehensive legislation criminalising all forms of sexual and genderbased offences has been continuously noted by legal actors working on the ground. The Government of South Sudan (GoSS) has recently ratified CEDAW and signed a Joint Communique on addressing sexual violence with the UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Zainab Hawa Bagura. However, it appears that no implementation plan has been developed to ensure these commitments translate into practical action. An action plan has been developed, however, on UN Resolution 1325, and an expert on gender rights and the implementation of the Joint Communique has been appointed within the office of the President. The development of package to address SGBV and CRSV should include at least the following:

a. Drafting and passing a Sexual and Gender-Based Violence Bill

Implementing group: Government of South Sudan with assistance of national legal organisations (consultations, advocacy and assistance in drafting) and international experts (technical expertise)

The Bill should comprehensively define and criminalise all forms of sexual and gender-based violence and provide instructions on issues including burdens of proof, admissibility, how to evaluate evidence and aggravating factors.

b. Developing advocacy and implementation plans for relevant legislation, international conventions and commitments

Implementing group: National legal organisations and international experts, in consultation with the Government of South Sudan

This should at least include plans for CEDAW, the Joint Communique issued by the government and SRSG on sexual violence in conflict and the SGBV Bill.

7.3 Conduct high level advocacy

Implementing group: To be coordinated by an international NGO with subject matter determined by national NGOs. To bring together the UN, AU, IGAD and donors.

A wide range of actors in South Sudan bear legal responsibility and accountability for the commission of SGBV and CRSV. These actors include police, the Sudan Peoples Liberation Army (SPLA), UNMISS personnel; the GoSS and its various arms and Ministries. There are certain actions that can be taken by donors and the international community to increase the accountability of these actors and access to legal redress for survivors. A High-Level Panel discussion with a focus on legal interventions should be undertaken with the UN, AU, Intergovernmental Authority on Development (IGAD) and donors to discuss what action can be taken to reduce ongoing impunity for these crimes.

7.4 Commence Strategic Litigation

Opportunities for strategic litigation in South Sudan should be identified and taken forward. Strategic litigation can establish important legal precedents, effect legislative and policy change, and provide access to legal redress.

a. Domestic litigation

Implementing group: National legal organisations

A number of opportunities for domestic strategic litigation in South Sudan have been identified including the potential for taking a class action against the police for failure to adequately respond to SGBV complaints. These should be further explored by local, regional and international actors, and taken forward.

b. Transnational civil case

Implementing group: Transnational legal organisations/ law firms

A number of opportunities to undertake transnational civil litigation have been identified, and should be further explored.

- A case may be taken under the TVPA in the US to address abuses committed in South Sudan. There are many South Sudanese Americans who may be able to act as the plaintiffs in a case and who could identify a suitable defendant.
- It may also be possible to use transnational civil litigation to address failures to protect by the peacekeeping force, funding of South Sudanese security forces by the Diaspora and the use of social media to engage in hate speech and incite violence outside of South Sudan.

- It may be possible to take a civil case against a multinational corporation operating in the security sector.

c. UN mechanisms

Implementing group: National and international legal organisations

A strategy for utilising the Universal Periodic Review mechanism should be developed and coordinated.

7.5 Increase capacity of women lawyers

Implementing group: Capacity building to be undertaken by international legal organisations

Research shows that survivors of sexual violence in South Sudan are more likely to approach female lawyers than their male counterparts for assistance and representation. Female lawyers are also best placed to undertake proactive legal work such as legal advocacy and strategic litigation aimed at changing law, policy and practice detrimental to the rights of women. Though they are most needed in and best placed to address these areas, they face challenges in terms of capacity and experience in legal representation and legal advocacy. Capacity building should be undertaken through periodic trainings and roundtables and ongoing mentoring.

Female lawyers are also best placed to undertake proactive legal work such as legal advocacy and strategic litigation aimed at changing law, policy and practice detrimental to the rights of women.



Conclusion

Levels of SGBV in South Sudan, and CRSV in particular, have risen dramatically since the outbreak of conflict in December 2013. Such violence is being committed by both parties to the conflict, militias and unidentified armed men in uniform with widespread impunity. International and national actors working on the ground report that while numerous projects are being undertaken to respond to these crimes, the demand far outweighs the supply, and that interventions targeting justice and accountability in particular are extremely limited.

There is currently no formal justice system in South Sudan capable of providing accessible and predictable access to justice for civilians throughout the country. Even where formal courts do exist, only a small percentage of civilians are able to access them due to insecurity, lack of development and the costs involved, which are beyond the means of the average South Sudanese citizen. The inadequacy of the formal justice system has been exacerbated by restrictions on funding to government institutions imposed by the UN in relation to UNMISS and by most international donors.

For many survivors of SGBV, customary justice mechanisms are therefore the only accessible legal system through which to pursue justice. However, customary justice systems provide limited protection to women, minorities and IDPs. They are an inappropriate and ill-equipped forum to handle cases of sexual and gender based violence as cases are usually held in public, conducted by men and focus on conciliation rather than accountability. Due to the relationship between formal and customary justice systems, customary systems are not in a position to hold government, or rebel, security forces accountable for sexual violence.

Creative legal thinking is now needed to address these complex issues, and to determine how meaningful access to justice and legal redress may be obtained by survivors of SGBV in South Sudan. To address ongoing violence and impunity, a shift in focus and priorities is needed.

Humanitarian assistance and support to customary structures, while important, will not address these problems alone. Activities aimed at strengthening rights to legal redress and reducing impunity must be developed and given adequate support. It is hoped that the recommendations outlined in this report will be supported, implemented and expanded on to better ensure legal protection, empowerment and justice for those who have survived and those who remain at risk of SGBV in South Sudan.

Activities aimed at strengthening rights to legal redress and reducing impunity must be developed and given adequate support.