

21 February 2019

English only

Human Rights Council

Fortieth session

25 February–22 March 2019

Agenda item 4

Human Rights Situations that require the attention of the Council

**Report of the Commission on Human Rights in South
Sudan*****


* Reproduced as received.

** The information contained in this document should be read in conjunction with the report of the Commission on Human Rights in South Sudan (A/HRC/40/69).

GE.19-02913(E)



* 1 9 0 2 9 1 3 *

Please recycle 



Contents

I.	Introduction	6
II.	Mandate/Methodology.....	6
A.	Mandate	6
B.	Methodology.....	7
1.	Standard of Proof	7
2.	Protection of Victims and Witnesses.....	9
C.	The Commission's Work.....	10
III.	Background.....	100
A.	Agreement on the Resolution of the Conflict in the Republic of South Sudan (2015).....	100
B.	Breakdown of the ARCSS	11
C.	High Level Revitalization Forum	12
1.	Agreement of Cessation of Hostilities, December 2017	12
2.	Second Phase of High Level Revitalization Forum.....	13
3.	Khartoum Declaration, June 2018.....	13
4.	Agreements on Security Arrangements and Governance, July and August 2018	14
D.	Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan	144
IV.	Current Context	16
A.	Political and Security Context	16
1.	Implementation of the Revitalised Peace Agreement.....	16
2.	Security Situation and Implementation of R-ARCSS's Security Provisions	18
3.	Targeted Sanctions and Arms Embargo	22
4.	Attacks on the United Nations and Humanitarian Actors	23
5.	Repression of Freedom of Expression and the Press.....	25
6.	Political Detainees and "Prisoners of War".....	28
7.	Economy	29
B.	Humanitarian Situation.....	31
1.	Starvation and Food Insecurity.....	31
2.	Denial of Humanitarian Access.....	33
3.	Displacement.....	34
4.	Health.....	37
V.	Applicable Law and Legal Developments	40
A.	International Human Rights Law.....	40
1.	Treaties to which South Sudan Became a Party in 2018	42
B.	International Humanitarian Law	43
C.	International Criminal Law.....	45
1.	Incorporation of International Crimes into Domestic Law.....	45
2.	Statute of the Hybrid Court of South Sudan.....	46
3.	Jurisdiction of the International Criminal Court.....	47
4.	Prosecution Outside South Sudan for International Crimes Committed in South Sudan	48
D.	Domestic Law.....	49

1.	Transitional Constitution (2011), Bill of Rights.....	49
2.	Penal Code Act (2008)	49
3.	Code of Criminal Procedure Act (2008)	49
4.	Child Act (2008)	50
5.	Sudan People's Liberation Army (SPLA) Act (2009).....	50
6.	Local Government Act (2009)	50
VI.	Thematic Human Rights Issues	51
A.	Securitization of the State: Arbitrary Detention, Forced Disappearance, Torture and Cruel, Inhuman or Degrading Treatment	51
1.	State Security Organizations	52
2.	Profiles of Detainees and Reasons for Detention	56
3.	Lack of Due Process.....	57
4.	Detention Facilities and their Conditions	59
5.	Torture and Cruel, Inhuman or Degrading Treatment in Detention	65
6.	Deaths in Custody	67
7.	Enforced Disappearance.....	68
8.	Post-Release Surveillance	69
9.	Lasting Effects of Arbitrary Detention, Torture and Cruel, Inhuman or Degrading Treatment	69
10.	Violations	70
11.	Responsibility.....	73
B.	Women and Girls in South Sudan.....	78
1.	Changes in Gender Roles and Norms.....	79
2.	The Status of Women in the Public Sphere.....	80
3.	Customary law and the Advancement of Women's Rights	81
4.	Marriage and Divorce.....	82
5.	Early Child and Forced Marriages	84
6.	Bride Price.....	85
7.	Women and Access to land	86
8.	Sexual and Gender-Based Violence in South Sudan.....	86
9.	Conflict-related Sexual Violence and Gender-Based crimes	88
10.	Sexual Violence Against Men and Boys	95
11.	Consequences and Lasting Impact of Sexual and Gender-Based Violence	95
12.	Access to Justice for Sexual and Gender-Based Violence	95
13.	UN Peacekeepers and Sexual Exploitation and Abuse	96
C.	The Situation of Children and Youth.....	98
1.	Recruitment and Use of Children in Armed Conflict.....	99
2.	Violations of the Rights to Life and Protection from Violence, Injury or Abuse, including Rape and Sexual Violence.....	102
3.	Displacement and Unaccompanied and Separated Children	103
4.	The Right to Education	105
5.	The Right to Health	112
D.	Redrawing of Administrative Boundaries	113
1.	Introduction	113
2.	Background to the Current Debate	114

3.	Creation of the Twenty-eight and Thirty-two States	115
4.	Impact of the creation of the Twenty-eight and Thirty-two States	118
5.	Revitalized Peace Agreement	121
6.	The Way Forward: Inclusivity, Transparency and Engagement	123
E.	Political Economy and the Conflict	124
1.	Introduction	124
2.	South Sudan's Oil Sector: Economy, Conflicts and Human Rights	125
3.	Other Resources as Drivers of Armed Conflict and Human Rights Violations	139
VII.	Emblematic Incidents	1411
A.	Unity State, 2018	1411
1.	Background	1411
2.	Southern Unity Offensive, April to June 2018	143
3.	Reintegration and Recruitment, September and October 2018	148
4.	Violations and Alleged Crimes	148
5.	Responsibility for Violations and Alleged Crimes	150
B.	Central Equatoria State, 2018	152
1.	Background and Current Situation	152
2.	SPLA Violations	154
3.	SPLA-IO (RM) Violations	156
4.	Attack on Emmanuel Christian College Compound, Goli, 14 May 2018	156
5.	Violations and Alleged Crimes	159
6.	Responsibility	160
C.	Western Bahr el Ghazal State, 2018	162
1.	Background	162
2.	Wau Triangle, Mid-June to November 2018	164
3.	Wadhalelo, 2017 - 2018	168
4.	Violations and Alleged Crimes	173
5.	Responsibility for Violations and Alleged Crimes	174
VIII.	Accountability and Transitional Justice	176
A.	Transitional Justice Framework	178
1.	Normative Framework for Transitional Justice	178
2.	Goals of a Transitional Justice Framework	181
B.	Transitional Justice Framework in South Sudan	182
1.	Impact of the Revitalized Agreement on the Chapter V Transitional Justice Institutions	182
2.	Challenges and Dilemmas	187
3.	Adapting Transitional Justice Responses	189
4.	The National Dialogue	190
C.	Accountability	191
1.	Amnesties and Accountability	193
2.	Conclusion	194
D.	Domestic Criminal Justice Context	194
3.	Uneven Geographic Access to Justice	195
4.	Prolonged and Arbitrary Detention and Case Management	196

5.	Prosecuting Sexual and Gender-Based Violence	196
6.	Protecting Children’s Rights in the Justice System.....	198
7.	Death Penalty	198
8.	The Terrain Trial	200
E.	Confidential Dossier	202
IX.	Conclusions and Recommendations	202
A.	Conclusions	202
B.	Recommendations	203
Annex		
	List of Acronyms and Abbreviations	207

I. Introduction

1. In its resolution 31/20 of 23 March 2016, the Human Rights Council established the Commission on Human Rights in South Sudan for a period of one year, and requested the Commission to, *inter alia*, monitor and report on the situation of human rights in South Sudan to make recommendations for its improvement, and to assess past reports on the situation of human rights since December 2013, in order to establish a factual basis for transitional justice and reconciliation.
2. On 14 June 2016, the President of the Human Rights Council appointed Yasmin Sooka, Kenneth R. Scott and Godfrey M. Musila to serve as the three members of the Commission, with Ms. Sooka as its Chair. Mr. Scott was replaced by Professor Andrew Clapham as Commissioner on 21 September 2017. Mr. Musila was replaced by Barney Afako on 14 June 2018.
3. On 14 December 2016, the Human Rights Council convened a special session on South Sudan to discuss the deteriorating situation of human rights, which was attended by the Chair of the Commission. The Commission submitted its first report on 6 March 2017.¹ The Council has extended the mandate of the Commission twice. At its 34th Session on 24 March 2017, the Council extended the Commission's mandate in Resolution 34/25 for a period of one year, and the Commission submitted its second report on 13 March 2018.² At its 37th Session on 23 March 2018, the Human Rights Council again extended the Commission's mandate in Resolution 37/31 for another year. The Commission provided an oral update to the Human Rights Council at its 39th Session on 17 September 2018.
4. The Commission was supported by a secretariat of 13 professional staff based in Juba and Addis Ababa, consisting of human rights investigators, legal, gender, and transitional justice advisors, military and forensic experts, a coordinator, a case manager, and security and administrative officers as well as three national language assistants. The first member of the secretariat was deployed on 16 June 2018 and the secretariat was fully deployed as of 3 September 2018.
5. In light of the Revitalized Agreement for the Resolution of the Conflict in South Sudan (R-ARCSS) signed on 12 September 2018, the Commission has chosen to focus on human rights issues which will likely remain of concern as the country moves forward in implementing the agreement and establishing peace such as the rights of women and children. Although the conflict may be drawing to an end, many of its effects will continue to be felt for years to come. In this regard, the Commission has also chosen to explore a number of patterns and trends at play in the South Sudan conflict which if left unaddressed and unresolved, might continue to trigger conflict and the commission of human rights violations in South Sudan. Such potential triggers include the administrative restructuring of governance institutions, the control of economic resources, and the increasing securitization of the state repressing public discourse.
6. The Commission has investigated a number of incidents that are emblematic of crimes and violations committed primarily in 2018, covering the period since its last report. This report examines recent incidents in the states of Western Bahr el Ghazal, Central Equatoria, and Unity and seeks to clarify responsibility, to the extent possible, for alleged gross violations and abuses of human rights and related crimes.

II. Mandate/Methodology

A. Mandate

7. When the Human Rights Council extended the Commission's mandate in Resolution 34/25 on 24 March 2017, it expanded the scope of the Commission's mandate, reaffirming it when the Council extended the Commission's mandate on 23 March 2018 in Resolution 37/31.

¹ Report of the Commission on Human Rights in South Sudan, A/HRC/34/63, 6 March 2017.

² Report of the Commission on Human Rights in South Sudan, A/HRC/37/71, 13 March 2018.

8. The Council mandated the Commission to include “determin[ing] and report[ing] the facts and circumstances of, collect[ing] and preserv[ing] evidence of, and clarify[ing] responsibility for alleged gross violations and abuses of human rights and related crimes, including sexual and gender-based violence and ethnic violence, with a view to ending impunity and providing accountability, and to make such information available also to all transitional justice mechanisms, including those to be established pursuant to chapter V of the Agreement on the Resolution of the Conflict in the Republic of South Sudan, including the hybrid court for South Sudan, once established in cooperation with the African Union.”³

9. The Council further requested in Resolutions 34/25 and 37/31 that the Commission continue to monitor the human rights situation in South Sudan and make recommendations to prevent its further deterioration. The Commission is also to report on the factual basis for transitional justice and reconciliation and to provide guidance on transitional justice, including accountability and reconciliation and healing, as appropriate, and – once the Government of South Sudan commits to cooperating with the African Union on establishing the hybrid court for South Sudan – to make recommendations on technical assistance to the Government to support accountability, reconciliation and healing.

10. The Commission is further mandated to engage with the Government of South Sudan, international and regional mechanisms, including the United Nations, the United Nations Mission in South Sudan, the African Union, including by building upon the work of its Commission of Inquiry on South Sudan and its African Commission on Human and Peoples’ Rights, the Intergovernmental Authority on Development, including the Partners Forum, the Chair of the Joint Monitoring and Evaluation Commission, and civil society, with a view to providing support to national, regional and international efforts to promote accountability for human rights violations and abuses.

11. Furthermore, the Commission is mandated to make recommendations on technical assistance and capacity-building, as appropriate, including to law enforcement institutions, on the promotion and protection of human rights and fundamental freedoms, including on addressing sexual and gender-based violence.

B. Methodology

1. Standard of Proof

12. Consistent with the practice of other United Nations fact-finding bodies, the Commission employed a “reasonable grounds to believe” standard of proof in making factual determinations on individual cases, incidents, and patterns of conduct. These factual determinations provided the basis for the legal qualification of incidents and patterns of conduct as human rights violations and, where appropriate, war crimes and crimes against humanity.

13. However, the Commission’s mandate to collect and preserve evidence to be provided to various accountability mechanisms including the Hybrid Court for South Sudan and the other transitional justice mechanism set out in Chapter V of the R-ARCSS also provided guidance for the secretariat’s working methods. The Commission thus sought to collect and preserve evidence to a standard that will support future accountability mechanisms. This included collecting detailed witness statements and official documentation, while preserving a clear chain of custody, and cataloguing and organizing evidence in a database which can support future criminal investigations and accountability processes.

14. The Commission is satisfied that there are “reasonable grounds” to believe that an incident or pattern of conduct has occurred only when it has obtained a reliable body of information, consistent with other material, upon which a reasonable and ordinarily prudent person would believe that the incident or pattern of conduct has occurred. While this standard of proof is lower than the standard required in criminal proceedings to achieve a conviction, it is sufficiently high to justify further investigations into the incident or pattern of conduct. The findings may also constitute *prima facie* grounds to initiate a possible prosecution. The findings of the Commission appearing in this report are therefore based on the “reasonable grounds” standard of proof.

³ Resolution adopted by the Human Rights Council on 23 March 2018, A/HRC/RES/37/31, para. 15(b).

15. Individual cases and incidents reflected in this report are therefore based on at least one credible direct source of information, which was independently corroborated by at least one or more credible source(s) of information.

16. Where the report describes patterns of conduct, these are based on several credible direct sources of information, which are consistent with, and corroborated by, the overall body of credible information collected. In the few instances where this standard of proof could not be met, but the Commission still considered it appropriate to reflect the incident or pattern, identifying the underlying sources, and noting the requirement for further investigations.

17. The Commission considered the following to be sources of direct information:

- Interviews of victims, their families, and eyewitnesses with direct knowledge of the issues, incidents, and trends, who were assessed by the Commission to be credible and reliable and the information valid;
- Medical examinations of witnesses who alleged torture, ill-treatment or injury during detention or military operations. Confidential reports are prepared after forensic analysis of medical and psychological findings in terms of consistency with the witness's testimony;
- Satellite imagery analysis from reliable sources, authenticated video and photo material, and other documents containing direct information from a reliable source;
- Publicly available admissions of relevant facts by the Government of the Republic of South Sudan, the Sudan People's Liberation Movement/ Army (SPLA/M),⁴ the Sudan People's Liberation Movement/ Army in Opposition (SPLA/M-IO), or other opposition groups;
- Laws, policies and directives of the Government of South Sudan and the SPLA/M as well as internal documents, provided that they were received from a credible and reliable source and their authenticity could be confirmed; and
- Statistics, surveys, situation reports, and other quantitative information generated by the United Nations, to the extent that the data is based on an apparently sound methodology and the inputs underlying the data are considered valid and originating from a credible and reliable source.

18. The Commission relied on the following types of information for the purposes of corroborating information from direct sources and providing the overall context to violations:

- Confidential interviews of witnesses who received the information directly from a person known to them, and where the Commission assessed the source to be credible and reliable and the information to be valid;
- Witness testimony and analysis contained in publications or in submissions by the United Nations, research institutes and human rights organisations, where the Commission assessed the source to be credible and reliable and the information to be valid; and
- Descriptions of patterns of conduct contained in public reports, submissions, books, documentaries and similar materials, where the Commission assessed the source to be credible and reliable and the information to be valid.

19. The reliability and credibility of each source was carefully assessed by the Commission. This assessment took into account, amongst other considerations, the following:

- The witness' political and personal interests and potential biases;
- The witness' capacity to correctly recall events, considering his or her age, trauma, how far back the events occurred, etc.;
- The position of the witness in relation to the subject of the information;

⁴ On 2 October 2018, President Kiir issued a Presidential Order changing the name of the SPLA to the "South Sudan People's Defence Forces" (SSPDF). While the Commission notes this change, for consistency and to aid in comprehension, throughout this Report, it continues to refer to the SSPDF by its former name, the SPLA, including in relation to incidents that took place after 2 October. See Presidential Order No. 18/2018 for the Transformation and the Change of Name of the Sudan People's Liberation Army (SPLA) to the South Sudan People's Defence Force (SSPDF).

- Where and how the witness obtained the information; and
- The reasons for which the witness provided the information.

20. The Commission also assessed every piece of information by considering, amongst other factors, its relevance to the inquiry, its internal consistency and coherence, its logic, and its consistency with and corroboration by other information.

21. Assessments of the reliability and credibility of the source were separated from assessments of the validity of the information. The Commission did not assume that a witness, judged to be a credible and reliable source, would necessarily provide fully accurate and valid information.

22. Direct reference to specific testimony in the report does not indicate that such testimony is the sole basis of judgement by the Commission in relation to the issues under analysis. Where these direct references and citations are found in the report, it is to be understood that the Commission has decided to introduce them for the purpose of providing an example or an illustration of broader human rights issues and/or patterns of conduct.

2. Protection of Victims and Witnesses

23. While the secretariat collected numerous witness statements of victims and witnesses of violations, identifying and protecting victims and witnesses and other potential sources of testimony during an on-going internal armed conflict was and remains challenging. Though some victims and witnesses could be located within the United Nations Mission in South Sudan (UNMISS) Protection of Civilians sites (PoC sites) in UNMISS compounds, many victims and witnesses had been displaced, often multiple times, into harsh and dangerous living conditions, far away from towns and villages, or transport hubs.

24. With regard to sexual and gender-based violence, the secretariat interviewed women both individually and in group discussions in UNMISS PoC sites, refugee settlements and other places in South Sudan and neighbouring countries. Beyond violations of a sexual and gender-based nature, women spoke to the secretariat about the overall impact of the conflict on their livelihoods, family and societal relations, sexual and reproductive health and medical needs, trauma, and general insecurity. Similarly, when the secretariat members met with children it ensured that a caseworker or guardian was always present for these discussions and inquired with the children whether they preferred to meet in groups or individually and proceeded accordingly.

25. Throughout the conflict, civil society activists, human rights defenders, humanitarian actors, journalists, and even United Nations staff members have been subject to threats, intimidation, harassment, detention and, in some instances, killing by Governmental actors and armed groups. Notwithstanding such an environment, many witnesses showed enormous courage by reaching out and making a contribution to the work of the Commission. The secretariat exercised caution in communicating with sources both inside and outside the country.

26. Since the outbreak of the conflict in late December 2013, a number of inter-governmental bodies, international and local NGOs and media have undertaken extensive interviewing of victims and witnesses to the conflict. The continuing trauma suffered by thousands of civilians since the outbreak of violence made the secretariat sensitive to the risks of re-traumatisation and it took appropriate measures in this regard. The secretariat was conscious of the fact that in South Sudan there is limited counselling or psychosocial support available to victims and witnesses; however, whenever possible and as necessary, victims and witnesses were directed towards existing support services.

27. In line with existing United Nations policy on information sensitivity, classification and handling, information provided by witnesses and other confidential material collected are classified as strictly confidential.⁵ Details which could reveal the identity of victims or witnesses such as names, dates and places have been omitted in order to ensure victims, sources, witnesses and their families' safety and security.

⁵ The United Nations' policy with regard to archiving and classification of documents can be found at ST/SGB/2007/6.

C. The Commission's Work

28. The Commissioners undertook two missions to South Sudan in August and December 2018. During these missions, they visited Juba, Wau and Yei in South Sudan and also visited Addis Ababa in Ethiopia, Nairobi and Kakuma camp in Kenya, Khartoum, Nyala, El Daein, and El Fasher in Sudan, and Arua, Imvepi, Kampala and Kiryandongo in Uganda. The Commission also organised a workshop on sexual and gender-based violence in Addis Ababa in March 2019.

29. From its base in Juba, the secretariat undertook investigative missions to Bentiu, Dablual, Goli, Kuruki, Leer, Mayendit, Nhialdiu, Panyume, Wau, and Yei within South Sudan, as well as to Addis Ababa in Ethiopia, Arua, Kampala, and Kiryandongo in Uganda, Nairobi and Kakuma in Kenya, and El Daein, El Fasher, Khartoum, and Nyala in Sudan.

30. The Commission found, throughout its work, that victims and witnesses were willing to share their experiences.

31. During the course of the current mandate, the Commission took 135 (99 male and 36 female) detailed individual witness statements from victims, witnesses, community leaders, civil society activists and international personnel. It also gathered over 3,100 documents covering incidents in South Sudan since December 2013, carried out 28 medical examinations victims and witnesses (24 male and 4 female), and participated in over 340 meetings with government officials and representatives of civil society and international organisations among others. All evidence collected is preserved in the Commission's database and archives.

32. In light of the mandate's focus on accountability and identifying responsibility for gross violations of human rights and related crimes, the Commission has focussed not only on establishing the occurrence of violations but also on identifying those bearing responsibility for those violations and crimes. In investigating the linkage evidence between the crimes and those responsible, it has sought to identify command structures, patterns in conduct, and indicators of control and discipline. This is a complex task normally involving significant circumstantial evidence and the material collected provides an invaluable basis for future prosecutions and accountability.

33. The Commission received information linking individual alleged perpetrators to specific violations or to patterns of violations. In some instances, there is sufficient information to warrant criminal investigations leading to indictments for individual alleged perpetrators under national and international law.

34. The Commission has collected and preserved this evidence in conformity with its mandate of supporting accountability mechanisms. Individual names have not been included in this present report, and are retained on a strictly confidential basis by the Commission and eventually OHCHR. In certain instances, while there was insufficient information to identify individuals responsible, the Commission was able to identify the armed entities responsible.

35. The Commission is grateful to the Government for granting the Commission access to the relevant parts of the country and for meeting with the Commission on multiple occasions. It also appreciates the cooperation it received from the Governments of Sudan, Kenya, Ethiopia and Uganda during its missions to those States.

36. The Commission thanks UNMISS for their support for various aspects of its work. The Commission also appreciates the assistance and contributions of United Nations agencies, civil society organizations, and experts.

III. Background

A. Agreement on the Resolution of the Conflict in the Republic of South Sudan (2015)

37. The 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) between the Government and the opposition, established the Transitional Government of National Unity (TGoNU), a power-sharing government, tasked with leading

a 30-month Transition Period, and implementing the commitments contained in the ARCSS.⁶ The Peace Agreement declared a permanent ceasefire applicable to all forces of the warring parties, armed groups, and all other forces or militias allied to either party.⁷

38. As part of the security arrangements, the parties agreed to continue to refrain from prohibited actions outlined in the 2014 Cessation of Hostilities Agreement, including actions that may impede or delay the provision of humanitarian assistance or protection to civilians; sexual and gender-based violence; recruitment and/or use of child soldiers by armed forces or militias; hostile propaganda, unauthorized recruitment, mobilization, redeployment and movement of forces; and acts of hostility, intimidation, violence or attacks against the civilian population including IDPs and returnees, UNMISS personnel, installations or equipment, international humanitarian agencies and organization and their personnel.⁸

39. The Joint Monitoring and Evaluation Commission (JMEC) was established under the ARCSS as the main oversight mechanism to ensure its implementation. It was: “responsible for monitoring and overseeing the implementation of the Peace Agreement... In case of non-implementation of the mandate and tasks of the TGoNU, or other serious deficiencies, the JMEC shall recommend appropriate corrective action...”⁹

40. The Ceasefire and Transitional Security Arrangements Monitoring Mechanism (CTSAMM) was established to monitor and verify alleged ceasefire violations.¹⁰

B. Breakdown of the ARCSS

41. In October 2015, not long after the signing of the ARCSS in August with extensive reservations, particularly from the Government, President Salva Kiir unilaterally declared a new “decentralised” system of 28 states, to replace the original 10.¹¹ In January 2017, President Kiir announced the creation of additional states, bringing the total to 32.¹² As discussed below, the creation of new states exacerbated tensions over boundaries and access to natural resources and continued to fuel conflict across the country.

42. Following international pressure, Riek Machar took up the position of First Vice President in the TGoNU serving under President Kiir. This uneasy truce did not last long. Following skirmishes in Juba between the SPLA and SPLA-IO in early July 2016, significant fighting broke out at the official residence of the President in the city on 8 July 2016. The fighting spread and resulted in widespread killings and rape of civilians, and extensive property damage and looting. At least 36,000 people were displaced, and 300 killed in fighting between the SPLA and the SPLA-IO, that involved the use of combat helicopters, tanks and other heavy weapons.¹³

43. The violence in Juba triggered further violence across the country. First Vice President Riek Machar and his SPLA-IO forces were forced out of Juba, and pursued across Central and Western Equatoria to the Democratic Republic of the Congo. Following a ceasefire, declared on 11 July 2016, the SPLA-IO member Taban Deng Gai was appointed First Vice President to replace Riek Machar, and allowed to fill executive positions previously nominated by First Vice President Riek Machar. Thereafter, Taban Deng Gai’s forces, referred to as SPLA-IO (TD) fought forces loyal to Riek Machar, referred to as SPLM/A-IO (RM) and carried out operations in Upper Nile, Unity, Western Bahr el Ghazal, and Jonglei States.

44. The conflict metastasized from a conflict primarily between the SPLA and the SPLA-IO to one that spread into new areas, particularly the Equatorias and reflected multiple defections and splinter groups.

⁶ The Agreement on the Resolution of the Conflict in the Republic of South Sudan, (2015) (ARCSS) was signed on 17 August 2015.

⁷ ARCSS (2015), Chapter II, Article 1.3.

⁸ ARCSS (2015), Chapter II, Article 1.7.

⁹ JMEC, see <http://jmecsouthsudan.org/>.

¹⁰ CTSAMM reports are publicly available (<http://ctsamm.org/reports-documents/ctsamm-violation-reports/>).

¹¹ Establishment Order, No. 36/2015, 2 October 2015 (28 States Decree).

¹² Establishment Order No. 36/2015, 2 October 2015; Republican Order, No. 02/2017, 14 January 2017.

¹³ Øystein H. Rolandsen & Nicki Kindersley, “South Sudan: A Political Economy Analysis”, Norwegian Institute of International Affairs, 16 October 2017, p. 7.

45. The reservations of the Government and its delay in signing the ARCSS strongly suggested that it had little intention of implementing the full accord. The Government's subsequent actions, including the pursuit of then-First Vice President Riek Machar across the country, and the establishment of new states in contravention of the terms of the ARCSS, evidenced a lack of political interest in honouring the agreement. However, despite the expulsion of then-First Vice President Riek Machar (and his subsequent confinement to South Africa) or the Government's attempt to project the continuity of the ARCSS through the elevation of Taban Deng Gai as First Vice President in place of Riek Machar, the country continued to fracture, with new fault lines appearing, particularly alienating Equatorian and communities other than the Nuer and Dinka. As the conflicts continued and spread, it became increasingly untenable to maintain that the implementation of the ARCSS was on track, or that the TGoNU was indeed a definitive power-sharing arrangement between political adversaries. It became apparent to the Intergovernmental Authority on Development (IGAD) that another intervention was needed to salvage the process in which the international community and the region had invested so much.

C. High Level Revitalization Forum

46. Concerned at the prospect of a moribund transition, and the continuing violence and humanitarian crisis, in June 2017, the IGAD Summit of Council of Ministers decided to launch a High Level Revitalization Forum (HLRF) to bring together the parties to the ARCSS and other estranged parties to try to revitalize the peace agreement in what is seen by many as an attempt to restore the peace process and a genuine transition in South Sudan.

1. Agreement of Cessation of Hostilities, December 2017

47. The first phase of the HRLF was held in Addis Ababa, Ethiopia from 18 to 21 December 2017 and resulted in the Government, the SPLA-IO (RM) and several armed groups signing of the Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access (CoHA) on 17 December 2017.¹⁴

48. The CoHA went into effect on 24 December 2017, requiring all forces to "immediately freeze in their locations", halt actions that could lead to confrontation and release political detainees, in addition to taking specific measures to protect vulnerable persons including children, women, girls, the elderly, and persons with disabilities or special needs; support and facilitate the reunion of families and the decent burial and memorialization of the dead; facilitate the free movement of persons, including women and girls; and ensure protection of media and civil society.¹⁵

49. Under the CoHA, particular violations of human rights law and international humanitarian law were highlighted and provision was made for monitoring compliance. The obligation on the parties to prevent, investigate and ensure accountability for breaches of the Agreement does not preclude investigations and punishment by any other entities.¹⁶

50. Former First Vice President Riek Machar,¹⁷ who had remained in South Africa during these negotiations, but whose delegation was the key opposition group in the negotiations, ordered his forces to cease all hostilities but at the same time maintained the right to act in self-defence and released a statement to that effect on 22 December 2017.¹⁸ All parties to the conflict have relied on similar language to justify ongoing attacks and continued violations

¹⁴ African Union, Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa, AU Doc. Assembly/AU/6(XXX), 30th Ordinary Session of the Assembly, 28- 29 January 2018, Addis Ababa, Ethiopia, paras. 26, 27; Armed groups consist of the National Salvation Front (NAS); the National Democratic Movement (NDM); the Federal Democratic Party/South Sudan Armed Forces (FDP/SSAF); the South Sudan National Movement for Change (SSNMC); the South Sudan United Movement/Army (SSUM/A); the South Sudan Liberation Movement/Army (SSLM/A); the South Sudan Patriotic Movement/Army (SSPM/A).

¹⁵ IGAD, Cessation of Hostilities Agreement, 21 December 2017.

¹⁶ IGAD, Cessation of Hostilities Agreement, 21 December 2017, Article 12 "Accountability for Any Violations".

¹⁷ The Commission notes that while Riek Machar was replaced as First Vice President in July 2016, under the R-ARCSS (Article 1.5.1.2), he will resume the position of First Vice President during the Transition Period.

¹⁸ SPLA-IO, "Declaration of Cessation of Hostilities, Reference 001/12/2017", ERN D104231-D104231. *See also* The Guardian, "South Sudan's Warring Parties Agree Ceasefire in Bid to End Four-year War", 23 December 2017.

during cessation of hostilities periods. Indeed, between 1 and 27 June 2018 alone, CTSAMM verified 11 incidents of fighting between the parties violating the CoHA.¹⁹

2. Second Phase of High Level Revitalization Forum

51. The second phase of the HLRF was conducted in Addis Ababa from 5 to 16 February 2018. It resulted in a Declaration of Principles for guiding the deliberations at the HLRF. Although the other parties signed the Declaration of Principles, the Government declined to sign them, expressing reservations about the provision that called for sanctions against certain parties in the event of non-cooperation. Deliberations nevertheless continued on Chapters I and II of the ARCSS dealing with governance and transitional security arrangements and agreement was reached on several articles of Chapter I, including on the mandate of a restructured TGoNU; the establishment and expansion of transitional institutions and mechanisms; and national elections.²⁰

52. Following the second phase of the HLRF, IGAD Council of Ministers undertook shuttle diplomacy, including to former First Vice President Riek Machar in South Africa, to try to narrow the distance between positions. The next phase of the HLRF took place from 17 to 23 May 2018 in Addis Ababa but did not yield the necessary compromises for the parties to reach agreement on the outstanding governance and security issues.²¹

3. Khartoum Declaration, June 2018

53. In a new impetus for the Revitalization process, President Kiir and former First Vice President Riek Machar met for the first time since the July 2016 breakdown of the ARCSS on 20 June 2018 in Addis Ababa, Ethiopia. IGAD decided that the peace process should continue with a lead role by Sudan and Uganda. Accordingly, the talks moved to Khartoum, Sudan, where former First Vice President Riek Machar was relocated from South Africa, and met again with President Kiir on 25 June 2018. Following two days of talks between the two, and other South Sudan opposition groups, including the South Sudan Opposition Alliance (SSOA),²² the Former Detainees and other political Parties, they signed the Khartoum Declaration of Agreement between the Parties to the Conflict of South Sudan on 27 June 2018.

54. The parties to the Khartoum Declaration agreed on a permanent ceasefire, which came into effect on 1 July 2018 and included provisions on the disengagement and separation of troops, opening humanitarian corridors and the release of “prisoners of war” and political detainees. The Declaration also included provisions on transitional security arrangements and the disarmament of civilians; the continuation of negotiations on outstanding issues in the IGAD Bridging Proposal; the improvement of infrastructure and basic services in South Sudan; and the rehabilitation of the oil fields in Unity State.

55. Following the Khartoum Declaration, President Kiir issued a Presidential decree declaring a permanent ceasefire countrywide on 28 June 2018.²³ Riek Machar, in his capacity

¹⁹ CTSAMM, *Report 2018/21: Fighting between Parties from 1 to 27 June 2018*, 27 June 2018. These included: SPLA-IO and SSNMC fighting in Gogomule, Central Equatoria on or about 1 June; SPLA-IO ambush on the SPLA killing 10 and wounding 14 in Rubkuay, Unity State on 2 June; SPLA and SPLA-IO fighting near Rubkuay on 4 June; SPLA and SPLA-IO fighting in Saura/Li Rangu in Western Equatoria on 3 to 4 June; an SPLA and SPLA-IO clash near Rubkuay in which an UNMISS patrol was caught in the crossfire on 8 June; SPLA and SPLA-IO clashes in Baggari and Wadhalelo, Western Bahr el Ghazal on 15 June; an SPLA attack on SPLA-IO positions in Pogee, Eastern Equatoria on 17 June; an SPLA-IO attack on an SPLA detachment in Makpandu, Western Equatoria on 17 June; and an SPLA attack on SPLA-IO positions in Saura and Nambia in Western Equatoria on 19 June 2018.

²⁰ JMEC, *Report by H.E. Festus Gontebanye Mogae, Chairperson of JMEC on the Status of the Implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan for the Period of December 1, 2017 to March 31, 2018*.

²¹ JMEC, *Report by H.E. Festus Gontebanye Mogae, Chairperson of JMEC on the Status of the Implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan for the Period of April 1 to June 30, 2018*, p. 8.

²² The South Sudan Opposition Alliance was formed in February 2018 to provide a unified opposition voice in the peace negotiations. It includes the FDP/SSAF, FDs, National Salvation Front (NAS), National Democratic Movement (NDM), People's Democratic Movement (PDM), SSLM/A, SSNMC, SSPM, SSUM/A and United Democratic Republic Alliance (UDRA). See Charter of the South Sudan Opposition Alliance, 16 February 2018, <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/21401/The-Charter-Of-The-South-Sudan-Opportunity-Alliance-SSOA.aspx>.

²³ JMEC, *Report by H.E. Festus Gontebanye Mogae, Chairperson of JMEC on the Status of Implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan for the Period April 1st - June 30th 2018*. See also Republican Order

as the Commander-in-Chief of the SPLA-IO forces also issued a press statement declaring a permanent ceasefire.²⁴ This Permanent Ceasefire has since been reportedly violated by the parties including in Unity, Western and Central Equatoria, and Western Bahr el Ghazal States.²⁵

4. Agreements on Security Arrangements and Governance, July and August 2018

56. Mid-July 2018 saw a number of initiatives by the Government which were criticised as being counter-productive to the peace process, including Parliament passing a bill extending the tenure of the executive and legislative arms of the national and state governments until 12 August 2021 and the dismissal of the Minister of Foreign Affairs Deng Alor Kwol, and his replacement with Senior Advisor and Presidential Envoy Nhial Deng Nhial, despite the post being allocated under the ARCSS to SPLM “Former Detainees”.²⁶

57. Nevertheless around the same period, an Agreement on Outstanding Issues of Security Arrangements was reached on 6 July 2018 and an Agreement on Outstanding Issues of Governance was reached on 5 August 2018.

58. The 5 August Agreement was signed by the Transitional Government, the SPLM/A-IO, the SSOA, the Former Detainees and other political parties. However, within two days of the agreement, two of the groups under the umbrella of the SSOA, the National Salvation Front (NAS) and the People’s Democratic Movement (PDM), denied signing the Agreement and the SSOA accused the Sudanese security services of intimidating some opposition representatives in Khartoum and ordering them to sign the governance agreement on behalf of their groups.²⁷

59. The parties continued negotiating in Khartoum through August 2018, harmonizing the remaining aspects of the 2015 ARCSS. The final agreement was set to be initialled on 28 August 2018, however, the SPLM/A-IO and the SSOA issued a statement on that day stating that they would not sign in light of unaddressed concerns regarding: decision making mechanisms and quorums in the TGoNU, the Independent Boundary Committee, and state and local governments; the proposed procedures for permanent Constitution making; mechanisms for the guarantors of the Agreement, Sudan and Uganda to contribute to the transitional security arrangements; and the inclusion of mediation text relating to the number and boundaries of states.²⁸ However, on 31 August 2018, the SPLA-IO (RM) and the SSOA issued another statement, reiterating their concerns but indicating that they had decided to sign.²⁹ As noted below, however, some members of the SSOA ultimately declined to sign.

D. Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan

60. On 12 September 2018, parties including the TGoNU, SPLM/A-IO, SSOA, SPLM-Former Detainees and other political parties signed the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) with the Presidents of Sudan and Uganda signing as co-guarantors. The new Agreement repeals and replaces the

17/2018 for the Implementation of the Provisions of the Permanent Ceasefire and Transitional Security Arrangements of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) (12 September 2018), 26 September 2018.

²⁴ JMEC, *Report by H.E. Festus Gontebanye Mogae, Chairperson of JMEC on the Status of Implementation of the Agreement on the Resolution of the Conflict in the Republic of South Sudan for the Period April 1st - June 30th 2018*.

²⁵ CTSAMVM, *Technical Committee Meeting Minutes*, No. 2, 10 October 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 3, 24 October 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 4, 7-8 November 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 5, 27-28 November 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 6, 18-18 November 2018.

²⁶ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

²⁷ Radio Tamazuj, “Cirillo says he did not sign peace deal in Khartoum, 7 August 2018; Sudan Tribune, Opposition alliance accuses Khartoum of intimidating its faction to sign South Sudan deal”, 5 August 2018; Sudan Tribune, “Opposition PDM says not part of South Sudan governance deal”, 6 August 2018.

²⁸ Joint Press Statement by SPLM/SPLA-IO and SSOA, 28 August 2018.

²⁹ Joint Press Statement by SPLM/SPLA (IO) and SSOA, 31 August 2018.

2015 ARCSS in its entirety.³⁰ The Transitional National Legislative Assembly ratified the R-ARCSS on 15 October 2018.³¹ However, some members of the SSOA, including the NAS led by Thomas Cirillo Swaka, Pagan A. Oketch, the PDM chaired by Hakim Dario, the NDM led by Emanuel Aban, and the UDRA of Gatwech K. Thich declined to sign the agreement.³²

61. The R-ARCSS sets out a pre-transitional period of eight months and a transitional period of 36 months, at the end of which national elections will be held.³³ The pre-transitional period is five months longer than in the ARCSS and has a new National Pre-Transitional Period Committee to coordinate activities including, importantly, the cantonment of forces, the implementation of key security provisions and the building of trust. The Revitalised Transitional Government of National Unity (RTGoNU) will be composed of Salva Kiir as President, Riek Machar as First Vice President and a further four Vice Presidents divided between the TGoNU (two nominations), the SSOA (one nomination) and the Former Detainees (one nomination who shall be a woman), each with their own defined areas of responsibility.³⁴ It will further comprise a Council of Ministers with 35 ministries and a Transitional Legislature with 550 members divided between the signatory parties.³⁵ This expansion in the number of Vice-Presidents, Ministers and Members of Parliament reflects the fragmentation that occurred since the last agreement resulting in a larger number of groups needing to be brought into the agreement as well as the unwillingness of the Government to retire or redeploy any existing members of the executive or legislature.

62. The parties agreed to canton their forces within 30 days of the agreement and to build a unified national army, police, national security service, and other organized forces before the end of the transitional period and to establish a DDR programme for those ineligible personnel.³⁶

63. In light of an inability to resolve one of the most controversial questions during negotiations, an Independent Boundary Commission (IBC) was to be established to consider the issue of the number of States, their boundaries and restructuring and adopt a final report by at least seven of its 15 members within 90 days.³⁷ The Council of States will be reconstituted on the basis of the report. If the IBC fails to issue a final report within 90 days, the issue of the number and boundaries of the States will automatically move to a referendum to be held before the end of the Pre-Transitional Period. As described below, a second body, the Technical Boundary Committee (TBC), is also to be established to define and demarcate the tribal areas of South Sudan as they stood on 1 January 1956,³⁸ and the tribal areas in dispute in the country. The TBC will finish its work within 60 days and its report will inform the work and conclusions of the IBC.³⁹

64. Beyond the chapters dealing with governance, security and the number of states, the remaining chapters of the R-ARCSS remain largely unchanged from the 2015 ARCSS beyond changes to composition and, crucially, timelines for the implementation of the obligations.⁴⁰ This includes chapters relating to humanitarian assistance and reconstruction; resource, economic and financial management; transitional justice; and the parameters of the creation of the permanent constitution.

65. One direct consequence of the repeal and supersession of the ARCSS is that the timelines for implementing the transitional justice mechanisms in Chapter V will now be delayed. Under the R-ARCSS, legislation to establish the Commission for Truth and Reconciliation and Healing must be promulgated within three months of the establishment

³⁰ R-ARCSS, Article 8.1.

³¹ JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018.

³² Sudan Tribune, “SSOA holdout groups voice rejection of South Sudan’s Revitalised peace”, 15 September 2018.

³³ R-ARCSS, Article 1.1.

³⁴ R-ARCSS, Articles 1.5-1.9.

³⁵ R-ARCSS, Articles 1.10, 1.14.

³⁶ R-ARCSS, Articles 2.2-2.3.

³⁷ R-ARCSS, Article 1.15.

³⁸ The date of Sudan’s Independence and the confirmation of administrative boundaries.

³⁹ R-ARCSS, Article 1.15.

⁴⁰ For a comprehensive comparison of the 2015 ARCSS and the 2018 R-ARCSS, see Malish John Peter, “A second Chance to Deliver Peace Through Power Sharing: A Comparative Analysis of South Sudan Peace Agreements”, Institute of Social Policy and Research, 15 October 2018.

of the RTGoNU and its activities must start within a month thereafter⁴¹ while the Compensation and Reparation Authority must be established within six months of the start of the Transitional period, which starts eight months after the signing of the R-ARSS.⁴² As was the case in the ARCSS,⁴³ no deadline is specified in the R-ARCSS for the establishment of the Hybrid Court; however, the Implementation Matrix provides that legislation to establish the Hybrid Court must be initiated within three months of the establishment of the RTGoNU and that the Hybrid Court should be established after the enactment of the legislation.⁴⁴

66. Unsurprisingly, South Sudanese reception of the R-ARCSS has been at once hopeful and tentative in light of previous experiences. In a survey conducted by the South Sudan Civil Society Forum in October and November 2018, less than half those surveyed thought the R-ARCSS would bring lasting peace, while just over a third considered that it might.⁴⁵ Indeed, only a small majority thought that the government and opposition leaders would be able to work together.⁴⁶ These views were reflected by many with whom the Commission spoke.

IV. Current Context

A. Political and Security Context

1. Implementation of the Revitalised Peace Agreement

67. Implementation of the R-ARCSS has been progressing with the establishment of the various institutions and mechanisms provided for in the Agreement and the nomination of representatives to them. Even as some progress is being made, each monthly report by JMEC on the implementation of the Agreement, has noted that many of the ambitious deadlines set out in the R-ARCSS have been missed.⁴⁷ With South Sudan's struggling economy, the expectation that the significant projected costs of implementing the Agreement will readily be met by international financing is unrealistic due to the continuing wariness of donors.⁴⁸ At a more profound level, the parties started from a position of a near complete lack of trust and this remains a major impediment to the timely implementation of the Agreement and has the very real potential to derail the fragile peace.

68. On 25 September 2018, President Kiir appointed the National Pre-Transitional Committee (NPTC) which is entrusted with the function of oversight and coordination of the implementation of the activities of the Pre-Transitional Period collaboration with the Incumbent TGoNU.⁴⁹ Since then, the NPTC has met on 21 and 22 October in Khartoum to establish a roadmap for implementation.⁵⁰ The NPTC has subsequently met regularly in Juba, with participation of all 10 of its members, and has set up its secretariat and its five sub-

⁴¹ R-ARCSS, Article 5.2.1.2,

⁴² R-ARCSS, Article 5.4.1.

⁴³ ARCSS, Article 5.3.

⁴⁴ R-ARCSS, Article 5.3, Annex D: Implementation Matrix.

⁴⁵ South Sudan Civil Society Forum, "Revitalizing Peace in South Sudan: Citizen Perceptions of the Peace Process", November 2018. The survey was conducted in South Sudan in Bentiu, Bor, Juba, Torit and Wau, and Kiryandongo refugee camp in Uganda and surveyed 1,147 people in October and November 2018.

⁴⁶ South Sudan Civil Society Forum, "Revitalizing Peace in South Sudan: Citizen Perceptions of the Peace Process", November 2018.

⁴⁷ R-JMEC, *Status of implementation of the R-ARCSS 2018*, 28 September 2018; R-JMEC, *Progress Report No. 2: Status of implementation of the R-ARCSS 2018*, 12 October 2018; R-JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018; R-JMEC, *Progress Report No. 4 on the Implementation Status of the R-ARCSS 2018*, 10 December 2018.

⁴⁸ Confidential Meeting, Juba, 15 December 2018; CTSAMVM, *Technical Committee Sixth Meeting Minutes*, 18-19 December 2018, p. 4; JMEC, *Progress Report No. 4: On the Status of Implementation of the R-ARCSS 2018*, 10 December 2018; CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019.

⁴⁹ Republican Order No. 16/2018 Formation of the National Pre-Transitional Committee, 25 September 2018. See R-ARCSS, Article 1.4.7.

⁵⁰ R-JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018.

committees charged with carrying out its mandate.⁵¹ In addition, the NPTC has reportedly been facilitating the return of opposition politicians to Juba.⁵²

69. Likewise, the National Constitution Amendment Committee met in Juba in November 2018 and drafted the Constitutional Amendment Bill incorporating the R-ARCSS into the Transitional Constitution;⁵³ however, finalisation of this important text was delayed as the National Constitutional Amendment Committee (NCAC) worked to reach agreement on the description of the system of government during the Pre-Transitional and Transitional Periods.⁵⁴ The NCAC eventually provided Transitional Constitution of South Sudan, 2011 (Amendment) (No.6) Bill, 2019 to the Minister of Justice and Constitutional Affairs on 24 January 2019.⁵⁵

70. An important milestone for advancing gender equality has been the R-ARCSS's commitment to including 35 percent women at the executive level.⁵⁶ However, this commitment has not been matched by the nomination and appointment of representatives to the various mechanisms and institutions, thus far.⁵⁷ For example, the National Pre-Transitional Committee only included one woman to the 10 person Committee.⁵⁸ This reflects a pattern seen in the peace negotiations where there was a stated commitment to greater participation of women (and indeed 27 women were participating by May 2018) but none of the chairpersons or spokespersons were women, limiting the prospect of their voices being heard in a meaningful way.⁵⁹ Empirical evidence indicates that peace processes that include women's participation are more likely to result in sustainable and lasting agreements.⁶⁰ Indeed, research has found that peace agreements are 35 percent more likely to last 15 years if women participated in the peace process.⁶¹

71. On 26 September 2018, President Kiir issued Republican Order No. 17/2018 on the implementation of the permanent ceasefire and transitional security arrangements in which he ordered the observance of the Khartoum Declaration ceasefire, the release of "prisoners of war" and detainees, the cessation of recruitment and training of SPLA and other forces, and the prohibition on acts of revenge, vengeance and retribution. While some political detainees and "prisoners of war" have been released, many remain detained as detailed below.

72. On 2 October 2018, the President issued a Presidential Order changing the name of the SPLA to the "South Sudan People's Defence Forces" (SSPDF).⁶² While the Commission notes this change, for consistency and to aid in comprehension, throughout this Report, it continues to refer to the SSPDF by its former name, the SPLA, including in relation to incidents that took place after 2 October.

73. On 31 October 2018, former First Vice President Riek Machar returned to South Sudan for the first time since he fled the fighting in July 2016. He addressed thousands of people who turned up for a peace celebration, which was also attended by regional leaders

⁵¹ R-JMEC, *Report by H.E. Amb. Lt. Gen. Augustino S.K. Njoroge (Rtd), Interim Chairperson of RJMEC, on the Status of Implementation of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan, For the Period 1st October to 31st December 2018*, p. 6.

⁵² R-JMEC, *Statement by H.E. Amb. Lt. Gen. Augustino S.K. Njoroge (Rtd), Interim Chairperson of RJMEC, to the 3rd RJMEC Monthly Meeting, 23 January 2019*, para. 22.

⁵³ R-JMEC, *Press Release: NCAC concludes deliberations to incorporate Revitalized Agreement into the transitional Constitution*, 28 November 2018.

⁵⁴ R-JMEC, *Progress Report No. 4 on the Implementation Status of the R-ARCSS 2018*, 10 December 2018.

⁵⁵ R-JMEC, *NCAC hands over constitutional amendment to Constitution Minister*, 24 January 2019.

⁵⁶ R-ARCSS, Article 1.4.4.

⁵⁷ R-JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018; R-JMEC, *Resolutions of the 3rd R-JMEC Plenary*, Juba, 23 January 2019.

⁵⁸ Republican Order No. 16/2018 Formation of the National Pre-Transitional Committee, 25 September 2018. See also Statement from South Sudanese Women Leaders, 26 September 2018, Djibouti, ERN D112671- D112672.

⁵⁹ Presentation at Launch of Evaluation Report on the recently concluded High-Level Revitalization Forum by Organization for Responsive Governance (ORG) / South Sudan Civil Society Forum (SSCSF), 2 October 2018.

⁶⁰ UN Women, *Women's meaningful Participation in Negotiating Peace and the Implementation of Peace Agreements, Report of the Expert Group Meeting*, 2018.

⁶¹ Laura Stone, "Quantitative Analysis of Women's Participation in Peace Processes" in *Reimagining Peacemaking: Women's Roles in Peace Processes*, Annex II, by M. O'Reilly, A. Ó Súilleabháin, and T. Paffenholz, International Peace Institute, 2015.

⁶² Presidential Order No. 18/2018 for the Transformation and the Change of Name of the Sudan People's Liberation Army (SPLA) to the South Sudan People's Defence Force (SSPDF).

including Sudanese President al-Bashir and Ugandan President Museveni.⁶³ By late 2018, a number of key opposition leaders had started to return to Juba including Rebecca Garang, of the SPLM Former Detainees, and Angelina Machar Teny, the head of the SPLM/A-IO's Committee for Security and Defence.⁶⁴ The next challenge will be whether South Sudan's leaders will progressively establish and maintain the minimum trust, and common investment in the Agreement, sufficient to keep the transition on track despite inevitable future setbacks.

2. Security Situation and Implementation of R-ARCSS's Security Provisions

74. As peace negotiations progressed in the lead-up to the Khartoum Declaration and the R-ARCSS, there was fighting in a number of areas of the country, apparently as parties to the conflict sought to gain territory before a ceasefire and peace agreement went into effect.⁶⁵

75. Between April and June, the SPLA undertook a major offensive through southern Unity State to clear the area of SPLA-IO (RM) forces and to open the road running from the border with Sudan down to Adok port. Although fighting had died down by late June, sporadic fighting continued to be reported in southern Unity into late August.⁶⁶ In May and June, there was also fighting in Western and Central Equatoria between the SPLA and opposition forces.⁶⁷ Mid-June also saw the launch of a new SPLA offensive in Western Bahr el Ghazal in the Wau Triangle area to the south and west of Wau town, which has continued into November 2018.⁶⁸

76. Since the signing of the R-ARCSS, there has been an overall decline in fighting across the country except in Central Equatoria and Western Bahr el Ghazal.⁶⁹ Inter-communal violence has also continued to negatively affect the security environment in Unity, Jonglei, Warrap and Lakes States.⁷⁰ In Western Bahr el Ghazal, the fighting which started in mid-June in the Wau triangle area, described above, continued into at least November.⁷¹

77. In Central Equatoria, while there was an initial decline in fighting after the peace agreement, on 2 October 2018, a faction of SSOA that did not sign the agreement formed a new parallel alliance known as the South Sudanese Opposition Alliance - Swaka (SSOA-SWAKA). This new alliance includes the National Salvation Front (NAS) led by Thomas Cirillo Swaka, the National Movement for Change (NMC) led by Vakindi Univuas, the People's Democratic Movement (PDM) led by Dario Hakim, the National Democratic Movement (NDM) led by Emmanuel Aban; and the United Democratic Republic Alliance (UDRA) led by Gatwech Thich.⁷² In mid-October 2018, the SSOA-SWAKA forces engaged in fighting with the SPLA-IO forces in Central Equatoria State which led to civilian displacement in Yei town.⁷³ CTSAMVM continued to find ceasefire violations in Central Equatoria into December 2018.⁷⁴

⁶³ Former First Vice President Riek Machar only returned to South Sudan for one day on this occasion.

⁶⁴ Radio Tamazuj, "Rebecca Garang returns to Juba after years in exile", 22 December 2018; Nyamilepedia, "Angelina Teny, Machar's Wife, Arrives in Juba for the Second Time in Less than Two Months", 20 December 2018.

⁶⁵ Confidential Meeting, Juba, 5 November 2018; Confidential Meeting, Juba, 31 October 2018.

⁶⁶ See below "Unity State" section (Section VII(A)). See also UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April-May 2018*; CTSAMM, *Report 2018/22 – Violations against Civilians including SGBV, in Southern Unity State May 2018*, 7 July 2018; CTSAMM, *Report 2018/25 – Righting in Thonyor, Unity State 19 June 2018*, 26 July 2018; CTSAMM, *Report 2018/28 – Fighting at Thaker, near Leer 30 June 2018*, 26 July 2018; CTSAMM, *Report 2018/30 Violations against Civilians in the Gandor Area, Unity State*, 17 August 2018.

⁶⁷ CTSAMM, *Report 2018/21 – Fighting between Parties 1-27 June 18*, 27 June 2018; OHCHR/UNMISS, *Violations and Abuses Against Civilians in Gbudue and Tambura States (Western Equatoria), April – August 2019*, 18 October 2018.

⁶⁸ See below "Western Bahr el Ghazal" section (Section VII(C)). See also Confidential Document, ERN D113942-D113947; Confidential Document, ERN D113948 - D113957; Confidential Document, ERN D114804-D114809; Confidential Document, ERN D113975-D113981.

⁶⁹ CTSAMVM, *Report (No.1) to RJMEC Plenary*, Addis Ababa, 19 November 2018.

⁷⁰ CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019.

⁷¹ CTSAMVM, *Report (No.1) to RJMEC Plenary*, Addis Ababa, 19 November 2018.

⁷² JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018.

⁷³ JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018; CTSAMVM, *Report (No.1) to RJMEC Plenary*, Addis Ababa, 19 November 2018.

⁷⁴ CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019.

78. Nevertheless, despite these skirmishes, as of January 2019, CTSAMVM was of the view that “the ceasefire is largely holding.”⁷⁵

79. As noted above, under the CoHA, which was reaffirmed by the Permanent Ceasefire Agreement and Chapter II of the R-ARCSS, all Parties’ forces are to freeze in their existing locations, with the exception of certain necessary movements authorised by the CTSAMVM.⁷⁶ A freezing of forces is an important first step for subsequent ceasefire processes, such as disengagement of forces. It is also an indicator of the willingness of parties to honour the cessation of hostilities. By mid-November 2018, CTSAMVM reported, with respect to Article 2.1.10.4 (regarding freezing of forces), that “[a]part from a few areas where tensions with occasional hostilities have been high, the Parties have demonstrated an overall effort to comply.”⁷⁷

80. As well as removing the immediate threat to life, a ceasefire in the context of a negotiated political settlement can serve a longer-term purpose: in the case of South Sudan, it is a pre-requisite for the envisaged transition from the current situation of multiple antagonistic armed groups to a future where unified national forces under democratic control would guarantee security for all. In this regard, Chapter II of the R-ARCSS sets out the security-sector reforms that are necessary for this transition and establishes a number of new bodies to develop and manage the process. These are the Joint Defence Board (JDB), Joint Transitional Security Committee (JTSC), Joint Monitoring Ceasefire Commission (JMCC), Strategic Defence and Security Review Board (SDSRB), and Disarmament, Demobilisation and Reintegration Commission (DDRC).⁷⁸

81. The security sector reform process consists of a number of sequential actions: cantonment, strategic review, unification and training or DDR, and finally deployment. Subsequent actions are dependent upon the successful completion of earlier actions, whilst all actions are reliant on the relevant managing body having been operationalized. Unfortunately, there has been a delay in the establishment of every single body⁷⁹ and as a result, every single action is behind schedule.⁸⁰

82. Cantonment is a particularly important element. As well as facilitating the start of the reform process, it underpins the ongoing ceasefire by requiring the disengagement, separation, and withdrawal of hostile forces, which are currently in close proximity to one another,⁸¹ with the potential to re-ignite hostilities.

83. The importance of the cantonment process is illustrated by the experience of the 2015 ARCSS. The cantonment process that was supposed to be undertaken in the 2015 ARCSS⁸² was hampered by disagreement between the Government and the Opposition over where the

⁷⁵ CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019. See also CTSAMVM, *Report (No 2) to R-JMEC Plenary*, Juba, 12 December 2018.

⁷⁶ Agreement on Cessation of Hostilities Protection of Civilians and Humanitarian Access, 12 December 2017, Article 1(2); Khartoum Declaration 27 June 2018, para. 1; R-ARCSS, Articles 2.1.2, 2.1.10.4.

⁷⁷ CTSAMVM, *Report (No.1) to R-JMEC Plenary, Addis Ababa*, 19 November 2018. See also CTSAMVM, Technical Committee Sixth Meeting Minutes, 18-19 December 2018 noting that “Implementation has generally been positive with the exception of deployments near Leer in November and December and Kawaji, approx. 12 km from Bunj town, on 08 Dec 18, by SPLM/A-IO forces.”

⁷⁸ R-ARCSS, Articles 2.4, 2.5.

⁷⁹ JDB should have been in place on 17 September 2018 (R-ARCSS Article 2.4.2) but was only established and held its first meeting on 26 November 2018. JMCC and JTSC should have been in place on 22 September 2018 (R-ARCSS Article 2.4.3, 2.4.4. respectively) but were only established on 30 November 2018. The SDSRB was already in existence, but was only reconstituted on 29 November 2018. The DDRC should have been reconstituted by 12 October 2018 but had still not been established as of mid-January 2019. See CTSAMVM, *Report (No. 2) to R-JMEC Meeting*, 12 December 2018; update on current status from Confidential Meeting, Juba, 15 December 2018; National Democratic Movement (NDM), *Mid-Term Evaluation of the Implementation of the Pre-Transition Activities of the R-ARCSS*, 14 January 2019; R-JMEC, *Resolutions of the 3rd R-JMEC Plenary*, Juba, 23 January 2019.

⁸⁰ Confidential Meeting, Juba, 15 December 2018.

⁸¹ R-ARCSS, Article 2.2.2.

⁸² ARCSSS, Chapter II, Article 2.

cantons should be allowed⁸³ and who was eligible to enter a canton⁸⁴ as well as a lack of funding.⁸⁵ Critics assessed that both parties had bad faith agendas regarding cantonment, “viewing [it] as a tool to reach their respective military objectives” with the Government using it to “reunify and strengthen the SPLA” whilst the Opposition saw it as “an instrument to strengthen [its] forces and extend [its] military power base”.⁸⁶ The continued disagreement over cantonment led the Chairman of JMEC to express concern in June 2016 that the issue could lead to the collapse of the peace agreement.⁸⁷

84. The role played by cantonment in the breakdown of the 2015 ARCSS must also be considered within the wider security arrangements under which the First Vice President Machar, apparently with great reluctance and under pressure from the Chair of JMEC over security concerns, returned to Juba in April 2016. The SPLA-IO had declined the original IGAD proposal for Juba to be completely de-militarised, and First Vice President Machar returned with a personal protection force 1,750 strong composed of soldiers and police.⁸⁸ At the insistence of the Government, they came with only light weapons, and established themselves at a base in the Jebel suburb of Juba city. Meanwhile, the SPLA retained 5,000 troops in Juba city, ostensibly to guard key installations, and a further 25,000 troops just outside the city (at a radius of 25 km) from where they could be easily redeployed into town should the need arise.⁸⁹ There were further allegations that 10,000 to 12,000 SPLA soldiers were hiding in Juba’s residential areas dressed as civilians.⁹⁰ By being effectively cantoned in the Jebel camp, the SPLA-IO force responsible for ensuring the security of First Vice President Machar was vulnerable to attack being in a fixed and identified, exposed location when fighting broke out in Juba on 8 July 2016.

85. As it was in 2015, the cantonment process for the R-ARCSS will likely be a delicate element of the peace agreement. Cantonment was scheduled to start on 12 September 2018, the date of signing of the R-ARCSS, and to be completed within one month.⁹¹ At the time of writing, two months beyond that deadline, the cantonment process is still far from complete with many troops remaining in their field deployment positions.⁹² The parties offered numerous operational and technical difficulties by way of explanation for these delays, but the most pressing reason appears to be the late establishment of the JDB, which has the ultimate responsibility for the implementation of the cantonment process and only held its first meeting on 25 November 2018.⁹³ CTSAMVM has been working to verify the disposition of forces, and had by mid-January 2019 verified 109 of the 145 declared SSPDF positions,

⁸³ The Government insisted that it be limited to those forces previously in combat in Juba, Jonglei, Upper Nile and Unity States whilst the SPLA-IO insisted that the provision for “any other forces related to the conflict in other areas that are declared by the warring parties” allowed it to have cantons in Greater Bahr el Ghazal and Greater Equatoria. See Claudia Breitung, “South Sudan’s stalled Peace Process Security arrangements in need of adjustment”, Bonn International Centre for Conversion, Policy Brief 5/2017; Golla, Rajiv, “Reassessing Ethno-Political Calculus in South Sudan’s War”, December 2017; Radio Tamazuj, “S Sudan parties in dispute over cantonment sites in Equatoria and Bahr el Ghazal”, 9 March 2016.

⁸⁴ The Government insisted that cantonment be limited to those already under arms whilst the SPLA-IO demanded that their field commanders could designate who entered the canton. The Government also sought to deny the right of entry to “other armed groups”, again despite the provision for “any other forces related to the conflict” (ARCSS, Chapter II, Article 2.2), whilst the SPLA-IO pushed for Equatorian groups to be admitted, thereby potentially boosting their ranks/numbers. See International Crisis Group, “South Sudan’s South; conflict in the Equatorias”, ICG Report No. 236/Africa, 25 May 2016 Golla, Rajiv, “Reassessing Ethno-Political Calculus in South Sudan’s War”, December 2017.

⁸⁵ Claudia Breitung, “South Sudan’s stalled Peace Process Security arrangements in need of adjustment”, Bonn International Centre for Conversion, Policy Brief 5/2017.

⁸⁶ Claudia Breitung, “South Sudan’s stalled Peace Process Security arrangements in need of adjustment”, Bonn International Centre for Conversion, Policy Brief 5/2017.

⁸⁷ Sudan Tribune, “S. Sudan president rejects consensus to establish cantonment areas for SPLA-IO”, 25 June 2016;

⁸⁸ John Young, “Isolation and endurance: Riek Machar and the SPLA-IO 2016-17”, Small Arms Survey, October 2017.

⁸⁹ John Young, “Isolation and endurance: Riek Machar and the SPLA-IO 2016-17”, Small Arms Survey, October 2017.

⁹⁰ Human Rights Watch, “South Sudan: Killings, Rapes, Looting in Juba”, 15 August 2016.

⁹¹ R-ARCSS, Article 2.2.2.

⁹² The CTSAMVM Technical Committee Fifth meeting, Khartoum, Sudan, 27-28 November 2018 reported the following: “immediate freezing of forces- ongoing.... Progress has been made but more needs to be done so as to avoid future clashes.” The “immediate disengagement of forces in close proximity- incomplete... there is need for the establishment of the JDB and the JMCC to help solve the problem of the movement of forces.” And regarding the “Ceasefire map (ongoing) of 532 declared positions [cantons] 30 have been verified. Parties were requested to submit updates on size of forces, contact numbers and GPS locations.” The sixth CTSAMVM Technical Committee Meeting in Addis Ababa on 18-19 December 2018 listed 531 declared positions.

⁹³ R-ARCSS, Article 2.4.4; Sudan Tribune, *South Sudan Joint Defence Board holds its first meeting*, 26 November 2018.

55 out of 282 SPLA-IO positions, and one out of 105 SSOA positions.⁹⁴ In mid-January 2019, it was announced that a pilot cantonment site had been identified in Yei which would “kick-off” the cantonment process; however, the Yei River State Government subsequently reportedly declined to approve the location.⁹⁵ It is crucial that the parties should continue to work through the impediments, and not permit the inevitable delays in the implementation of their cantonment obligations to lead to a resumption of fighting.

86. The Strategic Defence and Security Review (SDSR) process⁹⁶ depends upon data derived from the verification of cantoned forces to identify which personnel are suitable for retention in the unified forces, and which should be diverted into the DDR process.⁹⁷ Without complete cantonment, this data will not be fully available. Furthermore, the SDSR Board, which is tasked to conduct the review, has not yet started work due to the security concerns of its SPLA-IO members about working in Juba.⁹⁸ Accordingly, it will be some time still before the review will commence.

87. The unification of former adversaries into the national unified forces remains a long way off given that it is wholly reliant on the completion of cantonment, SDSR, and DDR screening. Work has not yet begun to develop the training curriculum for the unified forces, nor is it clear which body will have responsibility for this. Far from requiring combat training (weapons and tactics), the most pressing need is for training in those factors which restrain and control soldiers on the battlefield, which have been most problematic during the current conflict and have resulted in violations, i.e. cultural and gender awareness, international humanitarian law, tactical-level leadership, logistical provision, command and control processes.⁹⁹

88. Furthermore, although the R-ARCSS required civilian buildings to be demilitarized, many remain occupied by troops from all sides.¹⁰⁰ For example, in mid-December, CTSAMVM reported that the SPLA-IO was still occupying schools in seven locations while the SPLA were occupying schools, churches and other civilian buildings in 18 locations; however, it noted that the Parties were in the process of vacating a number of those premises.¹⁰¹

89. The Commission has continued to receive reports of the ongoing recruitment of forces, particularly in Unity State.¹⁰² Multiple witnesses have told the Commission of recruitment and training by the SPLA and the SPLA-IO (TD) ongoing in Unity State, particularly in the area of Rubkuai in northern Mayendit County, in September and October 2018.¹⁰³ Government Authorities have characterised the above as being simply a part of the ongoing integration of the SPLA-IO (TD) into the SPLA.¹⁰⁴ The Commission has also received reports of recruitment by NAS occurring in Central Equatoria in September 2018,

⁹⁴ CTSAMVM Technical Committee, *Seventh Meeting Minutes*, Juba, South Sudan, January 16-19, 2019, p. 11.

⁹⁵ Sudan Tribune, *South Sudan peace partners to launch pilot project for unified army*, 13 January 2019; South Sudan News Agency, *South Sudan Joint Defense Board to visit cantonment sites, vows to unify troops*, 16 January 2019; Radio Tamazuj, *Parties visit pilot joint force assembly area in Yei*, 16 January 2019; Radio Tamazuj, *Yei cabinet declines to approve plan for cantonment site*, 23 January 2019.

⁹⁶ R-ARCSS, Article 2.5.4.

⁹⁷ R-ARCSS, Article 2.2.2 refers to “registration of personnel” and “screening [for suitability]”. This task is the responsibility of the JTSC.

⁹⁸ R-JMEC, *Progress Report No. 4: On the Status of Implementation of the R-ARCSS 2018*, 10 December 2018.

⁹⁹ Confidential Meeting, 15 December 2018.

¹⁰⁰ R-ARCSS Article 2.2.3.1 with a deadline of “immediately”. The CTSAMVM Technical Committee 5th Meeting Minutes, 27-28 November 2018 reported “parties will vacate all civil buildings... (ongoing)... increasingly, Commanders on the ground are aware of the requirement, but claim to be waiting to receive orders from their chain of command [i.e. the JDB]”.

¹⁰¹ CTSAMVM Technical Committee, *Sixth Meeting Minutes*, 18-19 December 2018, pp. 10-11.

¹⁰² See also CTSAMVM Technical Committee, *Sixth Meeting Minutes*, 18-19 December 2018 which found limited evidence of enlistment of youth into the SPLA-IO in Kuajena County of Western Bahr el Ghazal. See also CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019 noting the “disappointing” speed of progress on this issue.

¹⁰³ Witness 839, ERN 101626-101631, para. 13; Witness 837, ERN 101638-101642, para. 10; Confidential Meeting, Bentiu, 21 September 2018.

¹⁰⁴ Meeting with Acting Governor of Southern Liech State, Leer, 4 October 2018; CTSAMVM, Technical Committee, *Fourth Meeting Minutes*, Khartoum, Sudan, 7-8 November 2018; CTSAMVM, *Report (No.1) to RJMEC Plenary, Addis Ababa*, 19 November 2018.

which should be investigated.¹⁰⁵ Contrary to R-ARCSS, Article 2.1.10.3, children associated with the armed conflict also remain in the ranks, particularly within opposition forces.¹⁰⁶

90. Notwithstanding the challenges set out above, there are a number of positive indicators. Firstly, at the field level, an increasing number of meetings between commanders of the SPLA and the SPLA-IO are being held, showing a growing willingness to communicate with each other, including to discuss practical arrangements regarding the local cantonment process. Such meetings have occurred in Yei, Panyume, Waat and Wau for example.¹⁰⁷ A general ‘war weariness’ is being observed amongst the front-line troops, along with a more engaging and inclusive attitude towards the civilian population.¹⁰⁸ This nascent ‘grass-roots’ reorientation augurs well for an ongoing ceasefire.

91. Additionally, it is widely accepted that the deadlines included in the R-ARCSS, across many issues, were overly optimistic, and could have been introduced to communicate urgency and commitment to the stated goals. Hence, the almost universal failure to meet them should not necessarily be perceived as a renege on the commitments.

3. Targeted Sanctions and Arms Embargo

92. In September and December 2017, the United States announced targeted sanctions against four South Sudanese officials for their roles in threatening the peace, security and stability of South Sudan: Benjamin Bol Mel, President Kiir’s principal financial adviser; Malek Reuben Riak Rengu, then Deputy Chief of General Staff for Logistics of the SPLA; Michael Makuei Lueth, Minister of Information, Communications Technology and Postal Services; and General Paul Malong Awan, then Chief of General Staff of SPLA.¹⁰⁹ The Government dismissed the action as unjustified and unhelpful to the peace process.¹¹⁰

93. On 2 February 2018, the European Union (EU) announced its first sanctions list related to the situation in South Sudan. Mirroring the United States’ list, Paul Malong Awan, Malek Reuben Riak and Michael Makuei Lueth are now also subject to asset freezes and travel bans by all EU member states.¹¹¹

94. On the same day, the United States, announced an arms embargo on all parties to the conflict in South Sudan, citing the continued use of military force by the Government and armed opposition, despite the 21 December 2017 Agreement on the Cessation of Hostilities, the continued obstruction of UNMISS from fulfilling its mandate, and the continued violence against civilians and humanitarian workers.¹¹² On 14 December 2018, the United States imposed sanctions on three individuals and six entities associated with those individuals: Gregory Vasili, a South Sudanese former Governor of Gogrial State who allegedly facilitated the transport of soldiers and armaments, the brokering of military equipment deals and oversaw the intra-clan ethnic violence; Israel Ziv, a retired Israeli Defence Forces Major General who allegedly supplied weapons to the South Sudanese Government and the opposition; and Obac William Olawo, a South Sudanese businessman who was allegedly involved in arms and armament supply to South Sudan.¹¹³

95. On 13 July 2018, the UN Security Council imposed an arms embargo on South Sudan until 31 May 2019. In doing so, it strongly condemned the ongoing human rights violations and abuses and violations of international humanitarian law.¹¹⁴ It also extended the targeted

¹⁰⁵ Witness 981, ERN 101980-101992.

¹⁰⁶ See below “Recruitment and Use of Children in Armed Conflict” section (Section VI(C)(1)). CTSAMVM, *Report (No. 2) to RJMEC Plenary*, Juba, 12 December 2018 continued to note “evidence of non-compliance”.

¹⁰⁷ CTSAMVM, *Report (No. 1) to RJMEC Plenary, Addis Ababa*, 19 November 2018; CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019.

¹⁰⁸ Confidential Meeting, Juba, 15 December 2018.

¹⁰⁹ United States, Department of State, “Press Release: Treasury Announces Targeted Sanctions on South Sudanese Officials and Companies”, 6 September 2017.

¹¹⁰ Radio Tamazuj, “Government says sanctions show US’s ignorance about South Sudan situation”, 8 September 2017.

¹¹¹ Council of the European Union, “Press Release: South Sudan: EU adds 3 persons involved in serious human rights violations to sanctions list”, 2 February 2018.

¹¹² United States, Department of State, “Press Statement: U.S Arms Restrictions on South Sudan”, 2 February 2018.

¹¹³ United States, Department of the Treasury, “Treasury Sanctions Three Individuals for their Roles in the Conflict in South Sudan”, 14 December 2018. The entities listed were: Global N.T.M. Ltd., Global Law Enforcement and Security Ltd., Global IZ Group Ltd., Golden Wings Aviation, Crown Auto Trade, and Africana General Trading Ltd.

¹¹⁴ UN Security Council Resolution 2428 (2018), S/RES/2428 (2018).

sanctions involving a travel ban and asset freeze imposed in 2015 against SPLA officers: Lieutenant General Gabriel Jok Riak, Major General Marial Chanuong Yol Mangok, and Major General Santino Deng Wol; and SPLA-IO commanders: 1st Lieutenant General Simon Gatwech Dual, Lieutenant General James Koang Chuol Ranley and Major General Peter Gatdet Jaka.¹¹⁵ It further added General Paul Malong Awan and Lieutenant General Malek Reuben Riak Rengu to its sanctions list.

96. Despite their inclusion on the sanctions list, President Kiir promoted Lt. Gen. Jok Riak to the position of SPLA Chief of General Staff on 3 May 2018,¹¹⁶ and Lt. Gen. Malek Reuben Riak Rengu to the position of Deputy Minister of Defence and Veteran Affairs of 24 September 2018.¹¹⁷ President Kiir had also promoted Maj. Gen. Marial Chanuong Yol Mangok as Head of Army Operations, Training and Intelligence, and Maj. Gen. Santino Deng Wol as the Head of Ground Forces in December 2017 who are also on the sanctions list.¹¹⁸

4. Attacks on the United Nations and Humanitarian Actors

97. For the third consecutive year, South Sudan has been described as the most dangerous place in the world for humanitarian workers.¹¹⁹ Fourteen humanitarian workers were killed in South Sudan in 2018 bringing the number of humanitarian workers killed since the beginning of the conflict to 112.¹²⁰ In the first six months of the year, 122 incidents of violence against humanitarian personnel were reported to OCHA.¹²¹ In the first half 2018, nearly half the violent incidents against humanitarians occurred in Unity and Central Equatoria States,¹²² corresponding with the areas sustaining the highest levels of conflict during the same period.

98. In February 2018, two humanitarian aid workers were killed during fighting in Koch County, Unity State. In April, following renewed fighting in multiple locations in Unity there were an additional three fatalities among humanitarian aid workers. One was killed by armed men while in a clearly marked NGO vehicle undertaking humanitarian activities. Another was shot and killed while fleeing from crossfire during inter-communal clashes outside a NGO health facility. The third was shot and killed while returning to check on a health clinic which had been looted. In May, a staff member of a local NGO was caught in crossfire while working at a health clinic.¹²³

99. In June 2018 alone, UNMISS patrols came under direct fire three times. On 4 June, an UNMISS patrol encountered small arms fire from unidentified armed men in an area controlled by SPLM/A-IO near Rubkway in southern Unity. Four days later, on 8 June, an integrated UNMISS patrol again came under direct and sustained fire in Rubkway from 80 to 100 armed men later confirmed to be from the SPLA.¹²⁴ On 26 June 2018, UNMISS

¹¹⁵ UNSC Resolution 2206 (2015), S/RES/2206 (2015).

¹¹⁶ Sudan Tribune, "South Sudan president appoints new army chief of staff", 3 May 2018.

¹¹⁷ Radio Tamazuj, "Kiir appoints blacklisted general as deputy defense minister", 24 September 2018.

¹¹⁸ UN Security Council, *Report of the Secretary-General on South Sudan (covering the period from 15 November 2017 to 16 February 2018)*, S/2018/163, 28 February 2018; Africa News, *South Sudan's Kiir Promotes Three Generals Facing UN Sanctions*, 16 December 2017.

¹¹⁹ Stoddard, A et al., "Aid worker security report: Figures at a glance", Humanitarian Outcomes, 2018.

¹²⁰ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018; OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (July 2018)*, 13 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (September 2018)*, 10 October 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (October 2018)*, 13 November 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (November 2018)*, 7 December 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (December 2018)*, 9 January 2019.

¹²¹ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018. This encompassed violence which was politically or economically motivated as well as exposure to incidental violence directly affecting humanitarian personnel while on duty (e.g. threats of violence, harassment, physical assault, detention/arrest, robbery).

¹²² OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018.

¹²³ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018.

¹²⁴ Letter dated 29 June 2018 from the Secretary-General addressed to the President of the Security Council, S/2018/653; United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

peacekeepers providing force protection to humanitarian workers travelling from Yei to Lasu were attacked by unknown gunmen and one peacekeeper was shot and killed.¹²⁵

100. In the same month, three humanitarian workers were killed in Rubkona and Mayom Counties in Unity State and two were killed in July in Terekeka, Central Equatoria and Rumbek East, Lakes State.¹²⁶

101. In July, a UN agency contracted convoy was fired upon in Rumbek East County, Lakes State and one of the drivers was killed. The same month, another humanitarian worker was killed in Juba, also in a clearly marked vehicle.¹²⁷

102. In September, an UNMISS peacekeeper was shot and injured by an SPLA soldier in Yei during a water collection patrol. Ten days later, shots were fired at UNMISS personnel unloading a UN plane in Rumbek.¹²⁸ An aid worker was also killed in September by unknown armed men in Yei County, while travelling in a clearly marked vehicle.¹²⁹

103. October saw the killing of two aid workers, one while travelling in a clearly marked convoy on the Juba-Lainya road and the other while on duty at a nutrition facility in Jonglei.¹³⁰

104. In numerous instances, violence and threats against humanitarian workers have required humanitarians to withdraw and suspend lifesaving services to protect their staff. This has included violence and threats against humanitarian workers in June and July in the Bentiu and Malakal PoC sites resulting in the closure of three of five clinics for over three weeks in the Bentiu PoC site and the suspension of health assistance in the Malakal PoC site. Similarly, youth protests over employment opportunities in Bunj, Maban County, Upper Nile resulted in the looting and burning of humanitarian premises and vehicles and the relocation of approximately 400 humanitarian workers.¹³¹

105. While a few instances of violence against humanitarian workers have resulted from being caught in the crossfire of fighting, most instances of injuries and deaths have occurred when they were travelling in clearly marked vehicles or working at identified humanitarian duty stations, indicating that attackers are aware of the civilian and humanitarian identities of their victims. The Commission concludes from this that attackers are either directing attacks against civilian objects or failing to abide by the humanitarian law principle of distinction.

106. The Commission underscores that directing attacks against civilians and civilian objects, including humanitarian operations, as well as failing to distinguish between civilian objects and military objectives are violations of international humanitarian law and may amount to war crimes. Furthermore, intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations is an international crime which would be punishable under Article 5(d) of the Draft Statute of the Hybrid Court for South Sudan once it is established.¹³² This war crime is defined in Article 5(d) as follows: “Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations and or the Constitutive Act of the African Union, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”

¹²⁵ Letter dated 29 June 2018 from the Secretary-General addressed to the President of the Security Council, S/2018/653; United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹²⁶ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹²⁷ OCHA, *South Sudan: Humanitarian Access Snapshot (July 2018)*, 13 August 2018.

¹²⁸ Confidential Document, ERN D116747-D116747.

¹²⁹ OCHA, *South Sudan: Humanitarian Access Snapshot (September 2018)*, 10 October 2018.

¹³⁰ OCHA, *South Sudan: Humanitarian Access Snapshot (October 2018)*, 13 November 2018.

¹³¹ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹³² See also Statute of the International Criminal Court, Article 8(2)(e)(iii).

107. Furthermore, the Commission recalls that parties to the Convention on the Safety of United Nations and Associated Personnel are required to criminalize attacks on United Nations and associated personnel and official premises.¹³³ While South Sudan is not a party to the Convention, the Status of Forces Agreement signed by South Sudan and the United Nations provides that the Government will ensure the Convention is applied and that attacks on the personnel or premises of UNMISS are established as crimes in national law and punished with appropriate penalties.¹³⁴

108. The Convention provides that State Parties may establish jurisdiction over such crimes where their nationals were the victims.¹³⁵ Accordingly, the States whose nationals have been attacked in South Sudan in this context can pursue criminal cases against the perpetrators if they are parties to the Convention. In addition, the Convention provides that:

The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.¹³⁶

109. The international case-law that has dealt with the crime of attacks on peace-keepers has considered under what conditions peacekeepers continue to be civilians and protected from attack even when acting in self-defence. The Appeals Chamber of the Special Court for Sierra Leone noted “that it is settled law that peacekeepers – like civilians – are entitled to use force in self-defence; such use does not constitute taking a direct part in hostilities.”¹³⁷ A recently published scholarly Manual explains:

Acting in lawful self-defence does not constitute a hostile act or automatically result in becoming party to an armed conflict under IHL. Lawful self-defence includes protection of mission personnel and/or civilians from imminent physical danger and extends to proportionate action to counter attempts to disarm or otherwise incapacitate mission personnel or seize vital installations or equipment.¹³⁸

5. Repression of Freedom of Expression and the Press

110. The civic space available to journalists, human rights activists and civil society to inform, debate, and dissent has continued to shrink in South Sudan. Citizens face legal, administrative and security deterrents to political participation and discussion which is resulting in growing self-censorship at a time when more, not less, engagement is needed if the peace agreement is to succeed. One activist the Commission spoke to mourned the absence of freedom of expression stating: “we can’t protest in the streets because there is no tear gas but only live bullets.”¹³⁹

111. The World Press Freedom Index for 2018 compiled by Reporters Without Borders ranked South Sudan as 144th out of 180 countries.¹⁴⁰ In February 2018, the UNMISS Human Rights Division issued a report documenting violations of the right to freedom of opinion and expression since July 2016.¹⁴¹ It verified 60 instances of violations of the legitimate exercise of freedom of expression involving 102 victims (85 men and 17 women). This included the killing of at least two individuals, the arbitrary arrest of 58 people (53 men and five women);

¹³³ Convention on the Safety of United Nations and Associated Personnel, Article 9.

¹³⁴ The Status Of Forces Agreement Between The United Nations And The Government Of The Republic Of South Sudan Concerning The United Nations Mission In South Sudan (“SOFA”) (2011), Article 48.

¹³⁵ Convention on the Safety of United Nations and Associated Personnel, Article 10(2)(b).

¹³⁶ Convention on the Safety of United Nations and Associated Personnel, Article 14.

¹³⁷ Special Court for Sierra Leone, *Prosecutor v Sesay et al.*, Appeal Judgement, Case No. SCSL-04-15-A, 29 October 2009, para. 531.

¹³⁸ T. D. Gill, D. Fleck, W. B. Boothby, and A. Vanheusden, (eds), *Leuven Manual on the International Law Applicable to Peace Operations*, (Cambridge: CUP, 2017) at 324. See further on the Convention E.T. Bloom, ‘Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel’, vol. 89 *AJIL* (1995) 621-31.

¹³⁹ Confidential Meeting, 20 August 2018.

¹⁴⁰ Reporters Without Borders, <https://rsf.org/en/south-sudan>, last accessed 21 November 2018. This ranking is based on a number of criteria including pluralism, media independence, media environment and self-censorship, legislative framework, transparency and the quality of infrastructure supporting the production of news and information.

¹⁴¹ UNMISS/OHCHR, *Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis*, February 2018.

the dismissal of 16 people from the work place as well as several acts of intimidation, harassment, and other forms of violence. It further found that at least nine media institutions were subjected to restrictions, with three media houses closed or suspended, four websites blocked, and at least eight articles censored from two newspapers.

112. In relation to the four websites blocked in July 2017 on instructions from the South Sudan National Communication Authority (SSNCA), two were news websites (Sudan Tribune and Radio Tamazuj) and two were blogs (Nyamilepedia and Paanluel Wel).¹⁴² At the time that they were blocked, the SSNCA alleged that they were disseminating “non-peace” messages, not considered to be “in the best interests of the country”. These continue to be inaccessible in South Sudan at the time of writing a year and a half later.¹⁴³

113. In early January 2019, the Editor in Chief of the Al Watan Arabic newspaper based in Juba was summoned to appear before the Media Authority as a result of three opinion pieces he had written about the protests in Sudan. The Media Authority’s summons indicated that “The ongoing protests in Khartoum are internal issues affecting a friendly nation, the media in South Sudan should not write or broadcast instigative statements and comments about it.”¹⁴⁴ The next day, Media Authority reportedly ordered him to immediately stop writing anything related to the situation in Sudan and gave him 72 hours to apologize to the Government of Sudan, which he refused to do. The Editor in Chief reported that he has been receiving threatening anonymous phone calls and has since reportedly fled the country.¹⁴⁵

114. The Commission also received information about South Sudanese journalists who have left South Sudan for security reasons continuing to be threatened and who remain under surveillance as a result of their journalistic work once in Uganda.¹⁴⁶

115. South Sudan’s international obligations and domestic law recognise the right to freedom of expression; however, aspects of South Sudan’s domestic law undermine this right. With respect to international human rights law, the African Charter on Human and Peoples’ Rights, to which South Sudan is a party, recognises in Article 9 the right to receive information and to express and disseminate opinions within the law.¹⁴⁷ The Commission notes that the African Charter does not permit derogations.¹⁴⁸ Furthermore, journalists are protected as civilians during times of non-international armed conflict under Additional Protocol II provided they do not take direct part in the conflict.¹⁴⁹

116. South Sudan has not yet acceded to the International Covenant on Civil and Political Rights (ICCPR), which protects freedom of expression in Article 19. However, it is encouraging that the Government has taken domestic steps to accede to the ICCPR: the Council of Ministers has submitted this treaty, along with others, to the National Assembly for adoption. Indeed, the official guiding principles of the Media Authority Act (2013) refer to Article 19 of the ICCPR.¹⁵⁰ South Sudan has maintained that the fact that it has not yet acceded to the treaty is “not a lack of will to adhere to international standards”.¹⁵¹

¹⁴² UNMISS/OHCHR, *Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis*, February 2018.

¹⁴³ Radio Tamazuj, “Opinion: South Sudan government should lift ban on blocked news websites”, 14 January 2019.

¹⁴⁴ Republic of South Sudan Media Authority, *Letter of Summon to Al Watan Arabic Newspaper*, signed by the Director General of the Media Authority, 7 January 2019, on file with the Commission, ERN D114939-D114939.

¹⁴⁵ Eye Radio, “Al Watan chief editor says his life under threats”, 14 January 2019; Eye Radio, “I can’t apologize –Al Watan chief editor tells S. Sudan Media Authority”, 8 January 2019; RFI, “South Sudan editor flees after receiving gag order”, 29 January 2019.

¹⁴⁶ Confidential Meeting, Uganda, 19 December 2019.

¹⁴⁷ The African Commission on Human and Peoples’ Rights has considered that arbitrarily arresting and detaining journalists, seizing magazine publications because they are critical of the government, closing media houses, establishing prohibitive registration requirements amount to violations under the African Charter. The Commission found violations of Articles 6, 7, 9, 14 and 16 of the African Charter. African Commission on Human and Peoples’ Rights, *Media Rights Agenda et al. v. Nigeria*, Communications 105/93-128/94-130/94-152/96, 31 October 1998.

¹⁴⁸ See African Commission on Human and Peoples’ Rights, *Media Rights Agenda et al. v. Nigeria*, Communications 105/93-128/94-130/94-152/96, 31 October 1998, para. 67.

¹⁴⁹ Additional Protocol II to the Geneva Conventions, Article 13; ICRC, *Customary IHL Database*, “Rule 34. Journalists”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule34.

¹⁵⁰ Media Authority Act (2013), section 6(2).

¹⁵¹ Letter dated 31 October 2013 from the Permanent Representative of South Sudan to the United Nations addressed to the President of the General Assembly, A/68/565, 31 October 2013.

117. Within domestic law, the Transitional Constitution (2011) enshrines in Article 24 the right to freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to public order, safety or morals as prescribed by law. The Media Authority Act (2013) also enshrines principles of freedom of the press including reiterating Article 24 of the Transitional Constitution, and stating that the law will promote freedom of expression, a diverse range of media services which serve South Sudan's national languages, ethnic beliefs and cultures of the communities, and enhance the right of the public to know through promoting pluralism and a wide variety of publications and programming. It further specifically provides that free media representing all groups and divisions of society shall be protected as essential to democracy, giving independent scrutiny of Government, and will be protected from censorship and against journalists having to reveal their source.¹⁵²

118. However, other aspects of domestic legislation undercut this Constitutional protection. The Penal Code (2008) criminalises a) defamation;¹⁵³ b) the publication or communication of false statements prejudicial to South Sudan (including statements which incite or promote public disorder or violence or endanger public safety; adversely affect the defence or economic interests of South Sudan; undermine public confidence in a law enforcement agency or the Defence Forces of South Sudan; or interfere with any essential service);¹⁵⁴ and c) statements undermining the authority of or insulting the President (including statements which engender hostility, hatred, contempt or ridicule toward the President; or are abusive, indecent or obscene toward the President).¹⁵⁵ The Media Authority Act relies on the Penal Code's defamation definition despite setting out procedures for handling defamation in section 28.¹⁵⁶

119. The National Security Service Act (2014) also gives broad powers to the National Security Service (NSS) allowing it to undertake surveillance and detention which it has used to silence journalists, political dissidents and civil society actors. These powers include the authority to monitor frequencies, wireless systems, publications, broadcasting stations and postal services with respect to security interests; request any information, statement, document, or any relevant material from any suspect and potential witness for perusal or examination, keep or take necessary or appropriate measures in respect of such information, statement, document or relevant material; summon, investigate and take particulars and depositions from any suspect and potential witness.¹⁵⁷

120. The Media Authority Act (2013) created the Media Authority which began operating in February 2017 with a mandate to regulate, develop and promote an independent and professional media in South Sudan.¹⁵⁸ However, the Commission has documented cases in which the Media Authority not only instituted administrative hurdles for media houses and journalists, hampering their ability to operate, but also participated in their intimidation, arbitrary arrest and detention, interrogation as well as the confiscation of their media equipment.

121. For example, in June 2017, the Media Authority requested all media houses to register including media advocacy groups and associations, television stations, radios, newspapers and magazines and printing companies.¹⁵⁹ In September 2017, it warned that non-compliance would result in fines and de-registration. This directive exceeded the Media Authority's mandate which only mandates the authority to regulate broadcast media, whereas print media is explicitly stated to be self-regulating under the Media Authority Act (2013).¹⁶⁰

122. Pursuant to this directive, in March 2018, the Media Authority issued a suspension order to the UN-operated Radio Miraya, which has the widest radio coverage in South Sudan, and asked the National Communication Authority to withdraw the frequency assigned to it.¹⁶¹

¹⁵² Media Authority Act (2013), sections 12, 13.

¹⁵³ Penal Code (2008), section 289.

¹⁵⁴ Penal Code (2008), section 75.

¹⁵⁵ Penal Code (2008), section 76.

¹⁵⁶ Media Authority Act (2013), sections 5, 28.

¹⁵⁷ National Security Services Act (2014), section 13.

¹⁵⁸ Media Authority Act (2013), section 7(1).

¹⁵⁹ UNMISS/OHCHR, *Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis*, February 2018.

¹⁶⁰ Media Authority Act (2013), sections 6(13)(i), 6(13)(j), 7(5).

¹⁶¹ Radio Tamazuj, "South Sudan government suspends UN radio station", 9 March 2018.

The reason given was that Radio Miraya had not acquired a licence to operate in the country, despite the fact that as a part of UNMISS, Radio Miraya falls within the Status of Forces Agreement between the United Nations and South Sudan and therefore does not need to obtain a licence to operate. Despite the Media Authority's order, Radio Miraya has continued to operate.

123. In May 2018, one of Radio Miraya's journalists was detained while trying to attend a press briefing by Minister of Information Michael Makuei. He was detained for most of a day by the NSS at its "Blue House" headquarters in Juba and his belongings confiscated during that time. It was reported that his detention had been ordered by the Media Authority as a result of Radio Miraya not having obtained a licence to operate.¹⁶²

124. The Media Authority also took over issuing foreign journalist accreditation in February 2017, and over the course of that year confirmed to the UNMISS Human Rights Division that it had denied accreditation to 20 foreign journalists on the basis that it deemed their past reporting to be inaccurate, or the Authority considered them to have disseminated information with the intention of tarnishing the image of South Sudan or inciting violence.¹⁶³

125. The NSS has taken on an increasingly active role in curtailing the freedom of the press. Multiple witnesses reported to the Commission that the NSS has agents in formal and open positions within the Media Authority and it is apparent that the two organizations coordinate operations. This includes transferring detained journalists and their belongings between the two organizations. Further, as early as 2014, there was a designated Director of Information within the NSS who oversaw cases and detention involving media professionals.

126. Multiple witnesses described to the Commission being arrested or detained and having their professional equipment confiscated and searched by NSS agents as a result of their journalistic work in 2018. While the pretext of such detentions was often related to a failure to complete an administrative requirement, in at least one case, it was clear, based on the NSS officer's line of questioning, that the Media Authority and NSS's real concern related to the subject matter the journalist was reporting on. In another case, the reason given for a journalist's arrest by an NSS officer, was: "Your case involved you reporting against the Government... All of your reports on the media were against the Government."¹⁶⁴ In other instances, journalists were threatened by the NSS and other authorities to intimidate them into refraining from publishing particular stories or as a result of having published stories. None of the witnesses the Commission spoke to were given access to a lawyer during their interrogation or detention. Furthermore, in some instances, witnesses were detained in informal locations rather than official offices or detention facilities.

127. Further treatment of issues relating to the arrest and detention of journalists may be found in the section "Securitization of the State: Arbitrary Detention, Forced Disappearance, Torture and Inhuman Treatment".

6. Political Detainees and "Prisoners of War"

128. Pursuant to the Cessation of Hostilities Agreement of 21 December 2017,¹⁶⁵ the Khartoum Declaration¹⁶⁶ and the R-ARCSS,¹⁶⁷ the parties to the conflict are required to immediately release all "prisoners of war"¹⁶⁸ and political prisoners. On 9 August 2018, President Kiir issued Republican Order No. 14 of 2018 granting a general amnesty to former First Vice President Riek Machar "and other estranged groups who waged war against the government of the [R]epublic of South Sudan".

¹⁶² Radio Tamazuj, "UN radio journalist released after 5 hours in detention", 29 May 2018; Eye Radio, "Why Radio Miraya journalist was briefly detained", 30 May 2018.

¹⁶³ UNMISS/OHCHR, *Report on the Right to Freedom of Opinion and Expression in South Sudan since the July 2016 Crisis*, February 2018.

¹⁶⁴ Source omitted for protection reasons.

¹⁶⁵ Cessation of Hostilities Agreement of 21 December 2017, Article 9 provided that "POWs" were to be released without delay and political detainees were to be released within 14 days.

¹⁶⁶ Khartoum Declaration, para. 1.

¹⁶⁷ R-ARCSS, para. 2.1.6.

¹⁶⁸ The term "prisoners of war" is used to refer to persons detained by the parties, including the SPLA and both factions of the SPLA-IO.

129. The President issued a Decree ordering the immediate release of all political detainees and “prisoners of war” on 27 September 2018.¹⁶⁹ The Government has since released some political detainees but it has not identified many of those released or published a list of those released, so it has been difficult to monitor these releases. Nevertheless, the ICRC confirmed that it had supervised the release of 24 detainees in Juba on 19 October.¹⁷⁰ The Commission attended the release of another 16 “prisoners of war” by the SPLA Military Intelligence in Wau on the same day.¹⁷¹

130. SPLM-IO’s former Governor of Kapoeta State (Eastern Equatoria), Marko Lokidor Lochapio and four others were released by the NSS on 25 October 2018.¹⁷² Lokidor was reportedly abducted from Kakuma Refugee camp in Kenya at the end of December 2017, handed over to the NSS, and detained for 10 months.¹⁷³

131. On 2 November 2018, the Government released James Gatdet Dak, former spokesman for SPLA-IO Chairman Riek Machar, who was arrested in Nairobi, Kenya and illegally deported to South Sudan in November 2016 and William Endley, a former adviser to former First Vice President Riek Machar, who was arrested in Juba in August 2016. Both men had previously been sentenced to death and had served time in the NSS headquarters and Juba Central Prison.¹⁷⁴

132. Despite these releases by the Government, the Commission received information that some of those who were released by the Government as political detainees were not detained on the basis of their political affiliation, but rather as a disciplinary measure for professional misconduct within the State security forces. Further, several high profile political detainees remain in detention, including Peter Biar Ajak, a political activist who was detained by the NSS at Juba International Airport on 28 July 2018,¹⁷⁵ and Dong Samuel Luak and Aggrey Izbon Idris, who were members of the opposition and reportedly arrested in Nairobi, Kenya and unlawfully transferred to NSS headquarters in Juba in January 2017.¹⁷⁶ With respect to the latter two, in a meeting with the Government of South Sudan, the Commission raised the issue of the transfer and removal of Dong Samuel Luak and Aggrey Izbon Idris from Kenya, however, the Deputy Minister of Foreign Affairs and International Cooperation denied having any knowledge of their whereabouts, stating that the Commission should make inquiries of the Government of Kenya.¹⁷⁷ However, at least eight witnesses the Commission spoke to indicated that they saw Aggrey Izbon Idris and Dong Samuel Luak in NSS custody in South Sudan shortly after they disappeared in Nairobi.

133. By early November 2018, the SPLA-IO had also released four detainees under their custody and another was released in Western Equatoria.¹⁷⁸

134. Further treatment of issues relating to political detainees and “prisoners of war” may be found in the section “Securitization of the State: Arbitrary Detention, Forced Disappearance, Torture and Cruel, Inhuman or Degrading Treatment”.

7. Economy

135. The economy continues to face significant challenges. The economy is expected to contract by 3.5 percent in 2018, which is a smaller contraction than the year before (6.9 percent contraction in 2017).¹⁷⁹ South Sudan continues to be highly dependent on oil,

¹⁶⁹ Sudan Tribune, “South Sudan president orders to release PoWs and detainees”, 28 September 2018.

¹⁷⁰ ICRC, “South Sudan: ICRC facilitates release of 24 detainees”, 19 October 2018.

¹⁷¹ See also CTSAMVM Technical Committee Fourth Meeting Notes, 7-8 November 2018.

¹⁷² Radio Tamazuj, “Government releases five detainees, including ex-Governor”, 25 October 2018; Radio Tamazuj, “Authorities urged to hand over Marko Lokidor to ICRC in Juba”, 26 October 2018; Confidential Document, ERN D114861-D114861; Confidential Document, D114938-D114938; CTSAMVM, *Technical Committee Fourth Meeting Minutes*, 7-8 November 2018.

¹⁷³ Sudan Tribune, “South Sudan rebel appointed governor abducted in Kenya”, 1 January 2018; Radio Tamazuj, “South Sudanese Opposition Governor Abducted in Kenya”, 31 December 2017.

¹⁷⁴ JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018.

¹⁷⁵ Al Jazeera, “Amid peace efforts, South Sudan arrests activist Peter Biar Ajak”, 15 August 2018.

¹⁷⁶ Radio Tamazuj, “Family urges President Kiir to release Dong Samuel”, 18 November 2018.

¹⁷⁷ Meeting with the Deputy Minister of Foreign Affairs and International Cooperation, Juba, 7 December 2018.

¹⁷⁸ JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018; CTSAMVM, *Technical Committee Fourth Meeting Minutes*, 7-8 November 2018.

¹⁷⁹ World Bank, “South Sudan Economic Update”, July 2018.

deriving 98 percent of its revenue from it.¹⁸⁰ Oil production continued at approximately 130,000 barrels per day, but this was expected to increase with the resumption of production in Unity State following the signing of the R-ARCSS.¹⁸¹ Nonetheless, much of this oil revenue will reportedly not benefit the citizens of South Sudan due to corruption; indeed, the anti-corruption organization Transparency International ranked South Sudan 178th out of 180 countries surveyed in 201.¹⁸²

136. On 20 August 2018, Parliament passed the draft national budget for 2018/2019 of 81.59 billion South Sudanese Pounds (SSP), or approximately USD \$526 million.¹⁸³ This budget is approximately 60 percent larger than the previous year's but it remains unclear how it is going to be financed.¹⁸⁴ This highlights the challenge the government faces in meeting its financial commitments as civil servants throughout the country have continued to face salary arrears.¹⁸⁵ Despite the signing of the peace agreement in the same period as the passage of the Budget, the budget itself notes that "expenditures are largely skewed toward defence at the expense of poverty reduction." Indeed, almost 20 percent of the budget is still allocated to security expenditures as compared to just 9.4 percent to education and 2.2 percent to health (see figures 1 and 2 below).¹⁸⁶

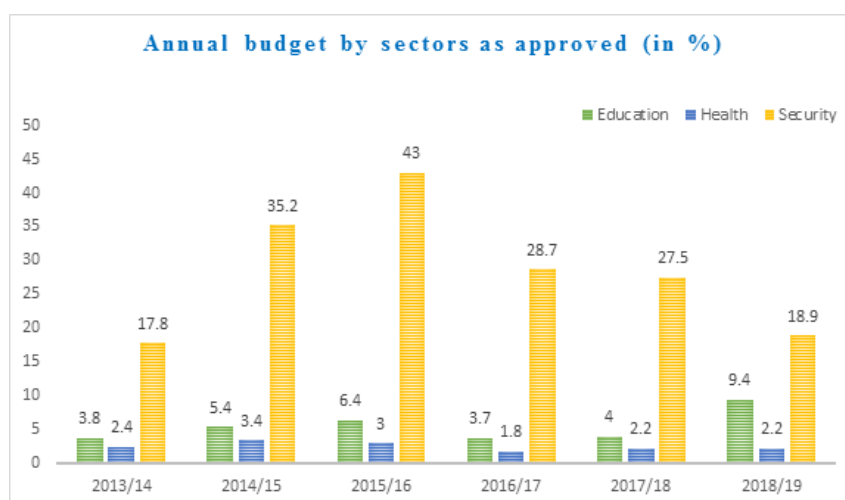


Figure 1: Annual Budget by sectors as approved

¹⁸⁰ Republic of South Sudan, Ministry of Finance and Planning, *National Development Strategy July 2018 – June 2021*, launched November 2018.

¹⁸¹ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹⁸² Transparency International, "Corruption Perceptions Index 2018", February 2019, <https://www.transparency.org/cpi2018> last accessed on 7 February 2019.

¹⁸³ Republic of South Sudan, Ministry of Finance, *2018/19 Approved Budget Book*, August 2018, <http://grss-mof.org/docs/2018-19-approved-budget-book/> last accessed on 22 November 2018; United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹⁸⁴ World Bank, "South Sudan Economic Update", July 2018.

¹⁸⁵ See for example: Radio Tamazuj, "Wau government pays employees' July salaries", 3 December 2018

¹⁸⁶ Republic of South Sudan, Ministry of Finance and Planning, *FY: 2018/2019 Approved Budget*. The Security entry of the budget makes up 19.5 percent of the budget, but when the Police budget is added to that, it accounts for 22 percent of the budget. Other main sectors in the Budget are Accountability (35%); Public Administration (18.9%) and the Rule of Law (5.7%); Economic Functions (3.5%); and Infrastructure (3.4 %).

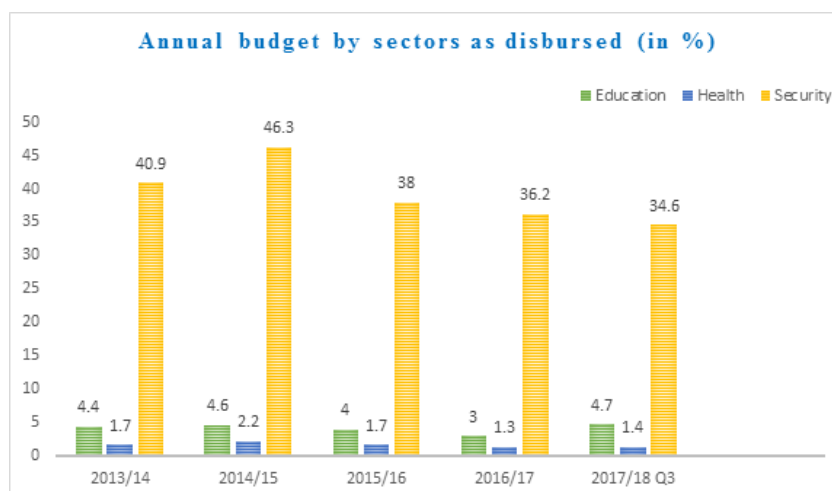


Figure 2: Annual budget by sector as disbursed

137. Extremely high levels of inflation continue to make food and basic commodities ever more expensive and unattainable for the average citizen. Inflation between July 2017 and July 2018 was estimated to be 123 percent.¹⁸⁷ In the two and a half years since the move from a fixed exchange rate arrangement to a managed float, in January 2016 and July 2018, the SSP has depreciated by 790 percent.¹⁸⁸

138. Despite the arrears owed to civil servants and inflation cutting into the ability of ordinary citizens to feed and support themselves, in July 2018, the Government reportedly gave 400 Members of Parliament USD \$40,000 each to allow them to purchase vehicles, amounting to a total expenditure of USD \$16 million.¹⁸⁹ This occurred just two weeks after MPs voted for the extension of the President's mandate until 2021.

139. A more detailed discussion of the relationship between the economy, the conflict and the human rights situation can be found in the thematic sections below.

B. Humanitarian Situation

140. While the signing of the new peace agreement may have brought hope to the South Sudanese, it has not brought immediate relief in terms of the dire humanitarian situation.

141. The Human Development Index (HDI), which measures three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living, ranked South Sudan at 187 out of 189 countries in 2017.¹⁹⁰ Between 2010 and 2017, South Sudan's HDI score decreased from 0.413 to 0.388.

1. Starvation and Food Insecurity

142. South Sudan continues to face extreme levels of food insecurity with almost 60 percent of its population severely food insecure. According to the Integrated Food Security Phase Classification (IPC) system, during the lean season of July and August 2018 it was estimated that 6.1 million people in South Sudan faced Crisis (Phase 3) or worse acute food insecurity including 47,000 people who were in Catastrophe/Famine (Phase 5) situations and 1.7 million people in Emergency (Phase 4) situations. While the situation was expected to improve somewhat during the post-harvest season between October and December, it was nonetheless predicted that 4.4 million people (43 percent of the population) would still face Crisis situations or worse, including 26,000 who would still be facing

¹⁸⁷ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹⁸⁸ World Bank, *South Sudan Economic Update*, July 2018.

¹⁸⁹ Eye Radio, "Citizens outraged as MPs get \$40,000 car loan", 27 July 2018; BBC, "South Sudan spends \$16m on cars for MPs", 26 July 2018.

¹⁹⁰ UNDP, *Human Development Indices and Indicators: 2018 Statistical Update: South Sudan*.

Catastrophe/Famine situations.¹⁹¹ Further, the situation is expected to relapse during the next lean season, between March and June 2019.¹⁹²

143. Although before the outbreak of the conflict in December 2013, there were already more than one and a half million people in South Sudan (17 percent of the population) categorized as being Phase 3 (Crisis) or above of the IPC system,¹⁹³ the conflict has severely exacerbated the food crisis. The most affected areas continue to correspond with the regions the most affected by the conflict. This is evidenced by the fact that the populations facing Catastrophe (Phase 5) levels between October and December 2018 included Leer and Mayendit Counties in Unity State and Greater Baggari, Wau County in Western Bahr el Ghazal, two of the areas which have faced the highest levels of insecurity in 2018, particularly during the planting and growing seasons.¹⁹⁴

144. Up to 95 percent of South Sudan's population depends on farming, fishing or herding to meet their food and income needs.¹⁹⁵ As a consequence, fighting and its resulting displacement during the planting and growing seasons have had a particularly catastrophic effect on food security in South Sudan. One witness told the Commission of an SPLA commander in Leer telling women sheltering in the Temporary Protection Area following the launch of the southern Unity offensive in April 2018: "nobody should cultivate this year".¹⁹⁶

145. Even where people are able to cultivate and harvest their crops, there has been a pervasive pattern of armed forces and armed groups attacking villages, looting people's crops and animals. One witness who was in Leer during the fighting in 2018 recalled: "After people had fled from the village, the soldiers collected food items and started loading them into their vehicles. Cows and goats were herded off on foot, while food items, grains, clothes and salt were loaded into vehicles."¹⁹⁷ The situation is exacerbated by the fact that soldiers are often not properly remunerated or able to support themselves, and are encouraged to loot as a means of sustaining themselves. A witness from Wadhalelo, Western Bahr el Ghazal recounted how SPLA soldiers who arrived in the village in June 2018 "were also using force to take peoples' food items. I heard that the soldiers had not received their food supplies from Wau, so they were collecting food from the civilians using force."¹⁹⁸

146. Civilians displaced by the fighting are separated from their farms and food supplies often find themselves in precarious situations of hiding in the bush eking out survival. One witness described hiding in the swamps in southern Unity: "We spent more than one month in the water with no food. We had to eat water lilies to survive. Many children were lost."¹⁹⁹ Another witness fleeing the fighting in the Wau Triangle described how they "remained hiding in the bush in Ngozili, but some of us occasionally sneaked back into Mboro and the surrounding area to gather leaves, cassava and other crops for food. [...] The soldiers had also stolen the water pumps that were used to pump water from the boreholes in the town, so it was no longer possible to pump drinking water."²⁰⁰

147. While people living in rural environments are seeing their planting and farming disrupted by the conflict, urban populations actually face higher levels of food insecurity, in part because of rampant inflation hampering families' already meagre purchasing power (see Economy section above (Section IV(A)(7))).²⁰¹ Similarly, even those who have sought refuge in the PoC sites which receive humanitarian assistance report that there is not always enough food. One woman who had recently been displaced from the fighting in Ngoko to a protection

¹⁹¹ Integrated Food Security Phase Classification, "The Republic of South Sudan, Key IPC findings: September 2018- March 2019".

¹⁹² Famine Early Warning System Network, "South Sudan Food Security Outlook, October 2018 to May 2019".

¹⁹³ Integrated Food Security Phase Classification, "Acute Food Insecurity Situation Overview: The Republic of South Sudan: 30 July 2013 to 20 September 2013", 29 July 2013.

¹⁹⁴ Integrated Food Security Phase Classification, "The Republic of South Sudan, Key IPC findings: September 2018- March 2019".

¹⁹⁵ FAO, "FAO in South Sudan: South Sudan at a Glance", <http://www.fao.org/south-sudan/fao-in-south-sudan/south-sudan-at-a-glance/en/> last accessed 23 November 2018.

¹⁹⁶ Witness 841, ERN 101623-101625, para. 8.

¹⁹⁷ Witness 831, ERN 101817-101827, para. 27.

¹⁹⁸ Witness 931, ERN 101799-101803, para. 8.

¹⁹⁹ Witness 793, ERN 101499-101205, para. 6.

²⁰⁰ Witness 914, ERN 101788-101793, para. 8.

²⁰¹ World Bank, "Impact of Conflict and Shocks on Poverty: South Sudan Poverty Assessment 2017", June 2018.

area in Wau told the Commission: “I have some family here in Wau and they help me and my grandchildren. [...] But there is no food here in this camp, nothing.”²⁰²

148. Food insecurity is rendered even more acute because of the logistical challenges faced by humanitarian organisations in delivering aid and the denial of access to humanitarian organisations trying to provide assistance (see next section).

149. Food insecurity has a particularly serious effect on South Sudan’s most vulnerable. Of the 6.1 million who were facing Crisis (Phase 3) or worse food insecurity between July and August 2018, an estimated 21 percent were children under the age of five, seven percent were elderly and seven percent were lactating mothers.²⁰³

150. Furthermore, food shortages have a particularly gendered effect. Many women have told the Commission of venturing back to villages after an attack or out of the PoC sites in search of food, water, and firewood and getting caught by soldiers and other armed men and raped or assaulted.²⁰⁴ While men also venture out in search of food, it is usually the women who go out as there is a general perception that men are more likely to get killed.

151. Food scarcity also affects the gender constructs in household and social relationships as women in households tend to prioritize feeding children and men over eating themselves thereby exacerbating their own malnutrition. One study found that women and girls were slightly more likely than men and boys to get less food as a coping mechanism.²⁰⁵ Women also report suffering from depression as a result of being unable to care for their children and assure their health. The stresses of food insecurity also fuel conflicts within the household, triggering domestic violence.²⁰⁶ Furthermore, food insecurity puts women at risk of turning to transactional sex in exchange for food or money,²⁰⁷ which has the additional effect of increasing their risk of being exposed to sexually transmitted diseases including HIV/Aids. Early marriage has likewise increased in South Sudan during the conflict, not only because families seek protection for girls, but also for economic reasons as girls’ families receive a bride price and go to live with the husband’s family.²⁰⁸

2. Denial of Humanitarian Access

152. Despite the obligation in the December 2017 CoHA requiring parties to facilitate unfettered access for humanitarian assistance and to guarantee the safety and security of all humanitarian personnel,²⁰⁹ and the reiteration of these commitments in the R-ARCSS,²¹⁰ in 2018, 760 humanitarian access incidents were reported to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA).²¹¹ In the Commission’s view, humanitarian aid has continued to be a political tool in South Sudan, used by all parties to the conflict. Strategies adopted by groups include the deliberate obstruction of humanitarian access to communities perceived to support the opposing party, the redirection of aid towards themselves or their own preferred communities, and denial of access to areas where hostilities are occurring to avoid having witnesses.²¹²

²⁰² Witness 876, ERN 101572-101576, para. 13.

²⁰³ Integrated Food Security Phase Classification, “The Republic of South Sudan, Key IPC findings: September 2018- March 2019”.

²⁰⁴ See e.g. Witness 276, ERN 100625-100636.

²⁰⁵ Plan International, “Adolescent Girls in Crisis: Voices from South Sudan”, 2018.

²⁰⁶ Catherine Huser, “Conflict and Gender Study – South Sudan: Addressing Root Causes Programme”, Agency for Co-Operation and Research in Development, January 2018; Search for Common Ground, “Nimule Conflict and Leadership Mapping Report, Together We Can: Supporting Local Peace Efforts in Nimule”, November 2016.

²⁰⁷ Global Women’s Institute of the George Washington University, “No Safe Place: A Lifetime of Violence for Conflict Affected Women and Girls in South Sudan, Main Results Report”, 2017.

²⁰⁸ Plan International, “Adolescent Girls in Crisis: Voices from South Sudan”, 2018.

²⁰⁹ Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access, 21 December 2017, Article 8.

²¹⁰ R-ARCSS, Article 2.1.2.

²¹¹ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (July 2018)*, 13 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (August 2018)*, 12 September 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (September 2018)*, 10 October 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (October 2018)*, 13 November 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (November 2018)*, 7 December 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (December 2018)*, 9 January 2019.

²¹² See e.g. Witness 597, ERN 101182-101186, para. 9.

153. These access constraints have come in the form of bureaucratic administrative impediments, operational interference in the implementation of humanitarian activities, restriction on movement of organizations, personnel and goods within and into the country, violence against humanitarian personnel, assets and facilities, and active hostilities impeding humanitarian operations.²¹³

154. Direct operational interference has been particularly notable in the Wau Triangle area, including Baggari, Bisselia, Bazia and Gedi where the SPLA turned back humanitarian convoys at checkpoints for more than two months between mid-June and late August 2018.²¹⁴ During this period, an estimated 28,000 people in the area in need of food, health, water, sanitation and hygiene, non-food items, education and protection assistance were left without support.²¹⁵ When the Commission raised the issue with the Acting Governor in Wau, he responded that the State Government had been asking humanitarians to go to the area but they had failed to do so. This was directly contradicted by humanitarians and UNMISS. He subsequently added that sometimes access is refused for the mission's own security.²¹⁶

155. Bureaucratic administrative impediments also include illegal taxation, cumbersome accreditation processes, and extortionate fees to physically access areas.²¹⁷ For example, state security forces' demands for fees and confiscation of cargo was reported to have interfered with humanitarian flights in Rubkona in September 2018,²¹⁸ while illegal checkpoints and illegal taxation have remained ongoing problems in Central Equatoria.²¹⁹

156. At least 115 humanitarian actors were detained in 2018.²²⁰ Two such incidents occurred in the months of March and April in Central Equatoria, both involving the SPLA-IO. In March, a humanitarian convoy of three vehicles was detained and seven aid workers held for almost three weeks.²²¹ In April, another convoy involving four NGOs and two UN Agencies was intercepted on the Yei-Tore road and 10 humanitarian aid workers detained for six days.²²² In both instances, the convoys had obtained clearances from both the SPLA and the SPLA-IO prior to travel, but were detained by the SPLA-IO and accused of spying for or collaborating with the Government.

157. Humanitarian aid delivery in South Sudan is already challenging even without these additional impediments. More than 70 per cent of roads are inaccessible during the rainy season, between July and December.²²³ The insecurity and access hurdles mean that the humanitarian community must rely on air and river transportation almost year-round, which can be up to eight times more expensive than road transportation.²²⁴

3. Displacement

158. As a result of the conflict, approximately a third of South Sudan's population of 12.3 million²²⁵ has been displaced with more than 2.2 million people having fled the country

²¹³ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018.

²¹⁴ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (July 2018)*, 13 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (August 2018)*, 12 September 2018.

²¹⁵ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018.

²¹⁶ Meeting with Wau State officials, Wau, 20 August 2018.

²¹⁷ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018.

²¹⁸ OCHA, *South Sudan: Humanitarian Access Snapshot (September 2018)*, 10 October 2018.

²¹⁹ OCHA, *South Sudan: Humanitarian Access Snapshot (September 2018)*, 10 October 2018.

²²⁰ OCHA, *South Sudan: Humanitarian Access Review (January – June 2018)*, 15 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (July 2018)*, 13 August 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (August 2018)*, 12 September 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (September 2018)*, 10 October 2018; *Humanitarian Access Snapshot (October 2018)*, 13 November 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (November 2018)*, 7 December 2018; OCHA, *South Sudan: Humanitarian Access Snapshot (December 2018)*, 9 January 2019.

²²¹ Confidential Document, ERN D113581-D113586.

²²² Confidential Document, ERN D113587-D113589.

²²³ OCHA South Sudan, *Humanitarian Needs Overview 2018*, p. 27.

²²⁴ OCHA South Sudan, *Humanitarian Needs Overview 2018*, p. 27.

²²⁵ Republic of South Sudan, National Bureau of Statistics, <http://www.ssnbss.org/>.

as refugees to neighbouring countries²²⁶ and 1.9 million people internally displaced.²²⁷ South Sudan is currently the world's third largest refugee crisis after the Syrian Arab Republic and Afghanistan, and is Africa's largest refugee crisis since the Rwandan genocide in 1994, almost 25 years ago.²²⁸

a) *Refugees*

159. More than 2.2 million South Sudanese are seeking refuge in neighbouring countries, with approximately a third in Uganda and a third in Sudan and the remainder in Ethiopia, Kenya, the Democratic Republic of the Congo and Central African Republic.²²⁹ Encouragingly, there has been a decrease in new arrivals in neighbouring countries in the second half of 2018,²³⁰ apparently corresponding with the decrease in hostilities following the signing of the Khartoum Declaration and the R-ARCSS. This has resulted in estimates for the end of 2018 being reduced from the initial estimate of 3.14 million refugees down to 2.64 million.²³¹

160. Although the decreasing numbers of new refugees is encouraging, it remains, and will continue to remain for some time, a crisis situation.²³² Refugees have cited the security situation, including fears of recruitment, hunger, and disease as the primary driving factors.²³³ Even as the security situation improves, there continues to be insecurity in some areas and the country continues to face serious food insecurity.

161. Displaced persons, particularly women and children, continue to be very vulnerable. Around 85 per cent of South Sudanese refugees in the region are women and children, with 63 percent of refugees under the age of 18.²³⁴ Almost 50,000 South Sudanese refugee children are unaccompanied or separated from their parents.²³⁵ Many of the children have been displaced multiple times, have been the victims and witnesses of horrific human rights violations, and have been separated from their families.

162. Even if the security situation eases and begins to allow people to return, many will find their homes destroyed by the fighting or taken over by other families since they left. The right to return will require systematic support will therefore need to continue for some time. In this regard, the Commission notes President Kiir's directive announced on 10 December 2018 at a meeting of the National Security Committee Council that those occupying the houses of displaced people should immediately vacate them to allow the rightful owners to return home.²³⁶ While the statement was made in relation to IDPs, the same principle will need to also be applied to returning refugees.

163. Furthermore, refugees will need to be included in reconciliation efforts and other transitional justice processes, as many of the ethnic and political tensions in South Sudan are

²²⁶ UNHCR, *Regional overview of the South Sudanese refugee population, 2018 South Sudan Regional RRP*, 31 October 2018. This number was revised downwards from almost 2.5 million as a result of a verification exercised in Uganda which decreased the numbers in Uganda from an estimated 1,073,125 at the end of August to 785,104 at the end of October 2018. See UNHCR, *Regional Update, South Sudan Situation 1-31 August 2018*; UNHCR, *Regional overview of the South Sudanese refugee population, 2018 South Sudan Regional RRP*, 31 October 2018; Republic of Uganda, Office of the Prime Minister, UNHCR, WFP, *Joint Press Release, OPM and UNHCR complete countrywide biometric refugee verification exercise*, October 2018.

²²⁷ OCHA, *Humanitarian Bulletin South Sudan*, 18 January 2018, p. 2.

²²⁸ UNHCR, *Global Trends: Forced Displacement in 2017*, 25 June 2018; UNHCR, *Aid appeals seek over US\$3 billion as South Sudan set to become Africa's largest refugee and humanitarian crisis*, 1 February 2018;

²²⁹ UNHCR, *Regional overview of the South Sudanese refugee population, 2018 South Sudan Regional RRP*, 30 November 2018. This number was revised downwards from almost 2.5 million as a result of a verification exercised in Uganda which decreased the numbers in Uganda from an estimated 1,073,125 at the end of August to 785,104 at the end of October 2018. See UNHCR, *Regional Update, South Sudan Situation 1-31 August 2018*; UNHCR, *Regional overview of the South Sudanese refugee population, 2018 South Sudan Regional RRP*, 31 October 2018; Republic of Uganda, Office of the Prime Minister, UNHCR, WFP, *Joint Press Release, OPM and UNHCR complete countrywide biometric refugee verification exercise*, October 2018.

²³⁰ UNHCR, *Regional overview of the South Sudanese refugee population, 2018 South Sudan Regional RRP*, 30 November 2018.

²³¹ UNHCR, *South Sudan Regional Refugee Response Plan, January 2019 - December 2020*.

²³² UNHCR, *South Sudan Regional Refugee Response Plan, January 2019 - December 2020*.

²³³ OCHA, *Humanitarian Bulletin South Sudan*, 18 January 2018.

²³⁴ UNHCR, *South Sudan Regional Refugee Response Plan, January - December 2018*, Revision July 2018.

²³⁵ UNHCR, *South Sudan Regional Refugee Response Plan, January 2019 - December 2020*.

²³⁶ Sudan Tribune, *South Sudan's Kiir directs to vacate newcomers from IDPs land*, 11 December 2018.

reflected in the refugee camps.²³⁷ For example, in 2017, there were 22 incidents of fighting between ethnic communities in Kiyandongo camp in Uganda, many of them triggered by events in South Sudan.²³⁸ While the situation reportedly improved in 2018,²³⁹ in June 2018 fighting broke out between Dinka and Nuer refugees in the Rhino camp settlement in Uganda during a World Cup football match which resulted in the killing of four people.²⁴⁰ The Commission was informed that there have been a number of such similar incidents both in Ugandan and Kenyan refugee camps.²⁴¹

b) Internally Displaced

164. In addition to refugees, there are more than 1.97 million people internally displaced as of October 2018.²⁴² Civilians displaced at the start of the conflict in December 2013, are now entering their sixth year of displacement. As of January 2019, UNMISS was sheltering 193,287 internally displaced in its PoC sites in Bentiu, Juba, Malakal, Bor and Wau, of which Bentiu is by far the largest.²⁴³

165. These PoC sites were established in an emergency context as temporary protection sites, but have become a longer-term arrangement due to the protracted conflict.²⁴⁴ The prolonged, crowded, confinement in PoC sites, coupled with the constrained humanitarian services amplify many of the stresses seen elsewhere in society including ethnic tensions and gender relations. When these tensions boil over, they in turn jeopardize the provision of humanitarian assistance in the camps. This was seen in June and July 2018 in the Bentiu and Malakal PoC sites.²⁴⁵ Disruptions by youth groups in Bentiu forced the closure of three health clinics for over three weeks and jeopardized the access to safe drinking water for an estimated 50,000 people. In Malakal, youth frustrated by the lack of employment opportunities threatened humanitarian workers, which resulted in the suspension of health assistance.²⁴⁶

166. The PoC camps are a microcosm of the tensions affecting the entire country. In mid-August 2018, for example, inter-communal fighting broke out between Nuer communities in PoC 3 in Juba. Although sparked by a minor incident of theft, the situation quickly escalated to clashes because of the pre-existing distrust between the Bul Nuer and other Nuer communities as a result of the Bul Nuer having supported the government troops in Unity State at various points in the conflict. The fighting resulted in one death and the injury of 179 people and the displacement of between 1,000 and 2,000 people from PoC 3 into the surrounding weapons-free zone surrounding the PoC site. Humanitarian assistance to the camp was severely restricted during this period resulting in complaints of lack of resources including food and water over the period. In late August, 3,500 Bul Nuer were relocated from PoC 3 to the Mangateen area.²⁴⁷

167. Life in PoC sites has a negative and gendered impact on IDPs given the limited freedom of movement and cramped living conditions with little privacy create living conditions that are conducive to depression, domestic violence, and crime. Men fear being killed or arrested if they venture outside and have few opportunities to engage in income generating activities. In part due to the fear of being killed if they go outside the camps, women have taken on the responsibility for leaving the camps to gather firewood in the

²³⁷ Two confidential meetings, Kiyandongo, Uganda, 17 December 2018; Confidential Meetings, Kampala, 18 and 19 December 2018.

²³⁸ Confidential Meeting, Kiyandongo, Uganda, 17 December 2018.

²³⁹ Confidential Meeting, Kiyandongo, Uganda, 17 December 2018.

²⁴⁰ Confidential Meeting, Kiyandongo, Uganda, 17 December 2018; Confidential Meeting, Kampala, 19 December 2018; Reuters, "Uganda police arrest 15 refugees after four killed in fight during World Cup game", 22 June 2018.

²⁴¹ Confidential Meeting, Kiyandongo, Uganda, 17 December 2018.

²⁴² OCHA, *South Sudan: Humanitarian Dashboard*, 31 October 2018.

²⁴³ UNMISS, *POC Update*, 12 January 2019.

²⁴⁴ The Global Women's Institute and International Rescue Committee, "No Safe Place: A Lifetime of Violence for Conflict-Affected Women and Girls in South Sudan", Washington DC: George Washington University and London, 2017.

²⁴⁵ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 17 September 2018.

²⁴⁶ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 17 September 2018.

²⁴⁷ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 17 September 2018; USAID, *South Sudan – Crisis Fact Sheet #11*, 7 September 2018; Commission Meeting with PoC Representatives, Juba, 22 August 2018.

course of which they become exposed to the risk being of raped.²⁴⁸ Although UNMISS has tried to schedule its patrols at the times when women collect firewood, the Commission continued to hear reports of women being raped when collecting firewood. Even within the PoC sites, women are at risk of being sexually assaulted. In September 2018, UNMISS reported that it had forwarded 16 cases of alleged sexual violence which occurred in the PoC sites in Juba, Malakal and Bentiu to the National Director of Public Prosecution.²⁴⁹ UNMISS has since provided logistical support to a mobile court in Malakal and Bentiu in October and December 2018 and January 2019 to try these case. The mobile court in Malakal tried five people charged with sexual violence crimes in the PoC sites and handed down convictions and sentences ranging from 18 months to 10 years. The two sessions of the mobile court in Bentiu resulted in six convictions for rape.²⁵⁰ The situation in the PoC sites is even more difficult for the most vulnerable such as elderly people, people with disabilities, children, and single mothers.

4. Health

a) Access to Health Care

168. South Sudan has some of the worst health indicators globally.²⁵¹ The population is highly susceptible to disease, particularly in light of the high levels of displacement, lack of sanitation, and conflict-related injuries. There is insufficient access to health care. Indeed, the lack of access to health care significantly contributes to morbidity as 70 percent of deaths in South Sudan are caused by curable diseases such as malaria, respiratory tract infections, and diarrhoea.²⁵²

169. Access to health care is limited with very unequal access across the country. According to the World Health Organization (WHO), 67 out of 80 counties have inadequate or no health care services at all due to dilapidated structures, destruction and closure of health facilities, and displacement of health care workers.²⁵³ At the end of 2017, it was estimated that 22 percent of South Sudan's health facilities (419 out of the 1,894) were non-functional in part due to the on-going conflict.²⁵⁴ Further, only 400 health care facilities were fully operational.²⁵⁵ Non-functioning health facilities were primarily located in Western Bahr el Ghazal, Unity, Upper Nile, and Jonglei States broadly correlating where there have been high levels of conflict.²⁵⁶

170. The large number of non-functional health care facilities, combined with there being few facilities to start with, means that a majority of the population does not live within easy access to health care. An estimated 71 percent of the population lives more than five kilometres away from the closest public health facility, which is approximately equivalent to one hour of travel from a health facility.²⁵⁷ Only three Counties (Kajo Keji, Yei and Torit) reached the target of 70 percent of the population living within five kilometres from a health facility set by the Ministry of Health to be achieved by 2015.²⁵⁸ With respect to secondary

²⁴⁸ Global Women's Institute, "No Safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", George Washington University, 2017.

²⁴⁹ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 17 September 2018; USAID, *South Sudan – Crisis Fact Sheet #11*, 7 September 2018; Commission Meeting with PoC Representatives, Juba, 22 August 2018.

²⁵⁰ For cases arising out of the PoCs, the UNMISS Rule of Law Advisory Section liaises with national authorities to have cases heard within the domestic justice system and provides logistical support to the national authorities for these cases. In so doing, it ensures due process and human rights are respected, including ensuring that no accused person is transferred to national authorities if charges are framed in such a way that the death penalty could be imposed, monitoring trials for fair trial rights, and inspecting prison conditions.

²⁵¹ WHO, *South Sudan Fact Sheet: Emergency Risk and Crisis Management*, March 2014.

²⁵² ICRC, *Facts and Figures: South Sudan, January – June 2018*.

²⁵³ WHO, *Country Cooperation Strategy at a Glance: South Sudan*, May 2017.

²⁵⁴ WHO, *South Sudan Humanitarian Response Plan January to December 2018*, December 2017.

²⁵⁵ OCHA, *2018 Humanitarian Needs Overview: South Sudan*, November 2017.

²⁵⁶ Health Cluster, *Health Cluster Bulletin #4*, 30 April 2018.

²⁵⁷ Peter M. Macharia, et. al., "Spatial accessibility to basic public health services in South Sudan", *Geospat Health*, 12(1): 510, May 2017.

²⁵⁸ Peter M. Macharia, et. al., "Spatial accessibility to basic public health services in South Sudan", *Geospat Health*, 12(1): 510, May 2017.

level of care, only 20 percent of people can reach a hospital within 24 hours.²⁵⁹ Even where health care is accessible, many rely on volunteer health care workers with limited training beyond treating basic illnesses.²⁶⁰

171. Despite the need for investment by the Government in health care, the 2018/2019 budget only allocated 2.2 percent of expenditures to health as compared to almost 20 percent on security spending (see Figure 1 above).²⁶¹ Approximately 80 percent of the health care in South Sudan is provided by NGOs.²⁶²

172. One of the factors behind the large number of non-functional health care facilities has been the high level of attacks on health care workers and facilities. In 2017, there were at least 37 events that affected health care, including 20 attacks on health workers and 11 on health facilities.²⁶³ Eleven health facilities were looted, two totally destroyed, and three damaged. With respect to attacks on health care workers, 12 were killed, six were kidnapped, 11 injured or assaulted, six arrested, and there were three instances of health workers being threatened or intimidated.²⁶⁴ Such attacks have continued in 2018. For example, on 23 July, a group of men broke into the Médecins sans frontières (MSF) office and compound in Maban, Upper Nile and looted the organization's and staff's property, burned down a tent full of equipment and destroyed most of the vehicles and communication devices.²⁶⁵ As a result, MSF temporarily suspended most of its services in Maban.

173. South Sudan is obliged under CEDAW to ensure access to health services for all women, including reproductive health.²⁶⁶ Women and girls continue to be affected disproportionately by the lack of access to health care. This is even more critical due to the high level of gender and sexual violence and the high mortality rate associated with pregnancy and birth in the country. Early marriage contributes to violations of the right of health as it puts girls at greater risk of death or ill-health as a result of early pregnancy and childbirth. Their children also face higher mortality rates. More generally, security and structural barriers impede women's access to maternal healthcare services. Some reasons are directly linked to the conflict, relating mainly to security concerns, but others are structural and relate to the availability, quality of care provided, and associated costs, especially in public health facilities. Traditional social norms also contribute to some women being hesitant to seek pregnancy related health care.²⁶⁷

b) *Mental Health*

174. The conflict has also taken a serious toll on mental health in South Sudan. A study on the mental health situation in South Sudan after the first year of the conflict found that almost 41 percent of people surveyed exhibited symptoms of probable post-traumatic stress disorder (PTSD).²⁶⁸ This number can be expected to have increased over the following years of the conflict as more people have witnessed and experienced traumatic incidents. Indeed, MSF documented more than 51,500 people seeking psychosocial support in 2017, a 35 percent increase from 2016.²⁶⁹ Examples of traumatic incidents included having a child abducted, a

²⁵⁹ ICRC, "Facts and Figures: South Sudan, January – June 2018".

²⁶⁰ Watchlist on Children and Armed Conflict, "Everyone and Everything Is a Target", 2018.

²⁶¹ Republic of South Sudan, Ministry of Finance and Planning, *FY: 2018/2019 Approved Budget*. The Security entry of the budget makes up 19.5 percent of the budget, but when the Police budget is added to that, it accounts for 22 percent of the budget.

²⁶² OCHA, *2018 Humanitarian Needs Overview: South Sudan*, November 2017.

²⁶³ Safeguarding Health in Conflict, "Violence on the Frontline, Attacks on Health Care in 2017", May 2018.

²⁶⁴ Safeguarding Health in Conflict, "Violence on the Frontline, Attacks on Health Care in 2017", May 2018.

²⁶⁵ MSF, "South Sudan: MSF suspends most medical activities in Maban after attack", 24 July 2018.

²⁶⁶ Convention on the Elimination of All Forms of Discrimination against Women, Article 12.

²⁶⁷ Human Rights Watch, "This old Man Can Feed Us, You will Marry Him", *Child and Forced Marriage in South Sudan*, 2013; Mugo et al., "The system here isn't on patient's side" – perspectives of women and men on the barriers to accessing and utilizing maternal healthcare services on South Sudan", *BMC Health Services Research*, 2018, 18:10; Gee et al., "We need good nutrition but we do not have money to buy food": sociocultural context, care experiences, and newborn health in two UNHCR-supported camps in South Sudan", *BMC International Health and Human Rights*, 2018, 18:40; Kane et al., "Too afraid to go: fears of dignity violations as reasons for non-use of maternal health services in South Sudan, *Reproductive Health*", 2018, 15:51; G. Vincent and F. M. Alemu, "Factors contributing to, and effects of, teenage pregnancy in Juba", *South Sudan Medical Journal*, Vol. 9, No. 2. May 2016, pp. 28-31.

²⁶⁸ Lauren C Ng, Belkys López, Matthew F. Pritchard, David Deng, "Posttraumatic stress disorder, trauma, and reconciliation in South Sudan", *Social Psychiatry and Psychiatric Epidemiology*, 2017.

²⁶⁹ Mednick, S., "South Sudan: 'The whole country is traumatised'", IRIN, 21 January 2019.

family member disappear, being imprisoned, witnessing war-related fighting, witnessing a friend or family member killed, having a close family member killed, threatened with death, being seriously injured, raped, having a family member raped, witnessing a rape, being tortured, having their house or property destroyed and getting ill with no access to medicine.

175. A number of witnesses, particularly women, told the Commission of their emotional distress, including experiencing suicidal thoughts. One woman told the Commission of her psychological distress after her brothers were killed and she was gang raped:

I am not sleeping more than two hours a night. I am thinking a lot about what happened. It is affecting my ability to work, like selling tea because I cannot concentrate. I would like to leave South Sudan but I cannot because I don't have any way to leave. My husband and my brothers have died. I am a dead body but I am talking. [...] I would like to see a doctor, I would like to kill myself. I would like some help with my children, I cannot cope with them. If you could find someone to look after my children, to take them away it would be better.²⁷⁰

176. Despite the significant need for mental health and psychosocial support, South Sudan has a critical shortage of mental health workers and facilities. As of 2016, less than one percent of people with common and severe mental disorders were receiving the services they need.²⁷¹ There are reportedly only three practicing psychiatrists, 20 community workers, one psychiatric nurse, 29 psychologists and one hospital ward with eight beds catering to mental health. This means that there is only one mental health professional for every 220,000 people.²⁷²

c) *Disability*

177. The conflict has created more hurdles for people with disabilities to receive adequate care. It is estimated that people with disabilities in South Sudan range from 10 to 15 percent of the population.²⁷³ Disabled persons are often marginalized and are also prone to becoming victims of violence and abuse.²⁷⁴ Men disabled by illness or injury may become unable to care economically for their family, leading, in some cases, to their wife obtaining a divorce. Girls and women with disabilities have even fewer opportunities to access education or vocational training or another activity allowing them to provide for themselves.²⁷⁵

178. To date, South Sudan has not become a party to the Convention on the Rights of Persons with Disabilities. However, the Transitional Constitution (2011) and other national laws include a number of provisions relating to the rights of people with disabilities.²⁷⁶ The Government has put in place a National Disability and Inclusion Policy, but a lack of funding and enforcement of legal provisions promoting and protecting the rights of people with disabilities are obstacles to the realisation of the objectives of this policy.²⁷⁷

179. Women with disabilities are especially vulnerable and face obstacles in accessing education and health services, in participating in the community and providing for their

²⁷⁰ Witness 142, ERN 100025-100030.

²⁷¹ WHO, "WHO scales up mental health and psychosocial support in South Sudan", November 2016.

²⁷² WHO, "WHO scales up mental health and psychosocial support in South Sudan", November 2016; Al Jazeera, "In South Sudan, stigma and underfunding plague mental health care", 18 January 2019; Mednick, S., "South Sudan: 'The whole country is traumatised'", IRIN, 21 January 2019.

²⁷³ Forcier & Handicap International, "Situation Analysis of Mine/ERW survivors and other people with disabilities. Juba, Central Equatoria, South Sudan", September 2016; B. Rohwerder, "Disability in South Sudan", K4D, 16 March 2018. The estimate of 5.1 percent in the 2008 census is considered to be an underestimate.

²⁷⁴ Forcier & Handicap International, "Situation Analysis of Mine/ERW survivors and other people with disabilities", Juba, September 2016; B. Rohwerder, "Disability in South Sudan", K4D, 16 March 2018.

²⁷⁵ Forcier & Handicap International, "Situation Analysis of Mine/ERW survivors and other people with disabilities", Juba, September 2016; B. Rohwerder, "Disability in South Sudan", K4D, 16 March 2018.

²⁷⁶ See Transitional Constitution (2011), Article 29; Child Act (2008), sections 26(2) and 27.

²⁷⁷ Government of South Sudan, *South Sudan National Disability and Inclusion Policy*, 2013; Ministry of Gender, Child and Social Welfare, *Strategic Plan 2013-2018*, June 2013.

families.²⁷⁸ As one disabled woman noted, when men attack and rape women who have gone into the bush to collect firewood, she is even more at risk as she cannot run.²⁷⁹

180. During attacks, fleeing for safety is more hazardous for people with physical disabilities and for others carrying or guiding them.²⁸⁰ One disabled man told the Commission that when his village was attacked in October 2015, his prosthetic leg was destroyed when the soldiers burned his *tukul* with his prosthetic leg inside. Since then he has not been able to secure a replacement prosthesis.²⁸¹

181. Witnesses have recounted that elderly people, who have less mobility than the general population, often do not flee with the rest of the population to seek shelter in the bush, either as they are physically unable to flee or because they do not wish to delay or slow down younger people, and hope that due to their status in the community they would be spared by the attackers.²⁸² Unfortunately, this hope has proven misplaced in many instances, and elderly people have been killed, often burned in their houses. The same has happened to others, including physically or mentally disabled persons, who could not escape. The Commission heard about a 17-year-old boy who was shot by soldiers as he fled when his house came under attack. He was badly injured, but because he was mute, although his family was searching and calling for him, he was unable to call out for help. It took two days to find him, delaying his access to medical care.²⁸³

182. People with disabilities who manage to flee, face accessibility problems that other displaced persons do not. In the PoC sites, people with disabilities and physical challenges have concerns regarding their safety as they constitute easier targets for criminals. Despite improvements, very often, PoC sites lack easy access for disabled persons such as health and rehabilitation services, accessible latrines, aid distribution, lockable and safe shelters. Training for the relevant actors would enhance the ability of persons with disabilities to participate in community life and be less stigmatized.²⁸⁴ The situation is even more difficult when they have sought refuge outside PoC sites in remote locations which require long walks to access assistance.

V. Applicable Law and Legal Developments

183. The Commission has conducted its work within the framework of international human rights law, international humanitarian law, international criminal law and the domestic law of South Sudan. The Commission's Report of 2018 set out in detail the law applicable in South Sudan²⁸⁵ and accordingly the detail is not repeated here.

A. International Human Rights Law

184. Under international human rights law, South Sudan is obliged to respect, protect, promote, and fulfil the human rights of all persons within its territory or under its control,²⁸⁶

²⁷⁸ Humanity & Inclusion and IOM, "Access to Humanitarian Services for People with Disabilities. Situational Analysis in Bentiu Protection of Civilians Site", South Sudan, 2018; T. Ayazi et al., "Disability associated with exposure to traumatic events: results from a cross-sectional community survey in South Sudan", *BMC Public Health*, 2013, 13:469.

²⁷⁹ Focus Group Discussion with women in Bentiu, 4 October 2018.

²⁸⁰ Human Rights Watch, "South Sudan: People with disabilities, older people face danger. UN, aid agencies should improve response to these groups", 31 May 2017.

²⁸¹ Witness 827, ERN 101811-101816, paras. 5, 7.

²⁸² See e.g. Witness 876, ERN 101573-101576, para. 12.

²⁸³ Witness 843, ERN 101512-101520.

²⁸⁴ Humanity & Inclusion and IOM, "Access to Humanitarian Services for People with Disabilities. Situational Analysis in Bentiu Protection of Civilians Site", South Sudan, 2018; Landmine & Cluster munition Monitor, "South Sudan Casualties and Victim Assistance", 9 October 2017.

²⁸⁵ Report of the Commission on Human Rights in South Sudan, 23 February 2018, A/HRC/37/CRP.2, paras. 98-163.

²⁸⁶ In a complaint brought by Democratic Republic of Congo against Burundi, Rwanda and Uganda before the African Commission, the Commission considered the control exercised by the Respondent States and "Recommend[ed] that adequate reparations be paid, according to the appropriate ways to the Complainant State for and on behalf of the victims of the human rights by the armed forces of the Respondent States while the armed forces of the Respondent States were in effective control of the provinces of the Complainant State, which suffered these violations." 227/99 *Democratic Republic of Congo / Burundi, Rwanda, Uganda*,

without discrimination. This includes the obligation to ensure a prompt, adequate, and effective remedy to those whose rights have been violated, including the provision of reparations and to investigate and bring to justice perpetrators of human rights violations.

185. In addition to responsibility for acts by State actors, a state may be held generally responsible for the wrongful conduct of non-State individuals or groups when the latter are acting in “complete dependence” on the State.²⁸⁷ A State may also be held responsible in cases in which non-State individuals or groups act on its instructions or under its direction or its “effective control”,²⁸⁸ and also when its own agents acknowledge and adopt the conduct of non-State groups.²⁸⁹

186. International human rights law applies both in times of peace and armed conflict.²⁹⁰

187. South Sudan is a party to seven United Nations human rights treaties: the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) and its Optional Protocol; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol; the Convention on the Rights of the Child (CRC) and two of its Optional Protocols. South Sudan is also the Convention Relating to the Status of Refugees and its Protocol.²⁹¹ It acceded to number of treaties in 2018 which are discussed in detail below.

188. South Sudan has also ratified the African Charter on Human and Peoples’ Rights (the African Charter),²⁹² the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), with reservations,²⁹³ and the African Union Convention Governing Specific Aspects of Refugee Problems in Africa.²⁹⁴ The Government has signed but not ratified the African Charter on the Rights and Welfare of the Child (ACRWC), and the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).²⁹⁵

33rd Ordinary Session of the African Commission on Human and Peoples’ Rights, 29 May 2003, Meeting in Niger, Holding, p. 14. See also paras. 7, 72, 88, 90.

²⁸⁷ International Court of Justice (ICJ), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 paras. 392, 399.

²⁸⁸ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 8, See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 paras. 109-110; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 paras. 400, 401.

²⁸⁹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 11. In its General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), the African Commission on Human and Peoples’ Rights expressed the view that a State could be held responsible for killings by non-State actors if it approved, supported or acquiesced in those acts. See also para. 9 of the General Comment General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia. See also the Report on the Commission of Inquiry on Burundi, September 2017 (A/HRC/36/54), paras. 23-27.

²⁹⁰ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C.J. Reports 1996, p. 226, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 106; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para. 216.

²⁹¹ South Sudan became a party to the CRC on 23 January 2015 and its Optional Protocols on 27 September 2018, to CAT and its Optional Protocol and to CEDAW and its Optional Protocol on 30 April 2015. They each came into force 30 days after ratification. South Sudan did not enter any limitations to, derogations from and reservations to the rights contained therein. The CAT Optional Protocol establishes an international inspection system for places of detention. The CEDAW Optional Protocol establishes complaint and inquiry mechanisms which allows the Committee on the Elimination of Discrimination against Women to hear complaints from individuals or inquire into “grave or systematic violations” of the Convention. CEDAW is complemented by United Nations Security Council Resolution (UNSCR) 1325 (2000), UNSCR 1820 (2008); UNSCR 1888 (2009), UNSCR 1960 (2010) UNSCR 2106 (2013), UNSCR 2122 (2013) and UNSCR 2242 (2015).

²⁹² Also known as the Banjul Charter. South Sudan ratified the African Charter on 19 May 2016 and it came into effect for South Sudan on 19 August 2016.

²⁹³ South Sudan ratified the Maputo Protocol, with reservations, on 16 October 2017. It came into effect on the same day. Reservations relate to Article 6(c) which encourages monogamy over polygamy, and Article 14(1)(a) and (b) and 14(2)(c) regarding women’s reproductive rights.

²⁹⁴ South Sudan ratified the African Union Convention Governing Specific Aspects of Refugee Problems in Africa on 4 December 2013 and the instruments of accession were deposited at the African Union in Addis Ababa on 19 May 2016 and the Convention entered into force in South Sudan.

²⁹⁵ South Sudan signed the ACRWC and the Kampala Convention on 24 January 2013.

189. At the time of writing, South Sudan is not a party to the following treaties: the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols; the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol; the International Convention on the Elimination of all Forms of Racial Discrimination (CERD); the International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW); the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), and the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol.

190. The Commission notes South Sudan's 2013 letter deposited with the General Assembly in which it stated that the Council of Ministers had acceded to a package of treaties and submitted them to the Legislative Assembly for adoption. These included among others the ICCPR, ICESCR, and CERD. At the time, it indicated the fact that it had not yet acceded to them was "not a lack of will to adhere to international standards".²⁹⁶ The Commission encourages to South Sudan to become a party to these conventions.

191. South Sudan is bound by rules of international human rights law that have attained the status of customary law,²⁹⁷ which includes the principles in the Convention on the Prevention and Punishment of the Crime of Genocide.²⁹⁸

192. While armed opposition groups cannot become parties to international human rights treaties, such non-state actors are increasingly deemed to be bound by certain international human rights obligations, particularly those actors exercising de facto control.²⁹⁹

1. Treaties to which South Sudan Became a Party in 2018

193. The Commission welcomes South Sudan's progressive accession to a number of international legal instruments.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

194. South Sudan acceded to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on 27 September 2018 which came into effect on 27 October 2018. The Protocol includes a commitment by Signatory State parties not to recruit or conscript children under the age of 18 into their armed forces; to take all possible measures to prevent such recruitment, including legislation to prohibit and criminalize the recruitment of children under 18 and involve them in hostilities; to demobilize anyone under 18 conscripted or used in hostilities and to provide physical, psychological recovery services and to help their social reintegration; and the Protocol states that armed groups distinct from the armed forces of a country should not, under any circumstances, recruit or use in hostilities anyone under 18.

²⁹⁶ Letter dated 31 October 2013 from the Permanent Representative of South Sudan to the United Nations addressed to the President of the General Assembly, A/68/565, 31 October 2013.

²⁹⁷ The Universal Declaration of Human Rights is the foundation of international human rights law. Many, if not all of the rights set out therein have attained the status of customary international law. See further H. Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", vol. 25 *Georgia Journal of International and Comparative Law* (1995/6) 287-397.

²⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 110-111, para. 161.

²⁹⁹ See United Nations International Commission of Inquiry on the Central African Republic (S/2014/928), 22 December 2014, paras. 41 and 107; Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 188. See also Report of the International Commission of Inquiry to investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, 2 March 2012, para. 18. The United Nations Committee on the Elimination of Discrimination Against Women has recently confirmed that: "both international humanitarian law and human rights law have recognised the direct obligations of non-State actors, including as parties to an armed conflict, in specific circumstances. These include the prohibition of torture, which is part of customary international law and has become a peremptory norm." CEDAW/C/GC/35, 14 July 2017, para. 25.

Optional Protocol to the Convention on the Rights of the Child on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

195. On the same day, South Sudan also acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which likewise came into force on 27 October 2018. Among the provisions of the Optional Protocol, Article 3 requires each State party to ensure that the following acts are criminalized in domestic law, whether they are committed domestically or transnationally or on an individual or organized basis: (a) in the context of sale of children, offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child; transfer of organs of the child for profit; or engagement of the child in forced labour; or improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; (b) offering, obtaining, procuring or providing a child for child prostitution; (c) producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography.

Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol

196. On 28 September 2018, South Sudan acceded to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol after it was ratified by the Transitional National Legislative Assembly. The Convention provides certain rights to refugees including the right not to be expelled, except under certain, strictly defined conditions; the right not to be punished for illegal entry into the territory of a contracting State; the right to work; the right to housing; the right to education; the right to public relief and assistance; the right to freedom of religion; the right to access the courts; the right to freedom of movement within the territory; and the right to be issued identity and travel documents. The 1967 Protocol removes the geographical and time limits that were part of the 1951 Convention.

197. This accession is important as South Sudan was hosting 291,824 refugees as of the end of December 2018.³⁰⁰ However, in any event, South Sudan has already been party since 2016 to the 1969 Organisation of African Union Convention on Refugees, a regional instrument governing the specific aspects of refugee issues in the African continent, and is a member State of the Pact on Security, Stability and Development in the Great Lakes Region which includes the Protocol on Protection and Assistance to Internally Displaced Persons.

B. International Humanitarian Law

198. International humanitarian law regulates the conduct of parties to an armed conflict. It comprises the principles and rules that seek to mitigate the effects of war by limiting the means and methods of conducting military operations and by obliging parties to spare those not participating in hostilities. Under the laws of war, not all deliberate killings are prohibited; however, the deliberate killing of civilians not directly participating in hostilities is expressly prohibited. Other fundamental principles are those of distinction, proportionality and precaution in attack.³⁰¹

199. In the Commission's view, international humanitarian law applied to the non-international armed conflict in South Sudan when clashes broke out between the SPLA and the SPLA-IO on 15 December 2013. Such a conclusion is also evidenced in statements issued by the International Committee of the Red Cross (ICRC) since January 2014.³⁰² Once the threshold for the application of Common Article 3 to the 1949 Geneva Conventions has been reached, the provisions which operate to protect the victims of war continue to apply even

³⁰⁰ UNHCR, *South Sudan - Refugees Statistics as of 31 December 2018*.

³⁰¹ Additional Protocol II to the Geneva Conventions of 12 August 1949 (Additional Protocol II), Article 13(2), ICRC, *Study on Customary International Humanitarian Law*, Rule 1; *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, ICTY Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paras. 109-119.

³⁰² See in particular the ICRC Annual Report 2013, p. 200, the press release 6 January 2014, <https://www.icrc.org/eng/resources/documents/news-release/2014/01-06-south-sudan-juba-peter-maurer-president-visit.htm>; ICRC Annual Report 2014, p. 204; the Intercross blog interview with the ICRC of 12 June 2015, <http://intercrossblog.icrc.org/blog/interview-with-head-of-delegation-in-south-sudan>; ICRC Annual Report 2015, p. 208; ICRC Annual Report 2016, p. 195; ICRC Annual Report 2017, p. 196; ICRC, *Press Release: South Sudan: Relief operations postponed after gunshots fired at ICRC compound*, 23 April 2018.

when there may appear to be periods of calm.³⁰³ The existence of an armed conflict is a question of fact based on legal criteria. The existence of an armed conflict such as the one in South Sudan does not depend on the appreciation of the situation by the government or any non-state actors or organisations. It is worth recalling here the considered words of the ICRC in their 2016 Commentary to the Geneva Conventions:

armed confrontations sometimes continue well beyond the conclusion or unilateral pronouncement of a formal act such as a ceasefire, armistice or peace agreement. Relying solely on the existence of such agreements to determine the end of a non-international armed conflict could therefore lead to a premature end of the applicability of humanitarian law in situations when in fact a conflict continues.³⁰⁴

200. Despite the signing of the permanent ceasefire and peace agreement, the Commission assesses that hostilities have persisted to a degree that international humanitarian law has continued to apply throughout 2018. In this regard, it notes the outbreaks of fighting that have continued to occur particularly in Western Bahr el Ghazal, Central Equatoria after the signing of the R-ARCSS.

201. South Sudan is a State Party to the four Geneva Conventions of 1949 and the three Additional Protocols of 1977 and 2005.³⁰⁵ Of particular relevance to the non-international armed conflict in South Sudan are Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions.

202. In addition, all parties to the conflict are bound by the relevant rules of customary international law applicable in a non-international armed conflict.³⁰⁶ These include requirements that parties to such conflicts must at all times abide by the principles of distinction, proportionality and precaution in attack.³⁰⁷

203. States are responsible for all violations of international humanitarian law committed by their armed forces or those acting under their direction or control.³⁰⁸ Under customary international law, the Government of South Sudan is obliged to investigate serious violations of international human rights and international humanitarian law and to ensure full reparation for loss or injury caused by the State.³⁰⁹

204. Certain violations of international humanitarian law can constitute war crimes and engage individual criminal responsibility on the part of their perpetrators.³¹⁰ Under customary international law, individuals may be criminally responsible for committing, attempting, assisting, facilitating, aiding or otherwise abetting the commission of a war crime, and may be criminally responsible under command responsibility.³¹¹

205. South Sudan is obliged to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, in particular those that amount to crimes under international law, and to punish individual perpetrators.³¹²

³⁰³ The ICRC 2016 *Commentary on the First Geneva Convention* (Cambridge, Cambridge University Press, 2016) on the criteria of intensity and organization required for Article 3 to be applicable, see p. 141, para. 387; pp. 174-175, paras. 414-444, 484. See also Gabriella Venturini, "The Temporal Scope of the Conventions", in A. Clapham, P. Gaeta, and M. Sassòli, (eds), *The 1949 Geneva Conventions: A Commentary*, (Oxford, Oxford University Press, 2015) 51-66, at 61.

³⁰⁴ ICRC 2016 Commentary, para. 490. See also Venturini (supra) "The 1995 *Tadić* Decision held that in the case of internal conflicts, IHL applies until a 'peaceful settlement is achieved'. In the *Haradinaj* Decision, the ICTY clarified that once the threshold of violence is met, a decrease in the intensity of fighting (or, one might add, degree of organization of an armed group involved) cannot end the applicability of IHL." *Ibid* at pp. 61-62.

³⁰⁵ South Sudan ratified the Four Geneva Conventions and their Additional Protocols on 25 January 2013; they entered into force for South Sudan on 25 July 2013.

³⁰⁶ ICRC, *Study on Customary International Humanitarian Law*, Rules 1-24.

³⁰⁷ *Ibid*.

³⁰⁸ Draft Articles on State Responsibility, Article 8; ICRC, *Study on Customary International Humanitarian Law*, Rule 149.

³⁰⁹ ICRC, *Study on Customary International Humanitarian Law*, Rules 144, 150, 157, 158. For examples of United Nations practice supporting the obligations of armed groups to make reparations see the ICRC, *Study*, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law - Volume I: Rules*, (Cambridge: Cambridge University Press, 2005) at 550 where they also make the point that "in many countries victims can bring a civil suit for damages against the offenders".

³¹⁰ ICRC, *Study on Customary International Humanitarian Law*, Rule 156.

³¹¹ ICRC, *Study on Customary International Humanitarian Law*, Rules 151, 152, 153.

³¹² The duty to investigate human rights violations arises as a result of the duty of States to provide an effective remedy and provide effective protection of human rights, but is also made explicit in a number of human rights treaties: e.g. CAT, Article 12. The

C. International Criminal Law

206. International criminal law governs situations in which individuals can be held individually criminally responsible for violations of international human rights law and serious violations of international humanitarian law, which amount to crimes under international law. South Sudan has the primary obligation to ensure accountability for these crimes. To comply with this obligation, the State must ensure that its domestic legislation incorporates the necessary legal basis to enable domestic courts to duly exercise jurisdiction over such crimes, in accordance with applicable principles of customary and treaty law.³¹³

1. Incorporation of International Crimes into Domestic Law

207. South Sudan's Geneva Convention Act (2012), which incorporated the provisions of the Four Geneva Conventions and its Additional Protocols into domestic law, provides for prosecutions before the South Sudanese courts for grave breaches of the Geneva Conventions, including grave breaches of Common Article 3 which applies to the non-international armed conflict in South Sudan, as well as for "other breaches" of the Geneva Conventions and its Additional Protocols, which could include breaches of Additional Protocol II. The Act provides jurisdiction over those who aid, abet or procure any other person to commit any grave breach of the Geneva Conventions or their Protocols in the territory of South Sudan.³¹⁴ Jurisdiction also extends to South Sudanese nationals who aid, abet or procure any other person to commit for breaches outside the country.³¹⁵

208. The Commission welcomes reports that work is in progress to incorporate the international crimes of genocide, crimes against humanity, and war crimes into domestic law which could be prosecuted and punished at the national level. The Commission encourages the Government, when incorporating international crimes into domestic law, to adopt definitions of the crimes in conformity with international definitions of these crimes found in the Geneva Conventions, the Genocide Convention, the Draft Statute of the Hybrid Court, the Statute of the International Criminal Court, and the International Law Commission's Draft Articles on Crimes Against Humanity.

209. It also encourages the Government to make relevant amendments to national law, including the Penal Code and the Code of Criminal Procedure, in order to ensure that national law can be used to investigate and prosecute these crimes effectively in line with developments in international criminal law. In particular, as international crimes are already criminalized under customary international law, the legislation may incorporate them into domestic law with retroactive effect. In this regard, the Universal Declaration of Human Rights foresees that: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national *or international law*, at the time when it was committed."³¹⁶ Such amendments would not violate the Transitional

duty to prosecute attaches to human rights violations amounting to crimes under either national or international criminal law and is explicitly referred to in a variety of treaties, including CAT, Articles 4 and 7, to which South Sudan is a party. The duty to investigate and prosecute serious violations of international humanitarian law is recognised in customary international law: see *ICRC Study on Customary International Humanitarian Law*, Rule 158; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and the United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

³¹³ United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principles 20, 21.

³¹⁴ South Sudan Geneva Convention Act (2012), section 6(1).

³¹⁵ South Sudan Geneva Convention Act (2012), section 7(1).

³¹⁶ Universal Declaration of Human Rights, Article 11(2) (emphasis added). In this regard, the Commission notes that the International Covenant on Civil and Political Rights, though not binding in South Sudan, confirms the position. Article 15 of the ICCPR states the following: (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or *international law*, at the time when it was committed; (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the *general principles of law recognized by the community of nations*.

Constitution's prohibition on non-retroactivity which states that "No person shall be charged with any act or omission which did not constitute an offence at the time of its commission".³¹⁷

210. In the same vein, the Commission encourages the Government to make the statute of limitations set out in Code of Criminal Procedure Act (2008) inapplicable to international crimes.³¹⁸ The Commission recalls the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) under which States parties agree not to apply statutory limitations to such crimes irrespective of their date of commission.

211. The Commission further notes that there is currently no provision in South Sudanese domestic criminal law for holding commanders responsible for failing to prevent or punish crimes committed by subordinates under their effective control. The new legislation regarding international crimes should incorporate such provisions on command and superior responsibility. Similarly, while the Penal Code (2008) already contains most of the other modes of liability set out in the Statute for the Hybrid Court³¹⁹ and the R-ARCSS,³²⁰ it does not include the equivalent modes of planning and ordering. The adoption of these modes of liability, as well as those of command and superior responsibility, will be of particular relevance if South Sudan is to be able to exercise concurrent jurisdiction to the Hybrid Court and to receive referrals from the Hybrid Court as foreseen in its Statute.³²¹ Failure to incorporate these modes of liability could result in the Hybrid Court being unwilling to refer a case to the national jurisdiction.

212. The domestic legislation should also ensure that responsibility may accrue regardless of a person's official position as foreseen in the R-ARCSS in relation to the Hybrid Court which states: 'No one shall be exempted from criminal responsibility on account of their official capacity as a governmental official, an elected official or claiming the defence of superior orders'.³²²

2. Statute of the Hybrid Court of South Sudan

213. In 2015, the African Union's Peace and Security Council agreed to: "the establishment by the AU Commission of an independent hybrid judicial court, the Hybrid Court of South Sudan (HCSS), in accordance with Chapter V(3) of the Agreement reached by the South Sudanese parties, as an African-led and Africa-owned legal mechanism."³²³ South Sudan and the African Union thereafter negotiated a Memorandum of Understanding on the establishment of the Hybrid Court and a Statute for the court. However, the Memorandum of Understanding still awaits South Sudan's signature.

214. In the R-ARCSS, South Sudan recommitted itself to fully cooperating with the African Union to establish a Hybrid Court for South Sudan to prosecute international crimes.³²⁴ The members of the UN Security Council most recently in December 2018 called on South Sudan's leaders "to take all necessary steps for the establishment of the Hybrid Court for South Sudan and the Commission for Truth Reconciliation and Healing."³²⁵

³¹⁷ Transitional Constitution (2011), Article 19(5). Similarly, the Code of Criminal Procedure (2008), section 6(d) states that "no punishment shall be inflicted upon any person exceeding that prescribed by the law in force at the time such an offence was committed."

³¹⁸ Section 47(2)(a) of the Code of Criminal Procedure Act (2008) sets a statute of limitations of 10 years for crimes punishable with death of over 10 years. The inapplicability of statutes of limitations to international crimes would be consistent with customary international law, as defined by the ICRC. See ICRC Customary International Humanitarian Law Database, Rule 160, "Statutes of Limitation", https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160.

³¹⁹ Draft Statute of the Hybrid Court for South Sudan, Article 8(1).

³²⁰ R-ARCSS, Article 5.3.5.

³²¹ Draft Statute of the Hybrid Court for South Sudan, Articles 10, 11.

³²² R-ARCSS, Article 5.3.5.5.

³²³ African Union Peace and Security Council communiqué dated 26 September 2015,

³²⁴ R-ARCSS, Articles 5.1.5, 5.3. The 2018 R-ARCSS replicates the 2015 ARCSS provisions on the establishment of the Hybrid Court with the exception of the addition of the words "where necessary" to the Hybrid Court's mandate "to investigate and *where necessary* prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period." See R-ARCSS, Article 5.3.1.1.

³²⁵ Security Council Press Statement on Sexual Violence in South Sudan, 7 December 2018. See also the African Union Peace and Security Council communiqué dated 26 September 2015, which, *inter alia*, reaffirmed the commitment of the African Union to

215. The R-ARCSS confers on the Hybrid Court primacy over the national judiciary, such that it will be empowered to assert jurisdiction over cases whether or not investigations and prosecutions are being conducted in the courts of South Sudan.³²⁶ The Hybrid Court will have jurisdiction over genocide, crimes against humanity, war crimes and other serious crimes under international law, and relevant laws of South Sudan including torture, gender-based crimes and sexual violence, crimes against children, and other serious crimes against persons or property.³²⁷ It will have jurisdiction over these crimes where they were committed in the territory of South Sudan between 15 December 2013 and the end of the Transition Period.³²⁸

216. Under the Draft Statute of the Hybrid Court, individuals, both civilian and military, regardless of rank and affiliation, may be held criminally responsible. Individual criminal responsibility under the Statute covers those who “planned, instigated, ordered, committed aided and abetted, conspired or participated in a joint criminal enterprise in the planning, preparation or execution of a crime” under the Statute.³²⁹ The official position of any accused person shall not relieve that person of criminal responsibility nor mitigate punishment, and no immunities shall bar the Court from exercising its jurisdiction.³³⁰

217. Under the Statute, a superior is criminally responsible:

if he or she knew or had reason to know that the subordinate was about to commit [acts referred to in the statute] or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.³³¹

3. Jurisdiction of the International Criminal Court

218. South Sudan is not a State Party to the Rome Statute of the International Criminal Court (ICC). Nonetheless, the ICC may still exercise jurisdiction in respect of crimes relating to a non-state party in certain circumstances. It may do so through a referral of the situation by the United Nations Security Council.³³² In addition, if South Sudan were to accept jurisdiction of the Court;³³³ the alleged perpetrator is a national of a State Party or a State accepting jurisdiction of the ICC; or the crime was committed in the territory of a State Party or a State accepting jurisdiction of the ICC,³³⁴ then the preconditions for the exercise of the ICC’s jurisdiction would be met. Once these preconditions for jurisdiction are satisfied the Court may exercise its jurisdiction where a State Party refers the situation or the ICC Prosecutor initiates an investigation *proprio motu*.³³⁵

219. The Commission notes that many South Sudanese also hold dual nationality in State Parties to the Rome Statute and consequently the ICC may exercise jurisdiction over crimes committed by these individuals.

220. Similarly, in its recent decision on jurisdiction over the deportation of Rohingya people from Myanmar, which is not a State Party, to Bangladesh, which is, the ICC Pre-Trial Chamber took the position that it could exercise jurisdiction over the crime of deportation and possibly other crimes within the jurisdiction of the ICC if it is established that at least an element of the crime is committed in a territory of a State Party.³³⁶ As the Pre-Trial Chamber explained: “an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States. What is more, the drafters of the Statute did not limit the

combating impunity, reiterated condemnation of the violence and abuses committed by armed actors in South Sudan, and agreed to the establishment of an independent hybrid court pursuant to the 2015 Peace Agreement.

³²⁶ R-ARCSS, Article 5.3.2.2.

³²⁷ Draft Statute of the Hybrid Court for South Sudan, 10 August 2017, Articles 2, 3, 4, 5 and 6.

³²⁸ Draft Statute of the Hybrid Court for South Sudan, 10 August 2017, Article 1(1).

³²⁹ Draft Statute of the Hybrid Court for South Sudan, Article 8(1).

³³⁰ Draft Statute of the Hybrid Court for South Sudan, Article 8(2).

³³¹ Draft Statute of the Hybrid Court for South Sudan, Article 8(4).

³³² Rome Statute, Article 13(b).

³³³ Rome Statute, Article 12(2) and (3).

³³⁴ Rome Statute, Articles 12(2), 13(a) and (c), 14.

³³⁵ Rome Statute, Articles 12(2), 13(a) and (c), 14.

³³⁶ ICC, “Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’”, ICC-RoC46(3)-01/18-37, 6 September 2018, para. 72.

crime of deportation from one State Party to another State Party.”³³⁷ The Pre-Trial Chamber further explained that “various types of conduct may, if established to the relevant threshold, qualify as ‘expulsion or other coercive acts’ for the purposes of the crime against humanity of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”³³⁸

221. Where crimes committed in South Sudan include an element committed in the territory of a State Party, the pre-conditions for jurisdiction would be satisfied. Relevant neighbouring States Parties to the ICC in the South Sudanese context include Uganda, Kenya, the Central African Republic, and the Democratic Republic of Congo. Careful consideration could be given to crimes against humanity which start in South Sudan and finish in these States.

4. Prosecution Outside South Sudan for International Crimes Committed in South Sudan

222. In addition, those suspected of international crimes may be arrested and prosecuted in States that have jurisdiction over such crimes committed outside their territory. Several States have adopted legislation that would allow them to prosecute the international crimes listed in Articles 6, 7, 8 of the ICC Statute, and referenced in the Geneva Conventions and their Protocols. Moreover, the list of war crimes under customary international law that could be investigated and prosecuted by other States extends beyond those listed in the Rome Statute and is said to include: using prohibited weapons; launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss; injury or damage; making non-defended localities and demilitarised zones the object of attack; using human shields; slavery; collective punishment; using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.³³⁹ Of particular relevance here is the war crime of launching an indiscriminate attack resulting in death or injury to civilians.

223. The ICRC Rules on Customary International Humanitarian Law state in Rule 157 that: “States have the right to vest universal jurisdiction in their national courts over war crimes.” In many cases, the legislation will require that the individual is present in the territory of the prosecuting State, but the Geneva Conventions do not require any particular link between the accused and the prosecuting State.

224. States parties to the Convention Against Torture may also decide to prosecute those accused of torture who are found in their territory where they have created jurisdiction to try those found on their territory as foreseen in Article 7(1) of the Convention. In this regard, it is noteworthy that acts of gender-based violence including rape can be forms of torture and individuals may therefore be prosecuted for the crime of torture separately from torture as a war crime, or as a crime against humanity.³⁴⁰

225. States parties to the International Convention for the Protection of All Persons from Enforced Disappearance may prosecute the crime of ‘enforced disappearance’ when the alleged perpetrator is present in any territory under their jurisdiction.³⁴¹ The crime of enforced disappearance is defined in the Convention as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to

³³⁷ ICC, “Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’”, ICC-RoC46(3)-01/18-37, 6 September 2018, para. 71.

³³⁸ ICC, “Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’”, ICC-RoC46(3)-01/18-37, 6 September 2018, para. 61.

³³⁹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law - Volume 1: Rules*, ICRC Customary Study (Cambridge: Cambridge University Press, 2005), p. 599.

³⁴⁰ Convention Against Torture, Article 1; Committee Against Torture, General Comment No. 2, Implementation of Article 2 by State Parties, (CAT/C/GC/2), 24 January 2008; CEDAW Committee, General Recommendation No. 19. Rape and sexual violence have been recognized as forms of torture by several international human rights mechanisms including the international criminal tribunals, Committee Against Torture and by independent special rapporteurs. See for example: *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998; ICTY *Prosecutor v. Kunarac*, No. IT-96-23, Trial Judgement, 22 February 2001; Committee Against Torture, General Comment No. 2, Implementation of Article 2 by State Parties (CAT/C/GC/2), 24 January 2008.

³⁴¹ International Convention for the Protection of All Persons from Enforced Disappearance, Article 9.

acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”³⁴² The Convention provides individual criminal responsibility for anyone who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance as well as superior responsibility for the commission of the crime by subordinates.³⁴³

D. Domestic Law

1. Transitional Constitution (2011), Bill of Rights

226. The Bill of Rights contained in the Transitional Constitution of the Republic of South Sudan (2011) provides that all organs of the Government shall respect, uphold, and promote the rights of the people of South Sudan to life, dignity, integrity, liberty and security of persons, non-discrimination and equality before the law, the special rights of women and children, and freedom from arbitrary detention and torture or cruel, inhuman or degrading treatment or punishment.³⁴⁴ Fair trial rights are also protected in the Transitional Constitution (2011) including the rights to be presumed innocent until proven guilty; to be informed of the reasons for arrest and the charges laid; to a fair and public hearing; to be tried in his or her presence; to a defence in person or through a lawyer of choice.³⁴⁵

227. Article 5 of the Transitional Constitution, which sets out the sources of law does not expressly mention international law as one of the sources in South Sudan. Nonetheless, Article 5(e), which refers to “any other relevant source”, may be construed to include international law. The Transitional Constitution further provides that “All rights and freedoms enshrined in international human rights treaties covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill [of Rights].”³⁴⁶ However, it does not state whether ratified treaties can be directly applied by courts or whether they must be incorporated by domestic legislation.

228. The Constitution contains provisions on states of emergency, declaring that while part of the Bill of Rights may be suspended, the protections of the right to life, prohibition on torture, right of non-discrimination, the right to litigation, and right to a fair trial may not be limited.³⁴⁷ For other rights, derogations are permitted only if they are clearly proclaimed in accordance with the law, limited to what is strictly required by the situation, and not discriminatory.

2. Penal Code Act (2008)

229. The rights to life and physical integrity are also protected by South Sudan’s criminal law in several provisions of the Penal Code Act (2008) as amended by the Penal Code (Amendment) Bill, 2015. Ordinary criminal provisions prohibit murder, rape and other sexual offences such as unnatural offences, and gross indecency, kidnapping, abduction, assault, grievous hurt, violations of personal liberty, robbery and damage to or destruction of property, among others.³⁴⁸ A number of the definitions of crimes in the Penal Code should be reviewed and amended. For example, under section 247(3) explicitly provides that there can be no rape within marriage.³⁴⁹

3. Code of Criminal Procedure Act (2008)

230. Under the Code of Criminal Procedure Act (2008), every accused person is guaranteed a fair and speedy trial without delay, presumed innocent until proven guilty, protected from

³⁴² International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

³⁴³ International Convention for the Protection of All Persons from Enforced Disappearance, Article 6.

³⁴⁴ Transitional Constitution of the Republic of South Sudan (2011), Bill of Rights.

³⁴⁵ Transitional Constitution of the Republic of South Sudan (2011), Article 19.

³⁴⁶ Transitional Constitution of the Republic of South Sudan (2011), Article 9(3).

³⁴⁷ Transitional Constitution of the Republic of South Sudan (2011), Article 188(a). States of emergency are frequently declared, for example on 9 November 2017 in Gogrial, Tonj, Wau and Aweil East (Republican Order No. 28/2017); 11 December 2017 for a three month period in Lakes State (Republican Order No. 35/2017).

³⁴⁸ See, for example, Penal Code (2008), sections 191, 206, 223, 235, 247, 248, 249, 269, 270, 298, 305.

³⁴⁹ Section 247(3): “Sexual intercourse by a married couple is not rape, within the meaning of this section.”

cruel or inhuman treatment or punishment, arbitrary detention, arrest and from non-discrimination and compensated for criminal harm.³⁵⁰ As in many jurisdictions, the role of victims in criminal proceedings is foreseen to be primarily as witnesses or as recipients of compensation.³⁵¹ The Act is silent on the subject of representation of victims in criminal proceedings.

4. Child Act (2008)

231. In accordance with international standards, the Child Act (2008) defines children as individuals under the age of 18. The Act upholds the rights of children to non-discrimination, to life, survival and development, to education, well-being and health and to liberty and security of person.³⁵² The minimum age for conscription or voluntary recruitment into armed groups is 18 years, and it is prohibited to use children in military or paramilitary activities.³⁵³

5. Sudan People's Liberation Army (SPLA) Act (2009)

232. The SPLA Act (2009) provides for the establishment, governance, and discipline of the State's armed forces and establishes a system of military justice for both criminal and disciplinary offences. The proceedings of the court martial are governed by both the SPLA Rules of Procedure and the Code of Criminal Procedure Act (2008).³⁵⁴

233. SPLA courts martial have jurisdiction over both offences of a military nature (desertion, unauthorized absence, disobedience of lawful orders, disrespect to a superior commissioned officer and cowardice in action, for example), and also over ordinary crimes that are not of a military nature, such as murder, rape, assault and theft.³⁵⁵ By incorporating the Penal Code (2008) in full into the SPLA Act, section 83 permits any crime – whether of a military nature or not, i.e. an ordinary criminal offence – to be tried by court martial. However, when the victim of any crime is civilian, section 37(4) requires the civil criminal court to assume jurisdiction over the case. A soldier may therefore be tried for theft, rape, and murder in either a military court-martial or a civilian criminal court depending on the identity of the victim. In practice, however, the criminal cases perpetrated by soldiers involving civilian victims are also tried in courts martial such as the Terrain Hotel Trial discussed in greater detail below.³⁵⁶

6. Local Government Act (2009)

234. The Local Government Act (2009) governs the jurisdiction and operation of the customary courts. Customary law courts have competence to adjudicate customary disputes and to render judgements in accordance with traditions, norms and ethics of the communities.³⁵⁷ The different levels of law courts have competence of issues including cross-cultural civil suits, customary disputes, customary land disputes, minor public order, family, marriage, divorce, adultery, elopement, inheritance, child rights and care, and women's rights cases.³⁵⁸ Customary law court hear the majority of cases in South Sudan, with some estimates that they hear 90 percent of cases.³⁵⁹

235. Customary law courts do not have jurisdiction over criminal cases except where a case with a customary interface is referred by the competent statutory court to the customary court.³⁶⁰ In this regard, the Penal Code Act (2008) governs criminal law in South Sudan, but it nonetheless provides that in the application of the Penal Code, "Courts may consider the existing customary laws and practices prevailing in the specific areas."³⁶¹ For example, in relation to the crime of murder, the Penal Code provides that if the relatives of the victim opt

³⁵⁰ Code of Criminal Procedure Act (2008), including sections 6, 75, 83, 93.

³⁵¹ See e.g. Code of Criminal Procedure Act (2008), sections 7, 195.

³⁵² Child Act (2008), sections 9, 12, 14, 15, 19, 36.

³⁵³ Child Act (2008), section 31.

³⁵⁴ SPLA Act (2009), sections 34(4), 38(2).

³⁵⁵ SPLA Act (2009), section 83.

³⁵⁶ See below Section VIII(B)(6).

³⁵⁷ Local Government Act (2009), section 98(1).

³⁵⁸ Local Government Act (2009), sections 99(7), 100(4), 101(2), 102(3).

³⁵⁹ Gabriel Mading Apach and Garang Geng, "Update: An Overview of the Legal System of South Sudan", September 2018.

³⁶⁰ Local Government Act (2009), section 98(2).

³⁶¹ Penal Code Act (2008), section 6(2).

for it, the court may award customary blood compensation.³⁶² In practice, however, in light of the lack of access to statutory courts, customary law courts hear and decide a large number of criminal law cases. This is further discussed below.³⁶³

236. The Supreme Court retains final jurisdiction over customary law³⁶⁴ and the Transitional Constitution (2011) provides that customary law remains “subject to this Constitution and the law.”³⁶⁵

VI. Thematic Human Rights Issues

A. Securitization of the State: Arbitrary Detention, Forced Disappearance, Torture and Cruel, Inhuman or Degrading Treatment

237. A culture of fear surrounding the National Security Services and the SPLA Military Intelligence is prevalent in Juba and around South Sudan as a whole, particularly among journalists, human rights defenders, civil society activists, opposition members, and those at risk of being perceived as supporting opposition groups, such as young men from minority ethnic groups. The security services have a pervasive presence in many sectors of society and the NSS’s headquarters, the “Blue House” was notorious long before its inmates staged a revolt in October 2018 protesting the conditions in which they were held.³⁶⁶ As one commentator has noted: “the goings-on within the NSS were Juba’s worst kept secret”,³⁶⁷ which only serves to perpetuate this culture of fear. This climate represses open dialogue and civic participation at a time when the public’s engagement is important if peace is to prevail in South Sudan.

238. The Commission has investigated cases of arbitrary arrest and detention, as well as torture and cruel, inhuman or degrading treatment perpetrated by the NSS and the SPLA Military Intelligence Directorate. It has chosen to focus on cases in which individuals were subjected to security-related detention, rather than looking more generally at detention conditions in criminal prisons in South Sudan, as it considers the phenomena of security-related detentions a development of particular concern at this point in South Sudan’s history. If steps are not taken to curtail and control excesses by these institutions, South Sudan could risk slipping toward a police state.

239. The Commission has documented at least 47 first-hand accounts of individuals who have been arrested, arbitrarily detained, and/or subjected to torture or other forms of cruel, inhuman or degrading treatment by the NSS and the SPLA Military Intelligence Directorate, since the start of the conflict in December 2013 through to late 2018.³⁶⁸ The Commission has

³⁶² Penal Code Act (2008), section 206.

³⁶³ See below “Women and Girls in South Sudan: Customary Law” section (Section VI(B)(3)) and “Domestic Criminal Justice Context” section (Section VIII(B)(1)).

³⁶⁴ Code of Criminal Procedure Act, section 10(a).

³⁶⁵ Transitional Constitution (2011), Article 166(3).

³⁶⁶ VoA, “Prison Standoff in South Sudan’s Blue House”, 7 October 2018.

³⁶⁷ Flora McCrone, “South Sudan’s National Security Service under the spotlight”, Pambazuka News, 6 November 2014.

³⁶⁸ The Commission documented 57 cases in total, including three cases involving female detainees. Witness 564, ERN 101271-101275; Witness 576, ERN 101082-101087; Witness 578, ERN 101097-101107; Witness 594, ERN 101203-101208; Witness 596, ERN 101187-101196; ERN 101725-101736; Witness 597, ERN 101182-101186; Witness 605, ERN 101276-101304; Witness 607, ERN 101476-101482, 101216-101222; Witness 609, ERN 101257-101260; Witness 610, ERN 101311-101320; Witness 623, ERN 101351-101356; Witness 752, ERN 101483-101491; Witness 786, ERN 101492-101498; Witness 801, ERN 101530-101541; Witness 851, ERN 101542-101549; Witness 852, ERN 102054-102080; Witness 871, ERN 102342-102348; Witness 905, ERN 101667-101673; Witness 906, ERN 101769-101782; Witness 907, ERN 101980-101992; Witness 908; Witness 910, ERN 102126-102140; Witness 911, ERN 102349-102355; Witness 912, ERN 102126-102140; Witness 916, ERN 102112-102125; Witness 924; Witness 936, ERN 101737-101768; Witness 939; Witness 942, ERN 102356-102363; Witness 950, ERN 101955-101979; Witness 951, ERN D116738-D116746; Witness 959, ERN D116734-D116737; Witness 960, ERN 102089-102111; Witness 964, ERN 102148-102171; Witness 983, ERN 102329-102341; Witness 993, ERN 102014-102053; Witness 994, ERN 102172-102183; Witness 995, ERN 101998-102013; Witness 1000, ERN 102081-102088; Witness 1001; Witness 1002; Witness 1003; Witness 1031, ERN 102184-102210; Witness 1052; Witness 1054, ERN 102232-102238; Witness 1062, ERN 102275-102285; Witness 1064; Witness 1070, ERN 102270-102274; Witness 1073, ERN 102286-102290; Witness 1091, ERN 102239-102248; Confidential Document, ERN D112809-D112814; Confidential Document, ERN D112815-D112824; Confidential Document, ERN D116262-D116270; Confidential Document, ERN D113765-D113785; Confidential

provided medical examinations to 15 former detainees and concluded that their injuries and psychological symptoms are consistent with prolonged detention in the conditions described below, and with sustained torture or cruel, inhuman or degrading treatment.

240. The Commission has been particularly aware of the need to ensure the safety of its witnesses in relation to these incidents, and accordingly has referenced incidents in a manner which protects the safety of witnesses. Despite not having included specific references as it has in other sections of the report, the Commission conducted its work in this area to the same standard as in other areas, as set out in the Methodology section above, and preserves the evidence collected in its databases.³⁶⁹ Furthermore, in many instances it has withheld either the year or location from the description of events in order to protect witnesses.

1. State Security Organizations

a) National Security Service

241. The National Security Service is governed by the National Security Service Act (2014), which provides that the NSS shall be subject to the authority of the Constitution and the law, respect the will of the people, the rule of law, democracy, human rights and fundamental freedoms and be professional with the mandate to focus on information gathering, analysis and advice to the relevant authorities.³⁷⁰

242. The NSS is composed of a National Security Council, and two operational organs: the General Intelligence Bureau and the Internal Security Bureau, each under the Minister of the NSS and headed by a Director General.³⁷¹ The National Security Council is composed of the President, Vice President, and Ministers of Defence, Foreign Affairs, Justice, Finance, Interior and National Security Service. The Council's responsibility is to define the general policy relating to the security of the nation, supervise the progress of security work and coordinate among security organs.³⁷²

243. While the National Security Act (2014) does not specify any departments or officials as being in charge of detention, the Commission understands that the Internal Security Bureau is in overall charge of all detention matters.

244. The NSS not only has offices around the country, but also has officers stationed in every sector, including in other government departments and agencies, such as the Media Authority, oil operations such as Dar Petroleum Operating Company (DPOC), Juba International Airport and other airports around the country, hospitals including Juba Teaching Hospital, all State-owned and private banks, most hotels, many civil society organizations and international organizations, public transportation including *boda bodas* (motorcycle taxis) and taxis, and as security guards manning gates.

245. The NSS's official role is to protect the national interest. This is conceived to include monitoring and investigating suspects and places related to the offences against the state; maintaining security, protecting the Constitution, national social fabric and safety of South Sudanese from any internal or external danger; gathering internal and external information related to the security of the nation and making recommendations to the National Security Council on the basis of information gathered; detecting and preventing any danger resulting from espionage, terrorism, conspiracy, piracy, cyber or environmental crimes or destructive actions; detecting and combating destructive activities by any organization, group or individuals foreign country or South Sudanese group inside or outside South Sudan, and protecting very important persons and public utilities.³⁷³

246. The Government has allowed the NSS considerable latitude in interpreting its mandate to protect the national interest, particularly in the oil sector, where the NSS plays an active, and often corrupting role, serving the partisan interests of the ruling party and officials. As will be discussed below in the section on political economy, the NSS has significantly

Document, ERN D112912-D112913; Confidential Document ERN D114938-D114938; Confidential Document ERN D114679-D114683; Confidential Document ERN D113749-D113764; Confidential Document ERN D113689-D113748.

³⁶⁹ See above Methodology section (Section II(B)).

³⁷⁰ National Security Service Act (2014), section 6.

³⁷¹ National Security Service Act (2014), section 9.

³⁷² National Security Service Act (2014), sections 10, 11.

³⁷³ National Security Service Act (2014), section 13(1) to (10).

overstepped its mandate in its encroachment upon the oil sector in South Sudan, particularly through expanding its influence and control over the Nilepet state-owned oil company. Notably, the Director General of the Internal Security Bureau of the NSS, has reportedly been a member of the board of Nilepet since 2014, and the Commission has received information that other NSS officials similarly have transferred to or held positions in the company. Both the Director General of the Internal Security Bureau of the NSS and the then Minister of Petroleum and Mining and current Minister of Finance and Planning instructed Nilepet to settle security-related bills in January 2016. These payments included fees incurred for transporting troops and equipment, including to Wau, Malakal and Paloch, thus using oil revenues to pay for the Government's military operations in these areas.³⁷⁴

247. As part of the NSS' general efforts in scrutinizing media activities, it has also obstructed and intimidated journalists criticizing aspects of the oil production in South Sudan.³⁷⁵ In addition, in March 2018, the NSS reportedly arrested the Nilepet Deputy Head of the Accounts, for "leaking documents exposing corrupt dealings in the government-own [sic] corporate".³⁷⁶

248. To achieve its wide ranging tasks, the NSS has been granted extremely broad powers including the powers to:

- monitor frequencies, wireless systems, publications, broadcasting stations and postal services with respect to security interests so as to prevent misuse by users;
- request any information, statement, document, or any relevant material from any suspect and potential witness for perusal or examination, keep or take necessary or appropriate measures in respect of such information, statement, document or relevant material;
- summon, investigate and take particulars and depositions from any suspect and potential witness;
- seize any weapon, machine, tool, automobile or gadget suspected to be connected with an offence or crime against the state;
- arrest and detain suspects for crimes related to National Security (set out in section 7 of the National Security Service Act);
- carry out any other function assigned to it by the President or the Council in accordance with the Constitution;³⁷⁷ and
- gather and retain any information related to any person, persons or institutions as necessary for carrying out its duties and functions.³⁷⁸

249. The National Security Service Act provides almost no safeguards against abuse of these very broad powers. Despite the fact that one of the stated purposes of the NSS is to protect the Constitution,³⁷⁹ and the NSS is subject to the authority of the Constitution,³⁸⁰ in a number of respects the National Security Service Act appears to contradict the provisions of the Constitution.³⁸¹

250. For example, the National Security Service Act provides essentially no safeguards against prolonged and arbitrary detention. It stipulates that a person who is found committing, or reasonably suspected of having committed, or attempted to commit, or being about to commit an offence against the state, may be arrested without warrant. In the case of an arrest without warrant, the person must be brought before a magistrate, as soon as reasonably

³⁷⁴ Confidential document, ERN D113807-D113808.

³⁷⁵ UN Security Council, *Final Report of the Panel of Experts on South Sudan*, UN Doc No: S/2016/70, 22 January 2016, paras. 19-23.

³⁷⁶ Radio Tamazuj, "National Security arrest senior Nilepet official over leaks", 22 March 2018; Sudan Tribune, "S Sudan security arrest state-owned oil entity official", 23 March 2018; Radio Tamazuj, "National Security still holding Nilepet official", 27 March 2018.

³⁷⁷ National Security Service Act (2014), section 13(11) to (16).

³⁷⁸ National Security Service Act (2014), section 32.

³⁷⁹ National Security Service Act (2014), section 13(3).

³⁸⁰ National Security Service Act (2014), section 6(a).

³⁸¹ Transitional Constitution (2011) as amended, Articles 12, 19, 22.

practicable, within 24 hours.³⁸² If the person is arrested pursuant to a warrant, the warrant must specify the period of the warrant which must not exceed one month. Thereafter, a judge “may extend that period as deemed fit”.³⁸³

251. No provision is made for the release of a person if charges are not laid within a specified time or at the conclusion of investigations. By contrast, in the Code of Criminal Procedure Act (2008), a person arrested by the police as part of an investigation may be held for a period of 24 hours for investigation, renewable by up to one week by a Public Prosecution Attorney or by up to a total of two weeks by a Magistrate.³⁸⁴ Once charged, the Code of Criminal Procedure Act provides that a Magistrate or Court may order detention of an accused for the purposes of investigation for a up to three months, reviewable weekly, or the competent President of the Court of Appeals may order detention for the purpose of trial for up to a total of one month, reviewable weekly, provided that the total period of detention does not exceed six months, except with the consent of the President of the Court of Appeal concerned.³⁸⁵

252. Furthermore, the National Security Service Act is silent on the legal rights of those arrested and detained, including the right to counsel, rights to access or contact with family, or to be tried within a reasonable time. It provides no safeguard requiring arrested persons to be held in official detention facilities, where they can be located and their conditions monitored. Additionally, it contains no provisions clarifying that torture is prohibited or governing the manner in which its officers investigate and take statements and depositions from suspects or potential witnesses.

253. Similarly, there are no provisions containing safeguards in relation to surveillance, search, seizure and collection of information. At a minimum, there should be a requirement for a warrant to undertake such activities in order to protect the right to privacy provided for in Article 22 of the Transitional Constitution.

254. The only review provided in order to be able to challenge detention is that “A person aggrieved by the issue of a warrant or by the extension of the period of a warrant may appeal to the court of Appeal within 14 days and the decision of the court of Appeal shall be final.”³⁸⁶ For offences committed by NSS members, including Penal Code offences³⁸⁷ and abuse of power and misuse of position,³⁸⁸ the National Security Service Act provides for the establishment of Service Tribunals.³⁸⁹

255. Multiple commentators take the view that the National Security Service Act and the NSS’s operations appear to replicate many of Sudan’s authoritarian security services’ features.³⁹⁰

b) SPLA Military Intelligence

256. The function of the Military Intelligence Directorate within the SPLA is to collect and analyse all information gathered during military missions to provide commanders with relevant and timely information upon which to base their tactical and strategic planning and decisions. This may involve informant identification, recruitment, handling and interrogation. In an internal armed conflict context, sources of relevant information will involve domestic intelligence collection. This has led the SPLA’s Military Intelligence Directorate to encroach into civilian police powers of arrest, detention, search and seizure.

257. SPLA Military Intelligence Directorate is its own department within the SPLA with its headquarters at Giada SPLA military barracks in Juba and deploys its own missions through the Military Intelligence Operations department. However, Military Intelligence officers also deploy as part of general SPLA missions. Military Intelligence officers are also stationed in other agencies, including in police stations. While some wear uniforms, others

³⁸² National Security Service Act (2014), section 54.

³⁸³ National Security Service Act (2014), section 55(4).

³⁸⁴ Code of Criminal Procedure Act (2008), sections 64(1) and (2).

³⁸⁵ Code of Criminal Procedure Act (2008), sections 64(3) and 100.

³⁸⁶ National Security Service Act (2014), section 55(5).

³⁸⁷ National Security Service Act (2014), section 56(1).

³⁸⁸ National Security Service Act (2014), section 62.

³⁸⁹ National Security Service Act (2014), sections 77-79, Schedule II.

³⁹⁰ Augustino Ting Mayi and Jok Madut Jok, “Sudan’s National Security Bill: Merits and Public Reactions”, Sudd Institute, 7 October 2014; David Deng and Rens Willems, “Legacies of Enforced Disappearances in South Sudan”, November 2015.

are dressed as civilians to more effectively collect intelligence. Many military intelligence officers are also employed in a civilian capacity while reporting intelligence gathered in the course of their activities back to military intelligence.

258. Police powers of investigation, arrest, detention, search and seizure are clearly provided for South Sudan Police Service Act (2009) and the Code of Criminal Procedure, and the NSS's operations and powers are set out in the National Security Service Act (2014). However, the SPLA Act (2009), which governs the military as a whole, does not address itself specifically to the powers and duties of the Military Intelligence Directorate, and internal SPLA rules governing the Military Intelligence Directorate's operations, duties and powers are not public. The result is that there is a complete lack of transparency as to whether any administrative safeguards are in place to protect citizens' constitutional rights.

c) Coordination between Security Services and Across the Country

259. Although the NSS and the SPLA are separate entities and operate independently, the Commission gathered evidence which indicates they also cooperate, particularly the NSS and the SPLA Military Intelligence Directorate. Multiple detainees, particularly those being held or transported from localities outside Juba, described being transferred between the security agencies.

260. Furthermore, a significant number of detainees are transferred between detention facilities. Indeed, many reported having been transferred between detention facilities multiple times, making it difficult for family, friends and sometimes even those working within the security sector searching for them to locate them. Some have been transferred to Juba from other towns around South Sudan, including Bazia, Magwi, Malakal, Maridi, Nassir, Pageri, Palouch, Wau, Wau Shilluk, Yambio and Yei. The Commission documented at least seven cases in which people arrested by the NSS and SPLA Military Intelligence were transferred to Juba from other towns by air, including commercial and military cargo planes and military helicopters.

261. Other detainees are transferred between facilities within the same town, including between those described below and others, such as police stations. While being transferred between locations, detainees are either forced to lie down in the beds of trucks or are put in trucks with built in holding cells referred to as "containers". Several witnesses described being forced to lie down in the bed of the trucks under a bench in an area ironically referred to as "the fridge". One detainee described:

They then forced me to lie face down underneath a bench where the soldiers were seated within the bed of the truck. The space where I was kept was not an enclosed space, but it was unbearably hot, and when I was put there, I burned my arm on the metal of the truck which was scorching hot [...] I was lying face down [...] I was terrified because I knew we were in a military vehicle, but I didn't know where the soldiers were taking me. I used to hear about things like this happening to other people, but not anyone close to me.³⁹¹

262. Another detainee indicated he had been driven around Juba in similar conditions for four hours. Several other detainees reported being forced to wear blind-folds made of red or dark cloth while they were being transported between facilities.

d) Involvement of Neighbouring States

263. There are a number of high profile cases involving the Kenyan security forces' participation in the rendition of South Sudanese to South Sudan and to the NSS's custody. These include James Gatdet Dak, Marko Lokidor Lochapio, Dong Samuel Luak, and Aggrey Izbon Idris. James Gatdet Dak was arrested in Nairobi, Kenya by Kenyan security services on 2 November 2016, deported to Juba and handed over to the NSS who detained him until his trial.³⁹² The latter two were reportedly detained in Nairobi, Kenya and unlawfully

³⁹¹ Witness 906, ERN 101769-101782, para. 15.

³⁹² UNHCR, *News comment by UNHCR's Spokesperson, Cécile Pouilly, on the return of Mr James Gatdet Dak to South Sudan*, 4 November 2016; Convention on the Status of Refugees of 1951 and Protocol 1967, Article 33(1)

transferred to NSS headquarters in Juba in January 2017, in effect a *refoulement*.³⁹³ The UN Panel of Experts on South Sudan documented information on individuals suspected to be connected to their disappearance.³⁹⁴ In a meeting with the Government of South Sudan, the Commission raised the issue of the transfer and removal of Dong Samuel Luak and Aggrey Izbon Idris from Kenya, however, the Deputy Minister of Foreign Affairs and International Cooperation denied having any knowledge of their whereabouts, stating that the Commission should make inquiries of the Government of Kenya.³⁹⁵ Nonetheless, at least eight witnesses to whom the Commission spoke indicated that they saw Aggrey Izbon Idris and/or Dong Samuel Luak in NSS custody in South Sudan shortly after they disappeared in Nairobi.

264. The Commission has also documented other instances of South Sudanese refugees in Uganda and Kenya being surveilled, detained, and questioned by the Ugandan and Kenyan authorities, as well as seeing South Sudanese security agents operating in these countries. Numerous witnesses told the Commission that they continue to feel insecure in these countries and some report continuously relocating for their safety.

2. Profiles of Detainees and Reasons for Detention

265. The vast majority of those taken into security-related detention are men who are on average in their mid-30s. Almost all cases documented by the Commission involved Nuer or Equatorian detainees, though a number were also of Shilluk and Fertit ethnicities. A few of those detained were also foreign nationals.

266. The Commission has also documented a number of cases of women being arrested and detained by the NSS and SPLA Military Intelligence, including pregnant women. However, there appear to be far fewer cases of women being detained. In most instances, women were reported to have been held separately from the male detainees. Additionally, there have been at least two instances of children reportedly under the age of 15 being held in the NSS Blue House and SPLA Giada military prison.

267. The profiles of people detained by the NSS and SPLA Military Intelligence differ to some degree. Those detained by the NSS have included human rights and civil society activists, community leaders, journalists, academics, political opposition members, and prominent business people, as well as a number of their own NSS officers and members of other security services including the SPLA. Additionally, a number of those detained by the NSS are, or have been, national employees of international organisations including the United Nations and NGOs.

268. Arrests undertaken by the NSS appear to be generally more targeted, as demonstrated by monitoring and surveillance of suspects before their arrest, arresting people at their homes, and verifying their names upon arrest. One detainee told the Commission:

We continued our work in human rights advocacy and documentation, but the Government of South Sudan started to crack down on human rights activists. I received threatening messages and phone calls asking whether I was documenting human rights violations [...], so I suspected the Government was monitoring my activities. At least twice, unidentified callers tried to intimidate me by saying they would find me and arrest or kill me. I also learned that the National Security Service (NSS) had even sent officers to my house a few times to ask the neighbours about me, but I was not home at the time.³⁹⁶

269. Although almost none of those arrested and detained by the NSS were charged or informed of the reasons for their arrests, over the course of interrogations some of the reasons for their arrests emerged through questions put to them and comments made by the NSS officers. These reasons included having documented and disseminated information about human rights violations, providing information to the international community, publicly criticizing the government, mobilizing communities, refusing to accept particular official jobs or to support particular government positions, and having contact with, or being perceived to, support opposition groups.

³⁹³ UN Security Council, *Final report of the Panel of Experts on South Sudan*, S/2017/326, 13 April 2017; Radio Tamazuj, “Family urges President Kiir to release Dong Samuel”, 18 November 2018.

³⁹⁴ UN Security Council, *Final report of the Panel of Experts on South Sudan*, S/2017/326, 13 April 2017.

³⁹⁵ Meeting with the Deputy Minister of Foreign Affairs and International Cooperation, Juba, 7 December 2018.

³⁹⁶ Witness 916, ERN 102112-102125.

270. Meanwhile, arrests and detentions by SPLA Military Intelligence, appear, generally, to be less targeted to people's professions and professional activities and more to their general profiles of being young men perceived to be supporters of the opposition on the basis of their ethnicity, place of origin and age. Many of those taken into custody were farmers, small businessmen, and *boda-boda* drivers, while a number of people arrested by SPLA Military Intelligence appear to have been rounded up almost at random. Broad sweeps conducted by Military Intelligence appear to have peaked in December 2013 and July 2016 in Juba, but also notably around the times when peace agreements or ceasefires were on the verge of being signed. Nonetheless, the SPLA Military Intelligence has also been involved in the arrest of some people with the same profiles as those described above as being those targeted by the NSS, including journalists and community leaders.

271. Taken together, the profiles of the people detained by the NSS and the reasons for their arrests demonstrate a concerted effort by the NSS to clamp down on public discourse, criticism of the government, and on those whose voices might lend support to the opposition. Meanwhile, the SPLA Military Intelligence has worked as a blunter tool to intercept those who might be expected to join the opposition based their general profiles. Both these undertakings are deeply concerning and must be brought to an end if South Sudan is to develop into an open and free society and to engage in meaningful reconciliation.

3. Lack of Due Process

272. The Transitional Constitution (2011) and the Code of Criminal Procedure Act (2008) provide for essential due process and fair trial rights. The Transitional Constitution provides the essential fair trial rights, including the rights to be informed, at the time of arrest, of the reasons for the arrest and to be promptly informed of any charges; to be released on bond or produced before a court within 24 hours of arrest; to a fair and public hearing by a competent court of law; be tried in his or her presence in any criminal trial without undue delay; to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence.³⁹⁷ Likewise, the Code of Criminal Procedure Act provides that an arrested person shall always be entitled to contact his or her advocate.³⁹⁸ These rights are also well established in international human rights law.³⁹⁹

273. Upon being arrested and detained, hardly any of the victims the Commission spoke to, when detained by the NSS or SPLA Military Intelligence, were informed of the reasons for their arrest at the time of their arrest, or thereafter formally charged, brought before a judge, or given access to a lawyer. Some detainees were reportedly detained for over four years without being charged, tried, or given access to a lawyer.

274. While there are a very few public examples of high-profile detainees being charged and tried, they remain a tiny minority. The two notable examples are James Gatdet Dak, former press secretary to former First Vice President Riek Machar, and South African William Endley, a former adviser to former First Vice President Riek Machar.

275. James Gatdet Dak was unlawfully arrested in Nairobi, Kenya on 2 November 2016 and deported to Juba despite having been granted refugee status by Kenya,⁴⁰⁰ in violation of the principle of *non-refoulement* found in the Convention on the Status of Refugees of 1951. He was detained by the NSS for over nine months before being charged and tried for treason, publishing or communicating false statements prejudicial to South Sudan, and undermining authority of or insulting the President.⁴⁰¹ James Gatdet Dak was convicted and sentenced to

³⁹⁷ Transitional Constitution (2011), Article 19.

³⁹⁸ Code of Criminal Procedure Act (2008), section 93(2).

³⁹⁹ See e.g. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly Resolution 43/173 (9 December 1988); African Commission on Human and Peoples' Rights, *Principles and guidelines on the right to fair trial and legal assistance in Africa* (2003); African Commission on Human and Peoples' Rights, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2014).

⁴⁰⁰ UNHCR, *News comment by UNHCR's Spokesperson, Cécile Pouilly, on the return of Mr James Gatdet Dak to South Sudan*, 4 November 2016; Convention on the Status of Refugees of 1951 and Protocol 1967, Article 33(1)

⁴⁰¹ Penal Code Act (2008), sections 64, 75, 76.

death and 20 years imprisonment on 12 February 2018.⁴⁰² His appeal was pending at the time he was released on 2 November 2018, pursuant to the R-ARCSS.⁴⁰³

276. William Endley was charged with insurgency, banditry, sabotage and espionage, terrorism and attempts to overthrow a constitutionally established Government under the National Security Services Act (2014) and the Penal Code Act (2008). He was convicted on 23 February 2018 and sentenced to death.⁴⁰⁴ William Endley filed an appeal before the Court of Appeal on 7 March 2018.⁴⁰⁵ His appeal was still pending when he was released on 2 November 2018, pursuant to the peace agreement (see section IV(A)(6) above).⁴⁰⁶

277. Even in these two cases in which charges were laid and trials undertaken, there were allegations that they were unfair. James Gatdet Dak's defence lawyers withdrew citing an unfair trial a month before the verdict, but the trial continued, which formed the basis of his appeal.⁴⁰⁷ Similarly, William Endley's appeal was based in part on the failure to respect his right to legal representation and to subpoena defence witnesses.⁴⁰⁸

278. For the vast majority of those held in security-related detention, however, no charges were laid, nor trials were held, and release could only be obtained through informal means. Detainees who managed to be released had well placed family or connections who were able to advocate for them and to raise their profile. Others have either escaped or have bribed soldiers or guards to secure their release or to help them escape. The Commission documented only one case of a detainee who was released as a result of a formal complaint made to the police, and even in that case, higher level intervention assisted in securing the detainee's release.

279. Many detainees reported being routinely interrogated while in detention, some of over the course of months, without being offered or provided access to a lawyer. Some of these interviews are nonetheless recorded by the NSS investigators. Numerous witnesses recalled how detainees were occasionally taken out of their cells to be interrogated after midnight. Interrogations often start with routine questions, including about age, place of origin, and occupation before moving on to questions about political affiliations, alleged connections and support for various armed opposition groups, and whether the detainee knows or has communicated with particular high-profile people, such as former First Vice President Riek Machar. When detainees do not respond as the investigators hope, they often resort to coercive tactics, which include threats and in some cases torture (as described below). One witness recalled:

The Investigation Committee never physically assaulted me during the [...] investigation. However, the NSS officers verbally threatened to keep me in detention for 10 years. They told me no one knew I was there, so they would take me to the river and kill me.⁴⁰⁹

280. Investigators have made numerous witnesses access their phones, personal and work computers (which had been confiscated) and electronic accounts to allow them to review their contents for evidence, while others were told their electronic devices were being taken to the forensics department for analysis. Most detainees reported that their personal belongings were never registered or returned. Detainees were also informed by the NSS

⁴⁰² Reuters, "South Sudan sentences rebel leader's spokesman to death", 12 February 2018.

⁴⁰³ R-JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018; United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018; Confidential Document, ERN D109336-D109340.

⁴⁰⁴ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018.

⁴⁰⁵ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018.

⁴⁰⁶ JMEC, *Progress Report No. 3 on the Implementation Status of the R-ARCSS 2018*, 5 November 2018; United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018.

⁴⁰⁷ Sudan Tribune, "Lawyers for jailed Machar's spokesperson pullout over unfair trial", 19 January 2018; Confidential Document, ERN D109336-D109340.

⁴⁰⁸ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018.

⁴⁰⁹ Witness 1031, ERN 102184-102210, para. 39.

during their interrogations that their phone calls and communications had routinely been tapped prior to their arrests.

281. During some interrogations, a member of the NSS Legal Department is present. The National Security Service Act provides that the functions of the NSS's Legal Department include acting as an ombudsman and ensuring that cases being handled by the service are expedited and promptly referred to court; attending to complaints within and without the service and advising on the best practices regarding the constitution and human rights; and checking excesses of power, receiving and forwarding complaints of employees within the service to the Complaints Board.⁴¹⁰ However, the presence of NSS lawyers during interrogations does not appear to have ensured that human rights and the Constitution were respected or to have checked excesses of power. On the contrary, there are cases in which it appears that members of the NSS Legal Department may themselves have been complicit in violations of fundamental freedoms.

282. Furthermore, many detainees reported never even being questioned or investigated at all during their detention, indicating that there was no effort to follow due process to even ascertain if those detained might have committed an offence. One witness told the Commission:

I didn't find out the reasons for my detention until [...] months after I had been arrested. There were even times when I wished for an interrogation so that I could at least understand why I had been detained.⁴¹¹

283. Many witnesses with whom the Commission spoke were unable to answer why they had been arrested and detained, even with the benefit of hindsight. The fact that they had not been told why they were arrested so that they could defend themselves weighed heavily on their minds and came up repeatedly during interviews. One witness to whom the Commission spoke mused:

I am still trying to figure out how the NSS can detain people for prolonged periods without taking them to a court of law... I thought that within their laws, the NSS could only detain a person for 24 hours or something like that before he or she had to be taken to court... There were even some inmates who had been detained since 2014 without being charged. Then, the NSS simply released them in the market to go out into the world without knowing why they had been kept there in the first place.⁴¹²

4. Detention Facilities and their Conditions

284. Witnesses described detention conditions which varied between NSS and SPLA Military Intelligence detention facilities. However, on the basis of their descriptions, hardly any of these facilities meet the United Nations' Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) which provide that "General living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception."⁴¹³ The facilities also failed to meet the standards set out in regional guidance such as Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa.⁴¹⁴ In this regard, the Commission notes that the Code of Criminal Procedure Act (2008) provides that an arrested person shall have the right to obtain a reasonable amount of food stuff, clothing and cultural materials, at his or her own cost, subject to the conditions relating to security and public order.⁴¹⁵

285. The Commission has mapped the detention locations discussed below at Figure 3 at the end of this section.

⁴¹⁰ National Security Services Act (2014), section 18(2).

⁴¹¹ Witness 964, ERN 102148-102171, para. 52.

⁴¹² Witness 852, ERN 102054-102080, para. 68.

⁴¹³ United Nations' Standard Minimum Rules for the Treatment of Prisoners (2015), Rule 42.

⁴¹⁴ African Commission on Human and People's Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2014).

⁴¹⁵ Code of Criminal Procedure Act (2008), section 93(5).

a) *National Security Service Detention Facilities*

286. The NSS headquarters, commonly referred to as the “Blue House”, is the NSS’s main detention facility in Juba. However, the NSS also has a number of other locations it uses to detain people which are both formal and informal. Among those where the Commission documented detainees being held are: the Riverside detention facility in Juba, the Luri training centre to the south of Juba, the Jubek State National Security in Hai Gabat, the Dar Petroleum Operating Company (DPOC) Office, an NSS facility in Hai Jalaba, the Media Authority offices, Juba International Airport and a number of unofficial locations around the city including in Muniki, Gudele, Mangateen, Jebel, and Jebel Nyoko. The NSS also has offices and detention facilities throughout the country. The Commission also documented cases where detainees were held in NSS facilities outside of Juba in Yei, Wau and Yambio.

287. Around mid-2015, detainees from a number of detention facilities in Juba, including NSS Riverside and unofficial facilities, were transferred to the Blue House. Nonetheless, recent cases documented by the Commission indicate that some of these locations are still operating.

NSS “Blue House” Headquarters

288. The NSS headquarters is located in the Jebel neighbourhood of Juba and is commonly called the “Blue House” because of the main building’s blue colour. The Blue House compound comprises a number of buildings partitioned by walls separating different areas of the compound. The compound also contains offices for the Minister of National Security and the Director-General of NSS. The main Blue House building houses most of the NSS administrators’ offices and, until late 2015, was also the detention facility.

289. Until late 2015, detainees were housed in the main Blue House building, when the new detention facility was completed. Most cells held between eight and ten people and were described as overcrowded, dirty and infested with mosquitoes and cockroaches. There were also a number of small solitary confinement cells measuring approximately one and a half by two metres. There were only very tiny windows with no ventilation. No mattresses or sheets were provided and detainees had to sleep directly on the hard floor. The cells in the main Blue House building did not have toilets, so detainees had to knock on the door for guards to let them out to use the facilities; during the night, they were given a bucket to use. Detainees were normally allowed a very short shower daily, though sometimes they had to go without for two or three days.

290. The new Blue House detention facility which opened in late 2015 has two floors. Most of the political prisoners are kept on the upper floor of the detention facility while other types of detainees such as criminal cases are generally held on the ground floor. The upper floor has two rows of cells divided by a corridor, each with their own self-contained bathroom. The upper floor also has a number of smaller solitary confinement cells, referred to as “zanzan”, measuring one metre by one metre whose occupants have to use a bathroom at the end of the corridor and rely on the guards to allow them to access these facilities. The solitary confinement cells have only a very small window for air. Sometimes the guards close the shutters of the windows and turn off the lights, plunging the occupants into complete darkness. One of the solitary confinement cells is reportedly used as an armoury. The conditions in the new detention facility are reportedly somewhat better than those in the main building as there is less infestation and vermin.

291. In 2016, NSS officers started allowing detainees out of their cells to stand on the platform on the upper floor overlooking the lower floor after some detainees in solitary confinement started developing paralysis from lack of movement. One witness explained:

Paralysis was actually a common sickness within National Security Service detention... Some detainees became paralysed because of the beatings and some developed paralysis due to limited movement - the only place we could go as detainees was to the toilet and back, but otherwise, we had no recreation, no exercise, nothing... and we were sleeping on a hard floor made of tiles.⁴¹⁶

292. Until mid-2015, two meals a day were provided at the Blue House, in the morning and late afternoon; however, since then, reportedly after the arrival of a new administrator, only one meal per day has been provided and occasionally none at all. As in other detention

⁴¹⁶ Witness 950, ERN 101955-101979.

facilities, food consists invariably of *ugali* and beans. Drinking water is obtained from the toilet tap either in the cell or at the end of the hall.

293. There is a drug dispensary in the Blue House compound and one of the offices is used as a medical facility; however, medical treatment reportedly remained inadequate. One detainee observed: “there was no real diagnostic equipment there. Someone [...] was assigned as a doctor there, but he had nothing to offer us. I even wonder whether he was a true doctor or not because the medicine he gave us was all wrong.”

NSS Riverside Facility

294. The NSS Riverside facility in Juba is located behind the immigration office, near the water plant and prison along the Nile River. The facility includes cells along a corridor which are approximately one metre by two metres often holding four detainees which is overcrowded given the amount of space. Other larger cells reportedly held up to 40 men.

295. The cells at Riverside were described as excruciatingly hot, not only because of outside temperatures, but also due to overcrowding and the lack of ventilation. One witness described that “it was so hot and dirty that I started developing sores on my skin and my hair began to fall out. Over time, my skin also started turning a pale white colour.”⁴¹⁷ Detainees are provided with food once a day in the afternoon and meals consist of very small portions of *posho* (stiff maize porridge) and beans. There is a tap in the cells to wash with and drink from.

296. Detainees rarely benefit from recreational activities and one witness recalled being let out into the yard once in the year he was detained there.

297. There is no proper medical attention at the Riverside facility despite there being outbreaks of malaria, given the facility’s location by the river. Some detainees resort to chewing bark from the Neem tree, while one witness described the medical attention he received:

I visited the doctor at NSS Riverside Facility [multiple] times when I experienced weakness, dizziness and body pains but I was never diagnosed with any illness. There was no medical facility there, but there was a man who claimed he was a medical doctor. I really wondered whether he was a doctor though because he never performed examinations, but just distributed the same types of medication like Paracetamol, Panadol, Metrozole, Prophenin and other antibiotic capsules regardless of our medical conditions.⁴¹⁸

NSS Training Centre in Luri

298. The South Sudan Human Rights Commission (SSHRC) published a report in 2018 detailing cases of at least 29 people illegally detained in inhuman conditions and tortured at the NSS Luri training facility, west of Juba in June and July 2018.⁴¹⁹ Detainees were reportedly held in extremely hot isolation cells with no toilets and only allowed out twice a day to relieve themselves. Others held at the facility were confined in cells measuring three by five metres holding more than 20 people with no beds or linens.⁴²⁰ The Commission received information about five detainees being assaulted at Luri and transferred to the NSS Blue House detention facility. However, further investigations are necessary.

299. The Commission notes with deep concern that when a CTSAMVM monitoring and investigation team attempted to visit the location on 18 December 2018, they were restricted from accessing it and were detained there for more than four hours during which time the team was physically assaulted, blindfolded, handcuffed, kicked, robbed, and stripped of their clothing, including the female member who was stripped completely naked. The team’s driver was threatened with death.⁴²¹

⁴¹⁷ Witness 995, ERN 101998-102013.

⁴¹⁸ Witness 995, ERN 101998-102013.

⁴¹⁹ South Sudan Human Rights Commission, *A Situational Report on the National Security: Torture, Arbitrary Arrest, and State Fear*, 2018.

⁴²⁰ South Sudan Human Rights Commission, *A Situational Report on the National Security: Torture, Arbitrary Arrest, and State Fear*, 2018.

⁴²¹ CTSAMVM, *Technical Committee Sixth Meeting Minutes*, Addis Ababa, 18-19 December 2018.

Unofficial NSS Detention Locations

300. The NSS makes use of unofficial detention facilities which are commonly referred to as “safe houses”, but are anything but safe. The Commission has documented the existence of a number of these locations in Juba including in the Bilpham, Gudele, Jebel, Mangateen, and Muniki areas; however, some are used for finite periods of time before being abandoned and new ones established. These are often regular houses, still furnished as residences, with nothing to distinguish them to the casual observer from the outside. Indeed, one informal detention facility used in Mangateen was not even in a closed compound. Witnesses repeatedly described entering musty homes that had not been used for some time and seeing dilapidated beds, couches, desks, televisions, plastic chairs and/or refrigerators. The Commission even received reports that in some instances the NSS detains people in their own homes before transferring them to other locations.

301. In some instances, only one detainee was held at the informal detention facility, while in others, a number of detainees were held in different rooms of the house. These facilities are generally manned by a small number of NSS officers, in a few instances they were supported by SPLA officers.

302. One witness described being held at one of these locations for five or six days during which he was beaten nightly for periods of one and a half to two hours by NSS officers and given water and food once a day.

303. The use of unofficial detention facilities is particularly concerning as they are removed from official oversight and monitoring, where maltreatment is possible without witnesses, and it is particularly difficult to locate people given the absence of registries and documentation, raising the likelihood of enforced disappearance.

b) SPLA Military Intelligence

304. The SPLA Military Intelligence detains people, including civilians at their barracks around the country, including for example at its barracks in Yei, Grinthe barracks in Wau and their barracks in Raga. The Commission collected information about the SPLA Military Intelligence detaining people at unofficial locations, including in commanders’ houses.

Giada SPLA barracks

305. The Giada SPLA barracks are located in the southern part of Juba, at the end of Hamia road and are often referred to as “Jamus” because the Jamus Battalion was based there at one point when Sudan was still one country. The detention facility is an old colonial prison sunk deep into the ground, accessed by cement stairs. From the outside the detention facility is not immediately apparent, and resembles a food storage facility covered with an iron sheet near a mango tree and offices.

306. There are at least two underground cells with a metal roof, brick walls and a mud floor. Over time, the number of people being held in these two cells has varied between 20 and 100. The cells are sometimes so overcrowded that it is difficult for detainees to change position or roll over while sleeping on the floor.

307. As a result of being underground, the cells are very dark with no ventilation but a lot of lice infestation. One witness observed that it was so dark that “I could not see at all, but after a few days of being there, my eyes adjusted and I was able to see.”⁴²²

308. There are no toilets in the cells, and, beyond being allowed out once in the early morning to use the toilet, detainees reported having to urinate in a bottle and defecate in plastic bags in front of other detainees. These bags are then hung in the cell until the next morning when detainees are allowed out again.

309. One witness also reported being locked in an office block in the middle of the Giada compound where the rooms were being used to hold as many as 15 detainees at a time. There, detainees were reportedly confined to smelly, overheated rooms with only two small vents at the top of the wall, which were infested with black ants, and had urine all over the floor since there was no toilet.

⁴²² Witness 596, ERN 101725-101736, para. 16.

310. Detainees are fed irregularly, and meals consist only of small portions of *posho*. One witness who was detained at Giada for eight days was reportedly only fed one of those days. There is also limited water available as all prisoners must share a 20 litre jerry can each day despite the exceedingly hot conditions.

311. Some detainees held in Giada were allowed to contact their families who were then able to bring them food. However, other detainees told the Commission that even the ICRC was prevented from visiting their cells.

312. Despite there being a military hospital at Giada barracks, medical care is inconsistent. While some detainees have been taken for treatment to the military hospital, multiple witnesses reported receiving no medical care while in detention at Giada. Others who became seriously ill were taken to the Juba Teaching Hospital for treatment.

Gorum SPLA detention facility

313. The Gorum SPLA detention facility is located 15 to 20 kilometres to the southwest of Juba, along the road to Yei. Gorum used to be a village but is currently heavily militarized and largely inaccessible to those outside of the security services. It is operated by the SPLA Military Intelligence Directorate, although there are also soldiers from other sections of the SPLA present there. The detention facility appears to have evolved over time but is usually described as consisting of four shipping containers measuring approximately five by 10 feet which are surrounded by a fence. One witness described:

I was detained in this container for [...] months, during which I witnessed many of the other detainees die from starvation or from illnesses that had not been treated. There were four containers at this location, with around 18 to 20 detainees in each. There was no fresh air. There was only one window, which measured around 20 square centimetres and was located high up towards the ceiling of the container. We were locked in throughout the day.⁴²³

314. There are no toilets in these containers and detainees have to defecate into pieces of plastic or cloth that have to be hung in the container to avoid sleeping with it.

315. The Commission received reports of at least two mass graves at the Gorum detention facility holding not only those who died at the facility but also some whose bodies were transported from Juba.

316. One former SPLA Military Intelligence officer asserted that “Gorum is the worst detention site of military intelligence.”⁴²⁴

⁴²³ Witness 605, ERN 101276-101304.

⁴²⁴ Witness 1091, ERN 102239-102248.



5. Torture and Cruel, Inhuman or Degrading Treatment in Detention

317. Torture and cruel, inhuman or degrading treatment of detainees by NSS and SPLA officers while in state custody is ubiquitous. Almost every witness the Commission spoke to recounted experiencing or witnessing ill-treatment at the hands of state agents while in security-related detention.

318. Beatings frequently occur during arrest and in the first hours of custody “to break [detainees] into the place”.⁴²⁵ However, torture occurs throughout detention, including in particular during investigation and interrogations. One witness, who was tortured during his interrogation, described:

two of the NSS officers who had brought me to the safe house came back to my room. As soon as they entered, they blindfolded me using a black cloth. Next, they grabbed me up from the bed [where I was sitting] and started kicking me. I was still wearing the same trousers and shirt I wore to work that day. The NSS officers asked my name, my tribe and the type of work I did. I responded by saying, “I am a citizen who lives in the town”. This caused them to become infuriated and they continued kicking me and beating me for two hours with wooden sticks on my shoulder, back, elbows and knees. The NSS officers kicked me in my waist, and as they kicked me, they asked me to tell them about my [human rights] documentation work and my employer. By this time, I had started bleeding on my knees and elbows. The NSS officers slapped my face and kept grabbing me up and then throwing me back down. I felt pain in my back and elbows from the restraints which were still tied on my wrists. I tried to resist but couldn’t get free. I felt faint, exhausted and very weak. I was afraid I was dying and was convinced that nothing would help me except God. While I was crying, I begged the NSS officers for their forgiveness and not to kill me...⁴²⁶

319. Multiple witnesses told the Commission about detainees being removed in the middle of the night for interrogation and torture; however, this also occurs during the day. Sessions of assault last between 10 minutes and two hours, but appear to last on average 20 to 30 minutes. While some witnesses were tortured only on one or a few occasions, others recounted being tortured and assaulted on a regular basis. One witness described his arrival at his place of detention and recalled:

Every morning thereafter around 8:00 AM, three NSS officers wearing [...] camouflage uniforms came downstairs to bring me outside for a short call. Next, they would take me to another room in the compound, sit me down on the floor and stand over me. They usually poured dirty water on me that they had collected from washing their dishes. My [...] hair would become saturated with residue. Next, the NSS officers would start to kick me and lash my wet skin with two-inch wide wooden sticks and whips made of cow tail while calling me a rebel. I don’t know the names of the officers who would beat me, but when they were speaking to each other, they spoke in Dinka. When the NSS officers addressed me, they spoke in Arabic. [...] This became a daily ritual—being beaten once every morning after going to the toilet. [...] These sessions of being tortured would last 30-40 minutes each time and I would cry and scream out loud, but I did not bleed at all. Even though I knew I would be beaten, I never resisted because I didn’t have options. The NSS officers still hadn’t informed me of any charges brought against me, but I was never allowed to call my family or speak to a lawyer. I also hadn’t seen anyone else in the compound that I could tell what was happening to me.⁴²⁷

320. Multiple witnesses described being beaten with sticks, iron rods, rubber hoses, the butts of guns, and whipped with leather or strips of tire rubber commonly referred to as “Uncle Black”. One witness described the beating he received:

They forced me to lie down on the floor in the corridor and proceeded to kick and stomp on my back. They lashed me more than 100 times all over my head and body with leather-like whips that might have been made of oxtail, in addition to a 1.5-inch thick garden hose pipe. [...] After being beaten for about 30 minutes straight, I had

⁴²⁵ Witness 1031, ERN 102184-102210.

⁴²⁶ Witness 916, ERN 102112-102125.

⁴²⁷ Witness 910, ERN 102126 -102140.

welts and swelling all over my body. [...] I ended up losing consciousness—I just felt off afterwards and could not recognize myself. Once I regained my senses, the pain was excruciating, and I could not sleep the entire night. Despite my pain, I was not offered immediate medical attention.⁴²⁸

321. While beatings and whipping are the most common forms of torture, witnesses also reported having toe nails removed, ears cut with scissors, incisions made with knives, razors and nails, and burning with plastic or wire. A few detainees reported being electrocuted at the NSS Blue House and Giada SPLA barracks. The security forces connected electrical wires to victims' nipples, arms and legs. Afterwards, victims were unable to urinate, had blood in their urine, vomited blood, and/or were unable to walk.

322. Detainees are also subjected to positional torture including being laid on their chests with legs tied to both hands behind their backs (*arbatachar*) or in front of them, the use of restraints on wrists and ankles even while confined in cells, and being suspended upside down. One witness described being hung and beaten by SPLA Military Intelligence officers:

They started beating me and kicking me with fist, shoes or butts of the guns and some of them with sticks. After a while I was unconscious. They tied me from my legs and arms. After a while they hanged me by rope to a tree. I was beaten while I was hanged also. I don't know how long I was hanged. After a while they released the rope then I felt down. They hanged and dropped me 6 times. In one of the fallings [m]y teeth cut my lips. They had beaten me with butts, sticks every part of my body was bleeding. When they saw that I was almost dying they stopped beating me.⁴²⁹

323. Detainees were subjected to psychological torture through threats of torture, enforced disappearance and death. They also described seeing and hearing other detainees being tortured. One witness recalled "the three NSS officers were beating [...] the guy while they were taking the statement. Everyone could hear his screams echoing throughout the building."⁴³⁰

324. Although there are comparatively few women arrested or detained by the NSS or SPLA Military Intelligence, there have been a number of instances of mistreatment of women in custody.⁴³¹ In one instance, "The NSS officers kept slapping the women's buttocks and pulling their hair and wigs. They kept calling them prostitutes and asking them why they had joined SPLA-IO. The NSS officers forced them to remove their t-shirts as well, so they were standing there in their brassieres."⁴³²

325. The Commission did not find information indicating widespread sexual abuse in security-related detention; however, it was told of individual incidents of sexual abuse, including forced nudity, attempted castration, needles stuck in a man's penis, and the rape of a male prisoner. However, further investigation is required in this respect.

326. The conditions in which detainees are held may also in some cases amount to torture or cruel, inhuman or degrading treatment. In this regard, the Commission notes in particular the detention conditions described above of dirty, infested with vermin, overheated, overcrowded cells with little ventilation and in some cases no light, particularly for those held underground. These conditions are compounded by insufficient water and food. The Commission particularly notes the absence of toilet facilities or any kind of privacy leading to inhuman and degrading conditions.

327. Furthermore, numerous detainees were held in solitary confinement at the NSS Blue House for extended periods of time, with some spending more than seven months in solitary confinement. The solitary confinement cells have even worse conditions than the conditions in the other larger cells. The tiny cells only measure about one metre by one and a half metres so detainees can barely move around. The doors to solitary confinement cells are only opened briefly once a day in the afternoon when detainees are fed and allowed to use the lone bathroom at the end of the hall to use the toilet and bathe. At other times of the day, detainees must use a plastic bottle in their cells to urinate.

⁴²⁸ Witness 950, ERN 101955-101979.

⁴²⁹ Witness 951, ERN D116738-D116746.

⁴³⁰ Witness 1031, ERN 102184-102210, para. 57.

⁴³¹ Confidential Document, ERN D116262-D116270.

⁴³² Witness 912, ERN 102126-102140.

328. The Commission has documented injuries consistent with the above described torture and cruel, inhuman and degrading treatment. This included scars, ear drum perforation and muscular-skeletal problems including bone fractures and joint damage indicative of incised or blunt object wounds, burns, marks or scars consistent with whipping, gunshot wounds, scars as a result of restraints used on legs, and keloids consistent with untreated skin wounds. Furthermore, many survivors exhibited psychological symptoms consistent with sustained torture and detention.

6. Deaths in Custody

329. The Commission has documented numerous deaths of detainees while in security-related custody. Some were extra-judicially executed, while others died as a result of being detained in inhuman conditions and denied adequate medical care. The Commission has identified on the basis of multiple sources at least five named individuals who died while in NSS custody at the Blue House in 2016 and 2017; however, the overall number of deaths occurring in security-related custody is clearly significantly higher.

330. The inadequate provision of food and water described above has led to deaths in custody at the Giada and Gorum SPLA military detention facilities, and at unofficial NSS locations in Juba. One witness described how in the Giada military detention facility, “After four days without food and water, four people in the custody cell died. They removed the bod[ies] and brought us food and water. It was only when someone was dying that they would bring us food and water.”⁴³³ The Commission was told that there were times at Giada during which prisoners would die every day.

331. Gorum appears to be a particularly deadly place to be detained both because of its conditions in hot, unventilated, crowded containers. One witness told the Commission he saw at least 10 people die during the three months he was detained at Gorum, while another described how “In each container there were 20 prisoners. At the end of 5 months there were only 2 left from the first 20.”⁴³⁴ Another described:

they took me to Gorum about 12-15 miles out of Juba town. This was worst. People are inside containers with a very small window. I was in a container with many people. I saw people dying in this container, their bodies are rotten, and you are alive in the same container. People dying, suffocating in the container and you are with their bodies.”⁴³⁵

332. A number of detainees have also died from illnesses as a result of being denied medical care, including in the NSS Blue House and Riverside facilities, SPLA detention facilities at Giada, Gorum, and the SPLA garrison prison in Raga. Some of these detainees had pre-existing conditions which were insufficiently treated while others developed conditions while in custody. One witness described a detainee who died who “had been vomiting blood [...]. However, the NSS officers ignored [him] and denied him medication.”⁴³⁶

333. Detainees have also died as a result of torture inflicted on them at Giada and Gorum SPLA military detention facilities described above. Additionally, one detainee at the NSS Blue House reportedly died of kidney damage after he was beaten in detention.

334. Furthermore, a number of detainees have been extra-judicially executed while in detention. A number of NSS detainees were killed for misconduct in detention. Further, another witness told of being among a group of five men who were lined up and shot at the NSS Blue House. He recounted: “I effectively died so I can’t tell you how long we were at the NSS Blue House before we were taken to an open field in a place called New Site on the left side of the road before you get to Bilpham Military Barracks. There, I was buried among other bodies in a mass grave. Even when I was being buried, however, I had no idea it was happening because I was unconscious.”⁴³⁷ Later that night, some civilians took the bodies to the mortuary at the Juba Teaching Hospital where it was discovered that the witness was still alive. The others, however, did not survive.

⁴³³ Witness 786, ERN 101492-101498.

⁴³⁴ Witness 1117.

⁴³⁵ Witness 1070, ERN 102270-102274.

⁴³⁶ Witness 960, ERN 102089-102111.

⁴³⁷ Witness 993, ERN 102014-102053.

335. Extrajudicial execution while in detention is not limited to Juba. The Commission was also told about killings at the prison in the SPLA military base in Yei where detainees are also held in containers. The Commission was told:

When they want to kill you, they take you out of the container. There is one excavator who will dig a big hole. The militaries will take the first five in the line and instruct them to line in front of the hole. A group of militaries with guns will line in front of them and start shooting, some other militaries will use panga, it's a machete and hit, cut people. So, they all fall into the hole. Some fell alive before being hit by panga. Then the militaries gave order to the excavator to close the hole. Some people were buried alive. I saw that several times.⁴³⁸

336. In cases where a detainee died inside the NSS Blue House detention facility, the corpse would sometimes be taken to the post-mortem section of Juba Teaching Hospital, where the deceased's relatives would be given a phone call and told their relative was sick. This was intended to prepare the family members for what they would encounter when they arrived. The NSS would then offer the family money for the deceased's funeral expenses and use its vehicles to transport the body to any location the family requested.

337. The Commission was told that in instances where people were killed or died at the Giada detention facility, the bodies would sometimes be buried, but often they would be thrown in the Nile River. Other detainees were sometimes made to help dispose of the bodies in the Nile.

7. Enforced Disappearance

338. Many of the NSS and SPLA detention facilities do not appear to keep complete registers of those in their custody, do not allow visitors including family and lawyers, and do not communicate with families about the whereabouts of detainees. Indeed, the Giada SPLA military detention facility is the only detention facility in relation to which the Commission consistently received information about relatives having access to and communication with their relatives. The result is that when people are detained for weeks, months and years, no one knows whether they remain in detention or have died. They have in effect disappeared.

339. In this regard, the Commission notes that the Code of Criminal Procedure Act (2008) requires that a register of all arrests be kept at every police station.⁴³⁹ While this applies to police stations, it should apply to all places of detention. This does not appear to be the consistent practice even in official detention facilities, although some witnesses recounted being registered in the NSS Blue House. In this regard, one witness explained that an acquaintance had tried to locate him after his arrest: "he had even called some NSS officers he knew personally to search the different locations where they detain people and check the registries for my name. However, since nothing was recorded about my arrest, the NSS officers couldn't locate me."⁴⁴⁰ While this applies generally to all locations of detention, it is particularly a problem in relation to unofficial places of detention.

340. The Commission has documented at least five individual cases of detainees in the NSS Blue House who were removed in the middle of the night and who have never been seen or heard from again, including two UN staff members Anthony Nyero and James Lual.⁴⁴¹ However, this number is misleadingly low. Former detainees to whom the Commission spoke reported being uncertain as to the fate of fellow detainees transferred between locations without explanation, never to be seen or heard from again.

341. Additionally, the fate of detainees who died or were killed and then buried in unmarked mass graves, including behind the Bilpham military headquarters and Gorum detention facility, or thrown in the Nile river, remains unresolved for their families.

342. The Commission was told about how families not knowing whether their loved ones are alive continue to try to cope with their disappearances. A number of detainee's families have held a funeral for them, thinking them dead only for them to be released years later.

⁴³⁸ Witness 1070, ERN 102270-102274.

⁴³⁹ Code of Criminal Procedure Act (2008), section 96(1).

⁴⁴⁰ Witness 910, ERN 102126-102140.

⁴⁴¹ Amnesty International, "South Sudan: Fate of two detained UNMISS staff unknown: Anthony Nyero and James Lual", 14 December 2016.

8. Post-Release Surveillance

343. Even after detainees have been released, many of them continue to be under surveillance and threat. Some are required to report regularly to the security services or are prohibited from travelling. Furthermore, a number of witnesses told the Commission of being detained on multiple occasions of the course of many years. Some witnesses recounted attempts to re-arrest them, resulting in them living in hiding or continuously relocating. Others continue to be harassed, threatened and surveilled including in neighbouring countries. One witness told the Commission:

I started receiving phone calls. I was traumatised [...]. Each time, a man talking in Arabic would tell me: "I know [where] you are, we have our people there, surrender or we will come to take you back to South Sudan". I have never gone back to South Sudan since then and I keep moving [...]. The last call that I received was on 31 December 2018. I am very scared.⁴⁴²

9. Lasting Effects of Arbitrary Detention, Torture and Cruel, Inhuman or Degrading Treatment

344. Even after release, detainees have continued to suffer the consequences of their detention and have struggled to rebuild their lives. In addition to ongoing threats and surveillance discussed above, former detainees continue to suffer from physical and psychological trauma as well as difficulty rebuilding careers and family connections after long periods of absence. As one witness put it: "Anyone who tells you that life is normal after being detained isn't telling the truth."⁴⁴³

345. The Commission has found upon medical examination of a number of released detainees that many survivors continued to exhibit physical and psychological symptoms consistent with sustained torture and inhuman detention conditions. Additionally, some continued to suffer from curable skin infections, fungal diseases and scabies likely acquired while in detention, due to inadequate access to health care for prolonged periods of time.

346. A number of those to whom the Commission spoke expressed the need for psychological support after their release:

I never actually went for the counseling services because I thought my case wasn't as bad as it could have been. However, after seeing the way it has affected me, it is important for employers and health care providers to follow up with others who have had similar experiences of being detained.⁴⁴⁴

347. The effects of prolonged and arbitrary detention not only has an effect on detainees themselves but also their families. One witness mourned:

You can walk out of detention and find that your family is not where you left them, you no longer have a house and you don't know how to re-start your life... your life can end up in a total mess [...] My life has been brought to zero. All of the resources I had accumulated are now gone. [...] I am completely starting over with nothing. My children are not being educated... The time when they were supposed to receive the best education in their lives is now over... I was supposed to provide for them as their father. The trauma still resides inside of me because when I go home, there is no food. My children just look at me... I used to be a real father who could provide for them and now my children just stare at me... What did I do for my whole family to deserve this punishment and suffering? [...] If I was to be taken to court, I should have been taken to court, but I was tortured inside of there and just released like nothing happened... If I was a criminal, I would not be sad... but this is my pain... the life my family had, compared to the life they live today is a shock to them. I wish there was some form of justice...⁴⁴⁵

⁴⁴² Witness 1070, ERN 102270-102274, para. 13.

⁴⁴³ Witness 960, ERN 102089-102111.

⁴⁴⁴ Witness 906, ERN 101769-101782, para. 38.

⁴⁴⁵ Witness 950, ERN 101955-101979.

348. Upon release, many who had flourishing careers find themselves unemployed, unable to pay for medical bills or support their families. Others who have resumed employment find themselves unable to focus and re-engage in their professions.

349. Many who had once enthusiastically put their professional skills and energy toward building their new country, were left, perhaps inevitably, deeply disillusioned, no longer willing or able to engage:

I lost *everything*, and if there is peace in this country one day, I have to seek justice. If I was a rebel, there would be no problem. They could take me to court and let the court sentence me to 10 years, so I could be confident that I had legitimately done something wrong, but it's not possible they can just keep me inside there and then release me. This is not how things should be... our Government even fought Sudan for independence for the same reasons. Now they are doing the same thing and worse in South Sudan... This is one of the worst things that happened in my life, and it still really pains me. So, this is the situation I have to bear...⁴⁴⁶

10. Violations

a) *Arbitrary Arrest and Detention*

350. On the basis of the information collected and described above, the Commission finds reasonable grounds to believe that members of the NSS and the SPLA Military Intelligence Directorate engaged in regular and widespread arbitrary arrest and detentions throughout the country between December 2013 and the end of 2018. The Commission has found that people are detained for extended periods of time, up to years, without being charged, brought before a judge or magistrate, tried before a court, or given access to a lawyer. Indeed, the fact that many detainees are never even formally questioned indicates no real intention on the part of these organizations to investigate whether crimes have been committed by these individuals.

351. Arrest and detention in these conditions constitute arbitrary arrest and detention and are violations of domestic South Sudanese law. The Transitional Constitution (2011) provides that "Every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his or her liberty except for specified reasons and in accordance with procedures prescribed by law."⁴⁴⁷ Furthermore, they are violations of the rights set out in the Transitional Constitution for an arrested person to be informed at the time of his arrest of the reasons for his or her arrest and to be promptly informed of any charges against him or her.⁴⁴⁸ The Transitional Constitution also provides that "A person arrested by the police as part of an investigation, may be held in detention, for a period not exceeding 24 hours and if not released on bond to be produced in court."⁴⁴⁹ While this applies to police arrests, the National Security Service Act (2014) also provides that a person arrested by the NSS must be brought before a magistrate "as soon as is reasonably practicable within 24 hours."⁴⁵⁰

352. Arbitrary arrest and detention are also violations of the rights set out in the African Charter on Human and Peoples' Rights to liberty and the security of the person and not to be deprived of freedom except for reasons and conditions previously set out by law.⁴⁵¹ In particular, it provides that "no one may be arbitrarily arrested or detained."⁴⁵² The African Charter also provides the right to be tried within a reasonable time by an impartial court or tribunal.⁴⁵³ The rights not to be subjected to arbitrary arrest and detention and to be receive a fair and public hearing are also included in the Universal Declaration of Human Rights.⁴⁵⁴

⁴⁴⁶ Witness 960, ERN 102089-102111.

⁴⁴⁷ Transitional Constitution (2011), Article 12.

⁴⁴⁸ Transitional Constitution (2011) (as amended), Article 19(2).

⁴⁴⁹ Transitional Constitution (2011) (as amended), Article 19(4).

⁴⁵⁰ National Security Service Act (2014), section 54(2).

⁴⁵¹ African Charter on Human and Peoples' Rights, Article 6.

⁴⁵² African Charter on Human and Peoples' Rights, Article 6.

⁴⁵³ African Charter on Human and Peoples' Rights, Article 7(1).

⁴⁵⁴ Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), Articles 9, 10.

b) *Extra-Judicial Killings*

353. The Commission finds reasonable grounds to believe that members of the NSS and the SPLA Military Intelligence have carried out extra-judicial killings of people in their custody, as described above. This is a violation of the right to life under Article 12 of the Transitional Constitution (2011) as well as under Article 4 of the African Charter on Human and Peoples' Rights. It constitutes murder under section 206 of the Penal Code Act (206).

354. Furthermore, some of these extra-judicial killings have taken place in the context of rounding up and killing people perceived to be supporting opposition forces in the conflict. As such, there is a nexus between some of these killings and the non-international armed conflict that has been ongoing in South Sudan since December 2013. As such, they are violations of international humanitarian law under Common Article 3 to the Geneva Conventions and Additional Protocol II to which South Sudan is a party and which it has implemented in its Geneva Convention Act (2012). They should be investigated and prosecuted as war crimes, including under Article 4(a) of the Draft Statute of the Hybrid Court for South Sudan.

c) *Enforced Disappearance*

355. As set out above, the Commission finds reasonable grounds to believe that a significant number of those arrested and detained by the NSS and the SPLA Military Intelligence Directorate are effectively subjected to enforced disappearance as they are taken into custody by state security officials and never heard from again, with no acknowledgement from the state. In this regard, the Commission notes the lack of consistent registration of detainees at many of the detention facilities, detainees' lack of contact with lawyers and family members, the threats made during interrogations that detainees can be made to disappear as there was no paper trail to trace them, as well as the disposition of bodies in unmarked mass graves and the river.

356. The Commission notes with particular concern that when it raised with the Government the cases of Dong Samuel Luak and Aggrey Izbon Idris, who were members of the opposition and reportedly detained in Nairobi, Kenya and unlawfully transferred to NSS headquarters in Juba in January 2017. When the Commission raised the issue of the transfer and removal of Dong Samuel Luak and Aggrey Izbon Idris from Kenya, however, the Deputy Minister of Foreign Affairs and International Cooperation denied having any knowledge of their whereabouts, stating that the Commission should make inquiries of the Government of Kenya.⁴⁵⁵ However, at least eight witnesses the Commission spoke to indicated that they saw Aggrey Izbon Idris and Dong Samuel Luak in NSS custody in South Sudan shortly after they disappeared in Nairobi.

357. The International Convention for the Protection of All Persons from Enforced Disappearance, defines "enforced disappearance" as the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁴⁵⁶

358. South Sudan is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance. However, there are a number of domestic legal provisions which provide protection against enforced disappearance. In particular, the Code of Criminal Procedure Act (2008) provides that an arrested person has the right to inform and contact his or her family,⁴⁵⁷ a right which is consistently violated. As noted above, the Code of Criminal Procedure Act (2008) requires that a register of all arrests be kept at every police station.⁴⁵⁸ While this applies to police stations, it should apply equally to all detention facilities.

359. Furthermore, the Commission recalls the United Nations General Assembly's Declaration on the Protection of all Persons from Enforced Disappearance which states that:

⁴⁵⁵ Meeting with the Deputy Minister of Foreign Affairs and International Cooperation, Juba, 7 December 2018.

⁴⁵⁶ International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

⁴⁵⁷ Code of Criminal Procedure Act (2008), section 93(4).

⁴⁵⁸ Code of Criminal Procedure Act (2008), section 96(1).

Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.⁴⁵⁹

d) *Refoulement*

360. The Convention Relating to the Status of Refugees prohibits any State party from expelling or returning (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁴⁶⁰ This prohibition against return is also established in the AU Convention Governing Specific Aspects of Refugee Problems in Africa.⁴⁶¹

361. The Commission finds reasonable grounds to believe that James Gatdet Dak and Dong Samuel Luak, who both had refugee status in Kenya, were detained and transferred back to South Sudan in violation their right to *non-refoulement*. Kenya is a party to both these conventions and as such violated its international legal obligations.⁴⁶² Furthermore, although Aggrey Izbon Idris did not have refugee status in Kenya, he was nonetheless deported without due process despite having a valid visa to reside in Kenya.

e) *Torture and Other Cruel, Inhuman or Degrading Treatment*

362. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which South Sudan is a party, defines torture as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”⁴⁶³ The same acts not perpetrated for the purposes enumerated above may amount to cruel, inhuman or degrading treatment.

363. The Commission finds that there are reasonable grounds to believe, on the basis of information collected as described above, that members of the NSS and SPLA Military Intelligence Directorate engage in widespread and regular use of torture through the use of severe beatings, whippings, positional restraint, electrocution and psychological abuse such as threats. This mistreatment is, in most instances, undertaken to obtain information or confessions about professional activities or political support or to punish detainees for perceived political or ethnic affiliations and therefore amounts to torture.

364. The Commission further recalls that conditions of detention may in certain instances amount to torture or cruel, inhuman or degrading treatment including: “Conditions of detention, such as a small or overcrowded cell, solitary confinement, unhygienic conditions, no access to toilet facilities, irregular or contaminated food and water, exposure to extremes

⁴⁵⁹ Declaration on the Protection of all Persons from Enforced Disappearance Adopted by General Assembly resolution 47/133 of 18 December 1992, Article 1.

⁴⁶⁰ Convention Relating to the Status of Refugees, Article 33(1).

⁴⁶¹ AU Convention Governing Specific Aspects of Refugee Problems in Africa, Article II(3).

⁴⁶² Kenya ratified the Refugee Convention on 16 May 1966 and the AU Convention on 23 June 1992.

⁴⁶³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1).

of temperature, denial of privacy and forced nakedness.”⁴⁶⁴ In particular, the Commission recalls that solitary confinement may constitute torture or cruel, inhuman or degrading treatment, particularly if it exceeds 15 days or for indefinite periods of time.⁴⁶⁵ The Commission finds reasonable grounds to believe that in many cases, the conditions in which detainees are held, including in particular solitary confinement of more than seven months amounts to torture or cruel, inhuman or degrading treatment.

365. These acts of torture and cruel, inhuman or degrading treatment are violations of Article 18 of the Transitional Constitution (2011).⁴⁶⁶ They are also violations of the Code of Criminal Procedure Act (2008) which provides that “An arrested person shall not be subjected to any treatment against human dignity nor shall he or she be physically or morally abused.”⁴⁶⁷ Such acts also amount to crimes under South Sudan’s Penal Code (2008), including criminal force (section 224).

366. In addition to being violations of the Convention Against Torture, these acts of torture and cruel, inhuman or degrading treatment are also violations of the Universal Declaration of Human Rights,⁴⁶⁸ and the African Charter on Human and Peoples’ Rights.⁴⁶⁹

367. The Commission also finds reasonable grounds to believe that there was a nexus between the commission of some of these instances of torture and cruel, inhuman or degrading treatment and the non-international armed conflict has been ongoing in South Sudan since December 2013, as many of these acts occurred in the context of interrogating detainees about their knowledge and support of opposing armed groups. As such, they are violations of international humanitarian law under Common Article 3 to the Geneva Conventions and Additional Protocol II to which South Sudan is a party and which it has implemented in its Geneva Convention Act (2012). They should also be investigated and prosecuted as war crimes, including under Article 4(a) (violence to life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment) and 4(e) (outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault), as well as Article 6 (which covers serious crimes under the Relevant Laws of South Sudan, including torture, and gender-based crimes) of the Draft Statute of the Hybrid Court for South Sudan.

11. Responsibility

a) *Individual Responsibility*

368. The violations and crimes described in this section were perpetrated in both official and unofficial detention facilities by officers and officials of the National Security Services and the SPLA Military Intelligence Directorate, many of whom were identified by their names, ranks and functions by witnesses interviewed by the Commission, especially witnesses who were detained for lengthy periods of time and therefore came to know the

⁴⁶⁴ Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 145(m), Professional Training Series No. 8, Rev. 1 (2004).

⁴⁶⁵ “[T]he Special Rapporteur concurs with the position taken by the Committee against Torture in its General Comment No. 20 that prolonged solitary confinement amounts to acts prohibited by article 7 of the Covenant, and consequently to an act as defined in article 1 or article 16 of the Convention. For these reasons, [...] any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances.” Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 76, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez). “Furthermore, [the Committee] is concerned about the use of solitary confinement for indefinite periods of time. [...] Full isolation of 22 to 23 hours a day in super maximum security prisons is unacceptable (art. 16).” Comm. against Torture [CAT], Concluding observations on the combined third to fifth periodic reports of the United States of America, para.20, U.N. Doc. CAT/C/USA/CO/3-5 (19 December 2014). See also Torture and other cruel, inhuman or degrading treatment or punishment (2013) G.A. Res 68/156, para. 28, (18 December 2013).

⁴⁶⁶ Transitional Constitution (2011), Article 18.

⁴⁶⁷ Code of Criminal Procedure Act (2008), section 93(1).

⁴⁶⁸ Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A), Article 5.

⁴⁶⁹ African Charter on Human and Peoples’ Rights, Article 5.

identities of these officials well. All of these witnesses attested to the existence of a generally functional hierarchical system of management and operations of these facilities.

369. In this regard, the Commission notes that both the National Security Service Act (2014) and the SPLA Act (2009) provide for penalties for NSS members and SPLA soldiers, respectively, who commit violations. The National Security Service Act specifically provides for the application of the Penal Code to members of the NSS and also creates offences, among others, for abuse of power causing injury or damage to another person; conducting himself or in a way incompatible with the dignity or respect for his or her position; and inciting or coercing another member of NSS to commit an offence under the Act.⁴⁷⁰ The SPLA Act specifically creates an offence for mistreating a detained under a soldier's charge.⁴⁷¹ Both Acts further provide for Service Tribunals and Court Martials to deal with cases of misconduct.⁴⁷²

Detentions by the NSS

370. As noted above, the structure and functioning of the NSS is regulated by the National Security Service Act (2014). This Act provides that the NSS is made up of the National Security Council and two operational organs, the General Intelligence Bureau and the Internal Security Bureau, both of which are supported by a Legal Department.⁴⁷³

371. While the National Security Act (2014) does not specify any departments or officials as being in charge of detention, the Commission understands that the Internal Security Bureau is in overall charge of all detention matters as part of its operations.⁴⁷⁴ The Commission has requested from the Government of South Sudan information on the internal structure of a number of security agencies in South Sudan, including the NSS, but has not received any response from the Government to date.⁴⁷⁵

372. From information received by the Commission, it is clear that the two main detention facilities in Juba, the Blue House and Riverside, were each managed by a Director and a Deputy Director of Detention. In relation to the Blue House detention facility, there was apparently both an organizational unit in charge of detention facilities, and one responsible for what was variously described as "detention" or "protection" for the period from late 2014 onwards.

373. At the NSS Blue House, the Commission understands that the Director of Detention Facilities was the 'officer-in-charge' for the daily running of the detention centre, and would report to the Director of Detention. Accordingly, both these Directors, as well as their deputies would be aware of all ongoing activities at the detention facility, including the number of detainees, when they had arrived, the cell occupation and detention conditions, and any significant events that occurred on a daily basis.

374. The National Security Service Act (2014) provides for a strict adherence to the chain of command principles, emphasizing that all members of the NSS shall carry out orders issued by their superiors. In particular, all members of the NSS shall "bear responsibility for any orders issued by him or her"⁴⁷⁶, and shall "at all times obey lawful orders issued to him or her by their superior related to his or her duties and exert utmost effort in executing such order".⁴⁷⁷

375. The Commission has found no evidence that the regular chain of command within the NSS had broken down. To the contrary, many aspects of the arrest and detention of persons, including their transfer from different locations inside and outside of the country to Juba, their investigation, and release indicates these events took place as a result of orders by senior NSS (and Government officials), executed and coordinated by their subordinates inside the service.

⁴⁷⁰ National Security Service Act (2014), sections 56, 62, 73, 74. See also sections 61, 66, 67, 68.

⁴⁷¹ SPLA Act (2009), section 77(d).

⁴⁷² National Security Service Act (2014), section 77; SPLA Act (2009), section 34.

⁴⁷³ National Security Service Act (2014), section 9.

⁴⁷⁴ Confidential Document, ERN D114127-D114129; Confidential Meeting, 19 December 2018.

⁴⁷⁵ Note Verbale to the Ministry of Foreign Affairs and International Cooperation of the Government of South Sudan, Requesting Documentation from Different Ministries, CHRSS/COR/2018/32, 21 November 2018.

⁴⁷⁶ National Security Service Act (2014), section 58(1)(b).

⁴⁷⁷ National Security Service Act (2014), section 58(1)(c).

376. Furthermore, there are reasonable grounds to believe that NSS officials in charge or employed in the facilities knew or had reason to know of the actions of their subordinates toward detainees. This is particularly the case for detention facilities run by the NSS at the Blue House as it is the NSS headquarters with senior officials' offices located in the same compound, and, prior to December 2015, in the same building. In this regard, the Commission further notes that the detention conditions and ill-treatment of detainees has continued for at least five years since December 2013, making it even less likely that NSS officials could be unaware of the situation.

377. Even allowing for the apparently regular rotation of Directors and Deputy Directors in the facilities, and occasional changes in their duties and responsibilities, these officials clearly knew the dire conditions prevailing in the detention centres and the frequent occurrence of torture and ill-treatment, some of which happened in their own offices,⁴⁷⁸ or with their participation. Such conduct clearly contravenes the National Security Services Act (2014), which stipulates that NSS members must respect "the dignity and self-esteem of human beings and protect human rights".⁴⁷⁹

378. For example, the Commission was told that one of the Directors of Detention at the Blue House, a Major, personally whipped a detainee, and made another detainee watch the ill-treatment in an apparent act of intimidation. Similarly, it could not have escaped his notice that his office was being regularly used to ill-treated detainees, and when one detainee reported that he had been ill-treated by a (named) NSS guard, he failed to take action. This same Major was clearly aware of the inadequate and inhuman conditions of detention, including the lack of adequate medical care, at the Blue House, as detainees raised this with him, but were rebuked or ridiculed by him for doing so.

379. Furthermore, as a senior official in charge of detention, this Major would have been aware of the enforced disappearance of prisoners in his custody, and should have instigated prompt investigations into such occurrences. However, he apparently failed to take such action, even when directly requested to do so by the family of a detainee, who was taken from his cell by NSS officers and subsequently disappeared. The Commission is also aware of allegations that this Major was accused of having committed crimes before he started working at the Blue House, which, if true, might have disqualified him from employment in the NSS.⁴⁸⁰

380. Other NSS officials in charge of detainees at the Blue House reportedly ill-treated persons in their custody, for example a 2nd Lieutenant, who was one of the Directors of Detention Facilities, whipped a detainee, while in the presence of his superior officer, the Director of Detention, a 1st Lieutenant. During the time these officers were in charge, detainees were frequently and seriously ill-treated, without receiving medical treatment afterwards. In addition, a 2nd Lieutenant who was reportedly Director of Detention Facilities during a time period when several prisoners disappeared. In this context the Commission again notes that Directors of Detention Facilities, who were in charge of detainees' accommodation, and were responsible for organizing roll-calls, would be responsible for investigating whenever someone in their custody went missing; however, the Commission is unaware that any such investigation was ever undertaken.

381. Similarly, as has been noted previously, the NSS officials in charge of detention and detention facilities would also be aware that the conditions of detention were severely inadequate, as was the standard of medical care. This knowledge is clear from the apparent practice by some NSS officers of hiding deaths in detention by accompanying deceased detainees to hospital, pretending they were still alive.

382. The Commission understands that a similar system of detention management existed at other NSS facilities in Juba and other areas of the country, such as the Riverside and Jubek State National Security detention facilities. Given the grave human rights violations against detainees that reportedly occurred in these facilities (as described above), these officials would similarly incur criminal responsibility for failing to prevent or address these violations.

⁴⁷⁸ For example, the office of the Director of Detention at the NSS Blue House detention facility.

⁴⁷⁹ National Security Services Act (2014), section 53(1)(g).

⁴⁸⁰ National Security Service Act, 2014, Article 33.1.d.

383. The Director General of the Internal Security Bureau, a Lieutenant General, is in overall charge of the Internal Security Bureau,⁴⁸¹ and thus carries command responsibility for human rights violations that were committed against persons in NSS detention, whether these occurred in official or unofficial detention facilities. This Lieutenant General was reportedly informed on a daily basis about all developments in the Blue House detention facility, and was “ultimately responsible for everything that happened there ... these other guys are just minions”.⁴⁸² The Commission received information that both a 2nd Lieutenant who was Director of the Blue House Detention Facilities in 2015 and early 2016, and a Deputy Director of Detention Facilities in 2018, reported directly to the Director General of the Internal Security Bureau.

384. In addition, two Major Generals, who served as consecutive Deputy Director Generals were aware about the ill-treatment, conditions of detention and fair trial violations against detainees, by virtue of their senior positions, and as they were receiving NSS internal reports on the detainees. The first of these Major Generals also spoke to some detainees during their investigations and/or immediately prior to their release, and as such would have been aware of the violations of due process and the unlawful nature of the detention. In one case, this Major General reportedly unilaterally decided not to release a prisoner, despite his release already having been ordered by a higher authority. The second of these Major Generals reportedly told one detainee that his arrest and detention had been a ‘mistake’ and that they should not speak to anyone about what happened to them. This Major General was reportedly promoted to a Governor after he left the NSS in 2017.

385. Furthermore, senior NSS officials, including those from the Legal Department, were aware that in many cases, as outlined above, the detainees’ arrest had been for either spurious reasons (minor misdemeanours such as not possessing adequate documentation) and their continuing detention was completely arbitrary, in contravention of the National Security Service Act.⁴⁸³ No steps appear to have been taken by senior officers to release detainees or bring them before a court in line with the provisions of the National Security Service Act, or other applicable law, or to ensure that their subordinates were prevented from or punished for violating these basic rights of detainees to a fair trial.

386. The Commission therefore finds reasonable grounds to believe that at least the above-named NSS senior officials knew or had reason to know that subordinates under their effective control were committing or had committed human rights violations and related crimes against detainees in their custody, and failed to take reasonable and necessary measures to prevent or punish them. Criminal investigations and prosecutions should be undertaken to determine their criminal accountability for the crimes set out in this report as well as all crimes committed in NSS detention facilities.

Detentions by the SPLA Military Intelligence

387. There are reasonable grounds to believe that SPLA Military Intelligence officers in charge of official and unofficial detention facilities, as well as other senior SPLA commanders, committed serious human rights violations and related crimes against persons in their custody as described above, for which they could incur individual responsibility under national and international law.

388. The position of the head of the SPLA Military Intelligence Directorate was occupied by the same General from at least 2014 to September 2017,⁴⁸⁴ and as such could be liable for command responsibility with regard to the acts and omissions of subordinate officers under his effective control, and the crimes committed by them in detention facilities.

389. In addition, information received by the Commission, points to this General having been present, as well as issuing orders at some of the detention facilities. In one of the worst detention centres run by the Military Intelligence, the Gorum SPLA military facility, a man by the same name was identified as one of the senior commanders. He was also described as being in charge at Giada SPLA military barracks.⁴⁸⁵ The Commission has received

⁴⁸¹ National Security Service Act, 2014, Article 16.1.a.

⁴⁸² Witness 964, ERN 102148-102171, para. 46.

⁴⁸³ National Security Service Act (2014), section 54(2).

⁴⁸⁴ VOA, “South Sudan President Fires Army Chief”, 24 April 2014; Sudan Tribune, “S. Sudan former head of military intelligence welcomes appointment to foreign ministry”, 17 September 2017.

⁴⁸⁵ Confidential Meeting, 21 September 2018.

information naming other individuals who are reportedly part of the SPLA Military Intelligence apparatus, as being present and/or in charge of these facilities; however, further investigation is necessary to clarify their positions and the extent of their involvement in and responsibility for human rights violations and related crimes.

390. The Commission also received information identifying a General who was a senior commander at the Giada military barracks, however, further investigations are required to establish his precise position. In this regard, the Commission notes that an individual by the same name, the Commander of the Presidential Guard (also called Tiger Division)⁴⁸⁶ is listed on the United Nations sanctions list, pursuant to Resolution 2206/2015 and that the Giada barracks was reportedly guarded by the SPLA Tiger Division.

391. The Commission has collected information that some civilians were arbitrarily detained and ill-treated by Military Intelligence at the SPLA Grinthe barracks in Wau, the base of the 5 Division of the SPLA. As noted below in section VII(C), in line with the principles of military hierarchy, the Commander of the 5 Division, a Major General, would therefore have command responsibility for the troops subordinated to him and under his control, including officers of the Military Intelligence, whom he in any case outranked.

392. The Commission has also received information identifying an officer who was reportedly the Director of Military Intelligence in Yei town, Central Equatoria State, and in charge of detention at the local military barracks, where he ordered arbitrary arrests and detentions and supervised summary and extra-judicial killings in 2016-2018. In addition, command responsibility for crimes committed by military intelligence personnel could likewise be attributed to a Major General who was the Commander of SPLA 6 Division Commander in Yei during 2016.⁴⁸⁷

b) State Responsibility

393. As the NSS and the SPLA are government bodies, their violations of human rights give rise to state responsibility on the part of the Republic of South Sudan. The Government has a duty to investigate and prosecute these human rights violations and alleged crimes and to provide compensation and restitution to the victims and their families.

394. The Commission reiterates that the South Sudanese Government has been regularly urged by international media, diplomats, and international human rights organizations to release those arbitrarily detained and to launch prompt, effective and impartial investigations into the human rights violations committed against detainees.⁴⁸⁸ As such the South Sudanese Government should be well aware of the human rights violations committed against its own citizens by members of its own security services, sworn to uphold the law.

395. South Sudan has the obligation under the Convention Against Torture, to which it is a party, to take effective legislative, administrative, judicial or other measures to prevent acts of torture, as well as acts of cruel, inhuman or degrading treatment, in any territory under its jurisdiction.⁴⁸⁹ No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.⁴⁹⁰ It has the duty to undertake a prompt and impartial investigation where there are reasonable grounds to believe that torture or acts of cruel, inhuman or degrading treatment have been committed.⁴⁹¹

396. The Commission has received no information regarding steps taken by the Government to criminally investigate and prosecute those responsible for these events in any of the detention centres listed above, or to provide compensation to any of the victims.

⁴⁸⁶ Sudan Tribune, “Kiir appoints new Presidential Guard commander”, 14 May 2017.

⁴⁸⁷ Confidential Document, ERN D103041-D103041.

⁴⁸⁸ For example, Delegation of the European Union to South Sudan, *Joint Statement on the Detention of Peter Biar Ajak*, 3 August 2018; Amnesty International, “South Sudan: Denied Protection of the Law – National Security Service Detention in Juba, South Sudan”, April 2016; Amnesty International, “A Trail of Broken Promises, Detention, Torture and Other Ill-Treatment by the National Security Service and Military Intelligence Directorate in Juba, South Sudan, Continues”, September 2018; Human Rights Watch, “South Sudan Announces Release of ‘Prisoners of War and Detainees’”, 28 September 2018.

⁴⁸⁹ Convention Against Torture, Articles 2(1), 16.

⁴⁹⁰ Convention Against Torture, Article 2(2).

⁴⁹¹ Convention Against Torture, Article 12.

B. Women and Girls in South Sudan

397. South Sudan is a deeply patriarchal society, in which historically, custom and tradition have preserved the role of men as the main decision makers in society and entrenched the subservience of women and girls. Sexual and gender-based violence against women and girls continues to rise at an alarming level as a result of the inter-ethnic conflict since independence waged by multiple armed groups. In the period since the Commission's last report in March 2018, there have been numerous incidents of rape and other forms sexual violence, committed against women and girls including in Unity State where more than 150 women and girls are alleged to have been raped and gang raped in a period of two weeks. Sexual and gender-based violence against women and girls is pervasive in large part due to the total impunity for those responsible. The Commission in this chapter addresses the root causes of sexual and gender-based violence, including conflict-related sexual violence, and the nexus with customary norms and practises.

398. Structural inequalities, poverty and discrimination hamper the access of women and girls to justice and security as well as to transitional justice processes. This chapter traverses the lived experiences of inequality and discrimination that women and girls continue to face in South Sudan, the resilience with which they confront the devastating impact of the ongoing conflict. There is no doubt that more needs to be done to address impunity for sexual and gender-based violence crimes with a victim centred justice and at a community level to deal with the stigma and trauma experienced by survivors of sexual violence and their families.

399. In terms of custom and tradition, women and girls pass from their father's authority to their husband as men are considered to be the head of the family responsible for decision-making, building the family dwelling, helping their wives cultivate fields, and responsible for cattle and livestock.⁴⁹² Women are expected to be submissive and obedient to their husband and other males of the family, taking of household chores including procuring food, water, firewood, maintaining the house, cooking, caring for children and being sexually available to their husbands.⁴⁹³ Women are expected do most of the work.⁴⁹⁴ If the woman does not fulfil her obligations, she can be reprimanded physically.⁴⁹⁵

400. Traditional practices such as bride price, early child and forced marriage persist and impact negatively on women and girls. The status of a woman in the family and community is defined by the bride price her father can acquire from a future husband and his family on marriage.⁴⁹⁶ South Sudanese women, the Commission spoke to, lamented the fact that a man can marry as many women as he can afford. However, these practises have evolved in more educated and urban households, where educated women are less likely to accept polygyny.⁴⁹⁷ Single and divorced women are frowned upon in South Sudanese society.⁴⁹⁸ Similarly, a

⁴⁹² Care, "Inequality and injustice: The deteriorating situation for women and girls in South Sudan's war. A progressive gender analysis: 2013-2016", 2016; J. Wars, "Because now men are really sitting on our heads and pressing us down...": Report of a preliminary assessment of gender-based violence in Rumbek, Aweil (east and West), and Rashad County, Nubba Mountains, USAID and University of Missouri, 2005; O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁴⁹³ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; Care, "Inequality and injustice: The deteriorating situation for women and girls in South Sudan's war. A progressive gender analysis: 2013-2016", 2016.

⁴⁹⁴ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁴⁹⁵ S. Benesova, "Southern Sudanese Women in the Diaspora", in *The Osprey Journal of Ideas and Inquiry*, 2004, pp. 79 ff.; ACORD, "Conflict and Gender Study – South Sudan, Addressing Root Causes Programme", January 2018.

⁴⁹⁶ Conflict Sensitivity Resource Facility South Sudan, "Gender in South Sudan", 2018.

⁴⁹⁷ Witness 925, ERN 101886-101890; O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; What Works to Prevent Violence against Women and Girls consortium, "No Safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017; M. Fadlalla, *Customary Laws in Southern Sudan. Customary Laws of Dinka and Nuer*, iUniverse, 2009.

⁴⁹⁸ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

childless woman will be considered not worth keeping as men are expected to procreate numerous children, and risk being labelled as infertile and mocked by the community.⁴⁹⁹

401. South Sudanese women are accorded equality in law and at policy level as the Transitional Constitution recognizes the need to advance the rights of women as well as promote equality and non-discrimination between women and men. In terms of the Transitional Constitution, custom and tradition are regarded as a source of law with an obligation on the Government to ensure that all levels, “it enacts laws to combat harmful customs and traditions which undermine the dignity and status of women”.⁵⁰⁰ At a political level, the Transitional Constitution of South Sudan requires that Government should promote women’s participation in public life and their representation in the legislative and executive organs by at least 25 percent as a positive measure to redress the imbalances of the past.

402. Substantive equality continues to elude women in South Sudan despite these reforms and the Government’s accession to CEDAW and its Optional Protocol on 30 April 2015. The lives of South Sudanese women and girls continue to be dominated by family and clan prescriptions, in accordance with tradition and custom.⁵⁰¹ The Government of South Sudan has also developed a National Action Plan for the implementation of United National Security Council Resolution 1325 on Women, Peace and Security and related resolutions.⁵⁰²

403. The prevailing inequalities and discrimination in power relations, lack of access to resources and the inability to access quality education, have made women and girls incredibly vulnerable and susceptible to domestic violence, which has been exacerbated by the conflict. The vast majority of cases brought by women are dealt with under customary law with an outcome usually violating their rights as the customary system is designed to remedy the grievances primarily of men and of communities as a whole, and have tended to fail women.

404. The increase in conflict-related sexual violence and the lack of accountability for these crimes continue to be of deep concern. This has also led to an international NGO filing the first ever case against the Government of South Sudan the CEDAW Committee in December 2018 for the rape, mass rape and sexual slavery of thirty South Sudanese women and girls before. The Complaint argues that the Government of South Sudan is in violation of its obligations under CEDAW as a result of its failure to protect and investigate, prosecute and eliminate sexual and gender-based violence committed against the complainants, specifically in relations to crimes committed in or around Central Equatoria in 2016 and 2017.⁵⁰³

1. Changes in Gender Roles and Norms

405. Gender norms and relations are dynamic and have gradually evolved. This evolution is reflected in legislation and peace agreements, and in the increasing number of female civil servants, politicians and women working in civil society, media, academia and the business sector. The ongoing armed conflict and displacement has also resulted in many women being widowed and separated from their spouses resulting in them taking on the role of the head of the family and household carrying the responsibility for all in the family. Women have become economically independent and resourceful in supporting their families.

406. While the conflict has resulted in greater poverty and hardship for women already impoverished, it has also built resilience and new opportunities to transform traditional

⁴⁹⁹ O. Stern, “‘This is How Marriage Happens Sometimes’: Women and Marriage in South Sudan”, in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁵⁰⁰ Transitional Constitution of the Republic of South Sudan as amended by the Transition Constitution of South Sudan, 2011 (Amendment) Act, 2013, Article 16 (4)(b).

⁵⁰¹ See the Transitional Constitution of the Republic of South Sudan as amended by the Transitional constitution of South Sudan, 2011 (Amendment) Act, 2013 which provides for the equality of rights and duties for men and women (Preamble, Article 16: Rights of women), the equal protection of the law without discrimination (Article 14: Equality before the Law), for the unconstitutionality of forced marriage (Article 15: Right to found a family), the Rights of women including the obligation for the Government at all level to enact laws to combat harmful customs and traditions which undermine the dignity and status of women (Article 16: Rights of women); Local Government Act (2009), section 110; M. Hove, E. Ndawana, “Women’s Rights in Jeopardy: the case of war-torn South Sudan”, *Sage open*, October-December 2017: 1-13; Care, “‘The girl has no rights’: Gender-Based violence in South Sudan”, Report, 2014.

⁵⁰² Government of South Sudan, National Action Plan on UNSCR 1325 on Women, Peace and Security and Related Matters, 2015-2020.

⁵⁰³ Legal Action Worldwide (LAW), “First Legal Case Lodged Against South Sudanese Government for Gang Rape and Sexual Slavery”, 6 December 2018.

gender norms and roles in South Sudanese society. Economic independence has led to many women heads of households challenging the usual gender roles in their families and in the broader society.

407. The ongoing conflict in South Sudan has impacted on men through challenging the traditional norms of masculinity in a society in which men are traditionally charged with the responsibility to protect their family and community. Masculinity is also demonstrated by taking part in fighting and cattle raiding. Not unsurprisingly, men who cannot provide for their family as they did before the war, are unable to perceive their identity as providers denied.⁵⁰⁴

408. The inter-ethnic conflict has also led to the introduction of new practises especially in the rites of passage for boys to adulthood which challenge prevailing norms of masculinity. Young men are unable to marry as they have no secure income or wealth in the form of land or cattle, consequently turn towards criminal activities, violence or substance abuse, especially in the PoC sites.⁵⁰⁵ This challenge to masculinity has also manifested in anti-social behaviour and an increase in domestic violence and gang rapes.⁵⁰⁶

409. It would be inaccurate to take the view that only men are resistant to women's equality and the elimination of customary practices harmful to women, in many instances, women themselves have been reluctant to accept change.⁵⁰⁷ Women should not be characterised as victims and men as perpetrators as women have agency and in some instances are themselves perpetrators and have also incited men to engage in inter-ethnic communal violence including cattle raiding.⁵⁰⁸

2. The Status of Women in the Public Sphere

410. Historically, women in South Sudan have always participated in the peace process, including in the Revitalization process although not always in the most visible role and with a few exceptions not at the frontline of negotiations.⁵⁰⁹ The participation of South Sudanese women in the public sphere has however improved with several legal provisions providing for equality and a minimum quota for women's representation in public institutions.⁵¹⁰ The Transitional Constitution also provided for a quota of 25 percent for the participation of women at all levels of government, which has been increased by the R-ARCSS to 35 percent of women in the Transitional Executive and the transitional justice institutions.⁵¹¹

⁵⁰⁴ Confidential Meeting, 4 October 2018; Focus Group Discussion, 5 October 2018; Witness 162, ERN D101242-D101244; O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokuto (Otuhlo), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Serie 1, Volume 1, 2012; UNDP, *The ascertainment of customary laws of the Balanda Bviri, Bongo, Ndogo and Mundari Communities of the Western Bahr el Ghazal and Central Equatoria States of South Sudan*, Series 1, Volume 2, 2012; *Ibid.*, *The ascertainment of customary laws of the Avukaya, Moru, Baka, Wa'di and Jur-Bel Communities of the Western Equatoria and Lakes States of South Sudan*, Series 1, Volume 3, 2012; S. E. Hutchinson, *Nuer Dilemmas. Coping with Money, War and the State*, University of California Press, 1996; M. Fadlalla, *Customary Laws in Southern Sudan. Customary Laws of Dinka and Nuer*, iUniverse, 2009; C. Mareng, *Loveless Mariage Among the Dinkas*, The Key Publishing House, 2014.

⁵⁰⁵ Confidential document, ERN D116346-D116348; Confidential document, ERN D116715-D116717; Confidential Meetings, 4 October 2018 and 22 January 2019; Focus Group Discussion, 5 October 2018.

⁵⁰⁶ Witness 932, ERN 101705-101710; Conflict Sensitivity Resource Facility South Sudan, Gender in South Sudan, 2018; ACORD, "Conflict and Gender Study – South Sudan, Addressing Root Causes Programme", January 2018.

⁵⁰⁷ Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012. K. Grabska, Gender, *Home & Identity. Nuer Repatriation to Southern Sudan*, Eastern Africa Serie, Boydell & Brewer, 2014.

⁵⁰⁸ ACORD, "Conflict and Gender Study – South Sudan, Addressing Root Causes Programme", January 2018.

⁵⁰⁹ M. van der Wolf, "Women Take Role in South Sudan Peace Talks", VOA News, 16 January 2014. See also participation in the drafting of the Comprehensive Peace Agreement of 2005 and the R-ARCSS.

⁵¹⁰ See the Transitional Constitution of the Republic of South Sudan as amended by the Transitional constitution of South Sudan, 2011 (Amendment) Act, 2013 which provides for the equality of rights and duties for men and women (Preamble, Article 16), the equal protection of the law without discrimination (Article 14: Equality before the Law), for the unconstitutionality of forced marriage (Article 15: Right to found a family), the Rights of women including the obligation for the Government at all level to enact laws to combat harmful customs and traditions which undermine the dignity and status of women (Article 16: Rights of women); Local Government Act (2009), section 110.

⁵¹¹ R-ARCSS, Articles 1.4.4 and 5.1.1.

411. These quotas have undoubtedly resulted in an increase in women's participation which is at close to 30 percent in the South Sudan Legislative Assembly and at 12 percent in the State's Legislative Assembly.⁵¹² However, it has not improved significantly at local government level: only one out of 10 Governors is a woman with only one woman County Commissioner out of 82 (Western Equatorial) and only 19 women state ministers out of a possible 127 (constituting approximately nearly 15 percent). Women are rarely awarded high level positions and even in institutions where they do exceed the requisite 25 percent level, they still find themselves at the lower end as a result of poor literacy levels, low quality education and the lack of opportunity.⁵¹³

412. While this has not translated into substantive gains for women it is nevertheless a positive step forward in a country in which both the public and political sphere have traditionally been dominated by men who take key decisions affecting women without consulting with them.⁵¹⁴ The Judiciary as at 2013 only included three percent of women, a figure that has not changed much since.⁵¹⁵ The Secretary-General in his 2017 report on women and peace and security noted that a gender-responsive legal and judicial system constitutes one of the building blocks of a resilient society.⁵¹⁶

413. The R-ARCSS and the Transitional Constitution of 2011 recognize the need to improve the participation of women and to advance their rights which continues to be stymied by a lack of political will on the part of the Government which manifests in the failure to build effectiveness measures to ensure realization.⁵¹⁷ Women themselves have voiced that the ongoing conflict and increased militarization as well as the lack of political will on the part of the Government limits their participation in the public life of the country despite specific provisions in the Constitution and now the R-ARCSS.⁵¹⁸ Furthermore, in rural areas many women have no formal education and continue to face exclusion and discriminatory practices, making their participation in the public sphere even more difficult.⁵¹⁹ In addition, the development of women's organizations and movements is still at an embryonic stage with very few women's organizations truly diverse and representative of the plurality of women in South Sudan. Nevertheless, the return of many qualified women to southern Sudan due to its independence and the important role that women should play in the political, economic and cultural development cannot be underestimated.

3. Customary law and the Advancement of Women's Rights

414. The Transitional Constitution of South Sudan provides that customary law should be regarded only as a source of law in South Sudan, and is binding to the extent that it does not conflict with the provisions of the Constitution. The reality however, is that numerous customary law provisions in respect of the status of women conflict with the right to equality in the Constitution and the statutory legal framework. In addition, while statutory and customary law courts coexist, statutory courts often apply customary law to women to their detriment.⁵²⁰

415. Gender biases are significant in the outcomes of the customary law courts and the statutory justice systems which are headed mainly by men with patriarchal views and entrench the notion of men as the heads of families and women in a subordinate role. For example, in cases of sexual and gender-based violence⁵²¹ it is not uncommon for customary

⁵¹² Inter-Parliamentary Union.

⁵¹³ JMEC, *Progress Report No. 4: on the Status of Implementation of the R-ARCSS 2018*, 10 December 2018.

⁵¹⁴ M. van der Wolf, "Women Take Role in South Sudan Peace Talks", VOA News, 16 January 2014; Statement from South Sudanese Women Leaders, 26th September 2018, Djibouti; A. T. Mayai, "Improving Gender Equality Quota Implementation in Post-conflict South Sudan", Weekly Review, The Sudd Institute, 6 November 2018.

⁵¹⁵ A. T. Mayai, "SPLM Politics of Gender Equity", Weekly Reviews: The Sudd Institute, Juba, South Sudan, 2013; Confidential Meeting, 2 December 2018.

⁵¹⁶ Report of the Secretary-General on women and peace and security, S/2017/861, 16 October 2017.

⁵¹⁷ A. T. Mayai, "Improving Gender Equality Quota Implementation in Post-conflict South Sudan", Weekly Review, The Sudd Institute, 6 November 2018.

⁵¹⁸ Articles 16(3) and 16(4)(a) of the Transitional Constitution, 2011; See A. T. Mayai, *Improving Gender Equality Quota Implementation in Post-conflict South Sudan*, The Sudd Institute, 6 November 2018.

⁵¹⁹ Conflict Sensitivity Resource Facility South Sudan, "Gender in South Sudan", 2018.

⁵²⁰ Conflict Sensitivity Resource Facility South Sudan, "Justice in South Sudan", 2018.

⁵²¹ Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012. See also e.g. a ruling from the Malual Bap Customary Court, Rumbek Central County of 4 February 2008

courts to order as compensation, the payment of a “girl child” to the family of the deceased in a murder case.⁵²²

416. The importance of the customary law courts has been reinforced by the long years of conflict, the resulting instability in the country, the absence of statutory structure and the lack of reform of the legal system with the emergence firstly of Southern Sudan and then South Sudan following independence.⁵²³ These customary law courts have been available and accessible to the vast majority of South Sudanese even during the conflict period and provide speedy and affordable justice for people as in most instances statutory courts are non-existent and where they do are extremely costly.

417. However, decisions of customary law courts are often unpredictable and violate a number human rights principles binding South Sudan.⁵²⁴ The Secretary-General pointed out that rule of law institutions in transition and conflict contexts should be supported to address inequality and respond to the most urgent needs of women affected by conflict, ensuring accountability for sexual and gender-based violence. He went on to say that the fair administration of both formal and informal justice processes requires that specific steps are implemented to promote women in leadership positions. National justice systems must be strengthened to facilitate the investigation and prosecution of sexual and gender-based crimes consistent with international standards and in compliance with the principles of non-discrimination.⁵²⁵

4. Marriage and Divorce

418. Marriage in South Sudan creates ties between two individuals and their families, clans and communities⁵²⁶ and can vary from one community to the other.⁵²⁷ Traditionally, marriage involves the payment of a bride price by the husband and his family to the bride’s family, either in cattle heads, goats, money, cereals, honey, and weapons.⁵²⁸ The new bride is

“On this day there were 63 men and 4 women at the court. Two cases were heard one was GBV. In this case a wife, 26 years old, brought a case against her husband, 40 years old, for beating her. Both are Dinka. The woman refused to cook food for the husband and told him to “go find his own water.” The man was insulted and beat her with a stick. He stated to the court, “when you beat her properly she will listen to you.” The chiefs found that Dinka customary law supports beating your wife if she threatens you. The chiefs ordered a punishment of thirty lashes to the woman in order to respect her husband. The woman did not agree with the court’s decision” cited in UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokuto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Series 1, Volume 1, 2012 and T Mennen, “Lessons From Yambio, Legal Pluralism and Customary Justice, Reform in Southern Sudan”, *Hague Journal on Rule of Law*, Volume 2, Issue 2, p. 218.

⁵²² Justice Africa, “Justice in Practice: South Sudan”, Spring 2015; Conflict Sensitivity Resource Facility South Sudan, “Justice in South Sudan”, 2018; UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokuto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Series 1, Volume 1, 2012

⁵²³ Human Security Baseline Assessment for South Sudan and Sudan, “Women’s Security and the Law in South Sudan”, Small Arms Survey, March 2012.

⁵²⁴ UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokuto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Serie 1, Volume 1, 2012; A/HRC/AC/9/2, *Preliminary study on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, 14 May 2012; B. Kühn, “Universal Human Rights vs. Traditional Rights”, in *Topical Review Digest: Human Rights in Sub-Saharan Africa*, University of Denver, 2009, pp. 59-73; M. Fadlalla, *Customary Laws in Southern Sudan. Customary Laws of Dinka and Nuer*, iUniverse, 2009.

⁵²⁵ Report of the Secretary-General on women and peace and security, S/2017/861, 16 October 2017.

⁵²⁶ O. Stern, “‘This is How Marriage Happens Sometimes’: Women and Marriage in South Sudan”, in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; S. Benesova, “Southern Sudanese Women in the Diaspora”, *The Osprey Journal of Ideas and Inquiry*, 2004, pp. 79s; What Works to Prevent Violence against Women and Girls consortium, “No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan”, 2017; Justice Africa, “Justice in Practice: South Sudan”, Spring 2015; B. Juuk, “South Sudanese Dinka Customary Law in Comparison with Australian Family Law: Legal Implications for Dinka Families”, *The Australian Review of African Studies*, Vol. 34, No. 2, December 2013, pp. 99-112.

⁵²⁷ M. Hove, E. Ndawana, “Women’s Rights in Jeopardy: the case of war-torn South Sudan”, *Sage open*, October-December 2017: 1-13; UNDP, “Ascertainment of Customary Laws in South Sudan”, Discussion Paper, 2012; UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokuto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Serie 1, Volume 1, 2012.

⁵²⁸ UNDP, “Ascertainment of Customary Laws in South Sudan”, Discussion Paper, 2012; M. Fadlalla, *Customary Laws in Southern Sudan. Customary Laws of Dinka and Nuer*, iUniverse, 2009; C. Mareng, *Loveless Mariage Among the Dinkas*, The Key Publishing House, 2014.

expected to replace the loss of cattle of her husband's family by giving birth to numerous children.⁵²⁹ The dire economic situation of South Sudan has increased the importance of the bride price in the relationships between families.⁵³⁰

419. Divorce remains rare,⁵³¹ but in most cases when granted, will trigger the return of the bride price from the wife's family to the former husband's family, resulting in many families pressuring women to reconcile especially since children remain in the husband's custody.⁵³² In most cases of domestic violence, customary law courts will favour maintaining a marriage and in some instances has been at the expense of endangering a woman's life.⁵³³ The ongoing conflict, exposure to life in urbanized settings including in the PoC sites and refugee camps is changing traditional marriage practices as income and cattle is not so widely available to pay bride price.⁵³⁴

420. Separation is not in the interest of women as any other relationship they enter into is considered to constitute the crime of adultery, under South Sudanese law.⁵³⁵ Children born from such relationships will in terms of tradition be deemed to be a child of her husband.⁵³⁶ In most cases, families and customary law courts will favour repairing the relationship for the good of the community.⁵³⁷ For example a customary law court in Warrap State ruled that a women did not have to forcibly remarry her former husband from whom she had previously obtained a divorce ruling from a customary law court for mistreatment and domestic violence. However, the court ruled that before she could get remarried her family had to pay back the bride price to the former husband.⁵³⁸

421. Under customary law, the death of a spouse does not terminate marriage, resulting in a widow being totally dependent on her late husband's family to survive. In some instances she will be married off to a male relative of her deceased husband through "wife inheritance", to maintain the strength of the clan.⁵³⁹ This practice originally intended to offer widows protection and support on the death of a spouse has had the consequence of reinforcing the notion of women as property, transferred to a male relative who inherits the belongings, the widow and the children of the deceased husband.⁵⁴⁰

⁵²⁹ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

⁵³⁰ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁵³¹ UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokoto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Series 1, Volume 1, 2012.

⁵³² In the case of young children, they would be left with their mother until they are older and can live with their father. Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012; Conflict Sensitivity Resource Facility South Sudan, "Justice in South Sudan", 2018.

⁵³³ Justice Africa, "Justice in Practice: South Sudan", Spring 2015, O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁵³⁴ K. Grabska, *Gender, Home & Identity. Nuer Repatriation to Southern Sudan*, Eastern Africa Serie, Boydell & Brewer, 2014; What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017; K. Grabska, "Marrying on credit: the burden of bridewealth on refugee youth", *Forced Migration Review*, Issue 40, August 2012, pp. 7-8.

⁵³⁵ See Section 266 of the Penal Code (2008). The section refers to customary law to deal with this offence.

⁵³⁶ The Child Act (2008) remains vague about the definition of 'parents'. Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012.

⁵³⁷ Justice Africa, "Justice in Practice: South Sudan", Spring 2015.

⁵³⁸ Michael Arensen, "If we leave we are killed. Lessons learned from South Sudan Protection of Civilian Sites 2013-2016", IOM, 2016; Justice Africa, "Justice in Practice: South Sudan", Spring 2015.

⁵³⁹ UNDP, "Ascertainment of Customary Laws in South Sudan", Discussion Paper, 2012; for the Dinka, see e.g. B. Juuk, "South Sudanese Dinka Customary Law in Comparison with Australian Family Law: Legal Implications for Dinka Families", *The Australian Review of African Studies*, Vol. 34, No. 2, December 2013, pp. 99-112.

⁵⁴⁰ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011. What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017. Care, "Inequality and injustice: The deteriorating situation for women and girls in South Sudan's war. A progressive gender analysis: 2013-2016", 2016.

5. Early Child and Forced Marriages

422. The practise of early and forced marriages is rife in South Sudan with 52 percent of girls being married before they turn 18 years old and nine percent before they turn 15 years old.⁵⁴¹ South Sudan ranks higher than most States with the highest prevalence of teenage pregnancies in the world.⁵⁴² The ongoing conflict and the dire economic situation in the country has resulted in families marrying off their daughters as young as 12 in order to obtain economic relief,⁵⁴³ and under the mistaken assumption that it will offer them protection from abduction and rape.⁵⁴⁴ Forced marriage also happens by way of “girl compensation”, when two families settle their disputes and reconcile by giving away a woman to marry a man in the other family.⁵⁴⁵

423. Most girls are unaware of health risks associated with early pregnancy and the risk of exposure to sexually transmitted diseases, including HIV, especially in polygynous marriage.⁵⁴⁶ Girls are also more prone to domestic violence as they have less experience in managing the household.⁵⁴⁷ Young girls have been known to deliberately become pregnant in order to escape forced marriage. While she risks being punished by her family, in some instances, it will give her the opportunity to marry the man of her choosing as traditional settlement favours marriage with the father of the child.⁵⁴⁸

424. In October and November 2018, the family of a 17-year-old Dinka girl from Lakes State sparked outrage when they auctioned her off on social media for marriage to the highest bidder, an older man, already husband to 8 wives, for more than 500 cattle, luxury vehicles, a sum of money and other commodities.⁵⁴⁹ If several men are competing to marry the same woman, very often the higher bidder marries her which was the case in the present instance.⁵⁵⁰

425. While the Government of South Sudan has committed to ending child marriage by 2030⁵⁵¹ and article 17 of the Transitional Constitution provides that every child has the right not to be subjected to exploitative practices or abuse and not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity, and to be protected from abduction and trafficking, these admirable intentions are at odds with customary practices which are protected by the provisions of Article 33 of the Transitional Constitution.

426. Article 33 provides that ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with the

⁵⁴¹ UNICEF, “State of the World’s Children”, 2017.

⁵⁴² UNICEF, “State of the World’s Children”, 2017.

⁵⁴³ Plan International, “South Sudan: Girls’ education cannot wait”, 10 June 2015; South Sudan Protection Cluster, “Protection Trends: South Sudan, January – December 2017”, April 2018.

⁵⁴⁴ O. Stern, “‘This is How Marriage Happens Sometimes’: Women and Marriage in South Sudan”, in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; S. Mednick, “Child bride auction in South Sudan goes viral, sparks anger”, *The Washington Post*, 21 November 2018; Care, “Women and girls in emergencies”, 2018.

⁵⁴⁵ O. Stern, “‘This is How Marriage Happens Sometimes’: Women and Marriage in South Sudan”, in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁵⁴⁶ UNFPA, “Mother in childhood. Facing the challenge of adolescent pregnancy. State of the world population 2013”, 2013; C. McGee, “South Sudan: The deadly consequences of child marriage”, *Al Jazeera*, 16 February 2016.

⁵⁴⁷ O. Stern, “‘This is How Marriage Happens Sometimes’: Women and Marriage in South Sudan”, in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁵⁴⁸ What Works to Prevent Violence against Women and Girls consortium, “No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan”, 2017.

⁵⁴⁹ Though it appears the girl and her mother were favouring another suitor.

⁵⁵⁰ Confidential Meetings, 22 November 2018 and 5 December 2018; The AHA Foundation, “South Sudan Girl Auctioned on Facebook for marriage”, 14 November 2018; W. Cirino, “South Sudan Girl Auctioned on Facebook for Marriage”, *VoA*, 6 November 2018; M. E. Taylor, “The Incredible South Sudanese culture of auctioning girls for marriage”, *Face 2 Face Africa*, 16 November 2018; S. Beswick, “‘We are bought like clothes’: The war over polygamy and levirate marriage in South Sudan”, *Northeast African Studies*, Vol. 8, issue 2, pp. 35-62.

⁵⁵¹ UNFPA, “Statement on ending child marriage in South Sudan by the Ministry of Gender, Child and Social Welfare and UNFPA”, 3 December 2018.

Transitional Constitution and the law.⁵⁵² Furthermore, while the Child Act, 2008 defines a child as any human being below 18 years old, the Constitution does not define the marriageable age which appears to be left to the appreciation of communities and start with puberty.⁵⁵³ These contradictions between the South Sudanese statutory legal framework and negative and harmful cultural practices have yet to be addressed.

427. The protracted conflict in South Sudan has had the most profound impact on girls with regard to their physical security and the risk posed by sexual and gender-based violence, the lack of access to food and education and the lack of access to appropriate health care, especially reproductive and sexual health care.⁵⁵⁴ Despite the increase in girls' enrolment in schools, since the signing of the Comprehensive Peace Agreement in 2005, girls face a number of challenges in accessing and remaining in formal education in South Sudan. These obstacles include the resistance of some families to educate girls, as some parents, particularly in agro-pastoralist communities, fear that in school their daughters will become pregnant or become too independent and self-assertive. It is still common for adolescent girls to miss several days of school a month due to the lack of menstrual support.⁵⁵⁵ However girls, often encouraged by their mothers, are willing to study despite barriers.⁵⁵⁶ In South Sudan, only 16 percent of female over 15 years of age are literate, against 40 percent of males of the same age.⁵⁵⁷

428. Girls live in fear of being abducted during military attacks and dread being around soldiers.⁵⁵⁸ The ongoing conflict has also made girls vulnerable to trafficking, sexual exploitation and child and forced marriage, despite the Constitution and the Penal Act criminalizing these practice.⁵⁵⁹ Furthermore, displacement has led to extended family members sharing shelters creating overcrowding which tend to increase disputes and domestic violence. Living in such close proximity to each other also creates the opportunity for sexual violence against girls from males in the extended family.⁵⁶⁰

6. Bride Price

429. Cattle raiding happens routinely and seasonally in order to enlarge one's herd which is considered a marker of wealth, virility and social status and is used to pay for the bride price.⁵⁶¹ In order to afford to pay the bride price, men are pressured to acquire wealth, especially in cattle heads and to marry several women for status.⁵⁶² While boys born from these unions ensure continuity and enlargement of the clan, girls will bring in more cattle heads when they get married.⁵⁶³ Increased militarization has resulted in military commanders

⁵⁵² Legal protection from early marriage also comes from the Child Act (2008), sections 5, 23(1), 26(1), 30 or the Local Government Act (2009), section 111(1).

⁵⁵³ Transitional Constitution (2011), Article 15; See M. Fadlalla, *Customary Laws in Southern Sudan. Customary Laws of Dinka and Nuer*, iUniverse, 2009.

⁵⁵⁴ Discussion focus group, 5 October 2018; Witness 981, ERN 101980-101992; Plan International, "Adolescent girls in crisis: Voices from South Sudan", 2018.

⁵⁵⁵ IOM, "South Sudan Update", November 2018, p. 5.

⁵⁵⁶ Witness 981, ERN 101980-101992.

⁵⁵⁷ What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017; H. Jay, K. Lee-Koo, "Raising their voices: Adolescent girls in South Sudan's Protracted Crisis", Monash Gender, Peace and Security, June 2018.

⁵⁵⁸ Witness 699, ERN 101521-101529; H. Jay, K. Lee-Koo, "Raising their voices: Adolescent girls in South Sudan's Protracted Crisis", Monash Gender, Peace and Security, June 2018.

⁵⁵⁹ Confidential Meeting, 3 October 2018; Plan International, "Adolescent girls in crisis: Voices from South Sudan", 2018.

⁵⁶⁰ Confidential Meetings, 4 October 2018 and 27 January 2019; Plan International, "Adolescent girls in crisis: Voices from South Sudan", 2018.

⁵⁶¹ H. Wild *et al.*, "The militarization of cattle raiding in South Sudan: how a traditional practice became tool for political violence", *Journal of International Humanitarian Action*, 2018, 3:2; Conflict Sensitivity Resource Facility South Sudan, "Gender in South Sudan", 2018; Care, "Inequality and injustice: The deteriorating situation for women and girls in South Sudan's war. A progressive gender analysis: 2013-2016", 2016. What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017; Ch. Hoots, "The role of livestock in refugee-host community relations", *Forced Migration Review*, August 2018, Issue 58, pp. 71-74. See *inter alia* Radio Tamajuz, "Policeman killed, one injured in a cattle raid in Western Lakes State", 10 December 2018; Radio Tamajuz, "500 cows stolen in fresh Duk Padiet raid", 9 December 2018.

⁵⁶² But it is not the only reason.

⁵⁶³ S. Beswick, "'We are bought like clothes': The war over polygamy and levirate marriage in South Sudan", *Northeast African Studies*, Vol. 8, issue 2, pp. 35-62.

manipulating traditional cattle raiding practices in some communities to raise troops, mobilizing communities along ethnic lines.⁵⁶⁴ Girls are also targeted and abducted during cattle raids and can then be auctioned to men and families and/or forcibly married in order to enlarge clans.⁵⁶⁵

430. Cattle raiding and the ensuing reprisal attacks while historical, have been distorted by the ongoing conflict and used increasingly as a military tactic as is evidenced by the conflict in Unity state between April and June 2018.⁵⁶⁶ Revenge attacks and killings perpetuate a cycle of revenge which feeds insecurity, and results in the abduction and rape of women and girls, remaining central to community conflicts.⁵⁶⁷ Evidence collected by the Commission confirms that attacks against civilians in some villages, such as in Unity state between April and June 2018, were incredibly brutal with men in those villages deliberately targeted and forced to flee or risk being killed.

7. Women and Access to land

431. In most South Sudanese communities, access to and the use of community land is governed by customary law where males inherit land from their fathers while women are excluded from being able to inherit land from either their husbands or fathers and are only entitled to usage of land through their male relatives.⁵⁶⁸ Both traditional and statutory courts discriminate against women being able to benefit from land rights in their family.⁵⁶⁹ The only instance in which a woman is able to acquire land independently is when she is identified as being vulnerable, i.e. in the case of a widow, or is the head of a household with young children and when it is in the interest of the community.⁵⁷⁰

432. While the Transitional Constitution provides that women can own property and inherit a share of their deceased husband's estate, they have yet to realize this right substantively.⁵⁷¹

433. A key challenge going forward is how the Government of South Sudan will deal with the return of the millions of South Sudanese displaced and where women and girls constitute households. Women interviewed in Yei, raised that when they had returned home to their villages, they had found their homes and land occupied. Widows in particular returning to their villages will find it difficult to access land without an adult male to claim it as per customary law.

8. Sexual and Gender-Based Violence in South Sudan

434. A recent study on violence against women and girls in South Sudan found that between 50 to 75 percent of women and girls had experienced intimate partner violence in their lifetime and around one third had been sexually assaulted by a non-partner at least once.⁵⁷² Sexual and gender-based violence has increased as a result of the ongoing conflict

⁵⁶⁴ Witness 877, ERN 101598-101602; Witness 872, ERN 101603-101608; Witness 863, ERN 101609-1201613; Witness 856, ERN 101614-101618; H. Wild *et al.*, "The militarization of cattle raiding in South Sudan: how a traditional practice became tool for political violence", *Journal of International Humanitarian Action*, 2018, 3:2; Care, "Inequality and injustice: The deteriorating situation for women and girls in South Sudan's war. A progressive gender analysis: 2013-2016", 2016.

⁵⁶⁵ Care, "Inequality and injustice: The deteriorating situation for women and girls in South Sudan's war. A progressive gender analysis: 2013-2016", 2016

⁵⁶⁶ Confidential Document, ERN D112933- D113082; Witness 837, ERN 101638-101642; Witness 838, ERN 101632-101637; Witness 856, ERN 101614-101618; Witness 877, ERN 101598-101602.

⁵⁶⁷ Witness 877, ERN 101598-101602; Witness 873, ERN 101648-101652; H. Wild *et al.*, "The militarization of cattle raiding in South Sudan: how a traditional practice became tool for political violence", *Journal of International Humanitarian Action*, 2018, 3:2; What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017. See between June and August 2011 two reciprocal raid on Lou Nuer and Murle communities in Jonglei State killed around 1000 people.

⁵⁶⁸ T. Mennen, *Customary Law and Rights in South Sudan*, NRC, March 2012.

⁵⁶⁹ See "Report on Customary Court of the Bari Tribe, Kator Payam, Juba County, Central Equatoria State, November 2014", in Justice Africa, *Justice in Practice: South Sudan*, Spring 2015, pp. 13-14; T. Mennen, *Customary Law and Rights in South Sudan*, NRC, March 2012.

⁵⁷⁰ T. Mennen, *Customary Law and Rights in South Sudan*, NRC, March 2012.

⁵⁷¹ Transitional Constitution (2011), Articles 3, 10, 16(5); Child Act (2008), section 26(2)(b); UNDP, "Ascertainment of Customary Laws in South Sudan", Discussion Paper, 2012; Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, march 2012.

⁵⁷² What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

and increased militarism in which rape and sexual violence are deliberately used as a tactic of war to sow terror fear by perpetrators. These statistics however need to be contextualized as there is no common understanding in South Sudan of what constitutes rape.⁵⁷³ Under customary law, a husband is allowed to discipline and beat his wife if she fails to prepare food for her him, and refuses to have sex with him and the consent of a woman to have sexual intercourse is not always sought.⁵⁷⁴

435. Survivors of domestic violence are fearful of reporting such incidents given social norms and their financial dependence on spouses, as cases of domestic violence adjudicated by the customary law courts often result in women being further victimized enduring further abuse. If the husband is found to have behaved wrongly, he may be ordered to compensate his wife by paying her medical bills or pay a fine in cattle, and in some cases divorce might be granted. Most of the times however the woman will be compelled to return to her abusive husband which deters reporting domestic violence.⁵⁷⁵ Impunity is a key factor in fuelling domestic and gender-based violence, as there are hardly any consequences for men. In addition, substance abuse, the difficulty of obtaining a divorce, forcing women to remain in abusive relationships, the stress and trauma of the ongoing armed conflict and displacement do not promote any kind of accountability.⁵⁷⁶

436. While sexual and gender-based violence in South Sudan pre-dates independence, it has been exacerbated by increased militarization and the ongoing conflict.⁵⁷⁷ Displaced households living in PoC sites, compel co-wives to share the same shelter as other co-wives and has also been responsible for an increase in domestic and gender-based violence.⁵⁷⁸

437. There is no incentive for women in South Sudan who have been raped to report their rape and seek medical assistance, as they fear exposure and stigma in a deeply traditional society. Investigations carried out by law enforcement offices usually lack a gender and victim centred approach.⁵⁷⁹ Women who have been raped and are not virgins are stigmatised and considered to be less desirable, unlikely to get married and only worth a lesser bride price.⁵⁸⁰ Women who have been raped are usually forced by their families to marry their rapist as rape is perceived to be an attack on the honour of the victim's family and are usually resolved through agreements between the two families which include the payment of reparation and bride price to the family often resulting in the perpetrator being able to avoid any criminal accountability. If the victim is married, compensation is paid to her husband.⁵⁸¹

438. If a married woman is raped, she can be accused and charged with adultery which is a crime under South Sudanese law. If a widow or a woman abandoned by her husband has a relationship with another man, the woman hereto can be charged with adultery and may be

⁵⁷³ What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

⁵⁷⁴ Confidential Meeting, 22 January 2019; Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012; J. Scott *et al.*, "An assessment of gender inequitable norms and gender-based violence in South Sudan: A community-based participatory research approach", *Conflict and health*, 2013, Vol. 7, Issue 1, p. 4.

⁵⁷⁵ Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012; J. Scott *et al.*, "An assessment of gender inequitable norms and gender-based violence in South Sudan: A community-based participatory research approach", *Conflict and health*, 2013, Vol. 7, Issue 1, p. 4.

⁵⁷⁶ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011.

⁵⁷⁷ What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

⁵⁷⁸ Witness 931, ERN 101799-101803; What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

⁵⁷⁹ Confidential Meeting, 27 January 2019.

⁵⁸⁰ O. Stern, "'This is How Marriage Happens Sometimes': Women and Marriage in South Sudan", in F. Bubenzer, O. Stern (editors), *Hope, Pain and Patience, The Lives of Women in South Sudan*, Fanele, Jacana Media, 2011; Care, "'The girl has no rights': Gender-Based violence in South Sudan", Report, 2014.

⁵⁸¹ Human Security Baseline Assessment for South Sudan and Sudan, "Women's Security and the Law in South Sudan", Small Arms Survey, March 2012; UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokoto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Serie 1, Volume 1, 2012; see also volumes 2 and 3 for more examples.

sentenced to a fine and if unable to pay will serve time in prison instead.⁵⁸² Marital rape is explicitly excluded from the legal definition of rape in South Sudan or in customary law.⁵⁸³

439. Rape cases fall within the jurisdiction of statutory courts but are unlikely to result in successful convictions because of evidentiary burden on women, gender biases and the perceived shame on the family and the community brought about by rape.⁵⁸⁴ There is a great deal of pressure on survivors to report rape in a system which is unable to address the security and protection of victims.⁵⁸⁵ In cases of gang rape or when the perpetrator is unknown, a woman or a girl will experience greater stigma in her family and community, as her family will not be able to marry her off or obtain a lesser bride price and so the family is unlikely to report it.⁵⁸⁶ However, recent judicial developments are starting to show some progress in this regard.⁵⁸⁷

440. More work needs to be done to educate survivors and their families about the rights of rape victims. Victims and their families operate under the misconception that a police form, “Form 8”,⁵⁸⁸ is necessary in order to receive medical attention following rape or that it is mandatory for the victim to report to the police.⁵⁸⁹ It has also been reported that in some instances a fee was requested in order to issue a Form 8 while its issuance is free of charge.⁵⁹⁰ Fearing to be stigmatized, many survivors avoid seeking medical attention believing that this form is necessary or that reporting to authorities is mandatory.

9. Conflict-related Sexual Violence and Gender-Based crimes

441. Conflict-related sexual violence refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.⁵⁹¹ Gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles and do not always manifest as a form of sexual violence and may include non-sexual attacks on women and girls, and men and boys, because of their gender.⁵⁹² Sexual violence, including rape, constitute gross violations which can amount to crimes under international humanitarian law and the domestic law of South Sudan.

442. The Commission has continued to document incidents of rape and sexual violence committed by all parties to the conflict. Sexual violence, and especially rape and gang-rape, have been a central feature of the conflict in South Sudan.

443. The recent signing of the R-ARCSS in 2018 has not prevented incidents of conflict-related sexual violence. In Unity State and the Bentiu area in particular, women have been the subject of ongoing attacks when travelling on foot to access humanitarian aid or when looking for firewood.

⁵⁸² Human Security Baseline Assessment for South Sudan and Sudan, “Women’s Security and the Law in South Sudan”, Small Arms Survey, March 2012; What Works to Prevent Violence against Women and Girls consortium, “No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan”, 2017.

⁵⁸³ Penal Code Act (2008), section 247; UNDP, *In search of a working system of justice for a new nation. The ascertainment of customary laws of the Toposa, Lokuto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan*, Serie 1, Volume 1, 2012.

⁵⁸⁴ Human Security Baseline Assessment for South Sudan and Sudan, “Women’s Security and the Law in South Sudan”, Small Arms Survey, March 2012.

⁵⁸⁵ Confidential Meetings, 17, 20 and 27 January 2019.

⁵⁸⁶ Michael Arensen, “If we leave we are killed. Lessons learned from South Sudan Protection of Civilian Sites 2013-2016”, IOM, 2016.

⁵⁸⁷ See for example, Mobile courts sessions held in Bentiu in December 2018 and January 2019.

⁵⁸⁸ Confidential Meeting, 3 October 2018; M. Hove, E. Ndawana, “Women’s Rights in Jeopardy: the case of war-torn South Sudan”, *Sage open*, October-December 2017: 1-13. Radio Tamazuj, “South Sudan interior minister reinstates use of ‘Form 8’ at hospitals”, 2 July 2018.

⁵⁸⁹ Confidential Meetings, 3 October 2018 and 27 January 2018; Care, “‘The girl has no rights’: Gender-Based violence in South Sudan”, Report, 2014.

⁵⁹⁰ Confidential Meeting, 3 October 2018; UNFPA and DPK, “Adapting restorative justice principles to reform customary courts in dealing with gender-based violence in Southern Sudan”, Final Report, 1 May 2008.

⁵⁹¹ Report of the Secretary-General on Conflict-Related Sexual Violence, S/2018/250, 16 April 2018.

⁵⁹² See International Criminal Court, Office of the Prosecutor, *International Criminal Court Policy Paper on Sexual and Gender-Based Crimes*, June 2014.

444. While UN agencies and local and international non-governmental organisations continue to document gender-based crimes and conflict-related sexual violence, this is not done on a disaggregated basis making it difficult to distinguish between sexual and gender-based violence and conflict-related sexual violence. Data is also not available as to the precise number of victims and incidents largely due to under reporting and inadequate systematic documentation and data collection processes.⁵⁹³ Many victims do not survive their attacks, others are still in hiding or living far away or do not report out of fear.⁵⁹⁴

445. Testimonies of courageous survivors provide evidence of large-scale rapes perpetrated during the ongoing attacks and to criminals benefiting from weak security in order to rape women on their way to food distribution or when searching for firewood.

446. Conflict-related sexual violence is indiscriminate and has targeted children, elderly, pregnant women as well as vulnerable persons.⁵⁹⁵ The Commission documented numerous incidents of rapes, gang rapes, sexual mutilation, abductions, sexual slavery as well as forced stripping.⁵⁹⁶ One witness recounted how Government soldiers shot a pregnant woman resulting in her death and the expulsion of her foetus from the womb.⁵⁹⁷ UNICEF reports that more than 25 percent of reported cases of conflict-related sexual violence involve children.⁵⁹⁸

447. Women and girls living in PoC sites have not been safe and have been raped inside the camp while using common ablution facilities including toilets, and shower blocks as well as in their own shelters.⁵⁹⁹ They have also been attacked when going out of the PoC sites to search for firewood and food.⁶⁰⁰ Women explained to the Commission that going out of the PoC site to fetch wood in order to sell it inside the PoC site, is the only source of income for their household.⁶⁰¹

448. The Bentiu PoC site is now five years old, and women have to walk as long as four hours in each direction in order to fetch wood, often struggling to return to the PoC site before its doors are locked in the evening. UNMISS and some partner organizations⁶⁰² have introduced patrols escorting women out of the PoC sites. Currently UNMISS organises four patrols per week to escort women outside the Bentiu PoC site.⁶⁰³ However, it is insufficient and women continue to go out unaccompanied to collect firewood. As a result, they are routinely assaulted and raped when venturing out.

449. Women are resigned to the risk of rape they face in going out of the PoC site to collect wood. The situation is so grave that mothers advise their daughters on how to respond when they are raped to minimize the violence.⁶⁰⁴ A mother of four children who lives inside the Bentiu PoC site told the Commission that she had been raped while going out to get firewood and added: "I will never go outside the PoC ever again. But that means that now we do not

⁵⁹³ The Gender-Based Violence Information Management System (GBV IMS) can only operate in situations where services to survivors are available and many areas in South Sudan do not provide such services.

⁵⁹⁴ Witness 1109, ERN 102324-102328; Witness 1113, ERN 102216-102219; Confidential Meetings, 17 and 27 January 2019; *Final report of the Panel of Experts on South Sudan*, S/2018/292, 12 April 2018; CTSAMM, *CTSAMM Report 2018/12. Sexual and gender-based violence and violence against civilians in the Yei area*, 20 April 2018.

⁵⁹⁵ Witness 930, ERN 101794-101798; Witness 913, ERN 101836-101841; Witness ID 881, ERN 101582-101586; Witness 873, ERN 101648-101652; Witness 872, ERN 101603-101608; Witness 867, ERN 101550-101556.

⁵⁹⁶ Witness 915, ERN 101828-101835; Witness 831, ERN 101817-101827; Witness 689, ERN 101400-101411; Witness 416, ERN 101375-101379; Witness 826, ERN 101856-101863; Witness 431, ERN 101503-101507; Witness 834, ERN 101643-101647; Witness 825, ERN 101848-101855; Witness 867, ERN 101550-101556; Witness 700, ERN 101462-101469; Witness 1095, ERN 102211-102215; Witness 1100, ERN 102318 - 102323; Witness 1109, ERN 102324-102328; Witness 1111, ERN 102220-102225; Witness 1112, ERN 102226-102231; Witness 1113, ERN 102216-102219; Witness 1114, ERN 102308-102312; Confidential Meetings, 22, 23 and 27 January 2019.

⁵⁹⁷ Witness 699, ERN 101521-101529.

⁵⁹⁸ UNICEF, Gender-Based Violence, South Sudan, Briefing note, August 2018.

⁵⁹⁹ Confidential document, ERN D116715 - D116717; What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

⁶⁰⁰ Confidential Meetings, 3 and 4 October 2018; Focus Group Discussions, 4 and 5 October 2018.

⁶⁰¹ Witness 1100, ERN 102318 - 102323; Witness 1109, ERN 102324-102328; Witness 1114, ERN 102308-102312; Confidential Meeting, 25 January 2019.

⁶⁰² As of October 2018, the Partner had suspended its firewood patrol due to a security incident against one of its staff.

⁶⁰³ Confidential Meetings, 3 and 4 October 2018, 19 and 22 January 2019.

⁶⁰⁴ Confidential Meetings, 22 and 27 January 2019.

have any source of income anymore. I do not know what we are going to do”.⁶⁰⁵ The mother of a 13-year old girl who had been raped in similar circumstances said:

we went to the PoC because of the insecurity but now I am thinking of leaving the PoC even if it means that my daughter will not go to school. I will not send my daughter outside the PoC anymore. [...] Selling the firewood we collect inside the PoC is our only way to survive. We do not have any other source of income. When we go out of the PoC to fetch firewood, we know what will happen, that there will be men to rape us. I do not want to go out but I have no choice and I have to sacrifice myself.⁶⁰⁶

450. The Commission heard evidence of girls as young as seven being raped by Government soldiers, members of armed groups and gangs of criminals.⁶⁰⁷ Survivors and witnesses testified to the brutality of the rapes, including of soldiers ramming a piece of wood in the vagina of a woman they had just raped.⁶⁰⁸ Young girls gang raped repeatedly have been left with physical injuries and psychological scars.⁶⁰⁹ One woman in Wau State told the Commission how after a soldier raped her, he beat her on the chest but she found the courage to lay a complaint with the local commander who in turn beat the perpetrator as punishment. Government soldiers later looted her home.⁶¹⁰

451. During attacks in Unity State between April and June 2018, witnesses testified to SPLA attacks, during which soldiers shot at men, raped women, and burnt elderly people inside their *tukuls*. Children were banged against military vehicles and trees by soldiers which resulted in deaths.⁶¹¹ Methods of killing have been specifically tailored to the gender of the victims: Young men were specifically targeted by SPLA soldiers because they were suspected of being rebels and women were raped.⁶¹² Armed groups have been specifically targeting young men and children so they join their ranks.⁶¹³

452. Witnesses told the Commission that women who resisted being raped would be killed by soldiers.⁶¹⁴ Most civilians fled their villages on foot during attacks describing how the soldiers chased them and caught women to rape them.⁶¹⁵ Witnesses also reported how after hiding in the swamp or the bush, they had no choice but to return to their village to find water and food for their children who were starving. Many women were raped when trying to save their children from starvation and went out of hiding to get food and in some instances were never seen again.⁶¹⁶ Most survivors, and witnesses have not been able to identify the direct perpetrators of sexual violence but are able to identify the armed groups involved and in some instances even the names of commanders who were present during attacks.⁶¹⁷

453. A substantial number of women have reportedly been raped even after the signature of the R-ARCSS. The Bentiu area in Unity state continues to be of grave concern given the substantial number of women reportedly raped in a short space of time in November 2018.⁶¹⁸ While the overall security situation has largely improved since the signature of the R-ARCSS, with many parties demonstrating a willingness to commit to peace and engage in

⁶⁰⁵ Witness 1114, ERN 102308-102312.

⁶⁰⁶ Witness 1100, ERN 102318 - 102323.

⁶⁰⁷ Witness 825, ERN 101848-101855; Witness 1095, ERN 102211-102215.

⁶⁰⁸ Witness 142, ERN 100025-100030. Witness 881, ERN 101582-101586.

⁶⁰⁹ Witness 915, ERN 101828-101835; Witness 764, ERN 101946-101954; Witness 741, ERN 101417-101457, Witness 717, ERN 101388-101399; Witness 689, ERN 101400-101411; Witness 825, ERN 101848-101855; Witness 828, ERN 101804-101810; Witness 880, ERN 101567-101571; See also UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April – May 2018*.

⁶¹⁰ Witness 881, ERN 101582-101586.

⁶¹¹ Witness 793, ERN 101499-101502.

⁶¹² Witness 930, ERN 101794-101798; Witness 915, ERN 101828-101835. Witness 705, ERN 101380-101383; Witness 851, ERN 101542-101549; Witness 925, ERN 101886-101890; Witness 931, ERN 101799-101803; Witness 968, ERN 101920-101924.

⁶¹³ Witness 607, ERN 101476-101482; Witness 834, ERN 101643-101647, Witness 837, ERN 101638-642; Witness 838, ERN 101632-101637; Witness 863, ERN 101609-101613.

⁶¹⁴ Witness 831, ERN 101817-101827; Witness 704, ERN 101375-101379; Witness 837, ERN 101638-101642.

⁶¹⁵ Witness 831, ERN 101817-101827; Witness 704, ERN 101375-101379; Witness 837, ERN 101638-101642.

⁶¹⁶ Witness 914, ERN 101788-101793; Witness 883, ERN 101557-101561.

⁶¹⁷ Witness 789, ERN 101508-101511; Witness 825, ERN 101848-101855.

⁶¹⁸ MSF, “125 women and girls seek emergency assistance in Bentiu after horrific sexual violence”, 30 November 2018.

dialogue, criminal activities involving armed robberies and rapes of women have increased in a disconcerting way.⁶¹⁹

454. The greater Bentiu area in Unity (new Northern Liech state) is under the control of SPLA and allied SPLA-IO (TD) forces which, since the signature of the R-ARCSS, have demonstrated willingness to collaborate and work together in view of the R-ARCSS and the integration process.⁶²⁰ However, several incidents have demonstrated that this is not a uniform position as numerous incidents that have taken place illustrate.⁶²¹ Further, SPLA-IO (TD) soldiers are not receiving a salary and have to finance and support themselves.⁶²² These conditions have created the opportunity ground for current or former armed personnel present in the area to continue to attack civilians.⁶²³ These incidents are not just criminal in nature but rather an extension of the conflict.

455. Interlocutors and witnesses interviewed by the Commission mentioned many cases of armed robberies and looting both inside the Bentiu PoC site and in the surrounding areas. While criminality inside the PoC site has been on the decline since November 2018, criminality outside remains high.⁶²⁴ Women are the primary victims of attacks as they are usually the ones in charge of fetching firewood or retrieving humanitarian aid during distributions.

456. Following a statement from MSF at the end of November 2018 reporting that 125 rapes had been committed in a timespan of about ten days in Bentiu area and immediate surroundings in Northern Liech state, various government investigations were conducted. Amongst them, the investigation led by the National Ministry of Gender, Child and Social Welfare concluded on 19 December 2018 that the allegations of rapes were unfounded and baseless; subsequently, President Kiir formed a new committee of inquiry.⁶²⁵ UNMISS Human Rights Division also investigated the issue as well as CTSAMVM.⁶²⁶ Following cooperation between UNMISS and the Northern Liech State Government, SPLA and SSNPS, some criminals have been apprehended. However, as the majority of the survivors are unable to identify their attacker or attackers, it remains difficult to hold perpetrators accountable.⁶²⁷

457. The Commission spoke to survivors and witnesses of rapes committed between November 2018 and January 2019 as well as to various interlocutors in the Bentiu area. Witnesses indicated that the attacks against women had been led by armed men, speaking Nuer, mostly wearing civilian clothes and often covering their faces with masks or a piece of cloth.⁶²⁸ The use of masks suggests that the perpetrators are local. Nevertheless, some women stated that their attackers wore military clothing.⁶²⁹ These attacks occurred mainly around the Bentiu PoC site, especially to the east and southeast of the PoC site, when unaccompanied women leave the PoC site to search for firewood or when women travel by foot between Bentiu and Nhialdiu or Guit.⁶³⁰ Many witnesses reported that they had been badly beaten, robbed of their belongings, had their aid ration cards destroyed and, for most of them, were raped or gang-raped by armed men, some of them wearing military uniforms.⁶³¹

458. Cases verified by the Commission show that there was a surge in rapes in November and December 2018 in these areas and that the number of rapes reported by MSF are likely

⁶¹⁹ Confidential Document, ERN D116281-D116341; Confidential Meetings, 18 and 22 January 2019.

⁶²⁰ Confidential Document, ERN D116281-D116341; Confidential Meetings, 19, 20, 22 and 23 January 2019.

⁶²¹ Confidential Document, ERN D116281-D116341; Confidential Meeting, 23 January 2019; Witness 1099, ERN 102313-102317.

⁶²² Confidential Meetings, 20 January 2019; Witness 1099, ERN 102313-102317; Confidential Document, ERN D116281-D116341;

⁶²³ Confidential Document, ERN D116281-D116341; Confidential Meeting, 22 January 2019.

⁶²⁴ Confidential Document, ERN D116281-D116341; Confidential Meetings, 18, 19, 20 and 22 January 2019; Witness 1111, ERN 102220-102225.

⁶²⁵ Radio Tamazuj, "No evidence to back claims of Bentiu rapes: investigation team", 21 December 2018; Republican Order No. 25/2018.

⁶²⁶ UNMISS, *Human Rights Investigators Rush to South Sudan's Bentiu Following Spate of Rapes*, 5 December 2018; CTSAMM, *Sexual and Gender Based Violations (SGBV) in Bentiu Area*, ERN D114855- D114860.

⁶²⁷ Confidential Document, ERN D116281-D116341.

⁶²⁸ Confidential Meetings, 19 and 27 January 2019.

⁶²⁹ Confidential Document, ERN D116281-D116341.

⁶³⁰ Witness 1112, ERN 102226-102231; Confidential Document, ERN D116281-D116341; Confidential Meetings 17, 18, 19, 22, 23 and 27 January 2019.

⁶³¹ Witness 1111, ERN 102220-102225; Witness 1112, ERN 102226-102231; Confidential Meetings, 17, 20 and 27 January 2019; Confidential Document, ERN D116729-D116733.

to be correct or indeed an underestimate.⁶³² One witness told the Commission that it was to be expected that more rape cases were reported in November than before because a biometric registration took place during that time and people were coming from villages to Bentiu.⁶³³ The Commission also verified additional allegations of rapes in the close vicinity of the Bentiu PoC site and the Bentiu-Nhialdiu-Guit triangle. This leads it to conclude that there have been even more instances of rape in the area since November 2018 than were reported by MSF.

459. Many of the survivors of these attacks are living in villages which are inaccessible by road and requesting them to travel by foot to meet with the Commission would have put survivors at risk of again being attacked. As a result of the media coverage that followed the MSF Statement and the stigma attached to sexual violence, the Commission used alternative means of gathering evidence in those instances where it was not possible to get direct access to witnesses. The Commission reiterates that investigations of human rights violations and international crimes, including sexual violence, should follow basic principles including the “Do No Harm” principle. The Commission received information that such principles were not followed in December 2018 by some actors on the ground and recalls that the security, safety and well-being of victims must guide such investigations.⁶³⁴

460. A women’s community leader told the Commission how she and her group provides psychosocial support to survivors of rapes committed within the Bentiu-Guit-Nhialdiu triangle but that many survivors feel ashamed and do not report what has happened to them. She went on to explain that during food distribution, rapes are more numerous because there are more women travelling from the villages to collect food. She added that the population was shocked at the authorities’ reaction following the MSF Statement.⁶³⁵

461. One elder to whom the Commission spoke about abduction and rapes of women and girls, said that when he went to his village located between Bentiu and Nhialdiu in December 2018, he saw several groups of armed youth on the way. When he arrived in his village, he met with two women and two adolescent girls who had been raped on their way to the village from Bentiu. Three of them were so traumatised that they could not talk. The fourth one said that the attackers, who were speaking Nuer language and wearing civilian clothes, also stole the SSP 37,000 she was carrying to buy Christmas clothes for her children. The elder, accompanied by youth, some of them armed, went to the location of the attack, where he discovered a camp where about 30 women were being held captive as well as other stolen objects. The attackers fled when they saw the elder and his escort. Some of the women told the elder that they had been raped, in addition to their money and belongings being stolen. Despite the attackers covering their faces, one of the women recognised a youth from Koch County. In other incidents, youth from Guit County were recognised.⁶³⁶ The incident was reported to SPLA-IO (RM) who informed the SPLA Commander in Bentiu.⁶³⁷

462. One witness told the Commission how towards the end of November 2018, a young lactating mother was raped when she was coming back from aid registration in Bentiu to her village in the Nhialdiu area. This witness added that in January a pregnant woman was held captive the whole day and raped at the same location by four men. On a different occasion, a woman who could not reach the MSF clinic during opening hours was brought to the police by her family who alerted the authorities.⁶³⁸ Once, a group of women brought a man along thinking his presence would protect them. When they were attacked, the assailants beat him very badly.⁶³⁹

463. One woman who came to the Bentiu PoC site for security reasons in 2014 was raped in December 2018 when she went out to fetch firewood. She was attacked by five Nuer men wearing civilian clothes, carrying AK-47 weapons and covering their faces with a mask.

⁶³² Witness 1111, ERN 102220-102225; Witness 1112, ERN 102226-102231; Confidential Meetings, 17, 18, 20, 22 and 23 January 2019.

⁶³³ Witness 1112, ERN 102226-102231.

⁶³⁴ Confidential Meetings, 17, 18, 27 January 2019.

⁶³⁵ Witness 1112, ERN 102226-102231; Witness 1113, ERN 102216-102219.

⁶³⁶ Witness 1095, ERN 102211-102215.

⁶³⁷ Witness 1095, ERN 102211-102215.

⁶³⁸ Witness 1112, ERN 102226-102231; Confidential Meeting, 27 January 2019.

⁶³⁹ Confidential Meeting, 27 January 2019.

Three of them raped her by inserting their hands in her vagina.⁶⁴⁰ In January 2019, a woman and an adolescent girl walking together to fetch wood outside the Bentiu PoC site, were attacked by seven men, they were gang-raped by four and three men respectively. Both of them described their assailants as men carrying weapons, wearing civilian clothes and hiding their faces behind a mask. The woman was beaten by one of the attackers. Once he was finished raping the girl, one of the assailants asked her to stand up and turn her back so he could kill her. Bravely, she responded that he would have to face her. One of the other assailants intervened and they left.⁶⁴¹ None of these women have been outside the PoC site since they were attacked and therefore are in a dire economic situation since selling firewood is their only source of income.⁶⁴² The members of the Community Watch Group inside the PoC site often observe women coming back to the PoC site crying and can tell from their body language that something has happened to them.⁶⁴³

464. On 2 November 2018, 13 girls aged 6 to 15 years old and two women were abducted; one was raped by two unknown men.⁶⁴⁴ Also in November 2018, one girl was raped outside the Bentiu PoC site. A few days later, she recognised her rapist as he had entered the PoC site. He was arrested and tried during the Bentiu mobile court session in January 2019. He was sentenced to 12 years of imprisonment.⁶⁴⁵ One 15-year old girl was raped about 200 metres from the PoC site when coming to visit her sick husband at the hospital.⁶⁴⁶ On 31 January, the Commission received two new allegations regarding two girls who had been raped when going outside the PoC site.

465. Following the report of attacks against women on their way between Nhialdiu and Bentiu, UNMISS responded by clearing up the side of the Bentiu-Nhialdiu road so it will be harder for attackers to hide. It also repaired the road so vehicles can use it again and increased patrols in the area.⁶⁴⁷ The SPLA has committed to increasing patrols in the area to deter criminality. However, the SPLA Command admitted that, except if incidents happen, they do not patrol the shortcuts used by the civilians to reach Bentiu.⁶⁴⁸ Attacks nevertheless continued in December 2018 and January 2019. The Deputy Governor of Northern Liech State himself acknowledged the occurrence of rapes in his area of responsibility and that sexual and gender-based violence are common there.⁶⁴⁹

466. Humanitarian aid providers have resumed food distribution in Nhialdiu.⁶⁵⁰ However, some beneficiaries still have to walk up to two hours each way to reach Nhialdiu and therefore remain at risk of being attacked. Women living in the Bentiu PoC site have no choice but to go out to look for firewood and they are resigned to being raped.⁶⁵¹

467. During its investigation, the Commission found that some women did not report their attacks to health service providers and encouraged them to do so. The Commission believes that some survivors might not have reported their attack either because they live too far from service providers or because they felt dissuaded to do so following public statements in December 2018 by authorities dissuading them from seeking assistance from the international health service providers.⁶⁵² Some public figures also rejected the reality of so many rapes. In some cases, due to stigma attached to sexual violence, survivors are also pressured by families and the community not to report.⁶⁵³

⁶⁴⁰ Witness 1109, ERN 102324-102328.

⁶⁴¹ Witness 1100, ERN 102318 - 102323; Witness 1114, ERN 102308-102312.

⁶⁴² Witness 1109, ERN 102324-102328; Witness 1100, ERN 102318 - 102323; Witness 1114, ERN 102308-102312; Confidential Meeting, 22 January 2019.

⁶⁴³ Witness 1111, ERN 102220-102225.

⁶⁴⁴ Confidential Document, ERN D116342-D116345.

⁶⁴⁵ Confidential Document, ERN D116342-D116345.

⁶⁴⁶ Confidential Meeting, 22 January 2019; Confidential Document, ERN D116342-D116345.

⁶⁴⁷ Confidential Meetings, 19 and 22 January 2019.

⁶⁴⁸ Confidential Document, ERN D116281-D116341.

⁶⁴⁹ CTSAMM, *Sexual and Gender Based Violations (SGBV) in Bentiu Area*, ERN D114855- D114860.

⁶⁵⁰ Food aid distribution resumed in January 2019. The previous time it had happened was in June 2017.

⁶⁵¹ Confidential Meetings, 21, 25 and 27 January 2019.

⁶⁵² Confidential Meeting, 27 January 2019.

⁶⁵³ See e.g. Statement of the Acting Chairperson of the South Sudanese Human Rights Commission during the 70 anniversary of the Universal Declaration of Human Rights indicating that some women were lying and were claiming they were raped in order to

468. Pressure was put on the NGO that initially reported the surge of rapes. This same NGO was also accused of not cooperating with the ongoing investigations.⁶⁵⁴

469. Collected evidence seems to suggest that the perpetrators of rapes in the Bentiu area are men who have the opportunity to come and go at ease within SPLA and SPLA-IO (TD) areas of responsibility, armed youth engaged in criminal activities, as well as current or former members of SPLA and SPLA-IO (TD). This is reinforced by the fact that some attacks took place close to checkpoints, barracks or encampments. However, no evidence received by the Commission points to the fact that this violence against women was organised or ordered by commanders. The actions taken by both SPLA and SPLA-IO (TD) in the area indicated a genuine will to search for and arrest perpetrators.⁶⁵⁵ While the Commission welcomes the steps taken by UNMISS, the Authorities of Northern Liech state, SPLA and SPLA-IO (TD), women continue to be sexually assaulted and therefore more should be done in order to ensure the security of the civilian population and especially the security of women and girls.

470. In the Wadhalelo area, Wau State, especially in 2017 and 2018, the community was continuously harassed by the soldiers stationed nearby, with several women raped by soldiers during military patrols in the village.⁶⁵⁶ The Commission also heard accounts of abductions, enslavement and servitude of women and girls with some forced to cook and clean for their captors.⁶⁵⁷ In addition, the Commission received information that women and girls, and in one instance a minor boy, had been raped by cattle herders when they ventured out of refugee camps to gather firewood. In one instance a perpetrator had reportedly been apprehended by the local authorities.⁶⁵⁸

471. The Commission also heard from several witnesses that Government authorities publicly mobilised and armed local youth promising them that they could raid cattle, abduct and rape women and loot all they could find and that those attacks were the perfect way to seek revenge for past attacks, for which they would not be punished.⁶⁵⁹

472. South Sudanese whom the Commission interviewed noted that historically women and children were not targeted during clashes, as there was an unwritten code that combatants did not target women, children, people with disabilities and elderly people because of their traditional belief system and rules governing fighting.⁶⁶⁰ However, tradition and customs have not spared these protected persons from being targeted during the ongoing conflict.⁶⁶¹

473. Evidence gathered indicates that men were more likely to be arbitrarily detained by Government Security forces. However, several women, including pregnant women, were detained, in facilities not gender sensitive to their specific needs. While women and men were kept in separated cells, this did not protect both men and women from rape and sexual violence. Former detainees who had the courage to speak, told the Commission about the rape and torture they experienced at the hands of their captors.

474. The Commission also notes that disorganised documentation of sexual and gender-based violence and conflict-related sexual violence is counterproductive and harmful to survivors. Documentation of sexual violence should not lead to disregard for the “Do No Harm” principle.

receive assistance from MSF, Confidential Document, ERN D116281-D116341; Confidential Meetings, 19 and 27 January 2019; Witness 1112, ERN 102226-102231.

⁶⁵⁴ Confidential Meetings, 17, 18 and 23 January 2019.

⁶⁵⁵ Confidential Meetings, 17, 18, 20, 22 and 23 January 2019.

⁶⁵⁶ Witness 931, ERN 101799-101803; Witness 925, ERN 101886-101890.

⁶⁵⁷ Witness 914, ERN 101788-101793; Witness 883, ERN 101557-101561; Witness 831, ERN 101817-101827.

⁶⁵⁸ Confidential Meeting, Wau, 24 October 2018.

⁶⁵⁹ Witness 877, ERN 101598-101602; Witness 872, ERN 101603-101608; Witness 863, ERN 101609-101613; Witness 856, ERN 101614-101618.

⁶⁶⁰ Human Rights Watch, “South Sudan: People with disabilities, older people face danger. UN, aid agencies should improve response to these groups”, 31 May 2017.

⁶⁶¹ Witness 825, ERN 101848-101855; Witness 828, ERN 101804-101810; Witness 831, ERN 101817-101827; Witness 872, ERN 101603-101608. On customary protected persons, see K. Grabska, Gender, *Home & Identity. Nuer Repatriation to Southern Sudan*, Eastern Africa Serie, Boydell & Brewer, 2014.

10. Sexual Violence Against Men and Boys

475. The Commission also received reports of male victims of sexual violence and consequently reached out to men and boys to document their experiences. Sexual and gender-based violence against men and boys is even more underreported than that against women and girls as there is a greater level of stigma in respect of male sexual violence. Some witnesses whom the Commission believed were survivors of sexual violence were not yet ready to speak about their traumatic experiences. In these cases, the Commission decided, as for women, not to pressure them but rather to have a general discussion about support services available to them.⁶⁶² The Commission continues to believe that male sexual and gender-based violence is grossly under-reported mainly due to the social stigma attached to sexual violence against men in a society where masculinity is core to status. The Commission also received reports of acts of sexual mutilation and castration, including impalement with a stick in his anus of a 12-year-old boy and the use of needles on the penis of a detainee.⁶⁶³

11. Consequences and Lasting Impact of Sexual and Gender-Based Violence

476. Sexual and gender-based violence has deep and lasting effects on survivors, their families, their communities and South Sudanese society. As mentioned in the Commission's previous report, survivors are further victimised as the result of the stigma associated with sexual violence and is the main reason why the majority do not report these crimes or seek medical, legal, and psychological support.

477. Numerous survivors of rape continue to experience physical injuries arising of rape and other forms of sexual violence and also have to deal with the prospect of having contracted sexually transmitted disease including HIV/Aids. Given that many survivors do not have access to medical attention or are too afraid to do so, they remain unaware of their HIV status.

478. Many survivors show signs of depression, sadness, hopelessness and anxiety and suicidal thoughts. Some express difficulty to focus, sleep, perform routine tasks, indicate being on the edge and afraid of uniforms. One woman who saw members of her family killed and who was raped in front of her children said: "I am a dead body but I am talking. [...] I would like to kill myself [...] I would like some help with my children. I cannot cope with them. If you could find someone to look after my children, to take them away, it would be better".⁶⁶⁴

479. Survivors in South Sudan do not have the necessary support and access to services to deal with rape and other forms of sexual violence as South Sudan lacks the infrastructure and basic services needed to support the large number of survivors of sexual and gender-based violence and conflict-related sexual violence given the massive number of rapes committed during the conflict. A number of international organisations have developed awareness and support programs for survivors and their communities in order to fight the stigma. They have also supported the establishment of women support groups and basic psychological support structure to assist survivors. However psychiatric and psychological needs are vast in a country with very few practicing professionals.⁶⁶⁵ The availability of services is therefore highly unequal depending on locations.

12. Access to Justice for Sexual and Gender-Based Violence

480. Rape is considered to be a crime under South Sudanese law⁶⁶⁶ and therefore falls within the jurisdiction of the statutory courts.⁶⁶⁷ However, access to justice for victims of rape and other forms sexual violence remains a challenge as rape cases rarely find their way before

⁶⁶² C. Dolan, "Hidden Realities: Screening for experiences of violence amongst war-affected South Sudanese refugees in northern Uganda", Refugee Law Project, Working Paper 25, August 2017.

⁶⁶³ Witness 700, ERN 101462-101469.

⁶⁶⁴ Witness 142, ERN 100025-100030.

⁶⁶⁵ According to an Amnesty International Report, in 2016 there were only two practicing psychiatrists in the country. Amnesty international, "Our Hearts have gone dark, The mental health impact of South Sudan Conflict", 2016.

⁶⁶⁶ Penal Code Act (2008), section 247. See also sections 248, 249. The Commission notes, however, that some aspects of the definition of crimes in the Penal Code should be reviewed and amended, for example, under section 247(3) effectively provides that there can be no rape within marriage.

⁶⁶⁷ Local Government Act (2009), section 98(2).

the statutory courts and are usually brought before customary courts which have an inherent gender bias and rarely hold male perpetrators accountable.⁶⁶⁸ In general, women do not trust institutions like the police, the statutory and the customary law courts, considering them prejudiced against women and also corrupt.⁶⁶⁹ Sentences meted out in these customary law courts are completely unsatisfactory and totally disproportionate to the crime committed. Perpetrator will usually be fined for these serious crimes and in some instances the victims are further victimized by being compelled by both families to marry the perpetrator.⁶⁷⁰

481. As previously reported by the Commission, conflict-related sexual violence in respect of South Sudanese women have rarely been investigated and prosecuted with women being left without any recourse, not being able to bring the perpetrators to justice and unable to obtain reparation.

482. The Terrain trial has demonstrated that when political will exists, the Government of South Sudan has been able to prosecute such crimes, albeit in a military court. However, political will and commitment does not exist in respect of dealing with conflict-related sexual violence against South Sudanese women.

483. A victim centred approach to justice for survivors of sexual and gender-based violence is essential.

484. Programmes raising awareness and building the capacity of law enforcement officials and the military raising criminal accountability for rape and other forms sexual violence have been established and continue to be delivered by UNMISS and ICRC.⁶⁷¹

485. Sexual violence continue to be used as a tactic of war to terrorise women and the entire community. The commission notes the correlation of attacks, the flow of displacements and the occurrence of crimes against the civilian population, especially sexual violence. All parties to the conflict should conform to the adequate norms of International Humanitarian Law and stop committing sexual violence crimes.

486. Survivors have expressed their frustration at the lack of accountability for perpetrators of sexual and gender-based violence and conflict-related sexual violence.

13. UN Peacekeepers and Sexual Exploitation and Abuse

487. Sexual Exploitation and Abuse (SEA) involving peacekeeping personnel or civilian aid workers is not new. Renewed efforts by the UN to address and prevent SEA within its field missions, including the Secretary-General's 2003 Bulletin on zero tolerance of SEA has been ground-breaking. The UN Secretary-General, in his report on measures for protection from sexual exploitation and abuse in 2017,⁶⁷² sets out a comprehensive strategy to protect individuals from SEA and published his first progress report on the implementation of the said strategy in 2018.⁶⁷³

488. The appointment of a Special Coordinator on Improving UN Response to Sexual Exploitation and Abuse to spearhead the implementation of the strategy has also been perceived to be a step in the right direction. The appointment of Jane Connors to the position of the UN's first-ever Victims' Rights Advocate, whose responsibility includes ensuring that the rights and dignity of victims are at the forefront of the fight against SEA has also been perceived as a positive step. Arising out of the 2017 strategy, the UN Secretary-General signed a voluntary compact with 100 Member States, who committed themselves to prevent

⁶⁶⁸ Justice Africa, "Justice in Practice: South Sudan", Spring 2015.

⁶⁶⁹ What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017; Justice Africa, "Justice in Practice: South Sudan", Spring 2015.

⁶⁷⁰ What Works to Prevent Violence against Women and Girls consortium, "No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan", 2017.

⁶⁷¹ Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, Annual Report 2017; Confidential Document, ERN D116281-D116341.

⁶⁷² See Special measures for protection from sexual exploitation and abuse: a new approach, A/71/818, 28 February 2017. The strategy focuses on four main areas of action: putting victims first; ending impunity; engaging civil society and external partners; and improving strategic communications for education and transparency.

⁶⁷³ Special measures for protection from sexual exploitation and abuse, A/72/751, 15 February 2018.

SEA, provide accountability and support victims meaningfully.⁶⁷⁴ Other initiatives that stem directly from the 2017 strategy are aimed at increasing partnerships and strengthening case management system, conduct of investigations and channels of reporting within the UN but also externally.⁶⁷⁵

489. UNMISS has committed itself to addressing the issue of SEA among UN military, police and civilian personnel. Notwithstanding this commitment, allegations of SEA continue to emerge in South Sudan and from early 2018 until January 2019, seven cases of SEA involving at least 18 alleged perpetrators from UNMISS (12 police, five civilians and at least one military personnel)⁶⁷⁶ have been registered in the UN SEA Database.⁶⁷⁷

490. Allegations include three cases of exploitative relationship, two cases of rape, one case of sexual assault and attempted sexual assault, and one case of transactional sex.⁶⁷⁸ Five cases are still pending investigation by the UN and Ghanaian and Nepalese authorities, while two cases have been finalized.⁶⁷⁹

491. One particular case involving 12 members of the Ghanaian Formed Police Unit (FPU) allegedly involved in sexual activity with women living in the PoC site in Wau attracted significant attention from the Government of South Sudan, the general public as well as the local and international media.⁶⁸⁰

492. The UN acted speedily on receipt of the complaint on 8 February 2018 and commenced a preliminary investigation, on 24 February 2018 which resulted in the 46-member FPU being recalled from Wau and confined to the base in Juba pending further investigation.⁶⁸¹ A further OIOS investigation substantiated the allegations against eight individuals resulting in them being repatriated to Ghana and their UN payments being suspended. A domestic investigation by Ghanaian authorities is pending.⁶⁸² Due to insufficient evidence, however, OIOS also found that allegations against four other members of FPU were unsubstantiated, and therefore the case against them was closed.⁶⁸³

493. The swift action taken by the UN which led to an on-site investigation before the individuals were repatriated has sent a clear signal to anyone who considers engaging in SEA that such conduct is prohibited and will not be tolerated under any circumstances. In the Commission's view, this is how allegations in respect of SEA must be addressed.

494. The Commission observes, however, that the UN SEA Database currently only includes incidents of SEA involving UN peacekeeping personnel working in the field missions. Data in respect of incidents involving the personnel of 'implementing partners' i.e. UN agencies, funds and programmes do not appear. This is likely to result in an under-count of SEA cases, with the actual number of SEA incidents likely to be significantly higher. During the course of its work, the Commission received allegations of such an incident, which is currently under investigation as per established procedure.⁶⁸⁴

495. In December 2017, the Secretary-General's Victims' Rights Advocate visited UNMISS in Juba and Malakal and met with the SEA victims, communities, civil society, UNMISS leaders and other relevant stakeholders, including the Coordinator of the Commission on Human Rights in South Sudan.⁶⁸⁵ The Victims' Rights Advocate has appointed a Field Advocate as her representative in South Sudan, who has been working to ensure that legal, medical, psychological and other services are provided to the victims of

⁶⁷⁴ Voluntary Compact available at <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/voluntary-compact> (last accessed 23 January 2019).

⁶⁷⁵ Special measures for protection from sexual exploitation and abuse, A/72/751, 15 Feb 2018, paras. 34-47.

⁶⁷⁶ The number of alleged UN military perpetrators has not been yet established.

⁶⁷⁷ <https://conduct.unmissions.org/table-of-allegations>.

⁶⁷⁸ <https://conduct.unmissions.org/table-of-allegations>.

⁶⁷⁹ One case was closed by the UN as the allegations were unsubstantiated due to insufficient evidence, and another case described concerned the 12 members of the Ghanaian Formed Police Unit.

⁶⁸⁰ See e.g. Reuters, "U.N. South Sudan mission recalls police unit over sex abuse allegations", 24 February 2018.

⁶⁸¹ UNMISS, *UNMISS acts on allegations of sexual exploitation against formed police unit*, 24 February 2018.

⁶⁸² <https://conduct.unmissions.org/table-of-allegations>.

⁶⁸³ <https://conduct.unmissions.org/table-of-allegations>.

⁶⁸⁴ Confidential Meetings, 27 and 30 January 2019.

⁶⁸⁵ Confidential Report by the Office of the Victims' Rights Advocate - Assistant Secretary-General, Mission Report: South Sudan 3 to 8 December 2017.

SEA.⁶⁸⁶ This office also deals with issues of paternity claims related to SEA as well as sexual abuse resulting in pregnancies.⁶⁸⁷

496. The steps taken by the UN regarding the allegations of SEA in the Ghanaian FPU case was critical to addressing impunity. While the approach is admirable, witnesses the Commission spoke to in South Sudan have raised the issue of unequal power relationships between victims and those committing the violations particularly in respect of transactional relationships as well as rape and sexual violence, which results in a chronic under-reporting of SEA. In addition, witnesses described the following factors as major challenges in ensuring accountability for SEA: failure to address the educational and livelihood needs of extremely vulnerable victims; the remoteness of field locations; lack of feedback to alleged victims; failure to ensure accountability of UN national staff, contractors and staff of implementing partners working in PoC sites; and a more general failure to ensure accountability due to the complexities inherent in pursuing accountability across different jurisdictions.

497. The Commission recommends that UNMISS and UN agencies take steps to address these shortcomings particularly in respect of access to justice for the victims. A key challenge is the inability of the UN to ensure that reparations or compensation is paid to victims of SEA and while paternity claims may be lodged, soldiers are repatriated often without the survivors receiving any kind of payment at all. The stigma in communities around the issue of children born of these relationships increase the hardship for women in South Sudan.

C. The Situation of Children and Youth

498. As set out in detail in the Applicable Law section above⁶⁸⁸ and the Commission's previous Report,⁶⁸⁹ South Sudan's domestic legislation, including the Transitional Constitution (2011) and the Child Act (2008) and its international obligations under the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, and the Maputo Protocol guarantee of children's rights in South Sudan. These include the rights of children to life, survival and development, non-discrimination, a name and nationality, to know and be cared for by parents or a guardian, not to be subjected to exploitative practices or abuse, corporal punishment, cruel and inhuman treatment, not to be subject to negative or harmful cultural practices, to be protected from abduction and trafficking, to education, well-being and health, and to liberty and security of person.⁶⁹⁰

499. Despite these legal obligations, the conflict in South Sudan and its resulting devastating humanitarian and economic situation mean that many of these guarantees are not fulfilled. As set out below, children's fundamental rights to life; protection from physical and mental violence including injury, abuse, and sexual abuse, rights to health, food, and education, as well as the right not to be recruited into the armed forces or armed groups are routinely violated.

500. Although the Government had signed an action plan for ending and preventing the six grave violations against children in armed conflict⁶⁹¹ in 2012, with the breakdown of the ARCSS in 2016, key elements of the agreed workplan remained largely unimplemented.⁶⁹² Re-engagement by the United Nations in 2017 reactivated progress on aspects of the

⁶⁸⁶ Special measures for protection from sexual exploitation and abuse, A/72/751, 15 Feb 2018, para. 29.

⁶⁸⁷ <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/victims-rights-advocate>.

⁶⁸⁸ See above Applicable Law section (Sections V(A) and V(D)).

⁶⁸⁹ Conference Room Paper on the Report of the Commission on Human Rights in South Sudan, A/HRC/37/CRP.2, 23 February 2018, paras. 105, 106, 162.

⁶⁹⁰ Transitional Constitution (2011), Article 17; Child Act (2008), sections 9-33, 36; Convention on the Rights of the Child, Articles 1, 4, 6, 19, 24, 27, 28, 37, 38; African Charter on Human and Peoples' Rights, Article 18(3); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 13(g).

⁶⁹¹ Recruitment and use, killing and maiming, rape and other forms of sexual violence, attacks on schools and hospitals, abductions and denial of humanitarian access to children.

⁶⁹² United Nations Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, S/2018/865, 25 September 2018.

workplan and resulted in the appointment of new SPLA child protection focal points to SPLA headquarters in Juba and the training of 70 officers from the SPLA child protection unit.⁶⁹³

501. However, even with the signing of the R-ARCSS auguring well for peace and a return to normality and re-engagement on the workplan to address the six grave violations, children and youth face significant challenges which can only be overcome with commitment and investment on the part of the Government, the international community, and all South Sudanese. The lasting effects of the conflict coupled with the already meagre resources and opportunities available to South Sudanese children risk creating a lost generation.

1. Recruitment and Use of Children in Armed Conflict

a) Legal developments

502. In a welcome development in 2018 the Government acceded to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. This commits South Sudan not to recruit or conscript children under the age of 18. States parties must take all feasible measures to prevent such recruitment, including enacting legislation to prohibit and criminalize such recruitment and use. South Sudan must also demobilize anyone under 18 conscripted or used in hostilities and provide appropriate assistance for their physical and psychological rehabilitation and social reintegration.

503. Since both the SPLA Act (2009) and the Child Act (2008) already provide that the minimum age for recruitment into the SPLA forces is 18 years,⁶⁹⁴ South Sudan does not need to legislate any further in relation to its armed forces as it has already met its obligations under the Optional Protocol. However, while the Child Act (2008) provides for penalties for the recruitment in “armed forces”,⁶⁹⁵ the Optional Protocol additionally requires States parties to take all feasible measures to prevent recruitment and use of children in armed groups other than the armed forces of a State. This obligation includes the adoption of legal measures necessary to prohibit and criminalize such recruitment and use of children.⁶⁹⁶ The Child Act (2008) should therefore be amended to also prohibit and criminalize recruitment into “armed groups”.

504. South Sudan also declared that the safeguards in the SPLA Act (2009) “shall be observed and bound by to ensure that all recruitment is made in public places and not done under force or duress, advertised in the press and national media for young people, the recruits undergo medical examination and the record consist of recruitment as appropriate, among others, a birth certificate, certificate of education or apprenticeship.”⁶⁹⁷ The Commission notes, however, that none of these safeguards referred to in the Declaration are provided for in the SPLA Act (2009) and the Child Act (2008).

505. Furthermore, it is not currently possible to check the age of recruits using birth certificates as fewer than 30 percent children in South Sudan have such certificates.⁶⁹⁸ In November 2018, the Civil Registry Act, which will make birth registration systematic, was signed into law. There remains therefore a gap in relation to verification of the age of new recruits.

b) Current situation

506. Despite the legal prohibitions, the recruitment and use of children in the armed forces and armed groups remains a major concern in South Sudan. In his May 2018 Report to the Security Council on Children and Armed Conflict, the United Nations Secretary-General

⁶⁹³ United Nations Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, S/2018/865, 25 September 2018.

⁶⁹⁴ SPLA Act (2009), section 22(2); Child Act (2008), section 31.

⁶⁹⁵ Child Act (2008), section 32.

⁶⁹⁶ Optional Protocol to the Convention on the Rights of the Child, Article 4(2).

⁶⁹⁷ Declaration to South Sudan’s Accession to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, C.N.448.2018.TREATIES-IV.11.b (Depositary Notification).

⁶⁹⁸ Global Initiative on Out of School Children, *South Sudan Country Study*, May 2018.

once again listed the SPLA, SPLA-IO (TD), SPLA-IO (RM), and the White Army as recruiting and using children in armed conflict.⁶⁹⁹

507. UNICEF has estimated that 19,000 children have been recruited and associated with the armed forces and armed groups since the conflict erupted in December 2013.⁷⁰⁰ The United Nations has been able to verify 513 incidents affecting 5,723 children (5,320 boys and 403 girls) since 2014 which includes 432 children in the first half of 2018.⁷⁰¹ It has also documented a further 654 incidents affecting 7,220 children which remain unverified. Almost half of those were recruited by Government security forces.⁷⁰²

508. Recruitment and use of children has been declining in South Sudan; however, it continues to occur. For example, the Commission received information about 1,500 children in the SPLA-IO ranks in the Wadhalelo area of Western Bahr el Ghazal in January 2018.⁷⁰³ In a report on human rights violations in Western Equatoria between April and August 2018, the UNMISS Human Rights Division documented the abduction of 41 boys, 26 of whom were recruited into the SPLA-IO (RM).⁷⁰⁴ The United Nations verified 50 instances of abductions of children in the first half of 2018 and the main reason for abductions continues to be for recruitment of children into the armed forces or armed groups.⁷⁰⁵ Likewise, since the signing of the R-ARCSS, CTSAMVM reported observing the use of children in SPLA-IO units in Yambio and Bentiu⁷⁰⁶ and the Commission has received information about the use of children in NAS units in Central Equatoria.⁷⁰⁷

509. While many children are forcibly recruited,⁷⁰⁸ one study found that approximately only a third of the children associated with armed groups and armed forces whom they interviewed, had been forcibly recruited.⁷⁰⁹ Many other children are driven to enlist in the armed forces and armed groups for security and economic reasons, including a sense of responsibility to defend their communities from attack, to protect themselves from being attacked or killed, and to obtain food and money. Nevertheless, even where enlistment is “voluntary” it remains prohibited.

510. The majority of children associated with the armed forces and armed groups are used in support roles including as cooks, porters, spies or bodyguards.⁷¹⁰ However, children are also armed, trained and used in active combat and to commit atrocities against civilians. Girls also participate in these activities but also report having to undertake domestic chores and being sexually abused.

c) Demobilization, disarmament and reintegration

511. Encouragingly, there is a growing acknowledgement and willingness to address the issue of recruitment and use of children in armed forces and groups among the leaders in South Sudan. At the end of 2017, Taban Deng Gai acknowledged the presence of children in the SPLA-IO (TD) and committed to ensuring their release.

⁶⁹⁹ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict*, 16 May 2018, A/72/865-S/2018/465, Annex I.

⁷⁰⁰ UNICEF, *Briefing Note: Childhood under Attack, the Staggering Impact of South Sudan's Crisis on Children*, 15 December 2017.

⁷⁰¹ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷⁰² UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷⁰³ Confidential Document, ERN D113892-D113900.

⁷⁰⁴ OHCHR/UNMISS, *Violations and Abuses Against Civilians in Gbudue and Tambura States (Western Equatoria)*, April- August 2018, 18 October 2018.

⁷⁰⁵ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷⁰⁶ R-JMEC, *Progress Report No. 4: On the Status of Implementation of the R-ARCSS 2018*, 10 December 2018; CTSAMVM, *Technical Committee Meeting Minutes No. 7*, 16-19 January 2019.

⁷⁰⁷ Witness 981, ERN 101980-101992.

⁷⁰⁸ See for example OHCHR/UNMISS, *Violations and Abuses Against Civilians in Gbudue and Tambura States (Western Equatoria)*, April- August 2018, 18 October 2018.

⁷⁰⁹ Human Rights Watch, “‘We Can Die Too’ Recruitment and Use of Child Soldiers in South Sudan”, 2015.

⁷¹⁰ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865. See also OHCHR/UNMISS, *Violations and Abuses Against Civilians in Gbudue and Tambura States (Western Equatoria)*, April- August 2018, 18 October 2018.

512. Additionally, in February 2018, following sustained engagement, the Ministry of Defence and the SPLA leadership agreed to provide unhindered access to the United Nations and the National DDR Commission to undertake joint visits to all military barracks to screen and release children associated with the SPLA. Unfortunately, owing to limited resources, only one such mission had been undertaken by June 2018.⁷¹¹

513. Furthermore, the R-ARCSS reaffirmed the commitment in the Cessation of Hostilities Agreement of 21 December 2017⁷¹² to refrain from the recruitment and use of children armed forces or militias.⁷¹³ The issue of the recruitment and use of children has been on the agenda of each CTSAMVM Technical Committee meeting, with CTSAMVM investigating reports of children in the armed forces and armed groups and raising the issue with the Parties.⁷¹⁴

514. Accompanying this growing awareness and engagement with the issue of recruitment and use of children in armed conflict, there has been some progress in the release and reintegration of children associated with the armed forces and armed groups in 2018. In particular, between February and August 2018 there were three releases of children in Western Equatoria State facilitated by the National Demobilization Disarmament and Reintegration (DDR) Commission, with the support of UNICEF and UNMISS. In February 2018, 311 children (224 boys and 87 girls) were released;⁷¹⁵ in April, 207 children (112 boys and 95 girls) were released;⁷¹⁶ and in August, 128 children (90 boys and 38 girls) were released.⁷¹⁷ These children were primarily released from the South Sudan National Liberation Movement (SSNLM) and the SPLA-IO. A fourth release of children in Western Equatoria was planned for September but did not take place.

515. Elsewhere in the country, 210 children (207 boys and three girls) were released in Pibor, Jonglei in May 2018.⁷¹⁸ An additional 91 children associated with the SPLA-IO (TD) forces were reportedly identified during the integration of those forces into the SPLA (now SSPDF) in Bentiu, Unity State. At the time of writing, their demobilization was being organized.⁷¹⁹

516. Overall, between January 2015 and June 2018, 2,740 children were released from the armed forces and armed groups.⁷²⁰

517. As the National DDR Commission does not have sufficient resources to meet the basic needs of released children, the United Nations and NGOs have been assisting with social reintegration and medical and mental health aspects of the reintegration.⁷²¹ As children are released, they receive medical and psychological screening, interim care, and family tracing and reunification.⁷²² Nonetheless many challenges remain such as reintegration, extending services to hard-to-reach areas, the lack of local social and psychosocial resources (there is no social work curriculum in the country), the lack of employment opportunities and the risk of re-recruitment.⁷²³

⁷¹¹ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷¹² Cessation of Hostilities Agreement, 21 December 2017, Articles 3(2)(f), 9(1), 10(a).

⁷¹³ R-ARCSS, Article 2.1.10.3.

⁷¹⁴ CTSAMVM, *Technical Committee Meeting Minutes*, No. 2, 10 October 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 3, 24 October 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 4, 7-8 November 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 5, 27-28 November 2018; CTSAMVM, *Technical Committee Meeting Minutes*, No. 6, 18-18 November 2018.

⁷¹⁵ UNMISS, *Press Release: UNMISS Welcomes Release of Hundreds of Former Child Soldiers in Yambio*, 7 February 2018; UNICEF, *Press Release: Hundreds of children released by armed groups in South Sudan*, 7 February 2018.

⁷¹⁶ UNICEF, *Press Release: Hundreds of children released from armed groups in South Sudan*, 18 April 2018.

⁷¹⁷ UNICEF, *Press Release: More children released from South Sudanese armed groups*, 7 August 2018.

⁷¹⁸ UN Security Council, *Report of the Secretary-General on South Sudan (covering the period from 17 February to 3 June 2018)*, S/2018/609, 14 June 2018.

⁷¹⁹ CTSAMVM, *Report (No.1) to RJMEC Plenary, Addis Ababa*, 19 November 2018.

⁷²⁰ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷²¹ Confidential Meeting, Juba, 29 October 2018.

⁷²² Confidential Meeting, Juba, 29 October 2018; UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷²³ Confidential Meeting, Juba, 4 September 2018.

2. Violations of the Rights to Life and Protection from Violence, Injury or Abuse, including Rape and Sexual Violence

a) Killings and Injuries

518. Children continue to be killed and injured in South Sudan as a result of being directly targeted and caught in the crossfire of ongoing military operations. It is estimated that more than 2,300 South Sudanese children have been killed or injured since the conflict first erupted in 2013.⁷²⁴ The United Nations verified 46 incidents of killings and maiming of children in the first half of 2018.⁷²⁵ A report by the London School of Hygiene and Tropical Medicine, based on 21 surveys, found that approximately 10 percent of those killed in violent deaths in South Sudan were children under 18 years old. Given that such children make up just over half the population of South Sudan, as would be hoped, they suffer a lower per capita proportion of deaths than the adult population.⁷²⁶ Despite these statistics, in all situations the Commission has investigated, both in previous mandates as well as this one, children continue to suffer not only as collateral victims but also targets of violence.

519. In all three regions that the Commission focused on in this mandate, it found evidence of violence against children, including deliberate attacks on children occurring in 2018. In Central Equatoria, the Commission documented the 14 May 2018 attack on Emmanuel Christian College (ECC) in Goli, Central Equatoria, in the course of which five students (boys) were shot and killed by SPLA soldiers from the Tiger Division.⁷²⁷ One of these boys who, was only 12 years old, had been shot in his dormitory and sexually assaulted.⁷²⁸

520. In the course of the southern Unity State offensive between April and June 2018, the Commission received evidence of SPLA, SPLA-IO (TD) and affiliated militias directly targeting children. Witnesses told the Commission of children being shot as they fled, tanks running down children, as well hitting babies against trees until they died.⁷²⁹ One witness told of a seven day old baby being shot with its mother.⁷³⁰ Further, other children died of starvation and drowning as they tried hide in the swamps to avoid the attacks.⁷³¹ The UNMISS Human Rights Division also documented the killings of 35 children in the course of the southern Unity offensive.⁷³²

521. Similarly, in the course of the fighting in the Wau triangle in Western Bahr el Ghazal starting in mid-June 2018, witnesses told the Commission of children as young as five being shot by SPLA soldiers.⁷³³ Others, as young as seven, were injured including by getting hit by shards of mortar.⁷³⁴

b) Rape and Sexual Violence

522. UNICEF estimates that nearly 25 percent of conflict-related sexual violence committed in South Sudan involves children, with girls particularly vulnerable to sexual violence, abuse and exploitation.⁷³⁵ By December 2017, UNICEF estimated that more than 1,200 children had been affected by sexual violence, 93 percent of whom were girls.⁷³⁶ The United Nations had verified 19 cases of rape and sexual violence affecting children in the

⁷²⁴ UNICEF, *Briefing Note: Childhood under Attack, the Staggering Impact of South Sudan's Crisis on Children*, 15 December 2017.

⁷²⁵ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷²⁶ Francesco Checchi, *et al.*, "Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018: A statistical analysis", London School of Hygiene and Tropical Disease, September 2018.

⁷²⁷ Witness 741, ERN 101417-101457, para. 6; Witness 703, ERN 101470-101475, paras. 8-11; Witness 764, ERN 101946-101954, para. 6; Witness 699, ERN 101521-101529, paras. 7, 9; Witness 717, ERN 101388-101399, para. 15; Witness 723, ERN 101454-101461, para. 18; Confidential Source ERN D113590-D113600; Confidential Source, ERN D115036-D115084.

⁷²⁸ Witness 700, ERN 101462-101469, para. 9.

⁷²⁹ Witness 793, ERN 101499-101502, para. 5; Witness 828, ERN 101804-101810, para. 11; Witness 839, ERN 101626-101631, para. 9.

⁷³⁰ Witness 826, ERN 101856-101863, para. 19.

⁷³¹ Witness 793, ERN 101499-101502, para. 5; Witness 826, ERN 101856-101863, para. 25.

⁷³² UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April – May 2018*.

⁷³³ Witness 883, ERN 101557-101561, para. 7; Witness 914, ERN 101788-101793, para. 11;

⁷³⁴ Witness 883, ERN 101557-101561, para. 10.

⁷³⁵ UNICEF, *Briefing Note: Childhood under Attack, the Staggering Impact of South Sudan's Crisis on Children*, 15 December 2017.

⁷³⁶ UNICEF, *Briefing Note: Childhood under Attack, the Staggering Impact of South Sudan's Crisis on Children*, 15 December 2017.

first half of 2018.⁷³⁷ However, it has been widely acknowledged that sexual violence against children, in particular against boys, is likely underreported due to fear of stigmatization and reprisals as well as the lack of adequate support services and accountability mechanisms.⁷³⁸

523. As with killings and maiming of children, in the three case studies that the Commission reported on under this mandate, rape and sexual violence against children was involved. In Central Equatoria, in the course of the 14 May attack on Emmanuel Christian College, the young boy of 12 who was killed was also sexually assaulted.⁷³⁹

524. In southern Unity, witnesses reported girls as young as 7 to 10 years old being raped by SPLA, SPLA-IO (TD) and associated militias in the course of the offensive from April to June 2018.⁷⁴⁰ Young girls were also abducted and forcibly taken as “wives” by soldiers: this was encouraged by commanders as part of their compensation for fighting.⁷⁴¹ Similarly, in the course of fighting in Wau triangle area from June 2018 onwards, girls were also reported to have been raped by soldiers.⁷⁴²

525. As described elsewhere in this report, the conflict accompanied by the worsening economic situation has increased the incidence of early child marriage affecting girls in South Sudan and in refugee settlements abroad.⁷⁴³

526. Despite the bleak situation in relation to sexual violence against children, one positive development in 2018 was that the Government introduced an additional layer of legal protection against sexual abuse of children. On 27 September 2018, it acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Among the provisions of the Optional Protocol, Article 3 requires each State party to ensure that the following acts are criminalized in domestic law, whether they are committed domestically or transnationally or on an individual or organized basis: (a) in the context of the sale of children, offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child; transfer of organs of the child for profit; or engagement of the child in forced labour; or improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; (b) offering, obtaining, procuring or providing a child for child prostitution; (c) producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography.

527. Section 22 of South Sudan’s Child Act (2008) already provides that the Government shall take concrete measures to protect children from all forms of abuse and to ensure that any child who becomes the victim of abuse will be provided with appropriate treatment and rehabilitation. In this regard, it provides that the abduction or trafficking (including sale) of a child; sexual abuse, exploitation and harassment of a child; or use of a child in pornographic performances and materials are offences liable to punishment of up to 14 years imprisonment.⁷⁴⁴ Its accession to the Optional Protocol provides South Sudan with a crucially important opportunity to review its child laws to ensure the definitions of crimes are in line with its international obligations.

3. Displacement and Unaccompanied and Separated Children

528. It is well-known that the conflict in South Sudan has resulted in extremely high levels of displacement, not seen in Africa since the Rwandan genocide.⁷⁴⁵ Displacement has

⁷³⁷ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷³⁸ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁷³⁹ Witness 700, ERN 101462-101469, para. 9.

⁷⁴⁰ See, example, Witness 825, ERN 101848-101855, para. 18; Witness 828, ERN 101804-101810, para. 12; Witness 872, ERN 101603-101608, para. 8. See also UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April – May 2018*.

⁷⁴¹ Witness 828, ERN 101804-101810, paras. 11, 12; Witness 827, ERN 101811-101816, para. 10; Witness 839, ERN 101626-101631, para. 8; Witness 872, ERN 101603-101608, para. 8.

⁷⁴² Witness 913, ERN 101799-101803, para. 8.

⁷⁴³ See above Women and Girls in South Sudan section (Section VI(B)).

⁷⁴⁴ See also Penal Code (2008), sections 254, 258.

⁷⁴⁵ UNHCR, *Aid appeals seek over US\$3 billion as South Sudan set to become Africa’s largest refugee and humanitarian crisis*, 1 February 2018.

however, disproportionately affected children who make up just over half the population of South Sudan, but represent over 60 percent of IDPs and refugees.⁷⁴⁶

529. Beyond being displaced, many of these children have been separated from their parents and guardians and many have had to make arduous journeys to safety unaccompanied. It is estimated that more than 15,000 unaccompanied and separated children have been displaced inside South Sudan since December 2013.⁷⁴⁷ There are an additional 50,000 unaccompanied and separated children who are refugees.⁷⁴⁸

530. Displaced children face a number of increased protection risks and unaccompanied and separated children are particularly vulnerable.⁷⁴⁹ These risks include psychological distress as a result of being exposed to traumatic events and violence, recruitment into armed forces and armed groups, physical violence as community and family structures deteriorate raising the risk of domestic violence, juvenile delinquency and risky behaviour exacerbated by lack of educational opportunities, child labour and exploitation resulting from dire economic situations, and sexual and gender-based violence.⁷⁵⁰ Furthermore, it is estimated that 46 percent of street children in Juba, Torit, Bentiu, Malakal, Bor, and Wau have previously been internally displaced.⁷⁵¹

531. The Commission met with 13 boys and girls between the ages of 12 and 16 in Kakuma refugee camp in Kenya, who were, or had been, unaccompanied and separated, about half of whom had arrived in 2018.⁷⁵² Some explained that their parents were still in South Sudan while others were orphaned. They stated that they were living with family members such as aunts or had been fostered. Despite difficult journeys out of South Sudan, including trips made on foot and coming under attack en-route, each nonetheless expressed aspirations for the future which centred on completing their education including becoming teachers, nurses and doctors.⁷⁵³

532. The Commission heard that women regularly arrive in refugee camps in Uganda having crossed from South Sudan with children they had found on the road to as they fled.⁷⁵⁴ These women decided to take care of these lost children and to bring them a safer place. Both the women and the unaccompanied and separated children come from different counties and even different states when they come across each other so it is not always clear from which county or state these children come. In some instances, these children recount that their parents have been killed.

533. Of the 15,000 unaccompanied and separated children displaced within South Sudan, approximately 6,000 have been reunified since 2013.⁷⁵⁵ However, the process remains slow. For example, between January and September 2018, the ICRC reunited 47 people, including children with their families.⁷⁵⁶ The prevailing conditions including the security and access challenges combined with the sheer number of unaccompanied and separated children make family tracing difficult as a result an emphasis has been placed on foster or kinship care.

534. Since 2017, within countries hosting South Sudanese children, there has been a focus on strengthening the capacity and mechanisms for family tracing and reunification and the restoration of family links. Indeed, UNHCR has identified these measures as one of its top three priorities in relation to South Sudanese refugees, along with improving psychosocial support to adolescents and youth and ensuring at-risk children have access to care and protection services.⁷⁵⁷ Accordingly, a roving expert on family tracing and reunification has

⁷⁴⁶ UNHCR, *Regional Update: South Sudan Situation*, August 2018; Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

⁷⁴⁷ UNICEF, *Making South Sudan’s families whole again*, 12 December 2018; UNHCR, *South Sudan Situation: Regional Framework for the Protection of Refugee Children, February 2018-December 2019*; Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

⁷⁴⁸ UNHCR, *South Sudan Regional Refugee Response Plan January 2019 – December 2020*, 18 December 2018.

⁷⁴⁹ UNHCR, *South Sudan Situation: Regional Framework for the Protection of Refugee Children, February 2018-December 2019*.

⁷⁵⁰ UNHCR, *South Sudan Situation: Regional Framework for the Protection of Refugee Children, February 2018-December 2019*.

⁷⁵¹ Global Initiative on Out of School Children, *South Sudan Country Study*, May 2018.

⁷⁵² Focus group meeting with unaccompanied and separated children in Kakuma refugee camp, Kenya, 27 August 2018.

⁷⁵³ Focus group meeting with unaccompanied and separated children in Kakuma refugee camp, Kenya, 27 August 2018.

⁷⁵⁴ Confidential Meeting, 2 February 2019.

⁷⁵⁵ UNICEF, *Making South Sudan’s families whole again*, 12 December 2018.

⁷⁵⁶ ICRC, “Newsletter: South Sudan Facts and Figures January to September 2018”, 19 November 2018.

⁷⁵⁷ UNHCR, *South Sudan Situation: Regional Framework for the Protection of Refugee Children, February 2018-December 2019*.

been deployed to assess the needs of children in Uganda, Kenya and Ethiopia to identify gaps in the current system.

535. This focus and prioritization appears to be showing success. As of June 2018, 82 percent of unaccompanied and separated refugee children had been placed in appropriate interim or long-term alternative care.⁷⁵⁸ Nonetheless, approaches and success have varied across host countries. For example, as of June 2018, only 21 and 50 percent of identified unaccompanied and separated refugee children in the Democratic Republic of the Congo and Central African Republic, respectively, had received appropriate assistance⁷⁵⁹ whereas 73, 80 and 88 percent were placed in alternative kinship or foster care in Sudan, Ethiopia and Kenya, respectively.⁷⁶⁰

536. The challenges which remain include providing alternative care to adolescents and the limited opportunities for sustainable livelihoods and self-reliance for caregivers.⁷⁶¹ A further challenge in reuniting refugee children with their parents still in South Sudan is that it is currently only possible to reunite them by bringing the children back to South Sudan, rather than taking the parents out of the country. This is an option that many parents decline.⁷⁶²

4. The Right to Education

537. South Sudan has the highest proportion of children out of school in the world.⁷⁶³ However, even for those South Sudanese children lucky enough to attend school or use other educational opportunities, there remain significant challenges relating to the quality of education and the opportunities upon completion.

538. Among the chief issues underlying access to education in South Sudan and its quality are the ongoing conflict and the resultant insecurity, economic constraints on resources dedicated to education, and cultural considerations. These complex and inter-connected factors intersect and result in school closures due to insecurity, displaced populations, an increase in early marriage and child labour driven by economic pressures and undervaluation of education. Furthermore, funding is directed toward the security expenditures rather than education, and a shrinking economy and high inflation make school fees unaffordable for many students.

539. South Sudan has relevant legislation including provisions in the Transitional Constitution of the Republic of South Sudan of 2011, the Child Act (2008), and the General Education Act (2012). The Government has developed a National General Education Policy 2017-2027 and a General Education Strategic Plan, 2017-2022. It has further developed some specialised programmes to address some of the specific challenges facing children in attending school, including a National School Feeding Programme and a National Inclusive Education Policy, which include programmes aimed at getting particular groups of children into school, including girls, overaged children, and pastoralist children. However, there remain challenges facing the implementation of these programmes.

540. One of the main challenges facing the education system is that it is severely under resourced. Between 2012/2013 and 2017/2018, the general education budget remained below five percent of the national budget.⁷⁶⁴ This is far below the recommended 15 to 20 percent of total public expenditure which should be directed to education according to international instruments such as the Incheon Declaration.⁷⁶⁵ The 2018/2019 budget has brought a welcome increase in the education budget, boosting it to almost 10 percent of the national budget (including higher education).⁷⁶⁶ However, when compared to the security budget

⁷⁵⁸ UNHCR, *South Sudan Regional RRP 2018 Mid-Year Report*, June 2018.

⁷⁵⁹ UNHCR, *Democratic Republic of the Congo: 2018 Mid-Year Report South Sudan Regional RRP, January to June 2018*; UNHCR, *Central African Republic: 2018 Mid-Year Report South Sudan Regional RRP, January to June 2018*.

⁷⁶⁰ UNHCR, *Sudan: 2018 Mid-Year Report South Sudan Regional RRP, January to June 2018*; UNHCR, *Ethiopia: 2018 Mid-Year Report South Sudan Regional RRP, January to June 2018*; UNHCR, *Kenya: 2018 Mid-Year Report South Sudan Regional RRP, January to June 2018*.

⁷⁶¹ UNHCR, *South Sudan Situation: Regional Framework for the Protection of Refugee Children, February 2018-December 2019*.

⁷⁶² Confidential Meeting, Juba, 17 October 2018.

⁷⁶³ Global Initiative on Out of School Children, *South Sudan Country Study*, May 2018.

⁷⁶⁴ Global Initiative on Out of School Children, *South Sudan Country Study*, May 2018.

⁷⁶⁵ Global Initiative on Out of School Children, *South Sudan Country Study*, May 2018.

⁷⁶⁶ Republic of South Sudan, Ministry of Finance and Planning, *Approved Budget 2018/2019*.

which makes up approximately 20 percent of the 2018/2019 national budget, the education budget remains disappointingly half the security budget.⁷⁶⁷ Furthermore, the forecast budget does not guarantee that the amount allocated to education will be disbursed. For example, in the 2016/2017 fiscal year, the most recent year for disbursement figures are available, only 68 percent of the allocated education budget was ultimately disbursed while 106 percent of the budget allotted to security was disbursed.⁷⁶⁸

c) *Access to Education*

541. In 2018, estimates indicate that 2.2 million children were not in school in South Sudan and this was projected to rise to 2.4 million by 2020,⁷⁶⁹ although this projection was made before the signing of the peace agreement and the increase in education spending.

542. A key factor in accessing education is that only 59 percent of primary schools in South Sudan were functional at the end of 2017. While this represents an encouraging nine percent increase in functional schools from 2016, in concrete terms it means that only 3,215 primary schools out of 5,042 were functional.⁷⁷⁰ The main reason for schools being closed related to the conflict and insecurity. In November 2017, in areas that were unstable, almost 90 percent of schools were closed.⁷⁷¹ Indeed, even where schools are functional, they face significant closures and interruptions, due primarily to insecurity. In this regard, in the 2017 school year, schools in South Sudan lost an average 30 days of education.⁷⁷²

543. In this regard, the Commission received information that none of the 18 schools in the Baggari area, in Western Bahr el Ghazal, are presently functioning. It was estimated that approximately 18,500 children from Baggari have been left without access to schooling as a result, although a group of educated community members have reportedly been volunteering to provide classes.⁷⁷³

544. There have been many instances of the armed forces and armed groups occupying schools and educational facilities with the result that they have not been able to operate.⁷⁷⁴ For example, first the SPLA-IO and then subsequently the SPLA when they gained control of Wadhalelo, in Western Bahr el Ghazal in June 2018, set up their bases in the primary school.⁷⁷⁵ The SPLA continued to occupy the school at least until October 2018. The school could therefore no longer be used and classes had to be held under the trees.⁷⁷⁶ The SPLA itself acknowledged that they had occupied a number of schools in the Wau Triangle area but indicated that they would be vacating them.⁷⁷⁷ The Commission also received information that the SPLA-IO (RM) and subsequently the NAS, after they attacked on 24 September 2018, used the Yondoru school in Central Equatoria as their barracks.⁷⁷⁸

545. In this regard, the R-ARCSS requires the Parties to immediately demilitarize civilian areas including vacating occupied schools.⁷⁷⁹ It was reported in November 2018 that the Government had issued an order to troops to vacate all civilian buildings, including schools.⁷⁸⁰ CTSAMVM is monitoring progress on this issue and, at its sixth Technical

⁷⁶⁷ Republic of South Sudan, Ministry of Finance and Planning, *Approved Budget 2018/2019*. Republic of South Sudan, Ministry of Finance and Planning, *FY: 2018/2019 Approved Budget*. The Security line of the budget makes up 19.5 percent of the budget, but when the Police budget is added to that, it accounts for 22 percent of the budget.

⁷⁶⁸ Republic of South Sudan, Ministry of Finance and Planning, *Q4 2016/17 Fiscal Report*, December 2017.

⁷⁶⁹ Global Initiative on Out of School Children, "South Sudan Country Study", May 2018.

⁷⁷⁰ A school is considered functional if a head and/or at least one teacher is present and classes are taking place irrespective of the number of students. Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁷⁷¹ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁷⁷² Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁷⁷³ Confidential Meeting, Wau, 1 December 2018.

⁷⁷⁴ See e.g. CTSAMVM, *Report (No.1) to the RJMEC Plenary*, Addis Ababa, 19 November 2018.

⁷⁷⁵ Witness 931, ERN 101799-101803, para. 7; Witness 925, ERN 101886-101890, para. 7; Witness 915, ERN 101828-101835, paras. 16, 20, 22.

⁷⁷⁶ Witness 915, ERN 101828-101835, paras. 16, 20, 22.

⁷⁷⁷ Confidential Meeting, 2 December 2018.

⁷⁷⁸ Witness 981, ERN 101980-101992; Witness 972, ERN 101936-101945.

⁷⁷⁹ R-ARCSS, Article 2.2.3.1.

⁷⁸⁰ CTSAMVM, *Report (No.1) to the RJMEC Plenary*, Addis Ababa, 19 November 2018.

Committee meeting on 18-19 December 2018, found “encouraging indications that action is in hand to vacate [civilian] buildings”.⁷⁸¹

546. The mean number of years of education achieved by South Sudanese children is 4.8 (4.0 years for girls and 5.3 years for boys).⁷⁸² One of the reasons for the small number of years of education undertaken is the widespread phenomena of late entry into school, which combined with interruptions and drop-out rates, means few students have the opportunity to complete their primary and secondary school educations. Nearly 75 percent of six-year-olds and 59 percent of seven-year-olds were not attending school in 2015. Rates of enrolment increase as children reach adolescence; however, the late start means that under two percent of 14-year-olds and under four percent of 15-year-olds have reached secondary school.⁷⁸³ Girls also tend to reach secondary school later than boys, which combined with higher drop-out rates relating to early marriage results in fewer years of education for girls.

547. One primary school teacher the Commission spoke to explained that although he taught P1, which is the first level of primary school, “this does not have any bearing on the age of the children. Many of them had missed out on school for many years because of the war. Some of the students were even in their twenties.”⁷⁸⁴

548. Primary schools suffered an average dropout rate of eight percent for girls and six percent for boys in 2017. The main reasons for girls dropping out were marriage and pregnancy, domestic duties, and a lack of food. Boys primarily drop out of school because of a lack of food, having to work, an inability to pay school fees, and insecurity.⁷⁸⁵

549. Girls in particular are deprived of access to education. South Sudan has the lowest proportion of female students enrolled in primary school in sub-Saharan Africa and the second lowest in secondary school.⁷⁸⁶ Just over one third of students enrolled in primary school in 2017 were girls.⁷⁸⁷ While this number is increasing each year,⁷⁸⁸ this proportion worsens when girls hit puberty because South Sudan has one of the highest rates of child marriage in the world.⁷⁸⁹ This, taken in conjunction with the widespread late entry into school, means that girls are likely to get married before they complete their primary education.

550. To address the low numbers of girls accessing education, the Government has created a specialised Community Girls’ School programme to assist girls in re-entering school.⁷⁹⁰ It consists of a three year course that mainstreams students back into primary education at Level 5. In 2017, these schools had enrolled approximately 6,000 students in 213 schools located in various parts of the country.⁷⁹¹

551. Rural children also face greater barriers to accessing education. While in urban areas 29 percent of boys and 32 percent of girls were out of school in 2015, in rural areas almost half of children are out of school (47 percent of boys and 53 percent of girls).⁷⁹² The urban/rural divide ties into the pastoralist culture in which children in cattle-keeping communities support their families by undertaking animal husbandry. To address some of these challenges, the Government has created a Pastoralist Education Programme which uses

⁷⁸¹ CTSAMVM, *Technical Committee Meeting Minutes*, No. 6, Addis Ababa, 18-19 December 2018.

⁷⁸² UNDP, *Human Development Indices and Indicators: 2018 Statistical Update*, South Sudan.

⁷⁸³ Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

⁷⁸⁴ Witness 915, ERN 101828-101835, para. 4.

⁷⁸⁵ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment*, South Sudan, November 2017.

⁷⁸⁶ Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

⁷⁸⁷ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment*, South Sudan, November 2017.

⁷⁸⁸ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment*, South Sudan, November 2017.

⁷⁸⁹ Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

⁷⁹⁰ Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018. The General Education Act (2012), section 9(2)(a) provides for the creation of non-formal education systems to provide learning opportunities for learners who missed their formal education. In 2017, the Minister of Education ordered all State Ministries of Education to ensure that there were sufficient Community Girls Schools to meet the educational needs of girls and young women. Ministerial Order No. 22/2017 on Girls Education in the Republic of South Sudan, 31 October 2017, Article 19.

⁷⁹¹ UNESCO Regional Office for Eastern Africa, *Annual Report 2017* (reporting that 6,84 students were enrolled (3,901 girls and 2,183 boys); UNICEF, *Annual Report 2017 for South Sudan* (reporting that 6,000 girls were enrolled).

⁷⁹² Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

flexible learning through mobile schools, local teachers who are present in the cattle camps and a truncated curriculum to fast-track learning.⁷⁹³ As of 2017, 1,311 (332 female, 979 male) students (children, youth and adults) were taking part in lessons in 10 cattle camps and one learning centre. A new curriculum designed for pastoralists was also being implemented by 37 (35 male and 2 female) teachers/community facilitators.⁷⁹⁴ Nonetheless, there is a need for the programme to be expanded.⁷⁹⁵

552. While it is reasonable to expect that population displacement resulting from the conflict results in significantly lower levels of access to education, given the dire education situation facing students in South Sudan this is not universally the case. Indeed, although IDPs and refugees have worse educational outcomes than urban children, they fare better than rural children in South Sudan.⁷⁹⁶ IDP children have similar rates of primary school attendance to urban children; however, at the secondary school level they have significantly lower levels of attendance (eight percent attendance rate among IDPs as compared to 22 percent attendance rate for urban children).⁷⁹⁷ As is the case with non-displaced children in South Sudan, displaced girls have significantly lower levels of access to education than do boys.⁷⁹⁸

553. South Sudanese refugee children have a right to primary and secondary education in all the surrounding countries hosting refugees; however, enrolment remains low with 59 percent at the primary level and just 11 percent at the secondary level. As is the case in South Sudan, there is a noticeable gender disparity.⁷⁹⁹ Further barriers to education for refugee children include language barriers, particularly in the Democratic Republic of the Congo and Central African Republic where the language of instruction is French.⁸⁰⁰ The Commission heard similar concerns expressed in Sudan, where the language of instruction is Arabic, and in Kenya where some education is in Swahili, languages many of the children do not speak.⁸⁰¹ Despite these barriers to access, refugee children in Kenya and Sudan have participated in national examinations.⁸⁰² Indeed, refugees with whom the Commission spoke raised access to education (as well as risk of recruitment) as one of their primary concerns which need to be addressed before returning to South Sudan.⁸⁰³

554. Despite these bleak figures on access to education in South Sudan, since independence, there has been an upward trajectory in primary and secondary enrolment in South Sudan. In primary schools, there was a dip in enrolment between 2013 and 2015 with the outbreak in the conflict; however, by 2017 enrolment had recovered and reached a new high. Likewise, since 2012, the number of students sitting the South Sudan secondary examinations has more than quadrupled.⁸⁰⁴ This, coupled with the increase in education funding in the 2018/2019 budget,⁸⁰⁵ gives reason for hope although there is a long way to go to get all South Sudanese children into school.

d) *Quality of Education*

555. Even where children have access to and are able to attend schools, the resources available to them are limited.

⁷⁹³ Global Initiative on Out of School Children, “South Sudan Country Study”, May 2018.

⁷⁹⁴ UNESCO Regional Office for Eastern Africa, *Annual Report 2017*.

⁷⁹⁵ Radio Tamazuj, “Terekeka pastoralists demand mobile schools”, 4 January 2019.

⁷⁹⁶ World Bank, “Impact of Conflict and Shocks on Poverty: South Sudan Poverty Assessment 2017”, May 2018.

⁷⁹⁷ World Bank, “Impact of Conflict and Shocks on Poverty: South Sudan Poverty Assessment 2017”, May 2018.

⁷⁹⁸ World Bank, “Impact of Conflict and Shocks on Poverty: South Sudan Poverty Assessment 2017”, May 2018.

⁷⁹⁹ UNHCR, *South Sudan Regional RRP 2018 Mid-Year Report*, June 2018. The percentage of children in school varies by host country with the lowest number of primary students enrolled in Sudan (42%) and the highest in the Democratic Republic of the Congo (76%) and at secondary level: the lowest percent in Kenya (5%) and the highest in Uganda (12%). Similar concerns were raised in respect of South Sudanese refugees in Darfur. Confidential Meeting, Nyala, Sudan, 26 August 2018. See also Confidential Meeting, Kiryandongo, 17 December 2018.

⁸⁰⁰ UNHCR, *South Sudan Regional RRP 2018 Mid-Year Report*, June 2018.

⁸⁰¹ Confidential Meeting, Nyala, Sudan, 26 August 2018; Focus group meeting with unaccompanied and separated children in Kakuma refugee camp, Kenya, 27 August 2018.

⁸⁰² UNHCR, *South Sudan Regional RRP 2018 Mid-Year Report*, June 2018.

⁸⁰³ E.g. focus group meeting with refugees in El Daein, Sudan, 27 August 2018.

⁸⁰⁴ Global Initiative on Out of School Children, *South Sudan Country Study*, May 2018.

⁸⁰⁵ See above para. 540.

556. Those schools which are functional are crowded with few resources. The average student to teacher ratio is 37:1.⁸⁰⁶ However, the student to teacher ratio varies according to the region and in some conflict affected regions the ratio is significantly higher with Jonglei and Upper Nile student to teacher ratios exceeding 50:1. Schools catering to South Sudanese refugees also face significant challenges. In this regard, the ratio of students to teachers is high, especially in Kenya (84:1) and Uganda (80:1).⁸⁰⁷

557. In addition, only 16 percent of teachers are women.⁸⁰⁸ This particularly affects girls' education because, for cultural and safety reasons, they are more likely to go to school if there is a female teacher serving as a role model and demonstrating to girls the value of education.⁸⁰⁹

558. Furthermore, there is a high degree of teacher absenteeism in large part due to the non-payment of teacher salaries. In November 2017, when teachers should have received 10 months' worth of salary in the 2017 school year, they had on average only received four months of salaries.⁸¹⁰ Indeed, in 2017, teachers from only one percent of schools had received seven or more months' worth of salary payments.⁸¹¹ In schools where salaries had been paid, over 75 percent of teachers were present, whereas in schools where they had not, attendance dropped by nine percentage points.⁸¹²

559. In November 2018, the EU-funded organization Impact announced that it would be paying all primary school teachers in South Sudan monthly incentives of \$40 USD for a period of 16 months to increase attendance and improve standards.⁸¹³ The programme also announced it would develop an electronic human resources database of nursery, primary and secondary teachers in all States in coordination with the Ministry of General Education and Instruction.⁸¹⁴ While the payment of incentives is a welcome step to ensuring teachers receive compensation for their important work, the responsibility remains with the Government to adequately fund the education system.

560. Even where teachers are present, very few are formally qualified. Only four percent of teachers have earned a secondary education certificate and under 40 percent of primary and 70 percent of secondary school teachers have any formal teacher training.⁸¹⁵ For example, one teacher told the Commission that although he had only reached Secondary Year 3 level of education himself, he was teaching mathematics, science and religious studies to Primary level 1 students.⁸¹⁶ Nonetheless, in a positive step, in late December 2018, the Minister of General Education and Instruction announced a screening exercise to ensure that primary and secondary school teachers meet the minimum qualifications.⁸¹⁷

561. Furthermore, there is a lack of appropriate educational tools and materials to aid teaching and learning. Only half of teachers have a full set of textbooks for the subjects they are teaching.⁸¹⁸ Although a new national curriculum was launched in 2015, it is not yet supported by the required teaching and learning materials as teacher guides and textbooks

⁸⁰⁶ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017; Global Initiative on Out of School Children, "South Sudan Country Study", May 2018.

⁸⁰⁷ UNHCR, *South Sudan Regional RRP 2018 Mid-Year Report*, June 2018. The percentage of children in school varies by host country with the lowest number of primary students enrolled in Sudan (42%) and the highest in the Democratic Republic of the Congo (76%) and at secondary level: the lowest percent in Kenya (5%) and the highest in Uganda (12%). Similar concerns were raised in respect of South Sudanese refugees in Darfur. Confidential Meeting, Nyala, Sudan, 26 August 2018.

⁸⁰⁸ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸⁰⁹ Global Initiative on Out of School Children, "South Sudan Country Study", May 2018.

⁸¹⁰ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸¹¹ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸¹² Global Initiative on Out of School Children, "South Sudan Country Study", May 2018.

⁸¹³ Impact, <https://impact-southsudan.org/>, last accessed 21 November 2018.

⁸¹⁴ Impact, <https://impact-southsudan.org/>, last accessed 21 November 2018.

⁸¹⁵ Global Initiative on Out of School Children, "South Sudan Country Study", May 2018.

⁸¹⁶ Witness 915, ERN 101828-101835, para. 4.

⁸¹⁷ Radio Miraya, "National Ministry of Education to screen-out unqualified teachers", 20 December 2018.

⁸¹⁸ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

are yet to be printed.⁸¹⁹ One of the challenges is that the General Education Act (2012) provides for early childhood education and Primary levels 1 to 3 to be taught in indigenous languages and for English to be the language of education from Primary level 4 onwards.⁸²⁰ However, only in November 2018, did the Ministry of Education and Instruction announce that it had started work on the translation of textbooks into Dinka, Nuer, Bari, Zande and Toposa.⁸²¹

562. Just as teachers do not have adequate resources to teach, students also lack the resources to learn. Only half of children attending school in 2017 had both a pen or pencil and their own notebook.⁸²²

563. Furthermore, only 30 percent of children have access to food during the school day and even this number varies widely across the country. For example, in Unity State, only five percent of children have access to food during the school day.⁸²³ This, despite the Government's provision for a National School Feeding Programme, which is being supported by WFP.⁸²⁴ The lack of food during the school day affects not only students' attendance but also their ability to learn.

e) *Attacks on Educational Facilities and Personnel*

564. Directing attacks against civilian objects, including schools, is a serious violation of international humanitarian law and is a crime punishable under the Draft Statute of the Hybrid Court for South Sudan. In 2017, a third of functional primary schools reported having been affected by attacks of various forms.⁸²⁵ While the majority of those attacks were in the form of looting, six percent of schools reported direct attacks on education personnel and being hit by bullets at least once in 2017.⁸²⁶ In the first half of 2018, the United Nations verified 11 attacks on schools, including looting, vandalism and destruction of facilities, attacks and threats of attacks on students and protected personnel, often during military offensives.⁸²⁷

565. A further two percent of schools reported having been occupied at least once by armed forces or armed groups in 2017.⁸²⁸ The United Nations verified 13 instances of military use of schools in the first half of 2018. Since 2014, 103 cases of military use of schools have been verified, affecting the access to education of over 32,500 children.⁸²⁹ Some of this occupation is short term while in other instances it has been more protracted. As of 30 June 2018, 85 of those schools had been vacated, while 35 remained in military use.⁸³⁰ Schools were used as military bases as well as sleeping quarters by parties to the conflict.

566. A particularly egregious example of attacks on schools occurred on 14 May 2018 at the Emmanuel Christian College (ECC) in Goli, Central Equatoria State. While the majority of the school and its staff had relocated to Yei town in 2016 due to insecurity and fighting in the area, it continued to offer basic education and health facilities at the Goli site.⁸³¹ On

⁸¹⁹ Global Initiative on Out of School Children, "South Sudan Country Study", May 2018.

⁸²⁰ General Education Act (2012), section 13.

⁸²¹ Eye Radio, "Ministry of Gen. Education translates textbooks into five national languages", 27 November 2018.

⁸²² Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸²³ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸²⁴ Global Initiative on Out of School Children, "South Sudan Country Study", May 2018; Republic of South Sudan Ministry of General Education and Instruction, *General Education Strategic Plan, 2017-2022*, May 2017.

⁸²⁵ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸²⁶ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸²⁷ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁸²⁸ Republic of South Sudan Ministry of General Education and Instruction, UNICEF and Save the Children, *Education Cluster Assessment, South Sudan*, November 2017.

⁸²⁹ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁸³⁰ UN Security Council, *Report of the Secretary-General on Children and Armed Conflict in South Sudan*, 25 September 2018, S/2018/865.

⁸³¹ CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 1.1; Confidential Source, ERN D113590-D113600; Confidential Document, ERN D114131-D114144.

14 May, members of the SPLA's Tiger division attacked the compound under the guise of searching for rebels.⁸³² While no opposition fighters were found in the compound, it resulted in the killing of five students (boys) and three ECC staff as well as two IDPs who were sheltering at the school.⁸³³ The premises were looted over the course of the 12 hour attack including breaking into the safe to steal the teachers' salaries.⁸³⁴ This incident is more fully described below in the section on Central Equatoria.

567. The Commission underscores that directing attacks against civilian objects, including schools, is a violation of international humanitarian law. Further, directing attacks against buildings dedicated to educational purposes where there is no indication that the building has lost its protected status is an international crime punishable under Article 5(e) of the Draft Statute of the Hybrid Court for South Sudan.

f) *Employment Opportunities for Youth*

568. South Sudan has a large youth population with 51 percent of the population under 18 years of age and 72 percent of the population under 30 years of age.⁸³⁵ More than 50 percent of youth are under-employed and only 12 percent are formally employed.⁸³⁶ Youth face complex challenges obstructing them from entering the workforce including low levels of education including lack of basic literacy and numeracy skills, lack of business management knowledge, psychosocial challenges, and barriers to accessing vocational training opportunities.⁸³⁷ In addition, trauma-related mental health disorders may pose barriers to their participation in community and work life.

569. Reducing the militarisation of youth and preventing their involvement in violence and crime going forward after the peace agreement will require, among other things, greater opportunities for youth in South Sudan. However, a shrinking economy presents a challenge in addressing high youth unemployment and under-employment.

570. The importance of this issue has been highlighted in 2018 by youth threatening and attacking humanitarian workers in Malakal as well as Bunj, Maban County in Upper Nile State.⁸³⁸ Both situations were reportedly sparked by frustration at the perceived lack of youth employment opportunities. In Malakal, youth groups threatened aid workers while in Bunj, the protests became violent leading to looting and burning of humanitarian premises and assets. Both situations resulted in the suspension of humanitarian assistance, and in Bunj approximately 400 humanitarian workers had to be relocated.⁸³⁹

571. Women and girls face particular barriers to vocational training as a result of gender norms dictating that they remain in the home and undertake domestic work. However, girls who have been impacted by the conflict also have significantly lower levels of income generating activities.⁸⁴⁰ This is in part related to heightened insecurity limiting their mobility and therefore their ability to go out to work, but also importantly because the conflict has increased the likelihood of early marriage among girls. The insecurity has incentivized both voluntary and forced marriage of girls both for security and economic reasons.⁸⁴¹

⁸³² Witness 699, ERN 101521-101529, para. 11; Witness 723, ERN 101454-101461, paras. 9, 20, 21; Witness 741, ERN 101417-101457, para. 21.

⁸³³ Witness 741, ERN 101417-101457, para. 6; Witness 703, ERN 101470-101475, paras. 8-11; Witness 764, ERN 101946-101954, para. 6; Witness 699, ERN 101521-101529, paras. 7, 9; Witness 717, ERN 101388-101399, para. 15; Witness 723, ERN 101454-101461, para. 18; Confidential Source ERN D113590-D113600; Confidential Source, ERN D115036-D115084.

⁸³⁴ Witness 689, ERN 101400-101411, paras. 7, 13-14; Witness 741, ERN 101417-101457, para. 10; Witness 700, ERN 101462-101469, para. 14; Witness 703, ERN 101470-101475, para. 6; Witness 764, ERN 101946-101954, para. 4; Witness 699, ERN 101521-101529, paras. 10, 16; Witness 723, ERN 101454-101461, para. 21.

⁸³⁵ Republic of South Sudan, National Bureau of Statistics, <http://www.ssnbss.org/>; World Bank, *Project Information Document: Economic Empowerment Training of Conflict-Affected Youth*, 2018.

⁸³⁶ African Development Bank Group, "2018 African Economic Outlook: South Sudan", 2018.

⁸³⁷ World Bank, "Project Information Document: Economic Empowerment Training of Conflict-Affected Youth", 2018.

⁸³⁸ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

⁸³⁹ United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

⁸⁴⁰ Pape and Phipps, "Impact of Conflict on Adolescent Girls in South Sudan", World Bank Group, July 2018.

⁸⁴¹ Pape and Phipps, "Impact of Conflict on Adolescent Girls in South Sudan", World Bank Group, July 2018.

572. These challenges are even more marked among displaced youth than among non-displaced youth. IDP youth have lower levels of labour force participation than urban youth (32 percent as compared to 63 percent of non-displaced youth) in addition to lower levels of education participation.⁸⁴² This results in higher levels of unemployment among IDP youth with one in four IDP youth not working, nor looking for work, nor in education. This is even more pronounced in relation to women (32 percent of female IDP youth are unemployed as compared to 16 percent of male IDP youth.).⁸⁴³

5. The Right to Health

573. The Child Act (2008) provides children with the right to health including the right to free basic health care, the provision of which is the responsibility of parents and the government. Children are entitled to free immunization, not to be subjected to discrimination in seeking medical treatment, and not to be deprived of treatment by reason of religious or other beliefs.⁸⁴⁴ Furthermore, the Transitional Constitution (2011) provides that all levels of government shall promote public health, establish, rehabilitate and develop basic medical and diagnostic institutions and provide free primary health care and emergency services for all citizens.⁸⁴⁵

574. Despite these legal guarantees, the availability of health services in South Sudan remains extremely constrained and women and children are among the worst affected by this shortage. Almost one in ten children in South Sudan dies before their fifth birthday, with 60 percent of these deaths occurring in the first year of life.⁸⁴⁶ Most of these deaths are preventable with proper health care. In this regard, few children have had their full course of immunizations and as with the general population, access to health care is limited.⁸⁴⁷

575. The conflict has resulted in high levels of malnutrition across the country, most acutely seen with respect to children.⁸⁴⁸ Over 30 percent of South Sudanese children under the age of five are moderately or severely malnourished (stunted) and there is a Global Acute Malnutrition (GAM) rate of 23 percent and Severe Acute Malnutrition (SAM) rate of 10 percent.⁸⁴⁹ South Sudanese refugees outside the country also face malnutrition with Global Acute Malnutrition among children under five within acceptable levels (below 5 percent) only in the Central African Republic and reaching up to 19 percent of refugee children in Sudan.⁸⁵⁰

576. Children have also suffered high levels of trauma as a result of what they have seen and experienced in the course of the conflict. UNICEF estimates that 900,000 children in South Sudan suffer from psychological distress.⁸⁵¹ Over a quarter of adolescent girls reported considering ending their lives in the past 12 months⁸⁵² and MSF reported that a number of children have attempted to commit suicide in the Malakal PoC camp.⁸⁵³ One woman told the Commission about how her adolescent son had been shot in the leg by SPLA soldiers during the fighting in Wau in 2017. He was taken to Juba by an NGO for treatment for six months but was so traumatized by the attack that he could no longer speak properly.⁸⁵⁴ She brought her son with her to meet the Commission.

577. The Government has acknowledged in its National Disability and Inclusion Policy that “[d]espite a high prevalence of mental illnesses there are insufficient services and drugs,

⁸⁴² World Bank, “Impact of Conflict and Shocks on Poverty: South Sudan Poverty Assessment Survey 2017”, June 2018.

⁸⁴³ World Bank, “Impact of Conflict and Shocks on Poverty: South Sudan Poverty Assessment Survey 2017”, June 2018.

⁸⁴⁴ Child Act (2008), section 15.

⁸⁴⁵ Transitional Constitution (2011), Article 31.

⁸⁴⁶ UNICEF, “South Sudan Health Briefing Note”, August 2018.

⁸⁴⁷ See above Health section (Section IV(B)(4)); WHO, “Amid insecurity, WHO scaling up routine immunization coverage in South Sudan”, 22 February 2018.

⁸⁴⁸ Republic of South Sudan, *Community Management of Acute Malnutrition CMAM Guidelines*, December 2017.

⁸⁴⁹ UNDP, *Human Development Indicators*, 2018, <http://hdr.undp.org/en/countries/profiles/SSD>; Republic of South Sudan, *Community Management of Acute Malnutrition CMAM Guidelines*, December 2017.

⁸⁵⁰ UNHCR, *South Sudan Regional RRP 2018 Mid-Year Report*, June 2018.

⁸⁵¹ UNICEF, *Childhood under Attack: The Staggering Impact of South Sudan’s Crisis on Children*, December 2017.

⁸⁵² Plan International, “Adolescent Girls in Crisis: Voices from South Sudan”, 2018.

⁸⁵³ MSF, “A mental health legacy that haunts the Malakal Protection of Civilians site”, 19 April 2018.

⁸⁵⁴ Focus group meeting, Wau PoC, 21 August 2018.

and as a result, mental health is not fully integrated into the health system.”⁸⁵⁵ Nonetheless, a number of international and non-governmental organisations have programmes addressing children’s mental health. For example, MSF provides mental health and psychosocial services in the Malakal PoC site as does IOM, which also provides services in Bentiu and Wau PoC sites.⁸⁵⁶ UNICEF reports having reached 14,135 children (6,242 girls, 7,893 boys) with psychosocial support activities in child-friendly spaces, schools and other community-based interventions in seven states.⁸⁵⁷ For refugee children in Uganda, War Child Canada and Transcultural Psychosocial Organisation Uganda provide programming aiming to help 7,000 refugee children recover from psychological stress.⁸⁵⁸

578. Furthermore, the conflict coupled with a lack of adequate health care has resulted in higher levels of children with disabilities.⁸⁵⁹ These disabilities include physical, visual, and hearing impairments, as well as intellectual impairments and mental illness. Such children face significant barriers, partly as a result of lack of services including a lack of specialised services, difficulty accessing mainstream health and education services, the lack of specific legislation relating to people with disabilities, and cultural perceptions. In many communities in South Sudan children born with disabilities are thought to be a sign that the family is being punished by God. Families regard children born with disabilities as source of shame and hide them from public view while some fathers abandon families when children are born with disabilities. There are even some reports that in some ethnic groups, babies born with visual impairments are killed.⁸⁶⁰ As in most other areas of life in South Sudan, girls with disabilities are more disadvantaged than boys with disabilities.⁸⁶¹

D. Redrawing of Administrative Boundaries

1. Introduction

579. With over 60 ethnic groups, each with widely varying land-use practices, but all with an interest in benefiting from the country’s resources and a desire to have their voices heard in decision-making processes, South Sudan’s governance structures must find a difficult balance in managing and addressing divergent and competing interests.

580. While these competing interests play out at the national level, they often manifest themselves directly at the local and state level between neighbouring communities sharing the same land and resources. Indeed, boundary disputes have a long history in South Sudan which have sometimes been manifested in and triggered by conflictual land-use practices, principally between pastoralists and agriculturalists, and often pitted ethnic communities against the central state, challenging its legitimacy to define internal boundaries.

581. In light of these multifarious demands and interests, one of the most fraught and fundamental issues facing South Sudan relates to how it divides its government and administration in a way that is seen to benefit and be inclusive of all its citizens and to reflect the identities of ethnic communities. In the last three years, the questions of administrative boundaries and the relationship of communities to the central state have been framed around the questions of the number and boundaries of the states and whether federalism will be introduced in the permanent constitution.

582. The Commission has taken note of this issue of the redrawing of administrative boundaries as it has been one of the drivers of the conflict since the creation of the 28, then

⁸⁵⁵ Republic of South Sudan, Ministry of Gender, Child, Social Welfare, Humanitarian Affairs and Disaster Management, *South Sudan National Disability and Inclusion Policy*, 2013.

⁸⁵⁶ MSF, “A mental health legacy that haunts the Malakal Protection of Civilians site”, 19 April 2018; IOM, Psychosocial Support, <https://southsudan.iom.int/programmes/psychosocial> (see also SVN 2018/06 (P) - Programme Manager (MHPSS) (P3) - Juba, South Sudan); IOM, “2018 Quarter 3 Report, July to September: Mental Health & Psychosocial Support”.

⁸⁵⁷ UNICEF, *South Sudan Humanitarian Situation Report*, 30 November 2018.

⁸⁵⁸ War Child’s I Deal Supports South Sudanese Refugee Children, <https://www.warchildholland.org/support-south-sudan-child-refugees-ideals>.

⁸⁵⁹ Brigitte Rohwerder, “Disability in South Sudan”, K4D, 16 March 2018; Republic of South Sudan, Ministry of Gender, Child, Social Welfare, Humanitarian Affairs and Disaster Management, *South Sudan National Disability and Inclusion Policy 2013*.

⁸⁶⁰ Republic of South Sudan, Ministry of Gender, Child, Social Welfare, Humanitarian Affairs and Disaster Management, *South Sudan National Disability and Inclusion Policy 2013*.

⁸⁶¹ Brigitte Rohwerder, “Disability in South Sudan”, K4D, 16 March 2018; Republic of South Sudan, Ministry of Gender, Child, Social Welfare, Humanitarian Affairs and Disaster Management, *South Sudan National Disability and Inclusion Policy 2013*.

32 states and has as such been a trigger for serious human rights violations. In practice, the way this issue has been dealt with has exacerbated historical divisions and mistrust between ethnic and political factions, particularly as the decision-making process has appeared to lack legitimacy and transparency.

583. The contention over administrative divisions is not merely about the number of states or their boundaries, but also importantly the division or sharing of powers between the different levels of government and whether the system ought to be a federal one, a decentralised one, or indeed a centralised one. While the questions of territorial divisions and division of powers are in many ways separate, they are inherently linked as both engage the question of regional representation. The number and make-up of states necessarily feeds into discussion of what division and allocation of powers is both feasible and desirable.

584. As South Sudan works to implement the new peace agreement, the question of the administrative boundaries will continue to be one of the most delicate issues which could derail the peace process setting off new cycles of violence. Further, if these governance questions are not resolved in inclusive and representative ways, they risk creating and entrenching systems which exclude or deprive groups of citizens of their equal voice in their government.

2. Background to the Current Debate

585. The genesis of these issues predates the Sudanese independence of 1 January 1956. Even before this date, southern disaffection with the direction of political events, especially following the 1954 elections, sparked the 1955 mutiny of Southern soldiers, which morphed into the first civil war after independence.⁸⁶² Southern support for Sudanese self-determination has always been conditioned on a federal system within an independent Sudan, with autonomy for the South. When the government in Khartoum reneged on its promise of federalism after independence, it sparked the first civil war. Over the ensuing decades, the twin questions of federalism (the relationship with Khartoum) and decentralisation (subdivision of the South) remained contentious and fuelled the Sudanese civil war.⁸⁶³

586. As the 2005 Comprehensive Peace Agreement focussed on the relationship between Sudan and Southern Sudan, it did not engage with the issue of internal Southern Sudanese administrative boundaries. As a result, at independence, the Transitional Constitution (2011) adopted a 10 state structure,⁸⁶⁴ keeping the same divisions which had been adopted in Sudan in 1992 of 26 states, 10 of which were in the south.⁸⁶⁵ The Transitional Constitution (2011) provided for a decentralized form of government which allocated certain responsibilities to each of the three levels of government. While it states that the National Government would “respect the powers devolved to the states and local governments”,⁸⁶⁶ the Transitional Constitution (2011) did not establish a federal system with exclusive areas of responsibility. In practice, the government of South Sudan has been highly centralised.

587. Over the course of the long history of the political discussion over how regional governance should be arranged, the division of boundaries and the concept of federalism has often been framed in historical narratives of exclusion and inclusion.⁸⁶⁷ Popular views on what federalism entails are quite mixed. In a recent survey undertaken by the South Sudan Civil Society Forum, when respondents were asked what they thought were the essential components of a federal system, respondents cited a range of issues including: devolution of resources (64 percent); people must live in their home areas (54 percent); devolution of power (47 percent); public sector employees must work in their home areas (35 percent); restrictions on executive power (32 percent) and breaking larger states into smaller states (13 percent).⁸⁶⁸ This indicates that although 62 percent indicated they supported a federal

⁸⁶² Gola Rajiv, “Reassessing Ethno-Political Calculus in South Sudan’s War”, December 2017.

⁸⁶³ For a detailed discussion see: Douglas H. Johnson, “Federalism in the history of South Sudanese political thought”, Rift Valley Institute Research Paper 1, 2014; Rens Willems & David Deng, “The legacy of Kokora in South Sudan”, November 2015.

⁸⁶⁴ Transitional Constitution (2011), Article 161.

⁸⁶⁵ Peter Hakim Justin and Lotje De Vries, “Governing Unclear Lines: Local Boundaries as a (Re)source of Conflict in South Sudan”, *Journal of Borderlands Studies*, March 2017.

⁸⁶⁶ Transitional Constitution (2011), Articles 48, 49.

⁸⁶⁷ African Union, *Final Report of the African Union Commission of Inquiry on South Sudan*, 15 October 2015, para. 144.

⁸⁶⁸ South Sudan Civil Society Forum, “Revitalizing Peace in South Sudan: Citizen Perceptions of the Peace Process”, November 2018.

system,⁸⁶⁹ what that actually means to them remains unclear. What does seem clear is that the question of both the number and demarcation of states and the relationship of the central and state governments are deeply political and contentious issues, the resolution of which superficial solutions will not suffice. Transparent engagement with and between the citizens and communities of South Sudan is essential if common understandings of the principles and issues are to be reached, and consensus on viable solutions to these complex issues is to be achieved.

3. Creation of the Twenty-eight and Thirty-two States

588. The ARCSS maintained the 10 state structure provided for in the Transitional Constitution (2011)⁸⁷⁰ and provided for power-sharing between parties to the conflict not just at the national level but also at the state level, with the governors of Unity and Upper Nile to be nominated by the SPLA-IO, and the opposition gaining a share of political positions in all the states.⁸⁷¹ It further asserted that the permanent constitution-making process would be based on the principle of federalism.⁸⁷²

589. However, on 2 October 2015, less than two months after the ARCSS had been agreed on the basis of a 10 state system, President Kiir issued Establishment Order 36/2015 increasing the number of states to 28. While the President initially issued the Establishment Order unilaterally, he subsequently submitted a proposal for parliamentary approval to amend the Transitional Constitution.⁸⁷³ The bill failed to secure the required two-thirds majority in both houses of Parliament which is required for a Constitutional amendment. However, the 189 lower house votes were combined with the 39 upper house votes to make a claim that the bill had passed.⁸⁷⁴

590. At the end of December 2015, President Kiir controversially appointed governors to these new states including to states that according to the ARCSS were for the opposition to appoint.⁸⁷⁵

591. On 31 January 2016, IGAD issued a communiqué declaring the formation of the 28 states to be inconsistent with the terms of the ARCSS and calling for its suspension until an inclusive National Boundary Commission could be formed to review the proposal. In the absence of agreement on the matter, it indicated that the provisions of the ARCSS should be reverted to.⁸⁷⁶ However, IGAD's communiqué was never enforced and the Government proceeded with the implementation of the decree. The failure to abide by IGAD's communiqué highlights that the resolution of this issue is unlikely to be provided by external actors but will require efforts directed at identifying and supporting processes that yield workable outcomes in which South Sudanese are invested.

592. Indeed, despite IGAD's communiqué and the public outcry over the 28 states, on 14 January 2017, the President further expanded the number of states from 28 to 32 by Republican Order, creating additional states in what had been Western Equatoria, Jonglei and Upper Nile States.⁸⁷⁷

⁸⁶⁹ South Sudan Civil Society Forum, "Revitalizing Peace in South Sudan: Citizen Perceptions of the Peace Process", November 2018.

⁸⁷⁰ The ARCSS did not explicitly address the number of states, but allocated power sharing on the basis of 10 states. See e.g., ARCSS, Articles 1.6, 15.2, 15.3.

⁸⁷¹ ARCSS, Articles 15.1-15.3.

⁸⁷² ARCSS, Article 1.2.

⁸⁷³ Radio Tamazuj, "Kiir Pressured into Taking Decree to Parliament for Approval", 14 October 2015; Stimson Center, "Briefing Note: The 28 States System in South Sudan", 9 August 2016.

⁸⁷⁴ Radio Tamazuj, "Less than Two-Thirds of S. Sudan Parliament Members Vote to Approve 28 States Proposal", 19 November 2015; Stimson Center, "Briefing Note: The 28 States System in South Sudan", 9 August 2016.

⁸⁷⁵ Eye Radio, "Kiir names 28 state governors", 25 December 2015. ARCSS, Article 15.1 provided for the Governors of Upper Nile and Unity states to be appointed by the SPLM/A-IO.

⁸⁷⁶ IGAD, *Communiqué of the 55th Extra-Ordinary Session of the IGAD Council of Ministers, Addis Ababa, Ethiopia*, 30-31 January 2016, paras. 7, 12, 13.

⁸⁷⁷ Republican Order No. 02/2017. Under the 28 states decree, Western Equatoria had been divided into three states: Gbudwe, Maridi and Amadi. Now Gbudwe was divided in two: Tombura and Gbudue states. Jonglei state had been divided into four states under the 28 states decree: Western Bieh, Eastern Bieh, Jonglei, and Boma states. Eastern Bieh was again subdivided in the 32 states decree into Bieh and Akobo states. Upper Nile State was divided into three states under the 28 states decree: Latjoor, Western

593. Furthermore, with the increase in the number of states came an increase in the number of counties and payams which not only has the effect of creating additional public expenditure where resources are already scarce, but also of creating new opportunities for conflict as local rivals compete to secure positions. In this respect, at independence, there were 86 counties.⁸⁷⁸ Following the creation of the 28 states, in April 2016, the President announced the creation of new counties within the 28 states more than doubling the number to 217.⁸⁷⁹

594. Some commentators and South Sudanese consider the creation of the new states as a major violation of the 2015 ARCSS and a destabilizing factor, whose provisions, particularly power-sharing agreements, were premised on the existence of 10 states.⁸⁸⁰ Many perceive it as having resulted from the influence of the Jieng Council of Elders who had proposed a 23 states model not long before the new states were created. However, it is also significant that former First Vice President Riek Machar had himself proposed a 21 state federal system in December 2014 on the basis of the former colonial districts.⁸⁸¹ While former First Vice President Riek Machar explained the proposal as effectuating a devolution of powers,⁸⁸² critics argued that it was a strategic move to try to win more supporters for the SPLM/A-IO, particularly Equatorians.⁸⁸³ The SPLM/A-IO, advocated for the 21 states throughout the peace talks preceding the 2015 ARCSS; however, at the time, the Government argued for keeping the 10 states on the basis that additional states would be inefficient and costly.⁸⁸⁴ There are also indications that some communities have lobbied for their own areas to be recognized as states, as for example, the Padang Dinka did during the negotiation of the 2015 ARCSS, as described below.

595. It has been argued that the proposals on 21, 23, 28 and 32 states are all gerrymandered state divisions to benefit and secure the economic and political interests of particular ethnic groups, to secure control over oil resources and increase some communities' political representation while diluting that of others.⁸⁸⁵ With respect to the control of oil resources, under the 10 state system, the majority of the oil fields were in Unity State (10) and in Upper Nile State (2). However, in terms of production for most of the period from 2013 to 2018, only Upper Nile State oil fields were in operation (see Political Economy section below). Unity State had a majority Nuer population, and Upper Nile State had mixed Shilluk, Dinka, Burun and Nuer populations. The 28 states model resulted in all but the Thar Jath oil field (in Block 5A) falling within states which are majority Dinka populated, while the 21 states model would have maintained the boundaries of Unity State, which encompasses the Thar Jath and Unity oil fields and is a majority Nuer state.

596. In relation to manipulating political influence, a map analysis carried out by Radio Tamazuj of the ethnic balances under 10, 21 and 28 states models found that under the 21 states model,⁸⁸⁶ areas control by the Nuer would have increased slightly compared to under

and Eastern Nile. Under the 32 states decree Latjoor was divided in two creating Lajor and Maiwut states; and Western and Eastern Nile were reconfigured into three states: Central Upper Nile, Northern Upper Nile and Fashoda states.

⁸⁷⁸ Peter Hakim Justin and Lotje De Vries, "Governing Unclear Lines: Local Boundaries as a (Re)source of Conflict in South Sudan", *Journal of Borderlands Studies*, March 2017.

⁸⁷⁹ Republican Order No.13/2106, 17 April 2016.

⁸⁸⁰ Malish John Peter, "A Second Chance to Deliver Peace Through Power Sharing: A Comparative Analysis of South Sudan Peace Agreements", Institute of Social and Policy Research, 15 October 2018.

⁸⁸¹ SPLM/A-IO, Dissolution of the 10 States of South Sudan, Ref OCC/FSG/PK/01/001, 21 December 2014; Riek Machar speech at SPLM/A-IO Party Conference, Pagak, Upper Nile, 10 December 2014, accessed at: <https://radiotamazuj.org/uploads/media/58efac5a2bae8.pdf> or <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/15918/categoryId/121/Machars-Reported-Speech-In-Pangak.aspx>. In fact, former First Vice President Riek Machar initially proposed the 21 states model in mid-July 2014; but more formally pursued it in December 2014. Confidential Meeting, Addis Ababa, 14 December 2018; Radio Tamazuj, "SPLM-IO proposes breaking apart existing South Sudan states", 17 July 2014.

⁸⁸² Riek Machar speech at SPLM/A-IO Party Conference, Pagak, Upper Nile, 10 December 2014.

⁸⁸³ PaanLuel Wël, "Making Sense of Riek Machar's Proposed 21 States for a Federal South Sudan", 19 July 2014.

⁸⁸⁴ Johnson, Douglas et al., "After the Khartoum Agreement: Boundary Making and the 32 States", Rift Valley Institute, October 2018.

⁸⁸⁵ See e.g. Roque, Paula Cristina and Remember Miamingi, "Beyond ARCISS: New Fault Lines in South Sudan", Institute for Security Studies, East Africa Report, Issue 9, January 2017; Golla, Rajiv, "Reassessing Ethno-Political Calculus in South Sudan's War", December 2017.

⁸⁸⁶ Radio Tamazuj, "Map analysis: Ethnic balance to change if 28 states approved", 22 November 2015.

the 10 state system, while under the 28 states model, areas under Dinka influence would have increased significantly.⁸⁸⁷

597. Furthermore, the 28 States Decree stated its fundamental objective was to “devolve power and resource[s] closer to the rural people.”⁸⁸⁸ Indeed, both the Government and the Opposition have referenced slogans used by the SPLM/A during the Sudanese civil war of such as “taking the town to the people”⁸⁸⁹ in their justifications for both the proposed 21 and 28 states. However, the 28 States Decree made no changes to the distribution of powers between the national level of government and the state or local levels of government. To the contrary it was an example of the centralised power of the President to create new states and appoint state governors. This further aggravated tensions among those seeking greater devolution.

598. As the crisis has unfolded, the contentions around administrative boundaries have resurfaced and the perception that more recent re-divisions have been used to increase ethnic proportions of power has marginalised certain communities and fuelled political division, as illustrated in the examples that follow below.



Major Ethnicities and the 32 Proposed States of South Sudan

United Nations Commission on Human Rights in South Sudan

February 2019

This map shows the major ethnicities of South Sudan in relation to the proposed 32-State administrative areas from January 2017.

LEGEND

Feritit Ethnic group

International boundary*

State boundary**

SUDAN

WAU

National capital

New State capital**

Rumbek

Abyei (disputed area)

Ilemi triangle (disputed area)

* The official boundaries of South Sudan are not determined. **The use of the 32-state configuration of South Sudan is for illustrating the 2017 proposal in relation to ethnicities, and this, as well as the names shown and designations used on this map are approximate and do not imply official endorsement or acceptance by the United Nations.



Date: 4 February 2019, created by OHCHR, ERS for the UN Commission on Human Rights in South Sudan Sources: UNMISS, UN Commission on Human Rights in South Sudan Contact: chrsouthsudan@ohchr.org

Figure 4: Major Ethnicities and the 32 Proposed States of South Sudan

⁸⁸⁷ According to the map analysis, under the 10 states model, the prevailing county level administrative influence was: Dinka: 26 counties making up 25% of South Sudan’s total area; Nuer: 16 counties, 15% of the total area; Shilluk: 4 counties, 3% of the total area; Equatorian: 24 counties, 31% of the total area; Murle: 1 administrative area, 7% of the total area; Other groups: 6 counties, 20% of the total area. Under the 21 states model, the prevailing state level administrative influence would have been: Dinka: 7 states making up 25% of South Sudan’s total area; Nuer: 4 states, 19% of the total area; Shilluk: 1 state, 3% of the total area; Equatorian: 6 states, 31% of the total area; Murle: 1 state, 7% of the total area; Other groups: 2 states, 14% of the total area. Under the 28 states model, the prevailing state level administrative influence would have been: Dinka: 12 states making up 42% of South Sudan’s total area; Nuer: 5 states, 13% of the total area; Shilluk: 1 state, 2% of the total area; Equatorian: 8 states, 31% of the total area; Murle: 1 state, 7% of the total area; Other groups: 1 states, 5% of the total area. The Commission notes, however, that there are limitations to such a simplified analysis based simple population majorities in states and percentages of geographic areas under state administrative influence.

⁸⁸⁸ Establishment Order No. 36/2015, Order 3.

⁸⁸⁹ Mareike Schomerus and Lovise Aalen eds., “Considering the State: Perspectives on South Sudan’s Subdivision and Federalism Debate”, Chr. Michelsen Institute, August 2016.

4. Impact of the creation of the Twenty-eight and Thirty-two States

599. The creation of the new states received mixed reactions in different areas of the country and in different groups. Some, welcomed the move which created more ethnically homogenous states as being likely to decrease ethnic tensions by giving each group their own areas.⁸⁹⁰ For example, in Lakes State, although a relatively homogenous Dinka state, it experienced significant inter-communal violence between Dinka clans, which decreased notably after the 28 States Decree divided the state in three.⁸⁹¹

600. Meanwhile, in Unity State, reactions varied widely. The Padang Dinka of Pariang and Abiemon Counties in the north of Unity State were delighted, having long felt marginalised in a Nuer majority state.⁸⁹² Further, their new Ruweng State contains most of Unity State's oil fields. However, to join Pariang and Abiemon Counties into a contiguous state, a triangle of land from Rubkona County, now part of Northern Liech State, was annexed onto Ruweng State. Not only did this deprive Rubkona of its valuable land bridge for trade links with Sudan, it also placed approximately 10 Nuer villages from Rubkona County in Dinka dominated Ruweng State. Furthermore, the Bul Nuer community from Mayom County were ambivalent about the new arrangement as they had fought with the Government, creating significant tensions with other Nuer communities with whom they now shared the new Northern Liech State. Meanwhile, the Nuer of southern Unity State, which became the homogenous Nuer Southern Liech State disliked the division as it cut them off from Unity's oil revenues.⁸⁹³

601. In a number of areas, the creation of new states had the effect of exacerbating or triggering conflict. Two such examples are set out below to illustrate the challenges of redrawing borders. In the former Upper Nile State, ethnic groups were separated and given their own states, which might have been expected to decrease conflict but actually sparked conflict over areas claimed by multiple groups but effectively allocated to one group. On the other hand, the new Lol State joined two different ethnic groups together which also sparked conflict as neither group wanted to share a state, and resulted in a largely non-functioning government. In both cases, people found themselves pushed out of their jobs on the basis of their place of origin.

a) *Upper Nile*

602. Under the 28 States Decree, Upper Nile State was divided largely along ethnic lines into three states: Shilluk dominated Western Nile, Dinka dominated Eastern Nile, and Nuer dominated Latjoor States.

603. While the west bank of the upper Nile was effectively given to the Shilluk in the Western Upper Nile State (it changed its name to Fashoda State in August 2016),⁸⁹⁴ the contested east bank for the Nile, areas of which have been historically inhabited and claimed by both the Shilluk and the Dinka, was effectively given to the Padang Dinka.⁸⁹⁵ Malakal, the contested state capital, was also made part of Eastern Upper Nile State.

604. In July 2015, during the peace negotiations, the Padang Dinka community had put forward a position paper to IGAD opposing the proposed power sharing which gave the SPLM/A-IO the right to appoint the governorships of Upper Nile and Unity States. They instead advocated for the creation of two states for their people: Ruweng State and Central Upper Nile. In the proposal, they stated: "it is a plain fact that all the major-oil fields in Paloch, in Upper Nile State and Unity State are all within the Padang Community's Territories. [...] We do not therefore understand the criterion used by IGAD Mediation to grant Riek Machar the rule of Upper Nile."⁸⁹⁶

⁸⁹⁰ See e.g. Sudan Tribune, "Unity state authorities welcome creation of 28 states in S. Sudan", 6 October 2018.

⁸⁹¹ Stimson Center, "Briefing Note: The 28 States System in South Sudan", 9 August 2016.

⁸⁹² Human Security Baseline Assessment, "The Conflict in Unity State", Small Arms Survey, 23 February 2016.

⁸⁹³ Human Security Baseline Assessment, "The Conflict in Unity State", Small Arms Survey, 23 February 2016.

⁸⁹⁴ Radio Tamazuj, "Western Nile changes name to Fashoda state", 30 August 2016.

⁸⁹⁵ Confidential Document, ERN D103541-D103597; Human Security Baseline Assessment, "Conflict in the Upper Nile", Small Arms Survey, 8 March 2016.

⁸⁹⁶ Padang Community Position on IGAD Proposed 'Key Provisions and Justification for the Agreement on the Resolution of the Conflict in the Republic of South Sudan', 22 July 2015, in ERN D103051-D103075.

605. Less than three months later, Ruweng and Eastern Upper Nile States were created as part of the 28 States Decree, largely matching the Padang's proposal and putting almost all of South Sudan's oil fields under their control.⁸⁹⁷ In December 2015, President Kiir appointed Chol Thon Balok, a Padang Dinka as Governor of Eastern Nile despite the fact that ARCSS had given the SPLM/A-IO the right to appoint the Upper Nile governorship.⁸⁹⁸

606. On 1 February 2016, an Administrative Order was issued in Malakal, which had been the capital of Upper Nile State, terminating the employment contracts of all government employees from the areas of what formed the new Western Nile and Latjor States.⁸⁹⁹ It indicated that government employees from the Eastern Nile State areas should remain in their positions of work and take over the positions occupied by those from Western Upper Nile and Latjor States. The order summarily terminated the employment of people on the basis of their place of origin and effectively terminated the employment of Shilluk and Nuer employees. The order was to have immediate effect.

607. The 28 States Decree and the administrative order aggravated already high tensions in Malakal, particularly in the PoC site which hosted 48,000 IDPs from Dinka, Nuer, and Shilluk communities. These tensions boiled over in the PoC site between 16 and 18 February 2016, two weeks after the issuance of the decree. On 16 February, a breach in the fence of the PoC site was discovered in the sector 2 area of the PoC site (the Dinka area) and SPLA forces were observed on the outside of the breach. The same day, two SPLA soldiers were detained trying to smuggle weapons into the PoC site. Fighting broke out the following evening in sectors 1 and 2 of the PoC site predominantly between the Dinka and Shilluk and Dinka IDPs were seen streaming out of the PoC site, aided by SPLA soldiers. The incident resulted in 30 deaths and 123 injuries.⁹⁰⁰

608. In January 2017, when Western and Upper Nile were reconfigured into Central and Northern Upper Nile and Fashoda States under the 32 States Decree, Panyinkang County, a Shilluk community, was severed from the Shilluk dominated Fashoda State and annexed onto the Dinka dominated Central Upper Nile State. This annexation was seen as an appeasement of the Shilluk community who claim Malakal in order to right some the perceived wrongs that were caused by the 28 States Decree and to secure the allegiance of Shilluk General Johnson Olony to Taban Deng Gai. However, both Shilluk and Dinka communities in Malakal reacted negatively to this annexation,⁹⁰¹ and the issue ignited the next round of fighting in Upper Nile.

609. By the end of January 2017, fighting broke out on the west bank near Malakal and in February, the SPLA launched a coordinated offensive to capture the Shilluk-populated Wau Shilluk and surrounding areas on the west bank of the White Nile, approximately 10 kilometers north of Malakal. The ensuing offensive and human rights violations were documented in detail in the Commission's previous Report.⁹⁰²

b) Lol State

610. The 28 States Decree divided Western Bahr el Ghazal into two states: Wau State in the east, with Wau town as its capital, and Lol State in the west, with Raga as its capital. Lol State included what had been Raga County in Western Bahr el Ghazal and also Aweil North and Aweil West Counties which had previously been part of Northern Bahr el Ghazal State. Raga, which makes up the vast majority of the territory of Lol State, is a sparsely populated area of predominantly Fertit people (approximately 54,000 inhabitants). Aweil North and

⁸⁹⁷ Ruweng state contains Blocks 1, (partially) 2 and 4; Eastern Nile state (created under the 28 States Decree) contains the largest oil fields from Blocks 3C and 7. These are currently the only operational oil blocks in the country.

⁸⁹⁸ Sudan Tribune, "South Sudan's Kiir appoints governors of 28 new states", 24 December 2015.

⁸⁹⁹ Republic of South Sudan Upper Nile State Administrative Order No (1) 2016, 1 February 2016, in ERN D103051-D103075.

⁹⁰⁰ Confidential Document, ERN D103051-D103075; Confidential Document, ERN D104115-D104151; Confidential Document ERN D103353-D103369.

⁹⁰¹ Confidential Document, ERN D103955-D103957.

⁹⁰² United Nations Human Rights Council, Report of the Commission on Human Rights in South Sudan, A/HRC/37/71, 13 March 2018, section VIII(D); United Nations Human Rights Council, Conference Room Paper to Report of the Commission on Human Rights in South Sudan, A/HRC/37/CRP.2, 23 February 2018, section VIII(D).

Aweil West are much smaller areas but much more densely populated and are predominantly Dinka populated (approximately 300,000 inhabitants).⁹⁰³

611. The effect of the conglomeration of these three counties was that Lol State's population is majority Dinka, increasing their political influence, whereas the majority of its territory, including its capital, Raga town, had traditionally been Fertit dominated.⁹⁰⁴ The new Lol State was highly unpopular with the Fertit community and as soon as it was announced, a number of petitions from the traditional leaders, civil society, and "intellectuals" were addressed to the President and taken to Juba objecting to the proposed change.⁹⁰⁵ They predominantly objected to the amalgamation of peoples of different pastoralist and agricultural traditions into one governance entity, fearing the resulting frictions. The move was equally unpopular with the Dinka from the former Northern Bahr el Ghazal who also petitioned the President against it.⁹⁰⁶

612. A number of witnesses interviewed by the Commission traced the rise of conflict and human rights violations in Raga to the creation of the 28 states.⁹⁰⁷ In the months following the creation of Lol State, the Commission was told that Dinkas from Aweil arrived in Raga and took over a number of the government jobs from the Fertit who had previously occupied them.⁹⁰⁸ One witness who was dismissed from her senior position within the government in Raga in April 2016 complained: "When the change of name was done, the government brought in staff from Aweil and we lost our positions and had to work as their assistants."⁹⁰⁹

613. Eleven members of the state legislature were suspended and replaced with people coming from Aweil, including the Speaker of the Legislature. However, MPs from Aweil do not want to come to Raga, apparently because they do not support the existence of Lol state, and as a result the legislature has not met since 2016 as there has been no quorum, such that there is no democratic oversight of the executive and the legislature has failed to adopt a constitution.⁹¹⁰

614. In June 2016, government soldiers from Aweil and Mathiang Anyoor began to arrive in Raga.⁹¹¹ Once there, they started harassing people and looting people's crops, either harvesting them before people had a chance or stealing harvested crops.⁹¹² This aggravated tensions between the farming Fertit and the pastoralist Dinkas and on 15 June 2016 fighting broke out in Raga town displacing at least 3,700 to Aweil West, and more than 3,000 people north to Sudan.⁹¹³ Insecurity since then has displaced much of the population of approximately 53,000 Raga town residents.⁹¹⁴

615. One witness described to the Commission: "Raga town is now deserted. People are awaiting the decision from the border committee before they will return. Currently there are not more than 5,000 people in the town. Even the government ministers are not all there."⁹¹⁵

616. The above examples show both the risks of creating ethnically-based states and the risks of failing to balance ethnic, political, and cultural differences. While giving ethnic groups their own states, as in Upper Nile and Unity States, might appear to decrease conflict, if this is done without consideration to resource allocation implications and areas that are either ethnically mixed or claimed by multiple groups, it may in fact increase conflict. Similarly, the examples of the Dinka Lakes State and the Nuer communities in Northern Liech State are reminders that sub-divisions within an ethnic group also need to be taken into

⁹⁰³ Sudan Population and Housing Census, 2008; Confidential Meeting, Wau, 19 October 2018.

⁹⁰⁴ Confidential Meeting, Wau, 21 August 2018.

⁹⁰⁵ Petition Traditional Leaders of Raga, 7 October 2015; Petition of Civil Societies of Raga County, 9 October 2015; Petition of Intellectuals of Raga County, 9 October 2015 annexed to Witness 707, ERN 101891-101903; Witness 704, ERN 101375-101379, para. 6; Confidential Meeting, Wau, 19 October 2018. See also Radio Tamazuj, "Tribal leaders in Raja reject newly created Lol State", 7 October 2015; Radio Tamazuj, "Protest in Wau town 'Lol State'", 14 October 2015.

⁹⁰⁶ Radio Tamazuj, "Disagreements in N Bahr 'Lol State'", 21 October 2015.

⁹⁰⁷ Witness 707, ERN 101891-101903, para. 9; Witness 704, ERN 101375-101379, para. 14.

⁹⁰⁸ Witness 704, ERN 101375-101379; Focus group with refugees from Raga, Sudan, 27 August 2018.

⁹⁰⁹ Witness 704, ERN 101375-101379, para. 7.

⁹¹⁰ Witness 704, ERN 101375-101379; Confidential Meeting, Wau, 19 October 2018.

⁹¹¹ Witness 704, ERN 101375-101379, para. 9.

⁹¹² Witness 706, ERN 101384-101387, para. 5.

⁹¹³ OCHA, *Humanitarian Bulletin South Sudan*, Issue 9, 30 June 2016.

⁹¹⁴ Confidential Meeting, Wau, 19 October 2018; OCHA, *Humanitarian Bulletin South Sudan*, Issue 9, 30 June 2016.

⁹¹⁵ Witness 707, ERN 101891-101903.

account. The above examples illustrate that following their independence, South Sudanese continue collectively to face the challenge of concurrently managing and celebrating their rich ethnic diversity, while also striving to build a viable and stable nation after years of damaging conflict. The different communities must necessarily coexist and cooperate with each other, and to that end, it will be necessary to identify and nurture formal and informal arrangements that contribute to cohesion and stability.

5. Revitalized Peace Agreement

617. The number of states and form of government proved to be one of the most controversial issues in the R-ARCSS. When the SPLA-IO and the SSOA declined to initial the revitalised agreement as planned on 28 August 2018, one of the four reasons given for the refusal related to ensuring the agreed process for determining the number of states was properly incorporated into the agreement.⁹¹⁶ When the SPLA-IO and SSOA relented two days later, they deemed it necessary to make a declaration regarding the process for determination of the number of states and the importance of the mediation proposal being specifically incorporated into the final agreement.⁹¹⁷

618. To determine the issue of the number and boundaries of states and the consequent restructuring of the Council of States, the R-ARCSS provided for the creation of an Independent Boundary Commission (IBC) as well as a Technical Boundary Committee (TBC). The IBC consists of 15 members, five from the Government, five from opposition groups and five international members.⁹¹⁸ An indication of the delicate nature of the IBC's mandate is that the chair IBC is to be a non-South Sudanese. The TBC is to be composed of a "suitable" number of experts from IGAD and Troika countries.⁹¹⁹

619. In an indication of the enduring importance South Sudanese attach to community identity and lands, the role of the TBC is to define and demarcate the tribal boundaries as they stood on 1 January 1956 and the tribal areas that are currently in dispute as a result of the introduction of the 32 states.⁹²⁰ On the basis of the TBC's report as well as considerations such as population size and social cohesion, geographic size, and economic viability, the IBC is then to study viable options and determine the number and boundaries of the states South Sudan should have.⁹²¹ The IBC is to adopt a final report by consensus or if not by at least seven of its 15 members within 90 days of the signing of the R-ARCSS.⁹²² The parties to the agreement agree to abide by the recommendations of the IBC and to implement them at the beginning of the Transitional Period.⁹²³

620. If the IBC fails to issue a final report within 90 days, the issue of the number and boundaries of the states will automatically move to a referendum to be held before the end of the Pre-Transitional Period.⁹²⁴ In the referendum, South Sudanese will be asked to choose one of the following options: a) the IBC proposal for rectifying the boundaries of the 32 states; b) 32 states; c) 21 states; d) 10 states; or e) any other number of states agreed by the IBC to be offered as an alternative.⁹²⁵ With respect to other alternatives which might be considered by the IBC, is the National Dialogue's proposal to revert to the colonial three provinces of Bahr el Ghazal, Equatoria and Upper Nile, each with an elected Governor and subdivided into seven or eight districts (for a total of 22 districts).⁹²⁶

⁹¹⁶ Joint Press Statement by the SPLM/SPLA-IO and SSOA, 28 August 2018, ERN D114040-D114041.

⁹¹⁷ Joint Press Statement by the SPLM/SPLA-IO and SSOA, 30 August 2018, ERN D114039-D114039.

⁹¹⁸ R-ARCSS, Article 1.15.3.

⁹¹⁹ R-ARCSS, Article 1.15.18.

⁹²⁰ R-ARCSS, Article 1.15.18.1; Annex E, para. 1.

⁹²¹ R-ARCSS, Annex E, para. 3.

⁹²² R-ARCSS, Article 1.15.

⁹²³ R-ARCSS, Article 1.15.11.

⁹²⁴ R-ARCSS, Articles 1.15.14-1.15.16. While Article 1.15.12 does not clarify when the 90 days within which the IBC must complete its work starts, the Implementation Matrix at Annex D of the R-ARCSS clearly states that it is 90 days from the signing of the agreement. However, the Commission was informed that it is being interpreted to start running from the date of the establishment of the IBC. Meeting with IGAD, Addis Ababa, 13 December 2018.

⁹²⁵ R-ARCSS, Annex E, Article 1.15.17.

⁹²⁶ Republic of South Sudan National Dialogue Steering Committee, "Proposal on the Reorganization of the South Sudanese State", October 2018.

621. By January 2019, mid-way through the Pre-Transition period, the IBC had not been established because, while the national members had been nominated, the international members had not.⁹²⁷ This, despite R-JMEC reporting in November 2018, that IGAD was expected to secure the services of experts to begin work on the IBC and TBC “in the coming weeks”.⁹²⁸ The TBC held its inaugural meeting in Juba on 6 December 2018 to discuss the terms of reference and Rules of procedure of the TBC and started its work in January 2019.⁹²⁹ R-JMEC indicated after the first meeting in December that the TBC would have the full two months to complete its work, running from the date of its initial meeting.⁹³⁰

622. In spite of the importance of resolving this divisive issue in an inclusive manner, a survey conducted in October and November 2018 by the South Sudan Civil Society Forum of 1,147 respondents found that more than a third of respondents did not know that the R-ARCSS addressed the issue of the number of states.⁹³¹ Furthermore, some of those with whom the Commission spoke expressed a lack of confidence that the IBC process would be respected.⁹³² To address these issues, both in respect of the states issue and the R-ARCSS more broadly, dissemination of the R-ARCSS is one of the key activities to be undertaken during the Pre-Transitional period and is the responsibility of all Parties.⁹³³ Pursuant to this, the National Pre-Transitional Committee has established a Dissemination and Advocacy unit.⁹³⁴ Civil society, community leaders, media, R-JMEC, CTSAMVM, UNMISS and international actors have also been engaging in dissemination activities at many levels both within South Sudan and in the refugee camps.⁹³⁵ For example, the Community Empowerment for Progress Organization (CEPO) reported in November 2018 that 25 workshops disseminating the R-ARCSS had been conducted for 1,600 civilians and security forces in South Sudan.⁹³⁶

623. However, this lack of awareness of and confidence in the process for determining the number of states highlights a challenge for the chosen mechanism as the issue of how to define the country’s internal boundaries has a very real impact for communities and, therefore, for any outcome to be acceptable, the process to reach the consensus will need to have been transparent and consultative. The determination of the number and boundary of states is not only a technical issue but an intensely political one, in which communities are highly invested.⁹³⁷ With a mere three months to complete its work, the Independent Boundary Commission faces a challenge to ensure that it genuinely engages with affected communities and takes on board their concerns. Although there are explicit no provisions requiring consultation or inclusion, because of the nature of the mandate, both the TBC and the IBC have an obligation to elicit and taken into account the views and concerns of affected

⁹²⁷ R-JMEC, *Progress Report No. 3: on the Implementation Status of the R-ARCSS 2018*, 5 November 2018. See also Eye Radio, *SPLM-IO rep calls for establishment of Boundaries Commission*, 13 November 2018; R-JMEC, *Resolutions of the 3rd R-JMEC Plenary*, Juba, 23 January 2019.

⁹²⁸ R-JMEC, *Progress Report No. 3: on the Implementation Status of the R-ARCSS 2018*, 5 November 2018. See also Eye Radio, *SPLM-IO rep calls for establishment of Boundaries Commission*, 13 November 2018.

⁹²⁹ R-JMEC, *The Technical Boundaries Committee (TBC) has on Thursday held its inaugural meeting in the South Sudan capital, Juba*, 6 December 2018; R-JMEC, *Progress Report No. 4: on the Status of Implementation of the R-ARCSS*, 10 December 2018; R-JMEC, *Resolutions of the 3rd R-JMEC Plenary*, Juba, 23 January 2019.

⁹³⁰ R-JMEC, *The Technical Boundaries Committee (TBC) has on Thursday held its inaugural meeting in the South Sudan capital, Juba*, 6 December 2018.

⁹³¹ South Sudan Civil Society Forum, “Revitalizing Peace in South Sudan: Citizen Perceptions of the Peace Process”, November 2018.

⁹³² Confidential Meeting, Kampala, 18 December 2018; Confidential Meeting, Kampala, 19 December 2018.

⁹³³ R-ARCSS, Articles 1.4.3.1, 2.1.3.

⁹³⁴ CEPO, “Oversight observation report on the Revitalized Agreement on Resolution of the Conflict in South Sudan”, 30 November 2018.

⁹³⁵ See e.g., Confidential Meeting, Kiryandongo, 17 December 2018; Confidential Meeting, Kampala, 18 December 2018; UNHCR and Sudan Commission of Refugees, *Summary Conclusions on the Dissemination of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) for Refugees*, 4 September 2018; UNMISS, *Bentiu residents pledge to disseminate the revitalised peace agreement*, 1 October 2018; UNMISS, *SSBC journalists vow to disseminate peace agreement and 'expose spoilers of peace to the public'*, 22 November 2018; Sudan Tribune, “SPLA-IO disseminates peace agreement among fighters in S. Sudan’s Bieh”, 4 October 2018; Radio Tamazuj, “South Sudan civil society groups preach peace in Uganda”, 21 January 2019.

⁹³⁶ CEPO, “Oversight observation report on the Revitalized Agreement on Resolution of the Conflict in South Sudan”, 30 November 2018.

⁹³⁷ Douglas Johnson et al., “After the Khartoum Agreement: Boundary Making and the 32 States in South Sudan”, Rift Valley Institute, October 2018.

communities. The R-ARCSS allows the IBC to draw up guidelines and internal regulations for the fulfilment of its functions.⁹³⁸ Because of the necessity of achieving outcomes which can be accepted as just and equitable by the various communities, the process by which the respective solutions are conceived should be perceived to be transparent and inclusive. This element will almost certainly prove to be as important as the outcome in determining whether a proposed solution is accepted.

6. The Way Forward: Inclusivity, Transparency and Engagement

624. How boundaries are drawn is in part determined by communities' identities and their relationships with each other but it will also shape identities and relationships between groups going forward. Any boundary determinations will almost necessarily result in majorities and minorities and if not determined in an inclusive and consultative way, with safeguards for minorities, may create or entrench the impression of winners and losers. The prizes of control over resources, political representation, and administrative responsibility cannot be underestimated as a source of conflict if the boundary determination is not seen to be justly reached, particularly in a society where patronage systems are so important. This increases the incentives for communities and elites to use and promote restrictive and exclusive definitions of ethnicity and territorial belonging to justify exclusive access to and control over resources and territory where historically inter-dependent and inter-connected communities had shared overlapping rights to these resources including communal control of natural resources and negotiated rights of access to grazing or water.⁹³⁹

625. Because the questions of the number of states and where the administrative boundaries fall are inherently part of the question of how people are governed, which is inextricably connected with the question of the form of government, including whether it is unitary or federal, centralised or decentralised in nature. In this regard, although the number of administrative units is relevant to governance and service delivery, the number and boundaries of states alone will not resolve disputes rooted in competing visions of state-society relations and decentralisation.⁹⁴⁰ Those questions are expected to feature in the permanent constitution-making process envisaged by Chapter VI of the R-ARCSS. Divisions of territory or power which result in exclusionary arrangements will inevitably brew resentment and will risk renewed conflict.

626. The solution does not, therefore, lie in simply drawing better lines or refining models of federalism but in investing in multi-level political and social solutions, rooted in communities. While the questions of the number and boundaries of states and which governance system to adopt will need to be resolved in the course of the implementation of the R-ARCSS and the adoption of the permanent constitution, it is likely that the relationship between the communities and the central state and between communities themselves will require continual good faith negotiations, and committed engagement with appropriate for a for addressing these important issues. In this regard, it will be particularly important for political and traditional leaders to shape the debate in a way that transcends, rather than stokes, ethnic divisions.

627. The parties to the R-ARCSS must follow through on their commitment in the R-ARCSS to building a system that "ensures unity in diversity be enacted during the permanent constitution making process."⁹⁴¹ Even if South Sudan opts for a federal system in its permanent constitution, inclusivity not division will need to be the guiding principle; political investment in separate states is not a substitute for genuine reconciliation and celebration of diversity. Long term, the establishment of strong institutions able to manage and mediate conflict will be the only guarantee of lasting peace.

⁹³⁸ R-ARCSS 1.15.8, Annex E, para. 3.

⁹³⁹ Douglas Johnson et al., "After the Khartoum Agreement: Boundary Making and the 32 States in South Sudan", Rift Valley Institute, October 2018; Mareike Schomerus and Lovise Aalen eds., "Considering the State: Perspectives on South Sudan's Subdivision and Federalism Debate", Chr. Michelsen Institute, August 2016.

⁹⁴⁰ Douglas Johnson et al., "After the Khartoum Agreement: Boundary Making and the 32 States in South Sudan", Rift Valley Institute, October 2018.

⁹⁴¹ R-ARCSS, Article 1.4.11.

E. Political Economy and the Conflict

1. Introduction

628. In spite of South Sudan's abundant wealth in natural resources – the country owns the third largest estimated oil reserves in Sub-Saharan Africa⁹⁴² – entrenched political instability, administrative mismanagement, and recurrent armed conflicts have fundamentally undermined its economic development. At the peak of the most recent armed conflict in 2016, the country's Gross Domestic Product (GDP) reportedly contracted by between 11 percent⁹⁴³ and almost 14 percent.⁹⁴⁴ However, there are some signs that the country is slowly recovering from this severe economic crisis as the GDP is estimated to have contracted by only 3.5 percent in 2018.⁹⁴⁵ Nonetheless, poverty levels in the country remain at record levels, with the World Bank estimating that 82 percent of the population is living under the international poverty level in the first half of 2018.⁹⁴⁶

629. An important factor for stability and a possible economic recovery has been the progress in renewed peace negotiations, culminating in the signing of the R-ARCSS in September 2018. Around the same time, oil production – the country's single largest source of income⁹⁴⁷ – increased as operations resumed at some of the country's oil fields,⁹⁴⁸ although current production rates are still far below those of the pre-conflict years. In addition, a huge amount of the oil revenue – already significantly reduced by high transportation and other transactional costs – is reportedly going directly to paying off outstanding debts, for which future oil output was used as a collateral.⁹⁴⁹

630. South Sudan's heavy reliance on oil production, and more importantly oil exports, has had enormous repercussions and impact on its socio-political and security situation and by extension, and as will be discussed below, it has both historically and more recently been the partial cause of large scale human rights violations. Countries that are heavily dependent on (the export of) their natural resources have been described as susceptible to the so-called 'resource curse', according to which they are prone to suffer from armed conflict, weak and corrupt government and endemic poverty.⁹⁵⁰ However, the presence of natural resources can also be a driver for peace⁹⁵¹ and indeed in the context of South Sudan, it has been used on several occasions in the past as the means to "bind the [...] peace together".⁹⁵²

631. Moreover, the Commission believes that South Sudan's natural riches, including both oil and other natural resources, when managed in an accountable way, and in accordance with the country's relatively strong legal instruments, prescribing equity and transparency in the distribution of revenues, could redress some of the legacy of past wrongs and lay the foundation for more inclusive political and economic processes, that can contribute towards achieving social justice.

⁹⁴² Hiba Morgan, "South Sudan seeks to revive oil production", *Al Jazeera*, 22 November 2018; Mohammed Alamin, "South Sudan Begins Talks with Sudan on Oilfield Rehabilitation", *Bloomberg*, 24 June 2018.

⁹⁴³ World Bank, "South Sudan Economic Update", July 2018.

⁹⁴⁴ Seik, Edris H. Kebret, Haile and Abdi, Ali Issa, "The State of the Political Instability and Its Impact on Trade in South Sudan: A Critical Assessment", Unpublished paper by the Horn Economic and Social Policy Institute (HESPI), Addis Ababa, Ethiopia, 2017, pp. 1, 2, citing IMF, 2017.

⁹⁴⁵ World Bank, "South Sudan Economic Update", July 2018.

⁹⁴⁶ World Bank, "South Sudan Economic Update", July 2018.

⁹⁴⁷ World Bank, "South Sudan Economic Update", July 2018.

⁹⁴⁸ Presentation of South Sudanese Minister of Petroleum, Ezekiel Lol Gatkuoth, Africa Oil & Power Conference, Juba, November 2018.

⁹⁴⁹ UN Security Council, *Interim Report of the Panel of Experts on South Sudan*, UN Doc No: S/2018/, 26 November 2018, para. 73; World Bank, "South Sudan Economic Update", July 2018; James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, p. 33; Patey, L. *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, p. 244.

⁹⁵⁰ Michael Ross, "The Natural Resource Curse: How Wealth can Make You Poor", in: Ian Bannon and Paul Collier (Eds), *Natural Resources and Violent Conflict, Options and Actions*, The World Bank, 2003, pp. 17-22.

⁹⁵¹ David K. Deng, "Oil and Sustainable Peace in South Sudan", South Sudan Law Society, February 2015, pp. 5-9.

⁹⁵² James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, p. 13.

632. This would be in line with some fundamental laws of the country,⁹⁵³ often publicly reiterated by leading politicians, stipulating that all natural resources in South Sudan are owned by its people.⁹⁵⁴ It would also assist in the much needed diversification of the country's economy,⁹⁵⁵ a goal underlined in the country's Transitional Constitution⁹⁵⁶ and which, if implemented, would contribute to a sustainable economic and socio-political future for the country.⁹⁵⁷

2. South Sudan's Oil Sector: Economy, Conflicts and Human Rights

a) *Historical context*

633. The presence of oil has inherently determined South Sudan's political and economic fate ever since its discovery in the late 1970s, when the country was still part of Sudan.⁹⁵⁸ Oil exploration and production soon became both a reflection of, as well as a factor in, the country's fragile security situation and ethnic and political divisions.⁹⁵⁹ Already in 1984, the American company Chevron, which had been at the forefront of the discovery of oil in Unity and Upper Nile States, halted its operations after a deadly attack by South Sudanese militia.⁹⁶⁰ From the 1990s onwards, the Sudanese Government continued to aggressively pursue exploration of an increasing number of oil fields - most of them located on the territory of what is now South Sudan - with increasing engagement by Canadian, European and later Asian oil companies, and with support of the Sudanese army and its proxy paramilitary groups.⁹⁶¹

634. Due to their location and demographics, some key oil field areas in the southern states of Unity and Upper Nile, near what now forms the border between the two Sudans, soon became flashpoints in the second Sudanese civil war, which spanned the period 1985 to 2005. The contestation in these areas was intense, and alongside the fighting between the Sudanese Armed Forces and the SPLA led by John Garang, each side mobilised or spawned militias or breakaway factions, with Nuer militias particularly active in Unity, former First Vice-President Riek Machar's home State.

635. The long civil war was waged with a brutal intensity in the areas where oil was being exploited, notably in Unity State, which rapidly became the focal point of hostilities,⁹⁶² with devastating consequences for the lives of hundreds of thousands of the civilian population, who suffered serious and large-scale human rights violations, notably forcible displacement and arbitrary killings.⁹⁶³ Over the years, these human rights violations have been documented by both non-governmental organizations and consultants, and (partially) as a result of the international outcry over oil-related abuses, some Western European and Canadian companies withdrew from the Sudanese oil operations.⁹⁶⁴ As discussed further down in this section, the Commission believes there has been a lack of corporate accountability for transnational companies, several of which were conducting profitable business in oil-

⁹⁵³ Transitional Constitution (2011) (as amended), Article 172(1).

⁹⁵⁴ Presentation of Ezekiel Lol Gatkuoth, Africa Oil & Power Conference, Juba, November 2018.

⁹⁵⁵ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, p. 248.

⁹⁵⁶ The Transitional Constitution (2011) stipulates that oil revenues shall be used to "develop other sectors of the economy, especially agriculture" (Article 172(2)(d)).

⁹⁵⁷ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, p. 248.

⁹⁵⁸ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 13-14.

⁹⁵⁹ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 43, 192-201.

⁹⁶⁰ Patey L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 1-3; 38.

⁹⁶¹ James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, p. 17.

⁹⁶² Human Rights Watch, "Sudan, Oil and Human Rights", 2013, pp. 66; see also pp 156-157, 521; European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010, p. 7; European Coalition on Oil in South Sudan/PAX, "Scrutiny of South Sudan's Oil Industry: Community Relations, Labour Practices and Impact on Land Use Patterns", 2014, p. 17.

⁹⁶³ European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010, pp. 38-74 Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 43, 58-60.

⁹⁶⁴ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 57-75; European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010.

producing areas at times when mass human rights violations were perpetrated against the local population, and which in various ways were complicit in these crimes.

b) *Current oil production situation*

636. The withdrawal of western companies for reasons mentioned above, and associated with both the security and political situation in the oil areas, led to a gradual influx and subsequent takeover of the oil production by Chinese, Indian, and Malaysian companies.⁹⁶⁵ These companies have led the oil exploration in South Sudan from the moment it gained independence in July 2011. The country has since been described as one of the most-oil dependent countries in the world,⁹⁶⁶ with oil revenues making up over 80 percent of the country's total income,⁹⁶⁷ or according to some sources, even higher rates.⁹⁶⁸

637. However, levels of productivity have dropped from an estimated 350,000⁹⁶⁹ to 480,000⁹⁷⁰ barrels per day (bpd) just after the country gained independence in 2011 to 130,000-150,000 bpd in 2018.⁹⁷¹ This decline in output, combined with sharp fluctuations in oil prices,⁹⁷² meant that South Sudan's major source of revenue for most of its existence has been extremely unreliable, with dire consequences for the country's economy.⁹⁷³

638. Even aside from the vagaries of international oil pricing, net profit from its oil is severely limited for South Sudan due to a complex scheme of payments it must make to its neighbour Sudan under the terms of the Agreement on Oil and Related Economic Matters, which is part of the Cooperation Agreement between Sudan and South Sudan providing for the implications of the secession of South Sudan.⁹⁷⁴ The payments, which included a Transitional Financial Arrangements (TFA) payment of USD \$3,028 billion,⁹⁷⁵ were agreed in part to cushion the adverse impact to the Sudanese economy of the loss of up to 90 percent of its oil revenues as a consequence of the key oil producing areas going to the South with the secession. This was in line with Article 1 of the Cooperation Agreement, by which the parties committed themselves to establish 'two viable states' (Sudan and South Sudan) notwithstanding the secession of the South.⁹⁷⁶ These payments also include the cost of

⁹⁶⁵ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 78-141.

⁹⁶⁶ David K. Deng, "Oil and Sustainable Peace in South Sudan", South Sudan Law Society, February 2015, citing Revenue Watch, *Resource Governance Index. South Sudan Overview* (2013).

⁹⁶⁷ World Bank, "South Sudan Economic Update", July 2018.

⁹⁶⁸ According to South Sudanese Minister of Petroleum Ezekiel Gatkuoth, 90 percent of South Sudan's economy is based on oil, Al Jazeera, "South Sudan holds oil conference to boost industry", 21 November 2018. In early 2012, the Petrodollar reportedly made up 98 percent of South Sudan's revenues: Luke Patey, *The New Kings of Crude, China, India, and the Global Struggle for Oil in Sudan and South Sudan*, 2014, p. 231.

⁹⁶⁹ Seik, Edris H. Kebrat, Haile and Abdi, Ali Issa, "The State of the Political Instability and Its Impact on Trade in South Sudan: A Critical Assessment", Unpublished paper by the Horn Economic and Social Policy Institute (HESPI), Addis Ababa, Ethiopia, 2017, p. 10.

⁹⁷⁰ According to Ezekiel Lol Gatkuoth, Minister of Petroleum of South Sudan, the country used to produce 480,000 barrels a day (before the 'crisis' of 2013), which was reduced to between 130,000-143,000 barrels a day currently, (54 Etats: *ECONOMY: Interview with Ezekiel Lol Gatkuoth, Minister of Petroleum in South Sudan*, 1 March 2018. Retrieved at <https://www.youtube.com/watch?v=elxNkHdFjQ>).

⁹⁷¹ Presentation by Sudanese Minister of Petroleum at Africa Oil & Power Conference, Juba, November 2018.

⁹⁷² United States Energy Information Administration, *Crude oil volatility decreases as prices rise from early 2016 levels*, 10 May 2016; World Bank Group, *The Great Plunge in Oil Prices: Causes, Consequences, and Policy Responses*, Policy Research Note by John Baffes, M. Ayhan Kose, Franziska Ohnsorge, and Marc Stocker, March 2015.

⁹⁷³ Gross domestic product is divided in nominal and real GDP: the former is made up by adding consumption expenditures (by the government and by private households), plus gross and government investment, plus the difference between exports minus imports of a country. The real GDP reflects the growth by subtracting inflation and deflation from the nominal GDP. While current domestic data on the South Sudan's GDP is not available, in 2016, oil exports made up 26.4 percent of the GDP (compared to 65 percent in 2011). In addition, oil made up 94 percent of the export of goods and services for 2016 (compared to 97 percent in 2011). Republic of South Sudan National Bureau of Statistics, *Release of South Sudan Gross Domestic Product (GDP) Estimates for 2016*.

⁹⁷⁴ Cooperation Agreement between the Republic of Sudan and the Republic of South Sudan, Addis Ababa, 27 September 2012.

⁹⁷⁵ Agreement between the Government of the Republic of South Sudan and the Government of the Republic of Sudan on Oil Related Matters, Addis Ababa, 27 September 2012, Article 4.4.1.

⁹⁷⁶ Cooperation Agreement between the Republic of Sudan and the Republic of South Sudan, Addis Ababa, 27 September 2012; It was envisaged that these payments and arrangements would be completed within 3.5 years, according to Article 22 of the Agreement between the Government of the Republic of South Sudan and the Government of the Republic of Sudan on Oil Related Matters, Addis Ababa, 27 September 2012.

transporting crude oil through the 1,600 kilometres oil pipeline running from the north of the country to Port Sudan, on the Red Sea.⁹⁷⁷

639. These payments were only agreed after talks between the two countries broke down in January 2012, at which point South Sudan completely shut down its oil production, an ostensibly rash move which seriously damaged both its economy as well as its existing oil infrastructure. The situation was only resolved with the signing of the Cooperation Agreement in September 2012, and oil production only resumed in April 2013.⁹⁷⁸ Meanwhile, the newly agreed costs were fixed and not pegged to the international oil prices, which then more than halved between 2012 and 2015.⁹⁷⁹ In 2017, the repayment schedule in the agreement was reportedly renegotiated, taking into account lower oil prices.⁹⁸⁰

640. While official oil revenue figures are reportedly not available, South Sudan's gross revenue was estimated to be USD \$2.02 billion in 2017.⁹⁸¹ The 2018/2019 budget notes that net oil revenues "available for the budget were estimated at SSP 71.800 billion".⁹⁸² As noted, South Sudan currently produces only around 150,000 barrels of crude oil per day,⁹⁸³ of which 40 percent goes to operational costs (also known as 'cost oil'). Of the remaining 90,000 barrels, 20 percent goes to the international companies in the oil joint ventures (see below), leaving the government with the rest (e.g. 72,000 barrels). As a result, South Sudanese oil sells for USD \$5 less than on the international market.⁹⁸⁴

641. The outbreak of armed conflict in late 2013 further disrupted oil production in South Sudan as oil fields and installations were specifically targeted. South Sudan's oil riches have thus remained one of the drivers of armed conflict, and ensuing violations of human rights and international humanitarian law. The Commission's investigations in Unity State indicate that the current conflict continues to center around the oil-producing area, with the same ensuing adverse consequence and human rights violations that were seen in the period from 1985 to 2005.

642. In addition, as discussed above, a strong correlation has been found to exist between the dependency of a country on exports of its commodities (in particular oil exports) and the outbreak of armed conflict if deliberate interventions are not made to ensure stability. Whilst some have expressed fears such a dependency could lead the South Sudan into a "vicious cycle of conflict and macroeconomic instability"⁹⁸⁵ the country has an opportunity, through the implementation of the R-ARCSS to develop a culture of political cooperation and sound economic and resource management to overcome the spiral of violence and instability. This would be in line with expert recommendations on redressing the 'resource curse', including by increasing revenue transparency.⁹⁸⁶

⁹⁷⁷ UN Security Council, *Interim Report of the Panel of Experts on South Sudan*, UN Doc No: S/2018/1049, 26 November 2018, para. 69; Agreement between the Government of the Republic of South Sudan and the Government of Republic of Sudan on Oil and Related Economic Matters, Article 4 (Financial Arrangements).

⁹⁷⁸ De Waal, A., "When Kleptocracy Becomes Insolvent: Brute Causes of the Civil War in South Sudan", *African Affairs*, 113/452, 2014, pp. 362-365; Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 225-237.

⁹⁷⁹ The price of crude oil was at the 'historically high levels' of over USD 111 per barrel in 2011 and 2012. See United States Energy Information Administration, *2012 Brief: Average 2012 crude oil prices remain near 2011 levels*. By late 2014 the price was under USD 30 per barrel. See The World Bank, *South Sudan Poverty Profile, Findings from the 2015 wave of the High Frequency South Sudan Survey*, 22 November 2016, p. 7.

⁹⁸⁰ Al Jazeera, "South Sudan holds oil conference to boost industry", 21 November 2018, retrieved at <https://www.youtube.com/watch?v=y1fWNR2CUZE&t=24s>.

⁹⁸¹ Bloomberg, "Peace at Last for South Sudan? That May Depend on the Price of Oil", 17 October 2018.

⁹⁸² Republic of South Sudan Transitional Government of National Unity, *Budget Speech FY 2018/2019 Presented to Transitional National Legislature by Honorable Savatore Garang Mabiordit, Minister of Finance & Planning*, para. 28.

⁹⁸³ Presentation of Ezekiel Lol Gatkuoth, Africa Oil & Power Conference, Juba, November 2018; Al Jazeera, "South Sudan holds oil conference to boost industry", 21 November 2018.

⁹⁸⁴ Al Jazeera, "South Sudan holds oil conference to boost industry", 21 November 2018.

⁹⁸⁵ Seik, Edris H. Kebret, Haile and Abdi, Ali Issa (2017), "The State of the Political Instability and Its Impact on Trade in South Sudan: A Critical Assessment", Unpublished paper by the Horn Economic and Social Policy Institute (HESPI), Addis Ababa, Ethiopia, pp. 19-21.

⁹⁸⁶ Michael Ross, "The Natural Resource Curse: How Wealth can Make You Poor", in: Ian Bannon and Paul Collier (Eds), *Natural Resources and Violent Conflict, Options and Actions*, The World Bank, 2003.

c) *Main actors and locations*

643. At present, three main consortia of companies operate and manage oil production in South Sudan, all of them led by Chinese, Indian or Malaysian majority shareholders, with the South Sudanese company Nilepet owning a minority share. These joint ventures are listed below, with an explanation of which oil blocks (locations) they are exploring. Not all oil blocks located in South Sudan are operational, for various reasons, mainly related to security and outstanding renovations of facilities.

- a. Dar Petroleum Operating Company (DPOC), established in 2012, is currently the largest oil-producing consortium in South Sudan, operating in Blocks 3C and 7 in former Upper Nile State (see Figure 5 below). The consortium is owned by the Chinese CNPC (Chinese National Petroleum Company, 41 percent), the Malaysian Petronas (40 percent), Nilepet (eight percent), Sinopet (a subsidiary of Nilepet, six percent) and the Kuwait/Egyptian Tri Ocean (four percent). The joint venture is exploring over 600 wells, producing 130,000 bpd (i.e. nearly all of South Sudan's current output).⁹⁸⁷ These fields produce the Dar blend oil, a heavier crude oil type, that requires special processing and transport conditions.⁹⁸⁸
- b. Greater Pioneer Operating Company (GPOC), similarly established in 2012, operates in Blocks 1, 2 and 4 (northern part of former Unity State, most of which is now Ruweng State), near the border with Sudan.⁹⁸⁹ The consortium is owned by CNPC (40 percent), Petronas (30 percent), Indian ONGC (Oil and Natural Gas Corporation, 25 percent), and Nilepet (five percent).⁹⁹⁰ GPOC is conducting its operations through EPSA (Exploration and Production Sharing Agreements) apparently since September 2018. The consortium is producing just around 45,000 bpd,⁹⁹¹ as oil production is only gradually starting up again since August 2018, after having been halted in 2014, as a result of the fighting which destroyed much of the company's facilities.⁹⁹² On 2 January 2019, the company restarted production at five of the 16 oil wells at Unity oilfield, in the north of Rubkona County in Block 1.⁹⁹³
- c. Sudd Petroleum Operation Company (SPOC), owned jointly by Petronas (67.875 percent), ONGC (24.125 percent) and Nilepet (eight percent), has announced imminent exploitation of Block 5A in former Unity State (current Northern Liech State), measuring around 20,000 square kilometres. Block 5A has significant potential as it is believed to contain the bulk of the South Sudanese oil reserves (82 percent).⁹⁹⁴ There are two oil fields currently situated there, Thar Jath (with 37 wells and 40 oil gathering manifolds (OGM)) and Mala (with 38 wells and 60 OGM), which could potentially produce 80,000 bpd. The 75 oil wells in Mala and Thar Jath could reportedly produce 29,000 bpd initially, which could potentially expand to 80,000 bpd. Other potential oil fields in Mirmir and Jumaa are envisaged to be added increasing production further.⁹⁹⁵ The reactivation and security of the Thar Jath oil fields is a stated priority of the South Sudanese and Sudanese Governments, noted explicitly in the Khartoum Declaration of 27 June 2018, a precursor to the R-ARCSS of September 2018.⁹⁹⁶ There was some oil production at Thar Jath between 2006 and 2012, peaking at 27,000 bpd and at the lowest rate of 15-17,000 bpd. In April 2013, SPOC reactivated Thar Jath oil fields,

⁹⁸⁷ Africa Oil & Power Conference, Juba, November 2018 and DPOC presentation at the conference retrieved at: <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

⁹⁸⁸ James, Laura M., (2015) "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, p. 27; Patey, L. (2014) *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, p. 245.

⁹⁸⁹ Africa Oil & Power Conference, Juba, November 2018 and GPOC presentation at the conference, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

⁹⁹⁰ GPOC presentation, retrieved at the Oil & Power Conference 2018, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

⁹⁹¹ Presentation of South Sudanese Minister of Petroleum, Ezekiel Lol Gatkuoth, Africa Oil & Power Conference, Juba, November 2018.

⁹⁹² Hiba Morgan, "South Sudan holds oil conference to boost industry, *Al Jazeera*, 21 November 2018.

⁹⁹³ Nyamilepedia, "Oil Production Resumes in Rubkona's Unity Oilfields", 2 January 2019; GPOC presentation at Oil & Power Conference, Juba, November 2018, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

⁹⁹⁴ Africa Oil & Power Conference, November 2018, SPOC presentation.

⁹⁹⁵ Africa Oil & Power Conference, Juba, November 2018 and SPOC presentation at the conference, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

⁹⁹⁶ Khartoum Declaration of Agreement of the Conflict of Parties of the Conflict of South Sudan, para. 5; Øystein H. Rolandsen and Nicki Kindersley, "South Sudan: A Political Economy Analysis", Norwegian Institute of International Affairs, 2017, p. 21.

but production was capped at 10,000 barrels a day because of the lower quality of the oil which needed to be mixed with a lighter blend to allow transportation through the Sudanese pipeline.⁹⁹⁷

644. As noted, almost all of the oil recovered currently in South Sudan originates from the oil fields in Blocks 3 and 7 in Upper Nile State, with a small portion of production coming from the recently reactivated oil fields 1, 2 and 4 in the new Ruweng State (part of former Unity State).⁹⁹⁸ While it was announced that production in another part of former Unity State, Block 5A (Thar Jath and Mala) was to be reactivated by the end of 2018, this has apparently not yet been achieved.⁹⁹⁹

645. Apart from the oil blocks in Unity and Upper Nile States, South Sudan's largest Block B (over 100,000 square kilometres) which is located largely in what used to be Jonglei State, remains virtually unexplored, with the French company Total previously holding the only concession;¹⁰⁰⁰ the South Sudanese Government is currently seeking new explorers and has already awarded one contract to the Pan African company Oranto Petroleum.¹⁰⁰¹

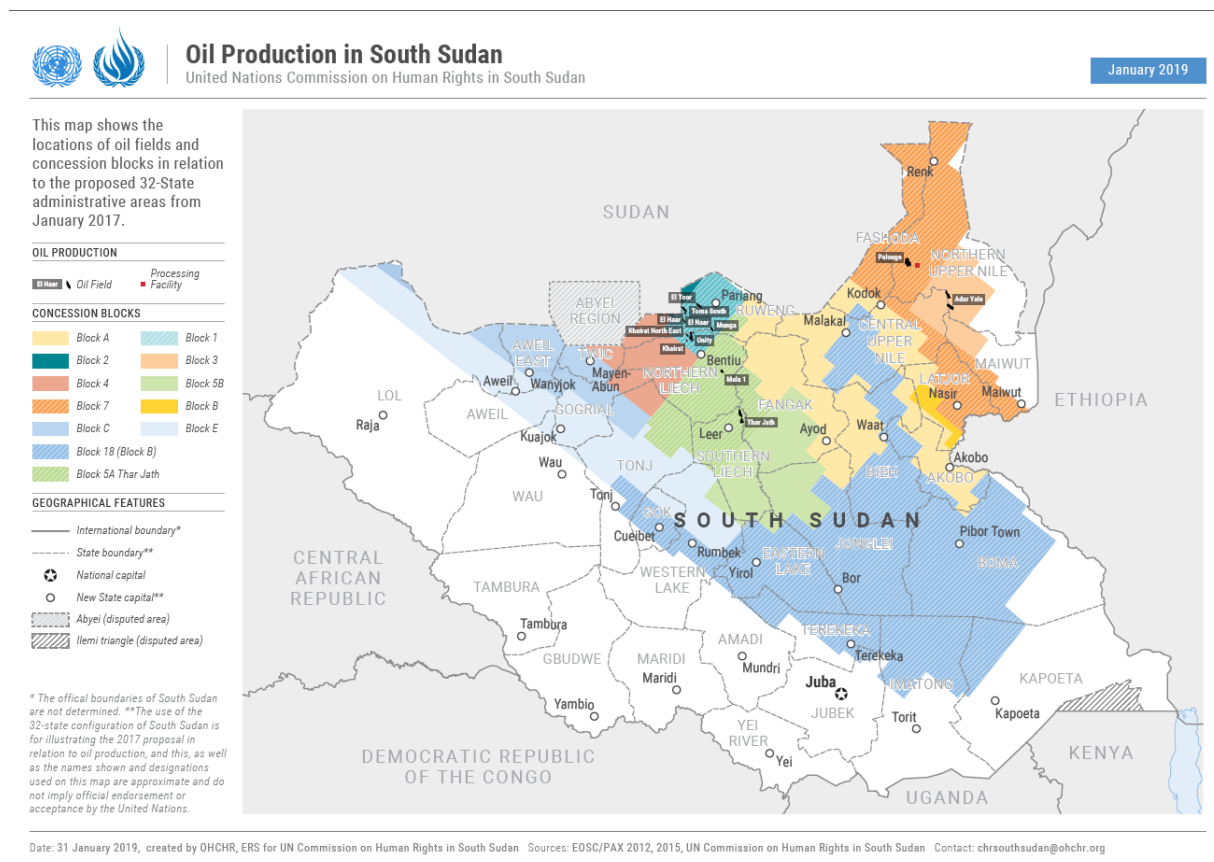


Figure 5: Oil concession blocks and some of the main oil fields in South Sudan

d) *Oil as a trigger for continued conflict and human rights violations*

646. In the more recent years of armed conflict in South Sudan, the economic and strategic importance of the oil producing areas in Unity and Upper Nile States has been a major driver

⁹⁹⁷ Confidential Meeting, 14 December 2018.

⁹⁹⁸ Presentation by South Sudanese Minister of Petroleum at the Oil & Power Conference, November 2018, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>; Nilepet Magazine (Issue No. 001, November 2018) notes that "[...] pervasive destructive attacks by negative forces loyal to different rebel factions (before the signing of peace agreement) ... led to temporary shutdown of some oil blocks (5A, 1, 2 & 4)."

⁹⁹⁹ Sudan Tribune, "Production of South Sudan's Thar Jath oil delayed for six months", 24 November 2018.

¹⁰⁰⁰ James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, p. 20.

¹⁰⁰¹ Presentation by South Sudanese Minister of Petroleum at the Oil & Power Conference, November 2018, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

for the continuing violence, the ensuing human suffering, and the violations of international humanitarian law witnessed there. This is also manifested in the fact that, following initial clashes in Juba in late 2013, fighting almost immediately spread and was waged with brutal intensity in oil-rich regions, taking into account also the long-standing ethnic tensions existing in these areas.¹⁰⁰²

647. Furthermore, and as discussed below, the location of the oil fields aggravated the contentious nature of the re-drawing of administrative boundaries under the 28 and 32 States Decrees of 2015 and 2017, respectively. Two of the newly created states under this Decree (Ruweng, created in 2015, and Northern Upper Nile, created in 2017), both of which have a majority Dinka population, now include the country's major operational oil fields.

648. While there are other drivers of the conflict, including historic grievances and local and national power-struggles, oil is intrinsically linked to the conflict, because control over the country's foremost source of income is a top prize in the struggle for political and economic power.¹⁰⁰³ Other parts of the country that are rich in natural resources, such as timber in the Equatorias, making them strategic areas to control, have equally suffered from intensive conflict, large-scale displacement, and other human rights violations. As a result, and as in the past three decades, civilians living in these areas rich in natural resources continue to be among those most at risk of conflict-related crimes in South Sudan.

649. The more recent armed conflict in South Sudan has also mirrored the past, as many of the military and security modes of operation, including the perpetration of human rights violations that accompanied the initial period of oil exploration and the second civil war have once again been witnessed in these areas several decades later.¹⁰⁰⁴ In particular, the militarization and securitization linked to the oil production involves the intertwining of regular military and security forces and paramilitary engaged in fighting in and around the oil fields has been a feature of all these conflicts. South Sudan as well as Sudan have displayed a pattern of habitually using proxy forces both to wage ethnically and politically motivated armed conflict, as well as to secure and guard oil fields, in the course of which, these forces have regularly committed serious human rights violations.¹⁰⁰⁵ For example, the Sudanese Government reportedly armed and instructed proxy militia from the Misseriya, an Arab pastoralist tribe from the former Kordofan province in Sudan, to violently displace the local population in the oil-rich Bentiu area in Unity State in the 1980s.¹⁰⁰⁶

650. Similarly, in Upper Nile State, local Dinka Padang militia were paid by the South Sudanese government to guard the Palouch oil field – at the time the only operational oil venture securing revenue for the country¹⁰⁰⁷ – and they simultaneously carried out military operations and atrocities against the local Shilluk population in 2014-2015.¹⁰⁰⁸ At a later stage, as noted in the Commission's 2018 Report, armed conflict in Upper Nile State in mid-2017 was linked to an SPLA offensive to remove SPLA-IO from the area, including the Palouch oil field, resulting in acts of killings, sexual violence, and pillage committed against the civilian population.¹⁰⁰⁹

¹⁰⁰² James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, p. 8; Human Rights Council: *Assessment Mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: detailed findings*, UN Doc No: A/HRC/31/CRP.6, 10 March 2016, paras. 82, 250-251.

¹⁰⁰³ Confidential Meeting, 13 December 2018; The African Union Commission of Inquiry on South Sudan quotes a South Sudanese interlocutor on economic aspects of the conflict: "the core issue is struggle for power, two, struggle to control resources. Actually resources of this country were actually been given by top politicians to support their own relatives. It is not all South Sudanese that have benefited. So the oil revenue that we have had in South Sudan is actually becoming a tool to harm the South Sudanese", *Final Report of the African Union Commission of Inquiry on South Sudan*, 15 October 2014, para. 239.

¹⁰⁰⁴ Confidential Meeting, Juba 13 December 2018.

¹⁰⁰⁵ James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, p. 12.

¹⁰⁰⁶ Human Rights Watch, "Famine in Sudan: The Human Rights Causes", 1 February 1999, pp. 19-20, 69.

¹⁰⁰⁷ Confidential Meeting, 17 December 2018.

¹⁰⁰⁸ Human Security Baseline Assessment for Sudan and South Sudan, "The Conflict in Upper Nile State", Small Arms Survey, 2016, pp. 3, 9; The Sentry, "Fueling Atrocities, Oil and War in South Sudan", March 2018, p. 3.

¹⁰⁰⁹ Human Rights Council, Report of the Commission on Human Rights in South Sudan, A/HRC/37/71, 13 March 2018, Section VIII(E).

651. The Government offensive in Unity State in April to June 2018, appears to have been undertaken to a large degree for the purpose of gaining control of the road going south from Bentiu to Koch and Leer Counties, leading to Adok Port on the White Nile river,¹⁰¹⁰ and either pacifying or removing civilian population from the areas near the oil fields by using extremely violent methods.¹⁰¹¹ This road passes the Thar Jath oil fields, in what is now Northern Liech State. As detailed elsewhere in this report (Section VII(A)), the renewed conflict in Unity in the first half of 2018 led to widespread and serious human rights violations by Government forces and affiliated militias.

652. The desperate human rights situation in oil-rich areas is closely and directly linked to the past and more recent armed conflict. South Sudan's oil industry currently remains overwhelmingly militarized and even securitized, with the National Security Services increasingly expanding their involvement in oil production and management: the NSS is mandated by law to provide security at oil fields, in cooperation with the South Sudanese national police.¹⁰¹² The Commission has received information indicating that NSS officers are seconded to the joint ventures, and appear to co-locate with oil company's staff both in their central headquarters as well as in the oil regions.¹⁰¹³ The most high-ranking NSS official has reportedly held a seat on the board of South Sudan's national oil company, Nilepet, since 2014 (see below). This extensive involvement of the country's state security services in the oil industry symbolizes the fundamental importance of oil for South Sudan's economy. Additionally, as described in the section above on the securitization of the state (section VI(A)), the NSS's has employed its very broad and unchecked powers to detain people perceived to pose a threat to oil production, and to limit reporting and discussion on issues relating to oil production.

e) Oil financing the conflict

653. Since the outbreak of the conflict in December 2013, significant oil revenues have been channelled into paying for the war effort, depriving key sectors of much needed financing. At the same time, the armed opposition has targeted several of the oil fields, leading to their closure and in some cases damage to the infrastructure. South Sudanese Government officials, have, in their announced plans to revive the oil production, made frequent references to the oil belonging to the people of South Sudan, as explicitly laid down in the Transitional Constitution of 2011 (see below) and the CPA.¹⁰¹⁴ Nevertheless, there have been consistent and detailed reports that revenues have been used to benefit members of the political and ethnic elite and their factions for warfare purposes and personal enrichment.¹⁰¹⁵

654. A key player in this misappropriation of funds is the state-owned petroleum company Nilepet, which, only in the period between March 2014 and June 2015, is reported to have facilitated the payment of over USD \$80 million – of assumed oil revenue – to both official and private actors and organizations, including for the Government's war-related expenses.¹⁰¹⁶ Financial and material support, sourced by oil revenue, was reportedly also provided to some of the Government's proxy militias, involved in the guarding of the oil fields, the above-mentioned Dinka Padang militia.¹⁰¹⁷

655. In March 2018, the US Department of Commerce announced that it had listed all three of South Sudan's above-mentioned joint ventures, as well as Nilepet and several of its

¹⁰¹⁰ Confidential Meeting, Juba, 14 December 2018.

¹⁰¹¹ Confidential Meetings, Juba, 5 December 2018 and 15 January 2019.

¹⁰¹² Petroleum Act (2012), section 57.

¹⁰¹³ Confidential Meeting, Juba, 17 December 2018; Witness 801, ERN 101530-101541, paras. 7, 9, 17, 20, 23-53; Witness 912, ERN 101674-101704, para. 29; Witness 1031, ERN 102184-102210, para. 73; Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", April 2018.

¹⁰¹⁴ Africa Oil & Power Conference, Juba, November 2018, presentation by Minister of Petroleum of South Sudan; CPA, Chapter III, Sections 1, 3 and 5.

¹⁰¹⁵ UN Security Council, *Final Report of the Panel of Experts on South Sudan*, UN Doc No: S/2018/292, 12 April 2018, paras. 62-63.

¹⁰¹⁶ The Sentry, "Fueling Atrocities, Oil and War in South Sudan", March 2018, pp. 2-4.

¹⁰¹⁷ UN Security Council, *Final Report of the Panel of Experts on South Sudan*, UN Doc No: S/2016/70, 22 January 2016, para. 56; James, Laura M., "Fields of Control: Oil and (In)security in Sudan and South Sudan", Small Arms Survey, Human Security Baseline Assessment for South Sudan and Sudan, Working Paper 40, 2015, pp.23-24; The Sentry, "Fueling Atrocities, Oil and War in South Sudan", March 2018, p. 4.

subsidiaries, and the Ministries of Petroleum and Mining, on its Entity List, which is a compilation of companies or actors whose activities are contravening US security or foreign policy. The stated basis for the US Department of Commerce's decision to add these companies to the list was that they were "contributing to the ongoing crisis in South Sudan because they are a source of substantial revenue that, through public corruption, is used to fund the purchase of weapons and other material that undermine the peace, security, and stability of South Sudan rather than support the welfare of the South Sudanese people".¹⁰¹⁸ In a similar move, and as noted above in Section IV(A)(3), in December 2018, the US Department of the Treasury's Office of Foreign Assets Control sanctioned three individuals, including for their role in fuelling the conflict and the ensuing violence against civilians in South Sudan, noting that some of them had been paid "through the oil industry".¹⁰¹⁹ One of the three individuals, is a former officer in the SPLA, who, in his capacity as Governor of Gogrial State, was allegedly implicated in ethnic violence leading to mass killings and displacement there in 2017.¹⁰²⁰ This individual was also previously named publicly as both being involved in providing security for Palouch oil fields, and being active in a private company providing supplies and fuel to the SPLA.¹⁰²¹ The Commission has furthermore received information that this individual may also have been involved in human rights violations in other parts of the country, particularly by providing and transporting weapons to SPLA troops.¹⁰²²

656. As will be discussed below, South Sudan's laws provide for strict provisions on accountability and transparency in the management of oil revenues, and the non-implementation of these legal safeguards has contributed to a woefully inadequate level of corporate accountability in the country's oil sector.

f) *Oil Production and Management: Legal Framework*

657. According to Article 172(1) of the Transitional Constitution (2011), "[o]wnership of petroleum and gas shall be vested in the people of South Sudan and shall be developed and managed by the National Government on behalf of and for the benefit of the people". These guiding principles, which were already included to some degree in the 2005 Comprehensive Peace Agreement¹⁰²³ are echoed in South Sudan's law regulating the petroleum industry¹⁰²⁴, as well as in the 2015 ARCSS and the 2018 R-ARCSS.¹⁰²⁵ These provisions highlight the basic principle that earnings from oil (and other natural resources) should be shared equitably and transparently among South Sudan's people, and aim to prevent misappropriation and misuse of oil revenue, making much of the conduct seen in the previous section unlawful.

658. Among the above-mentioned laws and agreements prescribing the principles of sharing the oil revenues equitably among the people and relevant communities of South Sudan, a key legal instrument is the Petroleum Revenue Management Act (2013). This Act, which has been commended as potential a 'game changer' in how South Sudan handles its oil revenues,¹⁰²⁶ describes in further detail the requirements facilitating transparency, accountability and an equitable allocation of oil revenues among the present and future population of the country. The law includes the following important provisions:

- a. All oil revenues due to the Government of South Sudan must be paid into a single account, the Petroleum Revenue Account at the Bank of South Sudan.¹⁰²⁷

¹⁰¹⁸ Bureau of Industry and Security, US Department of Commerce, *15 South Sudanese Entities Added to the Entity List*.

¹⁰¹⁹ US Department of the Treasury, *Treasury sanctions Three Individuals for Their Roles in the Conflict in South Sudan*, 14 December 2018.

¹⁰²⁰ Confidential Meeting, Juba 15 January 2018; US Department of the Treasury, *Treasury sanctions Three Individuals for Their Roles in the Conflict in South Sudan*, 14 December 2018.

¹⁰²¹ US Department of the Treasury, *Treasury sanctions Three Individuals for Their Roles in the Conflict in South Sudan*, 14 December 2018; The Sentry, "War Crimes Shouldn't Pay: Stopping the looting and destruction in South Sudan", September 2016, pp. 22-26.

¹⁰²² Witness 607, ERN 101476-101482, para. 24 and ERN 101216-101222, para. 25.

¹⁰²³ Article 3.1.1.

¹⁰²⁴ Petroleum Act (2012), section 7.

¹⁰²⁵ ARCSS, Chapter IV, Articles 1.5, 4.1.8 and 4.1.13.1; R-ARCSS: Chapter IV, Articles 4.1.5, 4.8.1.9 and 4.8.1.14.1.

¹⁰²⁶ Emily Savage, "South Sudan's Petroleum Revenue Management Act", The Sudd Institute, Policy Brief, 12 December 2013, p. 1.

¹⁰²⁷ Petroleum Revenue Management Act (2013), Chapter II, section 6.

- b. From this account, revenue can only be transferred either to the Consolidated Fund (to finance the national budget) or to the Petroleum Revenue Savings Account, at respectively 75 and 25 percent. The Petroleum Revenue Savings Account is made up of the Petroleum Revenue Stabilization Account (to receive 10 percent of oil revenue) and the Future Generation Fund (to receive 15 percent of oil revenue).¹⁰²⁸ These latter two funds are highly important as the Petroleum Revenue Stabilization Account creates a ‘buffer’, protecting the economy against hazards such as volatility in revenue (e.g. a drop in oil prices) and unexpected shortfalls in oil production.¹⁰²⁹ The Future Generations Fund will generate “savings for the long-term and support the welfare of future generations”,¹⁰³⁰ so that the money earned by South Sudan’s oil will benefit its population even after the oil wells are exhausted, which according to predictions may happen in around 30 years from now,¹⁰³¹ though estimates on the country’s oil reserves vary.¹⁰³²
- c. South Sudan’s oil-producing states and communities shall receive respectively two and three percent of its oil revenue (withdrawn from the Consolidated Fund, before it is fed into the budget).¹⁰³³ Transfer of these funds to the communities will be overseen by Community Development Committees “based on transparent, equitable and objective plans”,¹⁰³⁴ These particular provisions in the Act will go some way towards redressing the many violations and other hardship related to the oil-extraction suffered over the years by the civilian population of the oil-rich areas in South Sudan, though it has been noted that the term ‘communities’ may be open to different interpretations, thus making implementation of the Act problematic, without further clarification from the legislature.¹⁰³⁵ The two percent provision as incorporated into the 2005 CPA was however already criticized in 2009 by the then Governor of Unity State, Taban Deng Gai, arguing that Unity deserved to get an increased share of the oil revenue to address environmental damage caused by previous oil exploration.¹⁰³⁶
- The two percent provision also appears to be closely connected with the creation of additional states in 2015 and 2016, (see above Section VI(D), Redrawing of Administration Boundaries), as the location of oil fields and major oil blocks appears to be a possible motivation for the strategic re-dividing of states under the 28 and subsequent 32 States Decrees. As a result of these decrees, currently the majority of the operational oil blocks and fields are located in newly created states that have a majority Dinka population. As noted below in Section VII(A) on Unity, Ruweng State (Blocks 1, 2 and 4) has a majority Padang Dinka population.¹⁰³⁷ Similarly for Upper Nile State - and although Blocks 3 and 7 cover a larger area of this state - the main oil fields of Palouch and Adar are located in what is now Northern Upper Nile State,¹⁰³⁸ which has a majority Dinka population.
- d. The Act devotes an entire chapter (IX) to the transparent and accountable management of oil revenues, with detailed stipulations on the requirement of regular public reporting, In addition, Chapter X of the Act provides for internal and external auditing of any and all records related to the Petroleum Revenue Account and Petroleum Revenue Saving Funds.

¹⁰²⁸ Petroleum Revenue Management Act (2013), sections 9-11.

¹⁰²⁹ Petroleum Revenue Management Act (2013), section 13(3); Emily Savage, “South Sudan’s Petroleum Revenue Management Act”, The Sudd Institute, Policy Brief, 12 December 2013, p. 3.

¹⁰³⁰ Petroleum Revenue Management Act (2013), section 13(4).

¹⁰³¹ David K. Deng (2015), “Oil and Sustainable Peace in South Sudan”, South Sudan Law Society, February 2015, p. 1; Confidential Meeting, Juba, 14 December 2018.

¹⁰³² For example, in 2012 the Minister of Petroleum claimed there were proven reserves of 7 billion barrels, though his own Ministry put this at 1.7 billion (Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 245-246). In November 2018, the current Minister of Petroleum stated South Sudan holds 3.5 billion barrels in proven oil reserves (Presentation at Oil & Power Conference in Juba).

¹⁰³³ Petroleum Revenue Management Act (2013), Chapter VIII, section 29.

¹⁰³⁴ Petroleum Revenue Management Act (2013), section 9(3). Schedule B of the Act sets out detailed guidelines on the creation and functioning of the Community Development Committees. The allocation of two percent of oil revenues to oil-producing states (or regions) was already included in the 2005 Comprehensive Peace Agreement between the Government of the Sudan and the SPLM/SPLA (section 5(5)).

¹⁰³⁵ Emily Savage, “South Sudan’s Petroleum Revenue Management Act”, The Sudd Institute, Policy Brief, 12 December 2013, pp. 4-5.

¹⁰³⁶ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, p. 234.

¹⁰³⁷ Confidential Meeting, 18 December 2018.

¹⁰³⁸ Under the 28 States Decree, Upper Nile had first been divided into two states, Western and Eastern Nile.

659. Furthermore, the Petroleum Act (2012) stipulates that oil-related documentation held by the Government shall as far as possible be made publicly available and provides for regular public reporting by the Government and other parties, including on payments made to the Government and data on oil revenues and relevant details of petroleum agreements (Exploration and Production Sharing Agreements, EPSA).¹⁰³⁹ This law also lays down key regulations on environmental protection and compensation for harms suffered by local inhabitants and negative impacts on local communities.¹⁰⁴⁰ The Petroleum Act also establishes a National Petroleum and Gas Commission, which *inter alia* carries out important supervisory functions on behalf of the Government, and ensure that petroleum agreements are in line with the law.¹⁰⁴¹

660. The ARCSS and the R-ARCSS replicate several of the above-mentioned provisions, and lay down deadlines for their implementation, following the expiration of the Pre-Transitional Period of eight months (from the signing of the R-ARCSS). For example the R-ARCSS in Articles 4.8.1.1 and 4.8.1.2 calls for implementation of the Petroleum Revenue Management Act, and the closure of any petroleum revenue accounts not established under the Act, within three months of the start of the Transition period. The R-ARCSS also instructs the authorities to expedite the operationalization of Future Generations Fund and the Oil Revenue Stabilization Account and review and audit allocations and transfers of the two percent and three percent made to oil producing states since 2011.¹⁰⁴² Significantly, and as will be further discussed below, the R-ARCSS also calls for the review and transformation of both the national oil company Nilepet and the National Petroleum and Gas Commission, and to “empower them to exercise their responsibilities as stated in the Amended Constitution and Law”.¹⁰⁴³

g) *Implementation or lack thereof*

661. Despite the existence of the above-mentioned strong legal safeguards, and the fact that both the Petroleum Act and the Petroleum Revenue Management Act have been in force for a number of years now, as discussed below, in practice, they have reportedly not been fully enforced. This non-implementation of legal guidelines drafted and adopted by the South Sudanese Parliament seriously undermines the rule of law and negates the principles of social justice underpinning much of the legislation.

662. The very fact that the R-ARCSS explicitly asks for the implementation of the Petroleum Revenue Management Acts generally, and for review of the implementation of several of its provisions suggests that not only has there been little or no implementation thus far, but also that reliable information on the degree and manner of implementation is lacking.¹⁰⁴⁴

663. With regards to the Petroleum Act, there have been consistent reports that key provisions on transparency have not been implemented: for example, no exploration and production sharing agreements have been publicized by the Ministry of Petroleum and Mining, and the Petroleum Registry that should compile such agreements and other data to make them accessible to the public was not yet created.¹⁰⁴⁵ Crucially, information on oil revenues has not been made public by the Ministry.¹⁰⁴⁶ Such lack of oversight and scrutiny has reportedly surrounded deals where in particular, the Government has used future oil revenue as a collateral for loans¹⁰⁴⁷ and other transactions which it has sought to conceal. For example the Commission was informed that the Government attempted to sign a contract

¹⁰³⁹ Petroleum Act (2012), sections 77-80.

¹⁰⁴⁰ Petroleum Act (2012), sections 59-62, 81 and 100(8).

¹⁰⁴¹ Petroleum Act (2012), Chapter III, sections 9-11.

¹⁰⁴² R-ARCSS, Articles 4.8.1.14.7 and 4.8.1.14.9.

¹⁰⁴³ R-ARCSS, Article 4.8.1.14.14.

¹⁰⁴⁴ In addition, the last report by the Joint Monitoring and Evaluation Commission, on the Status of Implementation of the ARCSS, for the period from 1 April to 30 June 2018, noted in paragraph 45 that little, if any progress had been made in the implementation of Chapter IV of the ARCSS – “which concerns Resource, Final and Economic Management”.

¹⁰⁴⁵ David K. Deng, “Oil and Sustainable Peace in South Sudan”, South Sudan Law Society, February 2015, p. 5.

¹⁰⁴⁶ Global Witness, “Turning the tide: Building a clean oil sector through South Sudan’s Peace Agreement”, 2015, p. 12; Confidential Meeting, Juba, 18 December 2018.

¹⁰⁴⁷ Global Witness, “Turning the tide: Building a clean oil sector through South Sudan’s Peace Agreement”, 2015, pp. 5, 13-14.

with a Chinese company in early 2014, using oil to pay for military equipment.¹⁰⁴⁸ On the National Petroleum and Gas Commission, the Commission received information that this body is currently not functioning, since the resignation of its chairman.¹⁰⁴⁹

664. The implementation of key provisions on the protection of the environment, through the conduct of assessments on the impact of oil production for the local community, has reportedly also been inadequate.¹⁰⁵⁰ Only one such assessment was apparently done in 2013, prior to the outbreak of conflict.¹⁰⁵¹ The Commission is aware of recent reports of serious health risks in Ruweng and Northern Upper Nile States, caused by the exposure of local inhabitants to oil-related pollution.¹⁰⁵²

665. A specific and highly symbolic issue has been the failure of the state to ensure the allocation of the two and three percent of oil revenues to oil-producing states and communities. It has been established that the three percent revenue share had not been transferred to oil-producing communities since 2011, and as a result these communities are now owed an estimated USD \$305 million.¹⁰⁵³ Furthermore the bodies that by law need to be created to carry out this process – such as the Community Development Council have reportedly not been set up.¹⁰⁵⁴ While some of the two percent of revenue to the oil producing states was reportedly allocated and transferred, this was either done improperly (in some years exceeding the two percent, and in others falling short of it), and/or the money sometimes never reached the intended recipients in the states.¹⁰⁵⁵ It is also of concern that the process of allocation and transfer, as well the expenditure of these shares appears to have been completely un-transparent,¹⁰⁵⁶ and, for example, information on the disbursement of the entire amount of the two percent is not available.¹⁰⁵⁷ ¹⁰⁵⁸ As it is, paradoxically, inhabitants of oil-rich areas have been described as “among some of the worst off people in the country”.¹⁰⁵⁹ The Commission believes that the continued withholding of the lawful share of oil revenue due to affected populations is likely to be viewed as a sign of corruption. Hence it may lead to long-term mistrust of the state and foster resentment within communities, carrying a risk of violence. Therefore, the implementation of these particular provisions is of key importance in preventing instability and a return to violent conflict and further human rights violations,

666. Another fundamental and long-standing grievance of (former) inhabitants of oil-rich areas that has largely been left unaddressed by the South Sudanese Government is the issue of outstanding compensation for land and property of people who were forcefully displaced for the oil exploration.¹⁰⁶⁰ While the issue of compensation, was incorporated into the 2005

¹⁰⁴⁸ This reportedly involved a USD \$20 million contract with the Chinese company Norinco to buy communications and military equipment in exchange for oil; the contract had reportedly been negotiated by the South Sudanese President, the Chief of Staff and the Minister of Petroleum directly with their Chinese counterparts and was not signed in the end, although two oil shipments had arrived already in China. Confidential Meeting, Addis Ababa, 4 December 2017.

¹⁰⁴⁹ Confidential Meeting, Juba, 18 December 2018.

¹⁰⁵⁰ European Coalition on Oil in South Sudan/PAX, “Scrutiny of South Sudan’s Oil Industry: Community Relations, Labour Practices and Impact on Land Use Patterns”, 2014, pp. 10-12.

¹⁰⁵¹ Confidential Meeting, Juba, 18 December 2018.

¹⁰⁵² Confidential Meeting, Juba, 18 December 2018; Confidential Meeting, Juba, 14 October 2018; Al Jazeera, “Restarting oil wells in South Sudan has uncertain health effects”, 23 November 2018.

¹⁰⁵³ Ariic David Reng, Nhial Tiitmamer, “The Petroleum Revenue Sharing Arrangement in South Sudan”, The Sudd Institute, Special Report, May 22, 2018, p. 12; Confidential Meeting, Juba, 18 December 2018.

¹⁰⁵⁴ Ariic David Reng, Nhial Tiitmamer, “The Petroleum Revenue Sharing Arrangement in South Sudan”, The Sudd Institute, Special Report, May 22, 2018, p. 13.

¹⁰⁵⁵ Ariic David Reng, Nhial Tiitmamer, “The Petroleum Revenue Sharing Arrangement in South Sudan”, The Sudd Institute, Special Report, May 22, 2018, pp. 12-13.

¹⁰⁵⁶ Ariic David Reng, Nhial Tiitmamer, “The Petroleum Revenue Sharing Arrangement in South Sudan”, The Sudd Institute, Special Report, May 22, 2018, pp. 13-14; Emmanuel Akile, “Government “owes public” explanations for oil revenues – Researcher”, *Eye Radio*, 13 December 2018.

¹⁰⁵⁷ Parliamentarians are reportedly only informed about the total amount of the budget after deduction of the 2 percent/ 3 percent, not about the monetary amount of these percentages (Confidential Meeting, Juba, 18 December 2018).

¹⁰⁵⁸ Ariic David Reng, Nhial Tiitmamer, “The Petroleum Revenue Sharing Arrangement in South Sudan”, The Sudd Institute, Special Report, May 22, 2018, p. 2, citing Frankel (2011) and Lewin (2011).

¹⁰⁵⁹ European Coalition on Oil in South Sudan/PAX, “Scrutiny of South Sudan’s Oil Industry: Community Relations, Labour Practices and Impact on Land Use Patterns”, 2014, p. 19.

¹⁰⁶⁰ Confidential Meeting, Juba, 18 December 2018; European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010, pp. 22, 50, 66-70.

Comprehensive Peace Agreement,¹⁰⁶¹ no such provisions were written into the ARCSS and the R-ARCSS as it was recommended that some of these issues be resolved as part of the transitional justice arrangement.¹⁰⁶² The forced displacement of local inhabitants for the purpose of oil extraction is reportedly continuing in former Jonglei State,¹⁰⁶³ apparently to start exploration of the vast Block B. Forceful displacement carries with it, a profound historical and cultural trauma arising from the severing of the deep ties of the local population from its ancestral lands and property, and the accompanying loss of collective memory. Not surprisingly, some inhabitants of oil-producing areas have reportedly opted to remain in their homes, despite the risks to their health posed by the associated environmental pollution.¹⁰⁶⁴

667. The Commission urges the Government of South Sudan to implement the above-mentioned provisions in South Sudan's domestic laws and agreements that are meant to guarantee the accountable and transparent use of oil revenues, to improve adherence to the rule of law in the country and in the interests of social justice. In particular, the Commission recommends that redress be provided for the outstanding human rights violation of forcible replacement, as has been repeatedly requested by local and international human rights organizations.¹⁰⁶⁵ It is encouraging that the Government reaffirmed its commitment in this respect by aligning the goals of Chapter IV of the R-ARCSS (dealing with resource, economic and financial management) with its National Development Strategy in 2018.¹⁰⁶⁶

h) Corporate accountability – South Sudan's national petroleum company Nilepet

668. A key player in the production and management of oil in South Sudan is the state-owned national petroleum company, the Nile Petroleum Company Ltd. or Nilepet. The company was conceived in 2003 and incorporated under the New Sudan Companies Act in 2009,¹⁰⁶⁷ and is also specifically mentioned under the Petroleum Act (2012).¹⁰⁶⁸ According to the Petroleum Act, the provisions of the Act apply to the national petroleum company "to the same extent as this Act is applicable to any other licensee or contractor, unless otherwise expressly described by legislation."¹⁰⁶⁹ In spite of these legal safeguards, there have been consistent and detailed reports that describe Nilepet as an entity that operates with impunity above the law in South Sudan.

669. As the national oil company, and given the history and context in which oil production has been carried out in South Sudan, Nilepet should be expected to conform to the highest standards of corporate accountability and institutional transparency. However, core features of the company's management and operations indicate that it is to a large extent controlled by South Sudan's National Security Service, and consequently acts in the interests of this body, or of senior members of the South Sudanese Government. While there have been regular changes in the composition of Nilepet's Board of Directors, the Director General of the Internal Security Bureau of the NSS has reportedly been a member of the board since 2014,¹⁰⁷⁰ although this has never been publicly confirmed by the company.¹⁰⁷¹ Other information received by the Commission indicates that another General,¹⁰⁷² who reportedly held a senior position in the NSS in early 2016, may currently be part of Nilepet

¹⁰⁶¹ Articles 3.1.6, also 4.5 and 9.6.

¹⁰⁶² Confidential Meeting, Juba, 17 December 2018.

¹⁰⁶³ The East African, "Thousands of South Sudanese to create room for oil extraction", 12 November 2018.

¹⁰⁶⁴ Confidential Meeting, Juba, 17 December 2018.

¹⁰⁶⁵ European Coalition on Oil in South Sudan/PAX (2014), *Scrutiny of South Sudan's Oil Industry: Community Relations, Labour Practices and Impact on Land Use Patterns* pp. 80-81 and 102-116; European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lunding, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010, pp. 65-69.

¹⁰⁶⁶ Republic of South Sudan, *National Development Strategy, Consolidate Peace and Stabilize the Economy*, 2018.

¹⁰⁶⁷ Nilepet Magazine, November 2018, Issue No. 001, p. 5.

¹⁰⁶⁸ Petroleum Act (2012), section 13.

¹⁰⁶⁹ Petroleum Act (2012), section 13(3).

¹⁰⁷⁰ Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", 2018, p. 7.

¹⁰⁷¹ Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", 2018, p. 7.

¹⁰⁷² Radio Tamazuj, "S Sudan's Kiir appoints new members to media oversight body", 14 May 2015.

management.¹⁰⁷³ As already discussed, the NSS has a pervasive presence on the country's oil fields.¹⁰⁷⁴

670. Nilepet has been used repeatedly by the South Sudanese Government as an instrument to finance the ongoing inter-ethnic armed conflict in the country. For example in January 2016, a report by Global Witness indicated that Nilepet's Managing Director was instructed by the then Minister of Petroleum and Mining, as well as by the Director General of the Internal Security Bureau of the NSS, to provide payments for expenses by the South Sudan's security services, which at the time were engaged in armed conflict in the oil-rich areas of former Upper Nile State.¹⁰⁷⁵ Nilepet has also been named in several reports by the UN Panel of Experts as being complicit in diverting oil revenue to finance the Government's war efforts.¹⁰⁷⁶

671. Nilepet appears to have been used to channel oil money to finance the war without any difficulty given the lack of independent oversight of its commercial and financial activities,¹⁰⁷⁷ possibly because of its ambiguous status as a private company that is wholly state-owned, the company has been able to circumvent relevant legal obligations for public reporting and auditing of firms in the oil sector. Information on the company's net income from its oil-related business, its accounts, and expenditure has reportedly never been publicized.¹⁰⁷⁸ Furthermore, for example, the company has admitted to the use of crude oil for purchasing (refined oil) fuel¹⁰⁷⁹, even though transparent business practices would ensure that these two processes are separate.¹⁰⁸⁰

672. As mentioned above, the R-ARCSS has explicitly provided for the review and transformation of Nilepet, to better fulfil its responsibilities for the management of an important national resource in accordance with South Sudanese law.¹⁰⁸¹ Because earlier attempts to supervise and regulate Nilepet though a special law have been unsuccessful,¹⁰⁸² and in view of the significant information pointing to the company's role in facilitating the armed conflict and contributing to a lack of transparency and the inequitable distribution and use of oil revenues, the Commission considers that the prompt implementation of this article in the R-ARCSS will be highly important; particularly for the new dispensation of the Transition Period.

i) *Corporate accountability – International oil companies*

673. International companies historically have owned the majority of shares in the oil producing joint ventures, since oil was first produced in southern Sudan prior to its independence. All of the companies listed above under sub-section VI(E)(2)(c), have been doing business in Sudan and South Sudan for many years, while some Western European and Canadian companies that had operated there pulled out because of well-publicised public outcry in their home countries over oil-related human rights abuses in Sudan.¹⁰⁸³ Consequently, international companies operating in South Sudan should be well aware of the

¹⁰⁷³ Witness 936, ERN 101736-101768, para. 7.

¹⁰⁷⁴ See also Africa Oil & Power, *Fast Track Resumption of Oil Production at Unity Oilfields*, 26 November 2018, retrieved at <https://africaoilandpower.com/2018/11/26/fast-track-resumption-of-oil-production-at-unity-oilfields/>.

¹⁰⁷⁵ Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", 2018, pp. 3-4.

¹⁰⁷⁶ UN Security Council, *Report of the Panel of Experts on South Sudan*, UN Doc No: S/2016/793, 19 September 2016, para. 15; UN Security Council, *Final Report of the Panel of Experts on South Sudan*, UN Doc No: S/2016/70, 22 January 2016, para. 56.

¹⁰⁷⁷ Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", 2018, pp. 7-9 and 19-20.

¹⁰⁷⁸ Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", 2018, pp. 7-9 and 19-20.

¹⁰⁷⁹ Nilepet Magazine, November 2018, Issue No. 001, p. 7.

¹⁰⁸⁰ Confidential Meeting, Juba, 15 December 2018.

¹⁰⁸¹ R-ARCSS, Article 4.8.1.14.14.

¹⁰⁸² Global Witness, "Capture on the Nile, South Sudan's state-owned oil company, Nilepet, has been captured by the country's predatory elite and security services", 2018, p. 7.

¹⁰⁸³ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 66-76.

legacy of unaddressed human rights violations associated with oil explorations in the South.¹⁰⁸⁴

674. Furthermore, the inclusion of all three of the oil joint ventures operating in South Sudan in the US Department of Commerce's Entities List, as mentioned above, is a stark reminder that these companies have been found, as a consequence of their business activities, to have caused or contributed to the ongoing armed conflict and the violations against civilian in their areas of operation, risking exposure to potential criminal liability.

675. On several occasions over the years, international companies have reportedly been complicit either directly or indirectly in assisting Government forces and their proxies in the fighting that has taken place in the oil regions, especially by allowing them to use their facilities, in particular, air strips and road infrastructure. For example, the Canadian company Talisman, which in the late 1990s was part of the Greater Nile Petroleum Operating Company joint venture (with the Government of Sudan) and operated in the north of former Unity State, allowed the Sudanese Armed Forces to use its air strip and other facilities, despite knowing of the Sudanese Government's policy of forcibly displacing civilians and its commission of other human rights violations in the area.¹⁰⁸⁵ In a more recent case, the DPOC company, engaged in exploitation of the Palouch oil field, reportedly allowed a South Sudanese private company that supplied it with food and equipment to also carry cargo for SPLA units in the area.¹⁰⁸⁶

676. In view of this the Commission believes that it is of crucial importance for international companies operating in the oil sector in South Sudan to adhere to the strictest standards of corporate responsibility as well as to national laws regulating this sector, the provisions of which have been outline above.¹⁰⁸⁷ In line with Principle 2 of the UN Global Compact, businesses world-wide should operate according to a system of shared values and principles, including and in particular by respecting human rights and avoiding complicity in human rights abuses. Complicity for human rights abuses has been broadly defined as acts or omissions by companies (or their representatives) that in some way help another to carry out human rights abuses, combined with the company knowing that its acts or omissions have provided such help. This 'help' can include assistance, facilitation, legitimization, or encouragement.¹⁰⁸⁸

677. Additionally, the UN Guiding Principles on Business and Human Rights recognise that there is a positive obligation on businesses to both "[...] Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur" as well as to "Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."¹⁰⁸⁹ In order to achieve this, companies should carry out "human rights due diligence" by assessing the risks of human rights violations posed by their activities (either direct or indirect) and taking steps to address these risks, as well as publicizing these actions.¹⁰⁹⁰

678. The exposure to potential criminal liability of international companies for human rights violations committed in connection with their business operations has been highlighted by the recent case of the Swedish oil company Lundin, which was operating in Block 5A in Sudan in the late 1990s and early 2000s. During this period, widespread and serious human rights violations were committed against the local population, as part of military operations to forcibly displace hundreds of thousands of inhabitants for the purposes of oil exploration.¹⁰⁹¹ In October 2018, the Swedish Government approved a request by the Public

¹⁰⁸⁴ European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010; Human Rights Watch, "Sudan, Oil and Human Rights", 2003, pp. 438-455, and 470-475.

¹⁰⁸⁵ Human Rights Watch, "Sudan, Oil and Human Rights", 2003, pp. 64-66; Luke Patey, *The New Kings of Crude, China, India, and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp. 68-70.

¹⁰⁸⁶ Conflict Armament Research, "Weapon Supplies Into South Sudan's Civil War: Regional Re-Transfers and International Intermediaries", November 2018, p. 76.

¹⁰⁸⁷ See also Petroleum Act (2012), sections 4, 13(3), 58.

¹⁰⁸⁸ United Nations Global Compact, Principle 2: Human Rights.

¹⁰⁸⁹ UN Guiding Principles on Business and Human Rights, Article 13.

¹⁰⁹⁰ UN Guiding Principles on Business and Human Rights, Articles 17-21.

¹⁰⁹¹ Human Rights Watch, "Sudan, Oil and Human Rights", 2003, pp. 313-319; European Coalition on Oil in Sudan, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Block 5A, Sudan, 1997-2003*, 2010.

Prosecution to indict the company's Chief Executive Officer and Chairman for crimes against civilians committed on the territory of what is now South Sudan.¹⁰⁹² The case is an example of states exercising extraterritorial jurisdiction to indict their nationals over crimes committed in other states, and as such presents one of the first such cases where prosecutions may be brought implicating oil companies for their involvement in human rights violations. On 1 November 2018 Lundin Petroleum issued a press release explaining that:

The Swedish Prosecution Authority has issued a notification of a corporate fine and forfeiture of economic benefits against Lundin Petroleum in relation to past operations in Sudan from 1997 to 2003.

The notification indicates that the Prosecutor may seek:

- a) a corporate fine of SEK 3 million; and
- b) forfeiture of economic benefits from the alleged offense in the amount of SEK 3,282 million, based on the profit of the sale of the Block 5A asset in 2003 of SEK 729 million.¹⁰⁹³

679. The Lundin Press Release continues by explaining that any fines and forfeitures would only be imposed after any trial of the individuals, and in "June 2010, the Swedish Prosecution Authority initiated a preliminary investigation into alleged complicity in violations of international humanitarian law in Sudan during 1997–2003."¹⁰⁹⁴

680. As demonstrated by the Lundin case, attempts to hold transnational companies and their representatives criminally accountable for human rights violations have been painstakingly slow, complex and difficult.¹⁰⁹⁵ It has been noted however, that such prosecutions are not only a useful tool in bringing corporate officials to justice, they also can be "an effective means of shaping corporate conduct, particularly pointing to the systems and procedures companies should put in place to build a culture of compliance and prevention."¹⁰⁹⁶ This is especially relevant in the context of South Sudan, where transnational companies with majority stakes in the oil corporations such as CNPC and ONGC have reportedly not shown great concern for the legacy of human rights abuses linked to oil production in the areas where they have been operating.¹⁰⁹⁷

3. Other Resources as Drivers of Armed Conflict and Human Rights Violations

a) Cattle herding and migration

681. Several of the cases investigated by the Commission and others are closely related to tensions arising between local and ethnic groups on cattle movements and cattle raiding. Essentially the cattle migration relates to the (right of) use of land and agricultural activities such as the cultivation and harvesting of crops and the provision of food security in rural areas, which has historically been both a cause and a consequence of armed conflict in South Sudan.¹⁰⁹⁸ The problems are exacerbated by the fact that, as with the cattle raiding, opposing groups have been increasingly co-opted in existing Government and paramilitary armed

¹⁰⁹² Richard Milne, "Swedish oil bosses set to be charged over South Sudan deaths", *Financial Times*, 18 October 2018.

¹⁰⁹³ Lundin Petroleum, "Press Release: Lundin Petroleum receives information regarding a potential corporate fine and forfeiture of economic benefits in relation to past operations in Sudan", 1 November 2018.

¹⁰⁹⁴ Lundin Petroleum, "Press Release: Lundin Petroleum receives information regarding a potential corporate fine and forfeiture of economic benefits in relation to past operations in Sudan", 1 November 2018.

¹⁰⁹⁵ A similar case in point was the initiative by Amnesty International, urging the Dutch and UK Governments in 2017 to start criminal proceedings against representatives of the Dutch/UK Shell oil company, for their involvement in human rights violations in the Niger Delta in Nigeria in the 1990s. While AI provided extensive information and arguments substantiating allegations that Shell had "knowingly contributed to and encouraged the human rights violations committed by the Nigerian Government" against protestors from the Ogoni tribe, no criminal investigations have been launched to date in the companies' home countries (Amnesty International, "A Criminal Enterprise? Shell's Involvement in Human Rights Violations in Nigeria in the 1990s", November 2017. Multiple civil suits have meanwhile been filed against Shell in other countries though by victims of human rights violations or their relatives (Amnesty International, "Seeking Justice, the Rising Tide of Court Cases against Shell", Investor Briefing, May 2018).

¹⁰⁹⁶ *Corporate Complicity & Legal Accountability*, Volume 2, Criminal Law and International Crimes, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, p. 6.

¹⁰⁹⁷ Patey, L., *The New Kings of Crude, China, India and the Global Struggle for Oil in Sudan and South Sudan*, 2014, pp.178-183; The Globe Post, "South Sudan Turns to Oil Industry Investors to Spark Economic Growth", 21 November 2018.

¹⁰⁹⁸ Global Hunger Index, *Cattle, Conflict and Coping*, 2015.

formations and used strategically in the ongoing armed conflict.¹⁰⁹⁹ This indicates that agriculture and farming, which constitutes another key part of South Sudanese economy, has also become increasingly militarized, and as a result has become an additional catalyst of armed conflict.

682. For example, as discussed below in the section on Western Bahr el Ghazal State (section VII(C)), the Commission was informed that cattle-keepers bringing their herds prematurely into the Wadhalelo area have, for some years, created tensions with the local population, sparking conflict there in June 2018.¹¹⁰⁰ The traditional pastoralist practice of seasonally migrating cattle across grazing lands, which for many years occurred in a relatively peaceful manner, regulated and facilitated through local and semi-informal and tribal agreements and with assistance from UNMISS,¹¹⁰¹ has therefore increasingly become a factor in the outbreak of armed conflict, including in other parts of the country.¹¹⁰² In the case of Wadhalelo, as a result of conflicts between the Luo farmers and the Dinka pastoralists, the Luo inhabitants of Wadhalelo asked for support from the SPLA-IO which then drew in a response from the SPLA, drawing in the major military groups into what had been a local dispute.

683. In this context, and given the key role of pastoralism for the livelihood of many South Sudanese, the Commission notes that, in building on existing local and inter-state initiatives, lessons may be learnt also from previous agreements between Sudan and South Sudan on the peaceful and inclusive management of transhumance in the dry season. For example, the Agreement on Border Issues between Sudan and South Sudan of 2012 underlines that, to facilitate the peaceful cross-border movement of cattle, the affected parties should consider “the primary interest of the host communities and the security implications of such movements”.¹¹⁰³ Agreements, which were reached subsequently resulted from extensive consultations and negotiations between local governments, tribal chiefs, community and civil society representatives and official and *de facto* security officials, facilitated by the UN and international NGOs.¹¹⁰⁴ In particular, the long-standing practice of holding annual pre- and post-migration conferences between local communities on both sides of the border was apparently a big contributing factor to improved communal relationships, preventing violent cattle rustling incidents.¹¹⁰⁵

b) Illegal timber harvesting and trading

684. There has been a long-standing practice of exploiting the resource of timber, specifically teak, which is an increasingly rare commodity world-wide (with South Sudan reportedly holding the world’s largest, and Africa’s oldest, teak plantations)¹¹⁰⁶ to fund, among other purposes, military operations and conflict in South Sudan, notably in Central and Western Equatoria States.¹¹⁰⁷ Both the Government and opposition forces have engaged in this illegal trade, including by exploiting local companies and harvesters, and inhibiting the formal teak industry.¹¹⁰⁸ Reports have indicated that the illegal timber trade in Yei River State in former Central Equatoria involved plunder by high-ranking members of the SPLA-

¹⁰⁹⁹ Hannah Wild, Jok Madut Jok, Ronak Patel, “The militarization of cattle raiding in South Sudan, how a traditional practice became a tool for political violence”, *Journal of International Humanitarian Action*, 2018, 3:2.

¹¹⁰⁰ Witness 882, ERN 101577-101581, para. 6; Confidential Document, ERN D113892-D113900.

¹¹⁰¹ Confidential Meeting, Wau, 4 December 2018; UNMISS, Zenebe Teklewold, *Agreement on cattle migration has reduced conflict between farmers and herders in Western Bahr El Ghazal Region*.

¹¹⁰² REACH, “Kit – Nesitu Corridor Cattle Migration Brief, Juba County, Central Equatoria State, South Sudan”, April 2018; AfricaNews, “South Sudan herders, farmers discuss conflict over land, water”, 3 July 2018.

¹¹⁰³ *Agreement Between The Republic of The Sudan and The Republic of South Sudan on Border Issues*, Addis Ababa, 27 September 2012, Article 14 (2).

¹¹⁰⁴ Concordis, *Crossing the Line: Transhumance in Transition Along the Sudan-South Sudan Border*, October 2012, pp. 5-10.

¹¹⁰⁵ Steven Spittaels & Yannick Weyns, *Mapping Conflict Motives: the Sudan-South Sudan Border*, *International Peace Information Service*, January 2014, pp. 74-75.

¹¹⁰⁶ Cristian Nasulea, Beatrice Nicole Cretu, Ramona Madaline Moroianu, *All Roads Lead to Juba: An Inquiry Into the Economic Viability of South Sudan*, *Revista Economica* 68:6, p. 110.

¹¹⁰⁷ UN Security Council, *Interim Report of the Panel of Experts on South Sudan*, UN Doc No: S/2017/979, 20 November 2017, para. 48.

¹¹⁰⁸ UN Security Council, *Final Report of the Panel of Experts on South Sudan*, UN Doc No: S/2018/292, 12 April 2018, paras. 64-66 and Annex VI; UN Security Council, *Interim Report of the Panel of Experts on South Sudan*, UN Doc No: S/2018/, 26 November 2018, paras. 77-83.

IO as well as local government officials, with the assistance of border security and other officials in neighbouring Uganda.¹¹⁰⁹

685. The Commission has also received reports about the ongoing illegal teak harvesting and transportation by Government forces in war-affected areas in Wau State.¹¹¹⁰ While this appears to have been happening to a much lesser degree than in the Equatorias, accounts indicated that SPLA soldiers had cut and transported teak logs belonging to private farmers in a small village between Ngoku and Wau, as part of an overall campaign of looting and pillage.¹¹¹¹ The crime of pillage is specifically included as a war crime in the Draft Statute of the Hybrid Court for South Sudan.¹¹¹²

VII. Emblematic Incidents

686. The Commission focused on reporting the facts and circumstances of recent incidents in Western Bahr el Ghazal, Central Equatoria, and Unity, and on clarifying responsibility for alleged gross violations of human rights and related crimes committed in those locations in 2018. The Commission chose to focus on incidents that are emblematic of crimes and violations committed since the Commission's last report, and to clarify responsibility for these acts, as far as possible.

687. These incidents build on the work of the Commission in its last mandate, which covered incidents in Western Bahr el Ghazal, Central and Eastern Equatoria, and Upper Nile States. The Commission has also undertaken investigative work into incidents that occurred in Juba in July 2016 and Malakal in 2014.

A. Unity State, 2018

1. Background

688. Unity State lies in the centre of the country and runs southward from the border with Sudan. The landscape of Unity State is criss-crossed with a number of waterways and has extensive areas of swampland in the south and east of the State, which make road travel very slow and difficult particularly during the rainy season.

689. The main road in Unity State runs down the "dry-spine" of the state, from the Sudanese border to Adok Port on the White Nile River some 200 kilometres to the south. En-route it passes through and connects major settlements of the state, including Rubkona, Bentiu, Thar Jath, Koch junction (from which Koch town lies some 20 kilometres to the west), Leer, and Adok. The White Nile at Adok Port is navigable by large vessels and thus constitutes a logistics hub of strategic value, particularly during the rainy season when impassable muddy roads increase its strategic value considerably.

690. It is a Nuer dominated state. However, this statement belies its diversity and its divisions. The northern Abiemnom and Pariang Counties are dominated by the Padang Dinka who have consistently supported the Government throughout the conflict. The remainder of the state is Nuer dominated and includes Bul, Leek, Jikany, Jagai, Dok, Haak, and Nyuong Nuer groups. There is significant division among the Nuer groups in the state, most particularly with the Bul Nuer from Mayom County, dating back to the Sudanese civil war and carrying through the current conflict in which they supported the government in the conflict at various points.

691. Importantly, Unity State, and Leer specifically, is the birthplace of former First Vice President Riek Machar, and the southern portion of the state has been an SPLA-IO stronghold since the conflict began in 2013.

¹¹⁰⁹ Africa Uncensored, *The Profiteers*, Part 3, retrieved at <https://www.youtube.com/watch?v=aKpJs6a563I>.

¹¹¹⁰ Confidential Meeting, Wau, 1 December 2018.

¹¹¹¹ Witness 967, ERN 101914-101919, para. 16.

¹¹¹² Article 4(f); and see also the Statute of the International Criminal Court, Article 8(2)(e)(v).

692. Unity State has been one of the main centres of the conflict since it broke out in 2013.¹¹¹³ Following the outbreak of fighting in Juba in December 2013, the Nuer of the SPLA 4 Division based in Rubkona, near Bentiu, quickly defected to the opposition in reaction to the targeting killings of Nuers in Juba. These defections were significant enough to leave the SPLA without an effective fighting force in Bentiu, leaving them to rely on the Bul Nuer and forces from Bahr el Ghazal and Sudan. Clashes ensued in Bentiu and beyond in late December 2013. By the end of January 2014, Abiemnom, Bentiu, Pariang, Rubkona, and most of Mayom County, were under the control of the SPLA.

693. Major offensives were launched by the SPLA and affiliated forces into the SPLA-IO held areas of southern Unity from February to April 2014 and April to August 2015.¹¹¹⁴ These offensives resulted in some of the worst violations of human rights and international humanitarian law of the conflict.

694. In October 2015, with the introduction of the 28 States Decree,¹¹¹⁵ Unity State was divided into three states. In the north, Ruweng State was formed of Abiemnom and Pariang Counties, with Pariang as its capital, which is dominated by the Padang Dinka. The middle section of Unity State became Northern Liech State, which was created out of Rubkona, Guit, Mayom, and Koch Counties with Bentiu as its capital. Southern Liech State was created out of Leer, Mayendit, and Panyijiar Counties with Leer as its capital.

695. Although the August 2015 ARCSS provided for the SPLA-IO to nominate the Governor for Unity State,¹¹¹⁶ President Kiir appointed the Governors of the new states.¹¹¹⁷ The President appointed Bul Nuer Joseph Nguen Monytil, the former Governor of Unity State, as the Governor of Northern Liech State and Stephen Taker Riek Dong, a former Leer County Commissioner, as the Governor of Southern Liech State. Taker Riek had previously been a highly unpopular County Commissioner as he had reportedly led attacks on villages around Leer during the 2015 government offensive.¹¹¹⁸

696. Following the events of July 2016, when then-First Vice President Riek Machar fled the country and Taban Deng Gai was installed in his position as First Vice-President, the SPLA-IO split between those who remained loyal to Machar and those who followed Taban Deng Gai. Taban Deng Gai, a Jikany Nuer, also hails from Unity, specifically from Guit County. Since the split of the SPLA-IO in 2016, Kuergini in Guit County, to the east of Bentiu, has been an important base for SPLA-IO (TD) forces. The split between the SPLA-IO (RM) and the SPLA-IO (TD) reignited the cycle of violence in Unity State. When Taban Deng Gai aligned with the government, his SPLA-IO (TD) forces began recruiting and mobilized against the forces remaining loyal to former First Vice President Riek Machar.¹¹¹⁹

697. The main SPLA formation in former Unity State is the SPLA 4 Division with its headquarters in Rubkona, just to the north of Bentiu.¹¹²⁰ The 4 Division maintains a strong presence in all the other main towns of former Unity State.

698. The divisional emblem of 4 Division, worn as a patch on the soldiers' uniforms, is an oil-derrick, and confirms this formation's strategic purpose – the security of the oilfields of Unity State. Indeed, a large proportion of South Sudan's oil wealth lies beneath the soil of Unity State; however, oil production in Unity State was shut down at the beginning of the war and only restarted production in August 2018.¹¹²¹ With the tight financial constraints faced by the Government, securing stability to get the Unity oil fields operating again is of

¹¹¹³ For a detailed analysis of the conflict in Unity state during the early period of the war see: Joshua Craze *et al.*, "A State of Disunity: Conflict Dynamics in Unity State, South Sudan, 2013–15", Small Arms Survey, 2016.

¹¹¹⁴ Joshua Craze, *et al.*, "A State of Disunity: Conflict Dynamics in Unity State, South Sudan, 2013–15", Small Arms Survey, 2016.

¹¹¹⁵ Establishment Order 36/2015 for the Creation of 28 States, 2 October 2015.

¹¹¹⁶ ARCSS, Article 15.1.

¹¹¹⁷ Gurtong, "Kiir Appoints Governors Of 28 Newly Created States", 25 December 2015.

¹¹¹⁸ Human Security Baseline Assessment for South Sudan and Sudan, "The Conflict in Unity State", Small Arms Survey, 23 February 2016.

¹¹¹⁹ Witness 863, ERN 101609-101613.

¹¹²⁰ Ruweng State in the north has remained strongly pro-Government, with regular SPLA forces holding Pariang County with the 10 Brigade of 4 Division based there. Abiemnom County in the west of Ruweng State, and Mayom County in the west of Northern Liech state are controlled by the troops of Major General Matthew Puljang who are also loyal to the Government and indeed often referred to as the 'Special Forces Division' of the SPLA.

¹¹²¹ GPOC presentation, retrieved at the Oil & Power Conference 2018, retrieved at <https://africaoilandpower.com/2018/11/26/south-sudan-oil-power-2018-presentations/>.

primary importance, and is one of the stated goals of the new peace agreement. Indeed, the June 2018 Khartoum Declaration devoted one of the five operational paragraphs of the ceasefire agreement to the issue of rehabilitating the oil fields in Unity State.¹¹²²

699. Given the nature of the landscape of Unity State, the shortage of effective fighting forces within all warring factions, and the immense logistical challenges that complicate their ability to sustain the operational capacity of their forces, there has been little appetite or ability on the part of the SPLA to permanently hold large swathes of rural territory.¹¹²³ Indeed, this has been the prevailing logic during the conflict and throughout South Sudan. Thus, the SPLA maintains strong outposts in the main towns and important locations, with limited patrolling in and around those places. The towns of Leer and Koch are good examples of this phenomena.¹¹²⁴

700. Although the outlying countryside is often referred to as being controlled by the SPLA-IO, it is in fact more of a no-man's land, in that nobody holds it securely and permanently as the SPLA-IO favours the hit and run tactics of an insurgency group.¹¹²⁵ Until such time as an SPLA force moves into this territory, the SPLA-IO (RM) and the civilian population, enjoy a certain freedom of movement, and generally speaking the SPLA moves around cautiously and in strength for fear of falling into an SPLA-IO (RM) ambush.¹¹²⁶ When they venture out, caution would require that the SPLA leave sufficient forces in their bases to deter or defeat any counter-attack that the SPLA-IO (RM) may launch against what would be perceived as a temporarily weaker target.

701. As a result of this, to launch offensives, the SPLA has made use of armed youth militias, over which they have exercised general control and provided ammunition and training, to undertake their offensives in southern Unity.

2. Southern Unity Offensive, April to June 2018

702. Southern Unity State has remained turbulent despite the signing of the Agreement on Cessation of Hostilities on 21 December 2017. Indeed, only three days after the signing of Agreement, on 24 December, the SPLA-IO (RM) attacked Koch with the aim of displacing the SPLA's hold on the town. CTSAMM's investigation of the event found that 15 people, including 3 children, were killed in the attack and 26 wounded.¹¹²⁷

703. With the High Level Revitalization Forum relaunching peace negotiations in February 2018 raising the likelihood of a permanent ceasefire, incentives increased to gain control of territory before any such ceasefire came into effect.¹¹²⁸ This coincided with the arrival of the dry season making new offensives possible. On 27 February 2018, the SPLA sent a new Divisional Commander to 4 Division to Bentiu.¹¹²⁹ Two weeks later, in mid-March, he undertook a tour of the areas and sub-units under his command.¹¹³⁰ On 7 March, the Governor of Northern Liech State returned to Bentiu after a long absence.¹¹³¹

704. Shortly thereafter, preparations for a major offensive began. In the first weeks of March 2018, there were reports of massive recruitment of youth into the SPLA-IO (TD) ranks in Guit and Koch Counties as well as into youth militia in Koch County controlled by the Gany County Commissioner (formerly the Koch County Commissioner).¹¹³² Multiple witnesses described the recruitment of youth, particularly from the Jagei Nuer community into the youth militias headed by the Gany County Commissioner.¹¹³³ They described how he told the youth he recruited that their payment would be in the form of keeping any cows

¹¹²² Khartoum Declaration, 27 June 2018, para. 5.

¹¹²³ Confidential Meetings, Bentiu, 22 and 23 September 2018.

¹¹²⁴ Confidential Meetings, Bentiu, 22 and 23 September 2018.

¹¹²⁵ Confidential Meetings, Bentiu, 22 and 23 September 2018.

¹¹²⁶ Confidential Meetings, Bentiu, 22 and 23 September 2018.

¹¹²⁷ CTSAMM, *Report 2018/05: Violations of the ACOH: Fighting in Koch*, 15 January 2018; Witness 823, ERN 101653-101658.

¹¹²⁸ Confidential Meeting, Juba, 5 November 2018; Confidential Meeting, Juba, 31 October 2018.

¹¹²⁹ Confidential Document, ERN D115172-D115328.

¹¹³⁰ Confidential Document, ERN D112933-D113082, pp. D112995, D113007.

¹¹³¹ Confidential Document, ERN D112933-D113082, p. D112965; Confidential Document, ERN D114148-D114260.

¹¹³² Confidential Document, ERN D112933-D113082, p. D112938.

¹¹³³ Gany County was created out of a section of Koch County and the former Koch County Commissioner was appointed as the Commissioner of Gany County but remained largely based in Koch.

and property that they looted in the course of the attacks, and any women or girls they abducted as wives, and promotions in their ranks.¹¹³⁴ By one estimate, the Gany County Commissioner recruited approximately 8,000 youth in this manner.¹¹³⁵

705. In mid-April, a meeting was held in Leer involving, among others, the Governor of Southern Liech State and a Brigadier General who was the SPLA Commander based in Leer, to plan an operation to drive out the SPLA-IO (RM) from southern Unity and to secure the Bentiu to Adok road.¹¹³⁶ This plan also involved clearing the area of civilians on the premise that if civilians were driven out of the area, the SPLA-IO (RM) would not return.¹¹³⁷ As there were only about 500 SPLA troops based in Leer at the time, reinforcements were requested from the Gany County Commissioner.¹¹³⁸

706. Weapons and ammunition to support the operation were delivered to Bentiu and Leer from Juba by military helicopter and commercial aircraft regularly during April, including specifically on 22 April.¹¹³⁹ These weapons and ammunition were provided not only to the SPLA, but also to the SPLA-IO (TD) and the youth militias under the Gany County Commissioner.¹¹⁴⁰ As the operation got underway, Government troops used amphibious tanks and Armoured Personnel Carriers.¹¹⁴¹

707. Within days of the mid-April meeting, SPLA troops from the Rubkona 4 Division and SPLA-IO (TD) troops from Kuergini started to move southward from the Bentiu area down to Koch.¹¹⁴² In Koch, they were joined by the youth militia of the Gany County Commissioner and proceeded southward into Southern Liech State at Mirmir.

708. Witnesses explained that while the SPLA normally moved along the main road, during the operation, they instead fanned out, moving through the bush surprising people.¹¹⁴³ They formed three or four fronts, to the east and west of the main road, attacking villages as they moved southward toward Leer.¹¹⁴⁴ These groups were led on the ground by the Gany County Commissioner, the SPLA-IO (TD) Commander of Unity from Kuergini, an SPLA Commander who was a Brigadier General, and the Brigadier General SPLA Commander based in Leer.¹¹⁴⁵

709. Having reached Leer, some troops continued southwards toward Pilling, Thonyor (the SPLA-IO (RM) headquarters in the area) and on to Adok Port. Meanwhile others fanned out in all directions from Leer launching attacks on villages within approximately a 25 km radius from Leer.¹¹⁴⁶ The UNMISS Human Rights Division documented attacks on more than 40 villages in the Leer and Mayendit Counties area falling between Koch, Mayendit and Adok towns¹¹⁴⁷ which was subsequently confirmed by the investigations of the Commission.

710. Over the next two months, Government soldiers and affiliated militia conducted offensives throughout the area targeting some villages repeatedly. For example, Gandor came

¹¹³⁴ Witness 838, ERN 101632-101637, para. 11; Witness 837, ERN 101638-101642, para. 8; Witness 877, ERN 101598-101602, para. 8; Witness 856, ERN 101614-101618, para. 6.

¹¹³⁵ Witness 856, ERN 101614-101618, para. 6.

¹¹³⁶ Witness 823, ERN 101653-101658, paras. 14, 15.

¹¹³⁷ Witness 823, ERN 101653-101658, para. 15; Witness 877, ERN 101598-101602, para. 7.

¹¹³⁸ Witness 823, ERN 101653-101658, paras. 12, 15;

¹¹³⁹ Witness 826, ERN 101856-101863, paras. 15, 16; Witness 838, ERN 101632-101637, para. 12; Witness 856, ERN 101614-101618, para. 8; Witness 823, ERN 101653-101658, para. 20; Witness 837, ERN 101638-101642, para. 9; Witness 872, ERN 101603-101608, para. 14; Witness 877, ERN 101598-101602, para. 12; Witness 863, ERN 101609-101613, para. 12; Witness 873, ERN 101648-101652, para. 11; Confidential Meeting on 21 September 2018.

¹¹⁴⁰ Witness 825, ERN 101848-101855, para. 16; Witness 838, ERN 101632-101637, para. 12; Witness 837, ERN 101638-101642, para. 9.

¹¹⁴¹ Witness 839, ERN 101626-101631, para. 9.

¹¹⁴² Witness 873, ERN 101648-101652, para. 7;

¹¹⁴³ Witness 839, ERN 101626-101631, para. 5; Witness 877, ERN 101598-101602, para. 9.

¹¹⁴⁴ Witness 873, ERN 101648-101652; Witness 825, ERN 101848-101855; Witness 826, ERN 101856-101863.

¹¹⁴⁵ Witness 789, ERN 101508-101511; Witness 826, ERN 101856-101863; Witness 825, ERN 101848-101855; Witness 839, ERN 101626-101631; Witness 838, ERN 101632-101637; Witness 873, ERN 101648-101652; Witness 856, ERN 101614-101618; Witness 827, ERN 101811-101816; Witness 872, ERN 101603-101608; Witness 831, ERN 101817-101827.

¹¹⁴⁶ Witness 838, ERN 101632-101637; Witness 837, ERN 101638-101642; Witness 872, ERN 101603-101608; Witness 826, ERN 101856-101863; Confidential Document, ERN D113083- D113181; Confidential Document, ERN D113182- D113376.

¹¹⁴⁷ UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April-May 2018*, para. 26.

under attack four times between 29 May and 3 July 2018.¹¹⁴⁸ A 40 year old man who was in Gandor at the time described one of these attacks on Gandor:

Some of the women and children who had been hiding in the bushes decided to come out when the soldiers started aiming at the bushes. They came out waving their arms in the air. However, the soldiers aimed and killed some of them. They also raped some of the women and abducted some of the girls to be their ‘wives’. The men who were able to flee ran deep into the bush. The old men who had remained behind were rounded up and bundled into a Tukul. The soldiers closed the door of the Tukul and set it alight, burning them alive. I do not know the ages of these men, but all of them were old enough to be my father or even my grandfather.¹¹⁴⁹

The witness stated that at least 20 women and young girls were raped and gang raped during this particular attack, and that 15 women were burned in their *tukuls* while a further five women were shot and killed.¹¹⁵⁰

711. As they moved through villages, Government soldiers and affiliated militia targeted civilians with astonishing brutality. Witnesses recalled Government soldiers and affiliated militia killing everyone including women, children, and old men.¹¹⁵¹ They described old men being hung from trees, and people burned in their tukuls where they hid, unable to run.¹¹⁵² One witness recalled seeing four children, aged two, four, eight, and 15 years old being run over by a tank in Rukoy.¹¹⁵³ This same witness also saw a soldier hitting a one year old child against a tree until the child died.¹¹⁵⁴

712. As people fled into the swamp areas to hide, they were pursued by government amphibious tanks and shot at.¹¹⁵⁵ One witness recalled seeing a child shot in the back by an amphibious tank in Dablual in April.¹¹⁵⁶ While many died of gunshot wounds, others drowned.¹¹⁵⁷ A 32-year-old woman described fleeing from Mirmir to Pap where they hid in the swamp:

We were trying to hide in the floating grass. But many people died of drowning. Those who managed to swim went to Thonyor. Then we continued in the swamps. Then we reached a place called Kar, also in the highlands and then we went to Kuydok. We had water up to the neck. All those days we were living in the water. We spent more than one month in the water with no food. We had to eat the water lilies to survive. Many children were lost.¹¹⁵⁸

713. Most witnesses described rampant and brutal rape and sexual violence perpetrated against women and girls by soldiers and the militia.¹¹⁵⁹ One witness recalled that “they even raped one woman who had just delivered a baby. I understand that her baby was 1 to 2 months old. They even raped girls aged between 7 to 10 years old. The soldiers rammed a piece of wood into the vagina of one woman after they had raped her. They hung dead bodies from trees – both men and women.”¹¹⁶⁰ Some women died as a result of being raped, while one

¹¹⁴⁸ CTSAMM, *Report 2018/30, Violations Against Civilians in the Gandor Area, Unity State*, 17 August 2018; Witness 828, ERN 101804-101810, para. 17.

¹¹⁴⁹ Witness 828, ERN 101804-101810, para. 11.

¹¹⁵⁰ Witness 828, ERN 101804-101810, para. 12.

¹¹⁵¹ Witness 827, ERN 101811-101816; Witness 828, ERN 101804-101810; Witness 826, ERN 101856-101863; Witness 842, ERN 101619-101622; Witness 792, ERN 101503-101507, para. 7; Witness 793, ERN 101499-101205, para. 5; Witness 789, ERN 101508-101511, para. 6.

¹¹⁵² Witness 838, ERN 101632-101637, para. 13; Witness 825, ERN 101848-101855; Witness 827, ERN 101811-101816, para. 9; Witness 792, ERN 101503-101507, para. 6; Witness 873, ERN 101648-101652; Witness 823, ERN 101653-101658; Witness 828, ERN 101804-101810.

¹¹⁵³ Witness 793, ERN 101499-101205, para. 8.

¹¹⁵⁴ Witness 793, ERN 101499-101205, para. 8.

¹¹⁵⁵ Witness 839, ERN 101626-101631, para. 8; Witness 823, ERN 101653-101658; Witness 842, ERN 101619-101622.

¹¹⁵⁶ Witness 839, ERN 101626-101631, para. 9.

¹¹⁵⁷ Witness 826, ERN 101856-101863, para. 25; Witness 792, ERN 101503-101507, para. 9; Witness 793, ERN 101499-101205, para. 6.

¹¹⁵⁸ Witness 793, ERN 101499-101205, para. 6.

¹¹⁵⁹ Witness 792, ERN 101503-101507; Witness 789, ERN 101508-101511; Witness 827, ERN 101811-101816; Witness 828, ERN 101804-101810; Witness 826, ERN 101856-101863; Witness 841, ERN 101623-101625; Witness 837, ERN 101638-101642; Witness 823, ERN 101653-101658; Witness 838, ERN 101632-101637; Witness 837, ERN 101638-101642; Witness 872, ERN 101603-101608; Witness 873, ERN 101648-101652; Witness 789, ERN 101508-101511, para. 8.

¹¹⁶⁰ Witness 825, ERN 101848-101855, para. 18.

witness recounted how a newly-wed young woman was shot and killed because she refused to be gang raped.¹¹⁶¹ Women and girls were also abducted by Government soldiers and affiliated militia and taken as “wives”.¹¹⁶²

714. Soldiers and militia looted people’s possessions including stealing their cattle and goats and proceeded to burn tukuls and villages.¹¹⁶³ One witness recounted that:

Although all our possessions were looted, we were just glad to be alive. Personally, I lost my bed, my goats and children’s clothes. I had 35 goats which I managed to accumulate when my cows were stolen years before. The soldiers rounded up all of the goats in the village and left with them.

I came out of hiding 10 days later. [...] Our Tukul had been burned down by the soldiers, so we slept out in the open under a tree until we were able to build another tukul.¹¹⁶⁴

715. Satellite imagery analysis of the Mayendit and Leer areas shows that approximately 7,345 buildings were damaged or destroyed since the end of February 2018.¹¹⁶⁵ Most of the damage was documented in Leer County, where 3,788 structures damaged or destroyed were identified (see Damage map below at Figure 6).

716. These horrific events have also been documented by the UNMISS Human Rights Division that found that at least 232 civilians, including 35 children, 50 women and 35 elderly people were killed between 16 April and 24 May.¹¹⁶⁶ It further found that at least 120 women, including pregnant and lactating mothers, and girls as young as four years old were raped or gang raped.¹¹⁶⁷ It documented at least 15 incidents of abductions involving at least 132 women and girls.¹¹⁶⁸ Similar findings of gross violations were established by CTSAMM and Amnesty International.¹¹⁶⁹

717. The fighting and attacks on civilians resulted in massive displacement of the civilian population. In April alone, 7,000 people were displaced in and around Koch town.¹¹⁷⁰ In May, 40,000 people were reported to have been displaced in Leer County, out of a total population of approximately 80,000.¹¹⁷¹ This, at a time when the Integrated Food Security Phase Classification system predicted over 70 percent of Unity State to be at Crisis, Emergency or Catastrophe (Phase 3-5) levels of food insecurity.¹¹⁷²

718. Even as displaced and vulnerable civilians were the most in need of assistance, humanitarian organizations reported that their properties were looted and attacked in a number of instances, leading some to withdraw their staff supporting communities in need.¹¹⁷³

¹¹⁶¹ Witness 823, ERN 101653-101658, para. 15.

¹¹⁶² Witness 828, ERN 101804-101810, para. 12; Witness 827, ERN 101811-101816, para. 10; Witness 872, ERN 101603-101608, para. 8; Witness 839, ERN 101626-101631, para. 8.

¹¹⁶³ Witness 841, ERN 101623-101625, para. 6; Witness 872, ERN 101603-101608, paras. 8, 9; Witness 873, ERN 101648-101652, para. 9; Witness 830, ERN 101593-101597, para. 9; Witness 839, ERN 101626-101631, para. 8; Witness 792, ERN 101503-101507, paras. 8, 9; Witness 825, ERN 101848-101855, para. 18.

¹¹⁶⁴ Witness 828, ERN 101804-101810, paras. 13, 14.

¹¹⁶⁵ UNOSAT, “UNOSAT analysis of destruction in Western Bahr el Ghazal State and Unity State”, South Sudan, 23 January 2019, ERN D116708-D116714.

¹¹⁶⁶ UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April-May 2018*, para. 26.

¹¹⁶⁷ UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April-May 2018*, para. 30.

¹¹⁶⁸ UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity April-May 2018*, para. 32.

¹¹⁶⁹ CTSAMM, *Report 2018/22, Violations against Civilians including SGVB, in Southern Unity State April-May 2018*, 7 July 2018; CTSAMM, *Report 2018/25, Fighting in Thonyor*, 26 July 2018; Amnesty International, “‘Anything that was breathing was killed’ War Crimes in Leer and Mayendit, South Sudan”, 2018.

¹¹⁷⁰ OCHA, *South Sudan: Humanitarian Snapshot*, April 2018.

¹¹⁷¹ OCHA, *South Sudan: Humanitarian Snapshot*, May 2018; Danish Refugee Council, *Rapid Assessment Report for Leer Town Temporary Protection Area (TPA)*, 21 May 2018.

¹¹⁷² Integrated Food Security Phase Classification, *South Sudan: Key IPC Findings: January-July 2018*.

¹¹⁷³ MSF, “People caught in the frontlines of intense fighting in country’s north”, 31 May 2018; ICRC, “South Sudan: Relief operations postponed after gunshots fired at ICRC compound”, 23 April 2018.

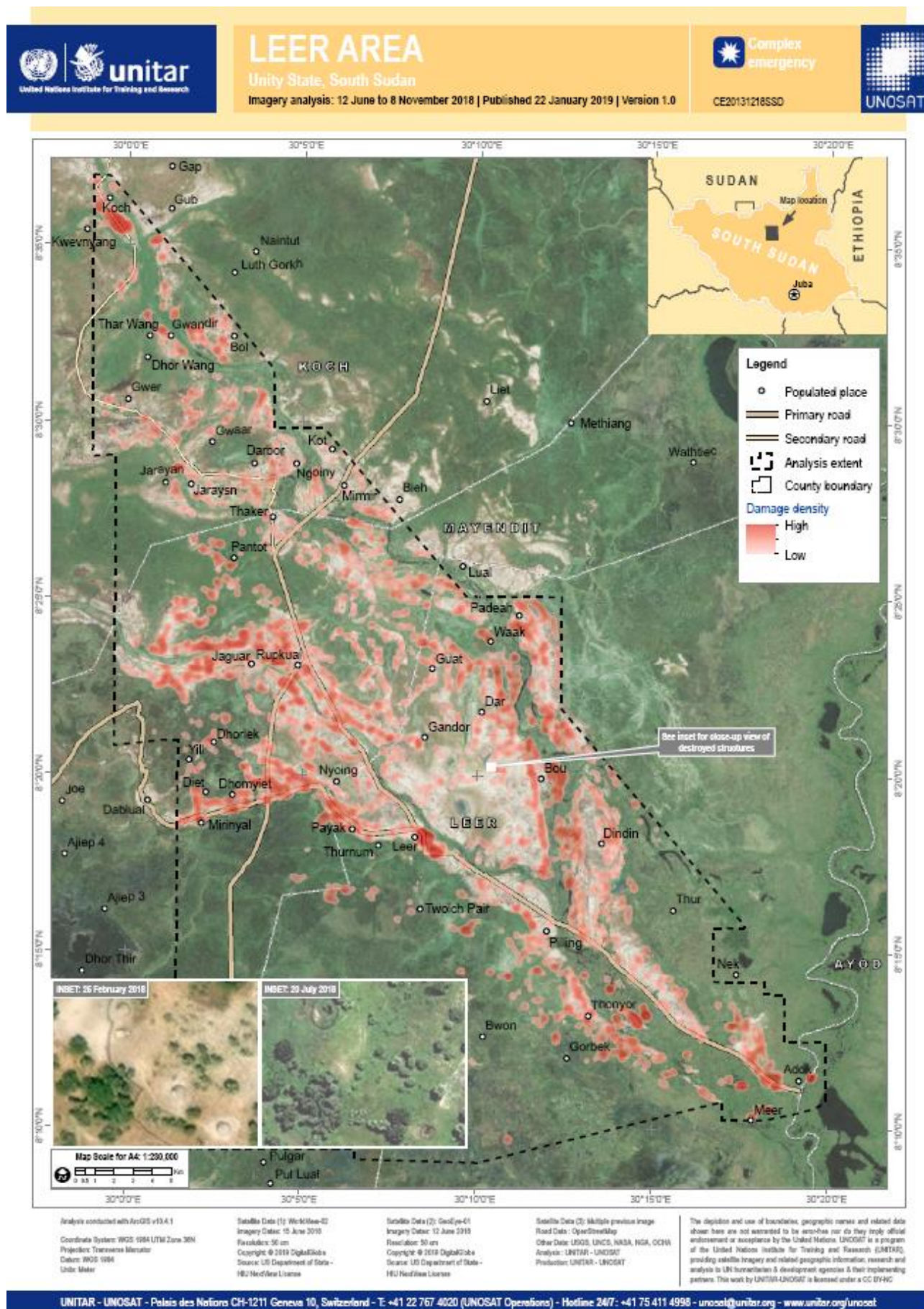


Figure 6: Damage Assessment map of southern Unity State

3. Reintegration and Recruitment, September and October 2018

719. Although the fighting in southern Unity State had largely subsided by the end of June/early July 2018, the area remains of concern.

720. In September and October 2018, after the signing of the R-ARCSS, the SPLA and the SPLA-IO (TD) were reported to be undertaking recruitment, particularly in the area of Rubkuai in northern Mayendit County.¹¹⁷⁴ Although these activities were explained as being part of the re-integration of SPLA-IO (TD) troops into the SPLA by the Acting Governor of Southern Liech State,¹¹⁷⁵ reports indicate that the exercise goes beyond re-integration and includes new recruitment. Observers have suggested that this recruitment is being undertaken in part to boost the numbers of the SPLA-IO (TD) to capitalise on the force allocations made in the peace agreement for the integration of forces into a unified national army.¹¹⁷⁶

4. Violations and Alleged Crimes

a) *Killings of Civilians, Rapes and Other Forms of Sexual Violence, Destruction of Civilian Property, and Pillage*

721. On the basis of the evidence collected by the Commission, as well as on the basis of credible investigations undertaken by other organisations,¹¹⁷⁷ the Commission finds reasonable grounds to believe that SPLA and SPLA-IO (TD) soldiers and affiliated militia deliberately fired on villagers taking no active part in the conflict during their ground offensive in southern Unity State from mid-April to June 2018 resulting in the killings of civilians, including women, children and the elderly.

722. Similarly, the evidence provides reasonable grounds to believe that SPLA and SPLA-IO (TD) soldiers and affiliated militia raped, gang raped, and inflicted sexual violence against large numbers of women and girls during the same offensive. Additionally, women and girls were abducted by these same troops. The Commission further finds that this was encouraged by commanders through their promises that the soldiers could take women and girls as “wives” in compensation for their services.

723. SPLA and SPLA-IO (TD) soldiers and affiliated militia deliberately burnt *tukuls* and other residential areas and villages in the course of their operation in Leer and Mayendit Counties. There is no information before the Commission to suggest that the destruction of private property carried out was due to military necessity.

724. Similarly, the evidence collected by the Commission also provides a consistent account of widespread pillage of private property by these same troops for their own use. This was likewise encouraged by commanders.

725. These killings, rapes and other forms of sexual violence, pillage and destruction of civilian property were committed by state agents and forces under their control and amount to serious violations of human rights law under the Transitional Constitution of the Republic of South Sudan (2011), particularly the right to life and human dignity (Article 11), the rights of the child (Article 17), freedom from inhuman or degrading treatment (Article 18), and the right to property (Article 28). They also amount to violations of the African Charter on Human and Peoples’ Rights, including in particular the right to life and the integrity of the person (Article 4) and the right to property (Article 14).

726. Such acts amount to crimes under South Sudan’s Penal Code (2008), including murder (section 206), rape (section 247), theft (section 293), and mischief (section 315). Moreover, the Government’s armed forces are also subject to the provisions of the SPLA Act (2009). In particular, section 57 of the SPLA Act establishes the offences of destroying and damaging

¹¹⁷⁴ Witness 839, ERN 101626-101631, para. 13; Witness 837, ERN 101638-101642, para. 10; Confidential Meeting, Bentiu, 21 September 2018; R-JMEC, *Progress Report No. 4: On the Status of Implementation of the R-ARCSS 2018*, 10 December 2018.

¹¹⁷⁵ Meeting with Acting Governor of Southern Liech State, Leer, 4 October 2018. See also CTSAMVM Technical Committee Fourth Meeting, Khartoum, Sudan, 7-8 November 2018.

¹¹⁷⁶ Confidential Meeting, Bentiu, 21 September 2018.

¹¹⁷⁷ Including UNMISS/OHCHR, *Indiscriminate Attacks Against Civilians in Southern Unity, April-May 2018*; CTSAMM, *Report 2018/22, Violations against Civilians including SGVB, in Southern Unity State April-May 2018*, 7 July 2018; CTSAMM, *Report 2018/25, Fighting in Thonyor*, 26 July 2018; Amnesty International, “‘Anything that was breathing was killed’ War Crimes in Leer and Mayendit, South Sudan”, 2018.

property, plunder and committing any offence against the property or person of any inhabitant or resident of a country in which he or she is serving.

727. Furthermore, the Commission finds reasonable grounds to believe that there was a nexus between the commission of these crimes and the non-international armed conflict that was ongoing in South Sudan at the time, because they occurred in the context of the SPLA-organized offensive against the SPLA-IO (RM) in Leer and Mayendit Counties. As such, they are violations of international humanitarian law under Common Article 3 to the Geneva Conventions and Additional Protocol II to which South Sudan is a party and which it has implemented in its Geneva Convention Act (2012). They should also be investigated and prosecuted as war crimes under Article 4(a) (violence to life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment), 4(e) (outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault), and Article 4(f) (pillage) of the Draft Statute of the Hybrid Court for South Sudan.

728. The Commission also finds reasonable grounds to believe that the killing of civilians, rape and sexual violence, destruction of private property and pillage in Leer and Mayendit Counties was part of a widespread or systematic attack directed against a civilian population. The attacks were systematic as they appear to have formed part of a planned attack against the civilian population of Leer and Mayendit Counties. This is supported by the evidence that superiors encouraged pillage and the “taking of wives” by the forces as payment for their services as well as by the evidence that part of the aim of the attack was to displace and terrorize the civilian population. Furthermore, the attacks were widespread as they occurred in over 40 villages over the course of a two month period. As such, they should be investigated and prosecuted as crimes against humanity, including murder, rape and sexual violence, and other inhumane acts under Article 3 of the Statute of the Hybrid Court for South Sudan.

b) Intentionally Directing Attacks against the Civilian Population, Organizations using the distinctive emblems of the Geneva Conventions, and Humanitarian Organizations

729. Based on the evidence collected and reviewed, the Commission finds reasonable grounds to believe that the SPLA, SPLA-IO (TD) and affiliated militia intentionally directed attacks against the civilian population. While some places attacked had SPLA-IO (RM) forces in them and involved fighting between opposing forces, such as Thonyor which was the SPLA-IO (RM) headquarters in Leer County, many of the villages and homesteads clearly had no opposition forces present in them at the time of the attacks.

730. Intentionally directing attacks against the civilian population or against individual civilians is prohibited by Article 13(2) of Additional Protocol II and section 7 of the South Sudan Geneva Convention Act (2012). Directing attacks against the civilian population is a crime under Article 5(a) of the Draft Statute of the Hybrid Court for South Sudan.

731. Even where attacks may have been legitimate military operations against an SPLA-IO (RM) presence, the evidence provides reasonable grounds to believe that there was an utter failure by the SPLA, SPLA-IO (TD) and affiliated militias to adhere to the fundamental international humanitarian law principle of distinction, such that the attacks amount to a violation of the customary international law prohibition of indiscriminate attacks.¹¹⁷⁸

732. Beyond this, however, the Commission takes particular note of one well-placed witness’s assertion that “The aim was to terrorise civilians by all means”. The gratuitously brutal nature of the attacks corroborates the apparent aim of terrorising the civilian population and indicates that these crimes should be investigated and prosecuted as ‘acts of terrorism’ as a war crime under Article 4(d) of the Statute of Hybrid Court.¹¹⁷⁹

¹¹⁷⁸ ICRC *Study on Customary International Humanitarian Law*, Rule 11.

¹¹⁷⁹ Article 4(d) of the Draft Statute of the Hybrid Court refers to “acts of terrorism” as a war crime. This crime is also included as a war crime in the Statute of the Special Court for Sierra Leone (Article 3(d)). The Appeals Chamber of the SCSL considered that this crime was intended to reflect the crime of acts of terrorism under Article 13(2) of Additional Protocol II to the Geneva Conventions and concluded that the elements of the crime were: (i) Acts or threats of violence; (ii) That the offender willfully

733. Furthermore, there are also credible allegations that armed men attacked and looted, humanitarian organizations in the course of the southern Unity operation, including an attack against the ICRC field base in Leer on 10 April 2018 and engaged in looting and destruction of two Médecins Sans Frontières (MSF) facilities. While these allegations require further investigation, in particular to determine the identities of the perpetrators of the attacks, these attacks may amount to crimes of intentionally directing attacks against buildings and personnel using the distinctive emblems of the Geneva Conventions and personnel, installations, material, units or vehicles involved in humanitarian assistance under Article 5 of the Draft Statute of the Hybrid Court for South Sudan.

c) Forcible Transfer of the Population

734. The offensive and attacks on civilians in Leer and Mayendit Counties by SPLA, SPLA-IO (TD), and affiliated militias led to the displacement of half the population of the Leer County, as well as thousands from Mayendit and Koch Counties.¹¹⁸⁰ Evidence collected by the Commission makes clear that one of the aims of the offensive was to clear the area of civilians who could potentially provide support to the SPLA-IO (RM) and to prevent their return by burning and destroying their homes and making them too scared of the brutal attacks.

735. This displacement gave rise to serious violations of human rights law under the Bill of Rights in the Transitional Constitution of the Republic of South Sudan (2011), including the right to freedom of movement and residence (Article 27) and the right to privacy encompassing the right not to be subjected to interference with his or her private life, family, home or correspondence, save in accordance with the law (Article 22). They also amount to violations of the African Charter on Human and Peoples' Rights including, in particular, the right to freedom of movement and residence within the borders of a State provided one abides by the law (Article 12).

736. Furthermore, the expulsion of people from their legal places of residence through coercion, with the intent to displace them, should be investigated and prosecuted as the crime of forcible transfer as a crime against humanity under Article 3(d) of the Draft Statute of the Hybrid Court for South Sudan.

5. Responsibility for Violations and Alleged Crimes

a) Individual Responsibility

737. The southern Unity offensive was an operation coordinated at a high level by the SPLA, the SPLA-IO (TD), and Government officials at the national, state and county levels in Juba, Bentiu, and Northern and Southern Liech States. As set out below, the Commission considers that these individuals may bear criminal responsibility through a number of modes of participation including planning, ordering, instigating, committing, aiding and abetting, and command responsibility.

738. Multiple witnesses attested to the planning that went into the offensive, including the recruitment of additional youth militia in Koch County, the resupplying of weapons and ammunition from Juba, delivered to Bentiu and Leer by military and civilian aircraft, and meetings held to plan the offensive.¹¹⁸¹ The evidence collected by the Commission provides reasonable grounds to believe that Governors of both Northern and Southern Liech States were involved in this planning, including participating in planning meetings and coordinating logistics including the delivery of weapons. The Gany County Commissioner also participated in the planning of the offensive including through his recruitment of the militia

made the civilian population or individual civilians not taking direct part in hostilities the object of those acts or threats of violence; and (iii) The acts or threats of violence were carried out with the specific intent of spreading terror among the civilian population. SCSL, *Prosecutor v. Fofana and Kondewa*, Case No.SCSL-04-14-A, Appeal Judgement, 28 May 2008, paras. 344-350; SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-25-A, Appeal Judgement, 26 October 2009, para. 889. See also ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeal Judgment, 30 November 2006, para. 102; ICTY, *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Trial Judgement, 17 January 2005, para. 589.

¹¹⁸⁰ OCHA, *South Sudan: Humanitarian Snapshot*, April 2018; OCHA, *South Sudan: Humanitarian Snapshot*, May 2018; Danish Refugee Council, *Rapid Assessment Report for Leer Town Temporary Protection Area (TPA)*, 21 May 2018.

¹¹⁸¹ See above "Southern Unity Offensive" section (Section VII(A)(2)).

and participation in meetings. Similarly, the new Commander of the SPLA 4 Division in Bentiu would have had to have been involved in the planning of an offensive of this scale involving troops under his command. There is further evidence that the Brigadier General SPLA commander based in Leer participated in planning meetings for the offensive.

739. The Commission was also able to identify on the basis of multiple witnesses' testimonies that the SPLA-IO (TD) commander based in Kuergini, Gany County Commissioner, and two SPLA Brigadier General commanders were present leading their troops on the ground during the attacks. There are, therefore, reasonable grounds to believe that they were ordering and participating in the commission of these attacks, or in the alternative at the least aiding and abetting them.

740. Further, there are reasonable grounds to believe that the SPLA 4 Division Commander, the two Brigadier General SPLA commanders, SPLA-IO (TD) commander based in Kuergini, and the Gany County Commissioner may bear command responsibility for having failed to take reasonable and necessary measures to prevent or punish the crimes committed by their subordinates under their effective control in the course of the offensive.

741. In this regard, the Commission notes that the offensive was an organised and systematic one carried out across multiple fronts each led by particular commanders. The Commission found no evidence that suggests that normal military command and control had broken down. Accordingly, it finds reasonable grounds to believe that these commanders were exercising effective control over their troops at the relevant time.

742. Furthermore, as a planned operation, whose goals included attacks on the civilian population to displace them, accompanied by the fact that a number of the commanders were present on the ground when the attacks were taking place, there are reasonable grounds to believe that these commanders knew that their soldiers were committing the crimes.

743. The Commission also considers that the commanders failed to take reasonable and necessary measures to prevent the brutal attacks on civilians. To the contrary, the fact that the Gany County Commissioner promised his militia that they could keep the cows and property they pillaged and the women they abducted as wives in the course of the operation indicates that, rather than trying to prevent these crimes, he instead instigated them.

744. Similarly, the Commission has received no information that reasonable and necessary measures were taken to punish those responsible. It has received no information of criminal or court martial investigations or prosecutions against the perpetrators, nor of any Presidential or State investigations. Indeed, one State official confirmed as much to the Commission, indicating that there were no judges available but that some measures were being taken to bring perpetrators before customary courts.¹¹⁸² While the customary justice system provides an important forum for compensation and recourse, it is not a suitable forum for adjudication of serious criminal cases, including in particular horrendous sexual crimes against women and children.

745. The Gany County Commissioner was reportedly removed from his post following the offensive. However, multiple sources have indicated that he has returned to the military and remains active in Unity State.¹¹⁸³ The Commission also received information that one of the SPLA Brigadier General Commanders who participated in the offensive was promoted following the offensive but it has been unable to confirm this.¹¹⁸⁴ The promotion of commanders who were present on the ground leading the offensive runs directly contrary to the requirement to punish those responsible.

b) State Responsibility

746. As the SPLA are government forces, their violations of human rights give rise to state responsibility on the part of the Republic of South Sudan. Furthermore, the evidence collected by the Commission provides reasonable grounds to believe that the SPLA-IO (TD) were acting in complete dependence on the SPLA, or at least of the Government, during the offensive. As such, state responsibility may also apply to their acts. In any event, the Government has a duty to investigate and prosecute these alleged violations of international

¹¹⁸² Confidential Meeting, 4 October 2018.

¹¹⁸³ Confidential Meeting, Bentiu, 21 September 2018; Witness 823, ERN 101653-101658.

¹¹⁸⁴ Witness 873, ERN 101648-101652, para. 6.

human rights and international humanitarian law, as well as the criminal acts committed in Leer and Mayendit Counties between April and June 2018.

747. The Commission requested information from the Government about any investigations, punitive action or prosecutions it has undertaken in relation to the violations and crimes committed in southern Unity between April and June 2018.¹¹⁸⁵ However, the Commission has received no information regarding steps taken by the Government to criminally investigate and prosecute those responsible for these events. As noted above, to the contrary, it appears that some of those involved were promoted rather than punished.

B. Central Equatoria State, 2018

1. Background and Current Situation

748. Central Equatoria State has historically been populated predominantly by Bari-speaking communities, including the Kakwa, Bari, and Pojulu. However, other ethnic groups, including Dinka and Nuer, have also historically been present, particularly in Yei town.¹¹⁸⁶ The southern part of Central Equatoria State (the new Yei River State), including Yei, Lainya, Morobo, and Kajo Keji Counties, remained relatively peaceful when the civil war broke out in South Sudan in December 2013.

749. Yei, the main town in the area, is of strategic importance as it is a key junction for road traffic in the area and down to the border with the Democratic Republic of the Congo and Uganda. Yei is a focal point for cross-border trade, and for the movement of people and goods in the local area, which is fertile and rich in natural resources, including in particular teak. Whilst Juba normally relies on the route through Nimule, in Eastern Equatoria, as its main supply route for the importation of goods from Uganda, any damage or threat to that route increases the strategic value of Yei as an alternative route.¹¹⁸⁷

750. Reflecting the strategic importance of Yei and the southern part of Central Equatoria State (new Yei River State), from early 2016, the Government gradually militarized the area in an attempt to gain and maintain control of the area.¹¹⁸⁸ This involved the deployment of SPLA soldiers and the Mathiang Anyoor, a Dinka youth militia raised in Aweil by former SPLA Chief of Staff Paul Malong.¹¹⁸⁹ Insufficiently trained and ill-disciplined, the Mathiang Anyoor contributed enormously to the subsequent alienation of the local Equatorian population.¹¹⁹⁰ The Mathiang Anyoor were deployed along the roads leading south to the borders to control access to and prevent civilians escaping from the area.¹¹⁹¹ Government forces have continuously controlled the main towns, however, there are large gaps between SPLA held areas and this allows the opposition forces to communicate and move around relatively freely.¹¹⁹²

751. Following the crisis in July 2016, then First Vice President Riek Machar fled Juba, heading south through the Equatorias towards safety in the Democratic Republic of the Congo. Initially, he was accompanied by between 2,000 and 4,000 supporters, including members of his armed security detail who had accompanied his return to Juba in April 2016.¹¹⁹³ As the targeting of Nuers in Juba continued, more and more Nuer joined the exodus southward, such that the SLPA-IO (RM) presence in Yei and Morobo counties eventually

¹¹⁸⁵ Note Verbale to the Ministry of Foreign Affairs and International Cooperation of the Government of South Sudan, Requesting Documentation from Different Ministries, CHRSS/COR/2018/32, 21 November 2018.

¹¹⁸⁶ REACH, "Situation Overview: Central and Eastern Equatoria, South Sudan", April - June 2018.

¹¹⁸⁷ Confidential Meeting, Juba, 27 November 2018.

¹¹⁸⁸ Confidential Meeting, Juba, 27 November 2018.

¹¹⁸⁹ Human Security Baseline Assessment for South Sudan and Sudan, "Spreading Fallout: The Collapse of ARCSS and the new conflict along the Equatorias-DRC border", Small Arms Survey, Number 28, May 2017, p. 13. For justification of EU sanctions against General Paul Malong, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1115&from=EN>.

¹¹⁹⁰ Witness 1055, ERN 102254-102260, paras. 15-19; Witness 1074, ERN 102296-102299, para. 5.

¹¹⁹¹ Witness 1055, ERN 102254-102260, para. 17. See also Confidential Document, ERN D116653-D116702.

¹¹⁹² Confidential Meeting, Juba, 19 November 2018.

¹¹⁹³ Human Security Baseline Assessment for South Sudan and Sudan, "Spreading Fallout: The Collapse of ARCSS and the new conflict along the Equatorias-DRC border", Small Arms Survey, Number 28, May 2017, p. 3.

reached a reported strength of approximately 16,000 men.¹¹⁹⁴ These armed fighters brought with them wives, children and assorted Nuer camp-followers. As Riek Machar continued his flight west and south to the Democratic Republic of the Congo, many of the Nuer paused, enjoying the comparative safety of southern Central Equatoria. For many, this pause became permanent.¹¹⁹⁵

752. The resulting change to the local demographic mix caused initially by the deployment of Dinka SPLA and Mathiang Anyoor troops, and then the subsequent influx of Nuers from Juba, was to have an enormously de-stabilising effect on the region.¹¹⁹⁶ The Dinka domination of political and security institutions,¹¹⁹⁷ as well as abuses allegedly perpetrated by the SPLA, Mathiang Anyoor, and Nuer in SPLA-IO (RM) against Bari-speaking Equatorian communities including Bari members of SPLA and SPLA-IO (RM) led to the creation of new armed opposition movements in Central Equatoria, notably the National Salvation Front (NAS), led by former SPLA Deputy Chief of General Staff for Logistics Lt. Gen. Thomas Cirillo Swaka, which emerged in March 2017.¹¹⁹⁸

753. The presence of multiple armed groups, many of them insufficiently supplied and resourced, has contributed to rising insecurity and criminality in the area as newly formed armed opposition groups have had relied capturing supplies, ammunition and weapons from other groups in the course of ambushes or fighting.¹¹⁹⁹ Such ambushes have continued to occur into 2018.¹²⁰⁰

754. Shortly taking up office in February 2018, the new Governor of Yei River State, Emmanuel Adil Anthony, ordered all County Commissioners to take up office in their counties.¹²⁰¹ Many had previously been staying in Yei, or even Juba, because of the perceived insecurity in their counties, which were partly, or largely, under the control of SPLA-IO (RM).¹²⁰² When they relocated to their counties, the Commissioners were accompanied by large security details – essentially SPLA troops dispatched from Juba.¹²⁰³ The result was further militarization of Yei River State and an increase in localized conflicts with the local civilian population as the newly arrived soldiers foraged for food.¹²⁰⁴

755. As the 2018 peace process leading to the R-ARCSS progressed, many Equatorians felt that it failed to address their demands for accountability for crimes committed in the Equatorias, accountability for land-grabbing, a federal system, security arrangements, and reform “so that it’s not just one tribe [in] command”.¹²⁰⁵ In particular, many Equatorians accuse the Government of failing to deliver on its promise of “real federalism” and of improved power-sharing among all the communities of South Sudan.¹²⁰⁶ One former combatant told the Commission: “We are tired of tribal government and we want to fight for federalism”.¹²⁰⁷ Land grabbing, initially by Dinka cattle-herders and later also by Nuers, became an additional driver of conflict in Central Equatoria. As a former SPLA-IO commander told the Commission: “we receive no salary, it’s just a sacrifice because of land. If someone grabs your land, where does the next generation will stay? That’s the reason why we fight in Equatorias”.¹²⁰⁸

¹¹⁹⁴ Witness 1050, ERN 102232-102238, para. 9.

¹¹⁹⁵ Confidential Meeting, Juba, 28 November 2018.

¹¹⁹⁶ Confidential Meeting, Juba, 28 November 2018.

¹¹⁹⁷ Witness 1050, ERN 102232-102238, para. 12.

¹¹⁹⁸ Witness 1063, ERN 102249-102253, paras. 10-11; Confidential Meeting, Kampala, 15 December 2018; Human Security Baseline Assessment for South Sudan and Sudan, “Spreading Fallout: The Collapse of ARCSS and the new conflict along the Equatorias-DRC border”, Small Arms Survey, Number 28, May 2017, p. 14.

¹¹⁹⁹ Witness 1050, ERN 102232-102238, para. 17; Witness 1063, ERN 102249-102253, para. 8.

¹²⁰⁰ See e.g. CTSAMM, *Report 2018/01 Violations of the ACOH in the Morobo area*, 23 March 2018.

¹²⁰¹ Confidential Meeting, Juba, 28 November 2018.

¹²⁰² Confidential Meeting, Juba, 28 November 2018.

¹²⁰³ Confidential Document, ERN D116365-D116473; Confidential Document, ERN D116703-D116707.

¹²⁰⁴ Confidential Meeting, Juba, 27 November 2018.

¹²⁰⁵ Witness 1063, ERN 102249-102253, para. 11.

¹²⁰⁶ UN Security Council, *Interim Report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2428 (2018)*, S/2018/1049, November 2018, para. 32.

¹²⁰⁷ Witness 1063, ERN 102249-102253, para. 7.

¹²⁰⁸ Witness 1050, ERN 102232-102238, para. 16.

756. As noted above,¹²⁰⁹ five parties ultimately did not sign the R-ARCSS, including Thomas Cirillo Swaka of the NAS.¹²¹⁰ The non-signature of the R-ARCSS resulted in further splintering within these groups as some disagreed about whether or not to sign and how to proceed in light of the decision, adding ever more players to the already crowded field of the Equatorias.¹²¹¹ The shifting dynamics and alliances in Central Equatoria in 2018 have contributed to ongoing insecurity in the state and continued harassment of the civilian population including and systematic human rights violations.

2. SPLA Violations

757. Throughout 2018, the SPLA and its allied militias have maintained control of the major towns in Central Equatoria such as Yei, Kajo Keji, Lainya and Morobo, and the main roads that connect them.¹²¹² People trying to exit towns must pass through checkpoints and are often accused by SPLA soldiers of going out into the bush to support the opposition.¹²¹³ For example in Yei, in January 2018, it was observed that “SPLA has a firm grip on the exits/entry of the town. They even have small posts in all small ingress routes which controls the movement of unknown or armed people.”¹²¹⁴

758. The areas surrounding towns and smaller villages are largely under the control of armed opposition groups.¹²¹⁵ To counter any threat that this may pose, the SPLA has carried out operations around these towns and along the connecting roads.¹²¹⁶ These operations have often included attacks on the civilian population, with the targeting apparently done along ethnic lines and premised on accusations of supporting the armed opposition.¹²¹⁷ The Commission has met with individuals who were victims of attacks by government forces in a variety of locations around Yei River State.

759. Witnesses told the Commission that in Yei River State, after Government forces clashed with the SPLA-IO, SPLA soldiers often retaliate against the local Equatorian population, accusing them of supporting the opposition.¹²¹⁸ Soldiers stop Bari-speaking men and youths, usually Kakwa or Pojulu, in the street and ask them which tribe they belong to. According to their response, they might be arrested and detained in military barracks, with many being executed during the night. It has been further reported to the Commission that SPLA soldiers who refused to carry out such executions were themselves putting their own lives at risk.¹²¹⁹

760. One example of such retaliation the Commission that documented occurred in early in 2018, when SPLA forces clashed with SPLA-IO between Limbe and Kenyi on the Lainya–Yei road. After the battle, as the Government forces who had escaped the battle were withdrawing back to their barracks in Kenyi town, they encountered a group of seven young Pojulu men who were returning from delivering their families to the refugee settlements in Uganda. As they approached Kenyi village the SPLA soldiers detained the men who were then taken to a nearby valley called Lamba and executed them. Local villagers were prevented from collecting the bodies as Government troops continued to patrol the road.¹²²⁰

¹²⁰⁹ See above “Revitalized Agreement on the Resolution of the Conflict in South Sudan” section (Section III(D)).

¹²¹⁰ Witness 1063, ERN 102249-102253, para. 11.

¹²¹¹ UN Security Council, *Interim Report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2428 (2018)*, S/2018/1049, November 2018, paras. 34, 35.

¹²¹² UN Security Council, *Interim Report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2428 (2018)*, S/2018/1049, November 2018, para. 28.

¹²¹³ Witness 1074, ERN 102296-102299, para. 6; Witness 1078, ERN 102291-102295, para. 5.

¹²¹⁴ Confidential Document, ERN D116653-D116702.

¹²¹⁵ Witness 1073, ERN 102286-102290, para. 8; Witness 1074, ERN 102296-102299, para. 6; Witness 1078, ERN 102291-102295, para. 5; UN Security Council, *Interim Report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2428 (2018)*, S/2018/1049, November 2018, para. 29.

¹²¹⁶ See e.g., CSTAMM Report 2018/15: *Reinforcement and fighting in the Kajo Keji area*, 9 May 2018; CSTAMM Report 2018/23 *Murder and rape in Goli, Central Equatoria state*, 7 July 2018.

¹²¹⁷ Witness 1073, ERN 102286-102290, para. 11; Witness 1074, ERN 102296-102299, para. 8; Witness 1078, ERN 102291-102295, para. 5; UN Security Council, *Interim Report of the Panel of Experts on South Sudan established pursuant to Security Council resolution 2428 (2018)*, S/2018/1049, November 2018, para. 29.

¹²¹⁸ Witness 1074, ERN 102296-102299, para. 6.

¹²¹⁹ Witness 1050, ERN 102232-102238, para. 11.

¹²²⁰ Witness 1074, ERN 102296-102299, para. 7.

761. Another instance of retaliation against the civilian Equatorian population occurred in February or March 2018, when the SPLA-IO reportedly attacked the SPLA barracks in Kogulu, six miles from Yei town on the road leading toward the Democratic Republic of the Congo, and took control of the town. The same day, SPLA soldiers fleeing that battle returned to Yei town and began to retaliate against local people, especially Bari Men and boys, accusing them of providing information about Government forces to the SPLA-IO. A witness heard the soldiers saying: “Equatorians, you are the one who are with the Nuers in IO in the bush. They kill the Dinka so the Equatorians who are in town will pay for it”.¹²²¹ During this incident, SPLA soldiers also robbed at gunpoint any Equatorians whom they encountered. This generated fear among civilians and forced them to flee towards Uganda that same day. During this exodus, a witness reported seeing the bodies of dead civilians lying around the main roundabout next to Freedom square in Yei town. Later, the same witness recounted seeing dead bodies of civilians in Mugwo payam of Yei County, as well as along the road on the way to the border with Uganda.¹²²²

762. SPLA soldiers have also engaged in looting in the region. For example, in January 2018, approximately 30 uniformed SPLA soldiers, all Dinka, went to Atende village, five miles outside of Yei town, where Kakwa people live and keep cattle. The soldiers looted at least 100 cattle and shot dead those that would not follow the herd as it was led away.¹²²³

763. Another instance of looting reported to the Commission occurred in August 2018, in a village in Yei County when the shop of a Kakwa merchant was attacked after dark by a large group of soldiers whom a witness recognised as Dinka by the scarring on their foreheads.¹²²⁴ The SPLA soldiers stole 80,000 SSP and chased the merchant out of the shop, beating him across the back of his head with a rifle butt. When he returned the next morning, the shop had been looted of all valuable items leaving only items such as toilet paper. The victim mourned: “The soldiers left me with nothing, survival was getting hard”.¹²²⁵ After this event, the merchant ceased trading and just hid in his house in order to avoid the government soldiers. He eventually fled to Uganda in January 2019.¹²²⁶

764. Witnesses also recounted how around this time, SPLA forces would always attribute responsibility for attacks to “unknown gunmen” even though the Government was in full control of the town.¹²²⁷ One such incident occurred around August 2018, near Mahat, north of Yei bridge on the Juba road, when unidentified armed men attacked a family in their home. A man and his wife were hacked to death with a *panga* (machete). Their seven-month daughter was also attacked, her left hand and an ear were cut off, but she survived. Their 10-year-old daughter, who had remained hidden behind a curtain, witnessed the whole assault and later recounted it to the police in presence of the witness to whom the Commission spoke. This witness had also seen the bodies. The daughter identified the assailants as Dinka men.¹²²⁸

765. Witnesses further informed the Commission that since 2016, SPLA Government forces have continually and systematically detained Kakwa men in the military barracks in the Yei area, many of whom were then methodically executed. Such operations are conducted by a ‘Joint-Operations Force’, consisting of SPLA, Police and Prison officers. Moreover, the Commission collected evidence about one Kakwa SPLA soldier who was arrested and detained for two days in the Yei military barracks in the second half of 2018. This was done on the orders of the SPLA Dinka Brigade Commander, who accused him of colluding with “the rebels.” Whilst the soldier was detained, his family was attacked at home. His wife was shot in the stomach and killed and their house was the burnt down with the family inside, including their six-month old baby.

766. The Commission received accounts of such arrests taking place as recently as mid-January 2019 when SPLA soldiers arrested four Kakwa people in Otogo Payam, Morobo

¹²²¹ Witness 1073, ERN 102286-102290, para. 11.

¹²²² Witness 1073, ERN 102286-102290, para. 11.

¹²²³ Witness 1078, ERN 102291-102295, para. 6.

¹²²⁴ Witness 1078, ERN 102291-102295, para. 8.

¹²²⁵ Witness 1078, ERN 102291-102295, para. 9.

¹²²⁶ Witness 1078, ERN 102291-102295, paras. 9, 10.

¹²²⁷ Witness 1063, ERN 102249-102253, para. 6; Witness 1078, ERN 102291-102295, para. 5.

¹²²⁸ Witness 1078, ERN 102291-102295, para. 7.

County and took them to the military barracks. Their circumstances remain unknown at the time of writing.¹²²⁹

3. SPLA-IO (RM) Violations

767. From early 2018, discontent and tensions erupted within SPLA-IO ranks in Yei River State. The Commission interviewed former SPLA-IO soldiers who stated that by May 2018, they had begun to realize that Equatorians were not just under threat by the SPLA, but also by the Nuer within the SPLA-IO (RM) ranks who were killing, raping women, land-grabbing and looting cattle of the community.¹²³⁰ Kakwa commanders in the SPLA-IO complained to their Nuer colleagues: “The crimes that you are committing are the same crimes that government committed in 2013. And this is the reason why we ran to the bush for rebellion. If IO does the same, what kind of change are we going to bring?”¹²³¹

768. As a consequence, Kakwa commanders began to leave the ranks of SPLA-IO in greater numbers. Some decided to join the South Sudan National Movement for Change (SSNMC) political party and the National Salvation Movement (NAS).¹²³²

769. Until these massive Kakwa defections started, the SPLA-IO (RM) had controlled most of rural new Yei River State. Since then, those areas of the new Yei River State that are not under Government control are mostly held by groups led by defected Kakwa commanders with much of the territory of Yei, Lainya, Kajo Keji and Morobo Counties being under the control of NAS.¹²³³

770. The Commission gathered accounts of SPLA-IO (RM) killings of Kakwa individuals between mid-October 2018 and early January 2019. For example, sometime between 15 and 20 October 2018, SPLA-IO (RM) forces allegedly killed 17 people in Mugwo payam in Yei County. Similarly, in Otego payam, Morobo County, SPLA-IO (RM) forces allegedly killed four people, whose bodies a witness observed being buried.¹²³⁴ However, these incidents require further investigation.

771. The Commission also heard allegations of looting and cattle raiding by SPLA-IO (RM) forces in Lasu payam in Morobo County and the establishment of cattle camps in Kajo Keji and in Payume payam in Morobo County. These are places where the cattle that SPLA-IO (RM) forces had stolen was kept.¹²³⁵ In this regard, the SPLA-IO forces have reportedly obtained resources, namely recruits and supplies, using coercive methods. A witness told the Commission how SPLA-IO (RM) patrols would visit villages asking for help to fight the Government, requesting “food, if you have goats they will ask for goats, if you have cattle they will ask for cattle. They would also ask you for clothes, sandals. If you refuse they will beat you.” Any refusal to help would lead to accusations: “are you supporting the Government? Are you giving information about our movements to the Government?” It appears from the investigation that the Commission carried out that Bari-speaking NAS soldiers do apply similar pressure for men to join the ranks of their movement including on Ugandan territory.¹²³⁶

772. Even refugees who had fled Central Equatoria State told the Commission that they did not feel safe in the refugee settlements in Uganda. One witness reported that he was approached by SPLA Dinka former soldiers whom he recognized. They were reportedly prowling around the camp and making enquiries about camp residents.¹²³⁷

4. Attack on Emmanuel Christian College Compound, Goli, 14 May 2018

773. In addition to the violations set out above, the Commission is particularly alarmed by an attack at a school that occurred in Goli in May 2018.

¹²²⁹ Witness 1050, ERN 102232-102238, para. 13.

¹²³⁰ Witness 1063, ERN 102249-102253, para. 10.

¹²³¹ Witness 1050, ERN 102232-102238, para. 19.

¹²³² Witness 1050, ERN 102232-102238, para. 22; Witness 1063, ERN 102249-102253, para. 10.

¹²³³ Witness 1063, ERN 102249-102253, para. 12; Witness 1050, ERN 102232-102238, para. 25.

¹²³⁴ Witness 1050, ERN 102232-102238, para. 18.

¹²³⁵ Witness 1050, ERN 102232-102238, para. 18.

¹²³⁶ Witness 1074, ERN 102296-102299, paras. 8-10.

¹²³⁷ Witness 1062, ERN 102275-102285, para. 13.

774. Goli is located in Central Equatoria State (new Yei River State) approximately 30 km to the north-west of Yei town along the Yei-Tore-Maridi road and approximately 50 km from Tore. Both Yei and Tore are held by the Government.¹²³⁸ However, in the territory between and surrounding the towns, while the SPLA-IO do not *per se* control the area, they are able to move freely, including in the Goli area.¹²³⁹ The SPLA troops stationed in Tore are from the Presidential Guard Tiger Division and are under the direct command of the Divisional Headquarters in Juba.¹²⁴⁰

775. Emmanuel Christian College (ECC) is located in Goli and includes a school as well as a clinic, a chapel, and residences for teachers and students in its compound. Since the July 2016 conflict, the ECC has only offered primary level schooling as the main college was moved to Yei for security reasons.¹²⁴¹ Since 2016, the ECC has hosted approximately 4,000 IDPs from Yei, Tore and surrounding villages in its compound.¹²⁴²

776. Very early on the morning Monday, 14 May 2018, between 6:30 and 7:00,¹²⁴³ a large number of SPLA soldiers surrounded and then entered the ECC compound after “arresting” the ECC’s guards.¹²⁴⁴ A number of witnesses were first alerted to their presence by the sound of gunshots.¹²⁴⁵ Although there were school holidays in May, in addition to the IDPs, a number of the students were still present doing exam revision as were a number of the teachers and staff.¹²⁴⁶

777. Witnesses indicated that more than 50 SPLA soldiers came to the ECC that morning, while some witnesses estimated that there may have been as many as 200, with one witness describing it as a whole battalion.¹²⁴⁷ The soldiers were mostly from the Tiger Division in Tore, as witnesses recognized their uniforms with the word “Tiger” on them.¹²⁴⁸ However, a few were from other divisions, including at least one from Military Intelligence.¹²⁴⁹ Witnesses also identified that most, though not all, of the soldiers were Dinka on the basis of the language they spoke and their facial markings.¹²⁵⁰

778. The soldiers entered the compound and rounded up men and boys and separated them from the women and children.¹²⁵¹ The men were questioned about whether there were “rebels” in the compound, their support for the SPLA-IO, and whether they had weapons.¹²⁵²

¹²³⁸ CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 2.10; Confidential Document, ERN D114940-D114954; Confidential Document, ERN D114955-D114961; Witness 699, ERN 101521-101529, para. 11.

¹²³⁹ Witness 717, ERN 101388-101399, para. 6; CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 1.1; Confidential Document, ERN D115036-D115084; Confidential Document, ERN D114955-D114961.

¹²⁴⁰ CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 2.10; Confidential Meeting, 18 August 2018; Confidential Meeting, 23 November 2018; Confidential Document, ERN D115036-D115084; Confidential Document, ERN D114940-D114954; Confidential Document, ERN D114955-D114961.

¹²⁴¹ CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 1.1; Confidential Source, ERN D113590-D113600; Confidential Document, ERN D114131-D114144.

¹²⁴² Witness 717, ERN 101388-101399, para. 40; CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 1.1; Confidential Document, ERN D114131-D114144; Confidential Document, ERN D115036-D115084.

¹²⁴³ Witness 741, ERN 101417-101457, para. 5; Witness 700, ERN 101462-101469, para. 4; Witness 689, ERN 101400-101411, para. 4; Witness 723, ERN 101454-101461, para. 6; Witness 764, ERN 101946-101954, para. 4; Witness 703, ERN 101470-101475, para. 5.

¹²⁴⁴ Witness 741, ERN 101417-101457, para. 5; Witness 699, ERN 101521-101529, para. 6.

¹²⁴⁵ Witness 700, ERN 101462-101469, para. 4.

¹²⁴⁶ Witness 700, ERN 101462-101469, para. 4; Witness 699, ERN 101521-101529, para. 6.

¹²⁴⁷ Witness 723, ERN 101454-101461, para. 6; Witness 700, ERN 101462-101469, paras. 4, 13; Witness 741, ERN 101417-101457, para. 9; Witness 764, ERN 101946-101954, para. 4; Witness 699, ERN 101521-101529, para. 6.

¹²⁴⁸ Witness 723, ERN 101454-101461, para. 6; Witness 703, ERN 101470-101475, para. 5; Witness 741, ERN 101417-101457, paras. 9, 23; Witness 717, ERN 101388-101399, para. 23; Witness 764, ERN 101946-101954, para. 11; Witness 700, ERN 101462-101469, para. 4. See also CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 2.10; Confidential Document, ERN D115036 - D115084.

¹²⁴⁹ Witness 700, ERN 101462-101469, para. 4; Witness 717, ERN 101388-101399, para. 23.

¹²⁵⁰ Witness 723, ERN 101454-101461, paras. 20, 23; Witness 699, ERN 101521-101529, para. 10; Witness 703, ERN 101470-101475, para. 14; Witness 741, ERN 101417-101457, para. 9.

¹²⁵¹ Witness 703, ERN 101470-101475, para. 6; Witness 764, ERN 101946-101954, para. 5; Witness 723, ERN 101454-101461, paras. 8-9.

¹²⁵² Witness 699, ERN 101521-101529, para. 11; Witness 723, ERN 101454-101461, paras. 9, 20, 21; Witness 741, ERN 101417-101457, para. 21.

The soldiers threatened to kill the men.¹²⁵³ One soldier, speaking Arabic, told a witness that “the government belonged to the Dinka and no one would ask about us if they killed us.”¹²⁵⁴ The soldiers searched the compound for weapons and found a very small number.¹²⁵⁵

779. A number of the men were detained and beaten by the soldiers with the butts of their rifles and sticks.¹²⁵⁶ The Commission’s Forensic Physician was able to examine two of those beaten and confirmed that their injuries were consistent with their testimony.¹²⁵⁷ A few of the men were taken away by the soldiers for further questioning, and one man described soldiers taking him toward the woods and shooting at him three times but surviving because the bullets missed him.¹²⁵⁸

780. Ten men and boys were ultimately shot and killed.¹²⁵⁹ Four, including two students, a watchman, and an IDP were lined up and shot point-blank near the chapel. Three others were killed near the dormitories while a 12-year old boy was shot in his bed and had a stick pushed up his anus. Two others were also killed: an IDP and a watchman for the school, who had been making his morning tea when he was shot.

781. The Commission collected evidence of two rapes by the SPLA soldiers, one of them by two soldiers.¹²⁶⁰ Soldiers tried to rape another woman but she managed to escape and multiple witnesses indicated that they believed that more women had been raped during the incident but were too scared to come forward.¹²⁶¹ The Commission’s Forensic Physician was able to examine one of the rape victims and his findings confirm her account.¹²⁶²

782. The soldiers searched the compound and stole cash, phones, computers, mattresses, bicycles and motorcycles and possessions from the IDPs, students and staff, and ransacked the school, including breaking into the school’s safe, which contained the teachers’ salaries.¹²⁶³ They forced the compound’s inhabitants to kill a bull and cook it for them.¹²⁶⁴ The Commission photographed several rooms in the school’s premises, which show the school’s ransacked premises and bullet holes confirming witnesses’ stories.¹²⁶⁵

783. The soldiers remained there all day, departing at approximately 19:30 or 20:00, approximately 12 hours after they arrived. As they left, “they were shooting in the air and celebrating in jubilation” and cheering.¹²⁶⁶

¹²⁵³ Witness 689, ERN 101400-101411, para. 8; Witness 723, ERN 101454-101461, para. 20.

¹²⁵⁴ Witness 723, ERN 101454-101461, para. 20.

¹²⁵⁵ The number varied from as few as one gun, but are consistently reported as being fewer than 10 in the ECC compound. Witness 764, ERN 101946-101954, para. 7; Confidential Meeting, 18 August 2018; Witness 723, ERN 101454-101461, para. 11. See also CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 2.6.

¹²⁵⁶ Witness 703, ERN 101470-101475, para. 6; Witness 764, ERN 101946-101954, paras. 9-10; Witness 699, ERN 101521-101529, para. 8, 10; Witness 717, ERN 101388-101399, paras. 14, 17; Witness 723, ERN 101454-101461, paras. 11, 21, 23.

¹²⁵⁷ Medical Examination Statement, ERN 101711-101712; Medical Examination Statement, ERN 101715-101716.

¹²⁵⁸ Witness 700, ERN 101462-101469, para. 12; Witness 764, ERN 101946-101954, para. 7; Witness 699, ERN 101521-101529, para. 8.

¹²⁵⁹ The Commission has documented the identities of each of the victims. Witness 741, ERN 101417-101457, para. 6; Witness 703, ERN 101470-101475, paras. 8-11; Witness 764, ERN 101946-101954, para. 6; Witness 699, ERN 101521-101529, paras. 7, 9; Witness 717, ERN 101388-101399, para. 15; Witness 723, ERN 101454-101461, para. 18; Confidential Document, ERN D115036-D115084.

¹²⁶⁰ Witness 741, ERN 101417-101457, para. 7; Witness 717, ERN 101388-101399, para. 16; Witness 689, ERN 101400-101411, paras. 17, 18; Witness 764, ERN 101946-101954, para. 9; Confidential Document, ERN D115036 - D115084.

¹²⁶¹ Confidential Meeting, 18 August 2018; Witness 717, ERN 101388-101399, para. 16; Witness 689, ERN 101400-101411, para. 16.

¹²⁶² Medical Examination Statement, ERN 101713- 101714.

¹²⁶³ Witness 689, ERN 101400-101411, paras. 7, 13-14; Witness 741, ERN 101417-101457, para. 10; Witness 700, ERN 101462-101469, para. 14; Witness 703, ERN 101470-101475, para. 6; Witness 764, ERN 101946-101954, para. 4; Witness 699, ERN 101521-101529, paras. 10, 16; Witness 723, ERN 101454-101461, para. 21; Confidential Source, ERN D114862-D114937.

¹²⁶⁴ Witness 689, ERN 101400-101411, para. 12; Witness 723, ERN 101454-101461, para. 23.

¹²⁶⁵ Investigator’s Report, ERN D114862-D114937; Witness 741, ERN 101417-101457.

¹²⁶⁶ Witness 689, ERN 101400-101411, para. 21; Witness 700, ERN 101462-101469, para. 14; Witness 703, ERN 101470-101475, para. 13. See also CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 2.7.

784. The ECC community buried all but one of those killed in the compound in three graves.¹²⁶⁷ The remaining victim was taken by his relatives to be buried. The Commission has documented the location of the graves.¹²⁶⁸

5. Violations and Alleged Crimes

a) *Killings, Rape, Inhuman and Degrading Treatment, Arbitrary Arrest and Detention, Pillage in southern Central Equatoria State in 2018*

785. On the basis of the evidence collected as described above, the Commission finds reasonable grounds to believe that the SPLA forces based in Yei committed serious crimes and human rights violations in the Yei area, including wilful murder of civilians, rape, cruel, inhuman and degrading treatment, attacks against protected persons, and pillage over the course of 2018 and into January 2019.

786. The Commission is also concerned by reports of similar violations having been committed by SPLA-IO (RM) forces, as outlined above; however, further investigations are required prior to making findings on these reports.

787. The acts committed by the SPLA amount to serious violations of human rights law under the Transitional Constitution of the Republic of South Sudan (2011), particularly the right to life and human dignity (Article 11), freedom from inhuman or degrading treatment (Article 18), and the right to own property (Article 28). They also amount to violations of the African Charter on Human and Peoples' Rights, including in particular the rights to life and the integrity of the person (Article 4), to liberty and security of the person (Article 6), and to property (Article 14).

788. These acts constitute crimes under South Sudan's Penal Code 2008, including, among others, murder (Article 206), criminal force (Article 224), rape (section 247), and theft (Article 293).

789. Moreover, the Government's armed forces are also subject to the provisions of the SPLA Act 2009, particularly Section 57, which establishes the offences of destroying and damaging property, plunder and committing any offence against the property or person of any inhabitant or resident of a country in which he or she is serving.

790. Furthermore, the Commission finds reasonable grounds to believe that there was a nexus between the commission of certain prohibited acts such as the killings of civilians on grounds of their ethnicity and the non-international armed conflict ongoing in South Sudan at the time in light of them reportedly occurring in retaliation for battlefield reverses suffered by the SPLA soldiers or on suspicion that the victims were supporting the opposition. As such, they are violations of international humanitarian law under Common Article 3 to the Geneva Conventions and Additional Protocol II to which South Sudan is a party and which it has incorporated into its national law in its Geneva Conventions Act 2012. They should also be investigated and prosecuted as war crimes under Article 4 of the Draft Statute of the Hybrid Court for South Sudan.

b) *Killings, Rape Other Forms of Sexual Violence, Arbitrary Detention, Destruction of Civilian Property, and Pillage, at the ECC in Goli on 14 May 2018*

791. On the basis of the evidence collected, as described above, the Commission finds reasonable grounds to believe that the SPLA Tiger Division forces based in Tore engaged in serious crimes and human rights violations at the ECC compound in Goli on 14 May 2018 including unlawful killings, rape, inhuman and degrading treatment, destruction and theft of civilian property.

792. The Commission is particularly concerned that these violations were committed in a place of education and religion and a place where internally displaced persons had sought refuge. In this regard, it recalls that attacks against schools are one of the six grave violations against children in armed conflict, according to UN Security Council Resolution 1612 (2005).

¹²⁶⁷ Witness 741, ERN 101417-101457, para. 14; Witness 700, ERN 101462-101469, para. 15; Witness 703, ERN 101470-101475, para. 13; Witness 764, ERN 101946-101954, para. 8; Witness 699, ERN 101521-101529, para. 7; Witness 717, ERN 101388-101399, para. 19.

¹²⁶⁸ Confidential Document, ERN D113601- D113604.

793. These acts were committed by state agents and amount to serious violations of human rights law under the Transitional Constitution of the Republic of South Sudan (2011), particularly the right to life and human dignity (Article 11), the rights of the child (Article 17), and freedom from inhuman or degrading treatment (Article 18). They also amount to violations of the African Charter on Human and Peoples' Rights, including in particular the right to life and the integrity of the person (Article 4), to liberty and security of the person (Article 6), and the right to property (Article 14).

794. These acts constitute crimes under South Sudan's Penal Code (2008), including, among others, murder (section 206), criminal force (section 224), rape (section 247), theft (section 293) and mischief (section 315). Moreover, the Government's armed forces are also subject to the provisions of the SPLA Act (2009). In particular, section 57 of the SPLA Act establishes the offences of destroying and damaging property, plunder and committing any offence against the property or person of any inhabitant or resident of a country in which he or she is serving.

795. Furthermore, the Commission finds reasonable grounds to believe that there was a nexus between the commission of these violations and the non-international armed conflict ongoing in South Sudan at the time in light of them occurring in retaliation by the SPLA for two ambushes by the SPLA-IO the week before which had resulted in the killing of a number of SPLA soldiers. Furthermore, the stated aim of the SPLA for the attack was to clear "rebels" from the compound. Although the aim of the attack was to search for "rebels", the Commission does not consider that the fact that one gun, or a very small number of guns, was found at the ECCC deprived the school of its civilian character. In this regard, no evidence indicated that any opposition fighters were found in the premises and one witness testified that the soldiers themselves came to realise that the guns were only for hunting.¹²⁶⁹

796. Accordingly, these acts are violations of international humanitarian law under Common Article 3 to the Geneva Conventions and Additional Protocol II to which South Sudan is a party and which it has incorporated into its national law in its Geneva Conventions Act 2012. They should also be investigated and prosecuted as war crimes under Articles 4 and 5(e) of the Draft Statute of the Hybrid Court for South Sudan.

6. Responsibility

a) *Individual Responsibility*

797. The Commission has received information regarding a number of SPLA commanders operating on the Yei area of responsibility in 2018 who appear to have been exercising effective control over their troops and to have been in regular communication with their forces.¹²⁷⁰ However, further investigations are necessary in this regard.

798. In relation to the violations and crimes committed at Yei military detention facility, numerous witnesses were consistent in attributing responsibility to soldiers under the command of an identified SPLA Intelligence Officer. He was based in Yei since at least mid-2016, though further information received by the Commission indicates he may have held other positions in the SPLA too. Witnesses described him organizing systematic arrests, detentions and executions of Kakwa civilian men and boys in Yei town and in the Yei military barracks, giving orders to soldiers under his command and being present at the scene of executions.

799. In relation to the attack at the Emmanuel Christian College in Goli, witnesses were consistent in attributing the violations and crimes committed to the Tiger division based at Tore, which was confirmed by an SPLA Commander in Yei.¹²⁷¹ Accounts are also consistent that the attack was a planned operation undertaken in response to allegations that the ECC

¹²⁶⁹ Witness 723, ERN 101454-101461, para. 11.

¹²⁷⁰ See e.g., Confidential Document, ERN D116653-D116702; Confidential Document, ERN D116542-D116652; Confidential Document, ERN D116474-D116541.

¹²⁷¹ Witness 723, ERN 101454-101461, para. 6; Witness 703, ERN 101470-101475, para. 5; Witness 741, ERN 101417-101457, paras. 9, 23; Witness 717, ERN 101388-101399, para. 23; Witness 764, ERN 101946-101954, para. 11; Witness 700, ERN 101462-101469, para. 4; Confidential Document, ERN D115085-D115171; Confidential Document, ERN D115036 - D115084. See also CTSAMM, *Report 2018/23 – Murder and Rape in Goli, Central Equatoria State*, 7 July 2018, para. 2.10; Confidential Document, ERN D114962-D114963.

was providing support to “rebels” following two ambushes of the SPLA by the SPLA-IO about a week before, resulting in multiple SPLA deaths.¹²⁷² The systematic separation and questioning of the men lends support to this. A number of witnesses also recounted being told by the attackers that the soldier who did most of the shooting was doing so in retaliation for his brother having been killed about a week before.¹²⁷³ Therefore, while the extent of violence toward the civilians may not have been part of the plan, there are reasonable grounds to believe that the attack on the ECC was a planned attack on a civilian place of learning, religion and refuge. Furthermore, it was incumbent on the commander to relieve the soldier whose brother had been killed from duty if there were concerns that he was out of control.

800. Witnesses of the Goli attack are consistent that there was a commander present who was in charge throughout the day, even following the killings.¹²⁷⁴ A number of witnesses describe having been taken to him by soldiers. However, while a number of witnesses were able to identify some individuals involved, the Commission has not been able to establish the identity of the Commander. Further investigations in this regard are required.

b) State Responsibility

801. In addition to any individual criminal liability that may arise in relation to these crimes, as the SPLA are government forces, the State is responsible for the violations of human rights and international humanitarian law committed by its forces. Furthermore, the Government of South Sudan has an obligation to investigate these incidents and prosecute those responsible (whether they be government forces or individuals forming part of the opposition), for alleged violations of international human rights and international humanitarian law.

802. In relation to the attack in Goli, the Commission notes that pursuant to an order from the President, the Yei River State Governor established an Investigative Committee on 18 May 2018 to investigate violations that occurred at the ECC.¹²⁷⁵ Witnesses described the committee visiting Goli in May and June 2018 to conduct investigations and that the committee was accompanied by the Governor, the County Commissioner and a Brigadier General from Tiger Division in Juba.¹²⁷⁶

803. The Commission welcomes the establishment of the State Investigative Committee and notes that one witness indicated that the County Commissioner had paid compensation for what had been looted.¹²⁷⁷ However, it notes with concern reports by witnesses that some of those soldiers involved in the attack returned to the ECC as part of the State investigation, calling into question the impartiality of the investigation and the state’s commitment to ensuring accountability.¹²⁷⁸

804. The Investigation Committee’s Report was submitted to the President; however, it is yet to be made public.¹²⁷⁹ Despite requesting a copy of the Committee’s Report, the Commission has not received a copy to date.¹²⁸⁰ It calls for the report to be made public and for findings of the investigation to be provided to the state prosecutors.

805. Furthermore, while a State investigation committee is a welcome step, the Commission notes that such committees do not have prosecutorial or punitive powers.¹²⁸¹ The General Court Martial in Juba confirmed to the Commission in December 2018 that there

¹²⁷² Witness 717, ERN 101388-101399, paras. 35, 37; Confidential Document, ERN D115085-D115171; Confidential Document, ERN D115036-D115084; Confidential Meeting, 18 August 2018.

¹²⁷³ Witness 700, ERN 101462-101469, para. 18; Confidential Meeting, 18 August 2018; Confidential Document, ERN D115085-D115171.

¹²⁷⁴ Witness 741, ERN 101417-101457, para. 21; Witness 703, ERN 101470-101475, para. 14; Witness 723, ERN 101454-101461, paras. 21, 23; Witness 764, ERN 101946-101954, para. 11; Witness 700, ERN 101462-101469, para. 13; Witness 717, ERN 101388-101399, paras. 21, 24, 28, 33, 37; Confidential Meeting, 18 August 2018; Investigator’s Note, ERN D114862-D114937.

¹²⁷⁵ Yei River State Governor’s Order No. 006/2018, 18 May 2018 referring to Republican Decree No. 27/2018. See also Witness 717, ERN 101388-101399, para. 34; Witness 764, ERN 101946-101954, para. 12; Witness 700, ERN 101462-101469, para. 17.

¹²⁷⁶ Witness 717, ERN 101388-101399, para. 33; Confidential Meeting, 18 August 2018.

¹²⁷⁷ Confidential Meeting, 18 August 2018.

¹²⁷⁸ Witness 764, ERN 101946-101954, paras. 11, 13; Confidential Meeting, 18 August 2018.

¹²⁷⁹ Confidential Meeting, 23 November 2018; Witness 764, ERN 101946-101954, para. 12.

¹²⁸⁰ Note Verbale to the Ministry of Foreign Affairs and International Cooperation of the Government of South Sudan, Requesting Documentation from Different Ministries, CHRSS/COR/2018/32, 21 November 2018.

¹²⁸¹ Investigation Committees Act (2006), sections 11-14.

were no cases before it in relation to the incident.¹²⁸² The Commission has been unable to confirm whether there have been any cases in the criminal system.

C. Western Bahr el Ghazal State, 2018

1. Background

806. Western Bahr el Ghazal is an ethnically mixed state which includes the Fertit, Lou and Dinka communities who have a history of conflict stretching back to the struggle for South Sudanese independence.¹²⁸³ The Fertit did not initially join the SPLA when it was formed in the 1980s due to fears of Dinka domination and instead formed a Fertit militia called Qwat Salem which resulted in fighting between the two groups in the late 1980s.¹²⁸⁴ The Khartoum government supported the Qwat Salem as a means of containing the SPLA without having to deploy their own troops, which gave rise to a common perception among Dinka that the Fertit fought and voted against independence. However, the Fertit joined the fight for independence in 1991 eventually integrated into the SPLA.¹²⁸⁵

807. Ethnic tensions increased again in October 2012 when the then-Governor of Western Bahr el Ghazal, Brigadier General Rizik Zarkaria Hassan, transferred the headquarters of Wau County to Baggari, a small town to the southwest of Wau town with little infrastructure, which was perceived by many as a move to transfer land and power to the Dinka.¹²⁸⁶ The decision resulted in protests, which turned violent in December 2012 and resulted in protesters being detained, injured, and killed.¹²⁸⁷ On 24 December 2012, President Kiir gave a speech in the Wau football stadium, in which he expressed support for the Governor and the move of the county capital, which many Fertit perceived as inflammatory and a threat.¹²⁸⁸ Shortly thereafter, a number of politicians who had opposed the move were arrested and detained.¹²⁸⁹

808. Following the outbreak of the conflict in 2013 and the division of Western Bahr el Ghazal into two states (Lol and Wau States) in 28 States Decree in October 2015,¹²⁹⁰ which

¹²⁸² Meeting with General Court Martial, 6 December 2018.

¹²⁸³ Human Rights Watch, "The People of Wau and Dinka-Fertit Rivalry" in *Famine in Sudan, 1998*, 8 February 1999; Human Rights Watch, "South Sudan: Civilians Killed, Tortured in Western Region", 24 May 2016; Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹²⁸⁴ Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹²⁸⁵ Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018; Schomerus, Mareike and Tim Allen, "Southern Sudan at odds with itself: Dynamics of conflict and predicaments of peace", LSE, 2009.

¹²⁸⁶ Witness 878, ERN 101587-101592, paras. 8-12; Witness 953, ERN 101930-101935, para. 6; Witness 960, ERN 102089-102111, para. 5; Confidential Meeting, Wau, 1 December 2018; Confidential Meeting, Wau, 9 October 2018; Confidential Meeting, Wau, 29 November 2018; Republic of South Sudan, *Report of the Investigation Committee on Wau Incident of 24-26th June 2016*, 1 August 2016, ERN D101519-D101553, p. 7; Confidential Meeting, Wau, 26 October 2017; Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹²⁸⁷ Witness 953, ERN 101930-101935, paras. 6-8; Witness 960, ERN 102089-102111, para. 7; Sudan Tribune, "W. Bahr el Ghazal splits over transfer of County headquarters from Wau town", 31 October 2012; Golla, Rajiv, "Reassessing Ethno-Political Calculus in South Sudan's War", December 2017; Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹²⁸⁸ Witness 878, ERN 101587-101592, para. 8; Confidential Meeting, Wau, 20 October 2018; Radio Tamazuj, "Calm conditions for President Kiir's visit to Wau", 24 December 2012; Sudan Tribune, "South Sudan president Kiir backs relocation of Wau county headquarters", 25 December 2012; Amnesty International, "South Sudan: Civil Unrest and State Repression Human Rights Violations in Wau, Western Bahr el Ghazal State", 2013; Golla, Rajiv, "Reassessing Ethno-Political Calculus in South Sudan's War", December 2017; Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹²⁸⁹ Witness 878, ERN 101587-101592, paras. 9-11; Enough Project, "Ethnic Tensions in Wau Spark Civil Unrest and Response from South Sudan Diaspora", 11 January 2013, <https://enoughproject.org/blog/ethnic-tensions-wau-spark-civil-unrest-and-response-south-sudan-diaspora>; Amnesty International, "South Sudan: Civil Unrest and State Repression Human Rights Violations in Wau, Western Bahr el Ghazal State", 2013.

¹²⁹⁰ Establishment Order No. 36/2015, 2 October 2015.

exacerbated ethnic tensions,¹²⁹¹ the Fertit militia which had existed before independence regrouped. The Fertit militia aligned themselves with the SPLA-IO (RM) although they continued to operate quite independently.¹²⁹² From late 2015, large scale recruitment into opposition Fertit groups was reported, and these groups started attacking Government forces in the areas to the south and west of Wau town,¹²⁹³ referred to as the Wau Triangle.¹²⁹⁴

809. Also from late 2015, the Government deployed mostly Dinka SPLA soldiers and the Mathiang Anyoor to Wau from the neighbouring states of Northern Bahr el-Ghazal and Warrap.¹²⁹⁵ This deployment coincided with an increase in attacks on Fertit villages in the Wau Triangle and on Fertit neighbourhoods of Wau town.¹²⁹⁶

810. Wau town, which is the capital of the state, has been consistently under the control of the Government. However, the presence of the SPLA-IO in the Wau Triangle has led to skirmishes and fighting between the SPLA and the SPLA-IO since late 2015.¹²⁹⁷ A pattern developed in Wau town and the Wau Triangle of SPLA-IO forces ambushing SPLA forces and then SPLA forces retaliating for their losses against the civilian population which was perceived as supporting the opposition.¹²⁹⁸ The killing, rape, pillage and burning of houses allegedly by SPLA soldiers based in the Wau Triangle led to thousands of displaced civilians.¹²⁹⁹

811. As described in the Commission's last report, since December 2015, there has been a number of major outbreaks of violence against civilians in Wau town including 17-18 February 2016, early April 2016, 24-25 June 2016, and 10 April 2017, in addition to the ongoing military skirmishes in the Wau Triangle.¹³⁰⁰ The Commission heard that there continue to be low level clashes in Wau town in October 2018 including in Hai Nazareth and Hai Kamsin neighbourhoods.¹³⁰¹

812. The ongoing conflict is also driven in part by the yearly arrival in the area of cattle and armed Dinka cattle herders for grazing creating tension with the Fertit farmers who complain of the "invasion" of their farmland and destruction of their crops.¹³⁰² This transhumance migration has occurred historically, and has exacerbated conflict in the area. While the Marial Baai Migration Peace Conference Resolution of November 2016 established parameters regulating cattle migration in the area, there is a Fertit perception that

¹²⁹¹ Confidential Meeting Wau, 9 October 2018; Confidential Source, ERN D105217-D105306, p. D105238; Confidential Source, ERN D105818-D105923, pp. D105885, D105886.

¹²⁹² Witness 953, ERN 101930-101935, para. 9; Confidential Meeting, Wau, 2 December 2018; Confidential Meeting, Wau, 29 November 2018; Golla, Rajiv, "Reassessing Ethno-Political Calculus in South Sudan's War", December 2017; Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹²⁹³ Confidential Source, ERN D106486-D106572, pp. D106552, D106555, D106558, D106561, D106564, D106567, D106570; Confidential Source, ERN D106378-D106485, pp. D106378, D106381, D106384, D106387, D106390; Golla, Rajiv, "Reassessing Ethno-Political Calculus in South Sudan's War", December 2017.

¹²⁹⁴ The Wau Triangle is the triangular area between Wau town, Bazia to the south, and Bisselia to the west and also encompasses Mboro, Ngoko, Ngesa, Moi, Bussere, Baggari, Taban, and Faraj Allah.

¹²⁹⁵ Witness 953, ERN 101930-101935, para. 12; Witness 178, ERN 100002-100006, para. 4; Confidential Source, ERN D106378-D106485, pp. D106449, D106454, D106458, D106462, D106466, D106470, D106474, D106478, D106482; Human Rights Watch, "South Sudan: Civilians Killed, Tortured in Western Region", 24 May 2016.

¹²⁹⁶ Witness 178, ERN 100002-100006, para. 4; Confidential Source, ERN D106378-D106485, pp. D106449, D106454, D106458, D106462, D106466, D106470, D106474, D106478, D106482; Human Rights Watch, "South Sudan: Civilians Killed, Tortured in Western Region", 24 May 2016.

¹²⁹⁷ The Wau Triangle is the triangular area between Wau town, Bazia to the south, and Bisselia to the west and also encompasses Mboro, Ngoko, Ngesa, Moi, Bussere, Baggari, Taban, and Faraj Allah.

¹²⁹⁸ See for e.g. Confidential Source, ERN D105924-D106050, pp. D105940, D105948, D106005, D106030, D106031; Confidential Source, ERN D106051-D106171, p. D106122; Human Rights Watch, "South Sudan: Civilians Killed, Tortured in Western Region", 24 May 2016.

¹²⁹⁹ Witness 178, ERN 100022-100006, paras. 4, 6; Witness 130, ERN 100007-100010, para. 4; Witness 135, ERN D101304-D101307, para. 4; Witness 136, ERN D101254-D101258, para. 4; IOM DTM, "Greater Wau Area Displacement Overview", June 2016.

¹³⁰⁰ Confidential Source, ERN D100624-D100633, p. D100629.

¹³⁰¹ Witness 878, 101587-101592, para. 21; Witness 958, ERN 101783-101787, para. 4.

¹³⁰² CTSAMM, *Report 003: Violations of the PCTSA in Western Bahr el Ghazal State concerning Protection of Civilians*, 22 March 2016, p. 4; Confidential Source, ERN D105217-D105306, p. D105238. See also IOM DTM, "Greater Wau Area Displacement Overview", June 2016, p. 1; Confidential Source, ERN D105924-D106050, pp. D105985, D105997; Confidential Source, ERN D106051-D106171, p. D106098.

it is happening in a more aggressive fashion now.¹³⁰³ Efforts in this regard will need to be ongoing, drawing on some of the principles set out in the IGAD Protocol on Transhumance, which is under development, and the Agreement on Border Issues between Sudan and South Sudan of 2012, which underlines that, to facilitate the peaceful cross-border movement of cattle, the affected parties should consider “the primary interest of the host communities and the security implications of such movements”.¹³⁰⁴

2. Wau Triangle, Mid-June to November 2018

813. In the first half of 2018, the Wau area remained fairly stable. However, on 3 June 2018, the new 5 Division SPLA Commander, a Major General, arrived in Wau.¹³⁰⁵ Within two weeks of his arrival, and as the negotiations for the R-ARCSS gathered speed, fighting again began in the Wau Triangle area, apparently as the Government sought to dislodge the SPLA-IO from the area in advance of the Agreement to avoid having SPLA-IO cantonment sites in the area.¹³⁰⁶ From late September, increased SPLA movements were observed around Wau town including an increase in armaments and equipment.¹³⁰⁷

814. From mid-June 2018 onwards, fighting was ongoing in the Mboro, Baggari, and Bisselia areas.¹³⁰⁸ Over the next five months, there was sporadic fighting between the SPLA and the SPLA-IO as the SPLA attacked SPLA-IO positions and the SPLA-IO undertook ambushes of the SPLA.¹³⁰⁹ In the course of this offensive, the SPLA engaged in a campaign of sustained attacks against the civilian population in the Wau Triangle, attacking at least 10 towns and villages in the area even in instances where no SPLA-IO forces were present. The pattern of attacks on the civilians in these villages is strikingly similar from one to the other.

815. One of the first attacks in the campaign occurred on 28 June 2018, when the SPLA launched an attack on Mboro, in the early morning, before it was light out, shelling the town.¹³¹⁰ Soldiers in SPLA uniforms as well as civilian clothes were supported by at least one military vehicle as they searched houses and looted grain, and setting the tukuls on fire as they went.¹³¹¹ Satellite imagery analysis by UNOSAT established that approximately 200 structures were damaged or destroyed in Mboro between mid-May 2018 and the end of August 2018.¹³¹²

816. The soldiers conducted extensive looting of the village. One witness described what he found when he ventured back to Mboro from hiding in the bush to collect some food:

Those amongst us who managed to sneak back into Mboro saw that the SPLA soldiers had looted the tukuls of all possessions and had even taken the iron sheets used as roofs for some of the houses. The soldiers had also stolen the pumps that were used to pump water from the boreholes in the town, so it was no longer possible to pump drinking water.¹³¹³

¹³⁰³ Confidential Meeting, Wau, 9 October 2018; CTSAMM, *Report 003: Violations of the PCTSA in Western Bahr el Ghazal State concerning Protection of Civilians*, 22 March 2016, p. 4.

¹³⁰⁴ *Agreement Between The Republic of The Sudan and The Republic of South Sudan on Border Issues*, Addis Ababa, 27 September 2012, Article 14 (2).

¹³⁰⁵ Confidential Document, ERN D116022-D116118.

¹³⁰⁶ Confidential Meeting, Wau, 18 October 2018.

¹³⁰⁷ Confidential Meeting, Wau, 19 October 2018.

¹³⁰⁸ Confidential Document, ERN D113942-D113947.

¹³⁰⁹ Confidential Document, ERN D113948-D113957; Confidential Document, ERN D114804 - D114809; Confidential Document, ERN D113975-D113981; Confidential Document, ERN D116022-D116118; Confidential Document, ERN D116119-D116154; Confidential Document, ERN D115566-D115601; Confidential Document, ERN D116155-D116252; Confidential Document, ERN D115602-D115748; Confidential Document, ERN D115566-D115601; Confidential Document, ERN D115329-D115464; Confidential Document, ERN D115749-D115897; Confidential Document, ERN D115465-D115565; Confidential Document, ERN D115465-D115565; Confidential Document, ERN D115329-D115464; Confidential Document, ERN D115898-D116021; Confidential Meeting, Wau, 1 December 2018.

¹³¹⁰ Witness 914, ERN 101788-101793, para. 6. See also Confidential Document, ERN D116022-D116118; Confidential Document ERN D116119-D116154.

¹³¹¹ Witness 914, ERN 101788-101793, para. 7.

¹³¹² UNOSAT, UNOSAT analysis of destruction in Western Bahr el Ghazal State and Unity State, South Sudan, 23 January 2019, ERN D116708-D116714.

¹³¹³ Witness 914, ERN 101788-101793, para. 9.

817. By September 2018, the SPLA was controlling Mboro with approximately 100 soldiers. They were occupying the school and dispensary.¹³¹⁴

818. Another major SPLA attack occurred on 3 October 2018 in Ngoko. The SPLA arrived in military vehicles including four Urals (large military lorries) and two tanks mounted with guns from the direction of Mboro rather than the direct road from Wau, taking residents by surprise.¹³¹⁵ The attack started in the early morning with heavy shelling which lasted until sundown and the whole attack lasted for three days.¹³¹⁶

819. Although Ngoko had been “under SPLA-IO control” for the past two years, there were no SPLA-IO forces permanently based in the village and they would only come to Ngoko from time to time.¹³¹⁷ Multiple witnesses told the Commission that there were no opposition fighters in Ngoko at the time of the attack, only civilians.¹³¹⁸

820. At least 40 soldiers, perhaps as many as 100, were seen shooting into the village and after civilians as they fled into the bush even as they could hear children crying.¹³¹⁹ One woman described:

[...] I now saw many soldiers on foot walking around the village. I had my granddaughter in my arms when I sneaked back to the village, and she started crying, probably because of the gunshots. This attracted the attention of the soldiers, and they started shooting in my direction. From another direction, I heard a woman screaming. I think she was hiding in the bush. The soldiers started shooting in her direction as well.¹³²⁰

821. Multiple civilians were killed including, a woman, an elderly man, and five-year-old boy who was shot as he was fleeing.¹³²¹

822. The market and houses in Ngoko were burned down in part by the bombardment and in part by being set alight afterwards.¹³²² The smoke rising for the burning village was visible to those who had fled into the bush five kilometres away.¹³²³ The residents of Ngoko had been warned by people in Mboro and Wau of a possible attack following the attack on Mboro.¹³²⁴ As a result, many had hidden and buried their harvests in the bush so that they would not be looted or destroyed. However, the SPLA set fire to the whole bush area.¹³²⁵

823. The SPLA soldiers looted the town including sacks of grain, mattresses beds, and chairs and loaded them onto their vehicles.¹³²⁶ Witnesses explained that they had recently harvested their crops and described seeing the looted items being brought back into Wau town and sold in the market.¹³²⁷

¹³¹⁴ Witness 914, ERN 101788-101793, para. 9; Confidential Document, ERN D113975-D113981.

¹³¹⁵ Witness 967, ERN 101914-101919, para. 9; Witness 928, ERN 101842-101847, paras. 5, 13; Witness 930, ERN 101794-101798, paras. 5, 7; Witness 876, ERN 101573-101576, paras. 5, 6; Confidential Document, ERN D113982-D113986; Confidential Meeting, Wau, 4 December 2018.

¹³¹⁶ Witness 967, ERN 101914-101919, para. 5; Witness 928, ERN 101842-101847, paras. 5, 6; Witness 930, ERN 101794-101798, para. 5; Confidential Meeting, Wau, 20 October 2018.

¹³¹⁷ Witness 967, ERN 101914-101919, para. 10.

¹³¹⁸ Witness 967, ERN 101914-101919, para. 10; Witness 930, ERN 101794-101798, para. 11; Witness 928, ERN 101842-101847, para. 14; Witness 876, ERN 101573-101576, para. 5; Confidential Meeting, Wau, 20 October 2018.

¹³¹⁹ Witness 928, ERN 101842-101847, para. 7; Witness 930, ERN 101794-101798, paras. 6, 7; Confidential Meeting, Wau, 20 October 2018.

¹³²⁰ Witness 930, ERN 101794-101798, para. 6.

¹³²¹ Witness 928, ERN 101842-101847, paras. 9, 10; Witness 914, ERN 101788-101793, para. 11; Witness 930, ERN 101794-101798, para. 8; Witness 876, ERN 101573-101576, para. 8; Confidential Meeting, Wau, 20 October 2018.

¹³²² Confidential Meeting, Wau, 20 October 2018; Confidential Document, ERN D113982-D113986; Witness 967, ERN 101914-101919, para. 14; Witness 930, ERN 101794-101798, para. 8.

¹³²³ Witness 928, ERN 101842-101847, paras. 6, 7.

¹³²⁴ Witness 928, ERN 101842-101847, para. 5; Witness 876, ERN 101573-101576, para. 5.

¹³²⁵ Witness 928, ERN 101842-101847, para. 11; Witness 970, ERN 101925-101929, paras. 8, 9.

¹³²⁶ Witness 967, ERN 101914-101919, para. 8; Witness 930, ERN 101794-101798, para. 9; Witness 876, ERN 101573-101576, para. 12.

¹³²⁷ Witness 878, ERN 101587-101592; Witness 953, ERN 101930-101935; Witness 881, ERN 101582-101586, para. 12; Witness 955, ERN 101870-101875, para. 11; Witness 954, ERN 101864-101869, para. 13.

824. Locations which were clearly of a civilian nature were attacked and looted including the church, medical clinic, and the school.¹³²⁸ Indeed, the Government forces are reportedly occupying the medical clinic, school and church buildings.¹³²⁹

825. The SPLA launched a number of other attacks at Ngoko¹³³⁰ including another in mid-November 2018. As with the attack on 3 October, the November attack started in the morning with the SPLA arriving from the Mboro direction. No SPLA-IO forces were present in the village, only civilians. Yet the soldiers were using heavy weapons including RPGs and shooting at civilians. Houses were again burned and possessions looted.¹³³¹

826. People fled Ngoko and hid in the bush. At the beginning of December 2018, it was estimated that 7,000 people from Ngoko were still surviving in the bush.¹³³² One witness who returned briefly to Ngoko in late November told the Commission that there are not more than 30 people remaining in Ngoko.¹³³³ Furthermore, the SPLA are reportedly based near the village's only water source so people are too afraid to collect from it and are instead traveling three hours by foot to access water.¹³³⁴ The attack on Ngoko had a particular impact on the civilian population as there had already been thousands of IDPs sheltering there from other areas in the Wau Triangle.¹³³⁵

827. One of the latest attacks the Commission documented occurred in the early morning of 5 November 2018 in the village of Tagoti Vimoi, a small village of approximately 500 inhabitants to the southwest of Busseri.¹³³⁶ The SPLA arrived from the direction of Baggari with their military vehicles on the road and proceeded to the village on foot.¹³³⁷ While there had been opposition forces in the general area before the attack, they did not go into Tagoti Vimoi village and the Commission was told that there were no opposition fighters in the village at the time of the attack; nonetheless, a large number of SPLA soldiers entered the village shooting¹³³⁸ and "they just shot at everyone".¹³³⁹ At least two civilians were reportedly killed during the attack including an elderly man who was beaten and then shot by the soldiers.¹³⁴⁰

828. As occurred elsewhere, the SPLA looted people's harvests, beds, chairs, bicycles, motorbikes, cooking utensils, chickens, and over 50 goats.¹³⁴¹ After they had looted each of the tukuls, they set fire to them.¹³⁴² One witness who returned to the village and described: "There was fire everywhere. My house was burning."¹³⁴³

829. SPLA soldiers had already been patrolling the area of Tagoti Vimoi in the days before the attack, harassing civilians and accusing them of being "rebels".¹³⁴⁴ A deaf man and a woman were shot and although the woman initially survived she eventually died of her injuries while the villagers only found the man's body three days later when they saw vultures hovering above the location.¹³⁴⁵ The harassment extended to beatings and detention,

¹³²⁸ Witness 928, ERN 101842-101847, para. 14; Witness 967, ERN 101914-101919, para. 8; Witness 930, ERN 101794-101798, para. 9; Confidential Meeting, Wau, 1 December 2018.

¹³²⁹ Witness 967, ERN 101914-101919, para. 8; Witness 930, ERN 101794-101798, para. 9; Confidential Meeting, Wau, 1 December 2018.

¹³³⁰ Witness 914, ERN 101788-101793, para. 11.

¹³³¹ Witness 970, ERN 101925-101929, paras. 8, 9.

¹³³² Confidential Meeting, Wau, 1 December 2018.

¹³³³ Witness 967, ERN 101914-101919, para. 15.

¹³³⁴ Witness 967, ERN 101914-101919, para. 15.

¹³³⁵ Confidential Meeting, Wau, 4 December 2018; Witness 914, ERN 101788-101793, para. 11.

¹³³⁶ Witness 968, ERN 101920-101924, paras. 6, 15; Witness 966, ERN 101909-101913, para. 4; Witness 958, ERN 101783-101787, para. 5; Witness 955, ERN 101870-101875, para. 6; Witness 954, ERN 101864-101869, paras. 5, 10.

¹³³⁷ Witness 966, ERN 101909-101913, para. 8; Witness 955, ERN 101870-101875, paras. 6, 8, 10; Witness 954, ERN 101864-101869, paras. 8, 11.

¹³³⁸ Witness 955, ERN 101870-101875, paras. 7, 8; Witness 954, ERN 101864-101869, para. 5.

¹³³⁹ Witness 966, ERN 101909-101913, paras. 11, 13.

¹³⁴⁰ Witness 966, ERN 101909-101913, paras. 9, 10; Witness 954, ERN 101864-101869, para. 14.

¹³⁴¹ Witness 968, ERN 101920-101924, para. 6; Witness 966, ERN 101909-101913, paras. 8, 12; Witness 958, ERN 101783-101787, para. 6; Witness 955, ERN 101870-101875, para. 8; Witness 954, ERN 101864-101869, paras. 6, 13.

¹³⁴² Witness 954, ERN 101864-101869, paras. 6, 7, 13; Witness 955, ERN 101870-101875, para. 8.

¹³⁴³ Witness 966, ERN 101909-101913, para. 12; Witness 958, ERN 101783-101787, para. 6.

¹³⁴⁴ Witness 968, ERN 101920-101924, paras. 7, 8; Witness 966, ERN 101909-101913, para. 7; Witness 955, ERN 101870-101875, para. 10.

¹³⁴⁵ Witness 955, ERN 101870-101875, para. 9.

including civilians being taken to Ngo Baggari and Grinthe SPLA barracks in Wau. One witness described how after being questioned by the soldiers in this fashion, they took money from her and some of her clothing. They also “took my baby’s clothing off and when they saw she is a girl they returned her to me and said they would have killed my child if it had been a boy.”¹³⁴⁶

830. The Commission heard numerous accounts of men and women being captured and detained by SPLA soldiers in the Wau Triangle. In the case of men, they were accused of being rebels, and taken to Grinthe SPLA barracks in Wau.¹³⁴⁷ Meanwhile, one woman from Mboro recounted being captured SPLA soldiers while gathering leaves for food and detained in Mboro for four days.¹³⁴⁸ Other women were likewise captured and detained in the Mboro and Baggari barracks.¹³⁴⁹ The particular witnesses the Commission spoke to did not report ill-treatment during these detentions.

831. The fighting and attacks on the civilian population resulted in significant population displacement. For example, it was reported that more than 12,000 of the 89,000 inhabitants of Farajallah were sheltering in the bushes in early September while only approximately 1,000 of the approximately 18,500 inhabitants of Baggari were still there by October 2018.¹³⁵⁰ In the 10 days between 7 and 17 October 2018, the number of IDPs from Ngoko, Ngo Pere and Mboro sheltering in the Toby primary school in Wau increased from 80 to 620.¹³⁵¹ Additionally, 9,101 individuals and 513 households arrived in the Lokoloko IDP camp in Wau town in the month of October, again primarily from Ngoko and Ngo Pere.¹³⁵²

832. Even more traumatically, many of those who fled were displaced multiple times as the places they fled to subsequently also came under attack. For example, a number of those who fled Mboro in June 2018 took shelter for about a month in the bush in a place called Ngozili.¹³⁵³ They lived on leaves, cassava and other crops they could gather in the area and sheltered as best they could from the rainy season weather.¹³⁵⁴ However, they were forced to flee again when Ngozili was attacked one afternoon. Although they had already lost everything when displaced, even the plastic sheeting they had managed to find to protect them from rainy season was looted by the soldiers.¹³⁵⁵ This time around, they were displaced to Ngoko.

833. Similarly, Ngo Pere is a small village of 1,000 inhabitants which is located in between Mboro and Ngoko.¹³⁵⁶ When it was attacked in September 2018, it was already sheltering about 2,000 civilians who had fled Mboro when it was attacked earlier in September.¹³⁵⁷ Early one morning, SPLA soldiers coming from Mboro attacked Ngo Pere using heavy weaponry and military vehicles.¹³⁵⁸ While many of the inhabitants had already fled, they shot into one house where a mother and her children were sheltering, killing her five year old son. Her other son was hit in the neck and chest by fragments from the shelling and was injured.¹³⁵⁹

834. Magnifying the impact of the displacement on the population was the fact that no humanitarian agencies had been able to access the Baggari area for more than two months from mid-June 2018 until 22 August which is when WFP gained access. Thereafter, in early September other organisations were also able to access the area.¹³⁶⁰ The result was that displaced people, who had had their harvests looted or destroyed were left to fend for themselves in the bush.

¹³⁴⁶ Witness 968, ERN 101920-101924, para. 9; Witness 966, ERN 101909-101913, para. 7.

¹³⁴⁷ Witness 930, ERN 101794-101798, para. 10; Confidential Meeting, Wau, 20 October 2018.

¹³⁴⁸ Witness 914, ERN 101788-101793, para. 9.

¹³⁴⁹ Witness 883, ERN 101557-101561, paras. 13, 15; Witness 954, ERN 101864-101869, para. 11.

¹³⁵⁰ Confidential Document, ERN D115566-D115601; Confidential Meeting, Wau, 20 October 2018.

¹³⁵¹ Confidential Document, ERN D115749-D115897.

¹³⁵² Confidential Document, ERN D115898-D116021.

¹³⁵³ Witness 914, ERN 101788-101793, para. 8.

¹³⁵⁴ Witness 914, ERN 101788-101793, para. 8.

¹³⁵⁵ Witness 914, ERN 101788-101793, para. 10.

¹³⁵⁶ Witness 883, ERN 101557-101561, para. 4.

¹³⁵⁷ Witness 883, ERN 101557-101561, para. 12.

¹³⁵⁸ Witness 883, ERN 101557-101561, paras. 6, 9.

¹³⁵⁹ Witness 883, ERN 101557-101561, paras. 7, 9, 10.

¹³⁶⁰ Confidential Document, ERN D113948-D113957.

835. In 2017, the SPLA had officially closed the road between Ngoko and Wau, except for pre-approved United Nations and humanitarian convoys. As a result, people taking their produce to Wau to be sold or to buy things from Wau have to take their goods on their bicycles often through the bush. Witnesses told the Commission that when the SPLA finds these people, they often kill them.¹³⁶¹ One witness recounted that her husband was making this trip with others in early November 2018 and was killed by SPLA soldiers along with two others near the SPLA barracks in Abu Shaka, on the Wau-Raga road. The soldiers took her husband's bicycle and the food he was carrying.¹³⁶² The Commission heard that over 300 hundred bicycles and the goods they were carrying had been stolen in this manner between June and September 2018.¹³⁶³

836. The Commission has been informed further that none of the 18 schools in the Baggari area are presently functioning. It was estimated that approximately 10,850 children from Baggari have been left without access to schooling as a result, although a group of educated community members have reportedly been volunteering to provide classes.¹³⁶⁴

837. At the time of writing, the area remains tense and unstable. Despite being told by the SPLA in December that they would soon be drawing down from Mboro and returning to Wau,¹³⁶⁵ the Commission received reports into late 2018 that the SPLA continued to increase its presence in Mboro, while the SPLA-IO continued to hold Ngisa, only 15 kilometres away.¹³⁶⁶ As of December, SPLA were also based in Ngo Baggari and looting was reportedly ongoing in Ngo Vandego.¹³⁶⁷

838. Additionally, the Commission received reports of SPLA-IO recruitment, including forced recruitment, of youth from Kuajena and Mapel areas, in the east of Western Bahr el Ghazal State.¹³⁶⁸

3. Wadhalelo, 2017 - 2018

839. Wadhalelo is a village of approximately 6,500 predominantly Luo (Jur) inhabitants, located 38 kilometres to the southeast of Wau to the east of the Busseri river and to the west of the Jur river.¹³⁶⁹ The conflict in Wadhalelo has somewhat different origins than the conflict in the Wau Triangle. Unlike the Fertit in the Wau triangle area, the Luo have traditionally had reasonably good relationships with the Dinka cattle herders despite being farming people.¹³⁷⁰ However, this relationship soured starting in 2015 when Dinka cattle herders allowed their cattle to graze on the Luo farms before they had been harvested. This came to a head in January 2017 when Dinka cattle herders shot a Luo boy of 18 in Wadhalelo while he was sitting under a tree eating.¹³⁷¹

840. Residents of Wadhalelo went to SPLA-IO to request assistance and protection and the SPLA-IO in turn set up a base in Wadhalelo in the primary school where they remained more or less consistently until June 2018 when the SPLA took control.¹³⁷² Witnesses' views on the SPLA-IO's presence in Wadhalelo were mixed. Some stated they felt safer with the SPLA-IO there and had a respectful relationship with the inhabitants while others stated the SPLA-IO occasionally looted and had been forcibly recruiting residents and as a result a number of the

¹³⁶¹ Witness 967, ERN 101914-101919, paras. 11, 12; Witness 970, ERN 101925-101929, paras. 6, 7.

¹³⁶² Witness 970, ERN 101925-101929, paras. 6, 7.

¹³⁶³ Confidential Document, ERN D113948 - D113957.

¹³⁶⁴ Confidential Meeting, Wau, 1 December 2018.

¹³⁶⁵ Confidential Meeting, Wau, 2 December 2018.

¹³⁶⁶ Confidential Meeting, Wau, 4 December 2018.

¹³⁶⁷ Confidential Meeting, Wau, 1 December 2018.

¹³⁶⁸ Confidential Meeting, Wau, 19 October 2018; Confidential Meeting, Wau, 4 December 2018.

¹³⁶⁹ Confidential Document, ERN D113942-D113947.

¹³⁷⁰ Witness 878, ERN 101587-101592, para. 20; Confidential Meeting, Wau, 4 December 2018.

¹³⁷¹ Witness 925, ERN 101886-101890, para. 6; Witness 915, ERN 101828-101835, para. 6; Witness 882, ERN 101577-101581, para. 6.

¹³⁷² Witness 925, ERN 101886-101890, paras. 6-8; Witness 915, ERN 101828-101835, para. 6; Witness 913, ERN 101799-101803, para. 6; Confidential Document, ERN D113892-D113900; Confidential Document, ERN D113942-D113947.

men had fled.¹³⁷³ As one witness put it: “We are stuck there in the middle between the SPLA and the IO, both mistreat us.”¹³⁷⁴

841. In response to the SPLA-IO’s presence in Wadhalelo, between January and August 2017, there were outbreaks of violence as the SPLA 5 Division forces sought to push out the SPLA-IO.¹³⁷⁵ Civilians fled to the bush to escape the fighting and when they returned, they found their homes burned and their possessions stolen.¹³⁷⁶

842. In April 2017, the SPLA managed to drive out the SPLA-IO and remained there for seven days. During this time, they looted the entire town including goats, chickens, motorcycles, bicycles and grain.¹³⁷⁷ Through April and May, they regularly returned to Wadhalelo on patrols of 15 or more soldiers, searching house-to-house and looting any property they found. They forced three young men to carry looted property back to their base and then shot and killed them there.¹³⁷⁸ During this period, government soldiers raped four girls between the ages of 12 and 15. Each girl was raped by two to five soldiers.¹³⁷⁹

843. The same pattern recurred in June 2017. One witness described the SPLA arriving on foot and in military vehicles and shooting in all directions. They again looted the town, going from house-to-house. At least three more women were raped by Government soldiers, one of whom was 17 or 18 years old.¹³⁸⁰

844. Between August 2017 and January 2018, the area was relatively calm.¹³⁸¹ Nonetheless, Wadhalelo faced a difficult humanitarian situation as neither the only school nor the clinic were operational and there was a scarcity of water and medicine.¹³⁸²

845. On or about 11 June 2018, just over a week after the new 5 Division SPLA Commander had arrived in Wau, the SPLA launched an attack on SPLA-IO positions in Wadhalelo apparently upon instruction to conduct disarmament in the area.¹³⁸³ At least 150 SPLA soldiers arrived in military vehicles and by foot.¹³⁸⁴ The soldiers were identified as being part of the SPLA 5 Division headquartered in Wau, in part by the elephant logo on their uniforms, which is the 5 Division logo.¹³⁸⁵ By the SPLA’s own description, they encountered very minimal resistance from the SPLA-IO.¹³⁸⁶

846. The attack started in the early morning. Witnesses described heavy shooting and tukuls burning down – some set fire to intentionally, others catching fire as a result of bombardment.¹³⁸⁷

847. Witnesses reported multiple women being raped and gang raped by SPLA soldiers.¹³⁸⁸ One 28-year-old woman described to the Commission: “[The soldier] raped me while my

¹³⁷³ Witness 913, ERN 101799-101803, para. 6; Witness 925, ERN 101886-101890, paras. 7, 9; Witness 931, ERN 101799-101803, para. 5; Witness 880, ERN 101567-101571, para. 6; Witness 882, ERN 101577-101581, para. 6; Confidential Meeting, Wau, 23 October 2018.

¹³⁷⁴ Witness 880, ERN 101567-101571, para. 12.

¹³⁷⁵ Confidential Document, ERN D113892-D113900; Witness 925, ERN 101886-101890, para. 7; Witness 915, ERN 101828-101835, paras. 8-12; Witness 913, ERN 101799-101803, paras. 7, 8.

¹³⁷⁶ Witness 925, ERN 101886-101890, para. 7; Witness 913, ERN 101799-101803, para. 7; Confidential Document, ERN D113892-D113900.

¹³⁷⁷ Witness 915, ERN 101828-101835, para. 8.

¹³⁷⁸ Witness 915, ERN 101828-101835, para. 11.

¹³⁷⁹ Witness 915, ERN 101828-101835, para. 10.

¹³⁸⁰ Witness 913, ERN 101799-101803, para. 8.

¹³⁸¹ Confidential Document, ERN D113892-D113900.

¹³⁸² Confidential Document, ERN D113892-D113900; Confidential Document, ERN D113942-D113947.

¹³⁸³ CTSAMM, *Report 2018/24 – Military Movement and Offensive Military Operations in the Wau Area*, 26 July 2018; Confidential Document, ERN D113942-D113947; Confidential Document, ERN D116022-D116118; Confidential Document, ERN D116253-D116260. See also Witness 915, ERN 101828-101835, para. 13; Witness 913, ERN 101799-101803, para. 9; Witness 880, ERN 101567-101571, para. 7; Witness 882, ERN 101577-101581, para. 6.

¹³⁸⁴ Witness 931, ERN 101799-101803, para. 6; Witness 880, ERN 101567-101571, para. 8.

¹³⁸⁵ Witness 931, ERN 101799-101803, para. 6.

¹³⁸⁶ Confidential Document, ERN D113942-D113947. See also Witness 915, ERN 101828-101835, para. 13; Witness 925, ERN 101886-101890, para. 10.

¹³⁸⁷ Witness 931, ERN 101799-101803, para. 6; Witness 880, ERN 101567-101571, para. 7; Witness 882, ERN 101577-101581, para. 7.

¹³⁸⁸ Witness 931, ERN 101799-101803, para. 7; Witness 915, ERN 101828-101835, paras. 18, 19; Witness 913, ERN 101799-101803, para. 11; Witness 881, ERN 101582-101586, paras. 6-9; Witness 882, ERN 101577-101581, para. 8.

children were watching; they didn't understand and thought he was killing me and were crying. [...] After he left I took the children and sat under a tree and cried."¹³⁸⁹

848. The SPLA forces broke into the hospital and looted the primary school.¹³⁹⁰ They also looted residents' food and possessions including goats, chickens, beds, and cooking utensils.¹³⁹¹ One witness who fled the fighting told the Commission:

My own house was not burned down, however all my possessions had been looted by the time I got back to Wadhalelo. These included my bicycle, six sacks of sorghum (50 kg), eight sacks of groundnuts (100 kg), and my clothes and shoes. I had recently harvested the sorghum and ground nuts and stored them in order to sell some and use the rest for food.¹³⁹²

849. The houses of people suspected of being SPLA-IO members were burned down, after being looted, and if the man of the house had fled, "[a]ny children or family members remaining in the house were usually flogged."¹³⁹³ One mother-of-four described SPLA soldiers conducting house-to-house searches and harassing civilians. After inquiring where her husband was,

[t]hen they asked us to give them six goats. They actually went and rounded up nine goats and thirty chickens.

They also took the few other possessions remaining in the house. After they had taken these items, the soldiers started beating all of us, including my children and grandmother. They were beating us with pieces of wood which we had used to prop up the mosquito nets for the beds. I was beaten all over my body. In fact, I was beaten so severely that my arms were all swollen and I had scars on my back and buttocks.¹³⁹⁴

850. At least three local men were detained overnight in Wadhalelo and beaten by SPLA soldiers and only released when village leaders attested to the SPLA Commander that they were not "rebels".¹³⁹⁵ At least one other man was "arrested" and severely beaten by the SPLA soldiers and eventually taken back to Grinthe SPLA barracks in Wau where he was detained for approximately three months.¹³⁹⁶ The SPLA continued to detain men in Wadhalelo and the surrounding area into October 2018.¹³⁹⁷

851. Despite not encountering resistance from the SPLA-IO, approximately 100 SPLA troops remained in Wadhalelo by the end of June 2018.¹³⁹⁸ Since gaining control of Wadhalelo, the SPLA used the Wadhalelo primary school as its barracks.¹³⁹⁹ By way of explanation of their use of the school as their barracks, the SPLA indicated that it had already been non-functional when they arrived.¹⁴⁰⁰

852. As a result of the mid-June fighting, a considerable proportion of the Wadhalelo population was displaced in different directions. Although at least 700 of those displaced had reportedly returned to Wadhalelo by the end of June 2018,¹⁴⁰¹ this represented a small proportion of those displaced from Wadhalelo. One witness estimated that approximately 500 civilians had fled to Kubri Gedim¹⁴⁰² while another 760 arrivals from Wadhalelo were

¹³⁸⁹ Witness 880, ERN 101567-101571, para. 10.

¹³⁹⁰ Witness 931, ERN 101799-101803, para. 7.

¹³⁹¹ Witness 915, ERN 101828-101835, para. 17; Witness 925, ERN 101886-101890, para. 11; Witness 913, ERN 101799-101803, para. 11; Witness 880, ERN 101567-101571, para. 8; Witness 881, ERN 101582-101586, para. 12; Witness 882, ERN 101577-101581, para. 8.

¹³⁹² Witness 915, ERN 101828-101835, para. 17.

¹³⁹³ Witness 915, ERN 101828-101835, para. 16; Witness 880, ERN 101567-101571, para. 6.

¹³⁹⁴ Witness 925, ERN 101886-101890, paras. 11, 12.

¹³⁹⁵ Witness 931, ERN 101799-101803, paras. 8, 9.

¹³⁹⁶ Witness 915, ERN 101828-101835, para. 21.

¹³⁹⁷ Witness 915, ERN 101828-101835, para. 22.

¹³⁹⁸ Confidential Document, ERN D113942-D113947.

¹³⁹⁹ Confidential Document, ERN D113942-D113947; Confidential Document, ERN D113987-D113992; Witness 915, ERN 101828-101835, para. 22; Witness 913, ERN 101799-101803, para. 11; Witness 881, ERN 101582-101586, para. 10.

¹⁴⁰⁰ Confidential Document, ERN D113966-D113974.

¹⁴⁰¹ CTSAMM, *Report 2018/24 – Military Movement and Offensive Military Operations in the Wau Area*, 26 July 2018; Confidential Document, ERN D113942-D113947; Confidential Document, ERN D116022-D116118; Confidential Document, ERN D116253-D116260.

¹⁴⁰² Witness 915, ERN 101828-101835, para. 15.

registered in Masna IDP camp in Wau by mid-July,¹⁴⁰³ and approximately 875 Wadhalelo inhabitants arrived in Kuajena in the second half of July and established the Nikija IDP camp.¹⁴⁰⁴ In mid-August, over 2,000 IDPs from Wadhalelo were also reported in Mapel.¹⁴⁰⁵

853. The SPLA-IO attacked Wadhalelo on or about 20 July 2018 in an unsuccessful attempt to regain control which resulted in the injury of four SPLA soldiers.¹⁴⁰⁶ By September 2018, Wadhalelo was deserted, except for the SPLA stationed there, with civilians living in the bush or displaced to surrounding towns.¹⁴⁰⁷

¹⁴⁰³ Confidential Document, ERN D116155-D116252.

¹⁴⁰⁴ Confidential Document, ERN D115602-D115748.

¹⁴⁰⁵ Confidential Document, ERN D116119-D116154.

¹⁴⁰⁶ Confidential Document, ERN D113966-D113974; Confidential Document, ERN D113987-D113992; Witness 915, ERN 101828-101835, para. 20; Witness 882, ERN 101577-101581, para. 9; Confidential Meeting, Wau, 23 October 2018.

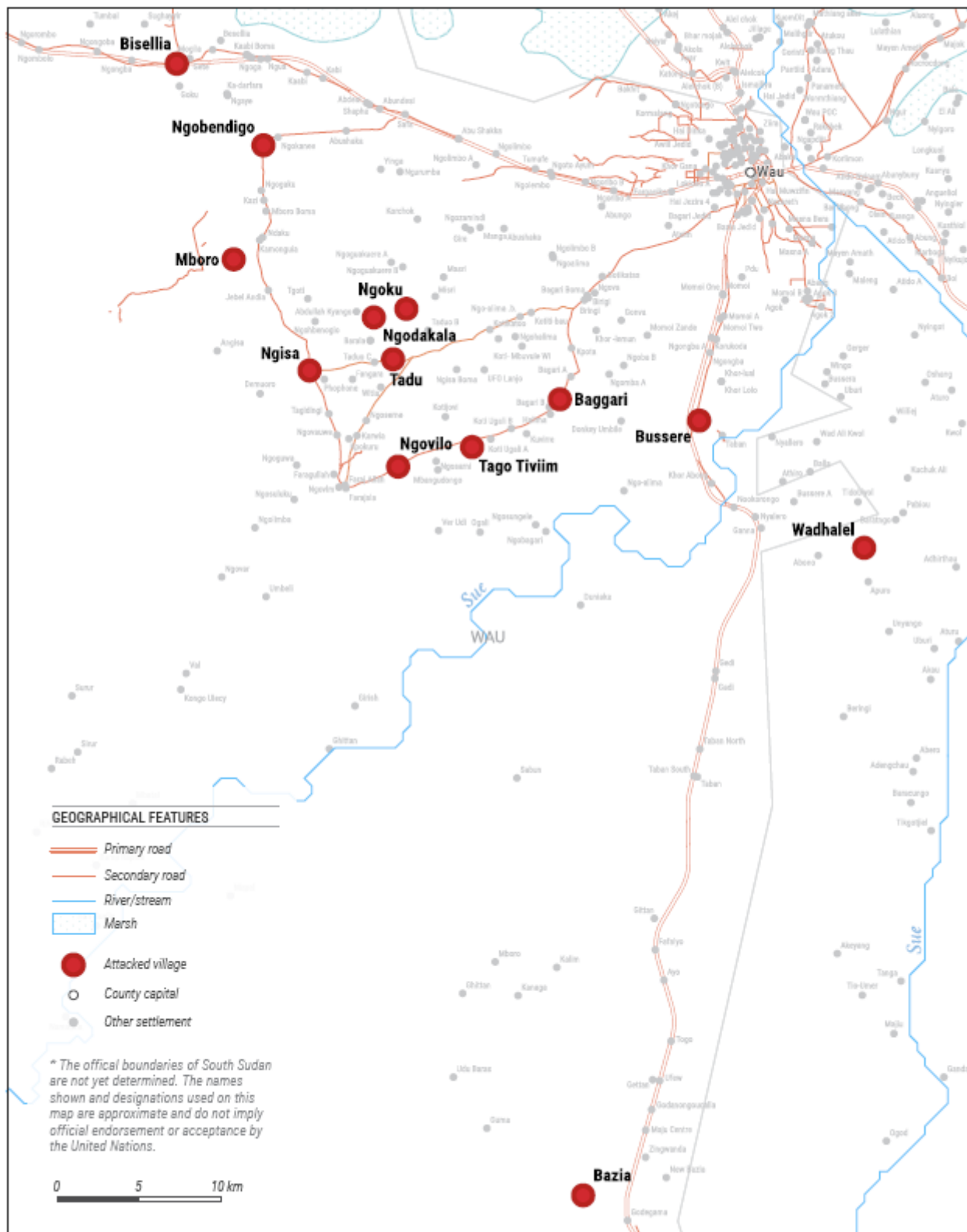
¹⁴⁰⁷ CTSAMM, *Report 2018/24 – Military Movement and Offensive Military Operations in the Wau Area*, 26 July 2018; Confidential Document, ERN D113966-D113974; Confidential Document, ERN D113987-D113992.



Locations of Attacked Villages in Wau Triangle

United Nations Commission on Human Rights in South Sudan

February 2019



Date: 1 February 2019, created by OHCHR Emergency Response Section for UN Commission on Human Rights in South Sudan Sources: OCHA, UN Commission on Human Rights in South Sudan Contact: chrsouthsudan@ohchr.org

Figure 7: Locations attacked in Wau in 2018

4. Violations and Alleged Crimes

c) *Killings of Civilians, Rapes and Other Forms of Sexual Violence, Arbitrary Detention, Cruel and Inhumane Treatment, Destruction of Civilian Property, and Pillage*

854. On the basis of the evidence collected by the Commission, it finds reasonable grounds to believe that SPLA soldiers fired on unarmed villagers taking no active part in the conflict during their ground offensive in the Wau Triangle from mid-June to November 2018 resulting in the killings of civilians, including women, children and the elderly. The evidence also provides reasonable grounds to believe that during this same offensive, SPLA soldiers beat, mistreated and arbitrarily detained civilians.

855. Similarly, there are reasonable grounds to believe that the SPLA beat, mistreated and arbitrarily detained civilians in the course of its attack on Wadhalelo in June 2018. Furthermore, in the course of 2017, the SPLA soldiers killed at least three civilian men from Wadhalelo. Additionally, the evidence provides reasonable grounds to believe that SPLA soldiers raped and gang raped women and girls in Wadhalelo during attacks on the village in 2017 and 2018.

856. SPLA soldiers deliberately burnt tukuls and villages in the Wau Triangle between June and November 2018 as well as in Wadhalelo between January and August 2017 and in June 2018. There is no information before the Commission to suggest that the destruction of private property carried out was due to military necessity. Additionally, the evidence collected by the Commission provides a consistent account of widespread looting and theft of private property by these same troops for their own use and sale in the markets.

857. The Commission also finds reasonable grounds to believe that in the course of its occupation of the Wadhalelo area prior to 11 June 2018, the SPLA-IO also pillaged civilian property.

858. These killings, rapes and sexual violence, arbitrary detention, cruel and inhuman treatment, looting and destruction of civilian property were committed by state agents and amount to serious violations of human rights law under the Transitional Constitution of the Republic of South Sudan (2011), particularly the right to life and human dignity (Article 11), the rights of the child (Article 17), freedom from inhuman or degrading treatment (Article 18), and the right to property (Article 28). They also amount to violations of the African Charter on Human and Peoples' Rights, including in particular the right to life and the integrity of the person (Article 4) and the right to property (Article 14).

859. Such acts amount to crimes under South Sudan's Penal Code (2008), including murder (section 206), criminal force (section 224), rape (section 247), theft (section 293), and mischief (section 315). Moreover, the Government's armed forces are also subject to the provisions of the SPLA Act (2009). In particular, section 57 of the SPLA Act establishes the offences of destroying and damaging property, plunder and committing any offence against the property or person of any inhabitant or resident of a country in which he or she is serving.

860. Furthermore, the Commission finds reasonable grounds to believe that there was a nexus between the commission of these crimes and the non-international armed conflict that was ongoing in South Sudan at the time, because they occurred in the context of the SPLA-organized offensive against the SPLA-IO in Western Bahr el Ghazal. As such, they are violations of international humanitarian law under Common Article 3 to the Geneva Conventions and Additional Protocol II to which South Sudan is a party and which it has implemented in its Geneva Convention Act (2012). They should also be investigated and prosecuted as war crimes under Article 4(a) (violence to life, health and physical or mental well-being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporal punishment), 4(e) (outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault), and Article 4(f) (pillage) of the Draft Statute of the Hybrid Court for South Sudan.

861. The Commission also finds reasonable grounds to believe that the killing of civilians, rape and sexual violence, destruction of private property and looting in the Wau Triangle was part of a widespread or systematic attack directed against a civilian population. The attacks appear to have been systematic as the same patterns recurred across the different attacks on villages. Furthermore, the attacks were widespread as they occurred in over at least 10

villages over the course of a five-month period. As such, these crimes should be investigated and prosecuted as crimes against humanity, including murder, rape and sexual violence, and other inhumane acts under Article 3 of the Statute of the Hybrid Court for South Sudan.

b) Intentionally Directing Attacks against the Civilian Population

862. Based on the evidence collected and reviewed, the Commission finds reasonable grounds to believe that the SPLA intentionally directed attacks against the civilian population in the Wau Triangle. While in some cases the SPLA-IO forces were in the general area when the SPLA attacked and there was fighting between opposing forces in the Wau Triangle area, many of the villages clearly had no opposition forces present in them at the time of the attacks. Similarly, by the SPLA's own account, resistance in Wadhalelo was minimal.¹⁴⁰⁸

863. Intentionally directing attacks against the civilian population or against individual civilians is prohibited by Article 13(2) of Additional Protocol II and section 7 of the South Sudan Geneva Convention Act (2012). Directing attacks against the civilian population is a serious crime under Article 5(a) of the Draft Statute of the Hybrid Court for South Sudan.

864. Even where attacks may have been legitimate military operations against an SPLA-IO presence, the evidence provides reasonable grounds to believe that there was an utter failure to adhere to the fundamental international humanitarian law principle of distinction, such that the attacks amount to a violation of the customary international law prohibition of indiscriminate attacks.¹⁴⁰⁹

5. Responsibility for Violations and Alleged Crimes

a) Individual Responsibility

865. The violations and crimes committed in the Wau Triangle and Wadhalelo from June 2018 onward were part of an organised operation by the SPLA to clear the area of opposition forces.¹⁴¹⁰ The SPLA acknowledged that it had launched an offensive on SPLA-IO positions in the Wau Triangle and Wadhalelo upon instruction to conduct disarmament in the area.¹⁴¹¹ The Commission also heard that additional forces were brought in from Aweil.¹⁴¹²

866. The Commission was informed further that the operations in the Wau area were the subject of coordination between the SPLA 5 Division and the State Security Committee in Wau, which meets weekly on Wednesdays and includes the SPLA, the NSS, the Governor Angelo Taban Biajo, and a number of State Ministers such as the Ministers of Local Government and Finance.¹⁴¹³ The Governor wields significant influence in relation to launching offensives through the State Security Committee.¹⁴¹⁴

867. The offensive started shortly after the arrival of the new 5 Division Commander, a Major General, on 3 June 2018 who would have been the overall commander of the operation.¹⁴¹⁵ Between July and October 2018, the Commander of the SPLA 15 Infantry Brigade based in Mboro was an identified Brigadier General whose area of responsibility extended to Bisselia, Baggari and Wadhalelo areas.¹⁴¹⁶ With respect to the attack in Wadhalelo, there are reasonable grounds to believe that an identified Major was the SPLA

¹⁴⁰⁸ Confidential Document, ERN D113942-D113947. See also Witness 915, ERN 101828-101835, para. 13; Witness 925, ERN 101886-101890, para. 10.

¹⁴⁰⁹ ICRC *Study on Customary International Humanitarian Law*, Rule 11.

¹⁴¹⁰ Confidential Meeting, Wau, 20 October 2018.

¹⁴¹¹ CTSAMM, *Report 2018/24 – Military Movement and Offensive Military Operations in the Wau Area*, 26 July 2018; Confidential Document, ERN D113942-D113947; Confidential Document, ERN D116022-D116118; Confidential Document, ERN D116253-D116260. See also Witness 915, ERN 101828-101835, para. 13; Witness 913, ERN 101799-101803, para. 9; Witness 880, ERN 101567-101571, para. 7; Witness 882, ERN 101577-101581, para. 6.

¹⁴¹² Witness 878, ERN 101587-101592, para. 16.

¹⁴¹³ Witness 878, ERN 101587-101592, paras. 16, 24; Confidential Document, ERN D115602-D115748; Confidential Meeting, Wau, 3 December 2018.

¹⁴¹⁴ Confidential Meeting, Wau, 3 December 2018; Confidential Meeting, Wau, 20 October, 2018.

¹⁴¹⁵ Confidential Document, ERN D116022-D116118.

¹⁴¹⁶ Confidential Meeting, Wau, 2 December 2018; Confidential Document, D113975-D113981; Confidential Document, ERN D116119-D116154.

field commander when Wadhalelo was attacked in June 2018.¹⁴¹⁷ The Commission also considers there are reasonable grounds to believe that another identified Major was the SPLA commander based in Wadhalelo from at least July 2018 and knew of some of the crimes committed there but failed to take punitive action.¹⁴¹⁸

868. The Commission found no evidence that the regular military command and control structures had broken down such that the 5 Division Commander or his subordinate commanders would not have been exercising effective control over their forces. In interacting with the SPLA forces in the area, at no point did they indicate to the Commission and other international organisations that they were not in control of their forces. To the contrary, in certain instances they confirmed that they were in control of an area and required clearance from the 5 Division Commander to pass checkpoints showing they were respecting regular military lines authority.¹⁴¹⁹

869. Furthermore, there are reasonable grounds to believe that SPLA commanders in the area knew or had reason to know of the actions of their subordinates toward civilians. In this regard, the Commission notes that the attacks lasted five months and there were significant numbers of displaced people arriving into Wau so information about attacks on civilians would almost certainly have reached the Commanders, even if they did not order them. Additionally, the 5 Division Commander acknowledged in mid-July 2018 that the security situation in the Wau Triangle was “not good”, yet the security situation remained largely unchanged for months afterwards.¹⁴²⁰

870. The Commission has received no information about steps taken by the SPLA commanders to prevent or put a stop to the attacks on civilians or to punish those who perpetrated the crimes in the Wau Triangle or Wadhalelo. In this regard, the Commission was told the 5 Division Commander is an experienced, effective and “no-nonsense” commander who would have taken immediate action against his subordinates had he not agreed with their actions. It can therefore be inferred from the continuation of these offences over many months that the Commander supported them.¹⁴²¹ Furthermore, the SPLA 15 Infantry Brigade Commander in Mboro between July and October 2018, effectively stated that to his knowledge, no SPLA members in Mboro had been investigated or detained in relation to violations in the area.¹⁴²² Information received by the Commission indicates that at least two of the SPLA commanders in Wadhalelo, both Majors, had violations directly reported to them but did not take steps to investigate or punish those involved. One of these commanders directly interacted with a rape victim, who identified her attacker; however, while the Major reportedly beat the soldier responsible during this interaction, no further steps were apparently taken to investigate the incident.¹⁴²³ Similarly, when a victim in Wadhalelo reported being beaten by SPLA soldiers to the second Major, his response was reportedly: “I was not there, it was my soldiers.”¹⁴²⁴ This lends additional credence to the conclusion that he took no responsibility for criminal acts of his subordinates despite his knowledge of them and his responsibility to do so.

871. The Commission therefore finds reasonable grounds to believe that at least these three SPLA Commanders knew or had reason to know that subordinates under their effective control were committing or had committed human rights violations and crimes against civilians, including war crimes, and they failed to take reasonable and necessary measures to prevent or punish them.

872. Furthermore, in respect of the crimes committed in Wadhalelo during the first half of 2017, the SPLA 5 Division in Western Bahr el Ghazal was at the time under the command

¹⁴¹⁷ Confidential Document, ERN D113942-D113947; Witness 881, ERN 101582-101586, paras. 10-11.

¹⁴¹⁸ Witness 925, ERN 101886-101890, para. 13; Witness 915, ERN 101828-101835, para. 22; Confidential Document, ERN D113966-D113974.

¹⁴¹⁹ Confidential Meeting, Wau, 2 December 2018; Confidential Document, ERN D116253-D116260; Confidential Document, ERN D116119-D116154; Confidential Document, ERN D113948-D113957; Confidential Document, ERN D113958-D113965; Confidential Document, ERN D114804-D114809; Confidential Document, ERN D113966-D113974; Confidential Document, ERN D113987-D113992; Confidential Document, ERN D113982-D113986; Confidential Document, ERN D113942-D113947.

¹⁴²⁰ Confidential Document, ERN D116155-D116252.

¹⁴²¹ Confidential Meeting, 3 December 2018.

¹⁴²² Confidential Meeting, Wau, 2 December 2018.

¹⁴²³ Witness 881, ERN 101582-101586, paras. 10-11.

¹⁴²⁴ Witness 925, ERN 101886-101890, para. 12.

of a Major General who was in turn under the SPLA's Sector 1, commanded by a Lieutenant General who is now the Chief of General Staff of the SPLA.¹⁴²⁵ As explained in the Commission's previous Report, it finds reasonable grounds to believe that they exercised effective control over their troops during this period¹⁴²⁶ and the Commission has received no information about measures taken to prevent or punish these crimes.

873. Finally, with respect to the looting carried out by the SPLA-IO in the Wadhalelo area, during their presence in the area, a number of witnesses identified the SPLA-IO Commander in the Wadhalelo area as a Brigadier General¹⁴²⁷ who reported to the SPLA-IO in Bazia which was commanded by a Major General.¹⁴²⁸ However, further investigations are required to establish their knowledge, effective control, and whether reasonable and necessary measures were taken to prevent or punish the crimes.

b) State Responsibility

874. As the SPLA are government forces, their violations of human rights and international humanitarian law give rise to state responsibility on the part of the Republic of South Sudan. In any event, the Government has a duty to investigate and prosecute these alleged violations of international human rights and international humanitarian law, as well as the criminal acts committed in the Wau Triangle between June and November 2018 and Wadhalelo between January and August 2017 and in June 2018. The Commission has received no information regarding steps taken by the Government to criminally investigate and prosecute those responsible for these events.

VIII. Accountability and Transitional Justice

875. In August 2015, the parties to the conflict signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS), committing to "national reconciliation, accountability, healing and combating impunity" among the priorities for the Transitional Government of National Unity.¹⁴²⁹ Chapter V of the Agreement provided for the establishment of three transitional justice institutions: the Hybrid Court for South Sudan (HCSS) to investigate and prosecute individuals suspected of committing genocide, war crimes and crimes against humanity, and serious human rights violations and violations of international humanitarian law; the Commission for Truth, Reconciliation and Healing (CTRH) to address the legacy of past human rights abuses; and the Compensation and Reparation Authority (CPA).¹⁴³⁰ Despite the commitments made in the ARCSS, the Government has failed to make meaningful progress in implementing the transitional justice framework.

876. Most recently, on 12 September 2018, the Government and the other parties to the conflict signed a Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS), which has not introduced major changes to the previous provisions dealing with the transitional justice framework, but it nevertheless has set out new time-lines for the establishment of the three transitional justice mechanisms.¹⁴³¹ In accordance with the R-ARCSS, the new transitional government, which will assume office in May 2019, will now be responsible for the process of establishing the transitional justice mechanisms, which is expected immediately to commence the implementation of Chapter V of R-ARCSS. Whereas

¹⁴²⁵ Human Rights Watch, "South Sudan: Civilians Killed, Tortured in Western Region", 24 May 2016; Confidential Source, ERN D106378-D106485, p. D106426; Confidential Source, ERN D106051-D106171, p. D106085; Confidential Source, ERN D103043-D103043; Confidential Source ERN D103041- D103041.

¹⁴²⁶ Report of the Commission on Human Rights in South Sudan, A/HRC/37/CRP.2, 23 February 2018, paras. 243-256.

¹⁴²⁷ Witness 925, ERN 101886-101890, para. 8; Witness 931, ERN 101799-101803, para. 5; Witness 913, ERN 101836-101841, para. 6; Witness 882, ERN 101577-101581, para. 10.

¹⁴²⁸ Witness 878, ERN 101587-101592, para. 19; Witness 707, ERN 101891-101903, para. 20; Sarah Vuylsteke, "Briefing Paper: Identity and Self-Determination: The Fertit Opposition in South Sudan", Human Security Baseline Assessment for South Sudan and Sudan, Small Arms Survey, December 2018.

¹⁴²⁹ ARCSS, Preamble, para. 8.

¹⁴³⁰ ARCSS, Chapter V, Article 1.1.

¹⁴³¹ Under the new scheme of the R-ARCSS, the three institutions are now to be set up by the Revitalized Transitional Government (R-ARCSS, Article 5.1.1) and the R-TGoNU will only be established eight months after the signing of the R-ARCSS on 12 September 2018 (see R-ARCSS, Article 1.1.2).

the renewed commitment to transitional justice is to be welcomed, the Commission is of the view that the process in establishing the transitional justice institutions must be transparent, inclusive and participatory, arising from consultations with all the relevant stakeholders, in particular victims and the communities. The new transitional government of South Sudan must also demonstrate political will to deal meaningfully with the past, including addressing impunity. Impunity is a manifestation of the absence of institutions that promote pluralism, participation, impartiality, accountability, and fairness.¹⁴³² The government of South Sudan needs to send a clear message to the people of South Sudan, the victims and other stakeholders that conflict transformation is not merely cosmetic but is of a profound nature, requiring justice and accountability for the violations and crimes committed.

877. In October 2015, the AU released the Final Report of the Commission of Inquiry on South Sudan, also known as “Obasanjo Report”, which found that the warring parties in South Sudan had committed gross human rights violations and war crimes.¹⁴³³ The Obasanjo Report recommended creating an AU-led process to bring those with the greatest responsibility for the atrocities to account. Ultimately, the ARCSS provided for the establishment of the HCSS by the AU Commission, and in September 2015 the AU Peace and Security Council made a decision mandating the AU Commission to establish the HCSS. This Commission notes with concern the stagnation of the negotiations between the AU and the Government, and a lack of major progress since 2017 regarding the establishment of HCSS. The Commission calls upon the Government to engage meaningfully and genuinely in the process of negotiations.

878. The Commission notes that the lack of accountability for decades of violence during the struggle for independence from Sudan has helped to fuel the current conflict in South Sudan. Since December 2013, tens of thousands of civilians have been killed in horrific attacks, often targeted on the basis of their ethnicity or perceived allegiances. Despite some past attempts by the Government to hold perpetrators to account for gross violations of human rights and serious violations of international humanitarian law, including the emblematic and the only case of this kind, Terrain Hotel case,¹⁴³⁴ Pervasive impunity has been part of the daily lives of the majority of South Sudanese. The reports of senior officials being promoted despite serious and substantial allegations of human rights violations¹⁴³⁵ have given rise to further concerns over the Government’s genuine commitment to deal with the past.¹⁴³⁶ The Commission urges the prompt establishment of the HCSS as per the terms of R-ARCSS, and development of a national prosecutorial strategy that must take account of the said HCSS, domestic statutory and customary law and courts, as well as alternative forms of justice, including indigenous and traditional processes. The Commission further calls on the Government to consider introducing the screening and vetting of security personnel, in particular the military and the police, in accordance with principles of due process.

879. Chapter V of R-ARCSS clearly envisages a role for customary, indigenous and traditional practices in the process of transitional justice in South Sudan, and therefore gives to the CTRH a supervisory function over such mechanisms.¹⁴³⁷ These customs and traditions, in line with the values of the African Charter on Human and People’s Rights, can play a complementary role to the current mechanisms for truth seeking and reparations by further promoting accountability.¹⁴³⁸ They can also play a significant role in the process of reconciliation in ways which are relevant and meaningful at a local context.

880. In December 2016, the Government launched a National Dialogue spearheaded by President Kiir, an initiative many observers considered a way to deviate attention from the failure of the Government to implement the Commission on Truth, Healing and Reconciliation and the Compensation and Reparation Authority as well as their delay in cooperating with the African Union to establish the Hybrid Court. While the National

¹⁴³² AU Panel of the Wise, *Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity, Report of the AU Panel of the Wise*, International Peace Institute, Africa Union Series, February 2013.

¹⁴³³ African Union, *Final Report of the African Union Commission of Inquiry on South Sudan*, Addis Ababa, 15 October 2014.

¹⁴³⁴ See below “Terrain Trial” section (section VIII(D)(8)).

¹⁴³⁵ See e.g., sections above “Targeted Sanctions and Arms Embargo” (section IV(A)(3)).

¹⁴³⁶ See discussion on Accountability below (section VIII(C)).

¹⁴³⁷ R-ARCSS, Article 5.2.2.3.9.

¹⁴³⁸ Bassiouni, M.C., “Assessing Conflict Outcomes: Accountability and Impunity”, in M.C. Bassiouni, *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Volume 1, Intersentia, 2010.

Dialogue has continued in 2017-2018 with consultations being held at the grass-root level and more stakeholders expressing the willingness to participate,¹⁴³⁹ the ultimate impact of the initiative and its relationship to future transitional justice mechanisms is yet to be seen. While taking account of reservations expressed by local and international stakeholders regarding the National Dialogue, the Commission urges the Government to conduct the process in a manner that is genuine and not intended to jeopardise the establishment of three transitional justice mechanisms set out in Chapter V of the R-ARCSS. If the National Dialogue, was seen to be inclusive, credible and transparent, the outcomes could be used to contribute more positively to future transitional justice mechanisms.

A. Transitional Justice Framework

1. Normative Framework for Transitional Justice

881. Dealing with past atrocities and the transformation of a conflict-torn country into a thriving and economically-sustainable democracy requires measures and approaches that go beyond ordinary methods of addressing violence. The Panel of the Wise has noted that “As Africa has progressed in building democratic institutions, more countries have paid attention to addressing the prevalence of impunity and enshrining values that underscore justice and reconciliation. Creating spaces for social and political contestation has provided the basis for vibrant discourse on how to end the spates of impunity that have characterized most African countries”.¹⁴⁴⁰

882. The adoption in 2005 of the Updated Principles to Combat Impunity by the General Assembly of the United Nations,¹⁴⁴¹ sets out a holistic framework to transitional justice that addresses both the duties of states and rights of victims through the promotion of a series of mutually reinforcing initiatives in the field of truth, justice, reparation and guarantee of non-recurrence, with the view to promoting accountability and maximizing victims’ satisfaction. Transitional justice also includes initiatives that aim to promote longer-term goals such as reconciliation and healing, and helps to ensure the respect for human rights and to foster civic trust in the public institutions, which further strengthens the rule of law, economic development and democratic governance.¹⁴⁴² Transitional justice is based on the premise that the underlying causes of conflicts and deeply rooted grievances, including historical injustices, unless adequately addressed and redeemed, can perpetuate cycles of violence with destabilizing effects at the domestic, regional, and international levels.

883. Discussions on transitional justice often focus on whether peace and justice are competitive or complementary goals. In the Commission’s view, this is an inappropriate assumption and is based on a narrow understanding of peace-making that assumes that peace processes are solely about ending violent conflicts. It also reflects a tendency to perceive justice only in terms of retributive justice—that is, prosecutions or criminal accountability. These positions ignore the intimate links between peace and justice: a more accurate conception treats peace and justice as fundamental to ending violence and preventing its recurrence, and as requiring a comprehensive, holistic approach.

884. Experience and best practises in the region in dealing with past atrocities suggest that sustainable peace and national reconciliation in South Sudan can only be achieved when the transitional justice framework and the process of implementation take place in a conducive environment that is inclusive and participatory taking into account the views of all the stakeholders, in particular of the victims and vulnerable groups and communities. This is

¹⁴³⁹ Clayton Hazvinei Vhumunu, *The National Dialogue Initiative in South Sudan: Assessing Progress and Pitfalls*, African Centre for the Constructive Resolution of Disputes, 31 May 2018.

¹⁴⁴⁰ AU Panel of the Wise, *Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity*, Report of the AU Panel of the Wise, International Peace Institute, Africa Union Series, February 2013.

¹⁴⁴¹ The Joint Principles and the Updated Principles to Combat Impunity. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. L. Joinet, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (hereinafter “Joint Principles”); Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (hereinafter “Updated Principles to Combat Impunity”).

¹⁴⁴² See UN Security Council, *Report of the Secretary-General on the rule of law and transitional justice in conflict and post conflict societies*, S/2011/634, 2 October 2011, p. 6.

necessary to building transparency, credibility and legitimacy and will go a long way to address the enormous mistrust among vulnerable groups towards the Government and other armed actors, whom they associate with having perpetrated gross violations of human rights and serious violations of humanitarian law.¹⁴⁴³ Meaningful engagement of civil society is therefore paramount to provide for an independent oversight, while the involvement of other constituencies to create the ownership over the process.

885. South Sudan is obliged to respect, protect, promote, and fulfil the human rights of all persons within its territory or under its control,¹⁴⁴⁴ without discrimination. South Sudan must therefore ensure that victims' rights to truth, justice, reparations and non-recurrence of violations are respected and realized. Chapter V of the ARCSS establishes a transitional justice framework for South Sudan in which criminal prosecutions is accompanied by other strategies of truth-seeking and investigations of past violations and reparations. This should be further accompanied by traditional, indigenous and religious approaches to justice and healing,¹⁴⁴⁵ as well as institutional reforms in order to create an environment conducive to building democracy.

886. Under international law, South Sudan has a duty to promptly and thoroughly investigate any allegations of gross human rights violations and serious violations of international humanitarian law, and to prosecute and punish those found responsible for these violations.¹⁴⁴⁶ The UN Security Council, on a number of occasions stressed an urgent need to "end impunity in South Sudan and to hold accountable and bring to justice all perpetrators for violations of international humanitarian law and violations and abuses of human rights"¹⁴⁴⁷ and emphasized its hope that the allegations would be dealt effectively by the transitional justice mechanisms. Similarly, the UN Security Council also expressed concerns about the delays in establishing the HCSS.¹⁴⁴⁸

887. South Sudan must also ensure that victims are able to realize the right to an effective remedy. A number of human rights treaties and instruments refer to the right of victims to an effective remedy, including African Charter on Human and Peoples' Rights, to which South Sudan is a State Party.¹⁴⁴⁹ Moreover, as confirmed by the African Commission of Human Rights in *Jawara v. The Gambia*, remedies must be available, effective, and sufficient.¹⁴⁵⁰ The Maputo Protocol on the Rights of Women in African further requires South Sudan to take appropriate and effective measures to "establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women."¹⁴⁵¹ The right to an effective remedy has two facets, namely the right to a fair trial

¹⁴⁴³ See e.g., Witness 162, ERN D101222-D101225.

¹⁴⁴⁴ In a complaint brought by Democratic Republic of Congo against Burundi, Rwanda and Uganda before the African Commission, the Commission considered the control exercised by the Respondent States and "Recommend[ed] that adequate reparations be paid, according to the appropriate ways to the Complainant State for and on behalf of the victims of the human rights by the armed forces of the Respondent States while the armed forces of the Respondent States were in effective control of the provinces of the Complainant State, which suffered these violations." 227/99 *Democratic Republic of Congo / Burundi, Rwanda, Uganda*, 33rd Ordinary Session of the African Commission on Human and Peoples' Rights, 29 May 2003, Meeting in Niger, Holding, p. 14. See also paras. 7, 72, 88, 90.

¹⁴⁴⁵ Bassiouni, "Assessing Conflict Outcomes: Accountability and Impunity", in M C Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Volume 1, (2010), at 5.

¹⁴⁴⁶ See e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 7. The majority of international human rights treaties and other documents of international character contain provisions related to the right of victims to an effective remedy. International bodies have pronounced that the duty to genuinely investigate and prosecute gross human rights violations derives from the victims' right to an effective remedy (e.g. IACtHR, *Case of Trujillo Oroza v. Bolivia*, Judgment, 27 February 2002, Series C No. 92, §99.).

¹⁴⁴⁷ E.g. UN Security Council Resolution 2406 (2018), S/RES/2406, 15 March 2018, p. 3.

¹⁴⁴⁸ UN Security Council Resolution 2406 (2018), S/RES/2406, 15 March 2018, p. 3.

¹⁴⁴⁹ While the African Charter does not explicitly provide for the right to an effective remedy, the latter might be interpreted from two relevant provisions of the Charter. In this regard see Articles 7 and 26 of African [Banjul] Charter on Human and Peoples' Rights 1982, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

¹⁴⁵⁰ African Commission on Human and Peoples' Rights, *Jawara v. The Gambia*, May 11, 2000, No. 147/95-149/96, § 32: "A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."

¹⁴⁵¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 4(2)(f).

by an independent and impartial court¹⁴⁵² and the right to reparations.¹⁴⁵³ “The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.”¹⁴⁵⁴

888. South Sudan is under obligation to ensure victims’ right to truth by establishing and promoting institutions, mechanisms and processes capable of facilitating the clarification of the relevant facts and examination of circumstances surrounding violations and abuses.¹⁴⁵⁵ Only a full account of events supported by a thorough analysis of the underlying root causes of the conflict will provide a vital safeguard against the recurrence of violations.¹⁴⁵⁶ Through their advisory function, truth commissions may also contribute to other transitional measures¹⁴⁵⁷ by recommending institutional reforms or alleged perpetrators for prosecution. Disclosing facts about violations to a general public and drawing the patterns of violations acknowledges the atrocities and their root causes, and therefore supports the reinstatement of the rule of law, and ultimately leads to reconciliation and healing.¹⁴⁵⁸ Truth commissions, in particular when properly mandated and conducted, can reveal wider patterns of abuse or structural injustice in a manner that trials are not designed to achieve.

889. South Sudan has a duty to prevent the recurrence of gross violations of human rights and serious violations of international humanitarian law. The 2005 Updated Principles to Combat Impunity provide further guidance on the measures that States must undertake to ensure the non-recurrence of violations.¹⁴⁵⁹

890. In addition, the framework developed by the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence categorizes measures that states typically undertake to ensure a non-recurrence of violations. Measures he identified include reforms within the security sector and judiciary, disbandment of parastatal and non-state armed forces, demobilization and social reintegration of children, an accession to or ratification of international treaties, legal and constitutional reforms, in particular repealing of discriminatory and abusive legislation.¹⁴⁶⁰ The Special Rapporteur also observes that actionable prevention policy cannot be achieved through ‘institutional engineering’ alone but also requires transformations in the societal sphere, particularly at the level of civil society, in the cultural sphere and in the sphere of individual dispositions.¹⁴⁶¹

891. The Commission notes that transitional measures must not be designed and implemented in isolation from each other. Implementing just one type of transitional justice measure will not do justice in the wake of serious human rights violations. For these reasons, the Commission urges the Government to provide for a comprehensive implementation programme that is timely and responds to the need of victims and which ensures that the three transitional justice mechanisms are operationalized in a manner which is comprehensive and strategic, and mutually reinforcing of each other.

892. Individuals and communities who have suffered the most harm should be at the centre of the design and implementation of any transitional justice programme. The design and implementation of the transitional justice framework must therefore apply a victim-centric approach throughout the process. Special account must be taken of women and girls, children,

¹⁴⁵² D. Shelton, *Remedies in International Human Rights Law*, 2nd ed. (2005), p. 7. See also European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Judgment, January 21, 2011, No. 30696/09, §288.

¹⁴⁵³ D. Shelton, *Remedies in International Human Rights Law*, 2nd ed. (2005), p. 7.

¹⁴⁵⁴ Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 8 February 2005, Principle 34.

¹⁴⁵⁵ Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 8 February 2005.

¹⁴⁵⁶ See Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 8 February 2005, Principle 2.

¹⁴⁵⁷ Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 8 February 2005, Principle 12.

¹⁴⁵⁸ See UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-occurrence, Pablo de Greiff*, A/HRC/24/42, 28 August 2013.

¹⁴⁵⁹ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principles 35-38.

¹⁴⁶⁰ See also, UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, A/HRC/30/42, 7 September 2015.

¹⁴⁶¹ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, A/HRC/30/42, 7 September 2015; UN General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, A/72/523, 12 October 2017.

youth, older people as well as internally displaced people as they remain the most vulnerable with their grievances barely being heard.

893. Appropriate arrangements must be made to ensure that victims are able to participate in the consultations preceding the implementation of three transitional justice mechanisms meaningfully as well as in truth-seeking and in criminal proceedings before the HCSS. The dignity of victims as well as their right to information, right to privacy, and the right to protection and assistance must be ensured at all times. In particular, all efforts should be made to avoid re-traumatisation of victims and survivors. Solid witness protection programmes should be developed by both CTRH and HCSS in order to mitigate any risk of intimidation or threat towards the witnesses, and to prevent any attempts at witness tampering.

2. Goals of a Transitional Justice Framework

894. In the aftermath of conflict or a period of repression, transitional justice mechanisms and processes are often adopted in pursuit of broader societal goals including the restoration of the fabric of society and, in the longer term, the attainment of the highest levels of human development.

895. The overarching goal of the transitional justice framework is to contribute to sustainable peace and democracy. Indeed, Goal 16 of the Sustainable Development goals (SDGs) makes a link between social integration, justice and sustainable peace as essential preconditions for stability and the construction of an inclusive society. Accordingly, the transitional justice institutions and mechanisms are not ends in themselves but constitute a fundamental step to build the rule of law and sustainable peace. In this regard, the measures and institutions of transitional justice must contribute towards much-needed healing within the community, fostering the well-being of victims and imbuing in those who have suffered as a consequence of the conflict, a sense that they matter and are valued as communities and individuals with a restored equal citizenship. In promoting transitional justice measures society also holds out the hope for a better future where individuals can leave without fear of coming to harm at the hands of the states or other citizens.

a) *Reconciliation*

896. Reconciliation is a complex and multi-faceted concept, which has been understood and articulated differently in different contexts. Reconciliation as a concept can venture at multiple levels of human interaction, be it individual, interpersonal, socio-political or institutional levels.¹⁴⁶² Following the violent conflict, societies coming to terms with their past frequently find themselves in a situation of rebuilding the antagonized social fabric, which has been broken by years of discrimination, disadvantage, injustice and violence. As Lederach once wrote “an enemy is rooted and constructed in our hearts and minds and takes on social significance as others share in the creation.”¹⁴⁶³ Reconciliation is therefore an adaptive and dynamic process of healing and building, and the process of change and redefinition of relationships.¹⁴⁶⁴ Transitional justice mechanisms contribute to this process of reconciliation and therefore the latter is often considered to be an ultimate and overarching goal of transitional justice. Reconciliation combines the elements of truth, justice, reparations and healing¹⁴⁶⁵ with and spiritual element of ‘forgiveness’ or ‘mercy’, which also often cited as a key to achieve reconciliation.¹⁴⁶⁶ The latter is, however, closely linked to religions and traditions that vary between the contexts, countries and societies. Reconciliation can be easily obscured by an unfair juxtaposition of peace versus justice debate, in which the two are placed as mutually excluding concepts. However, peace and justice are two sides of the same coin and one cannot be fully achieved without another.

¹⁴⁶² Paul Seils, “The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions”, ICTJ Briefing Note, June 2017.

¹⁴⁶³ Lederach, John Paul, *The Colonel, The Journey Toward Reconciliation*, (Herald Press, 1999).

¹⁴⁶⁴ Lederach, John Paul, “Civil Society and Reconciliation,” in Chester A Crocker, Fen Osler Hampson and Pamela Aall (eds.): *Turbulent Peace: the Challenges of Managing International Conflict*, (Washington DC, USIP, 2001) pp. 842-47.

¹⁴⁶⁵ D. Bloomfield, *On Good Terms: Clarifying Reconciliation*, Berghof Report No. 4, 2006; Quinn J R, *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill: Queen’s University Press, 2009).

¹⁴⁶⁶ D. Bloomfield, *On Good Terms: Clarifying Reconciliation*, Berghof Report No. 4, 2006; Quinn J R, *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill: Queen’s University Press, 2009).

897. Reconciliation cannot be prescribed, but conditions need to be created in which acts of reconciliation can be nurtured. The comprehensive implementation of ARCSS's Chapter V transitional mechanisms coupled with inclusive, participatory and transparent consultations on the transitional justice processes will create an environment conducive for reconciliation. The role of civil society, local and customary authorities as well as faith-based organizations will also be crucial in ensuring that the idea of reconciliation is understood by South Sudanese and adapted in order to reflect their customs and beliefs. The Wunlit peace processes between the Dinka and the Nuer in the 1990s, which ended years of conflicts, are a good example of arguably successful community-led reconciliatory efforts that relied on traditional practices and engaged community, traditional and religious leaders.¹⁴⁶⁷ The slaughtering of a white bull was a symbolic act of peace and reconciliation, and was followed by the prayers.¹⁴⁶⁸

898. The Panel of the Wise have noted that creating spaces for social and political contestation provides a basis for vibrant discourse on how to end the spate of impunity that has characterized most African countries. While sometimes reconciliation trumps justice in deeply divided societies, stable peace ultimately hinges on finding a judicious balance between the two objectives. Even where deeply divided countries have made short-term pragmatic concessions that privilege reconciliation and peace at the expense of justice, the purpose has ultimately been to strengthen institutions that diminish the persistence of impunity.

899. Under Article 1.4.3.3 of the R-ARCSS, during the Pre-Transitional Period, a "process of national healing and reconciliation that shall be led by the Parties, faith based groups and civil society groups inside and outside the Republic of South Sudan" shall be implemented.¹⁴⁶⁹ However, the provision does not provide guidance or indicate the mechanisms by which these efforts would be undertaken. Apart from the ongoing National Dialogue process, which is pursuing a range of objectives including the furtherance of national healing, peace and reconciliation,¹⁴⁷⁰ the Commission is not aware of specific efforts undertaken in the implementation of this provision.

B. Transitional Justice Framework in South Sudan

900. The Agreement on the Resolution of the Conflict in South Sudan was signed in August 2015, before, the AU-mandated Obasanjo Commission handed in their report. The ARCSS anticipated the outcome of the Obasanjo Commission and recommendations (in part as the report had been leaked), and provided that the Hybrid Court could draw on the report of the AU Commission of Inquiry, and other documents, reports and materials in AU's possession.¹⁴⁷¹

901. But even before the signing of that Agreement, it was clear that both main parties, particularly the Government, had reservations, including on the establishment of the CRA. While no explicit reservations were formulated with regard to the HCSS or the lustration clause which excludes persons indicted by the Court from participating in government,¹⁴⁷² it became clear in the course of the Commission's work that there has remained a reluctance on the side of the Government to move swiftly to establish the Court.

1. Impact of the Revitalized Agreement on the Chapter V Transitional Justice Institutions

902. Chapter V of the R-ARCSS has almost wholly maintained the provisions of Chapter V of the 2015 text but has introduced a few noteworthy changes. A significant and positive addition is the requirement that in establishing the transitional justice institutions, the

¹⁴⁶⁷ Kuyang Logo, *Exploring Linkages of Traditional and Formal Mechanism of Justice and Reconciliation in South Sudan*, 15 January 2018, p. 16.

¹⁴⁶⁸ Kuyang Logo, *Exploring Linkages of Traditional and Formal Mechanism of Justice and Reconciliation in South Sudan*, 15 January 2018.

¹⁴⁶⁹ R-ARCSS, Article 1.4.3.3.

¹⁴⁷⁰ <https://www.ssnationaldialogue.org/national-dialogue-objectives/>.

¹⁴⁷¹ ACRSS, Chapter V, Article 3.6.1.

¹⁴⁷² ARCSS, Chapter V, Article 4, which has been carried over into the R-ARCSS, Article 5.5.1.

requirement for ensuring at least 35 percent representation of women on these bodies should be observed.¹⁴⁷³ This allocation should therefore be applied to the CTRH, the HCSS and the CRA.

903. The responsibility initiating legislation for the establishment of these three transitional justice institutions now rests with the yet to be established Revitalized Transitional Government, which is expected to take office in May 2019.

904. Regarding the HCSS, there is a revision in the prosecutorial mandate of the Court, which now states that the HCSS shall be established by the African Union, to investigate “and where necessary” prosecute individuals bearing responsibility for violations of international law and applicable South Sudanese law committed from 15 December 2013 through the end of the Transitional Period.¹⁴⁷⁴ Some civil society representatives have expressed their concern to the Commission that the insertion of the term “where necessary” might indicate a deviation from the commitment to prosecute, and a limitation on prosecutorial discretion.¹⁴⁷⁵ While these concerns are legitimate, the Commission expects this article to be interpreted, in line with Article 5.3.2.2, to respect the independence and discretion of the court and its prosecutor. The Commission considers that the provision merely acknowledges that any prosecutions in the HCSS will be based solely on prosecutorial discretion which takes account of the outcome of investigations, and the sufficiency of the evidence.

905. Another change relates to the provisions on the selection of the commissioners of the CTRH, where national commissioners are now to be selected entirely by the R-TGoNU, without the requirement under the ARCSS to consult or take account of the views of the AU and the UN. As observed by the UN Special Rapporteur, the “truth commissions derive their power to a large extent from the moral authority and competence of commissioners”¹⁴⁷⁶ and therefore it remains paramount that the process of selecting commissioners is independent from the political pressure, credible, transparent and ideally, consultative.¹⁴⁷⁷ The credibility of the future CTRH will also depend on the representativeness of the commissioners who should ideally ensure a fair balance in the representation of ethnic, regional or religious groups, gender, and political views.¹⁴⁷⁸

906. Even in the Pre-Transitional Period, the parties to the agreement have a duty to protect and contribute towards the objectives of the agreement. With regard to the HCSS, the Commission has continued to call upon IGAD and the AU to set clear timelines for the Court’s establishment.

b) The Hybrid Court for South Sudan

907. Under the R-ARCSS, the HCSS is to be established by the AU to among other things investigate and prosecute “individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period”¹⁴⁷⁹. The AU’s prominent role in the establishment and operationalization of the Hybrid Court is no accident. It derives from the work of the AU Commission of Inquiry established in 2014 to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities.¹⁴⁸⁰ The findings of the investigation pointed to large scale abuses committed with impunity, leading the AU to call for a process of national healing and reconciliation, as well as political justice and reparations for victims.¹⁴⁸¹ The report further reiterated that accountability must be pursued as part of a wider process of societal reconciliation if sustainable peace is to be achieved in South Sudan.

¹⁴⁷³ R-ARCSS, Article 5.1.1.

¹⁴⁷⁴ R-ARCSS, Article 5.3.1.1

¹⁴⁷⁵ Confidential Meeting, Juba, 7 December 2018.

¹⁴⁷⁶ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, 28 August 2013, A/HRC/24/42, para. 53.

¹⁴⁷⁷ OHCHR, *The Rule of Law Tools for Post-Conflict States: Truth Commissions*, HR/PUB/06/1, 2006, p. 13.

¹⁴⁷⁸ OHCHR, *The Rule of Law Tools for Post-Conflict States: Truth Commissions*, HR/PUB/06/1, 2006.

¹⁴⁷⁹ ARCSS, Chapter V, Article 3.

¹⁴⁸⁰ African Union Peace and Security, *Final Report of the AU Commission of Inquiry on South Sudan*, 27 October 2015.

¹⁴⁸¹ African Union Peace and Security, *Final Report of the AU Commission of Inquiry on South Sudan*, 27 October 2015.

908. In accordance with the terms of the 2015 Agreement, the HCSS should have been fully operational by April 2017. As noted above and discussed below, at a high level meeting, the AU Peace and Security Council in September 2015 made a firm decision mandating the AU Commission to establish the Court. Yet three years since the signing of the ARCSS, the court is yet to be established, and that agreement has now given way to the R-ARCSS with new timelines and new approval mechanisms. Negotiations for the establishment of the court between the AU and the Government of South Sudan reached a stalemate in December 2017, despite the completion of the drafting of the Statute for the Court and a draft memorandum of understanding, which the Government has failed to sign.

909. In April 2018, following a visit to South Sudan by a high-level AU Peace and Security Council delegation, the AU announced that it had reached an agreement with the Government for setting up the court. However, no progress was made thereafter, and the government has continued to give mixed signals of its commitment to the court. Various government ministers, including the Minister of Information, have publicly declared their reservations about the operationalization of the Court, arguing that it would undermine peace efforts.¹⁴⁸² With the reiteration in the R-ARCSS of the parties' commitment to the Court, it should be expected that no further impediments will be cited in the way of its establishment.

910. However, the Commission has also been informed by other officials that the Government has reservations in signing the memorandum of understanding with the AU.¹⁴⁸³ While these reservations have not been disclosed, it is believed the government has two primary concerns. First, that signing the Memorandum of Understanding could trigger the immediate establishment of HCSS, which it is not ready for—the R-ARCSS has now clarified that the Court is to be established by the R-TGoNU. Secondly, officials may be concerned about the prospect an indictment by the court which would, even in the absence of a conviction, preclude them from holding office in the transitional or subsequent governments as prescribed in the R-ARCSS¹⁴⁸⁴. In discussions with the Commission in December 2018, officials further indicated that the government intended to domesticate all the relevant legal instruments pertaining to the HCSS, in order for the Court to become operational in the country.¹⁴⁸⁵ This will inevitably entail further delays in the setting up the court.

911. Bearing in mind the enormous deficits in the rule of law and the domestic justice system in South Sudan engendered by the conflict, it is evident that although the HCSS has primacy over domestic courts in pursuing those responsible for violations of international law and relevant South Sudanese law,¹⁴⁸⁶ the HCSS is likely to have limited capacity and therefore may not be able to hold to account a large number of perpetrators. Consequently, the prosecutorial policy once developed by HCSS will ultimately clarify the way in which HCSS prosecutors will exercise their powers and discretion. Given the practice of other hybrid and international tribunals, the HCSS is likely to focus on emblematic cases or high level perpetrators alleged to bear the greatest responsibility for the most serious crimes.

912. It is unlikely that the Hybrid Court will have a capacity to deal with all the crimes that have been committed during the conflict, it is essential to build and strengthen the capacity of the national justice system, to play a complementary role in ensuring accountability. Reforming and capacitating the judicial system would also fundamentally bolster the confidence of general public in rule of law institutions and more generally in the state, thus contributing to the rebuilding of sustainable peace and stability.

c) *Commission on Truth, Reconciliation and Healing*

913. The CTRH is to inquire into all aspects of human rights violations, abuses, breaches of the rule of law and excessive abuses of power, and to investigate, document and report on the causes of conflicts and recommend processes for victims to enjoy a full right to remedy, including reparations and compensation.¹⁴⁸⁷ The CTRH is to make sustained efforts of public-

¹⁴⁸² See e.g., Sudan Tribune, "South Sudan says establishing Hybrid Court undermines peace", 31 January 2017; VOA, "South Sudan Government Objects to War Crimes Court", 3 October 2018.

¹⁴⁸³ Meeting with a governmental delegation headed by the Minister of Justice, Juba 23 August 2018.

¹⁴⁸⁴ R-ARCSS, Article 5.5.1.

¹⁴⁸⁵ Meeting with the Minister of Cabinet Affairs and the Minister of Defence and Veteran Affairs, 6 December 2018.

¹⁴⁸⁶ R-ARCSS, Article 5.3.2.2.

¹⁴⁸⁷ R-ARCSS, Article 5.2.2.1.

education and awareness raising and regularly inform and involve the people of South Sudan, and engage with youth and women concerning its work, and to inform its understanding of the extent and pattern of past violations, their causes and consequences, as well as possible ways of preventing recurrence of conflict, abuses and violations in South Sudan.¹⁴⁸⁸ As with the HCSS, progress towards the establishment of the CTRH slackened considerably.

914. A technical committee created by the government to support sensitization activities and awareness raising about the CTRH barely managed to conduct a few rounds of consultations on the legislation for establishing the CTRH, some of which took place in refugee camps in neighbouring Ethiopia, Sudan and Kenya. Whilst many participants were able to express their opinions freely, others complained about challenges such as insufficient sensitization prior to the consultation and a lack of genuine commitment by the Government. Most internally displaced persons were also reluctant to participate in the process, questioning the timing, relevance and credibility of the process. The Commission has informed the government of its readiness to provide technical support for developing the legislative framework for the CTRH.

915. Under the R-ARCSS, the timeframe for the promulgation of the legislation to establish the CTRH has been reduced from six to three months after the formation of the revitalized Transitional Government. While this might have been in order to align its establishment with the HCSS, it is difficult to imagine how this target will be met given that the government failed to make progress under the more generous timeframes of the ARCSS. Neither would it be appropriate to rush legislation and appointments to the CTRH at the expense of thorough consultations, credibility of the commission and integrity of commissioners.

916. Because truth-telling is critical for the process of a society's recovery from conflict or repression from the early stages of post conflict transitions, the timely establishment of the CTRH by the R-TGoNU remains imperative. It will provide an important forum for reflecting on the past and will help to build a reliable body of information towards meeting transitional justice goals. In particular, the contextual and factual analysis of violations as established by the commission can contribute to criminal accountability efforts, while recommendations on institutional reforms and reparations can serve as a significant advocacy tool and can generate pressure on the government to act. Of the three Chapter V institutions, the process for the establishment of the CTRH will require the most inclusive participation of stakeholders in its formation, including in the selection of commissioners.

917. The preparatory process will however require sufficient time, likely beyond the stipulated three months, to enable country-wide consultations, outreach and sensitization efforts. As many South Sudanese will continue to live under conditions of forced migration for the foreseeable future, appropriate arrangements should also be made to ensure that displaced persons and refugees are also consulted and can participate in the processes of the CTRH. The scale of the challenge of sensitization is illustrated by a recent survey conducted by the South Sudan Civil Society Forum on the revitalized peace process and its outcomes, which suggests that the South Sudanese public still has a limited knowledge and understanding of the transitional justice processes in the R-ARCSS. Only 33 percent of respondents had heard of the CTRH.¹⁴⁸⁹

918. The CTRH commissioners will be selected by the R-TGoNU, including in consultation with the AU and the UN. Given the deep political divisions in South Sudan, it is imperative for the legitimacy of the CTRH that the processes are transparent and based on objective criteria. Consultations should include a broad, fair and balanced representation of opposition groups, civil society, women's groups, religious organizations and other sections of society. The consultative model has been adopted in the selection of commissioners in

¹⁴⁸⁸ R-ARCSS, Article 5.2.2.3.

¹⁴⁸⁹ See South Sudan Civil Society Forum, "Revitalizing Peace in South Sudan: Citizen Perception of the Peace Process", 27 November 2018, p. 29.

South Africa,¹⁴⁹⁰ Sierra Leone,¹⁴⁹¹ Liberia,¹⁴⁹² Timor-Leste¹⁴⁹³ and Kenya.¹⁴⁹⁴ In these instances, the selection process typically involved the setting up of a selection panel composed of representatives of various stakeholders, including victims groups, civil society, academia or local leaders, to least the view. The public was asked to nominate candidates, whom then were interviewed by the selection panel. The latter was responsible for providing a short-list of candidates to the appointing authority.¹⁴⁹⁵

d) *The Compensation and Reparation Authority*

919. Under the Agreement, the Compensation and Reparation Authority is to “provide material and financial support to citizens whose property was destroyed by the conflict, and to help them to rebuild their livelihoods”.¹⁴⁹⁶ The Government, however, has continued to argue, including in its interactions with the Commission, that it lacks the resources to set up the Compensation and Reparation Fund (CRF) that the Authority is to administer, and the utilisation of which is to be guided by legislation to be enacted by primary legislation.¹⁴⁹⁷

920. Although the remit of the CRA is focused on addressing loss of property and livelihoods, the need for other forms of reparation is envisaged and recognised in the ARCSS, through the mandate of the CTRH, whose functions include responsibility for recommending guidelines for determining the type and size of compensation and reparation for victims,¹⁴⁹⁸ and for identifying and determining victims’ right to a remedy on the basis of applications. It is striking that while Chapter V of the R-ARCSS contains detailed guiding provisions on the establishment of the HCSS and the CTRH, the agreement leaves the elaboration of the workings of the Fund to a future law.¹⁴⁹⁹ The decision to develop principles and guidelines relating to reparations at the later moment gives opportunity for deeper consideration of how best to ensure an effective framework for reparations that is coherent and integrated across the different institutions; all of which are envisaged to play a role in reparations. This also points to the importance of the CTRH, which could create the basis for the future reparation policy by providing relevant recommendations.

921. Reparations should not be seen solely as the work of formal institutions. While the CRA and CTRH will contribute to the fulfilment of the Government of South Sudan’s duty to acknowledge the widespread and systematic violations of human rights and to initiate steps aimed at repairing the material and moral damage of past abuses, there are also other non-formal institutions notably traditional justice mechanisms, that will also have an important contribution to make within a future reparations programme.

922. In fact, South Sudanese law already provides for reparations—primarily in the form of compensation—for victims of crime, including in the case of homicides, where the award is made by the criminal court trying the crime.¹⁵⁰⁰ As discussed below, the Terrain case awarded compensation to the victims, including with respect to the loss of earnings as an indirect consequence of the crimes committed.¹⁵⁰¹ Furthermore, compensation and other forms of symbolic reparations are deeply embedded in, and indeed characterise, the customary and traditional justice practices across all South Sudanese communities. The

¹⁴⁹⁰ 17 members (nine men, eight women), see Truth and Reconciliation Commission of South Africa Report, Final Report, October 1998, volume 1.

¹⁴⁹¹ Seven members (four men, three women), see Truth and Reconciliation Commission of Sierra Leone, Final Report, November 2004, volume 1, chapter 2.

¹⁴⁹² Nine members (five men, four women), see Truth and Reconciliation Commission of Liberia, Final Report, June 2009, volume 1.

¹⁴⁹³ Seven members (five men, two women), see, on the selection procedure, UNTAET, Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001, section 4.

¹⁴⁹⁴ Seven members (four men, three women), see Truth Justice and Reconciliation Commission Act No. 6 of 2008 of Kenya, clauses 9, 10, and first schedule.

¹⁴⁹⁵ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, A/HRC/24/42, 28 August 2013, para. 56.

¹⁴⁹⁶ R-ARCSS, Article 5.4.2.4.

¹⁴⁹⁷ R-ARCSS, Article 5.4.2.5.

¹⁴⁹⁸ R-ARCSS, Article 5.2.2.3.4.

¹⁴⁹⁹ R-ARCSS, Article 5.4.2.5.

¹⁵⁰⁰ Code of Criminal Procedure Act (2008), section 6(g). Under section 6(i) the court shall also recognise and enforce voluntary reconciliatory agreements between parties.

¹⁵⁰¹ See below “Terrain Trial” section (section VIII(D)(8)).

CTRH is to play an oversight role with respect to traditional justice mechanisms,¹⁵⁰² and in that regard, it can potentially facilitate a more systematic and appropriate use of reparations through these processes.

923. Any effective compensation and reparation programme will need to take seriously and reflect the needs and concerns of victims. Victims and Victims groups must be actively involved in the design and implementation of the reparation programmes. Once established, victims and victims' groups should be fully informed of the reparations process, including how to apply for and receive reparations.

924. In its interactions with the Government, the Commission has sought to share its experiences drawn from how other countries in the region have managed reparation programmes.¹⁵⁰³ It is especially important for the implementers and stakeholders to recognise that financial awards to victims and material compensations constitute only one element as a holistic understanding of reparations, is not limited to financial payments. Reparations carry a broader meaning; they consist of material and non-material elements, including restitution, compensation, rehabilitation and guarantees of non-recurrence. They are arguably the most victim-centred remedy, having the potential to make a real difference in the lives of victims.

925. Because men and women experience conflict differently, reparations must be gender sensitive and tailored to meet their specific needs. In South Sudan, women and girls have faced the most violence, economic and political marginalization and the denial of basic rights. Gender inequality is at the root of these circumstances which is reflected in chronic discrimination in areas such as employment, political and property rights. A weak legal system limits women's access to legal redress. The current conflict has further exacerbated these conditions, enabling the proliferation of the most vicious forms of gender-based violence, including widespread use of sexual violence as a tactic of war. The centrality of women as victims and their special status in the design and implementation of any reparations programme should therefore be recognized and should inform any meaningful reparation process. The Commission finds it regrettable that very little effort has been made by the government to engage the people most affected by the conflict, in particular women and girls, many of whom are part of the over 4 million refugees and internally displaced.

2. Challenges and Dilemmas

926. Having only attained independence in July 2011, preceded by more than 40 years of almost continual war, South Sudan was already a fragile, fledgling state even before the outbreak of fresh hostilities in December 2013. The adverse impacts of a conflict, characterized by massive violations, have been compounded by broken or non-existent institutions, limited resources allocated to the rule of law, diminished security, lawlessness and a population increasingly sharply divided along ethnic lines. Rebuilding such a society and achieving sustainable peace will therefore require immense political will and social investment, and the maintaining of a delicate but necessary balance between re-establishing the rule of law, addressing gross human rights violations and abuses alongside the promoting of measures for securing and consolidating long-term peace, reconciliation and healing. This will require the government to prioritise and allocate its resources more meaningfully towards social services, and measures to repair the fabric of society including the harm caused to its citizens by the conflict. As the discussion in this report on political economy¹⁵⁰⁴ notes, the government has been spending a disproportionate percentage of its revenues on the security sector. Now that an agreement has been reached to end the war, citizens will now expect a reduction in security and defence expenditure and a greater emphasis on social support services. Finally, South Sudan is also a deeply traditional society, where ethnic ties and attachment to culture remain strong, making it inevitable that traditional institutions will continue to play an important role in the processes, within and between communities, of dealing with the past.

¹⁵⁰² R-ARCSS, Article 5.2.2.3.9.

¹⁵⁰³ Meeting with representatives of the Ministry of Justice, Geneva, 20 September 2018.

¹⁵⁰⁴ See above "Economy" section (section IV(A)(7)) and figures 1 and 2.

a) *Leadership of Transitional Justice*

927. In the attainment of transitional justice goals, societies seek to transcend permanently the negative politics that have sustained conflict or misrule. The political contestation usually continues during the transition, and political actors and constituencies make essentially political appraisals and calculations about whether the different transitional justice processes or outcomes would advance or damage their perceived interests or those of political opponents.¹⁵⁰⁵ With respect to South Sudan, the Commission is mindful of the challenge of achieving genuine truth, justice and reconciliation in a period of political and social flux, especially when the same political and military leadership that has contributed to the violations and damage to the country, and many of whom are implicated in human rights violations and abuses, are by virtue of their positions expected to support and drive the transitional justice process.

928. Best practises of transitional justice in the region have demonstrated that the government and national authorities must demonstrate national ownership and political will to create and sustain a conducive environment in which the HCSS, the CTRH and the RCA are able to function effectively and make their necessary contributions. It is therefore imperative that the Revitalized-Transitional Government actively leads the process and protects an environment that will ensure freedom of expression, so that diverse, including dissenting, opinions can be communicated freely. This would be an essential step to open up democratic space and the pursuit of justice, national healing and reconciliation. In particular, victims and witnesses should be encouraged and facilitated to engage with transitional justice mechanisms, and to express their views and concerns without fear, or threat of reprisal.

929. The Commission is concerned at the current lack of political freedoms particularly freedom of speech and expression in South Sudan. Voices which are critical of government are labelled as dissenters and targeted by the National Security Service, and subjected to threats, intimidation and sometimes detention.¹⁵⁰⁶ Transitional justice processes cannot thrive in an environment of pervasive fear, and the process of recovering from the decades of human rights abuses and impunity must begin with the national authorities ensuring that these important processes take place in an atmosphere conducive to genuine engagement.

b) *Peace versus Justice?*

930. Chapter V of the R-ARCSS prioritises accountability using a range of mechanisms, including the Hybrid Court. This is a significant departure from the Comprehensive Peace Agreement of 2005, which did not include any justice or accountability mechanisms for the serious crimes committed in the years before the signing of the CPA.

931. Nevertheless, the question of whether the pursuit of criminal justice for crimes committed since December 2013 might jeopardise the current peace process has lingered in the background, occasionally finding expression in the pronouncements of officials. Many South Sudanese have expressed their perceptions that the delay in establishing the HCSS is due to the government's reluctance to create a court which might pursue high profile political leaders. Many civil society representatives view the government's investment in the National Dialogue process as an attempt to privilege peace ahead of justice. While reconciliation often trumps justice in deeply divided societies, stable peace ultimately hinges on finding a judicious balance between the two objectives. Even where deeply divided countries have made short-term pragmatic concessions that privilege reconciliation and peace at the expense of justice, the purpose has ultimately been to strengthen institutions that diminish the persistence of impunity.¹⁵⁰⁷

¹⁵⁰⁵ Murithi T, *The Politics of Transitional Justice in the Great Lakes Region of Africa* (Auckland Park: Fanele, 2016)

¹⁵⁰⁶ See above "Securitization of the State" section (Section VI(A)) and "Repression and Freedom of Expression and the Press" section (Section IV(A)(5)).

¹⁵⁰⁷ AU Panel of the Wise, *Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity, Report of the AU Panel of the Wise*, International Peace Institute, Africa Union Series, February 2013.

3. Adapting Transitional Justice Responses

a) *Holistic Approach to Transitional Justice*

932. The Commission since the inception of its mandate has supported the call for a holistic approach to the pursuit of accountability, justice, truth, reconciliation and healing which ensures that transitional justice mechanisms are sensitive to how best to serve the needs of South Sudanese society in its diversity and to address the particular manifestations and adverse impacts of the conflict on society.

933. Accordingly, in its work the Commission has emphasised the importance of implementing all aspects of the transitional justice framework adopted in the Chapter V of the peace agreements, with the fullest engagement of the South Sudanese people in the processes. In this connection, the Commission notes the communiqué and decisions¹⁵⁰⁸ of the Peace and Security Council of the African Union (PSC), which met at the level of heads of state and government in September 2015 (shortly after the signing of the ARCSS), and endorsed Chapter V of the Agreement as well as the recommendations of the Obasanjo Report. Drawing on the principles of the Constitutive Act of the African Union,¹⁵⁰⁹ the PSC directed the AU Commission to take all the steps necessary to establish the Hybrid Court and also to support the implementation within South Sudan of the other transitional justice mechanisms adopted by the ARCSS. The heads of state also underscored the need to ensure genuine ownership of the transitional justice processes by the South Sudanese people, so that they participate fully in the domestic transitional justice mechanisms, including in honouring the victims and seeking to repair the harm caused during the conflict.

934. With its complex history diverse cultures and divided society, and with considerable resources and potential for prosperity, a holistic approach to transitional justice in South Sudan would contribute towards the much-needed recovery of this young nation. Consequently, it is imperative that South Sudanese in all their diversity are encouraged and facilitated to participate in the planned transitional justice mechanisms and thereby develop a full sense of ownership of these potentially transformative processes.

b) *Role of Customary Justice*

935. In highlighting in Communiqué 547 the important contribution traditional mechanisms can make towards the search for reconciliation and justice, the PSC was also reflecting the reality that South Sudan, like many African societies is deeply anchored in tradition. For many South Sudanese, ethnicity continues to determine their primary identity; defining their sense of belonging. Community ties are often very strong and accordingly, traditional institutions will inevitably continue to provide the main recourse of the population for justice and for addressing conflicts, inter-community rifts, and serving to adjudicate a wide range of issues especially personal relationships.

936. It will therefore be necessary for South Sudanese communities to be active interlocutors and engage with the issues and processes of accountability and reconciliation, drawing on their customary mechanisms and laws, which are already formally recognised as a source of law by the national constitution.¹⁵¹⁰ Customary laws and practices are embedded within the community, draw on symbolism, stress acknowledgement of wrongdoing (and not amnesia), and emphasise reparations, including the payment of compensation.

937. As envisaged in the R-ARCSS, they are capable of delivering justice and facilitating processes of reconciliation and healing, although they might need to be adjusted to bring them in line with principles of natural justice.¹⁵¹¹ Concerns that such processes might exclude or disadvantage women participants are legitimate, and will need to be addressed. In this respect, the CTRH should, early in its mandate, develop a firm understanding of the contribution that customary institutions can make towards transitional justice, and make specific recommendations and provide guidance on how best to harness traditional

¹⁵⁰⁸ African Union Peace and Security Council, Communiqué 547, PSC/AHG/COMM.1(DXXVII), 25 September 2015.

¹⁵⁰⁹ The AU Peace and Security Council expressly referred to Article 4(o) of the Constitutive Act, concerning the total rejection of impunity. Communiqué 547, PSC/AHG/COMM.1(DXXVII), 25 September 2015, para. 15.

¹⁵¹⁰ Transitional Constitution (2011), Articles 5(c) and 122(1).

¹⁵¹¹ R-ARCSS, Article 5.2.2.3.9.

mechanisms in the immediate and long-term towards the range of goals of the transitional justice framework.

c) *Transitional Justice and Forced Migration*

938. The Commission has consistently heard from refugees and displaced persons that they do not want to be left out of the genuine transitional justice mechanisms. However, refugees and displaced persons, especially residents of the PoC sites within South Sudan, will often be deeply distrustful of the national authorities and other communities who might have caused them harm. They also reflect the deep polarisation of South Sudanese society. Forced migrants are key stakeholders whose needs for justice, reconciliation, reparation and healing need to be effectively addressed, so that they are not left behind as the envisaged national processes unfold.

939. Many individuals and families who have been driven from their lands and homes, will find on return that their properties have been taken over by others. Their return therefore needs to be carefully managed and supported in order to allow the rightful owners to either repossess their properties or to receive due compensation.

d) *Imperative Need for Partnerships*

940. The transitional justice processes provided for under the R-ARCCS are complex and will place significant demands on the leadership and resources of South Sudan. The R-ARCCS has retained the requirement in the 2015 Agreement for the Transitional Government to fully cooperate with and seek the assistance of the AU, the UN and the African Commission on Human and People's Rights (ACHPR) in designing, implementing and facilitating the work of the transitional justice mechanisms. The Commission met with the ACHPR Commissioner having responsibility for South Sudan, who briefed the Commission of the ACHPR's intention to activate its formal role under the Revitalized Agreement and to enhance its role in monitoring and reporting on emerging and new human rights issues South Sudan. The ACHPR also intends to deepen its collaboration with other relevant human rights and peace and security bodies of the AU and UN and pledged in this regard to cooperate with this Commission.

4. The National Dialogue

941. In December 2016, President Kiir initiated a National Dialogue process aiming to promote national unity and reconciliation.¹⁵¹² At the time that the National Dialogue was announced, the country was still reeling from the events of July 2016 and the renewed conflict. It was therefore inevitable that the process would attract deep scepticism from sections of South Sudanese society particularly, displaced persons, refugees and members and supporters of armed groups. Inauspiciously, perhaps following the model of the Sudanese National Dialogue, President Kiir declared himself the patron of the dialogue, a decision that he later reversed in response to the criticism,¹⁵¹³ leaving the leadership to a steering committee of eminent persons, perceived by many South Sudanese as largely sympathetic to the government.

942. Despite the criticisms about the non-participation of significant sections of the South Sudanese, the organisers of the National Dialogue strove to ensure that the consultations were as free and candid as possible. The Dialogue managed to gather a wide range of views from the public on the root causes of the conflict, and received surprisingly candid responses, including submissions attributing blame to the government for the crisis in South Sudan.¹⁵¹⁴ In an effort to extend its reach as widely as possible, a subcommittee of the organisers also visited several countries including Ethiopia, Kenya, Uganda and the Sudan to consult with South Sudan refugees and the diaspora.¹⁵¹⁵ The committee indicated to the Commission in December 2018 that there were only a handful of areas in South Sudan that they had not been

¹⁵¹² www.ssnationaldialogue.org/national-dialogue-objectives/

¹⁵¹³ VOA, "President No Longer Runs South Sudan National Dialogue", 1 June 2017.

¹⁵¹⁴ Reports of the consultations are on the website of the National Dialogue Secretariat, and including for example: *National Dialogue Listens to Plight of Anyuak of Pochalla and Akobo*, 27 March 2018, available at <https://www.ssnationaldialogue.org/news-item/national-dialogue-listens-plight-anyuak-pochalla-akobo/>.

¹⁵¹⁵ National Dialogue, "Press Release: Media Briefing on Consultations in Uganda and Kenya", 5 December 2017.

able to reach, and that they had reached an understanding with the Church to carry out grassroots consultations in those places.¹⁵¹⁶

943. Although some refugees were reluctant to engage in the consultation process, arguing that the political conditions were not conducive for genuine dialogue, many interacted quite openly with the representatives of the National Dialogue.¹⁵¹⁷

944. Despite lingering perceptions that it is acting at the behest of the Government to undermine the Chapter V Transitional Justice obligations, the National Dialogue has continued its work. In June 2018, the grassroots consultations were completed amidst challenges of security concerns and lack of resources, which limited the depth and geographic coverage of the consultations. The National Dialogue organisers are in the process of analysing the views gathered, and it plans to hold three regional conferences, for Equatoria, Greater Upper Nile and Bahr el Ghazal, after which it would convene a national conference in the first half of 2019, apparently prior to the establishment of the R-TGoNU.

945. Although there is still no clarity about how the outcome of the National Dialogue will be integrated into policy making processes, leaders of the National Dialogue also expect that the outcome of the consultations, particularly the recommendations would, at the very least, contribute ideas for addressing some of the challenges that the country faces, including on such constitutional matters as the administrative restructuring of the country. In December 2018, the National Dialogue Committee informed the Commission it had begun engaging constitutional experts¹⁵¹⁸ to assist in their deliberations and the formulation of their conclusions.

946. Since the signing of the R-ARCSS, the steering committee has also renewed its calls to the opposition groups to participate in the process, stressing the complementarity between the Revitalized Agreement and the National Dialogue. This prompted the SPLA/IO and the South Sudan Opposition Alliance, two of the signatories of the agreement, to indicate their interest in potentially participating in the National Dialogue process, although at the time of writing, they had not yet fully embraced the process. President Kiir has pledged to consider changes in the structuring of the National Dialogue, to make participation more appealing to opposition groups.

947. Despite the difficulties surrounding the National Dialogue, many citizens within the country have engaged with the organisers during the consultations in good faith, expressing their views with a remarkably high degree of candour. When citizens express their views at the invitation of the state, they are putting their trust in the authorities to respond to their concerns. Their views must therefore be accorded due consideration, otherwise there is a risk that such citizens who would have participated in good faith might lose faith in future consultation processes. More efforts should therefore be made to raise awareness about the how those views will be processed and considered for implementation. A recent survey conducted by the South Sudan Civil Society Forum revealed that whilst most South Sudanese recognized the importance of grassroots healing and dialogue process (76 percent), only 45 percent of respondents had heard of the National Dialogue.¹⁵¹⁹

C. Accountability

948. As already discussed in this report, there has been a consistent pattern of the commission of gross violations of international human rights law and serious violations of international humanitarian law, with devastating consequences for individuals and society. Government and allied forces, both factions of the SPLA/IO, and other armed groups continued to deliberately target civilians including on ethnic grounds, committed abductions, rape and sexual violence, looting and wanton destruction of villages and civilian property.¹⁵²⁰ Whilst the UN estimates that at least 50,000 may have been killed since the outbreak of the

¹⁵¹⁶ Meeting with National Dialogue representatives, Juba, 6 December 2018.

¹⁵¹⁷ Radio Tamazuj, "National dialogue committee concludes consultations in Arua district, Uganda", 22 November 2017.

¹⁵¹⁸ Confidential discussion with Expert from the National Dialogue Steering Committee, Juba, 9 December 2018.

¹⁵¹⁹ See South Sudan Civil Society Forum, "Revitalizing Peace in South Sudan: Citizen Perception of the Peace Process", 27 November 2018, p. 29.

¹⁵²⁰ See above Emblematic Incidents sections "Unity State, 2018", "Central Equatoria, 2018", and "Western Bahr el Ghazal, State 2018" (Section VII).

conflict in December 2013, the London School of Hygiene and Tropical Medicine has estimated the excess deaths in the country to be close to 400,000, with half of the lives lost estimated to be directly attributable to violence.¹⁵²¹

949. However, the Government of South Sudan has not demonstrated consistent political will to ensure accountability for these crimes. Added to this, the South Sudan criminal justice system lacks the capacity to address the crimes committed since the conflict erupted. Human Rights Watch, in its 2014 Report, cited a lack of independence and high politicization of prosecutors; climate of intimidation and threats against judges and lawyers, gaps and inadequacies in law as well as a lack of witness protection system, as major demonstrations of the weakness of South Sudanese legal system.¹⁵²² Impunity is also deeply entrenched in South Sudan's political culture and legal systems, effectively placing government forces and officials and their allied forces above the law.

950. For example, individuals implicated in attacks on civilians have been rewarded with promotions and government appointments instead of being held criminally accountable for their actions.¹⁵²³ As described above the Commission received information that one the SPLA Brigadier Generals who was a Commander in the offensive in southern Unity State between April and June 2018 may have been subsequently promoted.¹⁵²⁴ Likewise, one of the Deputy Director Generals in the NSS, who would have known about the human rights violations perpetrated against detainees but did not prevent them was subsequently given a Governor's post in 2017.¹⁵²⁵ The rewarding of officials implicated in serious human rights violations by promotions directly fosters impunity.

951. Since the beginning of the conflict, the Government has periodically undertaken to apply several measures including establishing investigation committees to hold perpetrators to account but, in general, has not followed through with the implementation of these undertakings.¹⁵²⁶ Various investigations committees were set up in the early stages of the crisis as in for example, in the immediate aftermath of the onset of hostilities in Juba, the government initiated multiple investigations into the violence, including an eight-person Human Rights Abuses Investigation committee established by presidential decree and headed by a former chief justice of the Supreme Court.¹⁵²⁷ Approximately 100 individuals were reported to have been arrested for the targeted killings that took place in Juba during the early days of the conflict. However, to date, little information has been provided about the identities of the detainees, the nature of the investigations, or the charges that were brought against them, and the reports of the investigations were never made public.

952. Following the July 2016 violence, the government also announced the formation of a General Court Martial to try SPLA soldiers accused of committing various crimes. Whilst a number of soldiers were reported to have been convicted for crimes including murder and rape, details of the trials were never provided to the public.¹⁵²⁸ Even though the alleged crimes were committed against civilians, the alleged perpetrators were not prosecuted in civilian courts, as would be required by national and international standards. Moreover, the South Sudanese criminal and military justice systems have repeatedly demonstrated a lack of

¹⁵²¹ Francesco Checchi, et al., "Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018", London School of Hygiene and Tropical Medicine, September 2018.

¹⁵²² Human Rights Watch, "Ending the Era of Injustice Advancing Prosecutions for Serious Crimes Committed in South Sudan's New War", 10 December 2014.

¹⁵²³ For example, a number of SPLA officers subject to sanctions have been promoted since being sanctioned. See above "Targetted Sanctions and Arms Embargo" section (section IV(A)(3)).

¹⁵²⁴ See above "Unity State, 2018: Responsibility" section (section VII(A)(6)).

¹⁵²⁵ See above "Securitization of the State" section (section VI(A)(11)).

¹⁵²⁶ See e.g. President Kiir established an Investigative Committee in October 2016 to investigate violations occurring in Yei; Yei River State established an Investigative Committee in December 2016 to investigate the alleged killing of 11 people in Central Equatoria in 2016 (see Human Rights Council, Report of the Commission on Human Rights in South Sudan, A/HRC/37/71, 13 March 2018, section VIII(A)); Republic of South Sudan, *Report of the Investigation Committee on Wau incident of 24-26th June 2016*, 1 August 2016, ERN D101519-D101553; President Kiir established an Investigative Committee in May 2018 to investigate the violations that occurred at Emmanuel Christian College in Goli on 14 May 2014 (see above section VII(B)(6)).

¹⁵²⁷ South Sudan News Agency, "Independent Investigation of Human Rights Violations in South Sudan Must Start Now", 22 November 2014.

¹⁵²⁸ Eye Radio, "Military Court Condemns Soldier to Death", September 2016.

capacity to conduct genuine investigations into allegations of serious violations, especially given the scale of the alleged violations reported in the current conflict.

953. Yet, as noted above, in the midst of this chronic impunity, there have been rare exceptions when perpetrators have been prosecuted, most notably, the Terrain Hotel trial in September 2018, which resulted in the conviction and sentencing of 10 soldiers to jail for their actions which resulted in the murder of a local journalist and the rape of five international aid workers. The trial, which this Commission observed, was seen as a test of the Government of South Sudan's ability and willingness to hold its soldiers to account. The Commission also notes that whilst this trial brought to justice the offenders in this particular case where international aid workers were targeted, there remains the broader problem of widespread sexual and gender-based violence against a large number of South Sudanese women and children which have gone unpunished.¹⁵²⁹

954. In relation to the opposition, the Commission notes that there has been no evidence, nor available public information, of any genuine accountability measures applied by opposition groups, including the SPLA/IO, to investigate, prosecute and punish violations committed by their members since the conflict erupted. The Commission requested the group for relevant information on such measures, but this was not forthcoming.

1. Amnesties and Accountability

955. Amnesties exclude the possibility of accountability and are seen as incompatible with the duty of states to investigate and prosecute gross violations of human rights law, and serious breaches of international humanitarian law as they deprive victims of their right to an effective remedy for such violations. While article 6(5) of Additional Protocol II of the Geneva Conventions makes provision for the granting of the broadest possible amnesties to "persons who have participated in armed conflicts, or those deprived of liberty, whether interned or detained, or reasons related to the armed conflict",¹⁵³⁰ the ICRC in its Rule 159 of the Customary International Humanitarian Law Database has specified that the granting of amnesties within the scope of this article does not extend to persons suspected of, accused of or sentenced for war crimes.¹⁵³¹ Furthermore, the Inter-American Court of Human Rights (IACtHR) in its decision against El Salvador for the massacres of El Mozote stated that this exception applies not only to war crimes but also crimes against humanity.¹⁵³²

956. South Sudan has a history of granting blanket amnesties for conflict-related crimes, often in an effort to facilitate the success of peace talks. As recently as August 2018, President Kiir declared a general amnesty for "Riek Machar and other estranged armed groups who waged war against the Government of the Republic of South Sudan"¹⁵³³ without any limitations or exceptions for allegations of crimes against humanity, war crimes or genocide. In February 2015, in the middle of negotiations, the President issued an order granting amnesty to all those who had been waging war against the State.¹⁵³⁴

957. However, blanket amnesties perpetuate historical injustice and protect those responsible for violent crimes which has contributed to a culture of impunity and have restricted victims' rights to obtain an effective remedy or reparations.¹⁵³⁵ Furthermore, while the offer of amnesties has been credited as an incentive for opposition groups to come to the negotiation table or to complete negotiations, amnesties have also been criticised for their potential to encourage rebellion. A June 2015 survey by the South Sudan Law Society, in partnership with UNDP showed that South Sudanese overwhelmingly support holding

¹⁵²⁹ For more in-depth discussion of the Terrain trial, see below (section VIII(D)(8)).

¹⁵³⁰ See Article 6, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

¹⁵³¹ See Rule 159 of the ICRC customary IHL study: https://ihldatabases.icrc.org/customaryihl/eng/docs/v1_rul_rule159. See also OHCHR Rule of Law Tools for Post-Conflict States: Amnesties, 2009 at: https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf.

¹⁵³² See *Merits, Reparations and Costs, Massacres of El Mozote and Nearby Places v. El Salvador*, Decision of October 25, 2012, Series No. 252, para. 286.

¹⁵³³ Republican Order No. 14 of 2018, 9 August 2018.

¹⁵³⁴ Nyamilepedia, "South Sudan: Salva Kiir Issues An Amnestied Decree In Attempt To Restore Peace!", 24 February 2015.

¹⁵³⁵ For example, in 2016, the President issued three presidential orders granting amnesties to all those who "waged war against the state." Republican Order No. 18/2016.

alleged perpetrators of human rights abuses accountable through criminal justice processes.¹⁵³⁶

958. The Government has clarified “the misconception that amnesty being issued by the President of the Republic condone violations of human rights in its communications with the Commission and has stated that the latest amnesty was restricted only to offences against the state as provided in the South Sudanese penal law. In this connection, it pointed out that the Terrain Hotel trial would not have taken place if the amnesty had covered serious crimes committed by members of organized armed forces.”¹⁵³⁷

959. No amnesty can prevent the Hybrid Court from indicting a person. As the R-ARCSS clearly provides: “[t]he HCSS shall not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties”.¹⁵³⁸ The Draft Statute of the Hybrid Court similarly confirms that: “An amnesty or pardon granted to any person falling within the jurisdiction of the Hybrid Court in respect of crimes referred to in this Statute and any statutes of limitation shall not be a bar to prosecution.”¹⁵³⁹

2. Conclusion

960. Because of the scale of the violations and crimes, the need for justice, reconciliation and healing in South Sudan is critical and indispensable for the recovery of the country and preventing a return to the horrific violations of recent years. South Sudan however faces significant challenges in implementing the agreed transitional justice mechanisms and processes a lack of financial, organisational and human resources. Chapter V of the R-ARCSS provides a sound basis for the delivering justice, promoting reconciliation and providing for reparations for victims, including by harnessing and adapting South Sudan’s rich customary institutions. The transitional justice architecture create by the Revitalized Agreement has the potential, if implemented, to contribute to the achievement of the broader goals of transitional justice as long as there is sustained political will and effective leadership for its implementation. The task of the Revitalized Government, when it takes office in May 2019, will therefore be to inject greater urgency into the establishment of these mechanisms and the other processes for dealing with the past, in a manner that honours the victims, and ensures that no South Sudanese are excluded from participating in these processes. In that endeavour, the national authorities must be prepared to invest sufficient national resources in the pursuit of the goals of transitional justice, and to seek and receive assistance from other bodies, including the AU, the UN as appropriate.

D. Domestic Criminal Justice Context

961. The transitional justice mechanisms set out in Chapter V of the R-ARCSS are essential to addressing the gross violations and international crimes that have occurred during the conflict and to starting the reconciliation, healing and institutional processes necessary to move South Sudan beyond its cycles of recurring violence toward enduring peace. However, in the long term, sustainable peace will also require South Sudan to develop a robust domestic culture of the rule of law buttressed by strong justice institutions. The history of impunity, driven by blanket amnesties, promotions for those most responsible for atrocities, and a weak domestic rule of law capacity has severely undermined victims’ ability to obtain effective remedy or reparations.

962. As detailed in the Commission’s last report, there are pockets of capacity and of proactive committed members of the law enforcement and legal sectors providing the basis for rule of law development in South Sudan; however, there remains a serious lack of resources and an ongoing need for skills development and a sustained contribution to capacity building. The Commission will not repeat that analysis but merely highlight a few areas where there have been notable developments.

¹⁵³⁶ See UNDP, *Search for a New Beginning: Perceptions of truth justice, reconciliation and healing in South Sudan*, June 2015, p. 3.

¹⁵³⁷ Statement of the Delegation of South Sudan to the 63rd Session of the African Union Commission on Human and Peoples’ Rights, 24 October-13 November 2018.

¹⁵³⁸ R-ARCSS, Article 5.3.5.4.

¹⁵³⁹ Draft Statute of the Hybrid Court of South Sudan, Article 13.

3. Uneven Geographic Access to Justice

963. There are approximately 145 public prosecutors, 165 judges and 1,150 defence lawyers in South Sudan. However, the majority of South Sudan's lawyers and judges are concentrated in Juba, and play only a limited role in courts outside of the capital. While many towns outside Juba have judges appointed to their courts, many of these appointed judges in fact reside in Juba, making them unavailable to hear cases in their appointed courts. This is the case, for example, in Malakal where the appointed High Court judge resides in Juba. Similarly, a recent UNMISS Rule of Law Advisory Section assessment in Bor found that the newly appointed High Court Judge had returned to Juba and it was unclear when he would be returning. This left Bor with only two second-grade county judges available.¹⁵⁴⁰ The availability of justice sector resources is even more sparse outside of State capitals.

964. When the Commission inquired with one State official in Bentiu about what measures had been taken to pursue accountability in relation to the serious crimes committed in southern Unity State in 2018, he responded that there were no judges available but that some measures were being taken to bring perpetrators before customary courts.¹⁵⁴¹

965. This widespread recourse to customary courts to fill the gap in the formal justice sector has its own problems. Traditional courts themselves lack resources. For example, the traditional "Bench Court" in Bor, which has been attempting to fill the justice gap, itself lacks resources and does not have its own offices such that it hears cases sitting under a tree which, among other things, is not conducive to dealing with sensitive case involving vulnerable people.¹⁵⁴² Additionally, and more importantly, these traditional courts lack the legal authority to hear serious criminal cases.

966. In addition to turning to traditional justice mechanisms, the lack of capacity in the statutory justice sector also results in civilian cases being tried by Court Martials. The Terrain trial, detailed below is one such example. While there is general acknowledgement that cases involving civilians should not be heard before military courts, there is a partial acceptance of it at present in recognition that it is currently a more efficiently operating system and may be the only access to justice victims have.

967. In response to the lack of judicial resources outside of Juba, at the request of the national authorities, the UNMISS Rule of Law Advisory Section provided logistical support to bring a High Court judge from Renk to Malakal to constitute a mobile court in Malakal in October 2018. The mobile court's primary purpose was to hear criminal cases arising out of the PoC site; however, while there, it also took the opportunity to hear a number of other criminal cases pending in Malakal. The mobile court operated for a week and tried five people charged with sexual violence crimes in the PoC site which resulted in convictions and sentences ranging from 18 months to 10 years.¹⁵⁴³ As a result of the success of the mobile court in Malakal, another mobile court deployed to Bentiu in mid-December 2018 and again late January 2019. Over the course of the December 2018 mobile court session in Bentiu, 16 cases were heard, resulting in eight convictions including five for rape. The January 2019 mobile in court session in Bentiu completed nine cases, resulting in six convictions, including one for rape of a minor.¹⁵⁴⁴ This was the first time a court was opened in Bentiu in the past three and a half years.¹⁵⁴⁵

968. While the focus of these mobile courts has been to facilitate the processing of cases arising from the PoC sites, this mobile court model has the promising potential to address some of the challenges of accessing justice in more remote areas where there are insufficient judicial resources if they could be deployed more widely. The Commission encourages the Government of South Sudan and UNMISS to continue to work together on this undertaking.

¹⁵⁴⁰ UNMISS Rule of Law Advisor Section, Exploratory Mission to Bor, 6 November 2018, available on file with the Commission.

¹⁵⁴¹ Confidential Meeting, 4 October 2018.

¹⁵⁴² UNMISS Rule of Law Advisor Section, Exploratory Mission to Bor, 6 November 2018, available on file with the Commission.

¹⁵⁴³ For cases arising out of the PoCs, the UNMISS Rule of Law Advisory Section liaises with national authorities to have cases heard within the domestic justice system and provides logistical support to the national authorities for these cases. In so doing, it ensures due process and human rights are respected, including ensuring that no accused is transferred to national authorities where charges are framed in such a way that the death penalty could be imposed, monitoring trials for fair trial rights, and inspecting prison conditions.

¹⁵⁴⁴ UNMISS Rule of Law Advisory Section.

¹⁵⁴⁵ Radio Miraya, "Mobile court opens in Bentiu after years of absence of justice systems", 12 December 2018.

4. Prolonged and Arbitrary Detention and Case Management

969. The Commission has considered in detail the prevalence of arbitrary arrest and detention by the NSS and SPLA Military Intelligence which has resulted in widespread arrest and detention without charge or due process and widespread torture and inhumane treatment. Within the regular criminal justice sphere, however, there are also problems with prolonged and arbitrary detention, arising not, as in the case of the NSS and SPLA Military Intelligence, as a result of intent to deprive detainees of due process, but rather as a result of lack of resources and case management inefficiency.

970. In recognition of this problem, the Director General of the National Prison Service of South Sudan constituted a Task Force on Prolonged and Arbitrary Detention for Juba Central Prison in August 2018 with the support of the UNMISS Rule of Law Advisory section. It finalised an action plan in September 2018 and has since then been working to identify priority cases for urgent disposal, submitted requests for release and/or expedited proceedings in numerous cases and developed a stronger case-management and record-keeping system.¹⁵⁴⁶

971. In its first months of operation, the Task Force realised some successes including submitting release requests for 15 adult prisoners on remand for minor crimes, many of whom had been awaiting trial for prolonged periods, including in some cases longer than the maximum possible sentences for the crime for which they were charged. Thirteen of these suspects have been released while two are still pending.¹⁵⁴⁷ Similarly, requests for expedition of proceedings were submitted in 41 cases where accused were awaiting trial since before 2017. Of these cases, two were convicted, 20 were released and the remainder are pending. Since the initial assessment undertaken between March and July 2018, the number of extremely prolonged pre-trial detention cases in Juba Central Prison (dating from between 2013 to 2016) have dropped from 29 to 14.¹⁵⁴⁸

972. Significant work needs to be done to address prolonged and arbitrary detention within the criminal justice sector, including addressing the very high numbers of remand warrants which have expired and have not been renewed, there has been encouraging progress on this important issue since the inception of the Task Force. The Commission encourages this initiative and the allocation of appropriate resources to support the logistics required to make it a continued success.

973. Further, such initiatives should be extended beyond Juba. In this regard, the Commission understands that efforts to relieve prolonged and arbitrary detention in prisons outside Juba has depended in many cases on the voluntary work local lawyers and organisations. While this work is commendable, the Commission encourages the development of effective case management systems throughout the country.

5. Prosecuting Sexual and Gender-Based Violence

974. There remain significant challenges for victims of sexual and gender-based violence in seeking justice. There continues to be stigma attached to sexual violence, and particularly sexual violence by an intimate partner, and as a result many survivors do not report their experiences or seek justice.¹⁵⁴⁹ Many cases continue to be heard in traditional courts as the only available avenue, where the focus is on community cohesion and reconciliation rather than the protection of individuals. Traditional courts are often held in the open air which is not conducive to hearing sensitive sexual violence cases and continue to be gender-biased against women.¹⁵⁵⁰ Additionally, remedies often include an agreement between the two

¹⁵⁴⁶ Republic of South Sudan Ministry of Interior, National Prisons Service of South Sudan, *Draft Juba Central Prison Taskforce on Prolonged and Arbitrary Detention, First Quarterly Report*, 2018.

¹⁵⁴⁷ Republic of South Sudan Ministry of Interior, National Prisons Service of South Sudan, *Draft Juba Central Prison Taskforce on Prolonged and Arbitrary Detention, First Quarterly Report*, 2018.

¹⁵⁴⁸ Republic of South Sudan Ministry of Interior, National Prisons Service of South Sudan, *Draft Juba Central Prison Taskforce on Prolonged and Arbitrary Detention, First Quarterly Report*, 2018.

¹⁵⁴⁹ What Works to Prevent Violence Against Women and Girls Consortium, “No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan”, 2017; D. Deng, R. Willems, “Sexual and Gender-based Violence (SGBV) in Unity State, South Sudan”, *Intersections of Truth, Justice and Reconciliation in South Sudan*, March 2016; Care, “‘The girl has no rights’: Gender-Based violence in South Sudan”, 2014.

¹⁵⁵⁰ Justice Africa, “Justice in Practice: South Sudan”, 2015.

families resulting in the rapist paying a bride price to the family of the survivor and marrying the victim, compounding the distress and injury of the victim rather than remedying it.¹⁵⁵¹

975. Furthermore, there remains a large gap between reports of sexual violence documented by human rights bodies such as the UNMISS Human Rights Division or this Commission and the number of formal prosecutions for sexual violence. In 2016, the most recent year for which statistics are available, the Ministry of Justice and Constitutional Affairs recorded 255 sexual and gender-based crimes cases which resulted in 45 convictions, including 147 rape cases, which resulted in 25 convictions.¹⁵⁵²

976. The 2016 figures are skewed downwards as the court system as a whole recorded fewer cases that year as a result of the fighting that broke out in July. There was a large reduction in cases processed in part because judicial services largely ground to a halt in the second half of the year and in part because the security situation, including massive levels of displacement, was not conducive to people reporting crimes.¹⁵⁵³ At the same time, however, the crisis also resulted in high levels of sexual violence being perpetrated and the drop in recorded cases suggests that there has been little or no accountability for these crimes. In this regard, the Commission notes that the UNMISS Human Rights Division documented 217 victims of sexual violence including rape and gang rape committed in Juba between 8 and 25 July 2016 alone.¹⁵⁵⁴

977. Of concern is the fact that, in addition to the relatively small numbers of sexual and gender-based violence cases which are prosecuted in the formal justice system (rape cases made up two percent of all cases in 2016), they also have a significantly lower conviction rate than other crimes. In 2016, the overall conviction rate was 82 percent. However, for sexual and gender-based violence cases, the conviction rate was only 18 percent.¹⁵⁵⁵ The reasons behind this discrepancy merit further investigation.

978. Nonetheless, a promising development is the initiative to set up a specialised court within the national justice system to focus on sexual and gender-based crimes. Following interviews with the national justice sector in 2017, UNMISS Rule of Law Advisory Section found that adequate legal and structural frameworks exist to support the investigation and prosecution of conflict-related crimes against women and children, including those committed by police and soldiers, and that there is willingness on the part of several senior officials to support the establishment of dedicated units to do so.¹⁵⁵⁶

979. Accordingly, a building within the Juba Courts Compound has been refurbished to house a specialised court to facilitate linking all the elements of investigation and prosecution more effectively. The building has sections for victim support, prosecution, and police. The specialised sexual and gender-based violence court is located in close proximity to the “One-Stop-Shop” Family Protection Centre in the Juba teaching hospital which provides survivors of sexual violence with a range of services including medical, psychosocial and legal support. The Court’s inauguration is expected to take place in early 2019.

¹⁵⁵¹ What Works to Prevent Violence Against Women and Girls Consortium, “No safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan”, 2017.

¹⁵⁵² Ministry of Justice and Constitutional Affairs, *Case Management Report 2016*. This included 147 rape cases, of which 25 resulted in convictions, 93 cases of kidnapping or abducting to compel marriage of which 18 resulted in convictions, 12 cases of enticing or detaining a married women, resulting in one conviction; two cases prosecutions for female genital mutilation which did not result in convictions; and one case of coercing or inducing someone for the purposes of engaging in sexual conduct, which resulted in a conviction.

¹⁵⁵³ By way of comparison, in 2015, 320 cases of rape were prosecuted—more than double the number prosecuted in 2016. See Ministry of Justice and Constitutional Affairs, *Case Management Report 2015*. Furthermore it should be noted that these figures are incomplete as they only include statistics from Eastern Equatoria, Central Equatoria, Northern and Western Bahr el Ghazal, Warrap and Jonglei states. No statistics from Unity, Upper Nile, Western Equatoria and Lakes states are included.

¹⁵⁵⁴ OHCHR/UNMISS, *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan in July 2016*, January 2017.

¹⁵⁵⁵ Ministry of Justice and Constitutional Affairs, *Case Management Report 2016*.

¹⁵⁵⁶ Interviews with UNMISS Rule of Law Advisory section.

6. Protecting Children's Rights in the Justice System

980. There have been a number of positive developments with respect to children's rights in the justice system in Juba in 2018. The Commission hopes, however, to see these positive developments replicated outside the capital in the near future.

981. UNMISS funded the renovation and refurbishment of a Juvenile Reformatory Centre in Juba which is only awaiting the construction of a perimeter security wall and it was expected to be operationalised in early 2019. The Centre consists of two separate enclosures, one for juveniles on remand and the one for convicted juveniles, and will allow 90 children in conflict with the law to be safely and securely housed. This is a particularly welcome development as children had previously been detained with adults in the Juba Central Prison.

982. Juba Central Prison's Task Force on Prolonged and Arbitrary Detention has also made progress in reviewing cases of juvenile detention and releasing children in accordance with the provisions of the Child Act (2008).¹⁵⁵⁷ In the second half of 2018, since the programme began, it reviewed the cases of 75 juveniles and submitted release requests for seven juveniles under the age of 14 were submitted on the basis of the Child Act (2008) which provides that children under the age of 12 cannot be criminally responsible and there is a rebuttable presumption that children between the ages of 12 and 14 cannot be criminally responsible because of lack of capacity to differentiate between right and wrong.¹⁵⁵⁸ The Juba County Court ordered the release of four of these children and the remaining three are still pending before the Gudele Court.

983. Similarly, there were requests for the release of 12 juveniles under the age of 16 on remand for non-serious crimes. The Child Act (2008) provides that children may only be detained if there is a reasonable suspicion that they have committed a serious crime such as those involving violence or a persistence in committing serious crimes.¹⁵⁵⁹ Eight of these juveniles were released by the Juba County Court and the remaining four are pending before the Gudele Court and the Juba County Court.

984. The Commission hopes to see these initiatives to address the rights of children in conflict with the law repeated outside of Juba to reduce the number of children improperly detained, and to secure those detained more appropriately and safely.

7. Death Penalty

985. South Sudan's Penal Code (2008) provides for the imposition of the death penalty for "extremely serious" offences such as murder and treason.¹⁵⁶⁰ However, the Transitional Constitution, 2011 and the Penal Code prohibit the imposition of the death penalty on anyone under the age of 18 or over the age of 70 as well as pregnant or lactating women.¹⁵⁶¹

986. Every case in which the death penalty is imposed is automatically reviewed by the Supreme Court and the death sentence may only be executed where both the Supreme Court and the President have confirmed the sentence.¹⁵⁶² Execution is carried out by hanging.¹⁵⁶³

987. Despite indications that South Sudan will soon accede to the International Covenant on Civil and Political Rights, the Government has signalled that it will not accede to Optional Protocol II on the abolition of the death penalty.¹⁵⁶⁴ Further, it has given conflicting responses to the question of whether there is a moratorium on death penalty executions in place.¹⁵⁶⁵

¹⁵⁵⁷ Republic of South Sudan Ministry of Interior, National Prisons Service of South Sudan, *Draft Juba Central Prison Taskforce on Prolonged and Arbitrary Detention, First Quarterly Report*, 2018.

¹⁵⁵⁸ Child Act (2008), section 138.

¹⁵⁵⁹ Child Act (2008), sections 139, 184.

¹⁵⁶⁰ Transitional Constitution (2011), Article 21; Penal Code (2008), section 8. See Penal Code (2008), sections 64, 67, 131(2), 206, 309, 383.

¹⁵⁶¹ Transitional Constitution (2011), Article 21; Penal Code (2008), section 9. See also Code of Criminal Procedure Act (2008), section 277.

¹⁵⁶² Code of Criminal Procedure Act (2008), sections 258, 276.

¹⁵⁶³ Code of Criminal Procedure Act (2008), section 275.

¹⁵⁶⁴ Confidential Document, ERN D114616-D114618.

¹⁵⁶⁵ Confidential Document, ERN D114616-D114618; Gurtong, "South Sudan Denies Execution of Prisoners Report", 8 December 2018.

988. In April 2018, the National Prison Service of South Sudan issued a circular ordering inmates on death row who were being housed in state and county prisons to be moved to the Wau and Juba Central Prisons.¹⁵⁶⁶ Although the decision may have been motivated by a desire to house death row detainees in more secure and appropriate conditions, it raised concerns that this was the precursor to an increase in executions.

989. As a result of this order, in September 2018, 34 inmates sentenced to death (32 male and two female) were transferred from Torit to Juba.¹⁵⁶⁷ Among this group was a lactating mother and a boy who was 15 years old at the time of his conviction in 2017.¹⁵⁶⁸ Amnesty International documented further transfers to both Wau and Juba Central Prisons.¹⁵⁶⁹

990. As of early January 2019, it was reported to the Commission that 387 prisoners (379 male and eight female) were on death row across the country.¹⁵⁷⁰ Amnesty International reported in December 2018 that four executions were carried out in Wau in May and October 2018, including one who was reportedly below the age of 18, and that three were carried out in Juba between July and October 2018.¹⁵⁷¹ However, the Government of South Sudan denied that it had carried out any death penalties since independence, stating “Since 2011, South Sudan has not executed any sentenced prisoner simply because we are signatory to the Charters that prohibit death penalty.”¹⁵⁷² The Commission has not independently verified death penalty execution figures.

991. There are real risks that any use of the death penalty in South Sudan in the present context would constitute an arbitrary deprivation of the right to life. International law requires that the death penalty only be applied for the most serious crimes (usually understood as involving an intentional killing), that certain categories of people can never be subjected to the death penalty, and that strict procedural safeguards must apply during and after the trial. In addition there are restrictions on the manner of any use of the death penalty. The African Charter on Human and Peoples’ Rights, to which South Sudan is a party, covers such situations as it contains no provision recognizing the death penalty and guarantees that that no one may be arbitrarily deprived of their right to life. The African Commission on Human and Peoples’ Rights has issued a General Comment on this treaty obligation and explains:

In those States which have not yet abolished the death penalty it is vital that it is used for only the most serious crimes – understood to be crimes involving intentional killing. If, for any reason, the criminal justice system of a State does not, at the time of trial or conviction, meet the criteria of Article 7 of the African Charter or if the particular proceedings in which the penalty is imposed have not stringently met the highest standards of fairness, then the subsequent application of the death penalty will be considered a violation of the right to life. Those sentenced to death have the right to seek clemency, pardon or commutation through a transparent process with due process of law. Mass trials resulting in the death penalty without due consideration to fair trial standards are illegal and should not take place. In no circumstances shall the imposition of the death penalty be mandatory for an offence. The death penalty shall not be imposed for crimes committed by children, and the burden of proof rests upon the State to prove the age of the defendant. Military courts shall not have the power to impose the death penalty.

Whatever the offense or the circumstances of the trial, the execution of pregnant or nursing women, children, elderly persons or persons with psycho-social or intellectual disabilities, will always amount to a violation of the right to life.

Where the death penalty has not yet been abolished, it shall be used in a completely transparent manner, with States giving reasonable advance notice of the timing, manner, and number of executions to those involved, including those under sentence of death, their

¹⁵⁶⁶ Republic of South Sudan, National Prison Service of South Sudan, Circular No. 3/2018, 26 April 2018.

¹⁵⁶⁷ Confidential Document, ERN D114964-D114965. See also Amnesty International, “‘I Told the Judge I was 15’: The Use of the Death Penalty in South Sudan”, December 2018.

¹⁵⁶⁸ Confidential Document, ERN D114964-D114965. See also Amnesty International, “‘I Told the Judge I was 15’: The Use of the Death Penalty in South Sudan”, December 2018.

¹⁵⁶⁹ Amnesty International, “‘I Told the Judge I was 15’: The Use of the Death Penalty in South Sudan”, December 2018.

¹⁵⁷⁰ Confidential Document, ERN D116364-D116364. See also United Nations Security Council, *Report of the Secretary-General on South Sudan (covering the period from 4 June to 1 September 2018)*, S/2018/831, 11 September 2018.

¹⁵⁷¹ Amnesty International, “‘I Told the Judge I was 15’: The Use of the Death Penalty in South Sudan”, December 2018.

¹⁵⁷² Gurtong, “South Sudan Denies Execution Of Prisoners Report”, 8 December 2018.

families and lawyers, and to the public at large. States shall not conduct executions in public, nor use methods that cause unnecessary physical or mental suffering. After an execution, the body should be treated with respect, and, where requested, be returned to the family for burial or other funeral rites, or information about the burial or cremation should be provided.¹⁵⁷³

992. The Commission is deeply concerned about the reports that the death penalty has been imposed in several cases, and that some executions may have been carried out. In particular, the Commission draws the attention of the international community to the prospect of the death penalty being used for those who were under the age of 18 at the time of the offence. Any such execution would be a violation of the Convention on the Rights of the Child to which South Sudan is a party.¹⁵⁷⁴ In addition, any execution of someone under the age of 18, over the age of 70, or of a lactating mother would constitute a violation of the Transitional Constitution of the Republic of South Sudan (2011).¹⁵⁷⁵

993. The Commission encourages the Government of South Sudan to declare a moratorium on all executions, with a view to the abolition of the death penalty. The Commission draws attention to the fact that South Sudan voted in favour of the United Nations General Assembly Resolution on a Moratorium on the Use of the Death Penalty in 2012 and 2014 which called among other things for States “(e) To reduce the number of offences for which the death penalty may be imposed; and (f) To establish a moratorium on executions with a view to abolishing the death penalty”.¹⁵⁷⁶ The Commission is not aware of any explanation as to why South Sudan reversed its position in 2016 when it voted against a similar Resolution at the United Nations General Assembly. The Commission encourages the Government of South Sudan to re-confirm its former commitment to a moratorium on executions at this particularly delicate moment in the history of this nation. The Commission considers that a moratorium would contribute to peace and nation-building, while the prospect and indeed the use of the death penalty is not only likely a source of injustice but also a factor which feeds tension and instability.

8. The Terrain Trial

994. On 6 September 2018, the SPLA General Court Martial issued its judgement against 11 low-ranking SPLA soldiers affiliated with the Presidential Guard for the incident on 11 July 2016 at the Terrain hotel in Juba which resulted in the murder of John Gatluak a South Sudanese journalist, the rape and sexual harassment of five female international humanitarian workers, and the armed robbery, theft, looting of the premises and its residents.

995. Ten of the 11 accused were convicted and sentenced to between seven years and life imprisonment and expelled from the SPLA.¹⁵⁷⁷ They were convicted variously of murder, criminal trespass, theft after preparation made for causing death, hurt or restraint in order to facilitate committing theft, house breaking, sexual harassment, rape, voluntarily causing hurt by dangerous weapon or means, acts committed by several persons in furtherance of a common intention under the Penal Code (2008),¹⁵⁷⁸ and of offences relating to operations and violation of standing orders under the SPLA Act (2009).¹⁵⁷⁹ The eleventh accused was acquitted due to insufficient evidence.

996. The Court further awarded compensation to be paid by the Government of South Sudan in the amount of USD \$2,258,590.48 to the Terrain Hotel for looting and damages, USD \$4,000 USD to each of the five rape victims, USD \$1,000 to a victim who was assaulted

¹⁵⁷³ General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, paras. 24-26.

¹⁵⁷⁴ Convention on the Rights of the Child, Article 37(a).

¹⁵⁷⁵ Article 21 reads: “(1) No death penalty shall be imposed, save as punishment for extremely serious offences in accordance with the law; (2) No death penalty shall be imposed on a person under the age of eighteen or a person who has attained the age of seventy; (3) No death penalty shall be executed upon a pregnant or lactating woman, save after two years of lactation.”

¹⁵⁷⁶ A/RES/69/186, para. 5, 18 December 2014.

¹⁵⁷⁷ Two accused were sentenced to life, two to 14 years, five to 10 years, and one to 7 years imprisonment, to be served in the civil prison. SPLA General Court Martial, *Government of South Sudan/Sudan People’s Liberation Army v. S/M Abraham Agany Tiah Dhuor et al.*, Case No. 135/2017, 6 September 2018.

¹⁵⁷⁸ Penal Code (2008), sections 206, 328, 296, 333, 395, 247(1), 233, 48.

¹⁵⁷⁹ SPLA Act (2009), sections 57(1)(e), 69.

and shot in the leg, and 51 cows to the family of John Gatluak, who was killed during the attack.¹⁵⁸⁰

997. The Defence counsel filed an appeal arguing that the defendants could not have been convicted based upon the evidence presented at trial. The counsel for the victims of rape and murder also submitted an appeal against the determination of the compensation awarded. In November 2018, the General Court Martial forwarded the case files to the Supreme Court for review. At the time of writing, there is no indication when the appeal decision will be rendered.

998. The trial, which began at the end of May 2017, nine months after the incident, was widely seen as a test for the South Sudanese justice system and its ability to prosecute its own soldiers, particularly for conflict-related sexual violence. Although the case only prosecuted low level perpetrators and strictly speaking should have proceeded in civil rather than military courts, it can be seen as a success, in particular by setting precedent in relation to protection measures for victim and witnesses.

999. The court was presided over by Military Judge Advocates, a military prosecutor assisted by two privately funded prosecutors (representing the victims and Terrain's civil claim) led the prosecution and five to eight military lawyers represented the defendants. The court heard evidence from 17 prosecution witnesses and four defence witnesses during the course of 31 hearings. One of the sexual assault victims returned to Juba to testify in person while other witnesses were able to testify via video-link following an application by the Prosecution. Importantly, the Court ensured that protective measures were used throughout the trial to protect the identity of victims and witnesses and to facilitate their testimony this sets precedent for future cases, particularly for sexual assault cases, in South Sudan.

1000. Simultaneous translation between Arabic and English was available during most of the trial and for those accused who were unable to testify in Arabic there was simultaneous translation from Juba Arabic to the Dinka language when they were on the stand.

1001. There were, however, concerns about the circumstances and conditions of the defendants' detention. One of the accused, First Lieutenant Luka Akechak, the commander of one of the units that attacked Terrain, died in custody at NSS headquarters in Juba, on 12 October 2017, reportedly of malaria and typhoid. At least one defendant appeared very seriously under-nourished. The other accused were notably thin, three appeared to be limping; one badly enough to use a crutch during part of the case.¹⁵⁸¹

1002. Furthermore, some of the victims wrote to the Commission expressing their disappointment that no senior commanders had been prosecuted and that the amount of the reparations was inappropriate.

1003. Nonetheless, the Terrain case demonstrated the SPLA's ability to hold its soldiers accountable. What is important now, however, is that this case not to be seen as exceptional, pursued as a result of pressure arising out of the international identity of the victims. The Commission is encouraged that the Court Martial prosecuted and convicted two soldiers for two further rape cases in July 2018,¹⁵⁸² both resulting in sentences of 14 years imprisonment and expulsion from the SPLA. The Commission is seeking further details on other prosecutions at the Court Martial for crimes of sexual violence.

1004. In this respect, it is encouraging that following the Terrain trial, the Directorate of Military Justice of the SPLA approached the UNMISS Rule of Law Advisory Section to request assistance in strengthening their ability to investigate and prosecute conflict-related sexual violence. As a result, a multi-part training programme has started to share best practices with military investigators, prosecutors, defence council and judges to try to help ensure that the momentum gained by the Terrain trial is not lost.

¹⁵⁸⁰ SPLA General Court Martial, *Government of South Sudan/Sudan People's Liberation Army v. S/M Abraham Agany Tiah Dhuor et al.*, Case No. 135/2017, 6 September 2018.

¹⁵⁸¹ There were concerns that the defendant's detention conditions did not meet the United Nations Standard Minimum Rules for the Treatment of Prisoners which set out minimum requirements for treating detainees in a humane manner, including accommodation, personal hygiene, food and medical services. See also the Basic Principles for the Treatment of Prisoners 1990.

¹⁵⁸² SSPDF General Court Martial Case Nos. 125/2018, 126/2018.

E. Confidential Dossier

1005. The Commission was mandated by the Human Rights Council to “collect and preserve evidence of, and clarify responsibility for alleged gross violations and abuses of human rights and related crimes”.¹⁵⁸³

1006. The Commission has determined that there are reasonable grounds to believe that a number of individuals bear responsibility for the related crimes identified by the Commission. The names of the individuals and links to the evidence related to the crimes referred to in this report have been placed in a confidential sealed dossier and this has been handed over to the United Nations High Commissioner for Human Rights. The United Nations High Commissioner for Human Rights has been asked by the Commission to consider providing access, in accordance with the relevant protocols, to the information in this confidential dossier at the appropriate time to relevant institutions, including the Hybrid Court for South Sudan and other relevant courts of law, following strict witness protection requirements, to ensure there is justice for the people of South Sudan. Particular attention has been paid in compiling the sealed dossier to the jurisdiction of the Hybrid Court for South Sudan to be established by the African Union.

IX. Conclusions and Recommendations

A. Conclusions

1007. The Commission has identified a number of individuals, units and groups who bear responsibility for the violations and related crimes, and the individuals concerned should face prosecution. Their names have been communicated on a strictly confidential basis to the United Nations High Commissioner for Human Rights. Access to that information is determined according to protocols established between the Commission and the Office of the High Commissioner.

1008. Sustainable peace in South Sudan requires meaningful progress towards accountability for past crimes. The stasis in the establishment of the Hybrid Court for South Sudan, and the minimal steps taken at the national level to prosecute war crimes including crimes of sexual violence, are leading to multiple frustrations and anger, doing nothing to reduce the chances of further violence.

1009. The lawless activities of the National Security Services and Military Intelligence, often linked to protecting economic interests particularly with regard to the oil sector, risk turning South Sudan into a police state built on fear and corruption.

1010. The protracted conflict in South Sudan has had the most profound impact on women and girls, who, on a daily basis, have to confront a horrific variety of acts of sexual violence committed by government forces and armed actors belonging to the opposition. Such acts include: the savagery of gang rapes, sexual violence, sexual exploitation, rape, forced marriage, forced pregnancy, forced abortion, as well as mutilation of sexual organs.

1011. Sexual and gender-based violence remains at crisis levels and needs to be urgently addressed, with the rate for females as high as 65 percent in some areas¹⁵⁸⁴ and as high as 36 percent for males, though underreporting makes accurate figures difficult to ascertain.¹⁵⁸⁵ These brutal acts are committed in front of children, humiliating the victims, their families and their communities, destroying the social fabric of South Sudanese society leaving behind hatred and trauma and sowing the seeds for future violence. There has been almost total impunity for those responsible for these crimes.

1012. Shortcomings within both the formal and customary justice systems prevent the resolution of gender violence, which is deeply anchored in tradition and cultural beliefs.

¹⁵⁸³ A/HRC/RES/37/31.

¹⁵⁸⁴ What Works to Prevent Violence against Women and Girls consortium, “No Safe Place: A lifetime of violence for conflict-affected women and girls in South Sudan”, 2017.

¹⁵⁸⁵ African Development Bank, “The Political Economy of South Sudan”, August 2018.

Structural inequalities, poverty and discrimination continue to obstruct access of women and girls to justice and security as well as to transitional justice processes.

1013. The Commission observes that the UNMISS SEA Database currently only includes incidents of SEA involving UN peacekeeping personnel working in field missions. Data in respect of incidents involving the personnel of ‘implementing partners’ i.e. UN agencies, funds and programmes do not appear. This is likely to result in an under-count of SEA cases, with the actual number of SEA incidents likely to be significantly higher.

1014. The structure of the South Sudanese economy shifted in the post-independence period from relying predominantly on agriculture to relying on oil. The armed conflict in South Sudan has been driven primarily by the need to control the oil producing areas in Unity and Upper Nile states, and has been a major driver of the continuing ethnic violence which has led to enormous human suffering and the commission of gross human rights violations as well as violations of international humanitarian law.

1015. South Sudan’s oil industry has become overwhelmingly militarized and securitized with the National Security Services having expanded their control and involvement in the oil production and management. Key figures in South Sudan’s National Security Services play a significant role in Nilepet, the state-owned national petroleum company. Nilepet continues to play a significant role in the war economy and has been used by the South Sudanese Government to channel oil money to militias and the security forces to finance the ongoing conflict. As a private company, Nilepet is able to operate in near total secrecy and has operated without any independent oversight of its commercial and financial activities.

1016. After delays in implementing the transitional justice provisions of the ARCSS (2015) the Revitalized Agreement (2018) has recommitted the parties to a transitional justice framework, which in addition to the Hybrid Court, the Commission for Truth Justice and Reconciliation, and the Compensation and Reparation Authority includes traditional mechanisms. However, the Revitalized Agreement has also stipulated new timeframes for the establishment of these mechanisms, commencing in May 2019.

1017. The government has continued to express reservations about the cost of the Compensation and Reparation Authority, considering that compensation would be unaffordable. Yet, a holistic framework for reparations constitutes a broader concept than individual financial compensation, encompassing collective and symbolic forms of repair, which are equally important.

1018. South Sudan is a diverse society in which ethnic communities continue to provide identity and a sense of belonging for most citizens. Customary justice, which may manifest many weaknesses, especially in relation to women’s rights and participation, is nevertheless the mainstay for justice and adjudication for most South Sudanese. Moreover, the conflict has often assumed ethnic dimensions which make traditional community mechanisms a potential key component of the transitional justice response in South Sudan.

1019. South Sudan’s leaders have not demonstrated sufficient consistency, commitment, or cohesion in leading the efforts for dealing with the past. With new prospects for the implementation of the Revitalized Agreement, there is an opportunity to mobilise effective leadership and to allocate sufficient resources for achieving the goals of transitional justice.

1020. The scale of violations and crimes committed during the course of the conflict demands an urgent and holistic approach which involves all South Sudanese, including forced migrants, in the pursuit of accountability, reconciliation and healing.

B. Recommendations

1021. In light of the meetings, discussions and investigations the Commission as undertaken in the course of this mandate as well as its findings set out in this report, it recommends:

1. To the Government of South Sudan:**Advancing the Rights of Women**

- **Fast track the finalization of the National Gender Policy, including measures to implement the equality provisions set out in the Transitional Constitution Bill of Rights which provide guarantees for equality and equity between women and men, and a 25 percent Affirmative Action for women in all spheres as temporary positive measure to redress past imbalance. Measures should incorporate a victim/survivor centred approach, acknowledging women as subjects of rights and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence, ensuring participation, prevention, protection, prosecution, punishment and redress. They should also address data collection and monitoring and international cooperation to accelerate elimination of gender-based violence against women, taking account of intersecting forms of discrimination;**
- **Ensure that the national justice system including the plural legal systems is strengthened to protect victims/survivors of gender-based violence, ensuring their access to justice and to an effective remedy which includes facilitating the investigation and prosecution of sexual and gender-based crimes consistent with international standards and in compliance with the principles of non-discrimination, in accordance with the guidance provided in the CEDAW Committee's general recommendation No. 33 (2015);**
- **Ensure effective access of victims to courts and tribunals; where the authorities respond to all cases of gender-based violence against women, including through the application of criminal law to prosecute the alleged perpetrators and bring them to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties. Fees or court charges should not be imposed on victim;**
- **Ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, such as mediation and conciliation;**
- **Eliminate discriminatory evidentiary rules and procedures, including procedures allowing for women's deprivation of liberty to protect them from violence, practices focused on 'virginity' and legal defences or mitigating factors based on culture, religion or male privilege. Such procedures also include traditional apologies, pardons from victims/survivors' families or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death being often reserved to women, as well as judicial practices that disregard a history of gender-based violence to the detriment of women defendants;**
- **Ensure that a data system is established to regularly collect, analyse and publish statistical data on the number of complaints about all forms of gender-based violence against women, including technology mediated violence, the number and types of protection orders issued, the rates of dismissal and withdrawal of complaints, prosecution and conviction rates as well as time taken for disposal of cases. The system should include information on the sentences imposed on perpetrators and the reparation, including compensation, provided for victims/survivors. All data should be disaggregated by type of violence, relationship between the victim/survivor and the perpetrator, as well as in relation to intersecting forms of discrimination against women and other relevant socio-demographic characteristics, including the age of the victim. The analysis of the data should enable the identification of protection failures and serve to improve and further develop preventive measures; and**
- **Ensure that international and national organizations working in the field of women rights, SGBV, counselling, investigation etc. take all possible measures to coordinate their work with the view of ensuring that the "do not harm" principle is respected. Moreover, various stakeholders operating in South Sudan should make efforts to coordinate the collection and collation of data pertaining to SGBV, and share it accordingly.**

Security and Detention

- Halt the use of secret detention in so-called ‘safe houses’, the torture and ill treatment of detainees, and urgently address the conditions in all places of detention to ensure they comply with UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (2015);
- Embark on radical reform of the arrangements for national security to ensure compliance with international human rights obligations, instruct all personnel to comply with the Constitution and international law, and reform the National Security Service Act to ensure procedural safeguards from arbitrary arrest;
- Cease the interference with the media and civil society so that freedom of expression can be reasonably exercised in order to ensure that the peace process is properly understood, that there can be accountability for past violations, that issues of corruption can be exposed, and that the process of healing can take place across the country;
- Re-confirm its former commitment to a moratorium on executions as a contribution to peace and nation-building; to confirm its commitment to respecting its international human rights obligations by declaring that no one who was under 18 at the time of the commission of their offence will be sentenced to death or executed;
- Consider carefully the draft legislation which incorporates international crimes in national law in order that all forms of liability relevant to such crimes are included so that there can be complementarity between the national criminal legal order and any international tribunals with jurisdiction.

Political Economy

- Ensure the implementation of Articles 4.8.1.1 and 4.8.1.2 of the R-ARCSS which provide that the provisions in the Petroleum Revenue Management Act facilitating transparency, accountability and an equitable allocation of oil revenues among the present and future population of the country, including the closure of any petroleum revenue accounts not established under the Act, within three months of the start of the Transition period;
- Establish an appropriate monitoring mechanism to monitor the transfer of an equitable share of the revenue to states and ensure public reporting;
- Ensure that the Government expedites the operationalization of Future Generations Fund and the Oil Revenue Stabilization Account and review and audit allocations and transfers of the two percent and three percent made to oil producing states since 2011;¹⁵⁸⁶ and
- Ensure that the review called for by the R-ARCSS, of both the national oil company Nilepet and the National Petroleum and Gas Commission, are dealt with expeditiously so as to transform them, and “empower them to exercise their responsibilities as stated in the Amended Constitution and Law”.¹⁵⁸⁷

Transitional Justice

- Exercise effective leadership and ownership of the transitional justice process, and promote civic engagement, including of victims and forcibly displaced persons, with the processes;
- Establish expeditiously the commission for truth, reconciliation and healing, with effective and transparent consultation of South Sudanese stakeholders, ensuring that the process of selection of commissioners is transparent and credible;

¹⁵⁸⁶ R-ARCSS, Articles 4.8.1.14.7 and 4.8.1.14.9.

¹⁵⁸⁷ R-ARCSS, Article 4.8.1.14.14.

- Adopt a broad approach to reparations, to include provisions of collective and symbolic forms of reparation, beyond the financial payments envisaged by the mandate of the compensation and reparation authority;
 - Ensure that the outcomes of all prior genuine consultations on how to address South Sudan's past and to shape its future, including the recommendations and outcomes of the national dialogue, are given due consideration and harmonised with transitional justice mechanisms of Chapter V of the Revitalized Agreement, as well as the Permanent Constitution-making process; and
 - Promote, with necessary adjustments to ensure their fairness (particularly towards women's needs), customary and other community-centred mechanisms that are capable of advancing accountability, truth-telling, reconciliation, reparations and healing.
2. To UNMISS:
- Increase, in conjunction with humanitarian actors, protection for women, girls and boys during their movements outside the camps to collect water and firewood, ensuring the training of men and boys to assist with the 'protection' of women, girls and children and promoting establishment of mixed sex and age watch groups, as well as movement in bigger groups;
 - Expand the current database which reflects incidents of SEA involving UN Peacekeepers to include incidents of SEA involving personnel of implementing partners; and
 - Continue to support the implementation of transitional justice mechanisms, in accordance with best practices and standards, including the activities for outreach and education on Chapter V of the Revitalized Agreement.
3. To Humanitarian Actors:
- Strengthen referral systems to support women, girls, boys and men who have been affected by GBV or who require psychosocial support due to the crisis, so that they are able to access the appropriate service providers for their different needs - and within the appropriate period of time (within 72 hours for survivors of sexual violence). Service provision should likewise be strengthened and training on the clinical management of rape should be provided, as well as post-exposure prophylaxis (PEP) kits and Mama Kits (for safe delivery).
4. To Civil Society Organizations:
- Raise awareness among families of the value of the girl child, changing stereotypes and attitudes from considering girls as family property – which results in early arranged marriage as a means to escape poverty. Awareness raising on the rights of the child may be encouraged to include protection of the boy child.
5. To the Parties to the Revitalized Agreement:
- Ensure that during the Pre-Transitional Period and beyond, the parties fully support the necessary full implementation of all transitional justice processes.
6. To the African Union:
- Engage and support the Government of South Sudan, on the basis of the Peace and Security Council Communiqué 547, to complete expeditiously the necessary steps for establishing the Hybrid Court and the other transitional justice mechanisms and processes.

Annex

List of Acronyms and Abbreviations

<u>Abbreviation or Acronym</u>	<u>Name</u>
ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
ARCSS	Agreement for the Resolution of the Conflict in South Sudan
AU	African Union
Bn.	Battalion
Bde.	Brigades
bpd	Barrels per day
Brig. Gen.	Brigadier General
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEPO	Community Empowerment for Progress Organization
CERD	International Convention on the Elimination of all forms of Racial Discrimination
CoHA	Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access
Col.	Colonel
CNPC	Chinese National Petroleum Company
CPA	Comprehensive Peace Agreement
CRA	Compensation and Reparations Authority
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRSV	Conflict-Related Sexual Violence
CTRH	Commission for Truth, Reconciliation and Healing
CTSAMM	Ceasefire and Transitional Security Arrangements Monitoring Mechanism

CTSAMVM	Ceasefire and Transitional Security Arrangements Monitoring and Verification Mechanism
Div.	Division
DPOC	Dar Petroleum Operating Company
ECC	Emmanuel Christian College
EPSA	Exploration and Production Sharing Agreements
EU	European Union
DDRC	Disarmament, Demobilisation and Reintegration Commission
FDP/SSDF	Federal Democratic Party/South Sudan Democratic Forces
FPU	Formed Police Unity
GAM	Global Acute Malnutrition
GDP	Gross Domestic Product
GPOC	Greater Pioneer Operating Company
HDI	Human Development Index
HLRF	High Level Revitalization Forum
IBC	Independent Boundary Commission
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ICRMW	International Convention on the Rights of Migrant Workers and their Families
IGAD	Intergovernmental Authority on Development
IOM	International Organization for Migration
IPC	Integrated Food Security Phase Classification
JDB	Joint Defence Board

JMCC	Joint Monitoring Ceasefire Commission
JMEC	Joint Monitoring and Evaluation Commission
JTSC	Joint Transitional Security Committee
Kampala Convention	Convention for the Protection and Assistance of Internally Displaced Persons in Africa
Lt. Gen.	Lieutenant General
Maj. Gen.	Major General
Maputo Protocol	African Charter on the Rights of Women in Africa
MSF	Médecins sans frontières
NAS	National Salvation Front
NDM	National Democratic Movement
NGO	Non-Governmental Organisation
NMC	National Movement for Change
NPTC	National Pre-Transitional Committee
NSS	National Security Service
Obasanjo Report	Final Report of the African Union Commission of Inquiry on South Sudan, 15 October 2015
Obasanjo Commission	African Union Commission of Inquiry on South Sudan
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OIOS	Office of Internal Oversight Services
ONGC	Indian Oil and Natural Gas Corporation
ORG	Organization for Responsive Governance
PDM	People's Democratic Movement
PoC	Protection of Civilians sites
PTSD	Post-Traumatic Stress Disorder
R-ARCSS or Revitalized Agreement	Revitalized Agreement for the Resolution of the Conflict in South Sudan
R-JMEC	Revitalized Joint Monitoring and Evaluation Commission
RTGoNU	Revitalised Transitional Government of National Unity
SAM	Severe Acute Malnutrition

SDSRB	Strategic Defence and Security Review Board
SEA	Sexual Exploitation and Abuse
SGBV	Sexual and Gender-Based Violence
SPLM/A	Sudan People's Liberation Movement/Army
SPLA/M-IO	Sudan People's Liberation Movement/Army In Opposition
SPLA/M-IO (RM)	Sudan People's Liberation Movement/Army In Opposition forces loyal to former First Vice President Riek Machar
SPLA/M-IO (TD)	Sudan People's Liberation Army/Movement In Opposition forces loyal to Taban Deng Gai
SPOC	Sudd Petroleum Operation Company
SSCSF	South Sudan Civil Society Forum
SSHRC	South Sudan Human Rights Commission
SSLM/A	South Sudan Liberation Movement/Army
SSNLM	South Sudan National Liberation Movement
SSNMC	South Sudan National Movement for Change
SSNCA	South Sudan National Communication Authority
SSOA	South Sudan Opposition Alliance
SSP	South Sudanese Pound
SSPDF	South Sudan People's Defence Forces
SSPM/A	South Sudan Patriotic Movement/Army
SSUM/A	South Sudan United Movement/Army
TBC	Technical Boundary Committee
TFA	Transitional Financial Arrangements
TGoNU	Transitional Government of National Unity
TPA	Temporary Protection Area
UDRA	United Democratic Republic Alliance
UNICEF	United Nations Children's Fund
UNMISS	United Nations Mission in the Republic of South Sudan
UNSCR	United Nations Security Council Resolution

USD	United States Dollars
WFP	World Food Programme
WHO	World Health Organization
