AU Commission of Inquiry on South Sudan
Addis Ababa, Ethiopia P. O. Box 3243 Telephone: +251 11 551 7700 / +251 11 518 25 58/ Ext 2558
Website: http://www.au.int/en/auciss

Original: **English**

FINAL REPORT

OF THE AFRICAN UNION COMMISSION OF INQUIRY ON SOUTH SUDAN

ADDIS ABABA 15 OCTOBER 2014

Table of Contents

ACKNOWLEDGEMENTS 3
ABBREVIATIONS 5
CHAPTER I 7
INTRODUCTION 8
CHAPTER II 34
INSTITUTIONS IN SOUTH SUDAN 34
CHAPTER III 110
EXAMINATION OF HUMAN RIGHTS VIOLATIONS AND OTHER ABUSES DURING THE CONFLICT: ACCOUNTABILITY 111
CHAPTER IV 233
ISSUES ON HEALING AND RECONCILIATION 234
CHAPTER V 274
CONCLUSION: 275
FINDINGS AND RECOMMENDATIONS 275
ANNEXURES 305

ACKNOWLEDGEMENTS

The report of the Commission of Inquiry on South Sudan had the benefit of support and insights from a wide variety of individuals and organizations. It is very important to point out from the onset that the Commission enjoyed the immense support of the Chairperson of the Commission of the African Union, H.E. Dr. Nkosazana Dlamini Zuma, the Commissioner for Peace and Security, H.E. Smail Chergui and the Commissioner for Political Affairs, H.E. Aisha L. Abdullahi, who in various ways put at the disposal of the Commission the necessary resources required for the execution of the fact-finding work it was tasked with.

The Commission wishes to thank from the outset, the Governments of the Republic of Uganda, Federal Democratic Republic of Ethiopia, Republic of Sudan and Republic of Kenya and in particular, President Yoweri Museveni, President Hassan Omer al Bashir and Prime Minister Hailemariam Desalegn for given the Commission the opportunity of sharing their insights on the South Sudan situation. At the same time, the Commission thanks former President Thabo Mbeki and the African Union High-Level Implementation Panel for Sudan and South Sudan for the useful contribution made to its fact-finding work. Lastly, the Commission wishes to thank the government of South Sudan and SPLM/IO for their cooperation and commitment to ensuring the safe passage of members of the Commission on the ground despite various constraints.

The Commission conducted interviews on a largely not-for-attribution basis and we therefore thank all those who gave so generously of their time in what were sometimes very difficult circumstances in a country facing complex state and nation building challenges. In this regard, the Commission would like to specifically, thank former Special Representative of the Secretary General, Madam Hilde Johnson and her interim successor, Mr Raisdon Zenanga and their team for the immense support provided to the Commission in the course of its work in South Sudan.

The Commission would also like to register its appreciation to the Office of the High Commissioner for Human Rights Office, Office of the Special Adviser of the Secretary General of the United Nations on the Prevention of Genocide and United Nations Women which all supported the investigative aspects of our fact-finding work. The Commission wishes to thank these offices for the technical back-stopping provided to the Secretariat and hopes that this cooperation and collaboration will continue into the future.

The Commission would also like to recognize the institutional support and assistance of various international organizations, international non-governmental organizations, non-governmental organizations in South Sudan and the South Sudan academia. In particular, we want to recognise the following organizations, the African Union, the African Union Commission, the African Union Peace and Security Council, the African Union High Level Implementation Panel on Sudan and South Sudan, the African Union Liaison Office in South Sudan, Diplomatic Corps Resident in South Sudan, the United

Nations, the United Nations Security Council, the United Nations Mission in South Sudan, the United Nations High Commission for Human Rights, the United Nations Development Programme, UN Women, the UN Office to the AU, the World Health Organization, UN OCHA, UNICEF, the Inter-Governmental Authority on Development — Mediators, IGAD — Monitors, Amnesty International, Human Rights Watch, the International Crisis Group, the International Committee of the Red Cross, the International Rescue Committee, Medicines Sans Frontieres, the South Sudan Commission of Inquiry on Human Rights Abuses, South Sudan Council of Churches, South Sudan Business Chamber, South Sudan Peace Coalition, South Sudan Women for Peace, South Sudan Bar Association, Sudd Institute, Ebony Center for Strategic Studies, University of Juba Department of Peace and Development Studies, South Sudan Media.

The Commission is very grateful to its Secretariat under the overall direction of the Legal Counsel of the African Union, Professor Vincent O. Nmehielle. The Commission acknowledges the following members of the Secretariat: Mr Olabisi Dare, Head of Humanitarian Affairs, Department of Political Affairs of the AUC as Executive Secretary; Dr Dawit Toga, Political analyst ; Mme. Simone Ouattara, Senior Programme Officer; Mr Adewale Iyanda; Legal Officer; M. Boitshoko Mokgatlhe, Senior political officer; M. John Ikubaje, Political officer; Mr Bonaventure Cakpo Guedegbe, Regional Desk Officer; Ms Lulit Getachew, Administrator; Dr. Godfrey Musila, Senior Researcher Dr Shakiratu Sanusi, Consultant, Research and Report Writing; Mr. Jose D. Dougan- Beaca, Chief Investigator; Dr. Ahmed Makata, Forensic Pathologist; Dr Segaran Ramalu Naido, Forensic Pathologist; Mr. Deo Mbuto, Investigator; Mr. Kitila Katala Mkumbo, Investigator; Ms Lucy Minayo Lugalia, Investigator; Ms Renifa Marypetra Madenga, Investigator; Sexual and Gender Based Violence, Ms Shuvai Nyoni, Gender Expert and Legziabher Beyene, Legal Intern. The Commission would also like to thank members seconded by other AUC Departments: Bureau of the Chairperson, Bereau of the Deputy Charperson, Department of Peace and Security, Department of Political Affairs, the Directorate of Women, Gender and Development and the Directorate of Information and Communications, the Directorate of Administration and Human Resources and the Directorate of Finance Budgeting and Accounting.

ABBREVIATIONS

CPA	Comprehensive Peace Agreement
AU	African Union
AUC	African Union Commission
AUPSC	African Union Peace and Security Council
UN	United Nations
UNSC	United Nations Security Council
UNMISS	United Nations Mission in South Sudan
UNHCHR	United Nations High Commission for Human Rights
UNDP	United Nations Development Programme
WHO	World Health Organization
IGAD	Inter-Governmental Authority on Development
ICRC	International Committee of the Red Cross
IRC	International Rescue Committee
GOSS	Government of Southern Sudan
GRSS	Government of South Sudan
AUCISS	African Union Commission of Inquiry on South Sudan
ACHPR	African Commission on Human and Peoples' Rights
FAS	Femmes Africa Solidarité
KII	Key Informant Interviews
FGD	Focus Group Discussions
IDPs	Internally Displaced Persons
SPLA	Sudan Peoples' Liberation Army
SPLM	Sudan Peoples' Liberation Movement
SSNPS	South Sudan National Police Service
SSR	Security Sector Reforms
DDR	Disarmament Demobilisation and Reintegration
SSNLA	South Sudan National Legislative Assembly
CBO	Community Based Organisation
FBO	Faith Based Organisation
CSO	Civil Society Organisation
POC	Protection of Civilians
SPLM/IO	Sudan Peoples' Liberation Movement — In Opposition
NIAC	Non-International Armed Conflict
SGBV	Sexual and Gender Based Violence
NCO	Non-Commissioned Officer
SSLA	South Sudan Liberation Army
NCP	National Congress Party
NLC	National Liberation Council
TCSS	Transitional Constitution of South Sudan
NCRC	National Constitutional Review Commission
NCC	National Constitutional Conference
TGNU	Transitional Government of National Unity
CODS	Chief of Defence Staff CODS
SRRA	South Sudanese Relief and Rehabilitation Association

CANS	Civil Administration of the New Sudan
SSDDRC	South Sudan Disarmament Demobilisation and Reintegration Commission
NDDRC	National Disarmament Demobilisation and Reintegration Council
SSDDT	Security Sector Development and Defence Transformation
IGP	Inspector General of Police
IHL	International Humanitarian Law
NGO	Non Governmental Organisation
GPAA	Special Administrative Area for Pibor known as the Greater Pibor Administrative Area
	NSCC New Sudan Council of Churches

CHAPTER I

INTRODUCTION

CHAPTER I

INTRODUCTION

INTRODUCTION

1. As part of its response to the crisis in South Sudan, the Peace and Security Council of the African Union (AU), at its 411th meeting held at the level of Heads of State and Government, in Banjul, The Gambia, on 30 December 2013, mandated the establishment of the Commission of Inquiry on South Sudan (AUCISS). In the said communiqué, the PSC requested:

> […] the Chairperson of the Commission, in consultation with the Chairperson of the African Commission on Human and Peoples' Rights (ACHPR) and other relevant AU structures, to urgently establish a Commission 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. Council requests that the above-mentioned Commission submit its report to Council within a maximum period of three months.[1]

2. In specific terms, the AUPSC Communiqué mandates the AUCISS:[2]

> a) To investigate the human rights violations and other abuses committed during the armed conflict in South Sudan;
> b) To investigate the causes underlying the violations;
> c) To make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities with a view to deterring and preventing the occurrence of the violations in future ; and
> d) To make recommendations on how to move the country forward in terms of unity, cooperation and sustainable development;
> e) To submit a report within a maximum period of three (3) months.

3. Pursuant to the AUPSC Communiqué, the Terms of Reference (ToR) detailed in the Concept Note Relating to the Establishment of the AUCISS are to:

> a) Establish the immediate and remote causes of the conflict;
> b) Investigate human rights violations and other abuses during the conflict by all parties from 15 December 2013;
> c) Establish facts and circumstances that may have led to and that amount to such violations and of any crimes that may have been perpetrated;

[1] AUPSC, Communiqué PSC/AHG/COMM.1 (CDXI) dated December 31 2013.
[2] Concept Note on the Establishment of the African Union Commission of South Sudan

d) Compile information based on these investigations and in so doing assist in identifying perpetrators of such violations and abuses with a view to ensuring accountability for those responsible;
e) Compile information on institutions and process or lack thereof that may have aided or aggravated the conflict resulting in violations of human rights and other abuses;
f) To examine ways on how to move the country forward in terms of unity, cooperation and sustainable development;
g) Present a comprehensive written report on the overall situation South Sudan to the African Union Peace and Security Council within a period of three (3) months from the commencement of its activities.
h) Make recommendations based on the investigation on the following:

- appropriate mechanisms to prevent a recurrence of the conflict
- mechanisms to promote national healing and cohesiveness, particularly focusing on the need for all South Sudanese communities to live together in peace;
- modalities for nation building, specifically focused on building of a functional political order, democratic institutions and post-conflict reconstruction;
- accountability mechanisms for gross violations of human rights and other egregious abuses to ensure that those responsible for such violations are held to account.

4. Considering the above, the Commission has interpreted its mandate to consist of four focal areas: healing, reconciliation, accountability and institutional reforms. The Commission approaches its mandate in a holistic manner. As the conceptual framework below demonstrates, the approach adopted by the Commission emphasizes the interrelatedness of the mandate areas.

5. Following consultations, the Chairperson of the AU Commission formally announced the creation of the AUCISS on 7 March 2014 at the Headquarters of the African Union. The Commission is constituted as follows:

The Chairperson:

i) H.E. Olusegun Obasanjo, Former President of the Republic of Nigeria

Other members of the Commission:

ii) Lady Justice Sophia A.B Akuffo, Judge, Supreme Court of Justice and former President of the African Court on Human and Peoples' Rights
iii) Professor Mahmood Mamdani, Professor, Executive Director, Makerere Institute of Social Research, Makerere University, Kampala, Uganda and Herbert Lehman Professor of Government, Columbia University

iv) Ms. Bineta Diop, President, of Femmes Africa Solidarité (FAS) and AU Chairperson's Special Envoy on Women, Peace and Security
v) Professor Pacifique Manirakiza, Professor, University of Ottawa and Member, of the African Commission on Human and Peoples' Rights

CONCEPTUAL FRAMEWORK

6. Following its establishment, the Commission developed and adopted a Work Plan. The Commission subsequently developed a conceptual framework to guide its work. The conceptual framework sets out the Commission's appreciation of its mandate including the focal areas of the commission's inquiry as well as key concepts and terms that frame the commission's work. These aspects include the Commission's understanding of its mandate as it relates to: healing & reconciliation, accountability and institutional reforms. Aspects of the conceptual framework are dispersed in various chapters of this report.

7. In addition to the Conceptual Framework, the Commission also developed various policies to guide various aspects of its work. These include policies on: operational modalities; investigations; communication (includes dissemination of the Final Report); and confidentiality.[3]

Temporal Jurisdiction

8. The Commission had an open-ended mandate that ran from December 15, 2013, the day that armed hostilities broke out in Juba. In this regard, the Concept Note on the Establishment of the Commission provides that the Commission shall investigate human rights violations and other abuses during the conflict by all parties from 15 December 2013. The other aspects of the Commission's mandate — reconciliation, healing and institutional reforms — are understandably not time bound. The Commission's mandate was originally set to end on June 12, 2014, three months from the date of its establishment on March 12, 2014, but was renewed for an additional three months. The Commission therefore had a lifespan of six months.

9. While temporally the Commission's mandate relates to events that flow from the eruption of violence in Juba on December 15, 2013, it is the Commission's view that the appropriate approach to our work relating to institutions as well as healing and reconciliation requires an examination of events before this date. Indeed, some respondents made the case in their statements to the Commission. In this regard, one respondent observed that:

> I think the four [mandate areas] are interlinked or intertwined and always when I am asked in a sentence, how do you characterize what happened on the 15th of December [2013], I say that it was a spark of accumulated

[3] See Annex to this Report

problems and themes. *So it will be a mistake if we just say we can handle what happened on the 15th of December in isolation of the real issues that were facing the country* (emphasis added).

10. For the Commission, such an approach is necessary because it would be difficult otherwise, for instance, to grasp the legacy of marginalization, which predates the current crisis, and to fashion appropriate responses. It is true that looking at antecedents — events that have occurred over time before December 15, 2013 — allows the Commission to better understand the present. Indeed, the Commission's firm view that for reasons of legality, only the Commission's mandate relating to accountability — which requires an inquiry into violations of human rights and 'other abuses committed during the armed conflict' (which the Commission interpreted to include violations of international humanitarian law) — should be time bound.

Defining Key Terms

11. The Commission's investigative mandate includes an inquiry into violations of human rights and other abuses committed during the armed conflict'. Violations of human rights are considered with reference to the Bill of Rights contained in South Sudan's Transitional Constitution as well as key norms in major international human rights instruments, including key African Union treaties such as the African Charter on Human and Peoples' Rights. As noted above, the Commission interpreted 'other abuses committed during the armed conflict' to include violations of international humanitarian law. These are considered with reference to customary international law and the key instruments ratified by South Sudan in 2012: Geneva Conventions of 1949 and the two Additional Protocols of 1977.

12. Key terms relevant to each mandate area — institutions, healing & reconciliation and accountability — are defined in respective chapters in this report. With respect to accountability, the relevant chapter considers, among others, the Commission's conception of accountability as well as various categories of crimes, including war crimes and crimes against humanity alleged to have been committed during the armed conflict.

Methodology

13. The Commission developed a policy detailing its working methods. This covers various aspects including collection and analysis of data, a research strategy driven by short term and long-term goals culminating in the final report. Aware that process does determine outcomes, the Commission's working methods adopted a deliberate gender dimension. While particular attention was paid to gender as an important aspect of the Commission's work, rather than present a separate 'gender report', the Commission decided to integrate gender analysis into all aspects of its mandate and themes treated in this report. The Commission's approach is informed by its knowledge that gender violations, and more specifically sexual violations, are often dismissed as an unfortunate consequence of conflict resulting in widespread

impunity for crimes that may be committed and general tolerance of gender based violence and disregard for gender equality and women's rights in post conflict settings.

14. The term gender is used to refer to social roles and understandings of male and female as assigned, determined, shaped and understood by society. Reference to gender in the work of the Commission includes understanding what happened to women, men, girls and boys in the conflict in South Sudan. However, given the general status of women and broader challenges of gender inequality in South Sudan, gender is quite often used to refer to issues relating to women and girls.

15. It is widely acknowledged that women and girls are disproportionately affected by conflict and targeted as casualties of violence, as internally displaced persons and as refugees. Violence against women and girls in conflict harms families, impoverishes communities and reinforces other forms of inequality. In addition, women and girls suffer direct violations of their physical integrity during conflict. The Commission explores gender with particular attention to the issues of women and girls across all its mandate areas. The AUCISS paid special attention to violations suffered by women and girls extending beyond sexual and gender based violence (SGBV) to consider loss of education, livelihood and land, forced labour, slavery and exploitation and trafficking of girls.

16. With respect to issues relating to children and youth, the Commission took a similar approach to gender. The views of one respondent reflect the Commission's thinking and approach to the subject:

> […] children's issues require a very serious consideration and children are both abused and used in many different forms. So they also form part of the ladder as perpetrators but they are also abused and they are very much manipulated by the political actors as well as the military actors within South Sudan. So I really hope and appreciate if you [the Commission] can make sure that there are specific aspects as attains (sic) with children …[4]

17. On data collection, the Commission adopted the following methods: Key Informant Interviews (KII) and consultations with various groups, including with experts; Focus Group Discussions (FGDs); on-site visits; investigation and desk-top research. In keeping with its gendered approach to all aspects of its work, the Commission held special meetings (KII and FGDs) to obtain women and girls' perspectives on all mandate areas. In order to protect respondents, the Commission adopted appropriate modalities of work including the provision of safe spaces. The Commission adopted a number of measures to ensure the security of witnesses and those that came into contact with it. These included: the adoption of a protocol; appropriate selection of venues for interviews; as well as various measures relating

[4] Rachael Anok Omot, Jonglei State Minister for Gender, Child and Social Welfare

to confidentiality. With respect to referencing, the Commission took a deliberate decision not to cite names of respondents in its Final Report where necessary. Ethical considerations regarding consent and confidentiality were taken into account during interview. In addition to wide-ranging consultations with groups and individuals in all 10 states, the Commission's team interviewed 70 witnesses in four major areas where violence and alleged violations occurred.

18. Site visits to alleged theatres of violence were undertaken where permitted. In particular, the Commission's team visited Gudele joint operation centre, Tiger Battalion barracks, Juba Teaching Hospital, New Site burial site, Giyada Military Hospital, Bor Teaching Hospital, St Andrews burial site, Bor burial site, Malakal Teaching Hospital and Malakal burial site. Forensic reviews of the stated sites were undertaken and documentation carried out. Witness or survivor injuries were also examined by the forensic doctors and forensic evidence was collected at crime scenes or incident sites. The Commission received evidence such as photographs documenting the violations. A forensic interpretation of this data was undertaken.

19. On research, the Commission was able, in addition to reviewing some relevant academic literature, to access reports of varying scope and depth published by other actors on the on-going crisis in South Sudan. These include reports published by South Sudanese organizations as well as international organizations.

20. The Commission faced numerous challenges relating to access to relevant information. What emerged early on was that some kinds of data such as reports published on the crisis in South Sudan by international organizations have been easier to access. Other types of information, particularly government reports (and documents generally) as well as reports published by South Sudanese organizations and intellectuals have been harder to come by. The Commission's investigative mandate faced particular challenges that are outlined in chapter 3 relating to violations of human rights, other abuses and accountability.

21. With this in mind, the Commission‘s approach was driven in part by the necessity to access all available information including from hard-to-reach sources and the need to engage with at least some of the information contained in the published reports, while filling gaps identified, the objective being to provide a fuller narrative of the situation and as complete as possible a picture of violations of human rights and humanitarian law that have occurred in South Sudan since the start of the armed conflict and to observe at first hand the situation on the ground to be able to buttress the Commission‘s findings and recommendations.

22. Having experienced difficulties in accessing views from unorganized South Sudanese in the first half of its mandate period, the Commission requested for extension of time in order to consult with different sectors of South Sudanese society. The Commission was subsequently able to visit all the 10 states in South Sudan, having initially concentrated its efforts in Juba and three conflict affected states. Members of the Commission held consultations with government officials at

the national and state levels, women groups, youth groups, chiefs and community leaders, church leaders, civil society leaders, diplomats and various international organizations including international non-governmental organisations. The Commission also visited various protection sites and IDP camps in South Sudan and refugee camps in neighbouring countries (Ethiopia, Kenya and Uganda). The Commission also consulted with regional and international leaders.[5]

23. The Commission's Final Report is a synthesis of primary and secondary data, with an emphasis on primary data — essentially information gathered by the Commission from the individuals and groups that the Commission interacted with during its work. In particular, primary data was derived from observation, interviews and consultations. Several individuals and organizations submitted memoranda. Although the report places emphasis on what we were told by various respondents, academic literature and reports constituted a useful source of information. The literature surveyed by the Commission provided some guidance to the Commission in terms of areas and themes to be considered while providing a deeper analysis of some of the themes treated in this report.

24. With respect to accountability, the Commission employs the "reasonable ground" threshold in reaching its factual findings on individual cases, incidents, victims, patterns of violations and alleged crimes. The factual determinations reached by the Commission formed the basis of legal qualification of the violations both under Human Rights and International Humanitarian Law.

Challenges and Limitations

25. There were a number of limitations that confronted the team such as lack of access to incident sites, key witnesses, investigation reports and documentary records. In relation to key witnesses, the team was unable to reach individuals who had been contacted by and provided information to international and other organizations that investigated the conflict prior to the creation of the Commission. To address this limitation, the Commission utilized contacts with community leaders in the PoC camps to identify witnesses with crucial evidence from among the IDP population in the camps.

26. With regard to incident sites, it was apparent that the Commission's investigative team would face challenges accessing sites where crimes were allegedly committed. To ameliorate this challenge the Commission contacted the Ministry of Foreign Affairs and notified the government of its intention to conduct investigations in South Sudan and requested the ministry's assistance with regard to accessing key crime sites. The ministry appointed a liaison officer who facilitated the Commission's access to key government informants as well as sites.

[5] A list of those consulted and places visited by the Commission is annexed to this Report

27. Lack of access to documentary evidence such as medical records and statements threatened to impede the work of the Commission. In particular the Commission was unable to access any data in the possession of the UNMISS which has been documenting the violations committed since the start of the violence in December 2013 — despite the resolution of the Security Council mandating it to cooperate with AUCISS. In relation to medical records, these were unavailable in the State hospitals since they were destroyed and or could not be reconstructed as medics fled from the violence. Despite this shortcoming, the team was able to use witness statements, physical evidence and documentary data availed to the team to reconstruct the events, obtain a forensic analysis and opinion of the events and make valuable conclusions thus meeting its objectives.

Activities undertaken by the Commission

28. In discharging its mandate to investigate human rights violations and other abuses during the conflict, as well as to establish facts and circumstances that may have led to and/or amount to such violations and crimes, the Commission met and held discussions with or conducted interviews with regional and international leaders, government and opposition officials, South Sudan citizens, victims, refugees, internally displaced persons (IDPs), civil society organizations and intellectuals. The Commission also visited various sites including IDP camps; refugee camps; alleged scenes of crimes; government offices among others. The Commission also received leaders and other stakeholders at its offices in Addis Ababa.

29. The Commission also met with several women involved in politics, the public sector and civil society in various places including Juba, Malakal, Bor, Bentiu, Kakuma refugee camp. These were drawn from among others, parliament, political parties, national, state and local government ministries (health, prisons; military sectors). The Commission learnt that some of these women, notably Members of Parliament and civil society have come together to respond to the ongoing crisis beyond political party or ethnic group divisions. Consultations with international partners included meetings with a range of international humanitarian and development actors as key interlocutors with vast experience working on issues related to gender and women in South Sudan. Amongst the groups were survivors, witnesses and victims of SGBV and other serious violations of human rights.

30. During the first three months, the Commission conducted several missions to South Sudan and neighbouring countries during the following dates; April 16 (Khartoum), April 23-30 (Juba), May 10-15 (Kenya), May 15-18 (Uganda); May 26-June 4 (South Sudan: Juba, Bor, Bentiu and Malakal), June 5-7 (Kenya: Kakuma Refugee Camp) and Khartoum; and 20 July — 11 August (Unity, Upper Nile, Jonglei, Central Equatoria State, Western Equatoria State, Lakes State, Western Bahr el Ghazar State, Northern Bahr el Gharzal State, Warrap State and Eastern Equatoria State).

31. The Commission was granted an extension of time of 3 months by the decision of the 23rd Ordinary Session of the Assembly of the AU held in Malabo from 26 to 27

June 2014 following the presentation of its Interim Report to the Assembly of Heads of States and Government. The Commission's request for extension of time was justified by the need to conduct more extensive consultations with different sectors of South Sudanese Society in all the 10 states as well as the Diaspora (in Kenya, Uganda, Geneva and London) and to finalize investigations.

32. During this second phase of the Commission's work, the Commission covered the entire country between July and August in its efforts to ensure that all parts of the society — particularly those parts of the country that were not the specific theatres of violence but had been, inevitably, affected by the conflict - were given the opportunity not only to offer their perspectives on the background to the crisis but to also air their views on the way forward for the country to emerge from the crisis.

Historical and political context

33. The territory that is now South Sudan has seen many violent conflicts. The first war that broke out on August 18, 1955 a few months before Sudan's independence from the Anglo-Egyptian administration on January 1, 1956, was to last for 17 years, beginning as a low level insurgency with the mutiny at Torit, Equatoria by Southern soldiers resisting transfer to the North. At the root of this conflict were several unfulfilled promises made to southerners by the departing British and northern elites. To agree to be part of the united Sudan, southerners had been promised among others, a federal arrangement which was soon disavowed by the Sudanese government.

34. Southern self-determination — in varying forms and for various reasons — and resistance to Islamisation and Arabisation were to become the central issues in the conflict between the North and South until the signing of the CPA in 2005. Although it is often suggested that the clamour for self-determination by the south started as early 1947, records show that claims for a federal arrangement were first voiced in 1955 by Southern MPs fearful of marginalization within a united Sudan.

35. As the British came under pressure to grant independence, a conference — the Juba Conference — was convened ostensibly to ascertain Southern aspirations. In the southern delegation were chiefs, several junior administrators (clerks) and non-commissioned officers (NCOs) while the delegation from the north was made up of key political leaders.[6] The record shows that there was a lively exchange among the delegates, with northern representatives extolling unity between the north and south, which had been administered separately from the North since the adoption of the

[6] See Elijah Malok *The Southern Sudan: Struggle for Liberty* (2008) 14 notes that the southern delegation lacked the capacity to understand the nature of the undertaking they were engaged in and the gravity of the decisions made.

Closed Districts Ordinance of 1922.[7] Malok notes that although there is no record of an agreement between the two sides, communication to the then Governor General of the Sudan, Sir Robert Howe from Sir Robertson concluded that southerners had agreed to join the union with the north as independence approached:

> The Southern Sudan, through her representatives in the two-day Juba conference, has agreed to throw her lot with the North. The best interests of the South will therefore be guaranteed in a united Sudan. Any future political and constitutional arrangements will therefore proceed on the premise and frame of unity between the North and Southern Sudan.[8]

36. Clamour for a different accommodation would begin soon after the appointment of southern representatives to the Legislative Council established in the North in 1948. One of the main resolutions of the Juba Conference of 1947 was that the South would send representatives to the Legislative Council, which was the main body established to prepare for independence. Dissatisfaction of southerners with the response of northern politicians to their demands for federation, coupled with the fear of northern domination fuelled the ensuing conflict that would begin on the eve of independence in 1955. The dishonoured agreement reached between Northern and Southern MPs was to the effect that 'as soon as independence is achieved, federation between the North and the South will be given special consideration'.

37. The isolated incidents constituting a low-level insurgency that began in 1955 escalated into the a full blown civil war between the North and South in the early 1960s when Equatorian Major-General Joseph Lagu masterminded the unity of various southern rebels under the South Sudan Liberation Army (SSLA), also known as Anya-Nya I. By this time, it had become evident to southerners that northern elites were not prepared to break from the British policy of neglect and marginalization of the south and the periphery in general. The monopolization of power bequeathed by the British to the dominant northern riverain elite and exclusion of the periphery elicited sustained armed insurgency.

38. Other than abrogating the agreement reached between Southern MPs and northern political parties to the effect that federation between the North and the South would be given special consideration once independence was achieved, it is reported that southerners had only been allocated 6 out of 800 civil servant positions when colonial rule ended.[9] The war was to end in 1972 with the signing of the Addis

---

[7] See Malok, above, Appendix I (Minutes of the Juba Conference of 1947 and Proceedings of the Juba Conference on the Political Development of the Southern Sudan) 288-293.

[8] Report of the Juba Conference, February 1947 cited in Malok, 12.

[9] Elijah Malok (n 6 above) 29. On the causes of the Anya-Nya I War, see John Young, *The fate of Sudan: The Origins and Consequences of a Flawed Peace Process* (Zed Books, 2012) 19-25; See also Robert Collins, *Modern Sudan* (2008) 65 cited in J Young, at 20.

Ababa Agreement under President Jafaar Nimeiri. The agreement granted significant autonomy to the South under a federal arrangement rather than outright secession demanded by SSLA. The 1973 Southern Constitution, while establishing Islamic Law and custom as the main sources of law, protected Christianity in addition to providing that personal matters of non-Muslims shall be regulated by the personal laws (essentially African custom).[10]

39. The second north-south war was to break out in 1983 when the government, in part under pressure from Islamists, effectively abrogated the Addis Ababa Agreement by reversing the 1973 commitments on Islam and use of Arabic in the South, as well as weakening the federal arrangement, by dissolving the Regional Assembly and dividing the South into three administratively weak regions — Equatoria, Upper Nile and Bahr el Ghazal — reportedly at the request of, or acquiescence of Equatorian elites, apparently fearful of Dinka domination.[11] The measures adopted by the government effectively introduced a new dynamic to the war in Sudan: it also became a South-South conflict, which the successive regimes in Khartoum would encourage and exploit from then on, beginning with the Anyanya II — SPLM/A divide in the mid 80s.

40. In addition to the abrogation of the Addis Ababa Agreement of 1972 by the government, the turn to pious Islam through the establishment of sharia law as the law of the land and *hudud* punishment (regarded as harsh punishment pronounced by 'courts of decisive justice', often leading to executions and amputations) commentators have given additional reasons for the renewal of war. First, the discovery of oil in the South in 1979 did not translate into reduction of poverty in the South. Economic marginalization continued with proceeds from oil appropriated for development in the North. Second, the construction of the oil refinery at Kosti instead of Bentiu where the oil was discovered, coupled with attempts to redraw north-south borders to include oil areas. Third, discrimination of southerners and people from other areas in the periphery — East and West of Khartoum — partly manifested in the forced deportation of people from these regions, ensured that the ranks of the southern rebellion would swell.[12]

41. The 1983 insurgency that would last until 2005 with the signing of the CPA between the Omar al Bashir-led National Congress Party (NCP) government in Khartoum and John Garang's SPLM/A brought together five disparate rebel formations in the initial years: Anyanya II led by Samuel Gai Tut, Akuot Atem de Mayen and Gordon Kong Cuol; army mutineers led by Kerubino Kuanyin Bol and William Nyuon Bany; the

[10] On the Addis Ababa Agreement and the ensuing regional government, see Malok (n 6 above) 80-141

[11] See John Young (n 9 above), 27; On the Regional Government and events leading up to the abrogation of Addis Ababa agreement, see Malok (n 6 above) 106-140.

[12] See MH Kanyane, J Hoth Mai & D Abot Kuol, *Liberation Struggle in South Sudan: Critical Issues for Consideration* (Durban, 2009) 11-12. See also Young (n 9 above), 46 (quoting SPLM Manifesto, 11-12)

Student Revolutionary Group led by Pagan Amum Okiech and Oyai Deng Ajak; Abyei Liberation Front led by Deng Alor Kuol and Chol Deng Alaak and; the Anyanya Absorbed Forces Revolutionary Movement, a covert group led by John Garang de Mabior. These groups would form the SPLM/A under John Garang. Following contestation, desertion, revolts and purges in the initial years, SPLM/A under John Garang would weather further storms over the years to become the dominant rebel force and challenger to the regime in Sudan by the time the CPA was signed.[13]

42. Over the years, the SPLA/M would undergo multiple changes as it waged the struggle of liberation. Of the events that came to define the SPLA/M, the split and eventual defection of Dr Riek Machar and Dr Lam Akol stand out as defining moment in the life of the movement. Having accused Dr Garang of what they regarded as dictatorial rule and undermining democratic evolution within the movement, the two SPLA commanders announced in 1991 that they had deposed the charismatic SPLM leader. The ensuing contest would result in 'the SPLM Split'.[14] From our consultations with South Sudanese, it emerged that events surrounding the split in 1991 continue to define and order relations within the movement. On the impact of the SPLM Split, one respondent observed that:

> That split has caused a lot of lives of South Sudanese and it is still fresh in the minds of the people. Even these skeletons are still there and it has fragmented all our refugees in the Diaspora and it has also broken the unity of the Southerners among themselves and most of these people went back to Khartoum. By then we were still in Khartoum. He came and he was still there [Riek Machar], the SPLM became very weak as a result of that split.

43. Many respondents recall these events with bitterness. Other than the lives and property lost, many respondents, believing that the war would have ended earlier than it did had the 1991 Split not occurred, blame the prolongation of the war on the split. It is the Commission's view that from multiple vantage points — political, healing and reconciliation — 'the ghosts of 1991' have to be confronted. In chapter 4 of this report, the Commission reflects on this issue from the perspective of national healing and reconciliation.

[13] For the early history of the SPLM, see Young (n 9 above) 44-50. See also, Mathew LeRiche and Mathew Arnold, *South Sudan: From Revolution to Independence* (2013) 31-40.

[14] On the events leading to the 'SPLM Split', the conflict between the Garang-led SPLM-Mainstream and SPLM-Nassir, to the Abuja Peace Talks, see generally Lam Akol, *SPLM/APLA: The Nassir Declaration* (2011)

The past and the Present: Where is the Link?

44. The brief background of the decades long North-South conflict above and the manner in which the conflict was dealt with by the CPA signed in 2005 provide not only a partial background within which the current South-South conflict should be understood but, also supplies pointers to some of the current conflict's root causes.

45. The Commission takes the view that the current conflict can be attributed, in part, to the flaws of the CPA (in terms of process and outcomes) as well as its implementation. Some respondents that expressed themselves on the subject as well as commentators who have engaged with the CPA have suggested that the CPA was a flawed peace process at various levels.[15] First, it adopted or followed the dominant paradigm of 'liberal peace-building', which in practice tends to privilege 'negative peace', with its preoccupation with ending violence. The consequence is that democracy and structural transformation receive limited or cursory attention. The Commission heard from several respondents that the central focus on ending the north-south conflict led the international community to overlook malpractices in the 2010 general elections as well as 'go easy' on the GOSS in the post CPA-era in relation to commitments to democracy and transformation.[16] It is the Commission's view that the inadequate attention paid to building democratic institutions during this period and the immediate post independence period created the situation that faced South Sudan in the lead up to the December 15 crisis: the inability of institutions to mediate and resolve conflicts, leading to the outbreak of violence.

46. Second, the focus on issues of marginalization and exclusion on a north-south axis ignored or glossed over similar concerns within the north and the south. While the conflicts in the Three Areas (Abyei, South Kordofan and Blue Nile) were on the CPA agenda and received consideration, little pressure has been exerted on the parties to meet commitments made. Some of those interviewed by the Commission agree that the failure of the CPA to address longstanding south-south grievances and problems, — some of which were at the core of conflicts within SPLM/A, as well as between SPLM/A and other formations during the civil war — had the consequence that break out of inter-south conflict would only be a matter of time.

47. The third defect of the CPA as observed by respondents, which is linked to the second, relates to the monopolization of the peace process by NCP and the SPLM/A as the only parties to the process. The exclusion of other critical actors, including other rebel formations in the south (such as SSDF which enjoyed significant strength) and parties in the north as well as civil society (in the North and South) resulted, in the tailoring of the talks to the narrow interests of the NCP and SPLM. For South Sudan, this could have laid the groundwork for a repeat of the exclusionary practices of the past. As the Commission takes the view in the chapter

[15] For a deeper treatment of this topic, see generally John Young, (n 9 above)

[16] LeRiche and Arnold (n 13 above) 129-132 describing the 2010 elections as 'not so transformational'.

on institutions in this report, the President's efforts to accommodate other armed actors (militia) during the interim period and beyond within the SPLA and other institutions appear to have failed to create lasting stability.

48. Several women leaders raised concerns about the CPA's provision on gender. They noted that the provisions on equality were not sufficiently detailed, describing the approach adopted as 'blanket'. The Commission notes however, that the Bill of Rights provided for in the CPA (which informed the National Interim Constitution, the Interim Constitution of South Sudan and the Transitional Constitution of South Sudan) addressed issues relating to gender equality. Apart from providing for equality between men and women as detailed in major international human rights instruments, it also made provision for equality before the law, and freedom from discrimination. It is the Commission's view that the problem was one of implementation, rather than lack of a legal framework *per se*. Although the Constitution additionally provided for gender quota of 25%, this was limited to elective office (did not extend to appointive office). In general, there was a lack of adequate institutional framework for the implementation of the normative framework on gender equality.

On the genesis of the conflict

49. From its consultations with leaders and other sections of South Sudanese society, the Commission learnt that prior to the outbreak of violence on December 15, 2013, there were indications as early as 2009 that all was not well, and that differences within the party portended violence. The Commission heard that conflicts emerged within the SPLM in 2009 as Southern Sudan prepared to hold elections in 2010. At the time, differences between the President and Pagan Amum, the then Secretary General of the SPLM had threatened to derail progress towards elections. The differences were eventually resolved, with many urging for unity of purpose as the elections and the eventual referendum approached.

50. The other dimension to these developments was the relationship between the President and his Vice President. The Commission established that long before the 2010 elections, the relationship between the two leaders was already strained, and that these differences were overlooked for the sake of unity within the party during the Interim Period (2005-2011). It is was suggested that the SPLM split in 1991, and the reordering of the SPLM leadership to accommodate Riek Machar on his return were partly to blame for the frosty relationship that carried on into government after independence. In 2010, the two leaders are said to have supported rival candidates in a number of key electoral positions, particularly the governorships of several states.

51. Respondents described to the Commission a difficult working relationship, and that throughout the interim period and after independence, there had been no direct communication between the Office of the President and that of the Vice President, with each cultivating other relationships and working directly with other government

officials. Based on the remarks of a senior government official who served with both leaders that 'there was no file moving from OP to VP's Office and vice versa', it appears that for sometime, there were two parallel governments, and that the political differences within the SPLM merely accentuated the factionalism revolving around the two leaders. In this regard, one respondent narrated as follows:

> I recall it every time especially when we had this transitional period of the CPA of the six years. The evidence made me know that one day something will happen is that there are two governments. You know if you are a civil servant, you know what is going on in the system. The President was there busy with his own goal to reach the referendum and the Vice President was given all the powers but he was setting [working with] his own people who were affiliated to him … in all ministries and we can see the soundness [implications] of what was going on.

52. Perhaps the strongest signal that the situation could deteriorate into violent confrontation was the developments in political circles. The dismissal of the Cabinet in July 2013, heightened tensions and fostered a sense of exclusion in sections of South Sudanese society. The Commission heard from many respondents that following this event, and in the lead up to the SPLM meetings held in December, there were rumours around Juba 'that the Dinka and Nuer are going to fight', pointing to deteriorating security situation around the capital.

53. Respondents also noted that the recruitment exercise carried out by the army added to the suspicion and tension that was building up in political circles. On this issue, the Commission was unable to establish the exact number of those recruited, as we received conflicting information. Figures ranged from 7,500 to 15,000. The Commission heard further that the recruitment was conducted mainly from Bahr el Ghazal by the then Governor of Northern Bahr el Ghazal Paul Malong as a response to the build up of tensions with Sudan over Heglig. The President confirmed that 7500 were recruited. A majority of the newly trained soldiers were not regularly integrated into the SPLA. According to officials, between 330 and 700 of these soldiers were eventually integrated into the Tiger Unit (Presidential Guard) following a commissioning ceremony attended by President. It was not clear, from the Commission's consultations, what happened to the rest of the newly trained recruits. However, the Commission heard that some of these were deployed around Juba disguised as 'street cleaners' in the weeks leading up to December 15.

54. Contestation over this exercise arose as early as May 2013. Top military leaders interviewed by the Commission had voiced concern that the exercise was skewed and irregular. Some concerns were raised about the composition of the new force. The Commission learnt that the new recruits essentially operated outside established military command. The President and former military leaders told the Commission that due to budgetary constraints, alternative arrangements were made (from private sources) to train, provide kits and pay the salaries of the new recruits.

55. Other respondents point to structural and institutional factors, rather than the events unfolding in the political scene. In this regard, one senior SPLM official observed that the structural weakness of the state and the ruling party provided the optimal conditions for the political conflicts to flourish, leading to the outbreak of violence:

> So you have that situation [of insecurity arising out of weaknesses within the SPLA and proliferation of arms] and then you have very weak institutions police, army, judiciary, there are so many cases that are not seen; and communities see criminals walking free, they decide to take law into their hands, that is there. I am mentioning this because all these areas the international community is working closely with the government and they know exactly where the weaknesses are, where the problems are. In some areas they invested, others they left it, they said it is not their responsibility. But we saw it come [the crisis]

56. Many South Sudanese as well as regional leaders told the Commission that the current crisis in South Sudan is partly a crisis of leadership, and that had those in positions of power — both within the SPLM and government — acted decisively, it is likely that the contestation within the party would have been resolved through democratic means. The violent confrontation that broke out within the military could have been arrested before it got out of hand. One regional leader aptly observed that the indecision of leaders can be attributed to the conflation of personal, communal and national interests. With respect to the lack of leadership, one respondent observed that:

> So all the other things that happened, practically were based on political failure leadership because it was something that can be solved within the political party but they allowed it and I think there were clear indicators that the leadership is not going on well. There were quarrels among them … a lot of confusion was going on.

57. It is quite clear to the Commission that the outbreak of violence in December 2013 was not an isolated event: all indications, as described, are that the crisis built up over time,

> Always when I am asked in a sentence how do you characterize what happened on the 15th of December, I say that it was a spark of accumulated problems and themes. So it is will be a mistake if we just say we can handle what happened on the 15th of December in isolation of the real issues that we are facing in the country.

58. On the reason why the conflict spread from the party, into the army and subsequently the general population, many respondents pointed to the structural links between the SPLA and the SPLM:

> If you read our literatures (sic) since 2009 … we were expecting an implosion [within SPLM] not explosion: because there was no delinking [of the SPLA and SPLM]. The political party was not delinked from the military. So [if] the difference is in the party immediately [it] will transfer to the military.

59. Although most senior political leaders are not SPLA, the factionalism that marks the political terrain, particularly within the SPLM finds expression in the military and, in the end, sections of the military identify with particular political leaders because of the lack of cohesion within the SPLA, which many respondents described as a 'collection of ethnic militia'. Echoing views of senior military officials, the Commission observes that while some elements of the military possess characteristics of a national army, reforms are necessary. The second chapter of this report delves deeper into issues relating to the SPLA, and makes recommendations at the end.

60. In keeping with the factionalism that characterised the army, once the conflict transitioned into the general population, it reflected the dynamics in the political scene. While political leaders have at different times insisted that the conflict is a 'political conflict', evidence shows that while the conflict started off as a political conflict within the SPLM, it quickly acquired a decidedly ethnic dimension as it progressed. Indeed, on the ethnicization of what was initially a political conflict within SPLM, one respondent lamented that: *'we the women thought that it was a war in the government only to realize that it was a war between the Nuer and Dinka'.* This dimension of the conflict manifested, not only in rhetoric but also in patterns that can be discerned from targeting of individuals. Chapter three of the Commission's report, which considers issues relating to violations of human rights and accountability, engages further with this issue.

On the key events leading up to the conflict

61. The developments described above provide a background to the events that unfolded within the SPLM in 2013. A survey commissioned by the government concluded that the government had failed on multiple fronts, and that there appeared to be widespread dissatisfaction with its performance in the general population. As the party prepared to establish new structures, and to renew itself in preparation for future elections, the findings of the survey begun to feature in the jockeying within the party. The Commission heard that there was concern within the party that the report reflected badly on its performance, and there was need to change direction. As the debate on the renewal of the party continued, some leaders sought to use the opportunity, and the outcome of the survey as a springboard for their own individual political ambitions. Echoing views expressed by several respondents, an opposition leader has suggested that the conflict within the SPLM was essentially about power:

> […] this is why I said the difference has nothing to do with reform … Riek [Machar] wanted to be Chairman, Rebecca Nyandeng' wanted to be the

Chairperson, Pagan [Amum] wanted to be Chairman and Salva [Kiir] wanted to continue. That was the problem.

62. With the frosty relationship between the President and Vice President as a background, the Vice President's declared ambitions to contest for the position of party chairman (and subsequently the Presidency in 2015) coupled with his criticism of the government further politicised the discussions within the party relating to the adoption of the party constitution, manifesto and rules and regulations in preparation for its registration under the new Political Parties Act, 2012. It is in this context of souring relations within the party, that the President is said to have acted, reportedly stripping the Vice President of his executive powers in May 2013.

63. Eventually, President Kiir would dismiss, on 23 July 2013, the Vice-President along with the entire Cabinet (with the exception of 4 ministers) and suspended SPLM Secretary General, Pagan Amum for alleged corruption. The President also removed 3 elected state governors (Jonglei, Unity and Lakes), promoting the Jonglei governor to the position of Minister of Defence while the other two were dropped.[17] The Commission notes that the President is constitutionally empowered to dismiss any minister and to remove elected governors. For the latter, the constitution stipulates that this may happen, 'in the event of a crisis in the state that threatens national security and territorial integrity', but an election should be organized by the care-taker governor within 60 days.[18]

64. Following his removal, Dr Machar accused President Kiir of moving towards dictatorship and announced that he would challenge him for the presidency.[19] An opposition group made up of Rebecca Nyandeng de Mabior, Pagan Amum and several other leaders developed a unified position on the direction of the party. On December 6, 2013, while the President was in South Africa, the group called a press conference at which they accused the President of dictatorial tendencies and unilateral decision-making [Testimony by Mac Paul, former Director, Military Intelligence). On December 8, a group of SPLM officials that some respondents referred to as 'SPLM-Mainstream' (already alluding to the factions that had already emerged within the party) held a press conference in Juba to counter the claims made by the former Vice President and his group on December 6. The Commission was informed that efforts led by the former President of South Africa Thabo Mbeki, the African Union High Implementation Panel on Sudan and South Sudan as well as the church to resolve the crisis in the SPLM before December 15 failed. In particular,

[17] Jonglei Governor Kuol Manyang Juuk was promoted to defence minister; the Unity and Lakes states governors were not given new posts. "South Sudanese welcome appointment of Jonglei governor as defence minister", *Sudan Tribune*, 31 July 2013; International Crisis Group, 'A civil war by any other name' Africa Report N°217, 10 April (2014) 4. Another governor, Paul Malong, was 'transferred' later in the year to assume the position of Chief of General Staff (CGS)

[18] See Article 101 (r) and (s)

[19] ICG (n 17 above) 4

the Commission established that advice to postpone the NLC meeting was not heeded by political leaders.

65. It is in this state of tension and contestation that the meeting of the SPLM's National Liberation Council eventually took place at the Nyakuron Cultural Centre in Juba on 14 and 15 December 2013. The meeting had been postponed several times since May 2013. The Commission received unverified reports that part of the reason for the repeated postponement of the NLC was the inability of leaders to predict the outcomes. However, senior officials told the Commission that while the former Vice President appeared to command greater numbers within the SPLM's party structures (the Political Bureau and National Liberation Council) the fluidity of the situation was such that one could not predict with certainty the outcomes.[20]

66. At the NLC meeting, three issues, around which contestation would revolve emerged: the voting method (whether it should by secret ballot or a show of hands); the proposed nomination by the President of 5% of the delegates that would eventually elect the party officials, including the party's Presidential candidate for the 2015 elections; and the election of the party's Secretary General. The first two issues were particularly contentious. The Commission heard that a group of NLC members led by the former Vice President preferred a vote by secret ballot, and opposed the clause in the draft constitution that reserved 5% of the delegates to the Party Convention to be nominated by the President. It was argued that the clause had the effect that the President would have an undue advantage in the party elections should he choose to contest.

67. After the first day of the NLC meeting (14th) that some described as manifesting heated debates where the mood was acrimonious and confrontational, Dr Machar and his group withdrew from the NLC, failing to turn up on 15 December. The party proceeded nevertheless to adopt the constitution, manifesto and code of conduct. Most accounts indicate that between 9pm and 10pm, fighting broke out at the SPLA Headquarters barracks in Juba amongst members of the Presidential Guard (the Tiger Division) pitting soldiers loyal to the President (mostly of Dinka ethnicity) and those who supported Dr Machar, (mostly Nuer). Following hours of fighting involving the military and some members of the organized forces (police, prisons, fire brigade), the fighting spread out into the general population, with the involvement and targeting of civilians from December 16th.

68. With respect to what triggered the violence on 15th December 2013, the Commission established that there are two competing narratives. The first holds that the violence

[20] See also ICG, (n 17 above) at 5 noting that: 'the national SPLM convention, scheduled for May 2013, was repeatedly delayed, as were other key meetings, such as those of the SPLM Political Bureau and NLC, in part because Kiir's rivals appeared to have more supporters in those bodies'. See also AUCISS Interview with Mac Paul and former CGS, James Hoth, noting that while Machar was popular within the NLC, the President would probably have still won a general election)

was sparked by disagreement within the Presidential Guard, following a claim that there was an order to disarm sections of the Presidential Guard. The second narrative, which emerged on December 16th, 2013 was that the violence was sparked by an aborted coup. From all the information available to the Commission, the evidence does not point to a coup. We were led to conclude that the initial fighting within the Presidential Guard arose out of disagreement and confusion over the alleged order to disarm Nuer members. The Commission notes further, that there are also suggestions of a mutiny within the Presidential Guard, and the ensuing violence spiralled out of control, spilling out into the general population.

On the broader context of current crisis

69. Many South Sudanese that the Commission interacted with in South Sudan and neighbouring countries expressed their disappointment at the outbreak of armed conflict not long after the country attained independence. The Commission heard from many respondents expressing their optimism when independence was attained that for once, southerners had the opportunity to decide their own destiny. One respondent captures this aptly:

> After the 2005 agreement was signed, there were so many expectations from the people on the ground and nothing ever happened and I think it's now 9 or 8 years and nothing really has ever happened.

70. As acknowledged in the grassroots survey on the performance of the government, which later became the subject of contestation and rancor within the SPLM, one respondent stated that in essence, the ruling party had failed to translate the CPA into a program of development:

> Since 2005, the leadership failed and basically transforming the CPA into a program that could actually be articulated into basic service delivery. If you look at some of these frustrations right now, we have leaders who have no vision, that's why we have chaos today.

71. Expressing the high expectations that South Sudanese of when independence was attained, one respondent cited what some consider as high levels of corruption that came to characterize post-CPA era and expressed disappointment that the lives of ordinary South Sudanese had not changed:

> The promises that they were going to remove the town to the rural areas [develop the country] is not there, all those hopes which they were having, the people who have come have found themselves losing everything and they did not get anything. The children also which they are having (sic), some of them now we have people who have finished South Sudanese School Certificate to go to the universities, people are not getting but there is a small clique which has no problem … This is why people need a change (sic) … when you do down to the county there is nothing. People

> do not feel that there is something that we the people of the Republic of South Sudan have.

72. While it is acknowledged that the new government in the South faced serious challenges, partly because it inherited a country without any strong institutions due to the decay occasioned by a long legacy of marginalization and neglect by the national government, some respondents were of the view that more could have been achieved since the signing of the CPA 2005:

> After the 2005 agreement was signed there were so many expectations from the people on the ground and nothing ever happened and I think it's now 9 or 8 years and nothing really has ever happened. The focus was on the few government structures that were set up, those government structures were unable to come up with programs that would address the very basic needs of the grassroots.

73. Indeed, a senior SPLM official acknowledged that by 2013 when the violence broke out, South Sudan lacked strong institutional foundations, and faced a set of interrelated challenges, which included weak rule of law and insecurity:

> So you have that situation [of insecurity arising out of weaknesses within the SPLA and proliferation of arms] and then you have very weak institutions police, army, judiciary, there are so many cases that are not seen; and communities see criminals walking free, they decide to take law into their hands, that is there. I am mentioning this because all these areas the international communities are working closely with the government and they know exactly where the weaknesses are, where the problems are. In some areas they invested, others they left it, they said it is not their responsibility.

74. The Commission learnt that with time, frustration had mounted among ordinary South Sudanese at the slow progress and lack of opportunities, which created a favourable environment for destructive forces to take root. In this regard, one respondent noted that 'the focus at the top was very narrow and so there was a lot of frustration and anger at the ground level and so it makes it easy to get to the situation we are and it required one little spark to let people express their frustrations [vent out their anger]'. The lack of opportunities for the youth not only contributed to insecurity but also created a ready pool for recruitment. In this regard, an SPLM official noted that:

> We also have huge number of youths that have not been engaged in any meaningful activity and already they started engaging themselves in cattle-rustling, they have money and they have cattle they trade with arms and that is there you have huge number of youths and by the way, the population of South Sudan is I think 75-80% youth and that component of the population are not engaged in gainful activities. So they become very

> vulnerable to anybody who comes and waves money or tempt them with guns or positions in the Army, they become very vulnerable.

75. As discussed in greater detail in the chapter on Healing and Reconciliation, many of the problems associated with the long civil war had not been addressed. These included the SPLM split of 1991 and the human rights violations committed by various parties. This was partly explained by the fact that the government prioritized peace and stability during the interim period, which necessitated the adoption of policies that glossed over many of the problems cited here and elsewhere in this report. With respect to the spill-over effects of the 1991 split on intra-SPLM relations, one commentator observed that:

> These differences, right from the split the harmonization of people and really addressing the heart, the killing, the serious things were never addressed. So that came when now our first National Convention was in 2008, we almost had a break-down at that time, 2008. But we decided there should be no serious elections because … we wanted to get to [the] referendum [we decided that] we should handle [resolve] it until then [after the referendum]. So we kept delaying these problems until December 2012 …

76. Speaking in relation to the underlying reasons for the failure to address violations of human rights committed during the conflict, another respondent pointed to the political consensus to resolve to work towards self-determination and independence before addressing south-south concerns:

> […] we always said lets finish with the North. We have our own problems but let us finish with the North. Once we finish with the North, we will come and put our house in order but this never happened. There were people who were hurt there was a lot of pain, others are killed children are killed, looted and also we sweep these issues under [the] carpet in the name of 'let us address [deal with] the enemy' [first]. But when we finished with the enemy nobody went back to [honoured] that promise.

77. As with all other violations committed before the CPA was signed, SGBV remained unaddressed. This was not only due to the exclusion of accountability from the agenda of the talks that led to the CPA but also to the failure to implement a national reconciliation agenda as decreed in the CPA. The political consensus that building new institutions, the 2010 elections and the referendum should be prioritized meant that many pressing concerns did not register on the national agenda. While debate occurred around the rights of women particularly in the context of the constitutional review process which resulted in the adoption of a 25% quota for women (in elective positions), there was no structured dialogue relating to how the institution of culture impacts women's rights and gender relations in general.

78. Such a dialogue would have interrogated some of the aspects of culture that affect the status of women and that place them at a disadvantage not only in the enjoyment of rights but also render them especially vulnerable in times of conflict. These practices include: patriarchy, child marriages, abduction of girls, bride wealth, polygamy and wife inheritance. The Commission also established that the impact on society and particularly on women of the many violent conflicts that played out in South[ern] Sudan since independence also called for a national conversation in view of the fact that conflict affected women in particular ways. At least one account indicates that while women played a critical role in the many conflicts in South Sudan, particularly during the war of liberation, some have been victims of SGBV.[21]

79. Beyond SGBV, the Commission learnt that conflict has had broader impact on women. The status of women in South Sudan has largely been determined and shaped by a combination of three decades of conflict and inequitable cultural norms and practises. Women account for over 60% of the population largely because of conflict that saw many men and boys being killed or fleeing to other countries for safety. Many women find themselves alone to face the challenge of providing for their families, often in situations of extreme poverty, which leaves them and their children extremely vulnerable and with little to no support and security structures.

80. In the Commission's view, the interaction between all the factors discussed above provided the conditions for what started off as a political conflict within the ruling party to erupt into violent confrontation and to spread into the army, later engulfing most of South Sudan with devastating effects. The view of one respondent appears to aptly capture the set of combustible factors that explain the progression of the conflict that culminated in violence on December 15, 2013:

> So that is why within three days, that disagreement at the NLC meeting changed from conflict between two jumped out to the army, from the army it jumped out to the communities, very quickly because it's a long time. The differences have been held for a long time. It affected more or less the entire fabric of the nation, not just the army … the [failed] DDR [disarmament demobilisation and reintegration] process, the militias, to people still remembering what happened in 1991 [the conflicts of the past] … [people] already have guns in their hands.. So it is something that we knew but we didn't know it was going to be this ugly and this soon.

Introducing the substantive chapters

Chapter 2: Institutions

81. The first plank of the Commission's four-fold mandate relates to institutions. On this aspect of our mandate, the relevant parts of the AUPSC Communiqué and the

[21] D'Awol, A. M 'Sibu ana, sibu ana. *leave me, leave me': Survivors of Sexual Violence in South Sudan'* in Bubenzer, F. and Stern, O (eds) *Hope, Pain and Patience* (2011).

Terms of Reference contained in the Concept Note on the Establishment of the AUCISS mandated the Commission to:

> Compile information on institutions and process or lack thereof that may have aided or aggravated the conflict resulting in violations of human rights and other abuses; examine ways on how to move the country forward in terms of unity, cooperation and sustainable development; and to make recommendations relating to: the appropriate mechanisms to prevent a recurrence of the conflict and; modalities for nation building, specifically focused on building of a functional political order, democratic institutions and post-conflict reconstruction.

82. The rest of the chapter considers reforms that have been undertaken that are currently ongoing in select sectors that the Commission considers to be critical to building a strong state with the aim of not only instituting a functional state that can do that which states ordinarily do but also creating effective, accountable and democratic governance. In particular, the sections consider the following: the security sector (army and police); executive and structure of the state; legislature, judiciary; political parties and; financial management of strategic resources (oil and land).

83. In terms of structure, focus on each institution outlines the current state of the institution, evaluates past and current reform initiatives and makes recommendations relevant to each institution while at all times integrating views gathered by the Commission from different sectors of South Sudanese society in consultations held there and from South Sudanese currently residing abroad, including neighbouring countries.

Chapter 3: Evaluation of Violations of Human Rights, Other Abuses and Accountability

84. This chapter documents alleged violations of human rights and humanitarian law committed in South Sudan during the unfolding crisis. In this regard, it captures the findings of the investigative work conducted by the Commission's Investigative Team as well as relevant views expressed during the Commission's consultations, which includes focus group discussions.

Chapter 4: Issues on Healing and Reconciliation

85. This chapter combines two interrelated focal areas of its mandate: healing and reconciliation, which are defined in the conceptual part of this report. In terms of content, this chapter reviews previous and current reconciliation initiatives and institutions in South Sudan. The objective is to map the terrain, but also to draw lessons in relation to institutional design and other aspects relating to how to pursue the reconciliation agenda in post conflict South Sudan.

86. The chapter engages with the views of government officials, members of civil society including intellectuals as well as ordinary South Sudanese consulted by the Commission over its mandate period. In terms of themes treated in this chapter, the Commission engages with multiple issues, including: how healing and reconciliation relate to other aspects of its mandate, notably accountability and institutional reforms; the views of South Sudanese relating to how they can live together; the interaction between national and local reconciliation processes and institutions; the role of different actors and; international best practice as it relates to all relevant issues considered.

87. In terms of the Commission's mandate relating to healing and reconciliation, expressed in the AUPSC Communique and Concept Note on the Establishment of the Commission, the AUCISS is charged with: the investigation of human rights violations including causes that underlie these violations; recommend the best ways of ensuring healing and reconciliation; and of moving the country forward in terms of unity, cooperation and sustainable development. It is the Commission's view that while reconciliation merits attention as an independent pursuit, when considered as a 'by-product' of other initiatives and processes related to accountability including criminal accountability and reparations as well as institutional reforms, reconciliation finds expression in various aspects of the Commission's mandate.

Chapter 5: Conclusion: Findings and Recommendations

88. This chapter of the Commission's report contains the findings and recommendations of the Commission relating to the four focal areas of its mandate: healing and reconciliation; human rights violations, other abuses and accountability and; institutions.

CHAPTER II

INSTITUTIONS IN SOUTH SUDAN

CHAPTER II

INSTITUTIONS IN SOUTH SUDAN

> Since attaining independence, many other African countries have bee unable to develop strong state structures and a sense of shared nationhood. Too often, one political force or tribe has sought dominance over others, political space has been restricted, military interference has impeded progress in civil affairs or competition for resources has led to instability, displacement and conflict. The overarching question for South Sudan is whether such scenarios can be avoided.[22]

A. INTRODUCTION

89. The first plank of the Commission's four-fold mandate relates to institutions. On this aspect of our mandate, the relevant parts of the AUPSC Communiqué and the Terms of Reference contained in the Concept Note on the Establishment of the AUCISS mandated the Commission to:

> Compile information on institutions and process or lack thereof that may have aided or aggravated the conflict resulting in violations of human rights and other abuses; examine ways on how to move the country forward in terms of unity, cooperation and sustainable development; and to make recommendations relating to: the appropriate mechanisms to prevent a recurrence of the conflict and; modalities for nation building, specifically focused on building of a functional political order, democratic institutions and post-conflict reconstruction.[23]

90. Having established that the crisis in South Sudan, has roots in, and is indeed a crisis of weak governance, weak leadership and weak institutions, conflation of personal, ethnic and national interests and the problematic nature of the transition instituted by the CPA, this chapter of the Commission's report treats this subject in greater detail. It reviews key state and non-state institutions, namely: the system of government; national and state executives (security sector, financial management of strategic resources); national and state legislature; the judiciary and justice system; political parties; civil society and media. The Commission's review of civil society, includes ordinary South Sudanese citizens; women's organisations; Diaspora; community leaders and; previously marginalised groups.

91. Evaluation of institutions forms a major plank of 'transitional justice', a combination of measures or mechanisms adopted in societies transitioning from repressive and

[22] Paul O'Grady and Geoffrey Weichselbaum, 'South Sudan: Prospects for democracy in to world's newest state' Democracy Reporting International Report, (April 2011) 3.
[23] AUPSC Communiqué (n 1 above)

authoritarian pasts to a more open and democratic dispensation. A number of commentators have offered various definitions of transitional justice.[24] Ruti Teitel sees transitional justice as 'the conception of justice associated with periods of political change.[25] Others consider transitional justice as encompassing four elements: accountability measures (prosecutions), gender justice, sector reforms (including security sector) and reparations programs.[26] Indeed, 'transitional justice is also thought of as an evaluation of the choices available to a state that is replacing an authoritarian regime with democratic state institutions and how the incoming democratic government deals with the gross injustices inflicted on people by the previous regime'.[27] In this sense, transitional justice is *institutional* as it speaks to institutions or mechanisms through which states and societies seek, in practice, to address past injustice and chart a new path.[28]

92. It is arguable that the totality of the mandate granted to the AUCISS — which relates to healing and reconciliation, accountability and institutional reforms — broadly encapsulates modern renditions of what transitional justice entails. While the process in which this Commission has been engaged is delinked from the IGAD mediation process aimed at finding a political solution to the crisis, it is the Commission's view that irrespective of the political settlement that is reached, the post-conflict dispensation must include renewal of existing institutions and the construction of new ones to better respond to the imperatives of effective, inclusive, accountable and democratic governance. As is reflected in the discussion relating to various institutions below, an overwhelming majority of views of South Sudanese captured by the Commission in its wide-ranging consultations reflects this aspiration.

93. Informed by the economic realities in South Sudan, the devastating effects of many years of war, neglect and state decay which include inordinately high levels of deprivation, displacement, inequalities, illiteracy in South Sudan, the Commission took the view that the discussion on institutional reforms must include rehabilitation of society and rebuilding of lives and livelihoods. The fate of hundreds of thousands, perhaps millions of refugees and IDPs, is of particular interest. The Commission is informed by the view that the appropriate approach to these issues must involve an

[24] For a review of various definitions, see Alex Boraine, 'Transitional Justice' in Charles Villa-Vicencio & E Doxtader *Pieces of the Puzzle* (2004) at 365; GM Musila, 'The accountability process in Kenya: Context, themes and mechanisms' in Waruguru Kaguongo and GM Musila, *Options for Transitional Justice in Kenya* (2010) a 17-60 at 28-30; [other sources]

[25] Ruti G Teitel, 'Transitional Justice Genealogy' *Harvard Human Rights Journal* 16 (2003) 70-94 at 70.

[26] ICTJ, 'Transitional Justice' Available at www.ictj.org (accessed on July 3, 2014).

[27] GM Musila, (n 24 above) 29.

[28] See Z Miller, 'effects of invisibility: in search of the economic in transitional justice' *International Journal of Transitional Justice*, 2(3) (2008). Miller categorizes transitional justice into two: 'institutional practice' and 'academic scholarship'.

inquiry into the use of strategic resources such as oil and land. Accordingly, the section of this report on the executive includes a discussion of this important subject.

94. The Commission took into consideration the influence of institutions in driving violence in South Sudan and maintaining high levels of insecurity for ordinary citizens, in particular women and children. The interrogation of institutions also considered the limited extent to which institutions provided mechanisms and/or social infrastructure to transform societal attitudes and practices such as those related to women's status in society and their rights. When asked about the nature of institutional reforms women spoke to the Commission about how they understood institutions to deliver dividends of peace and development, such as access to justice, health care, education and other opportunities.

95. In considering these questions and concerns, the Commission engaged with a multiplicity of issues including: factors that facilitate or impede state building and reconstruction, issues of diversity and sectoral interests, the role of South Sudanese in state building as well as the limits of international state building, which appears to have been the predominant model adopted in the post referendum South Sudan.

B. BACKGROUND AND LEGAL ARCHITECTURE FOR THE EVALUATION OF INSTITUTIONS

96. Any evaluation of institutions must start or be conducted in the relevant legal environment. The Constitution, as the basic law and the charter for governance is the starting point. Additionally, the nature of reforms required to institute wholesale transformation while establishing a system that responds to societal needs, especially one that has been characterized by exclusion and deprivation, requires constitutional sanction. Transformation requires constitutional guarantees to establish economic, social and political justice.

97. Political justice relates to measures taken to include excluded minorities within the political fold. This could include political reforms to correct legal and political regimes that have favoured certain sectors of society, or affirmative action to uplift minorities, taking into consideration the fact that they depart from a position of relative disadvantage in comparison to other groups. For the Commission, the notion of minority, which includes women in the context of South Sudan, is not conceived as a function of numbers alone, but also in terms of power and power relations. Economic justice, which can be achieved through various mechanisms, essentially targets the structural environment of key sectors of the economy to ensure the economic inclusion of those subsisting on the periphery and are economically marginalized. Such measures could include restructuring the state not only to devolve power but also to establish a system of equitable sharing of resources. Social justice entails addressing social structures that have produced injustice. This often involves far reaching legislative reforms that touch on varying sectors and areas such as land/property, succession, etc.

98. The Constitution is equally critical as the anchor of key institutions of governance and necessarily forms the *focal point* for any institutional reforms to be proposed. For these reasons, this section reviews the various constitutions spawned by the CPA, beginning with the Interim National Constitution of Sudan and the Interim Constitution of South Sudan in order to provide context for the discussion. However, the rest of this part necessarily focuses on the Transitional Constitution of South Sudan, the operative basic law that establishes current institutions that are subject of potential reforms. Relevant recommendations made at the end also relate solely to the Transitional Constitution of South Sudan and relevant enabling legislation.

The CPA and Governance in South Sudan

99. The background of the decades-long North-South conflict considered in Chapter I of this report, and the manner in which the conflict was dealt with by the CPA signed in 2005 provide not only a partial background within which the current South-South conflict should be understood and provides pointers to some of the current conflict's root causes but is also relevant for discussion on institutional reforms.

100. The CPA, as a negotiated agreement between North and South Sudan has greatly shaped the evolving democracy and governance in South Sudan. The content of what was agreed between the negotiating parties formed the irreducible minimums for constitution making in the interim period. As such, the Interim National Constitution of Sudan as well as the Interim Constitution of Southern Sudan of 2005 reflected what was agreed on key issues. The centrality of the CPA to the interim constitutional dispensation is clearly illustrated by the fact that references to the CPA pervade both constitutions and that the CPA was included as a source of law in both the national and regional constitutions.[29]

101. Other than the CPA serving as a base document that shaped interim constitutions, the Commission takes the view that the current conflict is in part due to the flaws inherent in the CPA (in terms of process and outcomes) as well as its implementation. Several respondents as well as the literature suggested that the CPA was a flawed peace process at various levels.[30]

102. First, it is suggested that the CPA adopted or followed the dominant paradigm of 'liberal peace-building', which in practice tends to privilege 'negative peace', with its preoccupation with ending violence.[31] The consequence is that democracy and structural transformation receive limited or cursory attention. With respect to both the North and the south, commentators observe that the central focus on ending the north-south conflict led the international community to overlook malpractices in the

[29] See various references to the CPA in all major sections of the Interim National Constitution of Sudan and Interim Constitution of South Sudan, 2005 beginning with the preamble as well as sections on the Executive, Legislature, Judiciary etc

[30] For a deeper treatment of this topic see generally John Young (n 9 above)

[31] Young (n 9 above) 1-17.

2010 general elections as well as 'go easy' on the GOSS in the post CPA-era in relation to commitments to democracy and transformation.[32]

103. Second, the focus on issues of marginalization and exclusion on a north-south axis ignored or glossed over similar concerns within the North and the South. While the conflicts in the Three Areas (Abyei, South Kordofan and Blue Nile) were on the CPA agenda and received consideration, little pressure has been exerted on the parties to meet commitments made. Some of those interviewed by the Commission agree that, despite the structural limitations of the CPA, its failure to address longstanding south-south grievances and problems, — some of which were at the core of conflicts within SPLM/A, as well as between SPLM/A and other formations during the civil war — had the consequence that break out of intra-south conflict would only be a matter of time.

104. The third defect of the CPA, which is linked to the second, relates to the monopolization of the peace process by the National Congress Party (NCP) and the SPLM/A as the only parties to the process. The exclusion of other critical actors, including other rebel groups in the South (such as SSDF which enjoyed significant strength by the time the CPA was signed) and parties in the North as well as civil society (in the North and South)[33] resulted, in part, in the tailoring of the talks to the narrow interests of the NCP and SPLM. For South Sudan, this could have laid the groundwork for a repeat of the exclusionary practices of the past that the movement claimed to stand against, notwithstanding President Kiir's subsequent 'big tent policy' that saw the integration of militias into the SPLA after the CPA.[34]

105. Fourth, the CPA, and the interim constitutions it spawned largely excluded opposition parties in the composition of the national and state executive and legislatures in both Sudan and South Sudan. It should be recalled that in South Sudan, all three instruments (CPA, Interim National Constitution of Sudan and Interim Constitution of South Sudan) guaranteed SPLM control of GOSS and all the 10 states, by reserving 70% of both branches for the SPLM with the remaining 30% being shared equally between the NCP and South Sudanese opposition parties.[35]

106. As a result, opposition parties are said to have complained that this power sharing formula 'unfairly elevated it [the SPLM] and undermined the development of a multiparty democracy' and that the delays in holding the CPA-mandated elections (held in April 2010 following several postponements) ensured SPLM control for most

[32] See Young (n 9 above) 135-176.
[33] Small Arms Survey, 'Pendulum Swings: The Rise and Fall of Insurgent Militias in South Sudan' (2013).
[34] On the big tent policy, see International Crisis Group, 'South Sudan: A Civil War by Any Other Name' Report N°217, 10 April 2014, p 5; Mathew Arnold and Mathew LeRiche (n 13 above) citing ICG, (n 18 above)
[35] See Interim Constitution of South Sudan, Article 94.

of the six-year interim period.[36] In this regard, leaders of opposition parties interviewed by the Commission cited the process that produced the Transitional Constitution of South Sudan, accusing the SPLM for reportedly abusing its position as the sole Southern party to have negotiated the CPA with the NCP.[37] Reports also document opposition lamentations of 'pro-SPLM bias' among western donors, which reportedly left the opposition unfunded and weak. It is fair to conclude that the failure of the leadership in the South to accommodate other parties in government particularly during the transitional period set the stage for the domination of southern politics by the SPLM.

107. Some of the problems that bedevil South Sudan can be attributed to the governing SPLM and how it relates to other actors. The link between SPLM and SPLA, the dominance of the military within the party (which dates back to its founding in 1983) and the resultant 'militarisation' of politics, governance and public life in South Sudan was identified as problematic by a majority of respondents. The SPLM relationship with the SPLA as well as its links with and total control of the state raised particular concerns among respondents. These themes are considered further in other parts of this chapter of the Commission's report.

C. THE NATURE, STATE AND CONTEXT OF INSTITUTIONS IN SOUTH SUDAN

108. It is widely accepted, as the Commission does, that the crisis in South Sudan is primarily attributable to the inability of relevant institutions to mediate and manage conflicts, which spilt out into the army, and subsequently the general population. As this chapter of our report suggests, beyond the political conflict, South Sudan faces a challenge of weakness or absence of institutions and the lack of institutional capacity within the state appears to be a generalized one. Indeed, the absence of institutions is a legacy of history. It is acknowledged that unlike many African states, South Sudan lacked any kind of institution when it attained independence. Currently, while part of the problem relates to design as other parts of this chapter of our report suggest, the fact that South Sudan is a relatively 'new state' and has been engaged in the process of building institutions for the last eight or so years has a bearing on the strength of institutions. Other institutional problems are discussed elsewhere in this report in relation to individual institutions.

109. A majority of views expressed by respondents during the Commission's consultations with different sectors of South Sudanese society lead to the conclusion that institutional reforms are necessary if South Sudan is to emerge as a strong state capable of protecting and serving its citizens and undergoing sustained economic development. Those who spoke with the Commission cited the weaknesses in the Transitional Constitution noting also that existing institutions are weak, are beset by multiple challenges that contribute, in part, to their inability to perform their normal

[36] ICG, *Politics and Transition in the New South Sudan* Africa Report No. 172, April 4, 2011, p 2.
[37] As above

functions. They also cited economic and material social conditions, including widespread poverty and deprivation as further justification for an overhaul of respective institutions.

110. The fact that South Sudan is a post conflict state, at least before December 15, 2013 when it slid back into violence, is significant. It is perhaps useful to note that currently, South Sudan is at once a 'post conflict state' and a 'state in conflict'. Post conflict states are almost invariably characterized as 'weak states'. Other common descriptions include 'troubled', 'failing' or 'failed' states.

111. Indeed, indices developed by various organisations that the Commission reviewed classify South Sudan as a 'failed state', citing various interconnected reasons including: prevalence of violence, insecurity and armed conflict; corruption; failure to build institutions in spite of cash inflows from donors; food insecurity; inability to cope with flows of returnees and refugees; resource conflicts (land, cattle-rustling and oil-with Sudan); poor human rights record including accusations of gross human rights violation and restricted space for media and civil society.[38] The report revisits some of these themes in relation to the discussion of various institutions below.

The Transitional Constitution of South Sudan

112. The CPA touched on a number of key issues including: security arrangements; power sharing; sharing of wealth; the question of self-determination of South Sudan and; broad stipulation on delineation of boundaries and the future of the three territories (Abyei, South Kordofan and Blue Nile). To establish a new dispensation in the post CPA Sudan, the agreement installed two constitutions: Interim National Constitution of Sudan, which related to the entire Sudan and the Interim Constitution of South Sudan.

113. Following the decision to secede from Sudan at the end of the six-year interim period, the newly created state adopted 'a new' constitution, the Transitional Constitution of South Sudan (TCSS), which has formed the basis of governance during the four-year transitional period during which the Permanent Constitution of South Sudan is to be drafted.

114. During our consultations, a majority of views expressed to the Commission in relation to the Constitution took issue with both content and process.[39] Indeed, In general, the process was said to have been characterized by lack of inclusivity,

[38] See various indices of failed/weak/failing states eg Fund for Peace, 'Troubled Ten' Failed State Index, 2013. Available at: http://library.fundforpeace.org/fsi13-troubled10 (Accessed on July 7, 2014); see also UNDP HDI Index;

[39] Lam Akol, 'Critique of the South Sudan draft transitional constitution' *Sudan Tribune*, reprinted on June 30, 2014.

participation, transparency and political will.[40] Taking issue with the process through which the TCSS was adopted, a member of civil society had this to say to the Commission:

> […] ask me who did the Constitution. It is the Parliament which passed the Constitution. It is the Ministry of Justice. And after we rejected this Constitution, they went and forced the Parliament to pass it. We rejected the Constitution as civil society that was brought and presented but they had to go to Parliament, lock these people up before the day of Independence so they were forced to sign at midnight.

115. While the Commission was unable to confirm the claims about the circumstances surrounding the signing of the Constitution, it established as valid the concerns that the process lacked inclusivity and transparency. The Commission revisits this issue in its recommendations relating to the ongoing, or future constitutional review process. Since part of the critique on content of the TCSS relates to constitutionally established institutions reviewed in this report, it is dealt with in relevant sections.

Towards a Permanent Constitution of South Sudan

116. A review of the Constitution established that the Transitional Constitution lays out the process for drafting the Permanent Constitution of South Sudan.[41] In terms of institutional arrangements, it provides for the establishment of the National Constitutional Review Commission (NCRC), within six months, reckoned from the declaration of independence on July 9, 2011.[42] In particular, it stipulates that: 'the President of the Republic shall, after consultation with political parties, civil society and other stakeholders, establish a National Constitutional Review Commission to review the Transitional Constitution of South Sudan, 2011'.[43] A number of other issues relevant to the process, including the composition of the NCRC, provision for a Constitutional Conference,[44] role of experts, requirement for public information program and civic education, are detailed in subsequent subsections and sections.

117. In exercise of powers conferred upon him by Article 202 of the Transitional Constitution, President Salva Kiir established the NCRC and appointed its members by Presidential Decree on January 9, 2012.[45] The Commission, which is co-chaired by Prof. Akolda Ma'an Tier and William Othwon Awer, has nine (9) full-time

[40] As above
[41] Transitional Constitution of South Sudan, Article 200
[42] Transitional Constitution of South Sudan, Art 200 (1)
[43] Transitional Constitution of South Sudan, Art 200 (1)
[44] Transitional Constitution of South Sudan, Art 201
[45] See Presidential Decree No 03/2012 on the Appointment of full-time and part-time members of the National Constitutional Review Commission (NCRC), 2012 (Decree on Establishment of the NCRC). Available at http://www.sudantribune.com/IMG/pdf/Constitution_Commission.pdf

members (including the two chairs) and 36 part-time members. Article 202(2) of the Transitional Constitution had stipulated that the NCRC 'shall be established with due regard for gender, political, social and regional diversity of South Sudan in recognition of the need for inclusiveness, transparency and equitable participation'. The NCRC is dominated by members from the SPLM from which a majority of its membership is drawn (4/9 permanent) and (20 part-time). Civil society organisations have one representative, the same for faith based organisations (FBOs).

118. With respect to the size of the NCRC, some of those that spoke to the Commission are of the view that the commission has too many members, and that the number should be reduced. One respondent captured this sentiment as follows:

> [t]he current number of commissioners in the current constitutional review commission is too large and some have other work to do. The size should be reduced .We have to look at the reforms of our institutions.

119. In terms of broad procedural steps, a National Constitutional Conference (NCC) shall be convened to consider the Draft Constitutional Text once the President has received and commented on the draft text of the constitution prepared by the NCRC. While the numbers representing each are not specified in the constitution, the NCC is to be comprised of representatives of following categories:[46] political parties; civil society organisations; women organisations; youth organisations; faith-based organisations; people with special needs; traditional leaders; war widows, veterans and war wounded; business leaders; trade unions; professional associations; academia; and other categories to be determined.

120. So far, the Commission learnt that the speed with which the NCRC has proceeded with its mandate has raised some concerns. Although constitutionally the Commission was to prepare a Draft Constitution within one year of its establishment having carried out civic education and conducted popular consultations to collect views from the public, it had not started work several months later having made little progress in establishing systems and structures to facilitate its work. While there appeared to be overwhelming desire on the part of the international community to support the constitutional review process, it is reported that the NCRC, was yet, six months later, 'to fully constitute its secretariat, adopt rules of procedure or work plan, or initiate civic education, let alone begin the required popular consultations'.[47]

121. Due to multiple challenges and constraints, the NCRC had, during its first year of existence, 'only managed to conduct a couple of workshops and a conference, adopted a plan of action and internal rules of procedure'.[48] Some of the challenges

[46] Transitional Constitution of South Sudan, Art 201 (1)

[47] See Jenn Christian, 'Is time running out for South Sudan's New Constitution?' Enough Project, July 2012 available at Available at: http://www.enoughproject.org/files/071112_SudanConst_Brief_v3.pdf

[48] Sudd Institute and Zacharia Diing Akol, 'A nation in transition: `South Sudan's constitutional review process' February 2013 Policy Brief, at 5.

included delayed approval of its budget in July 2012, six months after the Commission was stabled as well as difficulties experienced in securing premises for its operations.

122. The delay in meeting set deadlines, and presenting a Draft Constitution within one year (which expired in January 2013) prompted a review of the Constitution at the request of the Commission. The amendment was to be made to article 202(4) of the Transitional Constitution to extend the period within which the NCRC was to finalize a Draft Constitution for presentation to the national constitutional conference to December 2014.[49] Partly because of the crisis within the ruling party that developed throughout the year, the process stalled in 2013, at least one proposed amendment by the NCRC to extend the timeline to a date within that year having been missed. The NCRC's term was eventually extended to December 2014, when a draft constitution is expected to be ready.

123. One of the criticisms of the NCRC is that it does not have adequate representation of civil society and ordinary South Sudanese, and that it is largely a political party affair, a point that was emphasized by various respondents. Indeed, while some members of opposition parties that the Commission consulted complained about perceived SPLM 'over-representation' in the NCRC, they suggested that only political parties should shape the draft constitution, and that ordinary citizens should only be involved at the National Constitutional Conference. The Commission learnt that, driven by the objective of enhancing the impact of the voices of ordinary South Sudanese in the constitution-making process, civil society groups coordinated by the South Sudan Law Society and Justice Africa organized themselves and held consultations around the country, collecting views from different sectors of South Sudanese society. The Civil Society Resource Team consists of 18 civil society organisations. The resource team implemented dialogues in all the 10 states of South Sudan between April 2012 and July 2013 and issued a report in August 2014.[50]

124. The objective of the implementing CSOs is to use the report to lobby the NCRC for the views captured on a wide range of issues to be reflected in the Permanent Constitution. Another civil society group, the South Sudanese Network for Democracy and Elections facilitates meetings between members of parliament and their constituents and assists the latter to follow up on the concerns raised.[51] A

[49] See *Report of the Two Committees of Legislation and Justice of the NLA and Legislation, Legal Affairs & Human Rights of the Council of States on the Transitional Constitution (Amendment) Bill, 2013 available at* http://www.icnl.org/research/library/files/South%20Sudan/rssnat.pdf [Amendment effected, extending mandate to Dec 2014]

[50] See Justice Africa and South Sudan Law Society, 'Citizens' Dialogues on the Constitution conducted in the Ten states of the Republic of South Sudan' available at http://justiceafrica.org/wp-content/uploads/2014/03/Report-Citizens-dialogues-on-the-constitution-of-the-Republic-of-South-Sudan.pdf. For a brief description of initial activities, see Flora McCrone, 'Constitutional dialogue in South Sudan' December 16, 2013 available at http:/www.insightonconconflict.org.

[51] Kate Almquist Knopf, 'Fragility and State-Society Relations in South Sudan' Research Paper No 4, Africa Center for Strategic Studies (September 2013) 27.

number of other civil society formations have also undertaken various activities related to the review of the constitution. For instance, Sudanese women leaders have organized several forums with support from international organisations. A number of proposals relating to both the constitution making process and content of the constitution have been made.[52]

Different Sectors of the State

125. The rest of this chapter considers reforms that have been undertaken or that are currently ongoing in select sectors that the Commission considers to be critical to building a strong state with the aim of not only instituting a functional state that can do that which states ordinarily do but also creating effective, accountable and democratic governance. In particular, the sections consider the following: the system of government, executive (national and state executives; the security sector (army and police), financial management); national and state legislatures; the judiciary and the justice system; political parties and; civil society and media.

126. In terms of structure, focus on each institution outlines the current state of the institution, evaluates past and current reform initiatives and makes recommendations relevant to each institution while at all times integrating views gathered by the Commission from different sectors of South Sudanese society in consultations held there and from South Sudanese currently residing abroad, including neighbouring countries.

I. INSTITUTIONS I: SYSTEM OF GOVERNMENT

System of Government: Decentralization and Federalism

127. The Commission's review of relevant legal texts established that the Transitional Constitution of South Sudan establishes three levels of government: national, state and local government[53] based on certain principles, among these, devolution, acknowledgement of linkages between the three levels, collaboration and popular participation.[54] In terms of geographic division, there are 10 states, which are governed on the basis of decentralization. Each of the 10 states exercises executive and legislative power through an elected governor and a state legislative assembly respectively.[55] More specifically, the State Executive is composed of the Governor, Deputy Governor and state Ministers.[56] State Legislative Assemblies have the

[52] See for instance report of the 'South Sudan National Women Conference on Constitution Making Process' held between May 10-12, 2013 available at http://nationalwomenconferencesouthsudan.wordpress.com/. For a brief description, see also Meghan Davis, 'an examination of the constitution making process with reference to South Sudan' May 22, 2013 available at http://www.justiceafrica.org/2013/05/22/an-examination-of-the-constitution-writing-process-in-south-sudan/.

[53] Transitional Constitution of South Sudan, Arts 47, 161

[54] Transitional Constitution of South Sudan, Arts 48, 49.

[55] Transitional Constitution of South Sudan, Arts 162 (1)

[56] Transitional Constitution of South Sudan, Art 164

constitutional mandate to adopt a state constitution, to legislate in terms of constitutionally sanctioned legislative competencies and to exercise oversight over the state executive.[57]

128. In terms of executive and legislative competencies, each state enjoys, as is the case for national government,[58] a sphere of exclusive executive and legislative competencies as set forth in Schedule B of the Constitution[59] as well as concurrent[60] and residual executive and legislative powers as detailed in Schedules C, D and E.[61]

129. Revenue is shared between national and state governments, with each state receiving a share of 15% while the national government retains 85%. In this regard, a senior opposition leader stated that:

> The resources, 85% and more of the budget is spent here in Juba and 15% is the one that goes to the states and you call it decentralized; and when you look at this 15% most of it goes to salaries or people who are technically part of the central government. So none goes to development at all. If you look at the budgets, the health, even the latest budget, the health gets 4% of the budget. Education gets 6%, President's office gets 10% and paying arrears gets 7% more than both health and education; and then there is no good formula for allocating resources.

Local Government

130. With respect the third tier of government — local government — states are empowered to establish, in line with principles articulated in Article 48, a system of local government based on urban and rural councils.[62] The principles are: the affirmation of the need for norms and standards of governance and administration at the state and local government levels that reflect the unity of the people of South Sudan while recognizing their diversity; acknowledgement of the roles of the National Government and the states in the promotion of the welfare of the people and protection of their human rights and fundamental freedoms; recognition of the need for the involvement and participation of all people of South Sudan at all levels of government as an expression of unity; and pursuit of good governance through democracy, separation of powers, transparency, accountability and respect for the rule of law to enhance peace, socio-economic development and political stability.

131. Local government is made up of the County (the largest unit), Payam and Boma in the rural areas and city, municipal and town in urban areas.[63] The constitution

[57] Transitional Constitution of South Sudan, Art 163
[58] See Annexture on Areas of Exclusive Competence for National Government.
[59] The 42 areas of exclusive competence listed in Schedule B (see annextures)
[60] The 33 concurrent (shared) powers listed in Schedule C (see annextures)
[61] Transitional Constitution of South Sudan, Art 162 (2), (3)
[62] Transitional Constitution of South Sudan, Art 165 (1)
[63] Transitional Constitution of South Sudan, Art 165 (5)

details the objects of local government[64] and empowers them to levy, charge, collect appropriate fees and taxes in accordance with the law[65] enacted by the National Government 'to set common standards and criteria for organization of local government'[66] as well as by state government on all other matters.[67]

132. The Commission learnt that within the context of decentralized government in South Sudan, local government — the third tier of government and the nearest to the people — is perhaps the most neglected and consequently the least developed in all respects, in spite of its critical role as the center of service delivery within the existing structure of government.[68] In this regard, one report reviewed by the Commission notes that since the signing of the CPA in 2005:

> the international community and the Government of South Sudan have focused primarily on strengthening the central government institutions located in Juba, in spite of a decentralized government structure consisting of national, state and local level.[69]

133. Although it is structurally the third tier of government, local government is dependent on the states. As noted above, it is the respective state governments that establish local government, and the units so created are financially dependent on the state government, which has to finance their budgets from its share of 15% of national revenue, in addition to revenues raised locally. As a result, counties and other local governments suffer a debilitating lack of financial, human and physical resources. Simply, they lack the capacity to deliver services. In recent times, the situation was reportedly exacerbated by the austerity measures undertaken by the national government to address loss of revenues when export of oil through Sudan was halted.[70]

134. The Commission established that the situation in local government is dire, given that 'more than six years of limited allocation of funds to all levels of South Sudan's government have resulted in huge backlogs of salary payments to local government officials and limited funding for local service delivery activities'. [71] While the international community and NGO's have stepped in to fill some of the service delivery gaps, 'most of the programmes focus more on immediate relief than on sustainability and capacity development'.[72]

[64] Transitional Constitution of South Sudan, Art 165 (6)
[65] Transitional Constitution of South Sudan, Art 165 (7)
[66] Transitional Constitution of South Sudan, Art 165 (2)
[67] Transitional Constitution of South Sudan, Art 165 (1)
[68] See Local Government Act, which further details the functions of the three levels of government. See in particular, section 24.
[69] Local Government Capacity Building Programme, 1; See also, OECD, *Report on International Engagement in Fragile States: Republic of South Sudan'* (2011) 44.
[70] Local Government Capacity Building Programme, 1; United States Institute of Peace (USIP), *Oil and State Building in South Sudan: New Country, Old Industry* (2011) 10.
[71] Local Government Capacity Building Programme, as above
[72] Local Government Capacity Building Programme, as above

135. Concerns relating to organizational/institutional development and allocation of functions may also be raised. At the national level, the Local Government Board has the mandate of advising the President, and the national executive on matters relating to local government, while at the state level, the state minister in charge of local government performs functions relating to local government, and oversees the implementation of the Local Government Act.[73] There is a view that in terms of functions, there is lack of clarity as to the mandates of the state government and various local government units, and that the confusion occasioned by duplication undermines service delivery.[74] In deed, A senior government official that spoke to the Commission acknowledged that structurally, there are weaknesses in the system, and that the relationship between the states, and local government (which depends on the former) should be reviewed:

> The link between the state and the national government is not functional, and therefore at the state level there is inability to reach the closest levels to the grassroots. There was supposed to be the county level of governance as well which does not exist. There are a few people and names. There is a commissioner who has no office, you meet him under a tree, and he has neither papers nor the budget for the office. How do you expect the commissioner to do anything like that [to deliver]?

Traditional Authority

136. While its specific function is not clarified, the Constitution recognizes 'the institution, status and role of traditional authority under customary law'.[75] Traditional authority is envisioned as 'an institution at local government level on matters affecting local communities' and mandates the states to legislate and 'provide for the[ir] role.[76] The actors included in the rubric 'traditional authority' are varied, as traditional authority 'is vested in native administration consisting of tribal chiefs and their assistants, elders and opinion leaders in communities'.[77]

137. In our discussion of the judiciary and criminal justice system in South Sudan, the Commission outlines the critical role chiefs and elders play in the delivery of justice and resolution of conflicts at the local level (disputes such as grazing of livestock, water and fishing, blood feuds, family disputes, land). The fact that by many accounts, over 90% of cases (civil and criminal) in the country are handled by customary courts, it is fair to conclude that local government (particularly the institution of traditional authorities) is the level of government most South Sudanese

[73] Local Government Act, s 124; Local Government Capacity Building Programme, 4
[74] Local Government Capacity Building Programme, 4
[75] Transitional Constitution of South Sudan, Art 166
[76] Transitional Constitution of South Sudan, Art 167 (1);
[77] Samson Wassara, 'Traditional Mechanisms of Conflict Resolution in Southern Sudan' (2007, Berghof Foundation for Peace Support) 6

have contact with, and consequently should elicit more investment from both national and state governments and more attention from donor agencies.

The Debate on Federalism

138. One of the most contentious questions raised during the Commission's consultations relates to federalism. It appears that the crisis has reignited debates — sometimes quite heated and divisive — on one of the oldest political issues in Southern Sudan, which predates the war of liberation.

139. In this part, the Commission engages, albeit briefly, with some of the issues raised in this regard. The Commission does not take a position one way or another: it merely details and briefly interrogates the key views expressed in this regard, taking the view that the choice of what system of government should be adopted in post conflict South Sudan is to be made by South Sudanese themselves through established deliberative processes.[78] Currently, the constitutional review process offers such opportunity.

140. The Commission notes that claims for self-determination, expressed as federalism were made by South Sudanese as early as 1955 as Sudan prepared to receive the instruments of independence from the Anglo-Egyptian administration, which was achieved on January 1, 1956. It is recorded that fearing marginalization of southerners in a united Sudan, Southern MPs had made unsuccessful attempts on the eve of independence to extract concessions on a federal arrangement from Northern MPs. This fear was motivated by the fact that in terms of economic, social and political development, the South — a region that had been administered separately from North under Anglo-Egyptian rule — lagged behind the North.[79]

141. It was also noted that the failure to achieve internal self-determination in a united Sudan through a federal arrangement had led to the first civil war, which ended in 1972 with the signing of the Addis Ababa Agreement, which granted southerners autonomy and self-rule. Its abrogation in 1983 would lead to the second war, which ended with the signing of the CPA in 2005.

142. During the Commission's consultations, sections of those who interacted with the Commission stated that they would prefer a federal government which, in their view, accommodates diversity and ensures equitable sharing of resources and power. In this regard, one respondent noted that 'you do not have one standard federal system you take in but they have common pieces. Federalism must address diversity.' Another respondent stated that:

[78] The Commission's stance aligns with views expressed by key South Sudanese leaders to the effect that citizens should decide. See, 'South Sudan's Kiir says citizens should decide on federalism' *Sudan Tribune* June 3, 2014; See also 'Machar defends calls for federalism, expresses concerns over mediator's role' June 30, 2014.
[79] See Elijah Majok (n 6 above) 10-33.

> […] we need changes, like there should be federalism in South Sudan. [It] should happen, so that every State must govern themselves, then the central government will be there, [with] representatives from different States. We need that to happen.

143. The Commission also captured views of those who oppose federalism, noting that federalism if adopted could divide South Sudanese. In this category, the majority of those who expressed themselves prefer that the current system, which, as outlined above is denominated 'decentralization' be retained in a future constitutional dispensation. They emphasize that focus should be on working the current system with a view to fostering development and delivering services to the people:

> Things should remain as they are. Because you need more time to educate people to know for instance different languages … so you need resources … the communities can [then] choose which one is better when you train them …

144. What emerged from the views gathered by the Commission, as well as commentary on the subject is that the issue has been politicized, and that the debate appears to be coloured by historical narratives of exclusion and inclusion. Equally, there is misunderstanding in a significant portion of the population as to what federalism entails. Some, including those who advocated for change, appeared unaware that the current system in South Sudan includes elements of federalism.

145. There are those who believe that federalism means *separate existence* or segregation, which evokes painful historical antecedents for some.[80] One respondent told the Commission that in the federal arrangement he envisions, 'we want to be left to live alone, us in our area and the xx in theirs' referring to two ethnic communities. Some of those advocating for 'segregation' told the Commission that inter-ethnic relations were irreparably damaged by atrocities committed during the conflict, and that it would be difficult to co-exist side by side. For the Commission, these sentiments underscore the need for genuine reconciliation at the communal level, irrespective of the system of government adopted.

146. The other issue that is evident is that the debate has been a deeply emotional one, understandably because it is happening during an armed conflict which has manifested a clear ethnic dimension. It is fair to conclude, that the views of some of those that have taken a position one way or another could be informed by the current context. Capturing the fact that the debate could have been politicized and the fact that many views expressed may not be well informed, one respondent stated thus:

[80] On this see Sudd Institute and Augustino Ting Mayai, 'How the Federal System of Government is Misunderstood in South Sudan' June 4, 2014 Weekly Review citing *Kokora*, a system interpreted as ethnic federalism 'birthed and popularized by Equatorians in the late seventies and early 1980s, led to sectarian politics, resulting in bitterly segregated South Sudanese society on regional and ethnic lines', 1.

> […] You know these are things engineered by the leaders [the debate on and demands for federalism], ok. These are just engineered by the political wind. But to the ordinary person, and ordinary person does not understand what a federal system [is] … the people should be educated about what federalism is. All citizens, those who are IDPs, they don't know [what the] system is [in] South Sudan right now … so to me my recommendation is civic education for the entire community [in the] Republic of South Sudan.

147. It also emerged from the Commission's consultations that views on federalism, for those that support it, could be based on misconceptions about what the system could deliver for the ordinary citizen. While the majority took the view that federalism is about equitable sharing of resources and political power, there are those that believe that the adoption of a federal system would entrench good governance, and foster peace. One respondent noted that 'so really federalism is what we want, peace is what we want.' It is the Commission's view, on the question of good governance, that the set of principles, practices, norms and culture entailed in good governance are not automatically infused and entrenched by the adoption of any particular system of government. Any particular system of government must come fitted with systems and mechanisms to provide the appropriate normative and institutional framework, and a culture of respect for rule-based governance takes time to inculcate.

148. In relation to financial management for instance, there were some views expressed that adoption of a federal system could reduce levels of corruption said to exist in sections of government. The Commission notes that in the absence of appropriate accountability measures (both vertical and horizontal), a federal system, or any system that devolves resources and decision-making power could have the effect of increasing the number of 'centers' where corruption could thrive, depleting the limited resources available for development and service delivery. Indeed, some respondents pointed to the fact that there is, in the current decentralized system, leakage of resources at state-level partly because of weak formal accountability mechanisms. Equally, evidence shows that often, accountability is weaker at the periphery than at the center, in part because awareness among citizens is low, and civil society is weak or engaged with more 'national issues'.

Reflections and Issues for Consideration

149. A reading of the Transitional Constitution (see discussion above and 'executive' below) leads us to conclude that the decentralized system of government it establishes embraces both federal and unitary elements. Indeed, some commentators characterize this system as 'hybrid' or 'quasi-federal democracy'.[81] To flag the relevant elements, the Constitution establishes a decentralized system based on 10 states, endowed with executive and legislative power, although the

[81] See for instance, Sudd Institute and Abraham Awolich, 'Federal Democracy: A Strategic Institutional Choice for South Sudan' March 25, 2014 Policy Brief.

national executive is empowered to remove an elected governor, to dissolve a state legislature. Judicial power is national in character, with all statutory courts forming part of one judiciary, although customary courts — which are disassociated from the formal judiciary — fall under the local government.

150. Since the demands for federalism in sections of society is essentially about service delivery, guarantees for autonomy to decide on local priorities, and management of diversity (in the context of fear of domination) it is the Commission's view that whether a system is denominated 'federalism' or 'decentralization' or 'devolution', it is the 'content' of the system (in relation to adequate devolution of resources, decision-making power and guarantees against undue interference in devolved units by the center) as well as commitment to the implementation of the constitutional text that matters. One respondent captures this aptly:

> Even if we call it federalism and it is not real because that is just a word. Federalism in my opinion is just a word which you can play around [with]. You can either decentralize … because [the reason] why people are now calling for federalism … and others call for decentralization [the current system has not been implemented fully] … If we don't address the real issues, why are people calling for federalism […] So the idea is that people are fed up, they are not getting services and some areas have not been reached by government.

151. Indeed, one South Sudanese commentator suggests that calls for a federal system, rather than the full implementation of the Constitution misapprehend the character of the current constitution, and what federalism means and that what is perhaps required is emphasis on 'underlying gaps between the constitution and practice':

> Demands for federalism as a system of governance in the country, not the implementation of such, clearly demonstrate how misunderstood this widely discussed political philosophy truly is.[82]

152. The issue of federalism has also featured in the IGAD-mediated talks. Indeed, there is agreement that a future constitutional dispensation must embrace some form of devolved government. In this regard, the Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis in South Sudan stipulates, in relation to agreed principles on parameters for a Permanent Constitution, that:

> The TGNU [Transitional Government of National Unity] to initiate and oversee a permanent constitution-making process, during the Transitional Period, based on the *principles of federalism* and taking into [consideration] accountability in diversity, and to devolve more power to

[82] Sudd Institute and Augustino Ting Mayai, (n 80 above)

the states. The terms and parameters of this process shall be negotiated by the stakeholders in the negotiations.[83]

153. Although the leadership of the SPLM In Opposition is yet to sign the Protocol, it appears to align with the party's position on the issue.[84] This Commission does not take a position on the agreed principles, neither do we provide an analysis of what this clause means. However, the Commission reflects on some of the issues implicated in the debate on federalism, proffering only general counsel on some of these issues.

154. Irrespective of the devolved system that is eventually agreed upon by South Sudanese, the Commission counsels that care should be taken to craft an arrangement in which the rationale for its adoption — empowering the periphery politically and economically through equitable sharing of resources as well as accommodating diversity — is not undermined. The Commission is aware that there are various proposals relating to the number of devolved units (3, based on the 1983 divisions; 10, retaining the current number of states; 21 or 23, based on variations the old colonial districts).[85] While there may be need to create new units to accommodate diversity called for by citizens and the 25th August Protocol on Principles referred to above, consideration should be given to the risk of spreading resources too thin (creation of new structures, running the bureaucracy including payment of salaries) and deplete resources meant for development which justifies the call for greater devolution in sections of the population.

155. Experience shows that, often, actors are tempted to import models that are deemed to have worked elsewhere, without due consideration being given to local context. Indeed, during its consultations with the Commission, some respondents referred to experiences such as that of the United States, Nigeria, Canada and Kenya. The Commission counsels that these systems should be studied, and the best elements that suit the context of South Sudan adopted, taking into consideration 'best practice' relating to issues considered. It worth noting that the extent of federalism depends on the degree of devolution of executive, legislative and judicial power.

II. INSTITUTIONS II: NATIONAL AND STATE EXECUTIVE

156. This part of the Commission's report considers the executive, one of the key institutions of government, as well as the system of government itself. When reviewing relevant laws and practices relating to the institution as well as its relationship with other organs of state and levels of government, the Commission sought to establish whether — as contended by an overwhelming majority of those

[83] Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis in South Sudan, 25 August 2014.

[84] See SPLM IO Statement on Federal System of Government; See also SPLM IO delegation's submission to AUCISS

[85] See Proposal by SPLM-IO; Concerned Jieng Elders, 'Seeking solutions for acceptable administration to the people of South Sudan' July 18, 2014.

who spoke with the Commission or submitted their views — 'the executive is too powerful'.

157. For the Commission, for the purpose of this aspect of the Commission's work, we took the view that a powerful executive is not necessarily a bad thing, and that the constitution and enabling laws should endow that office relevant powers to facilitate the execution of assigned functions. In our view, it is the absence of separation of powers as well as adequate guarantees of checks and balances coupled with structural weaknesses in other state institutions and levels of government that would be problematic. This part therefore reviews the executive in context and makes relevant recommendations for reforms.

158. Aware that a constitutional review process was underway in South Sudan at the time hostilities broke out in December 2013, and that some of the key questions considered here would in any case be subject of national dialogue, the Commission is careful not to undercut that process. It attempts an objective review of key state organs, beginning with the executive in this part, and makes recommendations at the end relating to what is thought to be the threshold in terms of both process and content when constituting new institutions.

The State of the National Executive

159. The Commission found that, under the Transitional Constitution of South Sudan (TCSS), the executive is made up of the President, Vice President, Ministers and Deputy Ministers.[86] The functions of the President are detailed in Article 101 as well as other provisions and schedules of the constitution.[87] A review of these provisions discloses that the President has extraordinarily wide and apparently all-pervading powers, with very limited checks and balances in place.

160. First, the President has powers to remove key state officials including the Vice President,[88] Ministers and their deputies[89] elected State Governors[90] and judges.[91] In the case of removal of elected state governors, there is a constitutional requirement that the caretaker governor named by the President organizes elections within 60 days.[92] In January and July 2013, the President exercised these powers, removing the Vice President, the entire Cabinet and two state governors. With respect to the state governors, the constitutional requirement to hold elections within 60 days was not honored. The Commission notes that a number of changes were made while its inquiry was ongoing. While the appointment of some of these

[86] Transitional Constitution of South Sudan, Article 95
[87] See Transitional Constitution of South Sudan, Schedules A, B, C and E
[88] Transitional Constitution of South Sudan, Article 105;
[89] Transitional Constitution of South Sudan, Articles 113 and 118 respectively
[90] Transitional Constitution of South Sudan, Article 101 (r)
[91] Transitional Constitution of South Sudan, Article 135 (2)
[92] Transitional Constitution of South Sudan, Article 101 (s)

officials requires parliamentary approval, the same does not apply to their removal.[93] While it must be acknowledged that the constitution endows the President with these powers,[94] the removal of the Vice President, the entire Cabinet as well as state governors were cited by some respondents to justify the contention that the Presidency is too powerful.

161. Second, the President has powers to dismiss the National Legislative Assembly[95] as well as state legislatures.[96] Evidently, this has serious implications for separation of powers, and the ability of organs that ordinarily represent the people to discharge their functions independently. Equally, such powers, including those that relate to removal of elected governors by the President distort the established system of devolution by overly empowering the center, undermining constitutional principles that underpin such a system.

162. Third, the President has sweeping and unlimited powers to among others: appoint ad hoc commissions and committees; establish independent institutions and commissions and; supervise constitutional and executive institutions.[97] The exercise of several other functions is subject to concurrence of the national legislature or some other procedure including: appointment of judges; declaration and termination of state of emergency; direction and supervision of foreign policy and ratification of treaties.

163. It was also established that the Constitution provides for the following constitutional commissions and independent institutions, of which only the first three require parliamentary concurrence by simple majority of those present and voting: Independent Institutions and Commissions;[98] Anti-Corruption Commission;[99]Human Rights Commission;[100] Civil Service Commission;[101] Public Grievances Chamber;[102] Disarmament, Demobilization and Reintegration Commission; [103] Relief and Rehabilitation Commission [104] and; HIV/Aids Commission; [105] Land Commission and;[106] the Fiscal and Financial Allocation and Monitoring Commission.[107]

[93] For Vice President, appointment requires 2/3 majority in the National Legislative Assembly (Article 105(1); simple majority for both Ministers and Deputy Ministers (Articles 113(2) and 118 (2)). For a brief description of executive powers, see Kate Almquist Knopf, (n 50 above) 21.

[94] Refer to Riek Machar's Radio Interview, noting that the President had powers to fire him, and that he acted constitutionally in doing so

[95] Transitional Constitution of South Sudan, Article 101 (g)

[96] Transitional Constitution of South Sudan, Article 163

[97] Transitional Constitution of South Sudan, Article 101

[98] Transitional Constitution of South Sudan, Art 142

[99] Transitional Constitution of South Sudan, Art 143

[100] Transitional Constitution of South Sudan, Art 145

[101] Transitional Constitution of South Sudan, Art 140

[102] Transitional Constitution of South Sudan, Art 147

[103] Transitional Constitution of South Sudan, Art 149

[104] Transitional Constitution of South Sudan, Art 148

[105] Transitional Constitution of South Sudan, Art 150

[106] Transitional Constitution of South Sudan, Art 171

[107] Transitional Constitution of South Sudan, Art 179.

164. While the constitution subjects executive decisions to parliamentary approval in some of these cases, providing what appear to be necessary checks and balances, these limits on executive power are, in effect, negated by realities on the ground. Given that the state can be said to be 'virtually indistinguishable' from the ruling party SPLM in view of the intimate structural links between the two (in part because of the State President's position within the party and his/her role in the composition of the National Legislative Assembly during the transition), the limits on executive power appear only theoretical. In addition, the fact that the ruling party controls 90 of the National Legislative Assembly means that essentially, a powerful executive will have its way on most, if not all occasions and key decisions. There is a view that 'in the context of South Sudan, the president can rely on a political party that dominates the legislature, making it less likely that presidential prerogatives will be checked.'[108]

165. Fourth, impeachment, which ordinarily provides a constitutional accountability mechanism that can be activated in specified circumstances, usually when there is breach of the constitution or the President acts contrary to national interests, is impossible to achieve in the prevailing political context, in part for the reasons outlined in the preceding paragraph.[109]

166. Lastly, as outlined above in relation to the legal framework relating to ongoing constitutional review process towards a Permanent Constitution, (see the introductory section 'Towards a Permanent Constitution of South Sudan') the President has immense powers in relation to directing not only the process but potentially, the outcome of the review process. To recall, the President is constitutionally mandated to constitute the Constitutional Review Commission, a power that was exercised in 2011/2012. Equally, the Constitutional Review Commission is constitutionally obliged to submit the draft constitution generated following popular consultations to the President for his/her views before it is presented to the National Constitutional Convention. In our view, it is fair to interpret these provisions, as we did above, as elevating the role of the executive in the constitution making process above fora of popular will such as the National Legislative Assembly, and potentially, the National Constitutional Convention.

State Executive

167. The Commission established that the Transitional Constitution establishes 10 state governments headed by an elected governor, assisted by a state cabinet. The State executive is composed of a Governor, a Deputy Governor, and state ministers.[110] The governor has power to appoint and remove the Deputy Governor, Advisors, and state Ministers in consultation with the President and in accordance with the state constitution.[111] In terms of the constitution, State Ministers are

[108] O'Grady and Weichselbaum, (n 22 above) 12.
[109] Transitional Constitution of South Sudan, Art 103, which provides for the procedure
[110] Art 162(1) TCSS
[111] Art 162 (2) TCSS

individually and collectively answerable to the governor and the state Legislative Assembly in the performance of their functions.[112]

168. In terms of the competencies of the state executive, the constitution demarcates, as noted above, exclusive, shared and concurrent functions. With respect to exclusive functions, the constitution (schedule A) provides a long list of functions, some of which are critical for economic development: security (state police) prisons, wildlife and fire brigade services; management of state land; pre-primary, primary and secondary education; agriculture; social welfare and state pensions; enforcement of national and state laws and; development, management and conservation of natural resources [under the current law, 2% of net revenues are allocated to the producing state].

169. Among the key issues that emerged during the Commission's consultations in relation to the decentralized system of government, two stand out: whether as currently established state governments enjoy the requisite autonomy to carry out their assigned functions without interference from national government, and whether the decentralized units are viable, adverting to among other issues, the sufficiency of funding.

170. With respect to the first concern, many respondents expressed the view that the fact that the President can remove an elected governor undermines constitutional principles of devolved government, and practically placed state governments under the control of the national government. Earlier, the Commission cited several cases where State Governors have been removed by the President. It also noted that in all cases, there was failure to strictly adhere to the dictates of the constitution, which requires that an election be held within 60 days of the removal of the governor.

171. On financial arrangements, state governments receive a share of 15% of national revenue. However, the Commission heard that this portion is not always disbursed with regularity, which has starved state governments of funds. Equally, as is the case for national government, sufficiency of funds to devote to service delivery is a recurring theme. Security and salaries appear to consume a large portion of revenues, with national estimates of budgetary allocation to defence alone ranging between 40% and 60%. With respect to the revenue sharing formula between the national and state governments, and limitations imposed on state governments due to funding concerns, one respondent captured the totality of the situation thus:

> [With respect to] the resources, 85% and more of the budget is spent here in Juba and 15% is the one that goes to the states and you call it decentralized; and when you look at this 15% most of it goes to salaries or [to] people who are technically part of the central government. So none goes to development at all. If you look at the budgets, the health, even the latest budget, the health gets 4% of the budget. Education gets 6%, President's office gets 10% and paying arrears gets 7% more than both

[112] Art 162 (4) TCSS

health and education; and then there is no good formula for allocating resources.

172. It is the Commission's view that the viability of state governments depends not only upon adequate guarantees for autonomy to operate independently, but also a workable revenue sharing formula that enables the states to deliver services to the people and to undertake development programmes for the benefit of citizens. Democratic principles are undermined in an arrangement where the national executive exercises control over elected state executives.

173. The other concern that emerged during the Commission's consultations in relation to government in general, and state governments in particular, is the issue of corruption, which is considered in greater detail below (see section on financial management). With respect to state governments, the majority of respondents that expressed themselves on the subject view governors, and state governments, as corrupt. While oil-producing states receive additional revenue as their share of net oil revenues (2%), it was suggested that there is discernible impact in terms of development and service delivery. Indeed, some respondents concluded that most of the money is diverted or misappropriated. In this regard, one respondent expressed the view that the oil producing states 'are the most miserable states because there is no accountability. The 2% goes to the Governor. He does whatever he wants with it.' It is the Commission's view that weakness or absence of accountability mechanisms has largely contributed to wastage and corruption. Additionally, the lack of participation by citizens, with the result that revenues which were intended to benefit communities in resource-producing states, does not appear to have made a difference on the ground.

THE SECURITY SECTOR: ARMY (SPLA) AND POLICE

174. This part details the Commission's analysis of, and recommendations relating to Security Sector Reforms (SSR). The Commission understands SSR to mean 'a process of assessment, review and implementation as well as monitoring and evaluation led by national authorities that has, as its goal, the enhancement of effective and accountable security for the state and its people without discrimination and with full respect for human rights and the rule of law'.[113] In the Commission's view, SSR must be a priority for any state-building endeavor, and the facts relating to the state of the South Sudanese Army (SPLA) and Police suggest that this is one area that requires urgent concerted effort.

175. Indeed, since a state constitutes a legitimate monopoly of force over a defined territory, then state-building must begin with establishing a monopoly of force in South Sudan by the South Sudanese armed forces and police. While the context has changed, it is our view that efforts undertaken by the Government of the Republic of South Sudan in the post Independence period to neutralize militias

[113] UN Department of Peacekeeping Operations, Office of Rule of Law and Security Institutions, 'The United Nation SSR Perspective' (2012) 2.

should be revisited. In addition, removal of arms from the hands of private citizens often justified on grounds of 'self-defence' or even culture must be undertaken. However, the need to create a professional national army and police may require the pursuit of alternative models of neutralizing militia, eschewing the dominant approach adopted in the post CPA period of absorbing fighters into the SPLA and police.

THE ARMY (SPLA)

176. The link between SPLM and SPLA, the dominance of the military within the party (which dates back to its founding in 1983) and the resultant 'militarisation' of politics and public life in South Sudan was identified as problematic by a majority of respondents. While many emphasize the enduring structural links between the SPLA and SPLM, observing that the two 'are twins', for a senior SPLM official, the supposed link between SPLA and SPLM is fictional, as these two entities are legally, and practically separate and distinct.

177. Founded in 1983, the SPLA/M became the main liberation movement in Sudan, leading the struggle for liberation that culminated in separation from Sudan in 2011. The 1983 insurgency that would last until 2005 with the signing of the CPA brought together five disparate rebel formations in the initial years: Anyanya II led by Samuel Gai Tut, Akuot Atem de Mayen and Gordon Kong Cuol; army mutineers led by Kerubino Kuanyin Bol and William Nyuon Bany; the Student Revolutionary Group led by Pagan Amum Okiech and Oyai Deng Ajak; Abyei Liberation Front led by Deng Alor Kuol and Chol Deng Alaak and; the Anyanya Absorbed Forces Revolutionary Movement, a covert group led by John Garang de Mabior. These groups would form the SPLM/A under John Garang. Following contestation, desertion, revolts and purges in the initial years, SPLM/A under John Garang would weather further storms over the years to become the dominant rebel force and challenger to the regime in Sudan by the time the CPA was signed.[114]

178. The fractious nature of SS society has shaped SPLA/M over the years and reflects in the current crisis. It was established that three main forces have shaped South Sudanese politics, and the SPLA in particular: pure tribal divisions; contestation between it [SPLM] and opposed groups and; internal SPLA/M factionalism, which often takes ethnic dimensions.[115] Indeed, liberation struggle in South Sudan could not operate outside the dynamics of ethnicity, especially in such an ethnically diverse space. The leadership of the struggle came in waves, beginning with Equatorians in the First War (1955-1972) that ended with the creation of an autonomous region in the South; Nuer (Anya-Nya II) and Dinka (SPLA/M).

[114] For the early history of the SPLM, see Young (n 9 above) 44-50.

[115] LeRiche and Arnold (n 13 above), 65; Young (n 9 above) 65 noting that SS is one of the most decentralized societies in the world, only the Azande, Anuak and Shilluk have historically had centralized societies under Kings or sovereigns.

It emerged from the Commission's consultations that the ethnic composition of the SPLA/M has also been a subject of interest. The initial Nuer backbone in SPLA/M was whittled down with time for historical reasons — partly the 1991 Split that resulted in the formation of a Nuer-dominated SPLA/M-Nassir and proliferation of Nuer militia opposed to SPLA/M. It is suggested that this progressively resulted in Dinka dominance as the conflict progressed towards the CPA. The government's efforts to integrate the multiple armed groups/militias during the Interim Period and beyond resulted in a Nuer dominated SPLA, given that the majority of these militias (including the dominant SSDF) were mostly ethnically Nuer. While figures vary, and the Commission has not been able to authoritatively verify, the Commission was informed that by December 15, 2013 when violence broke out in Juba, the SPLA was 65-70% ethnically Nuer.

The State of the SPLA

179. The Commission established that a key feature of the SPLA from its foundation in 1983 is that it has been marked by its dependence on personal control and lack of institutionalization. Part of this reality was due to factionalism as well as to the 'stunting' of its political wing, which would have provided strategic political vision. In this regard, it has been noted that 'the SPLA was merely the armed wing" of the movement and was supposed to implement decisions of the political wing. However, the SPLM/A never managed to have a monolithic ideology and, over time, factionalism developed within the 'M' and 'A' lines.'[116]

180. To demonstrate personal control and lack of institutionalization of the SPLA, current President Salva Kiir is quoted stating that while he served as Chief of Defence Staff (CODS), he had no authority over key commanders in the field as they reported directly to Garang.[117] The military's capacity was greatly weakened by the measures taken by Garang to maintain tight control, including dividing military and political authority at the local level, placing supporters in key positions and control over weapons and supplies.[118] It is noteworthy that while instituting accountability measures and democratic control would require, as the Commission suggests in its recommendation, a separation of political and military beyond a strategic political vision for the military, it does not appear that the separation of these elements at the local level was done for these purposes.

181. As a result of these and other factors, the SPLA that emerged out of the CPA was one that was in dire need of reforms. Such reforms were necessary to render the SPLA more affordable, accountable and democratic. The Commission learnt that there are already measures being undertaken to institutionalize the SPLM as an

[116] Phillip AN Mwanika 'Transition and Transformation of the South Sudan National Defence and Security' (2012) 6 Occasional Paper No 3, International Peace Support Training Center. Available at http://www.ipstc.org/media/documents/Occasional_Paper_03_2013.pdf at 8.
[117] Young, 67
[118] John Young, 'John Garang's legacy to the peace process, the SPLM/A & the South' *Review of African Political Economy*, vol 32, n 106

entity with a separate existence from the SPLA. Those who spoke to the Commission attributed some of the problems that bedevil SS to the link between SPLA and SPLM and strongly advocated for separation:

> Then we have the national army, it is affiliated to a political party yet we are a multiparty state. We have around twenty six political parties but our national army is annexed to the SPLM. If the army could have been detached from the political party, some things may not have happened. With the current crisis the national army has been used as ethnic army used against other communities.

182. The other problem arose out of the amnesty and integration policy by which other armed groups (militias) were absorbed into the army between 2005 and 2006. While this step was laudable in the sense that it succeeded in reducing and neutralizing actors such as SSDF that could destabilize the country, it created a disjointed army, one that many have described as a 'a collection of militias' as many of those absorbed have never submitted to central command and control. The Commission heard that integrated militias still answer to former militia leaders, who were assigned the rank of General at integration. This view was supported by several testimonies to the Commission. In this regard, one speaker stated that:

> The 'national' army we have was not organized as the national army, they don't have the structure, and it is something loose from the state. Within the national army, we have different factions within the one general army which were not organized and they were not reconciled, many militia groups were pardoned and brought to the army. Some were not given any work to do, so they're still affiliated to wherever places they have come from. The national army should protect every citizen despite of where you come from.

183. Speaking in relation to the current crisis, some speakers opposed integration and promotion of rebels, stating that 'if they come back, it should be at the same rank' and that 'we should not reward people for rebelling'. Some thought that integration had turned rebellion into a 'business' for some, pointing to the fact that there are some who have rebelled several times, each time returning with a higher rank, and sometimes reaping financial rewards. This view is not restricted to respondents from the military. In this regard, one respondent stated, in relation to the policy of integration:

> You have seen the negotiations of many rebels in South Sudan, you bring this one today, the other one tomorrow goes. Because there is a routine kind of, no one is accountable. He goes tomorrow he kills, he comes back. For instance, if I today defect … if I have followers, I can just take a few, we fight one, two, three months, we sign a deal and I have a rank, I am promoted to be a General. Is the justice … we want? [It is not just]

184. On the same issue, another respondent made a forceful case for a review of the current policy, noting that focus should shift to resolving the root causes of rebellion and the seemingly endless cycle of violence:

> […] the government needs to stop accommodating people, because accommodation is failing us in government. So we accommodate people so not to have a rebellion in another area, but they do not deliver. The more people are accommodated, the more rebellion is caused, because somebody knows tomorrow they rebel, today they will be able to be accommodated. So we are not solving the problem, we are just putting it under the carpet.

185. It is the Commission's view that while political accommodation (integration) may be a necessary short-term measure to establish a semblance of stability as has been the case in South Sudan, perhaps the best approach to ensuring sustainable peace is to address the structural causes of conflict and violence.

186. Many respondents pointed to the unusually high numbers of generals in the SPLA. While the Commission was unable to establish exact numbers, it heard that there could be as many as 700 generals. There are suggestions that the SPLA 'has the highest number of generals of any military in Africa'. In this regard, the Commission notes that in January 2013, President Kiir, partly concerned by the bloated top echelons of the SPLA, retired 35 general officers, including all six deputies of the Chief of General Staff.[119]

187. The third concern that was raised by many respondents is the lack of diversity and reported Nuer dominance of the SPLA. The Commission established that by December 15, 2013, 65-70 per cent of the SPLA was of Nuer ethnic extraction. This imbalance is said to be in part a product of amnesty and integration policy that brought several militia into the SPLA. In this regard, one witness informed the Commission that 'what brought the ethnic people, Nuer, the majority in the army was because they were a majority in the militia, and they were integrated to the Army'. The concentration of militias within the SPLA, and the dominance of one ethnic community is seen as part of the factors that created the current crisis in the SPLA (its lack of a national character). In this regard, a senior SPLM official stated that:

> [b]y December 15th. 70% of the National Army was made up of militias all from Upper Nile and from one ethnic group. Isn't that a problem and militias? 70% people who were not loyal to the government not loyal to the command and illiterate and people who were at one time fighting the same Army they absorbed in. That is a problem. People saw it and you could see there were series of rebellion and they are being pardoned, they come back into the Army, they go away again. In that process, the whole of the

[119] See Knopf (n 50 above) 25. See also, Sudd Institute 'A brave decision or security and constitutional quagmire? The President's military and state reform orders' January 25, 2013.

> Army was already diluted … If 70% of those are militias, what do you expect?

188. In the Commission's view, the dominance by one community of a vital national institution is problematic. Regarding the current crisis, some respondents suggested, with respect to alleged recruitment of a force predominantly Dinka youth *gelweng*, that this could have been motivated in part by of concerns that the SPLA as constituted could not serve the interests of the ruling elite.[120]

189. Another problem that has so far appeared intractable is the size of the army itself. The Commission learnt that the army stands at 200,000 with over 45,000 veterans. As the discussion below shows, past attempts to reduce the size of the army through the DDR programme have failed. The commission also learnt that the defence budget constitutes 40% of the national budget of which 80% reportedly goes to salaries. It was established that this has been a cause of concern for the leadership in South Sudan and that a review of its expenditure has been considered in the past.

Description and Evaluation of Past Reform Efforts

190. The Commission learnt that reforms of the SPLA began in the early 1990s, although initial efforts bore little fruit. Weakened by the split in 1991 (in which Machar, Akol and Gordon Cuol) left to form the Khartoum aligned SPLM-Nassir, coupled with the loss of support from Ethiopia, SPLA/M (sometimes referred to as SPLA/M-Mainstream following the split), the SPLA/M moved to reform itself. The strategy adopted by the new Basher-led government in Khartoum — extensive use of Southern militia, essentially pitting SPLA/M against other ethnic communities unhappy with the SPLA/M for a range of reasons — had progressively weakened the movement.[121]

191. Faced with the prospect of total defeat, Garang moved to reinvigorate the movement, aiming in part to expand its base by convening the first ever meeting of the Political Military High Command (PMHC) in Torit and Chukdum on September 12, 1991. The meeting confirmed Garang's leadership but expressed the need for institutional reform, resolving that a national convention should be convened.[122] The convention would be delayed until April 1994, when it was held in Chukdum over two weeks. The SPLA/M's new rhetorical commitment to the ideals of the wave of democratization in Africa reflected in his remarks at the opening of the National Convention, which brought together a total of 183 delegates from different parts of Sudan, including Khartoum:

[120] ICG (n 18 above) 4, p 6; see also Sudan Tribune, 'South Sudan President admits forming private army' *Sudan Tribune* February 17, 2014 available at http://www.sudantribune.com/spip.php?article49993
[121] SeeYoung (n 13 above) and Arnold, 90-96.
[122] As above, 92.

> We must review the last eleven years of our existence as a movement and army to discover our mistakes and correct them, and to assess and consolidate our victories so that the SPLM/A forges ahead to achieve *peace with justice, liberation, democracy and human dignity* (emphasis added).[123]

192. Part of the reform measures undertaken during the convention involved the election of new leaders of a new National Liberation Council and National Executive Council. It has been suggested that the move was 'an attempt to accrue grassroots appeal based on greater inclusivity and a rhetorical emphasis on equality and justice.'[124] A number of resolutions were voted on and agreed including: on matter of administration of the movement; the need to separate the military and political components of the movement; establishment of civil administrations in the liberated areas; the need to restructure the movement's humanitarian wing, the South Sudanese Relief and Rehabilitation Association (SRRA) and; restructuring the SPLA, by adopting a Code of Conduct and a more conventional command structure proposed.[125]

193. On the overall outlook and impact of these 'reforms', the Commission learnt that the reforms were considered as being largely cosmetic in the sense that 'the implementation of the reforms at the national level stagnated soon after the convention' and that the most striking change in the six years after the National Convention was the SPLA/M's adoption of a new rhetoric which stressed democracy, even if it was never realized'.[126]

194. The Commission established that, as the peace process that led to the CPA approached, the SPLA/M's awareness that change was necessary increased, resulting in perhaps the greatest attempt to reorient its approach in 2000 as it prepared to govern in a future arrangement. The movement published the policy document titled 'Peace through development: Perspectives and Prospects in Sudan' calling for participatory democracy, good governance and the establishment of civilian administrations in the liberated areas known as Civil Administration of the New Sudan (CANS).

195. The Commission heard that SPLM's attempt to institutionalize governance in liberated areas did not end in success, in part because the CANS were dominated by military rather than civilian personnel and structures, including with respect to judicial organs. It is the Commission opinion that the SPLM's relative lack of

[123] SPLM/APLA, 'First national Convention: Transcript of Opening Speech by John Garang,' April 2, 1994 quoted in LeRiche and Arnold, (n 13 above) at 94.

[124] LeRiche and Arnold (n 13 above), 95 citing Clair Metelits, 'Reformed rebels/ Democratization, Global Norms, and the Sudan People's Liberation Army,' *Africa Today* 51:1 (2004) 73.

[125] LeRiche and Arnold (n 13 above) 95.

[126] Oystein Rolandsen, *Guerrilla Government: Political changes in the Southern Sudan During the 1990s* (2005) cited in Young (n 13 above) 70.

experience in governance has had a bearing on the state building efforts instituted following the signing of the CPA.

From the SPLA to the South Sudan Armed Forces (SSAF): Current Reform Efforts

196. The Commission learnt that at independence, the SPLA became the armed forces of South Sudan. The Transitional Constitution, recognizing the nature and state of the SPLA carried the commitment that the SPLA would be transformed. In this regard, Article 151(2) provided that the SPLA:

> […] shall be transformed into the South Sudan Armed Forces, and shall be *non-partisan*, *national in character*, patriotic, regular, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution and the law.

197. From the Commission's consultations, it emerged that the process of transformation has been slow, and remains incomplete. Perhaps indicative of the fact that the army remains largely untransformed, it [the army] is still widely referred to and ordinarily refers to itself as the SPLA, a fact that many of those who spoke to the Commission took issue with. In this part, the report describes the efforts that have been made so far to reform the SPLA by addressing some of the challenges identified in the previous sections ranging from the size of the army, its composition, its intimate links to politics as well as the adequacy of structures and system to manage a modern armed force.

198. The Commission learnt that one of the first initiatives to reform the armed forces was the adoption of 'Objective Force 2017' at the end of 2011.[127] Objective Force 2017 constitutes the leadership's vision of the armed force for 2017. It not only outlines the structure of the SPLA in 2017 but also provides for the main elements of transformation required to achieve the vision outlined. In terms of the desired force strength, Objective Force 2017 provided for 120,000, which was soon revised upwards to 140,000. [128] In 2012, a more detailed framework for defence transformation was adopted.

199. One of the main reform efforts has been the Disarmament, Demobilization and Reintegration (DDR). DDR constituted one of the key pillars of the security arrangements agreed upon under the CPA, and subsequently, it is seen as one of the necessary measures required to reform the SPLA into an affordable, accountable force. Indeed, the South Sudan Development Plan 2011-2013 envisions the establishment of affordable and effective security through the DDR of all the organized forces (SPLA, SSNPS, prisons, fire brigade and wildlife services)

[127] Objective Force 2017 is a confidential document

[128] John A Snowden, 'Work in Progress: Security Force Development in South Sudan through February 2012 (2012) 26

as one of five priority programs relating to the conflict prevention and security pillar.[129]

200. Following the signing of the CPA, a DDR program (the CPA-DDR) agreed upon by the parties as part of the CPA was instituted. Both sides had mutually agreed to 'proportional downsizing' of their armies, reportedly by 90,000 each and that DDR program would be instituted with the assistance of the international community to achieve these goals.[130] For Southern Sudan, demobilized SPLA soldiers as well as SAF serving in the South were to be absorbed, as appropriate, into 'various institutions of government in South Sudan.

201. The Commission learnt that the CPA-DDR program was supported by the UNDP, UNICEF and UNMISS. By the time the program was closed in December 2011, not much had been achieved. It fell far short of its targets because neither party (north and south) was prepared to reduce force numbers thereby weakening itself when conflict still loomed large. The government's explanation for the failure is that it was beset by 'programmatic challenges, uncertainty of the referendum and security considerations'.[131] A senior SPLM official who spoke to the Commission blamed the lack of funds for the failed DDR program, part of which depended on donor commitments:

> […] then you have a failed DDR, you have people with arms, the government is unable to pension them because pensioning them means you give money and international community offered to give money to take them out of the way … they are still there. As we talk today they are there because they are not engaged in their own homes with guns and under nobody's command.

202. On the related issue of proliferation of small arms and disarmament of civilians, a senior SPLM official who spoke to the Commission partly attributed the insecurity in South Sudan (and one of the factors that created the current crisis) to failure to implement relevant aspects of the CPA:

[129] South Sudan Development Plan 2011-2013, pp 105,

[130] On CPA Chapter VI on Security Arrangements, Articles 1(c), (d); 3 (d) and (e). See also Part III of the CPA on Demobilization, Disarmament, Reintegration and Reconciliation.

[131] See DDR update (2013) [on the paradox of supporting SSR programs in the North and South during the interim period, it LeRiche and Arnold (n 13 above) have been stated [pp 38-39] that: 'Strict adherence to the CPA's language of balance between the North and south Sudan resulted in most of the international community following a policy of theoretical dualism. This balance actively interfered with effective donor support to capacity-building programmes throughout the South and was particularly confusing to the security sector assistance, since many of the countries ran programmes in both the North and the South. It led too, to the irony of the international community assisting the North's security apparatus when the government's President and several of its bureaucrats had been indicted by the ICC. For example, the UK government maintained assistance to the security sector in the north and south Sudan throughout the Interim Period. Many other governments offered non-lethal assistance to the police in Northern Sudan in parallel to programs in the South.'

> […] the CPA provided for community disarmament that didn't take place. So it is like every household has a gun or two or so; and this is more profound in the three States that are experiencing the problem now. So, literally every civilian has one, two or three arms. That is also an outcome of the implementation of the CPA …

203. The Commission was informed that a new DDR program was launched in 2011 under the National DDR Council, which is constituted by 22 ministries, with the Vice President as Chair and South Sudan DDR Commission (SSDDRC) serving as the technical body. In terms of future planning, the new DDR program aims to reduce force numbers by 150,000 of which 80,000 from SPLA, and 70, 000 from other organized forces. According to the South Sudan DDR Commission, sub-groups have been identified within the two main groups. While it is not clear how much this will contribute in terms of numbers, (initial) focus of the DDR program is thus on 'those with physical disabilities, mental disabilities and children associated with armed forces and groups'.[132]

204. In 2012, the program aimed to process 3,000 from the SPLA and 6,000 in 2013. This falls far short of the 77,614 projected to have been processed by the South Sudan Development Plan by the end of 2013.[133] As of the last date of reporting, it was estimated that 12,525 soldiers had been demobilized, with 5,000 of these being reintegrated. [134] One of the program's stated objectives is to increase livelihood opportunities for ex-combatants in communities of return and to facilite release, return and reintegration of children associated with armed forces and groups into their families and communities. To this end, DDR includes skills training in various relevant fields and assistance from the government to form cooperatives, which are subsequently linked to various ministries for purposes of sourcing opportunities.[135]

205. In terms of prospects for DDR, the SS Development Plan 2011-2013 considers DDR as a program deserving of urgent attention. In this regard, it provides that

> 'there is an urgent need to re-energise this process, which will simultaneously support the screening, training and right sizing of security and rule of law personnel and agencies; and to help ex-combatants to gain peaceful livelihoods'.[136]

206. The Commission established that the government's public statements and rhetorical commitments do not appear to be matched by practice. Perhaps the slow progress is indicative of the challenges that face the DDR program. From the number of those who have been processed through the DDR program, it appears that the government's commitment to the DDR program is uncertain. The

[132] SSDDRC, *Inside DDR* March 2013, 2
[133] South Sudan Development Plan, 2011-2013, p 112
[134] SSDDRC, *Inside DDR* March 2013, 2
[135] SSDDRC (n 132 above) 5.
[136] South Sudan Development Plan, 2011-2013, p 114

government's views expressed through a senior government official suggest that there are 'disagreements with donors over the shape and modalities of future DDR programs, as well as the roles of coordinating agencies'.[137]

207. It is fair to conclude, as the Commission does, that outbreak of violence in South Sudan in December 2013 will further delay the DDR program, and create additional problems for it. The armed conflict created an environment where the ranks of the SPLA as well as various militia have swelled by unknown numbers. It will become necessary to reevaluate the program based on this new reality.

208. The Commission learnt that in addition to the DDR program, two additional programs aimed at reducing force numbers with a view to transforming the forces into affordable and accountable outfits are in the pipeline. These are the National Military Pension Fund[138] and the National Freedom Gratuity Fund. According to the SSDDRC, once the pension fund is finalized, all members of the SPLA will receive a pension based on their contribution since January 9, 2005.[139] For its part, the National Freedom Gratuity Fund will provide the possibility for army generals (who are not processed through the DDR program) to receive a once off 'golden handshake' in recognition of their contribution.[140]

209. The Commission established that the Transformation Strategy and Programme 2012-2017, which was developed with the technical support from UK's Security Sector Development and Defence Transformation (SSDDT), describes the sequencing of key reform elements. A Transformation Implementation Plan was subsequently developed in order to address question of resourcing of the transformation process. In 2012, the government, with the support of the SSDDT, developed job descriptions for senior SPLA officers and commenced work on sectoral command structures.[141]

SOUTH SUDAN NATIONAL POLICE SERVICE (SSNPS)

Background: South Sudan Police Service Within the Security sector

210. It was established that the South Sudan National Police Service (SSNPS) like the other forces in this cluster — Prisons Service, Wildlife Service and the Fire brigade — was established in 2005. Previously, police in South Sudan was made up of three different groups: former police of the Government of Sudan that were based in towns previously held by GOS in the south; SPLA combatants assigned as civil police in

[137] Snowden, 22 citing Small Arms Survey, *DDR in South Sudan* (2011)
[138] The National Military Pension Fund Bill (2005) is yet to be finalized
[139] SSDDRC (n 132 above) 4.
[140] SSDDRC (n 132 above) 4-5
[141] See generally, UK Department of International Development, *Annual Review Security Sector Development & Defence Transformation* (July 2012) available at <http://projects.dfid.gov.uk/project.aspx?Project=200329>

'liberated' territories held by SPLA/M and; demobilized SPLA officers.[142] In 2006, the three 'forces' were integrated and brought under the control of the Ministry of Interior.

211. In terms of the legal framework, while the CPA foresaw the establishment of a police service, it did not stipulate how it would operate, and no other legal framework existed to provide for an organizational structure and to govern the activities and procedures of the force.[143] For this reason, the work of the police was governed by Presidential Decree. Lack of a clear legal framework created some confusion and contestation over jurisdiction of the national, regional (Southern Sudan) and state level police with the Ministry of Interior asserting that it had national control over the entire force while State Governors claimed that police within the states fell under their control.[144]

212. The South Sudan Police Service Act was eventually enacted in 2009 and would govern the police during the remainder of the Interim Period. The Transitional Constitution adopted in 2011 provided for constitutional sanction for the establishment of the Police Service and other law enforcement agencies including the Prisons Service, Wildlife Service and the Fire Brigade Service.[145]

213. The Constitution establishes the National Police Service as a decentralized professional service with the mission to: prevent, combat and investigate crime, maintain law and public order, protect the people and their properties; and uphold and enforce this Constitution and the law.[146] In terms of Article 155(3), the SSNPS is organized at the national and state levels, with its functions regulated by law. Since a new law is yet to be enacted, the law that continues to apply is the Southern Sudan Police Service Act enacted during the Interim Period (under the Interim Constitution). There is a constitutional mandate for 'police at the national and state levels to coordinate, cooperate and assist each other in the discharge of their functions'.[147] The same provision foresees the establishment of mechanisms to facilitate coordination and cooperation.

214. It was established that while the SPLA and defence in general was the focus of much of the reform initiatives initiated during the post-CPA period, by 2009, the SSNPS had been neglected, commanding little attention from the Government of Southern Sudan (GOSS) as well as international SSR actors.[148] Interest in the police appeared to be event-driven, with elections scheduled for 2010. In terms of resource allocation for instance, defence (the SPLA) consumed, 40% of the national budget.

[142] For a brief history, see Alfred Sebit Lokuji, Abraham Sewonet Abatneh & Chaplain Kenyi Wani, 'Police reform in Southern Sudan' Policy Document by the North-South Institute (2009) 19.
[143] See CPA, Art 162
[144] Lokuji, Abatneh & Wani (n 142 above) 22.
[145] Transitional Constitution of South Sudan, Part Ten, Chapter II.
[146] Transitional Constitution of South Sudan, Article 155 (2)
[147] Transitional Constitution of South Sudan, Article 155(7)
[148] Lokuji, Abatneh & Wani (n 142 above) 22; Snowden, (n 128 above) 26;

The SSNPS was left 'to compete with other government institutions for the remaining finite sum'.[149]

215. The situation described here prevailed upon a backdrop of SSNPS' continuing absorption of large numbers of (demobilized) SPLA officers. In addition to posing serious programming challenges for its leadership, much of the budgetary allocation for the SSNPS went to paying salaries, in the region of 80% by some estimates.[150] In 2007, it is reported that the SSNPS budget was USD 50.3 million, and that 80% went into salaries. In 2011, the SSNPS budget was USD 267 million, of which USD 253 million (95%) went to salaries while the rest USD 14.3 million for operating costs and capital outlay.[151]

216. The Commission learnt that in subsequent years, a more concerted effort was initiated to reform the police, with various international actors playing a role. Before reviewing these reform initiatives, we provide a brief description of the state of the SSNPS, which informs subsequent discussion and recommendations at the end.

A Broad Evaluation: the state of the SS Police Service

217. While as described below there has been focus and commitment to police reforms in subsequent years, the SSNPS is still beset by serious challenges, including: lack of an appropriate legal framework; resource constraints; inadequacy of equipment and infrastructure, among others.

218. According to a government document, pre-independence projections anticipated employing a force of 36,000, although it is not clear whether these still apply.[152] In spite of clarity on the overall number of officers, the SSNPS leadership appears not to have control over the process over time. Snowden notes that 'as a result of constant military influx into the police and poor personnel accountability, the SSNPS leadership finds it difficult to determine actual size of the force.' In elaborating this reality, it has been noted that:

> During security preparations for the 2010 elections, it was estimated that the SSNPS had up to 30,000 personnel, but only 14000 to 16000 were 'useful and deployable'. In January 2011, the UN estimated SSNPS strength to be 33,000, which included 5,000-6000 new recruits who began training in early 2010.[153]

[149] Lokuji, Abatneh & Wani (n 150 above) 22.
[150] See Lokuji, Abatneh & Wani (n 142 above) 25;
[151] Snowden (n 128 above) 28 citing interviews with senior SSNPS officers conducted in December, 2011
[152] Small Arms Survey, 'Excess arms in South Sudan: Security Forces and Surplus Management' Number 6, April 2014. Available at http://www.smallarmssurvey.org/fileadmin/docs/G-Issue-briefs/SAS-IB6-Excess-Arms-in-South-Sudan.pdf
[153] John A Snowden (n 150 above) 27 partly citing UNMIS, 'Southern Sudan Justice and Security Sectors Interim Review' 2011

219. In terms of selection of recruits for training, each of the 10 states selected 500-600 recruits for the new academy at Rejaf. The newly trained officers would return to their states to form the 'backbone' of the new SSNPS for the elections and referendum but reportedly, 'the plan did not work out'.[154] To demonstrate the SSNPS leadership's apparent lack of control over force numbers, the size of the force continued to grow in 2011, reportedly reaching 48,000 or 50,000 in mid-2011, figures established following a screening exercise in 2011.[155] Part of the reason was that some states independently recruited and trained more officers in 2011.[156] As at April 24, 2013, the SSNPS stood at 46,427 officers, and the number could decline further, in view of a possible 11,000 ghost workers suspected to be still in the force.[157]

220. The increase in force numbers has not necessarily translated into improved security around the country. In part because of the vastness of the country and the quality of those absorbed within the force, it emerged that despite increasing force size, many parts of the country have remained un-served by the police, relying instead on the army to undertake policing needs, which has created several interrelated challenges.[158] Overall, police is yet to assume primacy over law enforcement around South Sudan, largely because of lack of capacity, which is acknowledged by the SSNPS leadership.[159]

221. The SSNPS leadership can be said to be 'militarised', which, in view of the civilian-oriented mandate of the police, can pose problems in terms of establishing a police service that espouses a new institutional culture and ethos other than that prevailing in the military. According to reports, the Command structure of the SSNPS is as follows: Inspector General of Police (IGP), reporting to the Minister of Interior and a deputy (both lieutenant generals) three Assistant IGPs in social welfare, administration and railway and river transport and a spokesperson (major generals) and 14 directors (9 are major generals) while nine out of the 10 Commissioners of Police in the states are major generals. On military culture within the SSNPS and lack of division of functions, one member of civil society observed that:

> There is no law and order. The police themselves are the demobilised soldiers. These soldiers are not interrelated in terms of how they can deal with society, therefore they become rude and arrogant. The society then feels that the police are enemies of the society. When they see the police they think they are problematic people. Anybody in uniform has the power to arrest. This means that some of them do not know their roles. This is

[154] Snowden, (n 150 above) 27

[155] Snowden (n 157 above) 27 citing discussion with senior SSNPS officers in December 2011.

[156] As above, citing the example of Eastern Equatoria that trained, as per discussions with senior SSNPS officers, 700 police in 2011.

[157] See UNSC, 'Report of the Secretary General on South Sudan' June 20, 2013, para 38.

[158] Lokuji, Abatneh & Wani (n 142 above) 24.

[159] See for instance, Snowden (n 157 above) 17 making the point in relation to provision of security during recent events in South Sudan (elections, referendum and independence celebrations in 2011). See also Human Rights Watch, 'South Sudan: "Rough Justice" in Lakes State' (discussing the role played by the army in law enforcement in the state).

seen where traffic police officer goes to someone's house to arrest them. It is also seen where someone arrests and prosecutes a citizen for a criminal offense not-related to their function.

222. Poor 'force quality' is due in part to the dynamics of the interrelated issues of history, education and training. In terms of history, it was noted that the first SSNPS was cobbled together in 2005 from three different sources and that a huge percentage of the SSNPS is constituted by former soldiers transferred by the SPLA. While there are exceptions, the prevailing view appears to be that those that have been subject of transfer, at least in the initial period 'were undesirable in the SPLA' or came from 'vulnerable groups' including women, the weak, aged and the injured.[160] A senior police officer in charge of administration has been quoted stating, in relation to the composition of the SSNPS, that 'the police service is a dumping ground for SPLA rejects'.[161]

223. With respect to education, the Commission's consultations as well as reports indicate that 80% of the South Sudanese Police Service personnel are functionally illiterate, which poses problems for the performance of normal police functions.[162] Measures are being undertaken to impart basic competencies but the task is difficult in view of the numbers involved.

224. The Commission heard that the human rights record of the SSNPS is another issue that continues to blight the outlook of the police service. Police have been accused of perpetrating human rights violations in various parts of the country that includes abuse of civilians, foreign nationals and staff members of international organisations. One report reviewed by the Commission indicated that in 2011, the treatment of recruits by instructors in Rejaf led to allegations of sexual abuse and torture.[163] In addition to cases of involvement in criminal activities, incidents of human rights violations have resulted in the perception that the police are a 'source of insecurity'.[164]

225. The Commission also heard that that low-level corruption, taking the form of extortion, is the most prevalent form of 'misconduct' by police, attributed in part to low salaries that they earn. A survey conducted in 2011 by a team of international advisers at the main police stations in six states indicated that over 40% of those

[160] Victoria Matatio Elia Guli and Jennifer Salahub, 'Women's Perspectives on the Reform of the Southern Sudan Police Service' in Jennifer Salahub (ed) *African Women on the Thin Blue Line: Gender-Sensitive Police Reform in Liberia and Southern Sudan* [North-South Institute, 2011] 45

[161] Victoria Matatio Elia Guli and Jennifer Salahub (above) 45 citing an interview conducted by the ICG in May, 2010; ICG, 'Jonglei's Tribal Conflicts: Countering Insecurity in South Sudan' Africa Report No 154, (2009) at 19 (noting that in some cases, especially for old soldiers, transfer to the SSNPS constituted 'appeasement'.

[162] Lokuji, Abatneh & Wani (n 142 above) 24; North-South Institute, *Police Reform in an Independent South Sudan* (2012) 2.

[163] North-South Institute (n 162 above), 2; Snowden (n 128 above) 27 citing discussions with senior SSNPS officers in December 2011.

[164] Lokuji, Abatneh & Wani (n 142 above); Knopf (n 50 above) 25 (making the point in relation to the security sector in general); Human Rights Watch, 'Rough Justice' (n 159 above)

seeking help from SSNPS were required to pay a fee for services.[165] The internal summary justice system established within the SSNPS does not appear to be effective, in part due to the difficulty involved in identifying offending officers.[166]

226. It is noteworthy that the SSNPS has consistently made statements in relation to addressing alleged human rights violations and regularly calls on its officers to uphold principles set out in the national constitution, by which they are bound.[167] In particular, Article 155(6) of the Transitional Constitution stipulates that 'the Police of South Sudan shall be governed by this Constitution and the law' and that it 'shall respect the will of the people, the rule of law and order, civilian authority, democracy, human rights, fundamental freedoms and execute judicial orders'.

227. The Commission established that that women officers make up 25% of the SSNPS, drawn largely from the SPLA.[168] One report reviewed by the Commission notes that, while these numbers are surprising, the potential for women officers to contribute to the police service has not fully been explored, in part because of the roles they tend to be assigned. The Commission was informed that women officers 'are often relegated to administrative roles, sewing and making tea'.[169] It is noteworthy that those transferred from the SPLA kept the ranks they had in the SPLA and that the highest ranking women in the SSNPS were at the level of colonel.[170] While this is the case, women officers lack voice to articulate their concerns, and to push for greater structural inclusion, visibility and meaningful engagement. It appears that the role of women within the SSNPS reflects existing power relations and gender roles within South Sudanese society. This has been confirmed by a number of those who spoke to the Commission.

228. On the place of women within the SSNPS, a senior government official from the gender ministry noted as follows:

> So their number [women officers] is high but at the junior positions; you cannot get them from Majors, very few. Lower position officers, the majority are there where they are not involved in decision making and that is the challenge. So the need is to empower women in the police, train them and then also have more women at the highest level so that they can also contribute in decision making in the fact of that they will be there.[171]

[165] Snowden (n 128 above) 33 citing Richard Rands, 'In need of review: SPLA Transformation in 2006-10 and Beyond' HSBA Working Paper No 23, at 46

[166] Snowden (n 128 above) citing discussions with international advisers in Juba, January, 2012. Suggestions have been made to pin names or identification numbers on police uniforms.

[167] North-South Institute, 2

[168] See Victoria Matatio Elia Guli and Jennifer Salahub, (n 160 above) 46

[169] North-South Institute (n 162 above), 3. Victoria Matatio Elia Guli and Jennifer Salahub, 46

[170] This is a middle rank among commissioned officers (in descending order: General, Lieutenant General, Major general, Brigadier, Colonel, Lieutenant Colonel, Major, Captain, Ist Lieutenant and Lieutenant.

[171] Ms. Esther Ikere Ladu, Undersecretary, Ministry Of Gender, Child And Social Welfare

229. Overall, the police service suffers from serious resource constraints. In addition to the fact that it competes unfavourably with defence, which at independence faced serious external threats, much of its budgetary allocation is, as described above, taken up by salaries, which account for over 80% of its budget. The result is that the service lacks funds to invest in basic infrastructure, equipment and capacity building.

Evaluating Past and Current Reform Initiatives

230. In an interview, former Special Representative of the Secretary General (SRSG) to South Sudan Hilde Johnson stated that the UN's greatest achievement during her tenure was transformation, with particular reference to police reforms. In this regard, while acknowledging that it had been a 'very tough time, particularly the first two years into independence which were marked by significant tensions with Khartoum, the shutdown of the oil, the Heglig border skirmishes between the two countries, and a major cycle of violence in Jonglei state' she stated in respect to police reform that:

> […] the main achievement in the period up to the crisis [of December 15 2013] has been the reform process and the strengthening and transformation of the South Sudan National Police [SSNPS]. We have been innovative by getting the region to provide trainers — Rwandans and the Ugandans for example, moved whole training teams and modules from their police training colleges to South Sudan, under UN Police (UNPOL), which has never been done before. The Kenyans have also been assisting in building capacity for livestock police. [172]

231. Following the adoption of the South Sudan Development Plan (2011-2013) which articulated a role for the national police service,[173] the Ministry of Interior adopted a Police Reform Plan in 2011, which had, as its main objective, the increasing and the developing of capacities of the SSNPS (mainly size) and the broadening of its area of activities across the country.[174] The Commission learnt that, building on this, the Inspector General of the SSNPS is in the process of developing a Strategic Action Plan for Reform (the process commenced in 2012).

232. A number of literacy programs for the police are run by government and international SSR actors. With respect to the former, literacy classes are run jointly by the police and the Ministry of Education while the SSNPS itself has offered classes, specifically for women officers in conjunction with UNMISS and CHF International (an NGO).[175]

[172] EastAfrican, Q&A With Hilde Johnson' *EastAfrican* June 28-July 4, 2014
[173] South Sudan Development Plan, 2011-2-13
[174] South Sudan Police Reform Plan
[175] Victoria Matatio Elia Guli and Jennifer Salahub (n 160 above) 50.

The Role of International Actors in Police Reforms

233. Various international actors, including the UN, individual governments, aid agencies and INGOs have been active in the South Sudanese SSR space for a number of years. With respect to police reforms, the main actor has been the UN, through its mission in South Sudan, UNMISS, which was created by the UN Security Council on the eve of South Sudanese independence on July 9, 2011.[176]

234. In terms of Resolution 1996 (2011), UNMISS' mandate in relation to police has three major elements: strengthening the capacity of SSNPS through advice on policy, planning, and legislative development, as well as training and mentoring in key areas;[177] providing advice and assistance to SSNPS at the national and local levels in fulfilling their responsibility to protect civilians and; [178] supporting the Government of the Republic of South Sudan to develop its capacity to provide security, establish rule of law, and strengthen security and justice sectors by supporting development of strategies for security sector reform and rule of law, including human rights capacities.[179]

III. FINANCIAL MANAGEMENT AND STRATEGIC RESOURCES (OIL AND LAND)

Introduction

235. It was clear from the various consultations of the Commission that the absence of equitable resource allocation and consequent marginalization of the various groups in South Sudan was a simmering source of resentment and disappointment underlying the conflagration that ensued, albeit the implosion of the conflict was brought about by the political struggle by the two main players. The struggle for political power and control of natural resources revenue, corruption and nepotism appear to be the key factors underlining the break out of the crisis that ravaged the entire country. Economic aspects of the conflict, such as control of natural resource (oil) has been a source of frustration among different tribes and the diaspora, who cannot benefit from the income of independence and especially from their country's natural resources. The resources in the country are being used for the personal benefit of top politicians and their families and on one account the oil revenue is becoming a tool of harm.

Overview of legal and institutional framework for managing resources

236. Pursuant to Part Twelve, Chapters I, II, III, IV and V of the Transitional Constitution of South Sudan sets out variously Guiding Principles for Development

[176] See UNSC Resolution 1996 (2011) available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20SRES%201996.pdf
[177] UNSC Resolution 1996 (2011) 3 (c) iii
[178] UNSC Resolution 1996 (2011) 3(a) iv
[179] UNSC Resolution 1996 (2011) 3(c) i; iii

and Equitable Sharing of National Wealth, Land Ownership, Tenure and Natural Resources, Petroleum and Gas Development and Management, Sources of Revenue, Fiscal and Financial Institutions related to finance and economic matters; essentially the key resources of the state.

237. The Guiding Principles in the Transitional Constitution makes provision for the equitable allocation of the country's wealth and natural resources.[180] The Petroleum Revenue Management Act, 2012[181] sets out a structure for the distribution of petroleum revenues with 2% of revenues allocated to oil producing states and 3% to local communities affected by oil production. The reality is different. South Sudan is a mono-economy with oil its main source of revenue.[182] Despite a legal and institutional framework[183] that speaks to equitable management of strategic

[180] Section 168 states, (1) The National Government shall promote, support and encourage broad based and balanced and participatory economic development based on the principle of subsidiarity and devolution of governmental functions and powers to the appropriate levels where the people can best manage and direct their own affairs. (2) Equitable economic development shall be based, inter alia, on the agricultural and agro-industrial sectors, and promotion of private sector conducted in accordance with the best known practices of sustainable development within a framework of transparent and accountable governance.(3 The National Government shall promote and encourage the participation of the people in the formulation of its development policies and programmes. (4) The National Government shall endeavour to build institutional, human, social and economic capacity, develop infrastructure and social services, and raise the standard of public services to attain the Millennium Development Goals. (5) The sharing and allocation of resources and national wealth shall be based on the premise that all states, localities and communities are entitled to equitable development without discrimination. (6) National wealth and other resources shall be allocated in a manner that will enable each level of government discharge its legal and constitutional responsibilities and duties and ensure that the quality of life and dignity of all the people are promoted without discrimination on grounds of gender, religion, political affiliation, ethnicity, language or locality.(7) The National Government shall fulfill its obligations to provide financial transfers to all levels of government, and shall, except as otherwise provided herein, apportion revenue equitably among the states and local governments. (8) Revenue sharing shall reflect a commitment to devolution of powers and decentralisation of decision-making in regard to development, service delivery and good governance. (9) All taxes and duties set out in this Constitution shall be regulated by law to ensure coordination, fairness, equity, transparency and to avoid an excessive tax burden on the citizens, private sector and investors. (10) No level of government shall unduly withhold any allocation or financial transfer due to another level of government. In case of dispute, any level of government, after attempting amicable solution, may initiate proceedings before the Supreme Court.

[181] For an overview, see Emily Savage, 'South Sudan's Petroleum Management Act' Sudd Institutte Policy Brief, December 12, 2013.

[182] See section 175 of the Transitional Constitution.

[183] See further section 172 of the Transitional Constitution; 172 which states that (1) Ownership 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.
(2) Petroleum and gas development and management shall be guided by the following principles:
(a) safeguarding National interests;
(b) creating lasting benefits for society;
(c) promoting efficient and sustainable resource management;
(d) using oil revenues to develop other sectors of the economy, especially agriculture;
(e) ensuring transparency and accountability;
(f) promoting fair competition to increase productivity and efficiency in the

resources, access to the resources of the country is determined by patronage and allegiance to the ruling party. Whoever controls the political power has advantage over the control of the resources.

238. On the sharing of resources between the national government and the States, a respondent informed the Commission:

> The resources, 85% and more of the budget is spent here in Juba and 15% is the one that goes to the states and you call it decentralized; and when you look at this 15% most of it goes to salaries or people who are technically part of the central government. So none goes to development at all. If you look at the budgets, the health, even the latest budget, the health gets 4% of the budget. Education gets 6%, President's office gets 10% and paying arrears gets 7% more than either health and education; and then there is no good formula for allocating resources. The oil is in two states, … This is Upper Nile and Unity. These are the most miserable states because there is no accountability. The 2% goes to the Governor, he does whatever he wants with it.

239. During consultations with the Commission, several respondents made reference to the contestation over access to resources as a key driver of conflict. Speaking in relation to the current conflict, a respondent told the Commission:

> [..] 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.

240. A view was expressed that calls for a federal system are informed by the desire of many South Sudanese to benefit from resources and to access services. In this regard, a respondent stated that:

---

petroleum and gas sector;
(g) promoting balanced and equitable development;
(h) creating a secure and healthy investment environment;
(i) protecting the environment and biodiversity;
(j) building the capacity of South Sudanese within the petroleum and gas sector;
(k) establishing oil infrastructure within South Sudan, such as pipelines, refineries, storage, processing and transport facilities;
(m) safeguarding interests of future generations;
(n) ensuring accountability for violations of human rights and degradation to the environment caused by petroleum and gas-related operations; and
(o) ensuring restoration of land and resources affected by development and management. National Petroleum and Gas Council Section 173 establishes a National Petroleum and Gas Council as a policy making body reporting to the Council of Ministers.

> If we don't address the real issues, why are people calling for federalism, they want to help the leaders of their own. They want to elect. If somebody is a friend of his own people, that one bring him here. Go to Upper Nile where the oil and the money is, if it was oil money, the money being brought here they speak to national (?) and others to protect them in power. So the idea is that people are fed up, they are not getting services and some areas have not been reached by government.

Corruption

241. What has been described as endemic corruption in South Sudan's political cycle and the public sector, poor natural resource, i.e. oil, management and the exclusion of the vast majority of citizens from natural resource benefits, has constituted a grievance and threat which has nurtured participation in, and mobilization for, violence. The dual exchange rate has also resulted in misallocation of resources. As the Commission was told:

> Violence has become the means of acquiring resources, of defining status and of defining social confidants. Because of this you have a vulnerable leadership, which has in a lot of instances, yield[ed] to the demands of various rival groups for political improvement. There is the phrase, which has developed which is called the policy of accommodation that is bringing various rival groups and these groups are mostly militarized, bringing them into positions of influence to keep the hope but to keep them quiet.

242. The result is that the vast majority of South Sudanese has been excluded from benefitting in any significant way from the country's natural resources and from power sharing. There was also a clear indication that being from the same ethnicity as the political group in power was key to being able to benefit politically, financially and socially, an unsustainable situation in a diverse, heterogenous country such as South Sudan.

243. On the type of corruption prevalent in South Sudan, a respondent said:

> […] we have not reached those stages yet [of grand corruption], there are very lousy thieves. We have not reached that stage. Our corruption is mainly in the area of contracts and procurement, the big ones, in contracts and procurement and we are very lousy thieves because when we take we put the money in our names, we get cheque books, we write the cheques. It is in the bank. I mean, my little computer is able to go on-line and retrieve all kinds of funny information and things flying around here and there. So we are not sophisticated yet in that department and that is why I have a lot of faith that we can still hold it in check.

244. There is great difficulty in tackling this sort corruption because it is imputed to those in high positions of power. Reform of the anti-corruption commission is a possibility but it is difficult to assess how any such reforms in isolation will make a

significant difference. Any such reforms will also not necessarily change the sense of entitlement of those who are arrogating the country's resources to themselves, families and cohorts, and using the country's resources as a tool for political gain to shore up their power and position. One approach would be to consider any attempts at an anti-corruption drive as part of a wholesale rule of law reform, inculcating respect for, not only the rule of law, but governance principles of transparency, accountability and fairness that ought to be intrinsic in being tasked with the responsibility of national resources and an appreciation that political governance comes with being the repository of trust and responsibility on behalf of the populace. The Commission was told:

> I think that focusing on the Anti-Corruption Commission will not really help matters here. It has to be the whole rule of law sector, because we cannot function in isolation, we are not Judges, we investigate and we use the sector to do other things. So we have to work collaboratively. So I think it is the rule of law sector that needs to be reformed; and with that reformation the whole issue of appointment on meritocratic grounds rather than on who I know or my relatives is.

245. Another difficulty is the mode of appointment in the public service/civil service where merit is not necessarily the sole basis of appointment and this has corrupted the process of institutional governance, severely weakening institutions. Being of the 'correct' ethnicity and having the right connection is key to securing posts. Public appointments are used to reward those who have been part of the liberation struggle.

> […] there is this kind of expression that we fought and you did not fight. This has been throughout and it has created the differences amongst the South Sudanese who voted for the independence regardless of the achievement that all of them participated from wherever they were. But still the language is there, we fought, and you did not fight. So this also created also some differences between the youth and even the people themselves.

Resource Allocation

246. There is a clear need for leadership in the control and access to natural resource incomes which would alleviate the disconnection between the Government and the population. Some victims, youths, traditional chiefs, and women's groups, all in different parts of the country expressed a desire for a federal form of governance as a solution and way forward in future. However, some respondents stated that they saw no need for federalism. There was also expressed desire for equitable resource and power sharing amongst the groups the Commission met with. It is clear that equitable natural resource distribution for all will be part of the solution to the conflict and may be what is underlying the call of all groups for federalism in a new South Sudan.

247. To that extent, the Commission considers reforms necessary in resource allocation and the derivation principle to redress the current inequity and enable the South Sudanese people to benefit developmentally from the natural resources of the country.

LAND

Introduction

248. Sections 169 — 171 of the Transitional Constitution of South Sudan[184] set out the legal framework for land tenure in South Sudan. The Land Act 2009 regulates

[184] The mandate of the Commission's work precludes a close examination of land tenure systems in South Sudan, however, it is important to note that there is inexistence, a legal framework which regulates land ownership and makes provision for compensation for anyone whose right of ownership of occupation is impaired in any way. The relevant sections state:

> 169. (1) All land in South Sudan is owned by the people of South Sudan and its usage shall be regulated by the government in accordance with the provisions of this Constitution and the law.
> (2) Notwithstanding sub-Article (1) above, and the provisions of Article 28 of this Constitution, the government at all levels, may expropriate land in the public interest as shall be prescribed by law.
>
> Land Tenure
> 170. (1) The regulation of land tenure, usage and exercise of rights thereon shall be governed by this Constitution and the law.
> (2) Without prejudice to sub-Article (3) below, the land tenure system in South Sudan shall consist of:
> (a) public land,
> (b) community land; and
> (c) private land.
> (3) Public land shall include, but not be limited to:
> (a) all land owned, held or otherwise acquired by any level of government as defined by law; and
> (b) all land which are not otherwise classified as community or private.
> (4) Regardless of the classification of the land in question, rights over all subterranean and other natural resources throughout South Sudan, including petroleum and gas resources and solid minerals, shall belong to the National Government and shall be regulated by law.
> (5) Community land shall include all lands traditionally and historically held or used by local communities or their members. They shall be defined, held, managed and protected by law.
> (6) Private land shall include:
> (a) registered land held by any person under leasehold tenure in accordance with the law;
> (b) investment land acquired under lease from the Government or community for purposes of social and economic development in accordance with the law; and
> (c) any other land designated as private land by law.
> (7) Rights in land and resources owned, held or otherwise acquired by the Government shall be exercised through the appropriate or designated level of government which shall recognize customary land rights under customary land law.
> (8) All levels of government shall institute a process to progressively develop and amend the relevant laws to incorporate customary rights and practices, and local heritage.
> (9) Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by the respective states taking into account the need to protect the environment, agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law.
> (10) Communities and persons enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources.

ownership of land in South Sudan, recognizes customary law and practices related to land owned by communities and guarantees a fair and prompt compensation to any person whose right of occupancy, ownership or recognized long standing occupancy of customary use of land is revoked or otherwise interfered with by the Government in law. Pursuant to the Local Government Act 2009 the local government council is the primary institution managing land issues within rural communities, whilst the Investment Promotion Act 2009 sets out the formalities for certifying and licensing foreign investors to operate in South Sudan.

249. In addition to the violence and atrocities perpetrated as part of the conflict, the Commission heard reports of land grabbing. One respondent stated:

> They are not happy over many things, besides this fighting. Their main problem is land grabbing. Even Marial himself, the Commander of Army he took a lot of land that belongs to some Equatorians. He fenced it into the President's compound and he said, well this is for the President now, because you are too close to the President's fence and this is considered as land grabbing, because he did not buy this land, he did not ask for it peacefully, he just fenced this area.[185]

250. It may well be that, in some instances, the appropriation is opportunistic. However, in those circumstances where there is a clear testimony and evidence that those in positions of power are abusing their position by appropriating land outside of the law and without compensation, the Commission had to consider carefully whether this was yet another example of persecution against an identifiable group or collectivity on political, or ethnic grounds in discharge of its mandate as part of its consideration of violations of human rights.

251. The testimony of land grabbing the Commission heard was outwith the law and impermissible and further evidence of the corrupt practices, and abuse of power and position which falls to be reformed.

---

(11) Communities and persons enjoying rights in land shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest.

Land Commission

171. (1) There shall be established an independent commission to be known as the National Land Commission, and it shall be composed of persons of proven competence, experience, integrity and impartiality.

(2) The Chairperson, Deputy Chairperson and Members of the Commission shall be appointed by the President in accordance with this Constitution and the law.

(3) The composition, functions, powers, and terms and conditions of service of the members and employees of the Commission shall be determined by law.

[185] Witness, Juba, 21 July 2014

NATIONAL AND STATE LEGISLATURES

NATIONAL LEGISLATIVE ASSEMBLY

252. The National Legislature, established under the Transitional Constitution of South Sudan is composed of two houses: the National Legislative Assembly and the Council of States.[186] The National Legislature is said to represent 'the will of the people of South Sudan and shall foster unity and nationhood, exercise legislative functions, oversee the Executive, and promote the decentralized system of government.'[187] The National Legislature exercises the exclusive, concurrent and residual legislative competencies of National Government detailed in schedules A, C and D as read with E. [188] The National Legislature's specific functions are detailed in Articles 55 (3) and 57 of the Constitution.[189]

253. Under the Transitional Constitution, the National Legislative Assembly (NLA) is composed of 170 members of the Southern Sudan Legislative Assembly; former members of the national assembly of the Republic of Sudan elected from Southern constituencies (96) and 66 members appointed under Article 94(2)(b).[190] For its part, the Council of States is composed of South Sudanese who were representatives in the Council of States of the Republic of Sudan and 20 representatives appointed by the President.[191]

254. In terms of Article 59 of the Constitution, the Council of States is competent to: initiate legislation on the decentralized system of government and other issues of interest to the states; issues resolutions and directives that may guide all levels of government on all matters relating to devolved government; [192] oversee national reconstruction, development and equitable service delivery in the states; monitor the repatriation, relief, resettlement, rehabilitation, reintegration of returnees and internally displaced persons and reconstruction of disaster and conflict affected areas; legislate for promotion of culture of peace, reconciliation and communal harmony among all the people of the states and; approve changes in state names, capital-towns and boundaries. Pursuant to its oversight role, the Council 'may

[186] Transitional Constitution of South Sudan, Art 54(1)
[187] Transitional Constitution of South Sudan, Art 55 (1)
[188] Transitional Constitution of South Sudan, Art 55 (2)
[189] Passing amendments to the Constitution; enacting legislation including, reconsidering a bill rejected by the President under Article 85 (2); discuss statements by the President and take decisions as may be necessary; authorize annual allocation of resources and revenue, in accordance with Article 87 of this Constitution; impeaching the President; approve declaration of war; confirm declaration of a state of emergency or termination thereof; and perform any other function determined by this Constitution or the law.
[190] Transitional Constitution of South Sudan, Art 56. See also Presidential Decree No. 10/2011 for the Transformation and Reconstruction of the National Legislative Assembly of the Republic of South Sudan, 2011 issued on August 1, 2011. Available at http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5529/Presidential-Decree-On-National-Legislative-Assembly-Reconstitution.aspx
[191] TCSS, Art 58
[192] This is in accordance with Articles 47, 48 and 49 of the Constitution.

request statements from Governors and national Ministers concerned regarding effective implementation of the decentralized system and devolution of powers and any other issues related to the states'.

255. The National Elections Act of 2012 (NEA) establishes a mixed electoral system, which combines both majoritarian and proportional representation in South Sudan. In particular, 60% of the NLA shall be elected to represent geographic constituencies (single member constituencies) based on first past the post (FPTP); 25% of the Assembly shall be elected to represent women, elected on the basis of proportional representation at the national level from party lists while 15% (men and women) shall be elected on the basis of proportional representation at the national level from closed party lists.[193] Beyond the transitional period, the State Legislative Assembly shall elect four members that represent states in the Council of States.[194]One of the four representatives must be a woman. In view of this rule, at least 25% of the Council of States shall be women.

STATE LEGISLATURE

256. In Addition to the National Legislative Assembly (SSNLA) and the Council of States, there are 10 other assemblies, which are established at state level. Each of the 10 states exercises legislative power through the state legislative assembly, which has the constitutional mandate to adopt a state constitution, to legislate in terms of constitutionally sanctioned legislative competencies (exclusive, concurrent) and to exercise oversight over the state executive.[195]

Assessment of the Capacity of the Legislature

257. In the discussion relating to the National and State Executives, the Commission noted that the TCSS institutes a weak system of checks and balances, in the context of a dominant presidency. Constitutionally, the NLA does not control its own calendar and is subject to presidential prerogatives. The presidency has the constitutional mandate of summoning and proroguing the legislature.[196] The ability of the legislature to control its own agenda and calendar is critical for a strong system of checks and balances, particularly in a presidential system of government such as the one in place in South Sudan.

[193] National Elections Act, section 60(2). See also, IFES and Conflict International, 'Beyond Quotas and Mainstreaming: Political Accommodation and gender in South Sudan: Workshop Report (July 2013) 5-6 available at http://www.ifes.org/~/media/Files/Publications/White%20PaperReport/Beyond%20Quotas%20and%20Mainstreaming_final.pdf; O'Grady and Weichselbaum, (n 22 above) 13-15.

[194] NEA, section 60(3)

[195] Transitional Constitution of South Sudan, Art 163

[196] TCSS, Art 101(g)

258. It is the Commission's view that the ability of the legislature to perform its legislative and oversight functions effectively is equally dependent on availability of adequate financial resources. This is not only in terms of paying emoluments for members but also establishing the necessary and functional committee system, infrastructure and human resources to be able to perform its functions. While this may not be unique to the national legislature, particularly in the context of austerity, the NLA attributes its inability to effectively discharge its functions to the lack of resources. Speaking in June 2014, Hon Manasseh Magok Rundial, the current Speaker of the NLA was quoted stating that:

> A serious challenge continues to restrain the main work of lawmakers in the legislature ie oversight of the executive. Since its inauguration [in 2011], the legislature has been having difficulties in executing its mandate because the Ministry of Finance has not been responsible adequately to our demands as per the approved budget.[197]

259. To illustrate the difficulties that the NLA faces, the speaker lamented that:

> The difficult situation of our legislature is epitomized by the following: lack of office space; all honorable members lack offices. Attempts to provide offices have failed as can be witnessed by the condition of the NLA building and in particular the structure northwest of this venue within the same compound. For more than four years, the structure has remained in that condition for lack of funds. Usually, any Parliament will also need a cafeteria for the refreshment of honorable members … for the last two years, CDF [Constituency Development Fund] budgets have not been released. This has left some MPs' projects 'stranded' [stalled].[198]

260. Noting that MPs are owed outstanding dues in the region of SSP 29million, Hon Rundial observed that the NLA has also been unable to pay membership fees to international parliamentary organisations to which it belongs, which, in his view, /leave the country in a low diplomatic standing'. In the Commission's view, the challenges enumerated by the speaker of the NLA render the legislature unable to act as an institution of accountability and oversight other than undermining its legislative role.

261. In the Commission's view, the parliamentary Committee system forms a critically important mechanism for the discharge of the mandate of the legislature, particularly oversight functions. In the context of South Sudan, parliamentary committees are a novel structure and are faced with many challenges. Since the first committees were established, a number of initiatives have been undertaken to build the capacity of parliament and its committees. For instance, the Commission learnt that the

[197] Radio Tamazuj, 'Politics: shortage of funds for South Sudan parliament' June 3, 2014. Available at https://radiotamazuj.org/en/article/politics-shortage-funds-south-sudan-parliament
[198] As above

International Republican Institute, with the financial support of USAID have conducted workshops to strengthen the committee mechanism by training staff.[199] Speaking to NLA staff at the end of one of the workshops in which more than 70 staff were taken through the legislative cycle, drafting of bills, conducting research an d taking minutes, Hon Aleu Ateny Aleu, Chairperson of the Security Order Committee emphasized the need for staff capacity thus:

> The strength of a parliament lies in its support staff. The work depends on you. We have learned that the only way to have a strong parliament is to have a strong support staff.[200]

262. In a recent policy paper reviewed by the Commission, Sudd Institute, a leading South Sudanese think tank, makes the argument that one of the main problems facing South Sudan is the affordability of government, due, in large part, to the reality that the government (executive and legislature) is too big, and bloated.[201] In relation to the legislature, it is claimed, with some empirical evidence in support, that South Sudanese bicameral legislature comprising of the NLA and Council of States with a total of 382 members has comparatively the highest number of MPs per population in the world.[202] From a global perspective, the report compares the size of the legislature in South Sudan to the most populous countries in the world and comes to the conclusion that at 36 MPs per million people, the population of South Sudan is overrepresented. China, with a population of 1.34billion and 2987 MPs stands at 2.2MPs per million people; USA with a population of 314 million and 535MPs stands at 1.7MPs per million people while India, with a population of 1.2billion and 790 MPs stands at 0.7MPs per million people.[203]

263. In the region, South Sudan's ratio of MPs to population (measured per million) is still by far the highest. The reports provides some useful data in this regard: Eritrea (150MPs) is the second highest with 26.9 MPs per million; Burundi with a population of 10.5million (167MPs) stands at 15.8MPs; Uganda with a population of 32.9million (386MPs) stands at 11.7MPs per million; Kenya with a population of 42.7million

[199] See IRI, 'In South Sudan Legislative staff strengthen the National Assembly'. Available at IRI on LA: http://www.iri.org/news-events-press-center/news/south-sudan-legislative-staff-strengthen-national-assembly
[200] As above
[201] James Alic Garang, 'The Question of Big Government, and Financial Viability: the Case of South Sudan' Sudd Institute Policy Brief (February 1, 2013) available at Sudd Ins big gov article: http://www.suddinstitute.org/assets/Publications/Trim-the-GovernmentJAGJan2013.pdf
[202] Comparison with China (3,000 members); and the Republic of Nauru (18) at each of the spectrum
[203] Sudd Institute, (n 210 above) 6.

(416MPs) stands at 10.4;[204]Tanzania, with a population of 43.1million (357MPs) stands at 8.3MPs per million people.[205]

264. While the South Sudan legislature may be the largest per population, an MPs salary, at a reported USD 38,000 per annum is claimed to be the lowest in the region, with Kenyan MPs, who earn a reported USD 122,000 per annum among the highest paid in the world.[206]Arguing that the low salaries that MPs earn have a direct impact on the morale and the performance of the constitutional duties, the report makes a case for a reduction of the number of MPs in South Sudan to 170 (a reduction by 282), coupled with a salary raise to USD 60,000 per annum. It is argued that this would not only improve performance, but also reduce the fiscal burden while saving approximately USD 4.125million annually, which could be spent on development programmes in the states.[207]

265. While the Commission cannot confirm the claim that South Sudanese MPs are the lowest paid in the region, in part because the analysis in the report does not include the other countries in the region, [208] the link made between remuneration, job performance and the ability of the legislature to act independently and to exercise oversight over the executive more effectively is valid.

266. It is argued in the Sudd Institute report that while President favours a leaner government, the demands for inclusion from various sectors of South Sudanese society after independence necessitate big government. Indeed, the 'big/large' tent policy adopted by the President to integrate various militia groups within the SPLA while accommodating various interests to foster peace, including expanding the legislature to include those who served in Khartoum during the Interim Period as well as opposition interests is partly to blame for the size of government and associated costs.[209]

267. While the Commission cannot fault the efforts of the government aimed at inclusion and the fostering of peace and stability, it is critical, as the Commission recommends at the end, that institutional design as well as other practical measures undertaken to ensure, among others, the ability and capacity of the legislature to legislate and exercise effective oversight, for thr legislature to act independently of the executive and judicial branches of government.

[204] The figures for Kenya based on the author's calculation of data from World Factbook (2012) have been corrected. The Suddd Institute report reflected 224 MPs, which was the number of MPs under the repealed constitution. The Constitution of Kenya 2010, creates a bicameral legislature (NA and Senate) and increases the number of MPs in the NA from 224 to 349 (290 from single member constituencies; 47 women representatives and 12 party nominees). The Senate has 67 MPs.

[205] Sudd Institute and Garang, (n 201 above) 5.

[206] Sudd Institute and Garang (n 201 above) 7.

[207] Sudd Institute and Garang, as above.

[208] In the region, the report only compares Kenya and Sudan, decrying lack of access to relevant data from other countries. The other countries included in the survey are USA (where congressmen earn approx. USD 176,000 p.a), UK (average pay for MPs is 65,000 Sterling Pounds)

[209] Sudd Institute and Garang (n 201 above) 4-5.

THE JUDICIARY AND THE JUSTICE DELIVERY SYSTEM

Introduction:

268. Earlier in this chapter, the report engaged with various characterizations of South Sudan. Before the outbreak of violence on December 15, 2013, the country would rightly be considered a post conflict society, a reference to its recent experience with conflict. The Commission observed that in view of certain characteristics, which include weak institutions, high levels of poverty, insecurity, a low score on human development indices, South Sudan has been described variously as a 'troubled', 'failing', or 'failed' state. The Commission noted that these characterizations relate to varying degrees of state capacity or incapacity to do that which states ordinarily do: establish a state of law and order partly by maintaining a monopoly over use of force, secure citizens and their goods and provide services.

269. Part of this process involves building the foundations and entrenching the rule of law, which essentially means establishing a state governed by rules, rather than the whims of man. Indeed, according to a number of commentators, "the essence of the rule of law ideal is that 'people ought to be governed by law.'"[210] One of the basic tenets of the rule of law is the exercise of power constrained by law, where both governed and those who govern are subject to the law, and operate under the dictates of the law. In this sense, it is urged that the rule of law should be seen 'as a culture that mandates adherence to principles and procedures'[211] and that failure to adhere to rules and procedures for whatever reason is likely to produce, anarchy and lawlessness, 'the very antithesis of the rule of law'.[212] Equally, establishing constraints on the exercise of power requires the establishment of minimum guarantees of liberties. Modern constitutions establish this limits through the device of constitutional rights (Bill of Rights).

270. If the rule of law requires that no person shall suffer sanction other than as pronounced by tribunals and courts established by law,[213] the judiciary plays a critical role, not only in enforcing protections stipulated in law, but also in ensuring adherence to the law by all, including other branches of government. With respect to the institutional requirements of the rule of law, it has been suggested that for the rule of law to be realized, "there must be suitable 'application mechanisms', including an independent and professional judiciary, easy access to litigation courts, and reliable enforcement agencies.'"[214] It follows that the 'rule of law sector', includes at

[210] A Marmor, 'The rule of law and its limits' *University of Southern California School of Law, Public Policy Research Paper* No 03-16 (2003) cited in P Kameri-Mbote and Migai Akech, *Kenya: Justice Sector and Rule of Law* (2011, Open Society Foundations) 22.
[211] As above, 23
[212] As above, 23
[213] The law itself must meet certain basic criteria: universality, should be promulgated and made known to its subjects; should be prospective; stability and; must be applied consistently. See above, 22.
[214] As above, 22

least the following entities: the executive (includes relevant ministries, police), the judiciary and prisons.

271. On the basis of the working definition adopted above, it is fair to conclude, as we do, that a number of challenges facing South Sudan today point to a state of weak rule of law. First, owing to the weakness of the State, coupled with the vastness of the country, many parts of which are sparsely populated, the State is unable to project its power and deliver services to all parts of the country. As a result, a good number of South Sudanese live outside the protection of formal law (physical distance from justice system). Second, the constraints established in law do not appear to apply to all: many cases were cited where the political branches have acted outside the bounds of the law. As an illustration, respondents cited numerous cases that seem to indicate that disregard of court orders is a common occurrence. In addition, and perhaps more symptomatic of the state of the rule of law, the independence of the judiciary is not guaranteed, as mentioned later, or faces serious threats. Third, linked to the above, South Sudan's legacy of war with attendant lawlessness partly owing to the proliferation of small arms and militia and what appears to be an intractable culture of impunity, apply serious pressures on attempts to entrench the rule of law. Lastly, while traditional authorities and chiefs constitute, as they did during the war, a critical structure of governance, their influence is said to wane for a variety of reasons (the appropriation of their powers by formal state structures; dislocation of returning refugees and IDPs from culture), with far reaching consequences on the rule of law, particularly in parts of the country beyond the reach of the State and formal authority.

Structure of the Courts and Key Themes

272. In terms of Article 124 of the Transitional Constitution of South Sudan, 2011, the Judiciary of SS is composed of: the Supreme Court; Court of Appeal; High Court; County Courts and 'other courts or tribunals as deemed necessary to be established in accordance with the provisions of this Constitution and the law.' So far, there are three branches of the Court of Appeal, one in each of the three major regions: Greater Bahr el Ghazal (Rumbek), Equatoria (Juba) and Greater Upper Nile (Malakal). The High Court is established in all the 10 states. There is also provision for the establishment of County Courts, which are the lowest courts in the formal court structure. The Commission was informed that, currently, only a few county courts are operational [ref Torit Interview with magistrate and public prosecutor].

273. The Transitional Constitution of South Sudan (TCSS) provides that the sources of law in South Sudan are the constitution; customs and traditions of the people; the will of the people; and any other relevant source.[215] In practice, legal pluralism is a key feature of the legal/judicial system in South Sudan, with formal law and customary law co-existing and interacting in various ways. While formal or statutory

[215] TCSS, Art 5

courts have a separate existence from customary courts, in the sense that the latter do not form part of the formal justice, practice indicates that either 'system' engages with rules originating in the other, often producing an admixture of rules in adjudicative processes.

274. It is shown that chiefs sometimes purport to apply statutory rules while judges in the formal justice system do refer to and apply rules derived from custom of various communities. For instance, Justice Jok, Leitch and Vandewint describe how, in the context of appeal, judges are engaging with, formalizing customary law and essentially setting precedent in relevant areas of law.[216] On legal pluralism, a recent report by the International Commission of Jurists, notes, with regard to legal pluralism, which arguably undermines legal certainty that:

> Different legal systems and concepts in South Sudan have merged to such an extent that it is sometimes impossible to distinguish which laws originate from pre-existing judicial culture and which have emerged through interaction with other legal cultures [including sharia]. Local and national laws and procedures percolate both up and down the judicial hierarchy: some chiefs sentence according to written laws, while some judges apply principles and procedures derived from local cultures. [217]

275. At the signing of the CPA, the new regional government in Southern Sudan made the decision to overhaul what existed of the judiciary in the south, discarding the legal system based on Sharia law with Arabic as a formal language of the judiciary in favour of common law, and English as the official language. The Commission heard that this was a conscious break from a past of oppression and subjugation (Arabisation represented subjugation of indigenous law and culture) which, in the judicial sector, Sharia and Arabic were thought to represent. In this regard, it was noted that:

> [Government of South Sudan], officials including members of the newly appointed Supreme Court faced the challenge of establishing rule of law norms and institutions in South Sudan. The pre-existing formal court structure, set up to apply Sharia law, symbolized everything that the SPLA had fought against. Accordingly, GOSS's priorities for the justice sector involved starting from scratch with an entirely new legal and judicial

[216] Justice Aleu A Jok, Robert Leitch and Carrie Vandewint, 'A study of customary law in contemporary Southern Sudan' (2004, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs) 49-50.

[217] International Commission of Jurists, 'South Sudan: An Independent Judiciary in an Independent State?' (2013) 14-15; see also, Cherry Leonardi, Leben Nelson Moro, Martina Santschi Deborah H. Isser, *Local Justice in Southern Sudan* (2010, Rift Valley Institute and US Institute of Peace) 17 (noting that different legal systems and concepts have merged to a particularly strong degree, making it impossible to distinguish entirely which laws originated in indigenous judicial culture and social norms and which have emerged through interaction with social norms and which have merged through interaction with government law and wider cultures).

> system. The new government opted for a common law system akin to that of its southern neighbours Kenya and Uganda.[218]

276. While the turn to common law tradition and adoption of English represented a sovereign decision of the new government in the south, it has created serious challenges in the administration of justice in South Sudan. What can be regarded as a rejectionist stance was, in practice, accompanied by the sidelining of lawyers and judges trained in Khartoum, despite the fact that the judiciary is grossly understaffed. According to a highly placed member of the judiciary, South Sudan currently has 200 judges (in South Sudan, 'judge' is commonly used by both judges and magistrates), following the recruitment of 78 new Arabic-speaking judges trained in Khartoum. This policy change (which ended a 7 year hiatus in the hiring of judges) is, according to the highly placed member of the judiciary, necessitated by the need to expand the reach of the judiciary, and the reality that a majority of South Sudanese speak or understand Arabic:

> I do not have very clear statistics to tell you right now [the number of lawyers trained in Sharia, speak Arabic], but what I want to underline is … if you go to the street now and you talk English, nobody will understand you. But if you talk Arabic, they will understand. So you can see the problem. I personally believe that even if language is the official language of the Republic of South Sudan [English], you cannot change the system overnight. You need to space out this kind of situation until such time when the people will come to know English.

277. The decision to hire and train Arabic-speaking judges nearly doubled the number of judges operating in the judiciary in South Sudan, and has greatly increased its capacity to deliver formal justice. It appears that the decision also reflects the realities on the ground: ICJ reports that 'the switch from Arabic to English as the language for the administration of justice still causes significant practical problems, as many judges, prosecutors and legal practitioners who received their training in Khartoum are not familiar with legal terminology' and that in the courts, there have been numerous misunderstandings, which has prompted some practitioners to submit written pleadings and other documentation in Arabic.[219]

The State of Statutory Courts: A Brief Evaluation

278. At a normative level, the Transitional Constitution recognizes the independence of the judiciary, stipulating that 'judicial power shall be vested in an *independent* institution known as the judiciary'.[220] The Constitution further affirms the principle of independence of the judiciary, enacting that 'the judiciary shall be independent of the

[218] David Pimentel, 'Rule of law reform without cultural imperialism? Reinforcing customary justice through collateral review in Southern Sudan', in *Hague Journal on the Rule of Law* 2:1 March 2010, at 13 available at http://www.innovatingjustice.com/media/Pimentel.pdf

[219] International Commission of Jurists (217 above) 16.

[220] TCSS, Article 123(2)

executive and legislature'[221] and that 'the executive and legislative organs at all levels of government shall uphold, promote and respect the independence of the Judiciary.'[222] Equally, there is formal commitment to the doctrine of separation of powers: the constitution establishes a tripartite system of government, with powers shared between the executive, legislature and judiciary.

279. The judiciary, has the power to adjudicate in accordance with the constitution and the law,[223] and is to do so guided by at least the following constitutional principles: non-discrimination; justice shall not be delayed; adequate compensation shall be awarded to victims of wrongs; voluntary reconciliation agreements between parties shall be recognized and enforced; and substantive justice, administered without undue regard to technicalities.[224]

280. In spite of the formal commitment to independence of the judiciary, in practice, it is undermined in a variety of ways. It is suggested that part of this is cultural, understood in historical context: decades of war led to the decay of the judiciary, with the militarization of society eroding mediated resolution of conflicts. Speaking to the Commission, a highly placed member of the judiciary suggests that this problem has been inherited by post independence South Sudan:

> We are dealing with a government with most of them having very little idea about the independence of the judiciary. We just emerged from war where a commander was everything. Even when you had a quarrel with your wife, he thinks it is his problem.

281. Available information suggests that in practice, 'a culture of judicial independence seems not yet fully to have taken root in the country' and that 'members of the executive and military powers have been reported to have exercised undue pressures on and illegitimate interference with the exercise of judicial functions'.[225] To illustrate the challenge posed to the independence of the judiciary by militarization of public life, a report documents one case in which a high ranking military leader facing suit is said to have showed up at a courthouse with an armed entourage following the hearing of the case. He is said to have repeatedly knocked on the window of the judge's office to ask when the judgment would be ready. It is reported that a favourable decision was hurriedly prepared and rendered by the judge.[226] The Commission heard that in some of the states, local leaders have reportedly orchestrated the removal of judges, or purported to dismiss judicial officers serving in county courts despite the lack of legal authority to do so.[227] Other

[221] TCSS 125(1)
[222] TCSS 125(2)
[223] TCSS, Article 123 (4)
[224] TSCC, Article 123 (5)
[225] ICJ (226 above) 28.
[226] ICJ (217 above) 28-29.
[227] ICJ (217 above) 29.

concerns about independence relate to procedures and criteria for selection of judges. It appears that no clear criteria is provided for in law.[228]

282. Other than the independence of the judiciary, there are other challenges that confront the administration of justice in South Sudan. These include limited reach of formal justice, with huge swathes of the country currently unserved by statutory courts, [poor infrastructure; Torit Magistrate]; limited capacity in terms of judicial officers and lack of physical facilities [court buildings, library and research facilities]. With respect to capacity, we noted that there are only 200 judges currently serving in the judiciary, with numerous vacancies remaining unfilled: only nine out of 11 positions in the Supreme Court have been filled, the three branches of the Court of Appeal have three judges, with the full complement being a total of 12 judges. Speaking to the Commission, the a highly placed member of the judiciary summarized the challenges facing the judiciary as follows:

> … the capacity of the people both Judges, support staff, they do not have that much experience. We need to train them so as to have a viable judiciary system. [The] judiciary is not available: There are no courts in certain counties outside Juba … There are so many problems … These are the basic ones. The infrastructure is not there [Recast].

283. To increase the capacity of the judiciary, new judicial officials trained in the north were recruited in 2013:

> […] for the first time after seven years, we appointed seventy-eight young South Sudanese and out of these seventy-eight, we had thirty-four women; it was more than 40%. That also was another innovation because the SPLM has been taking about 25%. I told them that we had to be honest because the women are 60% of our population and they are educated, why can we not represent them appropriately in the Judiciary.

284. A highly placed member of the judiciary observes that deliberate steps are being taken to increase the number of women in the judiciary, and that while the constitution stipulates 25%, this threshold should be surpassed with as more judicial officers are recruited, subject to availability of resources:

> I now have a lot of young women in the Judiciary and God willing, in the next financial year if our conditions improve, we will have additional appointments to the Judiciary.

285. To enhance access to justice across the country while addressing the problem of lack of infrastructure, mobile courts have been introduced. A highly placed member of the judiciary observes in this regard that:

[228] See Judiciary Act, s 26.

> Now I have introduced the idea of mobile courts. I argued to the government and the government agreed with me. I said if we have to wait for formal structures like this building, it will take generations to have buildings like this in certain counties. So I said, why don't we move judges instead? We move them to go and sit under trees for one month, two months and then we move them again. The government has accepted this idea, they are supporting me, they are even giving me some cars for this purpose. And so we have so many challenges but we are trying our best to do that.

Customary Courts

286. The Commission notes that South Sudan has a rich and long history of Chiefs' Courts, which precedes its encounter with colonialism.[229] For many years, especially during the civil war, traditional courts were the mainstay of justice in South Sudan. Today, while they are formally disassociated from the formal justice system in the sense that they fall administratively under local government (counties), they are said to handle over 90% of all cases, underscoring their centrality in the delivery of justice in South Sudan. [230]

287. To some degree, it is reported that even today, with the expansion of formal justice, many South Sudanese continue to seek recourse to formal justice for a variety of reasons; familiarity with the customary law administered by these courts; the fact that chiefs and elders who preside over the courts live within these communities; the fact that they combine retributive and restorative remedies, which include payment of compensation in modes acceptable by litigants, often cattle.[231] It is also suggested that many approach these courts as a matter of necessity in view of the limited reach of formal courts, particularly Payam Courts, the lowest courts in the formal justice system.[232] Refer to forum shopping: some come to customary courts when unhappy with outcomes.

288. Although customary courts do not form part of the judiciary in South Sudan (the Local Government Act places them under the control of local government), in practice, customary courts have been characterized as forming part of 'the lower rungs of the formal court system'.[233] In many places where there are no statutory courts, they are the only avenue available, and they handle both civil and criminal cases.

289. The Commission heard of the contestation between formal and customary courts over jurisdiction; they heard also that customary courts routinely decide cases that

[229] See generally, Cherry Leonardi, Leben N Moro, Martina Santschi and Deborah H Isser, *Local Justice in South Sudan* (2010).
[230] See, ICJ Report, citing Deng (225 above); See also Jok, Leitch and Vandewint (n 225 above)
[231] See *Local Justice in South Sudan* (n 217 above) 5. See also ICJ, (n 217 above) 24
[232] ICJ, (n 217 above) 24
[233] See *Local Justice in South Sudan* (n 238 above)

fall outside their jurisdiction. To illustrate the vital role these courts play in the delivery of justice, a chief told the Commission that they handle practically all cases (including serious crimes such as murder), and that their decisions enjoy recognition and respect by formal justice:

> All the disputes we handle, the Government always respects. If someone broke your leg, we handle it. If someone killed somebody, he is arrested, we engage in communication, the Government will accept. If someone steals from another, we capture and retain the person and we order the person to repay. If someone committed adultery against someone's wife, we get the person and detain him. The Government respects our decisions.

290. It emerged however that there is significant friction between statutory courts (particularly magistrates courts) and customary courts. Legally, only minor criminal cases should be tried by customary courts, which currently appear to have displaced formal courts in all matters. In this regard, the Local Government Act, 2009 provides that a customary law court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent statutory court.'[234] The fact that mediation, restitution, compensation and reconciliation are the core principles that underpin the work of customary courts is a key attraction for many South Sudanese.[235]

291. Other features that explain why many South Sudanese seek recourse to customary are: the fact that they are presided over by elders and other respected members of society; their informality, and the fact that they operate flexible procedures; affordability and the fact that adjudication is not mediated by lawyers.[236] It is also reported that, compared with formal courts, customary courts enjoy a high degree of public confidence, in part because they are perceived to be fair, accountable, and are less susceptible to corruption.[237]

292. The prevailing situation — where 90% of all cases are decided by customary courts — is not unique to South Sudan: in many developing and post conflict societies where formal justice lacks capacity and does not have legitimacy among the people, various forms of customary courts step into the gap to deliver justice.[238]

---

[234] Local Government Act, 2009 sections 98(1) and (2)

[235] On common features of disparate customary courts, see Samson Wassara, 'Traditional Mechanisms of Conflict Resolution in Southern Sudan (2007, Bergof Foundation for Peace Support) 11; Jok, Leitch and Vandewint (n xx above) 21 noting that the basis of customary law is to achieve reconciliation and inter-communal harmony.

[236] Pimentel (n 227 above) 14-15; ICJ (n 226 above) 24; Deng and SSLS, *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan*, (2013) 23.

[237] Pimentel (n 218 above) 15; Jok, Leitch and Vandewint (n 228 above)

[238] Commentators noted that this situation is not unique to South Sudan: 'In developing countries, customary systems operating outside of the state regime are often dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law'. Pimentel (n 218 above) 14 citing Chirayath et al, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, p 3

293. The Commission notes that customary courts are neglected, or operate on the fringes of the formal justice system. It is the Commission's view that the prevailing state of formal justice, as well as the limited access to justice by a majority of South Sudanese, calls for a pragmatic approach: one that seeks to formally recruit customary courts into the administration of justice through appropriate arrangements that relieve the burden on formal courts and extend the reach of the judiciary, while ensuring that customary courts align with constitutional principles, including respect for human rights. The Commission makes some recommendations in this regard.

The State of Customary Courts

294. One of the key concerns expressed in relation to weaknesses of customary justice is that it adjudicates on the basis of customs and laws that are inimical to human rights and other constitutional principles. This manifests itself in various ways. It is often the case that customary courts tend to discriminate against certain sectors of society, notably women and youth. Equally, some of their decisions, although anchored in local customs, offend against basic notions of justice and human rights. The Commission notes that compensation decisions that require the offending party to give away a young woman to the successful litigant (family or community) as deeply troubling and problematic. It is the Commission's view that such retrogressive practices should not survive the interaction between customary law and human rights. It is the Commission's view while respect for and sensitivity to time-honoured customs is validated, human rights must inform and permeate the dispensation of justice by all courts.

295. The Commission was informed that another challenge posed by customary courts relates to regulation, which is due in part to the fact that these courts tend to mushroom in multiple sites across the country. Views expressed to the Commission during its consultations as well as a recent report reviewed by the Commission cited various concerns related to regulation, noting that a majority of customary courts operate without 'warrant of establishment' from the Chief Justice, which is an order that ordinarily details its composition, substantive jurisdiction as well as other relevant matters.[239] Equally, the absence of a mechanism to supervise the functions of customary courts has been identified as a factor that hampers their operation, taking into consideration their interaction with statutory courts.[240]

296. During its consultations, the Commission received information that warrants of establishment have only been issued three times, and only one of the 'Special Courts' so established eventually sat to resolve the disputes assigned.[241] So far, the Special Courts, which apply a mix of formal and customary law, have been

[239] ICJ, (n 217 above) 24, referring to a workshop held in Juba in November 2012.
[240] ICJ, (n 217 above) 23.
[241] See Warrant of Establishment: Constitution of Special Court at Rumbek dated February 2014; Warrant of Establishment: Constitution of Special Court at Yirol dated February 26, 2014.

established at the level of the High Court.[242] Given that Special Courts are thus different from customary courts established under the Local Government Act, it is thus not clear whether the CJ could establish a special court at a level lower than the High Court.

297. When asked what should be done to establish accountability and reconcile communities, many respondents were quick to refer to traditional/customary courts, which they suggested have served communities well in the past. While this is the case, most of the crimes allegedly committed during the current conflict would fall outside the remit of cases handled by customary courts. In response to the Commission's question on whether customary courts could try cases arising out of the current conflict, one chief noted that:

> Our mandate is to handle cases that are local in nature but if something happens in the county, if someone kills somebody, they will take it to the county [court] … but anything to do with the Government, we are not capable of doing it. We can only manage traditional disputes that are happening within that county or Miyaditt that we are able to handle.

298. The response indicates that there seems to be the understanding among some chiefs that their mandate is limited, and that the scale of cases arising out of the current conflict would require the intervention of statutory courts. While this is the case, one has to grapple with the fact that even before the outbreak of violence, the reach of formal justice did not stretch beyond the major towns. In addition, information available to the Commission as well as its own observation is that the armed conflict has occasioned massive destruction of infrastructure, including public and private buildings. Other than lack of physical infrastructure, the operations of formal justice will be disrupted by insecurity. In addition to what is canvassed in this part, a report by the South Sudan Law Society cites, as one of the strengths of customary courts, their durability and their ability 'to function in areas prone to insecurity'. [243] For these reasons, it is the Commission's view that any future accountability project must necessarily devise an appropriate role for customary courts within particular communities. Comparative experience, particularly the case of Rwanda, shows that customary courts can be empowered to contribute to accountability efforts. In this case, *gacaca* a traditional justice and conflict resolution mechanism was formalized by legislation and rolled out across the country. Gacaca courts have reportedly processed more than a million cases.[244]

POLITICAL PARTIES

299. This section of the Commission's report focuses on political parties, which serve an important role in any democratic dispensation. This section first reviews the legal

[242] This power is exercised pursuant to section 7(f) and 19 of the Judiciary Act, 2008. Substantively, the courts have been mandated to 'try cases of sectional fights' between parties listed in the warrant.
[243] SSLS and Deng (n 236 above) 23
[244] On Gacaca, see Idi Gaparayi, *African Human Rights Law Journal;*

and political context in which political parties operate in South Sudan. The section then provides an overview of the major political parties. Recommendations relating to how this important institution can be strengthened are detailed in the last chapter of this report.

300. The environment in which political parties operate is regulated by the Constitution and the Political Parties Act of 2012. The Bill of Rights details a number of rights of relevance to and facilitative of, political participation including freedom of expression and media,[245] movement and residence[246] and assembly and association.[247] With respect to political rights, the right to form political parties is expressly recognized.[248] However, the mechanism for the registration of political parties — the Political Parties Council — established under the Political Parties Act, 2012 is yet to be activated. Currently, only Southern parties registered in the North under the Political Parties Affairs Council (PPAC) can operate legally in South Sudan.

301. Other than the right to form a political party, the Constitution also provides for the individual right to participate in the political process, to vote and to offer his/her candidature in any election:[249]

> (1) Every citizen shall have the right to take part in any level of government directly or through freely chosen representative, and shall have the right to nominate himself or herself or be nominated for a public post or office in accordance with this Constitution and the law. (2) Every citizen shall have the right to vote or be elected in accordance with this Constitution and the law.

302. Largely dominated by military actors since independence, coupled long periods of war, South(ern) Sudan did not develop a strong political (party) culture. By 1956 when Sudan attained independence, Southerners were ill-prepared to participate politically in the new state. As noted elsewhere in this report, the departing Anglo-Egyptian administration decided to grant independence to a united Sudan, yet the South had been administered separately from the North as a 'closed area' under the Closed District Ordinance of 1922.

303. The limited contact with the outside world, coupled with the fact that the South remained under the rule of chiefs overseen by British military rule meant that there were few opportunities, if any, to organize politically. When the Legislative Council was created in Khartoum in 1948, southern representatives had to be nominated (as agreed at the Juba Conference of 1947) as northerners elected their representatives through local councils that existed at the time. Southerners would lose the opportunity to develop political political parties formed in 1955 when the first civil war

[245] TCSS, Article 24
[246] TCSS, Article 27
[247] TCSS, Article 25
[248] TCSS, Art 25(2)
[249] TCSS, Art 26.

broke out on the eve of independence. The second opportunity to organize politically lasted for 10 years following the signing of the Addis Ababa Agreement and the creation of the Southern Regional Government in 1972. The second civil war would end in with the signing of the CPA in 2005.

304. Since 1956 therefore, the military dominated public life in the South, with the only 'civil administration', being that of chiefs. Traditional chiefs would subsequently become militarized, as the SPLM preferred to appoint its own chiefs in areas under its administration. Speaking to the Commission, one respondent lamented that South Sudan is characterized by immature political culture, in part because of its history with military rule, and limited opportunities to organize:

> The militarization of the politics in South Sudan is partly because of the shallow political culture in South Sudan. We have never had an opportunity to develop our party politics since independence of Sudan in 1956. So it has always been war. We had only ten years of post-Addis Ababa period where some political work there, but then it was linked to a totalitarian regime on the whole Sudan, that was Nimeiri's regime. So there was really no chance. The people of South Sudan never had the real chance of excising or practising real democracy in (sic) themselves.

305. From its consultations with various sectors of Southern Sudanese society, the Commission established that the situation does not appear to have changed, in part because the political space is dominated by an actor — the SPLM — with deep military roots and culture. The party's structural links with the army (SPLA) and its control of the state impact democratic evolution in South Sudan deeply.

306. On the role of women in political parties, the Commission learnt that women generally play an insignificant role within party structures, although some occupy positions of influence, including in the ruling party. In the discussion relating to the National and State Legislatures, it was noted that the Constitution imposes a 25% quota in elective positions. The Commission heard that current statistics show that in practice, the representation of women does not meet the constitutionally mandated quota, and that the same applies to key national institutions.

On the SPLM

307. Many respondents identified the link between SPLM and SPLA, the dominance of the military within the party (which dates back to its founding in 1983) and the resultant 'militarisation' of politics and public life in South Sudan as problematic. While many emphasize the enduring structural links between the SPLA and SPLM, observing that the two 'are twins', for a senior SPLM official, the supposed link between SPLA and SPLM is fictional, as these two entities are legally, and practically separate and distinct.

308. A key SPLM official, however, asserted that other than the fact that the President, who also doubles as the Chairperson of the party, is Commander in Chief of the Armed Forces, none of the members of the National Liberation Council, the party's highest decision-making organ, are SPLA, although many still use the ranks they held while they served in the SPLA. It was also acknowledged that long socialization of SPLM cadre in military ways during the struggle could still linger, and could have a bearing on their worldviews:

> So what I am saying is, our Constitution makes it clear that SPLA which is an Army of South Sudan is answerable to the executive and the government. In my [SPLM] office you will never see a [government] officer coming to take any directives … We don't have any relationship with the army at all, maybe it is in the minds of people, maybe because SPLA has not changed its name, but that cannot come from me as the Acting Secretary-General of SPLM, it will come from the Parliament and it will be, I think through the process of the constitutional review process that we have undertaken. It doesn't come from us. South Sudan should be lucky because we brought them an army … we gave it to South Sudan. It [SPLA] is no longer our army. They [SPLA] are not answerable to me. They are answerable to the President of the Republic. So I don't see how people still see SPLM as part of the army because I don't even go to the headquarters, they don't come to me.

309. On the conflation of SPLM and the State, a senior SPLM official affirmed that:

> […] separation of the party with the government is very clear. But also anywhere else, a ruling party provides the policy for the government. That is the relationship we have with the executive but not the army.

310. Other than the dominance of the military, the respondents told the Commission that the SPLM never institutionalized democratic practices. The result was absence of, or weakness, of institutions and personalization of power, which seems to have become a key feature of the organisation over the years. Some respondents observed that in the post CPA era, the SPLM failed to fully transition from a liberation movement to a governing political party and that the failure to create strong internal structures has been the constriction of democratic space within the party.

311. One respondent told the Commission that the inability of the party to resolve the political conflict that spiraled into the current crisis is partly because of lack of internal democracy, and the failure to institutionalize good governance:

> […] the SPLM has been having problems may be since its inception as a result of just one single factor of lack of organization and absence of institutions of internal governance. So always when contradictions got out they easily translate into violence and military confrontation.

312. On freedom of expression within SPLM and SS in general and its impact on democratic evolution in South Sudan, a respondent stated that:

> Within the party [SPLM], people are not free, even in our society, you are not really free to express yourself or to say the truth that this is wrong and the other to accept that this is wrong. What happened between the party is that there was lack of dialogue. There was no room for dialogue from the beginning when it started.[250]

313. Most respondents and commentators agree that the current conflict grew out of the ruling party's inability to resolve conflicts internally. The Commission found that conflicts surrounding leadership contests seem to be a common a feature of the recent history of the party. Examples cited include the 1991 split and the 2004 crisis arising out of the differences between Dr John Garang and his deputy Salva Kiir in 2004.[251] It is the Commission's view that these party conflicts are due, for the most part, to lack of institutionalization. Indeed, one commentator suggests that the 2013 conflict (relating to the choice of new party officials) was expected, given that in 2008, the party resolved not to elect new officials following disputes over certain candidates. It thus seems evident that 'the political upheavals within the SPLM follow a cyclical pattern that habitually surfaces before SPLM conventions'.[252]

314. Despite all the concerns detailed above, the SPLM remains the dominant political force in South Sudan, a fact many commentators attribute to the movement/party's role in the liberation struggle. The SPLM's dominance is such that some commentators see it as a 'political big tent where most of the various tribal-political forces co-exist, often on the basis of cooption and sharing of spoils of government'.[253] Other than the SPLM's position as the ruling party, the Commission takes the view that it is precisely because of this 'amalgam of interests' representing South Sudan's diversity that requires the SPLM to take a greater responsibility in the democratic evolution of the country. In 2011, it was argued, presciently, that SPLM's unity is synonymous with South Sudan's stability, but this depended upon how the various interests could be accommodated and managed, and that failure to do so portended violence.[254]

---

[250] See also, Kate Almquist Knopf, (n 50 above) 23, (noting that reflective of its military origins, debate within the SPLM is not encouraged, dissent is not tolerated, and decisions emanate from the top'); ICG, (n 36 above) at 12 (noting that since its formation in 1983, the movement suppressed internal dissent, more often relying on force than consent to maintain cohesion, and continues to employ firm intra-party discipline where possible).

[251] See Minutes of Historical SPLM Meeting in Rumbek 2004 called to resolve the dispute between John Garang and Salva Kiir, following allegations that Garang planned to [or had] replace[d] his deputy. Kiir and other SPLM leaders had accused Garang of personalizing the SPLM. The SPLM Vice Chair pointedly sought to know whether the Chair of the SPLM 'carried the SPLM in his briefcase on his travels'.

[252] Abraham Awolich, 'SPLM's Internal Politics: A Catalyst for the Dissolution of Government' Sudd Institute Policy Brief, October 9, 2013 at 2

[253] Paul O'Grady and Geoffrey Weichselbaum, (n 22 above) 4.

[254] Paul O'Grady and Geoffrey Weichselbaum, (n 22 above) 4.

315. There is no doubt that the SPLM occupies a unique place in South Sudan's political landscape, which demands an astute management of party affairs. This is heightened by its apparently seamless relationship with the state. However, it has been observed that while the ruling party has performed relatively well in difficult circumstances to maintain stability in ways described earlier in this chapter, the process of transformation from a movement to a governing political party remains incomplete.[255]

316. The Commission heard from leaders of opposition parties that the ruling party had reneged on the resolutions of the All Political Parties Forum agreed in 2010 relating to how the transitional period would be managed. This included the process and content of transitional constitution as well the length of the transition itself, which according to them [opposition parties] should have been a two-year period.

317. It is not suggested that a party that won an election should be hamstrung by the demands of opposition parties, which can oftentimes be unreasonable. The suggestion is that understanding its unique role as the dominant political party, the ruling part should — as much as possible — consult and accommodate alternative opinion, especially on matters of national importance. To illustrate its strength, the SPLM controls 94% of the National Legislative Assembly, having won 159 of the 170 elective posts in the 2010 elections in addition to other nominated positions. The largest opposition party and South Sudan's official opposition is Lam Akol's SPLM Democratic Change (SPLM-DC), which won 4 seats in the national legislature.

On Opposition Parties

318. While there has been a proliferation of political parties in South Sudan in the post-CPA era, most tend to be small, weak and of transient existence. [256] There are about 18 political parties, but the most prominent ones are: the SPLM DC founded in 2003; Sudan African National Union (SANU) founded in 1962 by South Sudanese exiles; SSDF (2001); United Democratic Front founded in 2003 by Peter Sule and the United Democratic Sudan Forum (UDSF) founded in 1997 following the signing of the Khartoum Peace Agreement between Khartoum and several southern militia groups. UDSF was headed by Riek Machar until he rejoined the SPLM in 2002.

319. Describing opposition political parties, one report reviewed by the Commission observes that:

[255] Paul O'Grady and Geoffrey Weichselbaum (n 22 above), 4 noting that 'Like most liberation movements elsewhere, SPLM tends to dominate political life and ignores dissident views. Following in the footsteps of other parties of liberation, some in the SPLM appear to believe that their victory in the struggle for independence gives them the mandate to decide the rules of the game without reference to other opinions. This approach runs the risk of alienating segments of South Sudan's diverse population, possibly sowing the seed of future violent conflicts'.

[256] The list of opposition political parties: NUDF; SLP; UDSLF; PURE; NDF; DUP; UDF; SSUP; NJMP; SSDA; SANU; UDSF; NCP; CPSS and AN. List drawn from Memorandum of South Sudanese Parties to the IGAD Mediation Process. The Commission learnt that there are several other political parties that cannot operate legally until the Political Parties Council is formally constituted.

> Opposition parties are weak. Outside Juba and a handful of state capitals, few have substantial following or enjoy any noteworthy degree of name recognition … party bases are often limited to a specific regional or ethnic dimension. Some maintain structures in multiple states, while for others, the oft-cited label of 'briefcase party' is not unwarranted'.[257]

320. The Commission heard from several opposition leaders that some of the factors that contribute to the weakness of opposition in South Sudan include: organizational weaknesses and lack of resources necessary to establish party infrastructure.[258] The Commission heard that the dominance of the SPLM, coupled with the weakness of opposition parties is such that some have been led to conclude, rightly or wrongly, that South Sudan is a *de facto* one party state. One respondent captures this view in the following words:

> Because we are saying we are multiparty but we are not. Actually we are single party; we are multiparty by name but not by practice. And these parties are really intimidated and they are really willing. For us we thought initially we need the parties to build this country but it did not happen …

321. It is the Commission's view that while opposition parties may be quick to blame the ruling party for some of the challenges they face, citing the limited space within which they operate, as well as lack of resources, some opposition leaders consulted by the Commission acknowledge their responsibility in building a strong opposition force that can contribute to governance processes in South Sudan. In this regard, one opposition leader noted that while the voice of the opposition could perhaps be strengthened if existing political parties constituted a united front, this option has never been seriously considered.

322. The ethno-regional nature of most opposition political parties, their lack of a clear ideological orientation and issued-based interventions in the political process limit their ability to act as alternative vehicles of political mobilization for the majority of South Sudanese. Citing interviews conducted in South Sudan, one report reviewed by the Commission, echoes respondents' views that there is a view that political parties' aspirations for power are criticized as 'based on no popular mandate and driven by no policy agenda' and that there is a perception among South Sudanese that some believe that' 'the majority of these guys [opposition] just want positions, nothing more, and they'll shut up as soon as they get them'. [259]

323. While acknowledging the role that a strong opposition should play in South Sudan, the Commission's recommendations detailed in a separate chapter in this report are based on the conviction that all factors considered, the SPLM is likely, in

[257] ICG, (n 36 above) 16.
[258] Paul O'Grady and Geoffrey Weichselbaum (n 22 above) 4; ICG (n 17 above) 16
[259] See for instance ICG, as above

the short and medium term, to remain the dominant political force in South Sudan, and that it has unique responsibility of developing a rooted political culture and deepening this nascent democracy.

CIVIL SOCIETY AND MEDIA

324. The role of civil society as part of the process of engineering a new South Sudan as the country moves forward is key. During the conflict of the past two decades, civil society, comprised variously of non-governmental organisations, religious groups and charitable organisations, occupying the space between the state and the individual, have worked to fill the lacunae of government in providing both essential and pastoral services to most communities in the area that is now South Sudan. Their role has remained crucial in the newly independent country, particularly in galvanizing citizen' participation in various peace processes. It is therefore inevitable that they are a part of the process of any institutional reforms that will set the basis for healing and reconciliation. To that extent, civil society organisations, traditional leaders, internally displaced persons (IDPs) and refugees, women, youth groups and any key constituency not represented by the government or those in opposition must have a voice.

325. There are clear indications that the crisis in South Sudan has roots in, and may be attributable to, a crisis of weak governance, leadership and weak institutions. As the Commission was told:

> So basically there is lack of horizontal accountability. We have various vertical accountabilities, which are in various sides, and this is the recipe for inversion. Lack of horizontal accountability also means lack of civil society, and also contestations even within civil society groups, with media, etc.

326. Thus, integral to any state building and nation building efforts is a commitment to a fully functioning state in which all societal institutions and organisations, state and non-state, are enabled to flourish in a manner that can engender harmony. Any state building and nation building effort ought to accommodate the diversity of groups within South Sudanese society not only to integrate differences within its society, but to ensure the participation, transparency and accountability that are key elements of good governance principles.

327. Rule of law and human rights are the foundational components of good governance. In addition to functioning, strong, impartial governmental institutions, civil society empowerment is fundamental to assuring and promoting the key principles of governance. Civil society groups foster popular participation to ensure accountability and transparency of governance. Civil society groups must therefore be strengthened as key stakeholders, not only in any peace process, but in post-conflict peacebuilding. The importance of a fully participatory process is recognized in UN Security Council Resolution 2155 of 2014 of 27 May 2014 in which the UN:

> Urge[d] all parties to engage in an open and fully inclusive national dialogue seeking to establish lasting peace, reconciliation and good governance, including through the full and effective participation of youth, women, diverse communities, faith groups, civil society, and the formerly detained SPLM leaders, encourages the efforts of IGAD and the United Nations to reach a peace agreement between the parties, and further urges them to ensure that child protection provisions are integrated into all peace negotiations and peace agreements;

328. Thus, as part of its consultative process, the Commission met with a number of civil society organisations and intergovernmental organisations working in South Sudan.

329. On 25th April 2014, the Commission met with a number of South Sudanese Women Oganisations. They requested that independent civil society organisations be included in any peace process. As grassroots organisations, they possess a knowledge base that can properly contextualize any proposed solutions and are aware of what is happening on the ground. Further, they can assist in providing the cultural context to any peace and reconciliation process. One of the issues that became clear was how the conflict has adversely affected the capacity of existing civil society organisations to assist in the manner in which they had hitherto been able. Not only did the security situation make things challenging, there was inadequate resources and, above all, the ethnically driven nature of the conflict thrust has denuded trust, to a certain extent, within the civil society. Further, it is not unknown for some organisations ostensibly representing civil society to be governmental organisations presenting as civil society to influence positions within the informal network; essentially infiltrating civil society organisations. One of the attendees, said:

> Coming to this actual 15th of December last year-- I have seen several situations but this one was the worst and it is more complex. I wish there is another way I can describe it but it is a bit difficult. We are now fighting amongst ourselves before we even know who is the enemy and who is the mediator, who genuinely wants to help us, who is using us or who is carrying the information from us. But now, it is becoming more complex in a situation that even amongst us as women, you find the same women on these same issues going around. The issue of trust becomes very poor.

The role of the civil society in institutional reforms and reconciliation

330. The Commission learnt that 90% of South Sudan is Christian of different denominations with the remainder being of Muslim or African traditional faith. Ostensibly, the Church is a community that cuts across tribal or ethnic or power bases, thus the role of the Church is therefore very important in South Sudan. On 25th April 2014, the Commission held a meeting with South Sudan Council of Churches. They informed the Commission of the various interventions they made to

calm the situation including the conduct of an ecumenical prayer on 11th January 2014, This led to a statement in February and April, which became a roadmap for the church and identified the root causes, governance and democratic institutions. On one view, it may well be the Church as an institution that can play a critical role in ending the conflict and ensuring peace and reconciliation holds fast in South Sudan.

331. Alliance of Civil Society, an umbrella group and combination of different NGOs, one of whose committees is engaging with the IGAD process also met with the Commission. They noted the marginalization of civil society in the peace and reconciliation process. David Dau, the Executive Director for Agency for Independent Media and member of Alliance of Civil Society said,

> as civil society, I would say that we are among the last to be consulted in the sense that the consultation that is going on is actually to provide a way forward for accountability, healing and reconciliation in South Sudan.

332. Mr Henry, Deputy Chair of South Sudan Civil Society Alliance said on role of civil society in any reconciliation process:

> A bit about reconciliation, how we can play our role; I think that the civil society because we are impartial, we are not looking for power and so we believe that we are in the right position not just to participate in reconciliation but we even believe that we should participate in the table of discussion. Because we are really speaking for the sake of the ordinary citizen, I mean we do not care who is in power but all we care about is peace for everybody because if it is only the two parties who are allowed to negotiate without an independent voice, I do not think that South Sudan can reach a solution anytime soon. But we believe that because we do not belong to A or B but we represent the ordinary citizen then we can contribute effectively.

D. CONTEXT OF PAST REFORM INITIATIVES IN SOUTH SUDAN

333. This part of the report supplies an overall review of state-building initiatives that have been undertaken in South Sudan since the CPA was signed in 2005 i.e the interim period and the post referendum period up to the outbreak of hostilities in December 15, 2013. It also reviews the role of international partners in the process, which has been very pronounced. Since this is an evaluation of success or failure of the overall state-building endeavour undertaken by or with the assistance of multiple international actors such as the UN, US, EU as well as individual countries during the stated period, it is useful to briefly outline the conceptual and theoretical framework that frames the Commission's approach to the task.

Conditions for State Building and Nation Building in South Sudan

334. Speaking to the Commission, a highly placed member of the judiciary expressed the challenges entailed in building a nation and fostering inclusivity in a multi-ethnic society such as South Sudan:

> It is unfortunate that there is this tribal mind-set which we cannot deny but as we are building a nation, there is no way we can proceed with this tribal mindset. We have to build a nation out of this different cultural and ethnic groups. We have more that 63 tribes in South Sudan and there is no way one tribe or two can run a nation without reference to others.

335. A majority of respondents that expressed themselves on the subject appeared to agree overwhelmingly that following the signing of the CPA, the leadership failed to take measures to begin to build the foundations of a nation. Speaking to the Commission, Hilde Johnson, former SRSG to South[ern] Sudan observed as follows:

> one element … is building a cohesion and nation. You know, during the civil war, South Sudanese were united against one enemy but they did not build an identity as South Sudanese. Now one of the things that I would say did not happen adequately from the day of independence and prior to that was a systematic attempt at building nation and this is a very significant job ... And so what you are seeing now is also breakdown of relations between … [communities], having allowed tensions to continue to be there and not really build a nation.

336. It is the Commission's view that given South Sudan's long war that wrecked societal relations and multiple conflicts that often took an ethnic or factional dimension, part of building a nation would have required an examination of this past, and forging national unity and reconciliation following the dissipation of the northern threat that had united disparate southern communities and interests. Unfortunately, it appears that as detailed elsewhere in this report [see reconciliation chapter], this challenge was not taken up even after the hoisting of the independence flag. One respondent aptly captures this tragic reality:

> Now, come to 2011 when we decided to vote as South Sudanese to become a Nation, we were supposed to go for reconciliation because we all lost. But people ignored and started accumulating the resources, enjoying wealth, forgetting that we were supposed to go for a National reconciliation that brings us as South Sudanese to make sure we forget what happened and we be build as a Nation because we have never had a Nation and everyone was hungry (sic) and they thought that maybe a Nation participates in it [in nation building]. We did not have that feeling of how does a nation looks like.

337. Incidentally, there is constitutional commitment to diversity in South Sudan. The Transitional Constitution of South Sudan (2011) holds the country out as 'a multi-ethnic, multi-cultural, multi-lingual, multi-religious and multi-racial entity where such

diversities peacefully co-exist.'[260] In various parts of this report, the Commission explores whether this rhetorical commitment to diversity has been translated into reality, and if not, ventures to suggest what could be done in this regard.

Status and General Diagnosis: Problems of State-building Initiatives in South Sudan

338. Reviews of state-building initiatives in South Sudan, which largely took the form of 'capacity building' in the post CPA period, largely reflect that overall, state-building appears to have failed, for a variety of reasons. This conclusion is not made solely by outsiders looking in: the general tenor of a comprehensive internal review commissioned by the Government of the Republic of South Sudan (GRSS) through the Office of the President is that the post CPA state, together with most initiatives undertaken to shore up its capacity largely failed to deliver.[261]

339. While there is agreement that 'donors certainly achieved a great deal, especially in terms of technical infrastructure and humanitarian assistance — from building roads and schools throughout South Sudan, to reducing poverty and mortality rates — the achievements towards state-building are less readily apparent'.[262] Indeed, to their credit, donors put a lot of money and effort into building institutional infrastructure. As suggested by some commentators,[263] this aspect of state-building, which involves building 'physical stuff', is 'easy.' It is the building of 'capabilities of the human system' (in our case the state) that is hard, which is where, according to the Commission's evaluation, the aspirations of the state-building project in South Sudan have not matched performance and outcomes. Many respondents expressed the view that the state-builiding process had not resulted in strong, accountable and transparent institutions.

340. First, there appears to be the dominant approach in internationalstate-building initiatives that focus on the technical, in the sense that there is a tendency to ignore the politics, and are invariably ahistorical, international partners have not resisted the urge to import designs that are deemed to have worked elsewhere, for the most part ignoring local context. In the context of South Sudan, the Commission learnt that literacy levels as well as the lack of a skilled cadre have proved to be a major challenge that confronts capacity building initiatives.

341. Second, the fact that South Sudan is a new state essentially means that there is a comparative lack of experience with governance, which has posed serious

[260] Transitional Constitution of South Sudan, Art 1(4).
[261] Comprehensive Review Commission by the President of the Republic of South Sudan
[262] Brian Levy and Francis Fukuyama, 'Development Strategies: Integrating Governance and Growth' *World Bank Policy Research Working Paper Series* (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1547635 at 8
[263] L Pritchett, M Woodcock and M Andrews, 'Escaping Capability Traps Through Problem-Driven Iterative Adaptation (PDIA)' UNU-WIDER Working Paper No 64, July 2012 [Available at http://www.cgdev.org/files/1426292_file_Andrews_Pritchett_Woolcock_traps_FINAL.pdf] at 1.

challenges for capacity building. In view of the fact that previous experience with governance in the target state/territory is one of the conditions that determine whether state-building succeeds or fails, the SPLM's lack of experience in governing (owing in part to its failure to effectively administer liberated territories during the civil war) is partly to blame. The Commission's review of what has happened in some State ministries and government ministries targeted for capacity building suggest that in part because of this deficiency, some technical advisors (TA) are engaged in performing governmental functions and running affairs within the civil service, including writing speeches for government officials, rather than performing their core task of building capacity through counseling, coaching, partnering, teaching, modeling and facilitating.

342. Although there are exceptions, the overall result is that there has been limited development of capacity among South Sudanese within target government units, amid complaints of 'poaching' of good ones by international NGOs and donors.

343. Third, those involved in state-building — perhaps overwhelmed by how much was required to be accomplished to establish a semblance of a functioning state — appear to have taken on too much at once. While it is true that core ministries and units were targeted in the initial phase of capacity building, the view among international partners involved in state-building were aimed at instituting reforms considered necessary for a modern nation-state.

344. Fourth, levels of econcomic development formed a critical background condition that determines whether state-building initiatives succeed or not. The situation in South Sudan, where low levels of economic development are manifest does not appear to have bucked the trend. Presumably, elevated levels of economic development would provide a more conducive environment for the entrenchment of broader reforms.

345. Fifth, it appears that the eagerness by the international community to assist the fledgling government in the face of state decay, absence of functional institutions, huge developmental and governance challenges turned out to be counter-productive. The convergence of international partners in Juba willing to help produced a paradoxical situation in a context of dire need: too many capacity builders and a massive enterprise of capacity building that is said to overwhelm even the recipients of assistance.

346. With respect to the capacity building project, the Commission learnt that five core ministries were initially targeted: Ministry of Justice and Economic Planning; Central Bank; Ministry of Petroleum; Ministry of Justice; Ministry of Cabinet Affairs and the Office of the President. It is recorded that the list of implementing partners that ran projects for various donors in the Ministry of Justice alone included: Deloitte (the largest, for USAID), Adam Smith International, Max Planck, UNDP, Conflict

Dynamics, advisors from the Government of Kenya.[264] Other donors implemented projects directly (not through implementing agencies). The list of ministries was expanded in 2013 with the renewal of Deloitte's contract to include two more ministries: Ministry of Labour and Ministry of Parliamentary Affairs and the National Legislative Assembly.

347. Each donor or its implementing agency is said to have hired multiple Technical Advisors (TAs) for each entity. Reports suggest that GOSS officials were overwhelmed. It is reported that one ministry, the Ministry of Finance and Economic Planning at one point had/has more than 40 TAs representing more than four implementing partners, and funded by several donors, each said to have overlapping mandates and agendas.[265] It is reported that in 2011, a group of donors — Netherlands, Norway, Sweden, UK, Denmark and Canada which jointly manage their development activities under the Joint Donor Team (JDT) decided not to provide any more TAs to this ministry because 'too many were already there'.[266] Speaking in relation to the number of foreign technical advisors involved in capacity building activities in South Sudan, a South Sudanese government Minister is on record stating: 'too many cooks can spoil the broth'.[267]

Role of the International Community in State Building

348. In view of the fact that state-building is a resource intensive undertaking, the role of international actors, particularly in post-conflict or weak states is often pronounced. As has already emerged, South Sudan has been no exception to 'the general rule'. Following the signing of the CPA, several international actors converged in South Sudan to assist in building capacity to enable the GOSS run its affairs in the interim period. The trend has continued in the post referendum period.

349. The strong interest of the international community in South Sudan should perhaps not be surprising. It is argued that the international community's interest in state-building, particularly aspects relating to Security Sector Reforms, is seen as its way of managing conflicts, with the overriding goal of preserving the international order based on states. For post conflict states, particularly for a new state like South Sudan, state-building initiatives are aimed at preparing the target territory for membership within the community of states, hence the strong interest in the enterprise.

350. The role of the international community raises a set of questions including ownership, the limits of international state building and the ability of post conflict states to develop state capacity to effectively perform functions ordinarily expected

[264] Greg Larson, Peter Biar Ajak & Lant Pritchett, 'South Sudan Capability Trap: Building a State with Disruptive Innovation' Harvard Center for International Development, Working Paper No. 268 at 15

[265] Larson, Ajak & Pritchett (above) 15.

[266] Larson, Ajak & Pritchett (n 265 above) 15 citing a donor official interviewed in 2013.

[267] As above, citing government minister interviewed in 2013.

of states: monopolization of the use of force; providing security; budgeting and spending money; delivering services; imposing taxation and enforcing rules.

351. The question of ownership often is an issue in state-building contexts, largely because of the funding model and the drivers of reforms. In South Sudan, the lack of locally sourced funds — even in the context of potential oil revenues — dictated that the enterprise would be externally funded. A number of submissions received by the Commission suggest that scarcity of resources and of skilled personnel was artificially created by corruption and discrimination against qualified cadre because they had worked in the north, and outside Sudan. In the latter part of this chapter of the report, the Commission engages with both propositions, finding, with respect to the public service, that the sense of entitlement on the part of some former freedom fighters has resulted in exclusion or marginalization of qualified South Sudanese from the Diaspora. In this regard, one respondent remarked that:

> […] there is this kind of expression that we fought and you did not fight. This has been throughout and it has created the differences amongst the South Sudanese who voted for the independence regardless of the achievement that all of them participated from wherever they were. But still the language is there, we fought, and you did not fight. So this also created also some differences between the youth and even the people themselves.

352. In the Commission's view, the approach adopted, one in which focus was placed on building institutions and norms necessary to build a 'modern' state, could raise questions about local input, particularly in terms of prioritization. However, the Commission heard that, although funding was externally sourced, South Sudanese officials played a critical role in decisions relating to initial focus of reform efforts and the ultimate direction of the reforms. It was also established that during the Interim Period, the potential threat of destabilization by Sudan appeared to have informed the posture of the international community towards the GOSS and its leadership, and that because of this, broader transformation of the state faced significant challenges.

CHAPTER III

EXAMINATION OF HUMAN RIGHTS VIOLATIONS AND OTHER ABUSES DURING THE CONFLICT: ACCOUNTABILITY

PART A

PRELIMINARY ISSUES

CHAPTER III

EXAMINATION OF HUMAN RIGHTS VIOLATIONS AND OTHER ABUSES DURING THE CONFLICT: ACCOUNTABILITY

PART A

PRELIMINARY ISSUES

Introduction

353. Pursuant to the AUPSC Communiqué and the Terms of Reference (ToR) detailed in the Concept Note Relating to the Establishment of the AUCISS, the Commission is mandated to investigate human rights violations and other abuses during the conflict by all parties from 15th December 2013, establish facts and circumstances that may have led to, and that amounted to, such violations and of any crimes that may have been perpetrated as well as compile information based on these investigations that can assist in identifying perpetrators of such violations and abuses with a view to ensuring accountability for those responsible.

354. In discharging its mandate on investigating human rights violations and other abuses during the conflict, as well as to establish facts and circumstances that may lead to and/or amount to such violations and crimes, the Commission met and held discussions with or conducted interviews with regional, international and national leaders, government and opposition officials, South Sudan citizens, victims, refugees, internally displaced persons (IDPs), civil society organizations and intellectuals. The Commission also visited various sites including IDP camps; refugee camps; military barracks, police, and other security services, scenes of alleged crimes; government offices among others. The Commission also received leaders and other stakeholders at its offices in Addis Ababa.Kakuma

355. The Commission conducted several missions to South Sudan and neighbouring countries during the following dates; April 16 (Khartoum), April 23-30 (Juba), May 10-15 (Kenya), May 15-18 (Uganda); May 26-June 4 (South Sudan: Juba, Bor, Bentiu and Malakal), June 5-7 (Kenya: Kakuma Refugee Camp) and Khartoum; and 20 July — 11 August (Unity, Upper Nile, Jonglei, Central Equatoria State, Western Equatoria State, Lakes State, Western Bahr el Ghazal State, Northern Bahr el Ghazal State, Warrap State and Eastern Equatoria State.

356. Having carried out preliminary consultations and fact-finding inquiries, on 15 August 2014, the Commission of Inquiry on South Sudan mandated a team of investigators to obtain further evidence and conduct general investigations on human rights violations and other abuses committed during the armed conflict in South Sudan that began on 15th December 2013 to fulfil its mandate. The Commission's investigators were on the ground in South Sudan to carry out investigative work between 15 August and 22 September 2014. In line with its Policy on Investigations, the Commission's investigations focused on:

a. Obtaining forensic evidence of alleged human rights violations and violations of humanitarian law.
b. Obtaining evidence of alleged crimes, including international crimes such as war crimes and crimes against humanity.
c. Establishing facts and circumstances that may have led to the commission of crimes and violations.
d. Obtaining perspectives on the causes underlying the violations.
e. Obtaining perspectives on institutions linked to violations as well as weaknesses in institutions that could have contributed to violations of human rights and humanitarian law.
f. Establishing the identity of alleged perpetrators.
g. Establishing the identity of victims of crimes and violations.

357. The Commission's investigations focused not only on the key areas in the four states that have been the main theatres of violence but also extended to other places where violations could have occurred or where relevant evidence may be found. Thus, the Commission's sites of investigations included Juba and its environs, Bor (Jonglei), Bentiu (Unity), Malakal (Upper Nile) rural areas surrounding these major towns, and Kakuma refugee camp in Kenya. Time constraints precluded visits to refugee camps in Ethiopia (Gambella), Sudan, and Uganda. Site visits to alleged theatres of violence were undertaken where permitted. In particular, the Commission visited Gudele joint operation centre, Tiger Battalion barracks, Juba Teaching Hospital, New Site burial site, Giyada Military Hospital, Bor Teaching Hospital, St Andrews Episcopal Church burial site, Bor burial site, Malakal Teaching Hospital, Malakal burial site and bentiu Mosque and hospital. Forensic reviews of the stated sites were undertaken and documentation carried out. Witness or survivor injuries were also examined by the forensic doctors and forensic evidence was collected at crime scenes or incident sites.

358. The investigations reflect that violations documented were committed in a systematic manner and in most cases with extreme brutality. In this context the Commission found cases of sexual and gender based violence committed by both parties against women. It also documented extreme cruelty exercised through mutilation of bodies, burning of bodies, draining human blood from people who had just been killed and forcing others from one ethnic community to drink the blood or eat burnt human flesh. Such claims were registered during interviews of witnesses of crimes committed in Juba. Elsewhere, witnesses of crimes committed in Bor Town, also provided evidence of brutal killings and cruel mutilations of dead bodies. In Malakal town, reports of abduction and disappearance of women from churches and the hospital where communities had sought refuge during the hostilities that began in December 2013 were rife.

359. Forensic evidence comprising biological blood evidence, crime scene visits and limited examination of burial sites, as well as digital medical evidence was collected and interpreted. The forensic medical appraisal of the nature, dynamics and details of the conflict involved crime and death scene examinations, collection of physical evidence where available, photo-documentary material obtained from witnesses, sites of burials of bodies of the dead arising from the

clashes, and the analysis of the evidence. The intention was to make medical evaluations that could be solidly relied upon as objective scientific evidence towards the findings to be made from the investigation in general.

360. The analysis of photo-documentary material from witnesses looked at the metadata properties in their electronic signatures for the dates[268] the images were originally taken by the camera operator and matched these against the known time sequence of events.

361. Specifically, the state or condition of preservation of the bodies in the images was looked at to determine the time interval between death and date of photography, which in turn reflected an objective estimate of the date or period of the death, thereupon establishing the linkage to the likely perpetrators.

362. The Commission received evidence such as photographs documenting the violations. A forensic interpretation of the data was undertaken and an opinion rendered.

363. Incidents documented are those earmarked by the Commission to be the most serious ones in terms of the number of victims, the scale of attacks and the level of atrocity of methods used in the violations. The Commission employed the "reasonable grounds to believe" threshold in reaching its factual findings on individual cases, incidents, victims and patterns of violations. The factual determinations reached by the Commission formed the basis of legal qualification of the violations both under Human Rights and International Humanitarian Law.

Overview of state visits

364. Overall, the Commission found that while there was limited active conflict in all states visited, tensions remain high in the three most conflict affected states of Upper Nile, Unity and Jonglei. Many respondents talked of fear and all stakeholders and interlocutors noted a level of anxiety of an impending attack by one side or the other. Life for civilians in all three state capitals of Malakal, Bentiu and Bor has not fully returned to normal. The majority of civilians remain either in UNMISS protection of civilian sites (POCs) or in inaccessible locations in the surrounding villages and rural areas. Guarantees of security remain a great concern for civilians. In addition the rainy season made access to civilians in remote areas extremely difficult for humanitarian actors.

365. The Commission endeavoured to meet with a broad range of stakeholders, interlocutors and actors in all states visited whenever possible. This included dialogue and consultations with state/ county authorities, military area commanders, internally displaced persons (IDPs) and their various leadership structures, groups of civilians in the towns where possible, traditional leaders, religious leaders, women and youth groups, humanitarian actors and UNMISS personnel. The Commission paid particular attention to individual accounts of

[268] The assumption was made that the camera date and time settings were correct, and where it was deemed unset by the operator, this was indicated upon a control document (Photo-documentary analysis and Commentary).

violations experienced and took detailed statements from these witnesses and survivors with a particular focus on women witnesses and survivors.

366. During its visits the Commission was provided with documentary information and lists[269] in various parts of South Sudan of the number of people killed or wounded, internally displaced persons and cattle raided.

367. The Commission encountered some mass burials and many individuals who say they are victims of crimes or witnessed the commission of crimes including sexual and gender based violence.

368. The Commission notes that South Sudan has witnessed gross violations of human rights for over 50 years, particularly during the 22 years of civil war. Whilst the crimes committed during the on-going violence are thus not new, the rate at which people have been killed during this conflict could be higher, according to some estimates,[270] than during the civil war. Reports received by the Commission from the exiled communities in Kenya, Uganda and Ethiopia as well as opposition leaders allege that between 15,000 and 20,000 ethnic Nuers were killed in the first three days (Dec 15 to 18). While proof of actual numbers was not provided, there seems to be a remarkable consistency in stories told by the communities of the brutality and violence on both sides. Regardless of whether those persons who carried out the attacks considered them to be retaliatory, the violence on both sides was no less acrimonious or brutal.

Conceptualizing Accountability

369. The Commission has adopted the understanding that accountability includes four aspects: criminal accountability; 'civil accountability' (reparations); 'administrative accountability' (administrative sanctions or lustration) and truth telling.

370. With respect to criminal accountability, the Commission investigated alleged violations of human rights and humanitarian law with a view to making recommendations on how any such violations which constitute crimes under

[269] On file with the Commission. These are referred to in detail in the body of this chapter in the location in which the killings are alleged to have taken place.

[270] It is difficult to state with any precision the number of those who have been killed during the current conflict. However, the indications from the reports that have been produced thus far are that the speed with which events unfolded over a short period, and the resulting displacement of persons point to a large number of deaths and killings which is difficult to quantify and verify. According to the South Sudan Human Rights Commission (SSHRC), more than 600 people were killed and 800 injured in Juba and its suburbs between 16 and 18 December 2013, see South Sudan Human Rights Commission, *Interim Report on South Sudan Internal Conflict December 15, 2013-March 15, 2013.* See further, UNMISS (United Nations Mission in the Republic of South Sudan) Report of 8 May 2014, *Conflict in South Sudan: a Human Rights Report* (May 8, 2014 (UNMISS Report) which found that from the very outset of the violence, gross violations of human rights and serious violations of humanitarian law have occurred on a massive scale. Civilians were not only caught up in the violence, they were directly targeted, often along ethnic lines. UNMISS is hosting over 80,000 displaced persons in protection sites. The International Crisis Group Report of 10 April 2014, *South Sudan: A Civil War by Any Other Name*, Africa Report No 217, estimates that more than 10,000 people have been killed and more than 1 million displaced. See also, Amnesty International, *Nowhere safe: Civilians under Attack in South Sudan* (May 8, 2014).

national law as well under international law should be dealt with; the most challenging aspect of the Commission's mandate.

371. With respect to 'civil accountability', the Commission notes that in international human rights law, the term 'reparations' is a 'composite term representing 'all types of redress, material and non-material, for victims of human rights violations'. [271] Having reviewed various sources, particularly the UN Basic Principles on the Right to a Remedy and Reparation[272] as well as academic literature, the Commission conceives of reparations as encompassing several measures including compensation, restitution, rehabilitation and several other symbolic measures such as apologies and memorialisation as well as structural reforms that target laws and institutions to prevent repetition of violations.[273]

372. With respect to 'administrative sanctions', the Commission, informed by comparative experience, understands that in certain contexts, perpetrators who are public servants could be excluded from holding public office for a period of time in addition to other measures that may be taken against them. In view of the limited resources available to it, in addition to other constraints that include the scope and depth of its investigations, this aspect of the Commission's work could be left to an appropriately empowered mechanism to be created following the completion of its work.

373. Aware that Sexual and gender based violence (SGBV) is often dismissed as an unfortunate consequence of conflict, and keeping with its gender-sensitive approach, the Commission investigated specific gender based violations and abuses and has taken into consideration gendered aspects of truth, healing, reconciliation and reparations in its recommendations.

On truth and accountability

374. The Commission is aware of the complexity that the notion of truth involves. It has adopted the understanding that it includes versions or types of truth: personal or narrative truth, which consists of personal versions of truth by individuals, including victims and perpetrators; factual or forensic truth, which is achieved through investigations, verification and corroboration; social truth, which is the

[271] For a discussion of reparations, see Theo van Boven 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms' UN Doc E/CN.4/Sub.2/1993/8 of 2 July 1993, para 13. See also, GM Musila, *Restorative Justice in International Criminal Law: The Rights of Victims in the International Criminal Court* (2010) Cap 6. B Saul 'Compensation for unlawful death in international law: a focus on the Inter-American Court of Human Rights' (2004) 19 *American Univ ILR* 523-584 at 541.

[272] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law` and Serious Violations of International Humanitarian Law, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) paras. 19-23. See also, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni: The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. UNESCOR, 56th Sess. UN Doc. E/CN.4/2000/62, (January 18, 2000) which provides a comprehensive outline of reparations.

[273] See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) A/RES/40/34 29 November 1985 96th plenary meeting. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

product of dialogue, interaction, discussion and debate; and healing and restorative truth.

Conceptual Framework

Human Rights Violations

375. South Sudan is yet to ratify any of the major human rights instruments, whether global or regional.[274] As a matter of international treaty law therefore, none of these instruments can be a source of binding obligations for South Sudan.[275] However, certain human rights norms which constitute customary international law are binding on states irrespective of treaty ratification. Major provisions in the Universal Declaration of Human Rights (UDHR) have attained this status. Equally, prohibitions against torture, cruel and degrading treatment, extrajudicial killings, slavery, recruitment and use of children in hostilities and arbitrary detention are binding on all parties to a conflict. Some or all of these acts, when committed in a certain context, or with a particular intent, also constitute international crimes; war crimes or crimes against humanity. The Transitional Constitution of South Sudan, also contains guarantees of certain fundamental rights for its citizens, including life, human dignity, equality and non-discrimination, liberty and security of the person, freedom from arbitrary arrest and detention, fair trial and equal protection of the law.[276]

Other Abuses (Violations of International Humanitarian Law)

376. As noted in the introductory chapter, the Commission interpreted 'other abuses committed during the armed conflict' to include violations of International Humanitarian Law (IHL). The body of International Humanitarian Law contained in various treaties as well as international custom, governs the conduct of armed conflict and protects those involved in, or affected by the conflicts. Of these, South Sudan is bound by the four Geneva Conventions of 1949, the two Additional Protocols of 1977 (both sets of which treaties were ratified by South Sudan in 2012) and customary international humanitarian law.

377. When deciding which rules of IHL are applicable, the Commission is aware that the nature of the conflict — whether international or non-international — is important. Equally, while there is a wider array of possible violations of IHL, the most serious of these are regarded as war crimes, irrespective of the nature of the armed conflict. Having characterized the conflict as a non-international armed

[274] These are the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (CESCR) and the African Charter on Human and Peoples' Rights (ACHPR). The Commission has been informed that the process of ratifying the African Charter on Human and Peoples' Rights, the instrument that anchors the African human rights system, was at an advanced stage before the outbreak of hostilities in Juba.

[275] See Law Society of South Sudan, 'Press Release: Final Letter on Ratification of African Charter' April 15, 2014. Available at <http://www.sslawsociety.org/news&events_Final_Letter_on_Ratification_of_African_Charter.html> (accessed on May 23, 2014).

[276] See also Penal Code Act of 2008 and Sudan Peoples' Liberation Act of 2009 which reinforce these constitutional protections by criminalizing certain acts of relevance to the current inquiry.

conflict opposing South Sudanese armed forces and opposition armed forces, the Commission is documenting all violations of IHL encountered but the narrower category of violations of IHL that constitute war crimes will receive greater attention.

378. In terms of the applicable law, it is the Commission's conclusion that government forces and all forces aligned with them as well as opposition forces are bound by Article 3 Common to the Geneva Conventions; Additional Protocol II and customary IHL.[277] The Commission is of the view that conditions for the application of Additional Protocol II have been met. These are responsible command for opposition forces, control of territory by opposition forces, and ability of these forces to conduct sustained operations.

Crimes against Humanity

379. The other category of core international crimes that the Commission is considering is that of crimes against humanity (CAH). CAH are essentially serious violations of human rights, sometimes referred to as gross violations of human rights, when committed in a particular context. This category of crime is denounced in order to protect civilians from the excesses of the State and organisations such as rebel formations, both in peacetime and in times of armed conflict. In this regard, international law prohibits certain inhumane acts such as murder, torture, and sexual violence, which are part of a widespread or systematic attack against a civilian population. These acts must be committed pursuant to a State or organisational policy, which is an essential element of this category of international crime.[278] In its analysis of the evidence in relation to crimes against humanity, the Commission adopted the definition contained in Article 7 of the Rome Statute and related case law.

PART B

DOCUMENTING VIOLATIONS AND CRIMES

I. The Commission's Consultations and Investigations

Violations of Human Rights

380. The stories and reports of the human toll of the violence and brutality have been heart-wrenching: reports of people being burnt in places of worship and hospitals, mass burials, women of all ages raped; both elderly and young, women described how they were brutally gang raped, and left unconscious and bleeding,

[277] On the rules of customary IHL applicable to a non-international armed conflict (NIAC), see International Committee of the Red Cross, *Customary International Humanitarian Law Vol I* (Geneva, 2009)

[278] On crimes against humanity generally, see Cherif Bassiouni, *Crimes Against Humanity in International Law* (The Hague, 1999); Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge, 2010) pp 230-266

people were not simply shot, they were subjected, for instance, to beatings before being compelled to jump into a lit fire. The Commission heard of some captured people being forced to eat human flesh or forced to drink human blood. All these accounts evoke the memories of some of the worst episodes of earlier human rights violations on the continent, including in South Sudan itself.

381. Within the limited time and resources available to it, the Commission was able to document various gross violations of human rights that have occurred during the conflict, and that continue to happen, albeit on a smaller scale despite the formal Cessation of Hostilities Agreement and on-going peace negotiations under IGAD.

382. Reported violations encompass extrajudicial killings (murder), including massacres in conditions violative of the rights to life and due process, sexual and gender based violence (SGBV) which of itself violates a number of human rights including freedom and security of the person and the prohibition of torture, violations of freedom of expression and of the media, and the discrimination entailed in targeting of individuals on grounds of ethnic origin. Alleged international crimes, which could constitute either war crimes or crimes against humanity include killings/murder, rape and sexual violence (SGBV), forced displacement/removal of populations, abducted children associated with conflict used in servitude and beaten, looting, pillage and destruction of property, disappearances, torture, targeting of humanitarian workers and property.

383. Reports indicate that both sides to the conflict have violated human rights. Alleged perpetrators include soldiers, militia, rebels and civilians.

The Sites of Crimes and Violations: General and Specific

384. The Commission's inquiry focused not only on the key areas in the four states that have been the main theatres of violence but also extended to other places where violations could have occurred or where relevant evidence may be found. Sites of inquiry and investigations thus included Juba and its environs, Bor, Bentiu, Malakal, rural areas including areas around major towns (but also Bahr el Ghazal where some IDPs from Malakal and Bentiu reportedly took refuge), and Kakuma refugee camp in Kenya.

385. The heaviest fighting during the armed conflict took place between December 15 2013 and April 2014. For Juba, the first few days saw the heaviest fighting and the number of casualties as well. Sources differ on the number killed. The South Sudan National Human Rights Commission report puts the figure of those killed in the first three days at *more* than 600, which includes soldiers and civilians of Nuer ethnicity.

386. However, reports received by the Commission from the exiled communities in Kenya, Uganda and Ethiopia as well as opposition leaders allege that between 15,000 and 20,000 ethnic Nuers were killed in the first three days (Dec 15 to 18). While proof of actual numbers was not provided, there seems to be a remarkable consistency in stories told by the communities. As stated above, it is difficult to quantify or state with any specificity the numbers of people who were killed.

387. All reports indicate that when fighting broke out within the Presidential Guards in Juba, Dinka members of the Presidential guard and other security forces targeted Nuer soldiers and civilians. Violence spread to various neighbourhoods in Juba i.e Munuki 107, New Site, Eden, Gudele, Khor William, Mangaten, Mia Saba, Jebel and Lologo as Dinka soldiers, members of Presidential guard and other security forces conducted house-to-house searches, killing Nuer soldiers and civilians in and near their homes. It is reported that some were arrested and killed elsewhere. Police stations and security installations were alleged to be sites of killings. Some were allegedly suffocated in containers, survivors were shot. Mass burial sites are said to exist.

388. While security has largely returned to Juba, which is under the firm control of President Kiir and the government, UN Protection sites in Juba still host thousands (probably up to 30,000) of individuals mainly of Nuer ethnicity who took refuge there in December 2013.

389. The Commission met with a number of people in Juba, as well as in other key locations in South Sudan to obtain first hand testimony of what happened. The following section contains information and testimony with which the Commission was provided, and which are redacted only to the extent necessary to protect the respondent, as well as the result of the Commission's investigations. The Commission endeavoured to meet with state representatives, opposition representatives and diverse groups within communities as well as witnesses and alleged victims in each location it visited to obtain as comprehensive an s understanding of events as possible.

Juba (Central Equatoria)

Testimony of State Authority

Meeting with President Salva Kiir[279]

390. President Salva Kiir informed the Commission that what happened was avoidable and should certainly not have degenerated to the level it reached. He confirmed the genesis of the conflict as arising out of the background of the National Liberation Council meetings in which the party was making preparations to register the SPLM as a party in South Sudan (the party was registered in Sudan prior to the secession of the South), canvass support from the grassroots and thereafter convene the National Convention of the SPLM for elections to various posts within the party with a view to upcoming general elections. There was a difference of opinion on how the vote should be conducted. President Kiir stated that it is usually done by a show of hands given the high levels of illiteracy amongst the general population of South Sudan, however, Dr Riek Machar and what the President referred to as his team felt that the voting should be done through the secret ballot. They were defeated when

[279] The Commission met with the President on two occasions, the first on 25 April 2014 and the second on 22 July 2014.

the 136 delegates voted on the matter and eight people failed to attend consequent party meetings the following day.

391. President Kiir informed the Commission that instead the eight persons held a secret meeting at the former Vice President's house where they planned the coup d'état. That evening fighting started within the Presidential guards and moved to the military headquarters in Juba north. President Kiir said that he did not know clearly what was happening but he learned that they were intending to take over power.

392. President Kiir provided a historical account of how during the struggle Dr Riek Machar in 1991 mobilized his Nuer people into militias to fight the SPLM/A. At the time Dr John Garang, Chairman of the SPLM/A, had wanted to fight Dr Riek and his militias but he, President Kiir, had advised against it knowing that Dr Riek Machar had support from Sudan. When Dr Garang died, President Kiir says he decided to accommodate Dr Riek Machar and stated that for a whole year prior to December 15th, Dr Riek Machar had been planning for this attempted take-over. President Kiir was of the belief that Dr Riek Machar thought the attempted take-over would be swift and the government would fall.

393. President Kiir told the Commission that he made appeals for calm in his first statement after the eruption of the crisis and did not mobilize his Dinka community. Dr Machar, on the other hand, subsequently made public his intention of becoming President of the country, destroyed Bor, moved on to Akobo and mobilized the Nuer White Army made up of youths who are under age. President Kiir stated that Dr Machar mobilized about 25 thousand people, killing civilians in mosques, churches, hospitals with his forces raping old people in Malakal. President Kiir stated that these atrocities did not happen because of the fighting in Juba but because Dr Machar had been planning a takeover of power for over a year.

394. President Kiir went on to say that the capture of Bentiu on 14/15 April by Dr Machar's rebellion was with the assistance of Misseriya and militias from Darfur who had been promised 15 000 USD for any injuries and 30 000 USD for any deaths. He noted that Riek Machar was determined to be President and will not stop his rebellion or respect the ceasefire until he achieves his aim.

395. On the steps taken by the government to investigate the allegations of violations of international humanitarian and human rights, President Kiir reported that they had formed a national commission of inquiry and mentioned that some people have already been arrested in the process [they subsequently escaped]. President Kiir was convinced that once the proceedings were completed and sentences passed, some people would face the death penalty which he would ensure were done in public as an indication of his government's resolve and commitment. He further noted that he had initiated a process of national reconciliation and healing, supported by various Church leaders, led by Vice President of the Republic James Igga Wani.

396. With regard to the arrested members of the SPLM leadership, President Kiir expressed distrust of their motives. He had released them to enable them to

participate as negotiators in the peace process and they had gone to Kenya then on to Addis Ababa. He says he knows them to be working with Riek Machar and that only the likelihood of being implicated in the atrocities Riek Machar has committed prevents them from openly joining Riek Machar. He confirmed that the remaining four prisoners had also now been released on his instructions prior to the final stages of their trial.

397. On the issue of the most appropriate political reconciliation as a means of addressing the crisis, President Kiir merely referred to the IGAD led process and the call for the establishment of an interim government with a Prime Minister by the Troika. He noted the desire to remove the current government and an interim body devoid of the current incumbents established. Nonetheless, President Kiir stated that the composition of the Cabinet and Government is something that can be discussed and agreed to within the national reconciliation process or through the national constitutional review process. President Kiir made a point of noting that Riek Machar wants to lead the interim government. President Kiir informed the Commission that he had enquired of IGAD why they wished to dissolve a democratically elected government and when he had been asked by a western envoy whether there was a credible Nuer besides Riek Machar he had told them to consult with the Nuers.

398. President Kiir again assured the Commission that even though the Dinka community, from which he hails, is in the majority, he had never mobilised their support. He mentioned that until a couple of days prior to the meeting the head of the Army was a Nuer whom he had kept on for five years because they enjoyed a good relationship. Nuer and Dinka have never had such magnitude of problems as currently witnessed, save for the minor tribal differences which were usually addressed through the traditional systems. However, he says Dr Riek Machar's rebellion of 1991 sparked large scale atrocities that led to long lasting and deep seated hostility between the two communities.

399. During the second meeting with the Commission, President Kiir confirmed his recruitment of 7500 troops.

Meeting with Major General Marial Chanoug, Commander of the Presidential Guards[280]

400. As has been widely reported, the chain of events that set the crisis in motion began within the Presidential Guards also known as the Tiger Unit. Major General Marial Chanoug was Commander. The Commission met with the Commander in Juba. He described the entire incident as a mutiny against established command.

401. The Commander informed the Commission that the Unit is composed of 2 Brigades with a strength of 4000 and provides VIP Protection to very senior officials of government. The Brigades were under the command of Brigadier

[280] 22 July 2014, Juba

Peter Lim Bol and Brigadier Simon Yien Makuat, both Nuer officers. Brigadier Bol has now defected. The Presidential Guards Commander further noted that his Deputy in Command of the Tiger Unit, Brigadier General Simon Yien Makuat, is also a Nuer who is still in government.

402. The SPLM held its National Liberation Council at a venue about 1 kilometre away from the military base. On the night of the 15th December, 2013, the Commander retired to his house which is about 700 meters from the main barracks, early in the evening. At about 22.00 hours, the sound of gun fire woke him up, and he observed that the sound of the firing was coming from the general direction of the garrison. He immediately wore his uniform amidst taking several phone calls coming in on his hand set. One of the calls was from the Chief of Staff of the Armed Forces, General James Hoth. It took him about 15 minutes to move from his residence to the garrison, where he noticed that the shooting was actually coming from the direction of around the 3rd Battalion and 1st Battalion.

403. It was at this point that he called Lt. Col. Bona Bol Commander 3rd Battalion, and sought to know from him what was going on, since the direction of the shootings were coming from near his battalion. The 3rd battalion Commander confirmed that the shooting was from the 2nd battalion under the command of Lt. Col. John Malual Biel, who was said to have broken into make shift armoury of the Brigade in a bid to arm themselves and in the process had shot and kill his Deputy, a Major Akuol. A further shooting incident involved another Nuer major who shot Lt Abraham Manuak, a platoon commander. The Commander stated he maintained a position near the gate of the barracks and continue to return fire in the general direction of the 2nd battalion, from where mainly Nuer officers were fighting in increasing numbers. At the time he could not establish the cause of the firing by these officers; he merely tried to repel them. He remained in the same location till 1.00 p.m. on 16th December when the attackers withdrew.

404. He described the entire incident as a mutiny against established command, which still requires investigation. However, he noted, the government had quickly named it a coup d'etat.

405. The question of possible disarmament of a group of military personnel as a trigger to the shooting was raised. The Commander drew the Commission's attention to the fact that in a garrison, when soldiers are not on duty they are required to hand over their weapons to the armoury where they are kept in safety. This was the case in the formation. He, as the Commander, ordered all personnel not on duty to ensure that weapons in their possession were returned to the armoury as is the standard practice. He was of the view that a standard practice ought not to be the cause for a mutiny if there was no ulterior motive which should be investigated. He further stated that it is also instructive to note that the two key officers involved, Lt. Col. Peter Lok Tang and Lt. Col. John Malual Biel who shot his deputy, have fled the country and are now with Dr Riek Machar as VIP protection.

406. On the question of the forces that took the violence to the streets of Juba, the Commander stated that he was not in a position to ascertain who they may be, as he was maintaining his position by the gate of the barracks, where he remained

until the shooting stopped at about 1.00 p.m. He opined that this could have been the handiwork of other uniformed entities such as the Police, Wild life and Fire Brigade.

407. On whether he reported the incident to the President of the Republic, in view of the fact that he is the Commander of the Presidential Guards, the Commander stated that he did not as he did not report directly to him in person. Furthermore, in the course of the chaos, he lost his phone. He recalled that at about 7.00 hours, the Chief of Staff, arrived at the garrison at which he gave him a briefing on what the situation was from his own vantage point. The Chief of Staff thereafter, went to the State House to brief the President, where the President was reassured that the Presidential Guards were maintaining their position.

408. The Commission sought to know where the armoured vehicle that destroyed the residence of Dr Riek Machar and Major General Chuol came from. The Commander pointed out that on December 17, 2013, there were shootings towards the house of the President which is in the same direction of the house of the Vice President and upon inquiry, he was informed by a Major that there was firing from the residence of the former Vice President and the fire was being returned. He doubted if an armoured vehicle was used on the compound. He subsequently ordered that the shooting be ceased.

409. On the accusation that several residents of Dr Riek Machar's house were killed in the shootout that took place there, the Commander revealed that one of his deputies, Lt. Col. Lual Wek rescued 34 people from Dr Riek Machar's compound and kept them in safe custody. The Commander provided to the Commission, a list containing the names of those that were said to have been rescued in this process.

410. The Commander equally informed the Commission that a number of officers were arrested for random killings and looting during the period between the 15 - 18 December 2013. It is however, unfortunate that these persons later escaped from custody and disappeared. They were composed of 18 suspected of unlawful killings and 19 suspected of looting of properties.

411. With regard to the alleged recruitment of men outside of the normal procedure, the Commander revealed that he was only aware of 700 men that had earlier been recruited for operations against North Sudanese incursion, whose commissioning was formalised at an investiture in Luri, conducted by the President of the Republic.

Meeting with Major General Mac Paul, former Director of Military Intelligence, 29 July 2014.

412. Major General Mac Paul, former Director of Military Intelligence, gave the Commission an idea of the web of rumours that were beginning to cover certain sectors in Juba:[281] "On the 11th, a lot of rumours were going around — that Salva

[281] Maj. Gen. Mac Paul, former Director of Military Intelligence, 29 July 2014

has ordered the disarmament of Nuer in the Presidential Guard — from the 10th to 11th — Taban called me to say we have heard there is impending disarmament of the Nuer — I called Major General Merial, Commander of the Presidential Guard. He denied the rumour. We had the old regulation that all guns have to be in the armory. This rumour spread within certain sectors, but there was no public disclaimer. Instead there was a counter-rumour that Salva has mobilized his own tribe in Luri, near his farm, that he has brought 7,000 from Bahr el Ghazal — in reality, this force was 311, because 10 of them died in training."

413. He told the Commission that 38 died on the side of government and 59 on the other in the fighting in the barracks on the 15th: "On the 16th, there was another shootout. These people were defeated at 2 p.m. They lost 22 in that random shooting; seven members of a civilian family were also killed by a shell falling on their house. This was after the President's address on the 16th. The President's address re-triggered the shooting in the barracks. I was in the office, and could not hear any counter-fire — only random shooting for 20 minutes, fighting within government troops in response to a rumor that an attack was coming. I could hear all weapons, even tanks."

Meeting at the Ministry of National Security and Intelligence, Maj Gen Akol Koor Kuc, Director General for Internal Security[282]

414. The Director General gave an overview of the political circumstances leading to the NLC and the obvious and deteriorating relationship between the President and former Vice President. Prior to the NLC he held a meeting with Riek Machar when he advocated dialogue between the two men to avert the possibility of serious problems given the heightening of the tension in the lead up to the NLC and the upcoming NLC. He said, :

> "Riek asked me do you have the word called *Dhol* in your (Dinka) language? The literal translation is to belittle or ignore someone — there are some common words in Dinka and Nuer. He said if a Nuer said *Bol,* it means they have already started fighting. He said he was not happy and his supporters were not happy. The President had removed him from his tenure and yet his supporters had voted for him. I told him that this was going to take us to the situation of 1991 and innocent people were going to die. He responded that "you people" did not understand the achievements of the 1991 war."

415. The Director General informed the Commission that he had also met with Taban Deng, former Governor of Unity State on 7 December before he met with Riek Machar. Taban Deng wanted assurances that Riek Machar would take over the leadership in 2020 in the absence of which Taban Deng apparently stated that the way to the bush is open, that has he remained as Governor of Unity State he would work for peace but as he had been removed, he would not.

416. The Director General stated that, given the circumstances, he started mobilising his officers and informed the Commission of intelligence in their

[282] 23 July 2014.

possession regarding the moment when Taban Deng and Riek Machar ordered the fighting to start. When the fighting started, it was because Taban Deng had communicated with one of the senior officers saying "the Big man has said you should start". Apparently, initially they were supposed to undertake their activities on the 16th but they knew their activities had been intercepted and changed the plan and start on night of the 15th. He confirmed the existence of voice intercepts of Taban Deng manning the situation, and asking those with whom he was in contact if they had accessed the guns as well as mobilising the youths who had been trained around the mountains because they were not armed. The Director General said:

"He even asked the youth, "have you got the guns"?

417. The Director General further stated that when Riek Machar left his house it was to go to Taban Deng's house before he left for the bush.

418. The Commission was provided with tapes of the interception at the meeting, listened to them thereafter but could not detect information relating to a coup from the intercepted conversation they listened to.

Meeting with former officials of the South Sudan government[283]

419. The Commission met with the eight-man group of ex-officials of the South Sudan government to gather first- hand information and facts on the remote and immediate causes of the conflict in South Sudan and to discuss possible ways of addressing the political as well as the conflict situation in South Sudan and prevent it from further escalation.

420. The consensus among the ex-officials was that the genesis of the conflict in South Sudan began from an intra-party disharmony specifically between President Salva Kiir and Dr. Riek Machar. In 2008, an attempt to remove Riek Machar and Comrade Pagan Amum from their positions of First Vice Chairman and Secretary General respectively resulted in crisis within the Party. After the 2011 referendum which was adjudged successful and applauded to have been conducted in a free and fair manner, a grass-root opinion survey to assess the performance of the SPLM was undertaken in 2012. The outcome of the survey indicted the SPLM as lacking vision and direction, losing touch with its grass root as well as failing to provide services to people of South Sudan. The report that emerged was however rejected by the Chairman of SPLM and Presidential Advisors.

421. In 2013 there were renewed tensions among the ranks in the Party, and by the beginning of 2013, there was already disharmony within the Political Bureau over the consideration of the report from the grassroots which was critical of the leadership as well as the controversy over the draft constitution, manifesto, the basic rules and regulations and the disciplinary rules of the party. The tension within the party leadership was further heightened by the declared interest of Riek Machar in vying for the chair of the SPLM and by extension, presidential

[283] 1 May 2014, Addis Ababa. The former officials presented themselves as neutral in the on-going conflict.

candidate of the party coupled with the expression of no confidence in the President Kiir's administration by Riek Machar, which was spelt-out in a six-point statement of the failures of the Kiir's government. Efforts by self-appointed individuals of goodwill to avert the looming crisis were unsuccessful. As a result of this leadership succession struggle within the party, the party structures were rendered ineffective and dysfunctional. This hampered the normal conduct of party activities including the Political Bureau meeting which could not be called and, when it was convened there was no agreement on how to conduct the business of the party.

422. According to the group, the crisis that erupted on the 15th of December 2013 was an offshoot of a deliberate attempt to disarm the Nuer elements of the Presidential guard that resulted in exchange of gunfire between the Nuer and Dinka elements of the Presidential Guard (Tiger Division). The Commission was informed that prior to this time, there had been several indicative signals of imminent crisis which President Kiir failed to address or resolve and which ultimately snowballed into full-blown conflict. Some of these signals included an attempt by Salva Kiir in May 2013 to influence the numeric composition of the Presidential Guard to the benefit of the Dinka ethnic group by recruiting into the Presidential Guard specifically from Warrap and Northern Bahr el Ghazal States. These new recruits were deployed outside the command structure of the SPLA. Secondly, President Kiir withdrew the delegated powers of the Dr. Riek Machar without any attention to due process. In addition, they told the Commission that President Kiir dissolved the entire Government of South Sudan without any form of consultation or regard for the constitution. President Kiir was also accused of making several political statements perceived as inciting division along ethnic lines in South Sudan.

Testimony from SPLM/A-IO

Meeting with the Leader of SPLM in Opposition, Dr. Riek Machar[284]

423. The Commission met with Dr Riek Machar in Nasir on 28 April 2014. During this meeting, Dr Machar told the Commission that he took over command and control of the forces he met in Paniyan, near Bor, encompassing groups such as the White Army, on his way from Juba which he left on 17th December 2014.

424. Dr. Riek Machar noted that the conflict did not start with the event and incidents of December 15, 2013. For over a year, the issue of succession in the party leadership had been on the cards. The leader of the party, who was also the Republic President, H.E Mr. Salva Kiir, had served the party for eight (8) years as leader, while he had served the nation as President for the last five (5) years. It was against this backdrop that it was felt within party ranks that change was not only imminent, it was imperative that succession be considered. There was also a need for consideration of the party's basic documents which included the party constitution, code of conduct of members as well as regulations on activities of members of the party.

[284] The first meeting with Riek Machar took place on 28 April 2014 in Upper Nile State and the second took place on 7 July in Addis Ababa.

425. He revealed that most of the members of the party's politburo stood for greater democratization within its structures, including the review of the party's base documents, as well as for tenure limitation. This was what accounted for the arrest of politburo members for coup plotting. It was also revealed that discussions around the issue of greater democratization of the party took place both formally and informally amongst the generality of members.

426. Another issue that had loomed in the build up to the full blown crisis was corruption in the polity. The president was said to have been ambivalent in his reaction to several accusations of corruption against officials, particular, of those around him. The issue came to a head, when in reaction to the accusations, the President sent a generic letter to all cabinet members requesting them to return any government funds or assets corruptly acquired to the chest.

427. This letter was written in April 2013. The matter was raised at the cabinet meeting, where it was pointed out that the generic nature of the letter was not fair, as some Ministers were newly appointed, for example. Rather than considering the concerns raised, the President, according to Riek Machar was preoccupied that the letter had been leaked to the Press. The issue of corruption was also raised in Parliament when the President was in attendance and the Speaker advocated that the President set up an investigation panel to look into the entire phenomena of corruption in the system to dispel the general belief that he was condoning corruption.

428. The second issue that formed part of the background to the crisis was the domination of state structures and institutions by one ethnic group in the country. This situation had resulted in complaints by the other ethnic groups in the country.

429. The third issue of concern was the fact that insecurity was spreading throughout the country. Rebellion had occurred in several parts of the country and it seemed intractable. Riek Machar accused the President of treating the issue of insecurity with levity.

430. Fourthly, he accused the President of not being in control of the national economy, which was falling deeper into the woods.

431. The issue of the country's relations with its neighbours was another thorny problem in the background leading to the crisis. Dr. Machar believed South Sudan was increasingly becoming unpopular amongst its neighbours, all of whom had played crucial and significant roles in the quest for independence; an unpopularity which, he believed, was also shared by the wider international community.

432. The last issue was the question of SPLM and the organization of its structures. It was revealed that in an attempt to reach out to its grass root base soon after independence, the President dispatched both cabinet members and parliamentarians to the different states in the country. The purpose was to solicit their views on the way forward both in the party and the country at large. The

message from the President also thanked party apparatchiks for the struggle towards liberation and ultimate independence. These consultations involved the leadership of the party including the Vice President. However, the response from all the four corners of the country was not encouraging as the generality of the people expressed disenchantment with the situation in the party. Party members and other national stakeholders consulted expressed disappointment at the lack of focus of government as well as the deviation from ideological path committed during the struggle for independence. This was indicative of the need for greater democratization within the party. The lethargy created within the party led to Dr. Machar advising the President to vacate the post of the party leader at the end of his current tenure and allow other aspirant contest for the post. The leader of the SPLM In Opposition also stated that he further urged the President not to run for another term of office at the end of his tenure and allow others to enter the fray.

433. Three members of the party including Dr. Machar expressed interest in the post of party President. This development subsequently led the President and the leader of the SPLM to dissolve the party structures on account of the party not holding its statutory meetings within the stipulated time of five years which just elapsed within the year. The President was however, reminded that only the SPLM National Convention is vested with the powers to dissolve the party structure and not the leader of the party. This incident occurred on 6 December 2013. The President thereafter, convened the meeting of the National Liberation Committee on 14th December 2013, where he was said to have displayed extreme bellicosity according to Riek Machar.

434. Due to the behaviour of the President, the leader of the SPLM in opposition, decided to boycott attendance of the conference the following day 15th December. Dr Machar further stated that there were also indications that the President was planning to arrest some personalities, including himself. Eventually, 8 Dinkas, 2 Nuers, 2 Shilluks and 2 persons from Equatorial were arrested and accused of plotting to overthrow the government. The arrests took place between 17 and 19 December 2013. It is instructive to note that the arrests were not ethnically biased. They were simply arrested on the bases of their being members of the party's politburo and who have all been vociferous in their demand for party reforms. Following the arrests of these individuals, one of the presidential guards fired a shot which triggered the widespread violence which snowballed across the land.

435. By the following morning. Dr. Machar, stated that he called on the Special Representative of the Secretary-General of the U.N, Madam Hilde Johnson, who advised the country's leaders to take control of the situation. He was however, surprised at a broadcast claiming that he, Riek Machar, had been arrested along with some other Ministers for plotting a coup d'etat to overthrow the government. He pointed out that he took the government's claim seriously and this prompted him to go into hiding till 17 December 2013 when he left for Jonglei state. It was at this point that he started his resistance movement, which has just been formally declared on 15 April, 2014.

436. In joining the peace talks in Addis Ababa, he was signatory to the Cessation of Hostilities Agreement and subsequently called for the release of those

detained. The SPLM in opposition had also resolved to investigate alleged violations, which they acknowledge and condemn. He admitted that there was a lot of confusion going on as the fighting force comprised of both members of the regular army as well as 'volunteers'.

Meeting with Mrs Angelina Machar Teny

437. The Commission met with Mrs MAchar on April 29, 2014 in her capacity as a Women's Leader. She was accompanied by Mr Hatim Cuel Deng and Dr Dhiam Mathok Ding Wol. She expressed her views on the root causes of the conflict as well as its immediate causes. She provided a list of 27 members of Riek Machar's family reportedly killed on December 18, 2013.

438. In her view, the cause of the conflict was the failure of the government to implement the six years CPA adopted during the negotiation with Khartoum to have a Referendum. The CPA was constantly violated by President Kiir who failed to pay proper attention for the implementation of the country's interim constitution. The government turned a blind eye to impunity, serious violation of human rights, and corruption was rife. Further, insufficient attention was paid to peace and people were marginalized. There was no implementation of national reconciliation as contained in the CPA. The President dismissed two elected Governors unconstitutionally despite the objection of the Vice President and mixed party political and governmental issues.

439. Shortly after independence, serious disagreements started to arise between the President and the Vice President on the transitional process, particularly on the fundamental issue regarding what the transitional constitution should look like with respect to the governance system, on the mandate of the Vice president, the term of election of the presidency and government. This disagreement resulted in the development of two versions of the sconstitution.

440. The President resisted the process of making the constitution a people-led process, which led the Vice President to draft his own version of the Constitution and present it to the parliament. The President threatened to dissolve Parliament if they did not adopt his version, behavior which Mrs Machar termed constituted intimidation on the part of the President.

441. As to the recent crisis, Mrs Machar noted that at the meeting of the National Liberation Council called by the President on 14 December 2013, when the Deputy Chairperson of National Liberation Council tried to attend the meeting, his body guard was disarmed at the entrance and a seat was not provided for him. Madam Rebecca who is considered as a mother of the South Sudan Nation was prevented from addressing the meeting because she was advocating reform for SPLM. In sum the atmosphere of the meeting was hostile and intimidating thus she and her husband, Dr Riek Machar did not attend the following day.

442. She narrated that whilst at home on the 15th December she and her husband were informed that their residence had been surrounded, and described a heavy military deployment around the Vice President's house. They both escaped with three bodyguards and a driver.

443. She informed the Commission that on the night of December 11, 2013 there was targeted killing of Nuer people in Juba.

444. On December 16, 2013 a traditional Sultan, Deng Macham, proclaimed on the radio that "*anyone with a weapon will be responsible for his own safety"*. A short while after this proclamation the President made a statement that there had been an attempted coup.

445. On 17th December she received a call from one of their guards to say they were going to be killed by the government. There had been 14 people in the house when she left; some civilian and some armed guards. 9 people were killed and 5 escaped. Her son was arrested and people at his house were killed.

Testimony from Other Sources

446. The Commission met diverse groups and individuals including witnesses and alleged victims who could provide first-hand testimony of events leading up to 15th December, the events of the day as they unfolded and possible causes. The Commission also met with many diverse groups including civil society groups, women's groups, youth groups, elders, church groups, as part of its consultation in discharge of its mandate. Extracts from some of these meetings now follow.

447. On events leading to 15th December:

Dr Lam Akol told the Commission as follows[285]

> On the 14th when the NLC was open they all went there, the two groups. They went and attended ... So both of them went to the meeting, the speech of the President was not helpful… It was very combative, even talking about death, you know they are not going to surrender and all this. There was something like that and that you know '91 will not repeat itself, things like that. Yeah, songs were made and he even abandoned his van, took up the song then he was talking about they will not surrender. Anyway, it was not helpful in short. So it made the atmosphere now from tense to charge[d]. Then in the first session they took a break, people were allowed to go to church and I think the evening session, the other group deciding not to go, because they did not see reconciliation. They decided not to go. So the day after when they were concluding in the evening this is where the shooting took place and the shooting came as a result of the Commander of the Republican Presidential Guards was ordered to go and disarm his troops.
>
> …
>
> Now, it was in the process of the disarmament that scuffles resulted which went in to add confrontation. Some refused to be disarmed, some who were disarmed went and broke into the store and got arms and then the fighting started; and those guards. And that particular group to be sure it was composed of the former bodyguards of Salva. [The group to be disarmed]
>
> …
>
> So the composition of this group is that they were the former bodyguards of Salva, bodyguards of Riek Machar, bodyguards of Polina Mate [Deputy

[285] 21 July 2014.

> Commander-in-chief, now deceased]. He is a Nuer also from Bentiu. He is from Bentiu. So definitely the Nuer groups were more. Now this is the beginning of the problem, the Nuers overwhelmed the Dinkas, they took over the place. Now there is another presidential guard and this is the most controversial unit. It was trained outside the Army and it was trained also in the background. This is very important, in the background of, you know, when Riek's powers were stripped. When he was stripped of his powers, I think sometime in March, I don't remember the date. But it was well before the reshuffle. You know small people talk, the Nuers on the streets they were saying, oh no we are going to fight the Dinkas, how can they mistreat us like that, because they conceive Riek is their representative. He is not dead, he is the Vice President of the country or a member of the SPLM or Vice Chairman of the SPLM … So this one was well before July. So there was small talk on the streets.
>
> ….
>
> So when they were recruited [presidential guard in background] around March and they were brought to Juba here, the Army General-in-Staff refused to train them because they said they are not part of the Army. If they are part of the Army give them to us and if the President wants exactly Republic Guards we will give them. So they refused. Figure is different, but around 3,000.
>
> …
>
> So there was already a conception among the low people that the Nuers are saying we will fight the Dinkas because they are mistreating us and these things are taken by the other side and in turn now they prepare themselves more than the others, those who started the talk.
>
> ….
>
> So when that Force was now called in to recapture the Republican Guards Headquarters that was captured by the group that refused to be disarmed, they came in the morning. They captured the place. They are the ones now who went loose. No, after they finished this one they went to where the Nuers are perceived to be staying and this is where they started the killing of the Nuers. Even though they were fighting on the side of the Army….And now the thing became tribal. Then now again, of course Tuesdays people have this not in the past, so immediately the cadets in Bor, the Jemists in Bentiu—[went like] Wild fire, they started killing Dinkas as well. Riek ran for his life, there is no doubt about that. I don't think they had planned a coup, because they were all in their houses. They were in their houses and they are Generals among them, like Oyai, like Majak, all this. No General and the President knows very well will send his troops to combat and he goes to sleep. He must follow the progress of the operation. So I don't believe that there was a coup. He ran for his life. The mistake I give him is that he took over, a rebellion that was not his.

It thus appears that, on some views, Riek Machar took ownership of, and over, a rebellion for political gain. His fellow Nuers were outraged and responded to reports of the killings of their fellow Nuers by retaliating. By his own account above, he formed his own resistance movement shortly after the event of 15 December, by 17 December.

448. On the events unfolding on the 15th December:

A respondent eyewitness[286] provided the following testimony to the Commission on the fast moving events:

> It was Sunday. Like this moment as we talk now, this time. I tried to find out, there is somebody whom I knew who is close to the Vice President, he said, no there was no shooting and then some minutes later we heard shooting from Military Headquarters. It was not that much, some shooting just for like some seconds and then it died down. Then around 8.00 then it was followed now by heavy shooting late 8 or 9. So it was now heavy shooting and then now this call came in, my colleagues, friends calling me there is shooting in Geada and there is fighting. People said it is a fighting between the bodyguards of those who are loyal to Riek within the Presidential Guard and those who are loyal to the President, they are shooting each other; and then sometime we had to go down under the bed and then when the shooting died down, we came out. Then I saw so many people running in those areas of Jabel because after Geada is Jabel… I have somebody who we go to church together, he is a Colonel in the Army and then I called him because I saw him on that day in church in the morning, but his barrack is outside. Then I called him, what is happening? He said, we are already in Geada, we dislodged the Dinka — let me put it that way — because he is a Nuer. They killed some of the bodyguards, some Nuer who were Tiger they killed them, then we came and now we are looting the store, we are taking guns, that is why you see so many people are coming and taking guns from the barrack… to arm themselves. I was telling him, what are you doing? He said, we want to control the Geada. Then what is next? No, this fighting now has become between Dinka and Nuer, so we want to chase away the Dinka. Don't worry much. These are things he was telling me; and then in the middle of the night the fighting died down around 12.00; and then I tried to reach him, his phone could not go through. Up to now I don't know where he is. Maybe he is dead, I don't know. Even people who know him they don't know where he is now.
> …
> So in the morning around 3.00 [of the 16th] then we heard heavy vehicles moving and then now some friends with me they called a friend they said, they are moving in more troops, is that loyalists of Riek Machar remain in control in Geada, the barrack. They said this reinforcement was coming from Luri. Then heavy fighting started and we can hear the tanks passing by. So I think because we were in contact with people who get all the information, so they said they dislodged the loyalists of Riek Machar.
> …
> From the barrack, now they control it; and then some thirty minutes later these guys came in, running into Jabel the soldiers, loyalists of Riek. We went out because we could speak the language. We asked them, what is happening? They said, they came with tanks, they are chasing us away. Who are you? No, we are supporters of Riek Machar. They were going in the middle. They were not even shooting. Even civilians came out, we were looking at them,

[286] 21 July 2014, Juba. No further information provided to protect the identity of the witness.

> they were running and then they melt into the Jabel. Then tanks would come around the area, even civilians were out, they were just telling the civilians go back, go back; and then it went on, it went on, this group would come out, the fighting would start, they would be chased away, they would go back, they would melt into the community… With their guns, yeah
> …
> On the 16th many soldiers came from the barrack now. They were coming where we were, the residential areas. They were now well organized Army, they said let us follow these — they call them defector whatever — let us follow them they are on that side, because we can shoot. These are now the government Army that followed until they chased away these guys out of the area. Then the fighting stopped even people could go back, people who were looking for food, the shops were opened.

Another respondent eye witness from Juba,[287] said:

> I really cannot say exactly the genesis of the problem, but what I can say is what I saw take place…and what I know is that the people who are staying in that area are drawn from both tribes, because the Presidential Guards or what they call "the Tiger Battalion" is composed of, they are protectors of both the President and the Vice President. So each one of them would bring people mostly from this tribe. So there are a lot of Dinkas and there are a lot of Nuers. Now when the problem started the Army came with tanks [on the 16th] [t]hen they were pounding at Riek's house and the missile used to pass over my house. And I think at that time he was not there but there were some guards. I think they were around fifteen and most of them were just killed there and there by the firing from tanks. Yeah, they came with tanks, yes and destroyed the place completely. Well, they took, they took two days. Because there was also shooting then from the house. So sometimes they had to pull away at times and come back and begin shooting.

449. *On the possible causes of the events,* another witness from Juba[288] also said,
> Those who attacked the Nuer in their houses were members of the National Security and the Tiger Commondo (sic). There were no civilians involved. Civilians came after one or two weeks…. What happened was that, in 2012 when the SPLM internal crisis came up in the meeting I think in July somewhere in this restaurant called Home and Away, the group supporting the two principals started to recruit their own supporters. Even in the training camp in Luri the soldiers were not in the same gang.
> …
> When the President Salva Kiir brought certain tanks from Yei and put them direct to Forces of Riek Machar in the same Bilba that is behind that, before Luri there is Bilpam…. Military tanks and from there we started to smell the smoke of crisis. We were aware.
> …
> Immediately after they differed in the SPLM political bureau meeting, just few days we hear that Salva Kiir brought his tanks… Riek was helping his Forces

[287] 21July 2014 . Details of witness on file with the Commission.
[288] .21 July 2014. Details of witness on file with the Commission

> near Osava and near Bilpam. So there were two camps, there was Riek Machar camp on this side and then the other then they were all compiled together as tactic to disarm the Nuer group. To disarm Nuer group, before 15th. There were two Forces, Riek was helping his own camp, Salva was helping his own camp. Then Salva uses force.
> …
> A week before the incident took place, the Nuer were ordered to go to Yei where the crisis started. Just south the main barracks here. When they went there, there was a move, even us from outside we were hearing that they want to disarm them. So they started not giving assignment to Nuer officers. It was between 13th-14th, because here people are supposed to have drawn the assignment and night duty and whatever. On the 14th and I was sitting with a very senior Commander, the same person in that place -- He told me that he is sleeping at night because they had been told by the President that they should disarm the Nuer before they go for the convention, before they go for liberation council and SPLM meeting.
> …
> Then on the 15th, it seemed the Nuer took their weapons and they went behind the military barracks. And then the Dinkas went they wanted to force them to surrender their weapons. Then the Nuer attacked the stores and took over the stores. And they did not surrender their weapons. From there, the fighting broke out here.
> …
> When the incident took place on the 15th, the security personnel were armed and I think they were prepared. They were armed and they were the ones going to individual houses. They even came to my [house] because they knew that there were some Nuers working [there]. Two of them took them to UNMISS but they were insisting that one guard who worked with me, I should surrender it to them.

450. It was revealed that another group of Presidential Guards were trained outside of the national security arrangement. It was speculated that this group were trained to forestall a perceived Nuer insurrection within the presidential guards following the removal of the Vice President in May 2013.

451. The Commission spoke with witnesses who spoke of the President's personal army. One said, [289]

> [Luri] is where the President is training some military people and Riek was saying this is a personal Army of the President. Yes, but he is definitely training people there, mostly from his tribesmen. But now with James Wani Igga, his Vice, I think there are a few of the Bari tribesmen in that programme. At the beginning it was mainly Ekeli his own tribesmen who were in Luri and that is also where he has the farm.

452. On media interference:[290]

[289] 21 July 2014. Details of witness on file with the Commission
[290] 21 July 2014. Details of witness on file with the Commission

> Yeah, any person who has been saying things sort of independently they have been very unhappy, particularly… the media because they thought this would influence the thinking of the people and the people will be against them.

453. *On hate media/incitement to violence:*

> Yes there was an incident — this is a government-owned radio station, Bentiu FM. Bentiu FM is owned by the government. Now when it fell into the hands of Riek Machar it broadcasted some news items, very inciting. There was somebody — of course we were being told this because it was operating in Nuer language which only the Nuer would understand. I would not understand it. But he was saying the brokers — and this was by military men, they went to the station and removed the reporters, the journalists. They said you go aside, let us do the broadcasting. So they broadcasted they said, one of them and it was all Nuer men, you move around if you find any Dinka woman just rape her, just like that. Incitement moved to violence and as they were doing that.
>
> …
>
> There were also some cases of sort of incitement to violence saying that, I think that was in Bor but it was a short period then they were saying, well this is our land and we the Nuer and the Dinkas don't have a place here and things like that. So that was really sort of inciting others to throw out the Dinkas. But it is important to note that these were actually government-owned institutions and the government l[o]st control of them[291]

Another respondent also stated:

> [T]hen the social media those ones fought outside Juba actually was as a result of actions of the social media[292]

454. *Killings/attempted killings:*

> Suddenly [evening of the 16th] Now, around 3.30 then another group came in. We saw so many civilians running towards us and then we said, what is happening? They said they are killing people and then these civilians now were running towards the market. Then some Nuer they came to our house. We asked them, what is happening? They said, no, the tank came and run over so many civilians and one of the house and the tank destroyed even the owners of the house. So now they are killing the civilians. Who are they? They said the government soldiers. So now the civilians started running, leaving their houses.
>
> …
>
> Now civilians were running, even the SPLA, the Army that went previously they were coming back now with the wounded…. then suddenly these soldiers appeared with a tank. Our house, we were next to the church. There is a church called Murley Community. Actually that place where we were majority are Murley. So there is a church like this, there is a road and then the tank was coming. They were seven people in the tank. They were four people in front and then inside the church they were some civilians hiding

[291] 22 July 2014. Details of witness on file with the Commission
[292] 21 July 2014. Details of witness on file with the Commission

> there. Then this guy wanted to shoot them. Now, we were peeping through the window. So we could hear the neighbour. Our neighbour are Murley, the other neighbours I don't know them but they were crying there, they were being shot. They were shooting people. I could see people also running that side. This group I saw they were around the tank. I saw two, one in a short and half jacket with a gun and the other one with civilian clothes. But the rest of the soldiers had uniform and then now they wanted to shoot the civilians in the church.
> …
> Then they went and then this guy said no, crash that room, crash that house … [T]here was a house, it was like for a watchman. I think they suspected that maybe a soldier went there. So they told the tanker crash the other one and the tank went on it and crashed it. The next house is owned by a General in the Army, but he is from another region. So I think somebody peeped through the window and the tank was crashing that; and then they saw, they said these are the ones, shoot, shoot. Then they shot. Then somebody went there and just put his gun and crashed through the window and shot, shot, shot, shot in the other house… He mentioned these are the Burjazi shoot, shoot, what are you waiting? They were speaking Arabic. Because the tank was moving around and we locked our gate and they did not see us. When we saw them, they are like now targetting people, we went and lied down. Then after they shot at the house, then they went, they followed the tanks. Now, I told this guy now these guys are targetting, they are killing anyone, we need to get out of this place because another group may come.
> ….
> Then we came inside Geada, then we saw so many dead bodies. I think that is the fight that night. They had not removed the dead bodies. They were in military uniform. Then we left Geada, we came out of the Geada because Geada from behind it has no fence. It is connected with the civilians.
>
> One of the soldiers came crying, he said they killed my uncle in that house. He has nothing to do, he is a civilian, he even begged them don't kill me, I am just a civil servant and then they shot him because he is related to Riek.[293]
>
> I think to me I can say soldiers were acting under somebody's directives[294]

The following testimony was also given to the Commission:

> One of our in-laws was arrested and they wanted to shoot him. When I told them that, leave this guy to me they refused but I told them, okay you take the generator and I will take this guy. They took the generator and I took the guy to my compound.

A member of a youth organisation[295] stated:

[293] 24 August 2014. Testimony from witness in Juba, details on file with the Commission.
[294] 22 July 2014. Testimony from witness in Juba, details on file with Commission.
[295] 22 July 2014.Witness from Juba. Details on file with Commission.

> If you could allow me to narrate on 15th because I was having shock and asking what actually happened because no one was expecting that gunshot in Juba and I tried to call people in different organized forces, people I know and asked them actually what happened. Two days, three days after the events and I miss one of my best friends. On Monday 15th I was communicating with him and after one hour up to now I don't know whether he is alive or not alive; and he was civilian actually in [XXX].

455. The Commission was told of appropriation of property and land, some perhaps opportunistic as a result of the chaos of the conflict and some, from the context of the information the Commission heard, historic resulting from a sense of entitlement by those in a position of power and authority.

A respondent[296] stated:

> [People] are not happy over many things, besides this fighting. Their main problem is land grabbing. Even Marial himself, the Commander of Army he took a lot of land that belongs to some Equatorians. He fenced it into the President's compound and he said, well this is for the President now, because you are too close to the President's fence and this is considered as land grabbing, because he did not buy this land, he did not ask for it peacefully, he just fenced this area.

456. There were also reports of looting and the Commission was told by a respondent[297] :

> [On the 17th] [t]hey started shooting. What are they shooting at? Some said they are killing those people in the house of the Vice President, some people said they are killing the detainees because they put them in one of the detainee's house. So nobody knew anything. But it went on for like one hour. Some soldiers from the compound from the General went to see what was happening and then we just saw them, they came back with the loot, chairs, mattresses. We told them, what is happening? They said they destroyed the Vice President's house, they destroyed one of the detainee's house in Gerchwam house.

457. On repercussions for the communities:

> The problem is that the societies have been divided by these people, among them they will have no problem. In fact, they did not have a problem from the beginning. The Nuers in Juba did not know that there was a fight going on in the military barracks, yet they got killed and some had to run to the UNMISS camp. The Dinkas in Bor or Bentiu also did not know what was happening. In fact, some of them might not have heard about Salva Kiir or Riek Machar. But then they got entangled in this situation as a result of — you know that in our African setting also which is another negative thing, is that if you touch my brother then you have touched me, I have to fight. So within the societies it is

[296] Witness from Juba. Details on file with Commission.
[297] Witness from Juba. Details on file with Commission.

not difficult to get them. But the problem with that a wall has been drawn between them and they cannot interact.[298]

I don't think there is somebody who can stop you because of your tribe, it just came out when Salva and Riek…. But at the village level, I don't think it is there. It is only at the political level as far as I know…. The people in the village they have no government. So they are living peacefully.[299]

458. *On the response of the President:*

Even in his statement on the 16th, when Salva Kiir appeared in his Military Fatigue to give a statement on Monday, the 16th, he did not mention the word "coup"…The narrative of the coup begua a day or two later. He was talking about those people who are allied with Riek they are the ones who created this and so on. That they are the ones who attacked the government troops and all that. He did not even give condolence to those who died. That was very surprising, a Head of the State. That speech is devoid of such emotions.[300]

459. *On the role of the President:*

A respondent[301] told the Commission:

When Salva went to Bahr El Ghazal in his rallies and in his own village a place called Akono, this was in August. He talked in Dinka. This was aired by the SSTV. That there are people who want to take this power, this cloth, the power I have belongs to you people and some people want to take it. Are you going to accept? People said, no, no, no, we will not accept. So now he ordered the Governor of Northern Bahr El Ghazal called Olo to mobilize about 3-4,000 youth, mainly from Gogrial and Awel and these guys were brought and trained in Duri. They were not part of the SPLA, they were not part of the police, they were not part of the National Security.

It was a private army which Salva trained and actually using the youth and elements of the UPDF to train them and arm them; and sometimes in November these guys were seen in Juba here cleaning all over Juba township a little, clean the town, but it was like really they were [carrying out] reconnaisance [in] places where the ethnic mess were and that is why in fact when the fighting started in Giada. The fighting in Giada was just to provoke. It was just only to be a signal for these guys to start their work. So immediately when this fighting started in the others, these guys were now deployed and they did the killing, Nuer ethnic group, in Kor William, in Gudele, Mia Saba, ten so it in these areas where those concentrations had been made. Mostly women and children, elderly and youth. So it was a deliberate, it was something planned and this explains why even there was no talk about it. There was not report in the press about this thing. The population in Juba

[298] Dr Lam Akol.
[299] Witness from Juba. Details on file with Commission.
[300] Dr Lam Akol.
[301] Mr Okar.

was told never to talk about it. If you were heard talking about this killing in Juba you will just be killed."

The Forces against the peace are very strong and even within the government who should be the President while celebrating this 16th, the 31st Anniversary of the SPLA on 16th of May talking about the peace process, the document they signed in Addis Ababa. Just started to talk in Dinka, in his own language that we are going to chase these people until we scatter them, which really contradicts his message for peace… Chase Riek Machar and the rebels. This is the President of the State. So he is giving message to the Dinka in the Dinka language and the different what to be to the rest.[302]

460. *On role of Major-General Marial Chanoug, Head of the Presidential Guard:*

He is the one who ordered the Forces of Nuer to be disarmed. He was the one who confronted the situation, otherwise if this idea of disarming did not take place, I think by now we would not have been having war, because the whole thing was to disarm and not to be disarmed.[303]

461. The Commission learnt that that when the gunshots began ringing at around 9.00 p.m. the President who had been in the palace left and was escorted to the National Security building. It was alleged further that the soldiers who accompanied the President were Dinkas only as one Lieutenant Colonel LUAL MAROLDIT ordered the separation of Dinkas and Nuer soldiers within Tiger Batallion first ring of protection.

462. The Commission was informed about an incident that took place at J2 palace (which is adjacent to the Presidential palace) on 16th December 2013 where about 90 Nuers and 21 soldiers were gathered by soldiers and executed with only 13 soldiers escaping with their lives. It was alleged that the 90 Nuers were civilians who were running away from the fighting that had erupted all over Juba. The 21 soldiers, the Commission heard, were Nuers who were part of the President's first ring of protection and had earlier on been disarmed by a senior military officer.[304]It was alleged that the person who ordered the killing of the civilians and the disarmed soldiers was Lt. Colonel LUAL MAROLDIT who was attached to the VIP close protection unit otherwise known as Tiger Battalion or Presidential Guard.

463. The Commission was also told about the incident that occurred in the Tiger Batallion in Giada on 15th December 2013 at around 9.00 to 10.00 p.m. Witnesses informed the Commission that the violence pitted soldiers from the Nuer and Dinka communities against each other. One witness who worked in the battalion informed the Commission that he had already retired to his home in Manga area which is not far from Geada when he returned to the barracks upon hearing gunshots. The witness claims that when he moved to the barracks he

[302] Mr Akor.
[303] 22 July 2014.Witness details on file with the Commission.
[304] See witness JWB

joined the Nuer soldiers. The witness said that both sides were receiving orders from senior military officers from their communities[305]. This statement is corroborated by the commander of the battalion himself who informed the Commission that fighting erupted at 9.00 p.m. while he was in his house which is located about 700 metres East from the main gate to Tiger battalion barracks.

464. The evidence gathered by the Commission suggests that there were killings committed by elements of security forces from 16th December 2013 in residential areas like Muniki 107, Khor Williams, New Site, Gudele one, Mangaten, Mio Saba, Customs, Nyakuren. The Commission was informed that Juba was subdivided into four operation sectors which are Maharat, commanded by General SALVA MATOK; Gudele and Mio Saba which was commanded by General BOL AKOT; Mangaten which was commanded by General GARANG MABIR; and Khor William which was commanded by General MARIAL CHANUANG306. Roadblocks were set up around Juba and were manned by policemen and soldiers. The officers were checking identities and arresting suspected Nuer men.

465. Witness KWQ who was staying in Khor William testified that his niece was killed and that soldiers went round looking for male Nuers. They would arrest them, interrogate them and take them away. Witness JWR also testified that he saw policemen and soldiers killing civilians in a place called Customs. The witness also saw people being killed in his neighbourhood called Konyokonyo. Some of those were killed were identified as Khol Manyang, Bashar Manyang and Nyaguek Kwer. They were all civilians. Witness JWX also saw soldiers killing people in Customs area. This evidence finds support from a list of victims which was provided to the Commission. In the list are names of people who were reportedly killed in various residential areas in Juba.

466. This information was buttressed by witness JWW who asserted that government officers were tasked to collect bodies of dead individuals in and around Juba. The witness informed the Commission that a total of 134 bodies were collected from Gudele, New Site, Bilpam, Munuki 107, Gudele around Buwaba and Lou areas, Khor William, Jebel, military headquarters of 116 and Lologo. According to the witness, a total of 258 bodies were collected between 16 and 31 December 2013 and taken to Juba Teaching Hospital307. The victims were buried at New Site area. The evidence is further supported by the testimony of Mr. Angelo Sebit who was the Senior Prosecutor of Central Equatoria State who signed off the mass burial of the 258 bodies that were found at Juba Teaching Hospital.

467. Several corroborative witnesses testified about killings that were committed in Gudele one area and particularly at the Gudele Joint Operation Centre (witnesses refer to the same as a "Police Station"). It was alleged that SPLA soldiers were moving from house to house in search of Nuer civilians. In one case reported to the Commission, a group of soldiers stormed into the witnesses'

[305] See witness statement of JWB and JWV
[306] See witness statement of JWV, JWT and JWU
[307] See witness statement of JWW and Report from Juba Teaching Hospital

house where there were ten males and gathered them. One of the males was shot dead at the house. The soldiers are then alleged to have moved to other houses and rounded up other males. Three of the witnesses' neighbours were shot dead in the process. The victims were all Nuers. This is corroborated by witness JWB who testified that he saw upon reaching Gudele area a group of Nuer men who had been gathered in one place by SPLA soldiers. The gathered men were killed by soldiers. Another witness, JWX testified that he saw a captain gathering Nuer soldiers, tying their hands behind their backs, killing them and saying that "they wanted to kill Nuers in the open so that everybody sees what will happen to whoever tries to fight the Dinka government"

468. The evidence of killings in Gudele one area is further bolstered by the evidence of witness JWW who testified that among other areas where government officials collected bodies was Gudele one.

469. The Commission therefore concludes that corroborating evidence on record confirms that killings of civilians and disarmed soldiers were committed in Gudele One area.

470. Corroborating evidence also reflects that killings occurred at the Gudele One Joint Operation Centre. One witness informed the Commission that he together with the other males that were gathered earlier were taken to Gudele Joint Operation Centre (witnesses refer to the same as a "Police Station") where one of his relatives — uncle — was shot dead under a mango tree. He contended that the rest of them were put in a small room which had three small windows and the door was chained. The witness also stated that in the room there were about 400 other men speaking Nuer language.

471. The witness informed the Commission that at around at 8.00 p.m. or thereabout on 16th December 2013 soldiers began shooting into the room where the men had been gathered. According to witnesses, the shooting was done intermittently and many of the people died in the process. Others allegedly died from suffocation. Witness JWJ contended that he was able to survive the shooting by pretending to be dead. He was however injured when a bullet ricocheted and hit him on his hand.

472. The witness informed the investigators that he stayed in the room for two days and drank urine to survive. He contended that on the third day a Dinka soldier called JAMES AKOT rescued him and moved him to another room where he stayed for three more days and was later moved by the said soldier to his home. The witness contended that he later made his way to safety.

473. This evidence is corroborated by a witness who was on duty at the Gudele Police Station in the night of 16th December 2013 who heard people being brought in and people crying when the shooting starting. The witness JWC also confirmed that the shooting was intermittent. The next morning he saw dead bodies. A credible police officer, witness JWW, corroborated this evidence since he was part of the team that collected bodies from the scene.

474. From the evidence elaborated above, the Commission concludes that there were killings of civilians and possibly disarmed soldiers at Gudele one Joint Operation Centre on the night of 16th December 2013.

475. The Commission also received evidence of possible torture or ill treatment of civilians in Gudele One area. According to witnesses, SPLA soldiers gathered Nuer civilians on 16th December 2013 and subjected them to beatings before compelling them to jump into a lit bonfire. The Commission also heard evidence that some of the people who had been gathered were compelled to eat human flesh while others were forced to drink human blood belonging to a victim who had been slaughtered and his blood collected on a plate308. This evidence finds corroboration in witness JWA's statement who said that she saw SPLA soldiers burning dead bodies and compelling Nuer women to eat burnt flesh of burnt victims. According to the witness, one of the people who were forced to eat this flesh has reportedly lost his mind and is at a refugee camp in Kenya.

476. The Commission was also informed about rapes that were perpetrated against civilians in Juba between 16th and 18th December 2013. The Commission spoke with witnesses who averred that they had been raped by SPLA soldiers. Witness Martha testified that she was raped by SPLA soldiers between 17th and 18th December 2013. Additionally, she described the coercive circumstances surrounding the rape incident including the killings and how she lost people related to her and observing acts of inhumane nature309. Another witness, JWY testified that she was in Juba when the conflict erupted and she fled when she realized that government soldiers were targeting Nuer women and raping them310. Witness JWB and witness JWS both testified that while at UNMISS PoC Site in Juba they came into contact with women who had been raped by soldiers when they tried to go outside the camp to look for food.

477. From the above evidence, the Commission is of the view that acts of torture and rape were committed in Juba by elements of security forces aligned to the government.

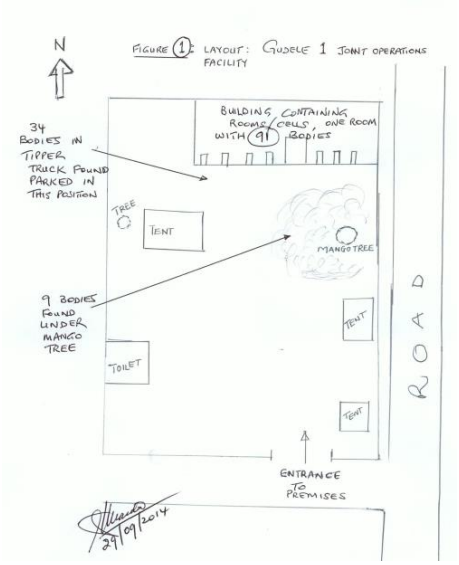
Forensic Review

478. The Commission's investigative team carried out a site visit to Gudele 1 Joint Operations premises to carry out a forensic review on 16th September 2014 following witness testimonies of the alleged killings, torture and ill-treatment that took place there.

479. According to JWW, the total number of bodies found at the scene when the police arrived was: 134 bodies, as follows: 34 found in a tipper truck covered with a blue tarpaulin cover, 9 under a large mango tree outside the building entrance; and 91 bodies in the cell.

308 See witness statements of JWA, JWB and JWC
309 See witness statement of JWA
310 See witness statement of JWY

480. In Figure 1, below, (Sketch of layout of premises) the site of the mango tree, position of the tipper truck containing bodies, and the building with rooms/cells are depicted. In Figure 2 (Broad Floor Plan of building), the detention room/cell is represented. Figure 3 shows the actual scale-specific layout of the room and measurements, with the positions of bullet damage and suspected bloodstain smudges shown, Figure 4 depicts what is a possible (though not confirmatory) set of directions of the bullets via the windows and door. The door of the cell was not attached or present at the time of inspection visit.



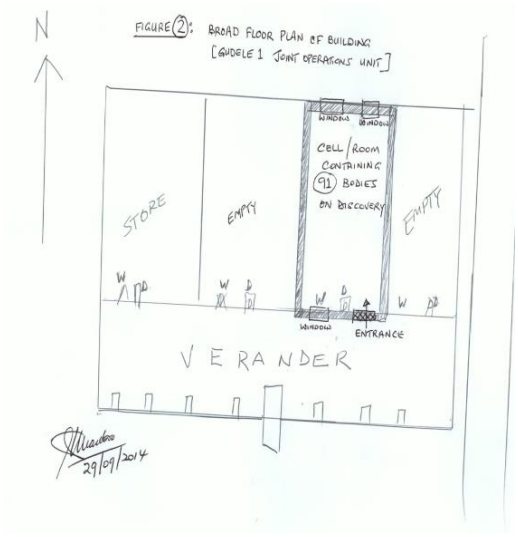


Fig 1 and Fig 2: Layout — Gudele 1 Joint Operations facility and Floor Plan of Building

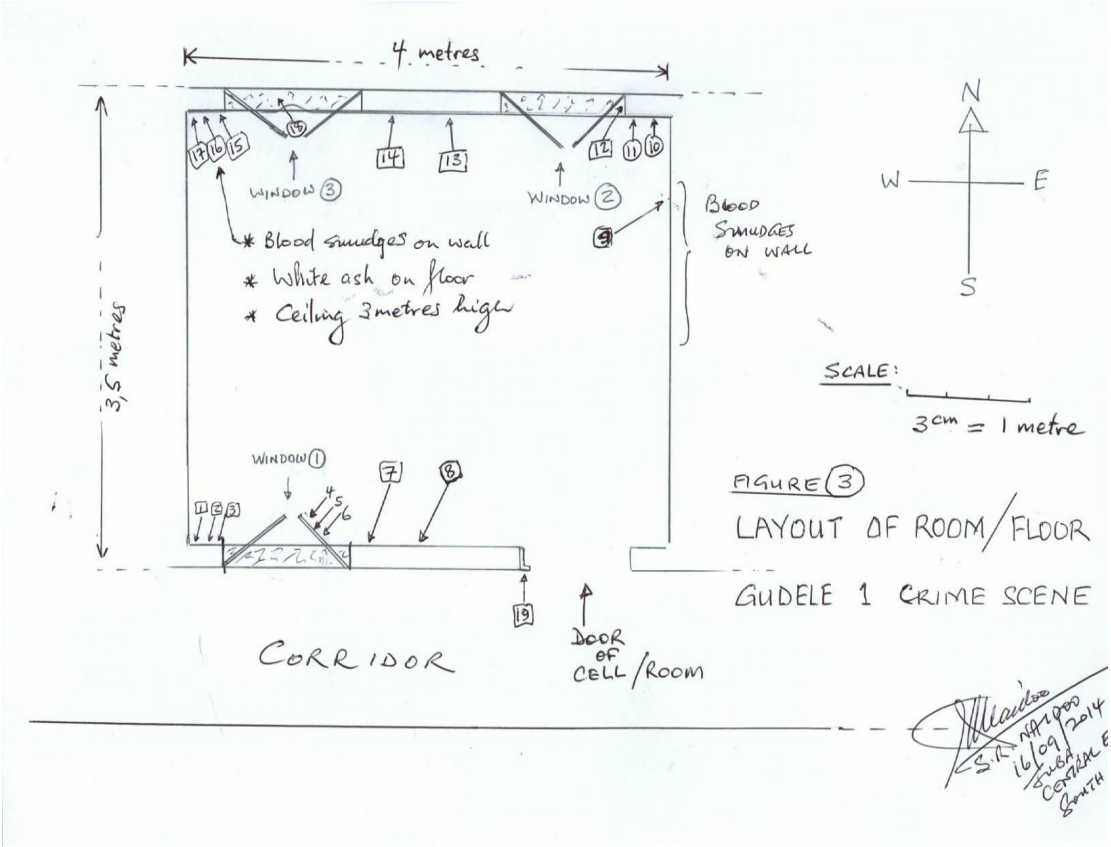


Figure 3: Layout of Detention room

481. The bullet pock-marks on the walls number at least nineteen (19), suggesting that the number of individual shots fired into the room or cell were at least this approximate number. These included three (3) perforations of the metal window shutters and one (1) perforation of the metal door frame at the south wall and one (1) perforation of a metal shutter on a one window of the north wall, all of which betrayed the typical metal characteristic of inwardly directed shots.

482. The balance of the ballistic defects in the plaster of the south and north walls could either be direct or ricochet bullet impacts and were five (5) on the south wall, eight (8) on the north wall indicating source of gunshots from the south windows and door, and one (1) on the east wall — may be a ricochet from either of the north or south directions

483. The joint appearances are thus those of inwardly-directed gunfire from the south or north sides, in other words criss-crossing the room, as below.

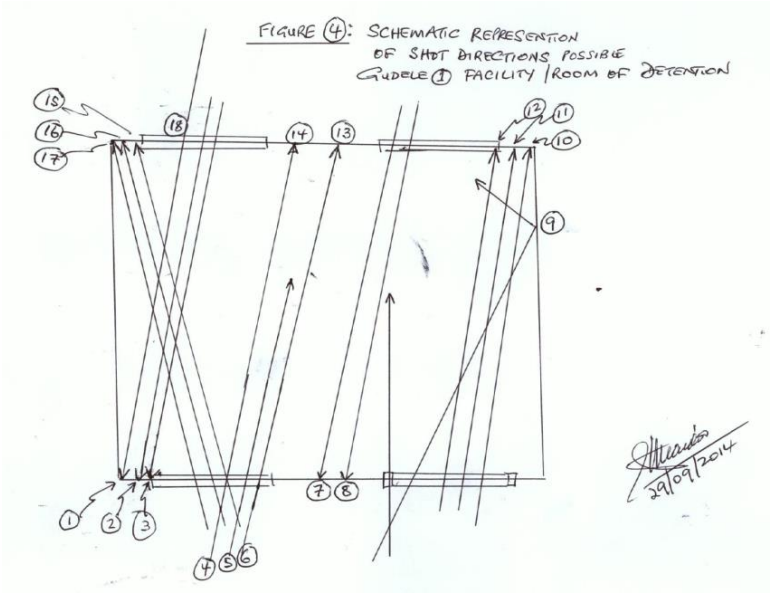


Figure 4: Schematic representation of shot directions

484. A suspicion of blood smudges were seen upon the north and south walls and specimens (scrapings) taken is intended for blood identification with anti-human antibody testing. For DNA analysis, however, there may be a lack of control samples for comparative analysis.

485. The floor was covered with a thick layer of whitish dust or ash, and no blood smudges nor bullet impact marks could be identified on the floor; amongst other debris there were two motor cycles, bags of ash or cement, a rusty old rifle, and two old plastic chairs noted within the room. The room walls were covered with cobwebs.

486. The room dimensions was 4 metres long, 3,5 metres wide and 3 metres high, thus a floor area of 17,5 square metres, and room volume (capacity) of 42 m3 (cubic metres).

487. The photographs below depict some representative findings at the Gudele detention facility.



Fig 5: Outside of Gudele 1 Joint Operations Unit ("Police station") — view from south; the mango tree trunk is on the right side of picture and tent on left side.

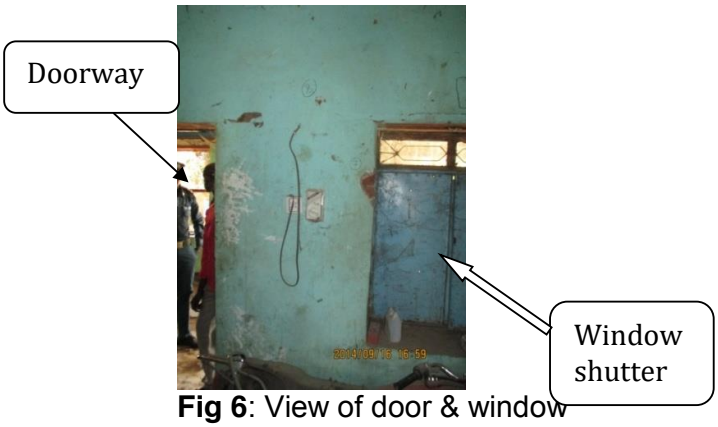


Fig 6: View of door & window on south wall from inside of the cell: note metal window shutter which shows three (3) perforations by bullets



FIG 7: East side wall showing pock mark of bullet shrapnel and blood smudge on wall from which scrapings were taken



FIG 8: Door frame showing bullet mark 19 composed of a perforating defect through the metal of frame with inwardly-deflected metal edges and furrowed track across the adjacent paint/mortar or wall

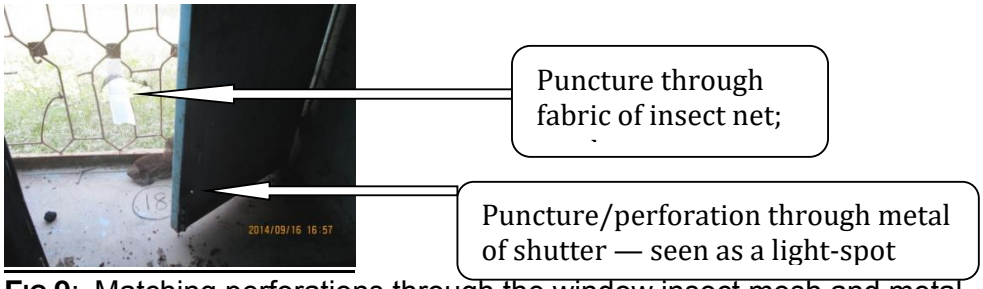


FIG 9: Matching perforations through the window insect mesh and metal shutter (gunshot 18), correlating with single gunshot perforation.

Interpretation of findings at Gudele detention facility

488. The penetration of the metal door frame and window shutters by bullets, some of which may have had enough kinetic energy to ricochet against the opposing wall indicate that the firearms were of the close-range high-velocity type and consistent with rifles. Some of the bodies of the detained persons would likely have received close-range shots.

489. In general, within 1 m2 of floor space, 4 standing persons will be the maximum capacity for a brief period of reasonable breathing as in a tightly compacted lift (elevator). With 6 persons in the same square metre of space, there will be compressive effects and some limitation of breathing capacity, with resultant syncope (fainting). Exceeding this number of people per square metre will limit ventilation and there will be risk of suffocation.

490. The 91 persons placed within the confined floor space of 17,5 m2 amounts to approximately 5,2 persons per m2.. However, it is not certain whether there may have been more persons in the same cell, considering the 34 bodies found placed in the tipper truck. In any event, this would result in some reduction of available oxygenated air over a period of time. Furthermore the vitiation of the atmosphere in the room/cell would have been exacerbated by the panic and hyperventilation and the combustion gases of gunfire into the room. The sustaining of gunshot wounds in the clustered space would have led to individual collapse and a “domino” effect of the collapsing of many, likely worsening the effects of relative asphyxia.

491. It is possible that several of the dead may not have been shot, or if shot were possibly not immediately fatal and that an asphyxial effect would possibly have been a contributing mechanism of death, aside from haemorrhagic shock following blood loss. If the bodies were to be autopsied, or if exhumed at a later date, it is our opinion that several of the bodies may not show immediately fatal gunshot wounds.

492. The dead were removed and buried without forensic investigations and procedures (including death scene forensic examination or standard medico-legal autopsies) and legal inquiries or inquests. According to Juba Teaching Hospital staff, no autopsies were done on the bodies from this scene.

493. In respect of the suspicion of blood smudges on the walls of the room, it must be considered that there was attempt to wipe away the blood spatter. In respect of the ash or white sand on the floor, it should be considered that the ash probably came from the contents of the bags within the room; it also cannot be determined as to whether the substance on the floor was present at the time of the incident or not. The possibility that there were deliberate attempts at obliteration of evidence at the scene by the perpetrators by the use of sand or ash upon the floor and the washing away of blood on the walls must be considered.

494. The number of bodies reported by various witness are in the region of 300 to 400[311]. The report of 134 bodies at the scene and 91 within the cell must be considered a more formal, reliable and professional source, whilst the approximate figures quoted by others is probably exaggeration which may be understandable as from lay witnesses to this incident in states of fear and panic at the prospect of injury and/or death.

Mass Burials — New Site Graveyard

495. The Commission's investigative team also carried out a site visit to New Site graveyard. The Commission had heard testimonies from witnesses about mass burials located there and visited to carry out a forensic review. Witness JWW informed the Commission that both police and military burials lie adjacent to one another, that two graves (with 115 bodies and 101 bodies respectively) were created by Health/Police (including those from Juba Teaching Hospital) in marked bags, and two graves by the Military (including those from the Gudele 1 deaths in unmarked bags and of unknown number). The graves were not formally or professionally marked. The bodies were not individually identified. All burials were cluster dumped without laying out in individual rows of bodies.

496. No "burial permits" were issued for the burials that were done by the Military alone. Commingling (mixture) of bony remains must be expected in those cases buried by the military where no body bags were used, and this would render difficult the specific later identification if and when such may be conducted after exhumation.

[311] According to Witness JWJ.



Fig 10: Graves at New Site Cemetery: four mass burial sites pointed out

497. The Commission's findings on the scene visit concluded that the one grave (by police) dimensions were 6, 4 metres length and 3,5 metres wide at maximum, and that the large adjacent grave was 10 metres wide at greatest length. The distance between graves was 4 metres.

498. The graves in New Site included burials from the Gudele 1 deaths and Juba hospital deaths as well as other deaths that occurred at about the same dates in and around Juba. There are likely a number of graves in Juba that have not been visited.

499. The number of burials cannot be reconciled with the numbers of deaths at specific sites because of different origins of the bodies from different sites, the graves were not site-specific, and there were dual burial "authorities" (Military on one side and the Health/Police on the other).

500. It must be considered a possible violation of municipal or state by-laws for the Military to bury civilian bodies without burial authorisation. It is also against standard guidelines on the correct disposal of the unidentified dead, which stipulate that bodies should be enclosed in provisionally labelled body bags in the event that exhumations may be required for legal and/or ethico-moral reasons. There is thus noteworthy concern that the burials by the military in this manner might have been an attempt to conceal the scale and nature of the killings.

Military Hospital

501. The patient register at the Minor Surgical (Casualty) section of the hospital was not completed for the 15th, 16th and 17th December 2013 owing to extreme pressure and demand on the staff, but the operation theatre record was completed. A massive leap in admission of major cases for gunshot trauma was seen in those 3 days. Most cases were soldiers with gunshot wounds. There was no physical evidence retained by the hospital. The dead were referred to the police for burial.

Giyada Military Post

502. In the visit to the scene of the combat at the Giyada armoury, no evidence of ballistic damage was noted to adjacent buildings or structures.

Juba Teaching Hospital

503. The tension and anxiety amongst staff and patients, where armed soldiers were in and around hospital premises and entered wards with firearms (or soldiers who were patients retaining firearms at their bedsides), were cause for concern and indicated the grave security situation. One armed soldier discharged his firearm within the outpatient department causing panic amongst staff and patients. Doctors spoke of the serious challenge to free discharge of their duties.

504. Only external viewings of the unclothed dead brought to hospital and of live patients who died shortly after admission were done. No formal autopsies were done but the anatomical pathologist stated all corpses had gunshot wounds.

505. Initial admissions were those with gunshot wounds, mainly shot in the back, and the later admissions were those shot from different directions and in different positions, namely at the head, in the chest and the abdomen. Three (3) in civilian clothing were tied by the hands at their backs and sustained shots from the front.

506. Admissions were not categorised in terms of site of origin of conflict, as this information was not known or provided. In terms of ethnic composition of corpses and patients seen, the strong presumption was a Nuer origin on the basis of ethnic scarifications.

507. Only a few bodies were identified by the relatives. The bodies were buried in a cooperative effort between the police CID and the health team. Photographs taken by medical staff were given to the police.

508. No forensic evidence of any sort was collected, but it must be noted that the practice at the hospital would have been to hand to the patient or his/her family any such exhibits such as bullets, etc. taken during surgery.

509. No SGBV cases were identified by the health team during this time of conflict - it was stated that no complaints were received, but it must be noted that any victims of these may not have been seen at the hospital.

510. Interview and examination of one of the very few Gudele 1 incident survivors described shots into the room from the door and through the windows; the hot barrel of the gun passed in through the door burnt his right leg, and he also sustained a superficial ricochet gunshot injury to the left arm.

Jonglei State

511. Much of the fighting in Jonglei had been in Bor. Areas where alleged crimes were committed included Bor town, the State hospital, St Andrews Episcopal

Church, UNMISS Bor Camp, KCB, the market, the school and other parts of the State, notably Akobo.

512. When the events unfolded in Juba, social media was rife with information that people were being killed and information was disseminated. As one respondent told the Commission:

> [T]hen the social media those ones fought outside Juba actually was as a result of actions of the social media[312]

513. By December 17/18, 2013, there was information flow recounting what was happening in Juba. The White Army was mobilised in Bor in Jonglei State to go and defend their people. The White Army is an informal force within the Nuer community that can be mobilised at short notice. Historically, it is understood that the White Army would be mobilised for issues such as cattle rustling or grazing but, latterly, the mobilisation appeared to have taken a more modern turn with aspects of defected army soldiers absorbed into the White Army with command structures for specific operations for a sole purpose. On the role and formation of the White Army, a respondent said:

> The formation of the White Army previously and traditionally it is a Protection Force of the community, because there are cattle raid issues, grazing issues and other issues. There are tribal conflicts. For rival tribal conflicts they use this Force and the common structure is risen by the community. But the Opposition they mobilize this Force by different reasons. In some cases, it is mobilized just to overtake rival areas or as usual traditional for raiding cattle or to loot rival properties because that is the tradition. They use this tradition by way of mobilization. In other cases, some cases of course it is not verified but it is mobilized also since the Nuer population is attacked in Juba and they mobilized it to revenge for that massacre ... for example if they have a plan or an operation to take over some base from the government, they have a defected Army component and they add to that the White Army. They mobilize the White Army and they put within the command of the defected Army. The Army is command structure, it has a General, it has other command structures. They mobilize the White Army, they put there. They do not hold the White Army for a long time, just for one moment of operation ... Then after that, to go back home. Then when they have another plan, they will mobilize. But they have the former defector SPLA Army component they have as a permanent component in their Force.[313]

514. The White Army carried out what might be termed reprisals against Dinkas in Bor. Ugandan troops became involved in the conflict to assist the government.

515. The Commission was unable to meet with representatives of the opposition in Jonglei state, despite its best endeavours, because of security reasons.

---

[312] Witness from Juba. Details on file with Commission.
[313] Testimony from IGAD MVT.

Testimony from State Authority

Meeting with Governor of Jonglei State, John Kong Nyuon[314]

516. The Governor retired from the Army in 2005 as a Lieutenant General when the CPA was signed. He was also Minister of Defence from 2011 to July/ August 2013. He apprised the Commission on the conflict in Bor and Jonglei State, after describing what happened in Juba at the meeting of the SPLM National Liberation Council(NLC) as follows:

> *On the conflict in Bor and other parts of Jonglei State*
> On the 18th I came to the state, the situation here was also not good. There was a rebellion and it was under the leadership of the Commander in Division 8. On the 17th there was fighting in the Division headquarters and also in barracks.
>
> When I came (to Bor) the situation was not good in the town. I was received from the airport by some ministers. Others had decided to leave the town; I met them here in town. The Deputy Governor then (Hussein Mar), has since joined Dr Riek Machar's group. When the ministers were briefing me about the situation and what happened, they said all the organised forces divided themselves into a group supporting Dr Riek and one supporting government, along ethnic lines. When they were briefing me, in the house, we heard gun shots from the Northern side of the town, I asked the Police Commissioner, Ajok Manyong (what was happening). He said he did not know what was happening but had some police on standby. In no time, a group attacked us; we did not know who they were. We escaped the attack and went to UNMISS camp. After that, the army of Division 8 and the police and other organised forces who decided to join the rebellion, took control of the town. Those who were supporters of the government went to the Northern side of the town. We stayed in the UNMISS camp from 18th to 23rd December. On the 21st, head of UN, Toby Lancer, said they wanted to take us to Juba and wanted to take us to the airport. I (asked) told them how we were going to go there, when the airport was under the control of Maj. Gen Peter Gadet. I told them I could not do this (go to the airport) unless I wanted (intended) to surrender myself to Peter Gadet. They then accepted the helicopter to land in the camp; the helicopter picked us up and took us to Juba. We went to Juba, by that time the situation in Juba had become normal.
>
> *Changing of hands of Bor Town*
> On the 24th Dec, SPLA captured the town and took control from the rebels, they controlled from 19th up to 30th December (2013). SPLA controlled the town for one week. On 30th December (2013), rebels took control until 18th January (2014) (town and surrounding areas). At that time we came to the town, we found a lot of mess, a lot of destruction. Even this office was not like this; everything was destroyed. When we came, we made some minor repairs etc. There was a lot of killing; many dead bodies (were) on the ground.

[314] Governor's office, Bor, Jonglei State, 6 August 2014. In attendance were also the Speaker of the State Assembly, the Minister of Cabinet Affairs and the Secretary General of the Government.

Burying the dead

All the parties to the fighting included were among the dead bodies, SPLA, rebels, civilians who had taken up arms, White Army. There were killings in the church and the hospital. There were dead bodies also in the surrounding suburbs. In February we sent an advance team of Commissioners from Greater Bor, they came ahead and also the members of the state Legislative Assembly, this group came here to the town to clean the town from dead bodies and they were followed by another group of ministers, mainly from the area here (Greater Bor). Ministers from other tribes did not come because of their own security. We sent only the ministers from this area; these Ministers came to clear the area. The bodies were buried in mass graves. There are three mass graves, in Northern part of town and one in front of the church.

The White Army involvement in the fighting

White army is a name given to a group who are not soldiers, mobilised by Riek, they are youth. They are from this state but not from this county. The youth organised by Riek are from Nuer tribe, mainly from Lou (Nuer), Gawar and Mayut counties… The White Army are not soldiers, they are people mobilised from their own houses with their own guns. Riek made a mistake, you cannot mobilise people who are not under the command of anyone, because you cannot control them. The command of the White Army is not called a command. They organise themselves when they are in their own houses. They are not commanded like soldiers. When they are in action, they have a leader. Every clan has its leader. When they are in the fighting, they do not have one command.

Displacement of civilians

The fighting displaced the civilians and most of them crossed to the Western side of the Nile. Some of them went to Central and Eastern Equitoria and others as far as Uganda. Displacement began from the 16th, 17th and 18th (December). Some of them went to the UNMISS camp. After the town was captured by SPLA on 18 January (2014), they (civilians) left the camp and went across to the Western side of the river. In February (2014) there was also an attack in Konyang Payam from the Murle tribe (of Pibor county) — by a group associated with David Yau Yau. They killed 28 people including women and children. We thought the attack was from rebels but the community identified them as Murle.

Killings in Juba and beginning of the conflict

When shooting took place, everyone was indoors; no one was moving around on the streets, it was only the army, police and other organised forces. Killing took place in Juba, targeted killings. Some of the people were senior officials in government. I do not know all the details, on the 18th I came here to Bor from Juba. Of course, those who were killing were soldiers. At times, some of them could have been putting on uniforms although they cannot be identified as soldiers (some could have been dressed as soldiers although they were

not). Many people were killed in Mia Saba (107) near Bilpam. There are people from Nuer who were killed.

Government efforts to stop the killing

Yes, the government did, but during the fighting, it was difficult for the government to do anything. Some soldiers were killing without orders from anyone. There was shooting on 15th, 16th and 17th (December 2013) On the 17th, the shooting subsided. When something happens at night it is difficult to know for certain what happened. As civilians we were in the house, bullets were passing over our houses. That is why people will say they were in the house. There was a decision by the Division Commander that shooting must stop and everyone must go back to the barracks.

Skirmishes with Sudanese forces in Northern Bahr el Gazal (NBG) in 2012

This was a general mobilisation of volunteers to defend the country, not mobilisation of militias. In NBG, they volunteered alone (to defend the country), in Bentiu also they mobilised themselves. At that time, some of them were not armed and they remained in NBG. I do not have an idea of who they reported to or where the budget to pay them came from. It is the Chief of Staff who would have to answer about being asked to pay the group of soldiers.

Peace talks and mediation efforts - preparations for next round of fighting

What I know is that there is talk in Addis and the Government and the rebels signed an agreement. It is one person that can violate, not the two people. The person who makes the first move is the one responsible for violation. At that time the Cessation of Hostilities Agreement was violated because there was no one monitoring the agreement. IGAD has now appointed a team to monitor and verify. I do not think the government is preparing for a next round of fighting. You cannot not arm your soldiers because you will be accused of violating (the Agreement).

April attack on Bor UNMISS Compound 17 April 2014 attack

On the 17th (April 2014) I left for Juba, I went to the airport and the Ministers accompanied me. When I was at the airport, the mayor of the town phoned me to say he received a call from Juba saying there is a shooting at Marom market in the town. Immediately I called the police commissioner and told him there is information that there is a gathering of youth in the market, you find out what is happening there. He went and found the youth; some of them were armed and shooting in the air. When he tried to talk to them and stop them, they became very hostile to him. They did not listen to him they pushed him. He called me on the phone and told me they were very hostile.

I decided to send the County Commissioner to join the Police Commissioner. Immediately after they pushed the Police Commissioner, they came to the Governor office and then proceeded and on the way met the County Commissioner. He tried to talk to them and they were very violent. All the

people I was sending are from the area (from Bor). Still they did not listen to them, they said they were going to present a petition to UNMISS; they were asked for a copy of the petition and they refused. At that time the Commissioner of Police, was with those people (the people dealing with the youth), there were no people around and I tried to call the Commander of the Division to put security around the airport. The phone was not going through. I sent two Toyotas to the barracks and to bring some soldiers.

The Coordinator of the camp (UNMISS PoC SITE) talked to me and said we have information that the youth and the SPLA are coming to attack the camp. I told him that it was armed youth and they were very hostile and that we are unable to control them because we do not have police here. While we were talking, the soldiers did not arrive in time and they were already at the gate of the UNMISS camp. They attacked the gate of the UNMISS camp. They killed 46 civilians and 30 were seriously wounded and lighter injuries. Immediately the Ugandan forces took control, who are here, and UNMISS forces intervened. From their side they (the youth) had 5 dead and 15 injured from the youth. From the civilian in the camp, first report was 26 dead and after the fighting it was 46 dead and 30 seriously wounded. This is what happened on the 17th and I immediately reported this to the President. He was not in the country, he was in Addis. I reported on the phone.

Reforms, peace, reconciliation and the way forward

The only thing that will bring peace on the ground is to bring the grass roots in conferences and to rebuild the confidence and restore the trust among them (ordinary people). This is the only way that will bring reconciliation and peace. The peace will come from Addis Ababa but there will (be a) need to bring people together at the grass roots level."

Meeting with State Minister of Gender, Child and Social Welfare, Jonglei State, Rachael Anok Omot*[315]*

517. The meeting primarily focused on the State Ministry's response to the impact of the conflict on women and children with particular focus on sexual and gender based violence (SGBV). The meeting took place at the Governor's offices as the Ministry offices had been looted and burnt. She spoke about the importance of education and schools for children to address the issue of children in conflict and to aid the change of a mindset of conflict in children. She further expanded on the key role education can play in peacemaking in the country, inculcating a sense of nationhood rather than on lines of ethnicity.

518. The Minister spoke about SGBV before the conflict and the advocacy work done previously, the difficulty of reaching the women in the POC and the stigma attached to rape. With regard to sexual violence during the conflict she said:

When the war came, I stayed because I did not think that this thing would go this way. It was especially Dinkas (who were targeted), when the rebels came

[315] 6 August 2014.

the second time; the survivors reportedly raped were women. Those who came to clean up the town said that when they found the bodies, the women were naked, tied up and legs open.

519. The Minister said when she asked the women if they knew the people who raped them, they said they did not; the only thing they know is that they were Nuer and came from other counties. In some cases, they hid their faces behind masks.

Meeting with the SPLA Commander in Bor, General Majeer, SPLA Camp Bor[316]

520. The General joined the army on 15 October 1983. He informed the Commission that he trained in Ethiopia in 1984 and then in Uganda in 1998.When the conflict erupted on 15 December he was serving in Bentiu.

521. Gen. Majeer informed the Commission that the situation in Bor was calm and stable. The only problem was that the Youth continued to attack certain places including Ayod and several times the opposition factions attacked places such as Ayod and Nasir, violating the ceasefire agreement. He stated that at the time of ceasefire signing, President Salva Kiir had announced that there shall be no movement by government troops to violate the ceasefire agreement and they had followed this order. However, he said that the rebels continued to violate the agreement. He underscored that the SPLA continues to respect the rules set by IGAD. The General said that they welcome IGAD and they would welcome any force that is African to help them address the situation. The General further stated that they have a good working relationship with UNMISS and appreciated the fact that UNMISS provides food to their people.

522. The General condemned the attack on UNMISS of April 17, 2014 but denied any knowledge of who was responsible, suggesting that the civilian authorities should know and indicating that there must have been meetings to discuss this matter of demonstrators to which he was not party. The General could shed no light on the SPLA relationship with the Ugandan troops.

Meeting with Ugandan Peoples Defence Force (UPDF)[317]

523. There are three perceptions of the Ugandan troops : the protection of civilians, the view of the rebels that they are in South Sudan to interfere in the internal affairs of an independent State and the view of the government that they are in South Sudan to protect a legitimately elected government.

524. The Commission met with Operations and Training Officer, Lt Ndahura and Intelligence officer Lt Mutabazi. The UPDF officers told the Commission they have 4 battalions stationed in Juba and Nisitu. Their total number comes to 2000 men. Lt. Nduhara indicated that they were in South Sudan to protect all south Sudanese who are under threat including the Nuers who are in Protection of

[316] 7 August 2014.
[317] 7 August 2014, UNMISS compound.

Civilian camps. He indicated his view that the rebels want to gain control of Bor town for bargaining purposes during the negotiations in Addis Ababa. The role of the Ugandan force is to help avert any unnecessary death of civilians.

525. Lt. Nduhara informed the Commission that they arrived in South Sudan, Bor on 16 January 2014 and that he considered that they had been successful in carrying out their mandate to protect civilians; before they arrived in Bor, the town had changed hands between the SPLA and the Opposition forces six times. However, since they took over the town on 16 January 2014, it had never changed hands.

Attack on UNMISS PoC Site

526. On the circumstances surrounding the incidents of 17th April — the attack on UNMISS PoC Site- , the UPDF men gave their version of how the events unfolded. They explained that they had sent some of their soldiers to fetch water. As they were fetching water they reported hearing gun fire around the Governor's House. The reports prompted him, as officer in charge, to go and establish what was going on. He noticed that between the Governor's House and the airport, there was a big group of about 300 and 500 youths armed with guns and machetes. He said he immediately contacted his commanding officer in Juba General Kayanja. Who gave him three orders:

1. Get the soldiers in the camp ready for defense;
2. They should go and rescue the soldiers who had gone to fetch water;
3. They should create liaison with UNMISS officials.

527. They proceeded to rescue the team that was at the water point. The forces have a team of medics in Bor who came with the team, so after rescuing the soldiers they went to rescue the doctors who were working with the UN. Later on they called the SPLA Liaison Officer who also informed them that the situation was bad. General Kayanja called once again and instructed that the UPDF were to protect the civilians at the UN compound. They thus deployed 200 troops, six tanks, 6 BMPs 2's and 7 IFV's. When they arrived there, they noticed that there was still some shooting.

528. Lt. Nduhara continued:

> I called a UN officer called Col. Graham and met him at the gate. Meanwhile our troops commenced patrolling the area around the camp and chasing away the attackers. Subsequently, we deployed around the UN facilities to ensure no more attacks on them. We deployed our troops from the 17th to 21st April (Four Days). Meanwhile we carried out aggressive patrols within the Bor town. We also provided protection to the Residence of the Governor.
>
> When all of these fast paced events were taking place, we engaged the Bor Government officials and asked them to urge the youth to stop the attacks. We spoke to the Governor, to the Mayor, the SPLA, the Commissioner of Police and asked them two things;
>
> 1. To stop the youth and

2. If not stop we will deal with them

When we called the Mayor he was with the Governor. Incidentally the entire cabinet was at the airport with the Governor who was departing for Juba. We received from the government the response we required because the Governor sent the State Minister of Youth who unfortunately the Youth defied as he is not a Bor Dinka. The Mayor was called to assist and he was able to talk to the Youth as he is a Bor Dinka.
Once the fighting subsided, we ensured that those wounded were taken to the hospital in Juba. There were ten dead bodies, they were from both sides. There were seventeen injured people. Some of those injured were flown by the SPLA while others were taken by Médecins Sans Frontières.

529. Lt. Nduhara says that when he next spoke to Col Graham he informed him that he was getting his troops ready to deploy out of the UN compound. He says he advised against such a course of action because this would have been perceived as an all out war with the Youth and would have much more disastrous consequences.

530. When asked about the activities of Peter Gadet, Lt. Nduhara said that as far as he knows, before the 15 December incident Peter Gadet was Commander of Division 8th in Ban pandia. When rebellion broke out, he defected and moved to a place 4 kilometers from Bor. When the Ugandan forces were advancing to Bor town, in a place between Terekeka and Gemeza counties, there was heavy fighting with Peter Gadet on 13th January 2014, who was fighting UPDF in an attempt to stop our forces from arriving in Bor town.

531. Lt. Mutabazi augmented his colleagues' presentation by adding that they came to intervene and put the situation to normal. They came to rescue the civilians. He differentiated their mission from that deployed in Somalia. He said if the South Sudan situation is not secure Uganda cannot be secure. He underscored that while it may be necessary to defend yourself internally, here you had a situation which was developing at supersonic speed and therefore it is equally important to stop it.

Use of Cluster bombs

532. The Commission inquired about the persistent reports that there were cluster bombs, which are considered unlawful by international law, used by the UPDF in Jonglei. Lt Nduhara responded by saying bombs are bombs they fragment when they explode and thus can be mistaken for the cluster bombs. As far as he was concerned they used normal bombs and cannot understand why people say the UPDF used cluster bombs.

533. On the ceasefire signed in Addis Ababa, when the team was asked how it should be viewed, they said that the period was being used by the two sides to arm their forces. They stated that in Nasir the SPLM in Opposition had recently killed people the week before when they attacked a place called Ayod they violated the ceasefire. The UPDF stated that the SPLA was on the defensive because of the attacks of the Opposition troops. In their view the SPLA is responding to the command from the President not to be on the offensive.

534. When asked about how long they think they would be in South Sudan, they stated that they are ready to leave anytime they are told to. They said they are still here because they had to protect civilians. They stated that neither the SPLA nor the UNMISS is in a position to provide the necessary protection to the civilians. They went further to say that the UN has been grossly compromised by the 17 April situation as they are viewed to be protecting Nuer rebels. They informed that ordinary citizens as well as the political leaders feel that the IGAD forces, once deployed, should not be deployed in the UNMISS camps, otherwise they would be treated the same way as UNMISS forces.

535. The Commission sought their views on how the AU Commission of Inquiry could be of help to address the current situation. They would like the AU Green Berets to come and assist the Blue Berets. On integration of militias, the UPDF felt that the integration of David Yau Yau and other militias is not helping the situation, the only thing they believe is required is the AU forces. On whether the UPDF should be a part of the Green Beret, as there are those who say that countries should come from afar with no direct interest on South Sudan. They said Uganda has no direct interest and so could be a part of the AU forces. These forces would have AU standard operating procedures and would be reporting to the command and control of the AU.

Testimony from Other Sources

536. The Commission heard testimony from diverse groups and individuals including witnesses and alleged victims as well as from a number of humanitarian organisations, one of which stated:

> …with regard to this … there is no valid reason for the massacre to the civilians. They took babies. They were civilians they were women and children. They were not armed they were summarily executed. The perimeter was breached…Because this wasn't a matter of military engagement between two other parties it was a group of [Inaudible] coming in to massacre civilians. We saw for we were there.

537. Members of youth organisations from Bor also met with the Commission and gave testimony about how they came to be displaced. One young man said:

> …So on the 17th …when I tried to call some of my relatives they told me that …they started killing people. I left on the 18t people were displaced…and the rest of the people we spend at least six days in the cold. I managed to cross with those who could not walk, those who were trapped by the church remained in Bor and they were two.

538. Another youth said about the December and April unrest:

> [W]hen the government took over the town I came out …and I crossed the river…Then I left on Saturday, I went, I slept by the riverside. On Sunday I left. On Monday night, they arrived in Bor, and they killed 24 women in the church. I thought you could also investigate that. 24

> women, innocent women who were praying in the church. After they killed them … That was on 30th of December. These ladies they were in the church. They were raped, after raping them they were killed. And they stick…on their private parts. The media or those people from the [Inaudible] they came and they saw themselves. … So then concerning the 14 April, is it? 17th, I heard them say there was a peaceful demonstration. I personally I was within Bor area but I didn't know what was going on in that side. And what they…. but I saw people came here running the office here, moving. The custom was in the airport …They went. As the peaceful demonstrators they UNMISS opened fire on them.
>
> The army came … to have one by one killing people. So the time when they were killing people, the rest of the people who were seen that the army killing them, those are the people … as my brothers have said before and the rest went now to the other side of the river… We don't know why killing innocent people.

Women's Voices

539. On 7 August 2014, the Commission met with eight women IDP leaders (mostly Nuer) from the BOR UNMISS PoC SITE[318]. The meeting with the women focused on obtaining the women's perspective on the conflict, to gain an understanding on the impact of the conflict on the women and hear their thoughts on prospects of the future.

Genesis of the conflict and events in Bor

540. The women told the Commission that when the crisis started, they ran to the UN base for protection on 18th December 2013. While they were in the POC, the government troops came, and they ordered all Dinka to leave the POC. They knew it was the SPLA soldiers or troops because they would come with their vehicles to the UNMISS camp and call their people to come out. They took them with SPLA vehicles and evacuated them to different places. All foreigners were also evacuated from the PoC. The women said they did not want to be evacuated because they felt safer in the camp. The government said people could leave, but many people were killed on their way leaving the PoC and that is why people came back and others stayed. They are unable to go out of the PoC because they realised if the government is the one killing people then they are not safe.

Safety and security of civilians in Bor

541. They reported not feeling safe in the POC and referred to the attack on the 17th April (2014). They said they also heard rumours from other government officials, speaking to the youth in Bor. The National Chair for Bor Community (also Minister of Information) Michael Makuei (who is a Bor Dinka), came to the PoC in February 2014 and addressed the people and told them it was now safe to go out to town. The people in the POC told him that it was not safe and that when they go out to collect fire wood they are killed. When he left, the women reported that he gave orders that the people in the POC should be killed as they

[318] Details of the respondents are on file with the Commission.

are rebels. Yet, when the government came for assessment in the POC it was clear that they were civilians in the POC and there are no guns.

542. The women gave an example of one time when women went outside to collect firewood and one woman was taken by SPLA and kept the whole day. She had left her baby in the POC and she did not come back. When she came back in the late hours she reported that she had been raped by the soldiers outside. The people who raped her were SPLA soldiers in SPLA uniform.

543. On the loss of livelihood, an elderly woman said:

> I want to share on something I witnessed and something that had an impact on me. We are suffering a lot in the POC. Now it is like we have been put in prison, we are suffering from all sorts of diseases; the attack on the PoC in April is affecting us. When we were living our normal lives, we had a choice on what kind of food we could eat, but now we have no choices or options. I blame the leaders because they are failing to manage the people. They started this crisis in Juba and it had nothing to do with us. When we came to the PoC we were coming to seek the protection of the UN, but we were followed to the PoC and also attacked. When we were outside we had all our property but now we have lost everything. In our culture, if you are in your home and someone comes to chase you out of your home, you can fight back. We lost everything and are now in the PoC with nothing.

April 17th attack on UNMISS PoC SITE

544. The women reported that when they (the attackers) came, the type of machine guns (they) were using were very new, and that showed that the government provided the weapons to the attackers. They additionally indicated that the attackers were Dinka. One woman gave testimony of what she witnessed:

> What I witnessed on the 17th of April (2014), was beating and shooting of women, pregnant women had the stomachs cut open. I was also beaten and almost shot, but survived because the man's bullets ran out. The attackers were mixed, some in SPLA uniform, some in police, some in prison, some in wildlife, and others in civilian clothes. They looted some of our property and when they left, they left in SPLA vehicles. (There was) someone called Deng — (a policeman) — and James (wildlife personnel), Makur (a Dinka) and (SPLA) were identified. Makur was initially in the POC and then later went out from the POC and then came together with the attackers.

The visit of the central Minister of Information, Michael Makuei February 2013.

545. The women narrated on the Minister's visit, and the refusal to allow him entry into the POC with his guns. He wanted the community to come and talk to him outside, however the UN refused. The Minister then said if "you don't want to talk

to me outside, you will see". In the end, the IDPs talked to the Minister through the gate.

Identifying the dead and abductions

546. The women reported that no one is able to go and bury the people killed outside the POC and that sometimes, the bodies of those killed are displayed on the fence of the PoC. Some of the young women, girls and children, were abducted especially on the 17th April. Of 11 girls taken, one was killed and the body found just outside the gate. They hear that she was killed because the group fought amongst themselves about who should take her and then at the end they decided that no one should have her and they killed her. The other 10 were taken with the SPLA. The women suggested that perhaps the soldiers want to make wives of those taken to be divided amongst them.

On Accountability

547. They said:

> The President (Salva Kiir) should be held accountable because he allowed the situation to escalate to affect civilians. We voted for him and he should protect us. Many people fought for liberation, not only Dinkas, many people died, even Nuer. The problem is that the government has brought foreign troops to be involved in the fighting and so reconciliation will be very difficult. The government must be inclusive. Other foreign people are dividing the people (of South Sudan). As South Sudanese, we have our own ways of reconciling and coming together, but we need the foreign troops to leave and then we can resolve our differences. We can forgive each other if there is no involvement of other people. Those who committed crimes should be brought to justice.

The Humanitarian Situation

548. The Commission was keen to get a sense of the humanitarian situation on the ground, how it was being addressed. It thus held a meeting with a number of humanitarian organisations on 6 August 2014. The greatest challenge however for all the humanitarians concerned freedom of movement for the IDPs. It was not possible for IDPs to leave the POC and access the market. Further, people are traumatised and it has been difficult for them to be confined to the POC for the six to seven months.

Movement of civilians

549. It was reported that since February, the greatest difficulties have been movement. There are threats and harassment of IDPs outside of the POC. In February, there were three sets of abductions, (out of these) one person returned and one was later found dead outside the POC. Concerning the 17th April (2014) attack on the PoC, there is state responsibility to protect the IDPs. Mostly women and children were killed and there were also some abductions. In March and April there were enough incidents where people were going to be medically evacuated

but the authorities refused to evacuate Nuer sick people. They were told that Nuers would not be assisted to be evacuated, they should die here. There have been both restriction by omission and commission, where sometimes they (government authorities) want to get injured soldiers ownto humanitarian flights.

550. There are numerous challenges of movement for people from the POC, at the airport people are subjected to harassment and scrutiny. There are processes to get people on flights but these are very stringent and it is clear that there is targeting of Nuer and these screenings are only confined to Nuers nationals. All these restrictions limit the livelihood activities of the people in the PoC. There are high feelings of insecurity and fear, which the organisations believe are legitimate, the Commission was told. On the 1st of May, 2 men going into town were taken by SPSS; one of them was summarily executed and the other one managed to escape with wounds. Three weeks earlier, an IDP from Central Equitoria who is a trader was abducted and detained in town for a few days, he was given a choice to remain in the POC or return to town but could not do both.

Unaccompanied minors and parent tracing

551. A child protection agency reported that since April (2014) they had had a lot difficulty ensuring they could transport unaccompanied minors for reunification purposes and have had challenges bringing children back to the POC. They are made to disrobe in front of five men in order to prove that the child being brought back is indeed the one who documents say it is. They report challenges on restriction of movement; and discriminatory practises.

Access and provision of humanitarian assistance — potential for conflict

552. They further reported instances where humanitarian partners are responding, some authorities think they are favouring the areas where the opposition is in control i.e Ayot County. Humanitarian response is taking place for 30,000 IDPs in Jonglei state, 50% of them are being reached by the humanitarians. Most of the areas have not been reached because of insecurity.

553. There is a perception from the people living outside the POC that humanitarians are not doing anything for them but more for those in the POC. The people within the POC cannot go out to find firewood or the market for other goods. There is a huge need to pay attention to the returnees. In the last month, about 50% of the former population of Bor town have returned. The town is now bustling, compared to the situation a few months earlier. In Bor town there is sufficient shelter whereas in other counties all the shelter was destroyed, so many of these people are returning with nothing. There is potential for inter communal conflict, because many of the people who are in Bor town now are not necessarily Bor residents so they are staying in shelter that is not their own. There needs to be mapping of what could happen if the owners come back. There is a lot of movement between Minkamam and Bor with people gauging the situation to see if it is possible to come back. There is a disconnect between the statements of the government saying people can come back to town but it is not matched by actions or an enabling environment.

554. The following is an analysis of the evidence collected and analysis made in relation to events that transpired in Bor between 17th December 2013 and 17th April 2014.

555. The Commission was told that the events in Bor began on 18th December 2013. However the Commission learnt about isolated and sporadic attacks that were carried out between 15th and 18th December. According to witnesses on 15th December some Dinka youth were killed but the events climaxed on 18th December when it is alleged that the commander of SPLA's Division Eight, General Peter Gadet, defected and joined the SPLA/IO. It was alleged that the violence in Bor was sparked by the shooting of a police captain called Chau Mayol Juk by the then minister of law enforcement called Lieutenant Colonel Duop Lam. He has apparently since defected to the opposition.

556. Witness BWF testified that on 17th December 2013 General Peter Gadet and his soldiers defected from Panpandier and moved to Khorinyang. This evidence was corroborated by witnesses BWH, BWI, BWU and BWN.

557. In the afternoon of 18th December 2013, it is alleged that Dr. Riek Machar arrived in Bor town using a motorboat. Slightly after his arrival policemen led by Lt. Col. Duop Lam killed civilians who were trying to cross the river. Several witnesses testified about this incident. For example, witness BWN stated that at around 4.30 p.m. he went to the riverside near the office of the Criminal Investigation Department where he saw the former minister of law enforcement, Lt. Col. Duop Lam coming with policemen and soldiers and shooting and killing civilians who were trying to cross the river. This witness further stated that Lt. Col. Duop Lam shot and killed Captain Chau Mayol Juuk. This is corroborated by witness BWI who testified that on 18th December 2013 he saw people drowning in the river when they were shot at while trying to cross the river.

558. Witness BWM narrated how from 1st January 2014 in her neighbourhood called Panjak she witnessed the White Army kill at least six people known to her, among them a child.

559. Witness BWU also testified that Dinkas were killed in Bor that on 18th January 2014 in the afternoon, civilians who were trying to cross the river were shot at and killed. Those who were not killed drowned while trying to cross the river. The witness further testified that he was attacked by Nuer youth who shot at him and his two colleagues including his driver who were killed.

560. Witness BWC also testified on killings that were committed at Bor State Hospital. the witness who left town on 30th December 2013 returned on 23rd January 2014 and found dead bodies in the wards. According to the witness some of the deceased were patients and civilians she had left behind when she fled from the violence. In total the witness found 45 civilians including six women and three children dead.

561. Several other witnesses testified about rapes perpetrated against them by men in uniform particularly witness BWP who was raped by soldiers at Khorinyang. This was the place where the first defectors went from Panpandier.

Another witness who was raped was BWR who was raped in the afternoon of 18th December 2013 while at her home in Bor town. Witness BWS who lived near the Anglican Church in Bor was also raped in her home. All the witnesses corroborate each other on important features of their evidence on how the rapes were committed. For example, they all stated that they were gang raped and the rapes were perpetrated by men in uniform believed to belong to SPLA/IO.

562. The majority of the women stated that the rapists consistently uttered verbal references to be reiterated against Dinka, thus confirming that women were being targeted not only because of their gender but also because of their ethnicity. In Bor Nuer women also allege acts of SGBV including rape was perpetrated against women during the armed conflict in Bor and when some Nuer women left the camp for one reason or the other. 319 Two witnesses testified that government Dinka soldiers attempted to rape them. Witnesses BWG and BWK both testified how they were approached by Dinka soldiers who indicated they were going to be rape them because they were Nuer. Witness BWK stated she escaped rape after convincing the Government soldiers that she was in fact Shilluk and not Nuer. Witness BWG stated that she was rescued by an Equatorian soldier who received orders from the governor to release her since her late father was a friend to the governor.

563. The evidence of mass killings recorded in Bor town, support the allegations that killings were committed at St Andrew Cathedral, at Bor State Hospital, Bor Market place, at the CID compound (river bank), at the Police barracks. Other areas where massive killings took place within Bor town are Panjak, Malou and Marol areas.

564. From the evidence on record, Peter Gatdet defected on the night of 17th December 2013 with mostly Nuer soldiers. In the process of defecting, the general ordered the killing of his deputy in Command Brigadier Ajak Yen. The evidence also suggests that on 18th December 2013, soldiers under his command killed a prison warden called Lt. Manguak in Block 4. On the same date, mass killings were committed in the neighborhood of CID offices, near the river bank. The killings targeted civilians of Dinka ethnicity who were trying to cross the river fleeing the impending war. Therefore the Commission finds that indiscriminate killings against civilians were committed by policemen led by Lt. Col. Duop Lam in the neighbourhood of the CID office near the riverbank.

565. The Commission also believes that systematic killings were carried out in various parts of Bor town. Evidence on record indicates that defected soldiers together with White Army went around Bor searching and killing civilians of Dinka ethnicity. This conclusion is derived from the evidence of BWM who recounted how a child was killed by soldiers she believed were Nuers from the SPLA/IO and white army. This witness testified about the killing of other six males and females

[319] Focused group discussions with 55 Nuer women in Bor on 9 September 2014, the Chairperson of the Women in the POC, BWJ confirmed there were women who were raped. One of the identified rape survivor could not give her testimony because her husband had reservations in her talking to the AU investigators at this stage when they were still battling with the appalling conditions in the PoC where they had stayed for nine months. The investigators suggested counseling to prepare the survivor to make an informed decision regarding the right time to give her testimony.

who were not participating in the fights. They were killed in Panjak neighborhood. Other corroborative evidence on the house to house search was provided by witnesses who were raped from their homes or from bodies that were retrieved from the houses after the war.

566. The evidence of destruction and looting of property was still visible when the Commission visited Bor Town.

567. The forensic analysis of the incident sites or crime scenes concluded that the killings (and destruction of property) were committed anytime between 18th December 2013 and 18th January 2014.

568. Regarding the attack on the PoC, both the victims and the community outside the PoC agree that the attack took place on the 17th of April 2014. Witnesses stated that the PoC was attacked by a group of people including armed police officers and soldiers as well as youth wielding traditional weapons such as spears, stones, sticks and cutting devices. 46 people were reported to have been killed and many wounded. Majority of the dead were women and children. A uniformed police officer suspected to be one of the attackers was killed during the attack and his body recovered at the entrance of the PoC[320]. Two UNMISS soldiers from the Indian contingent were also reportedly killed.

569. The recovery of the body of a policeman in uniform from the PoC, the return of the suspected attackers to town, to their normal lives and the fact that no investigations have been conducted or arrests made to date by the authorities lead the victims to suspect that the killings might have had the support of government officials in Bor.

570. The Commission considers it reasonable to believe that there was a close working relationship between the SPLA/IO and the White Army. Not only did Riek Machar inform the Commission that he was in command and control of the White Army, the Commission also spoke to other witnesses about the command structure. One insider witness stated that the White Army came from Ayod, Yiror, Nyiror and Akobo to reinforce Division Eight soldiers in Bor. He further stated that when the government mobilized its forces against the SPLA/IO and White Army in Bor General Peter Gadet and his White Army pulled out of Bor on 25th December 2013. They retreated to Gadiang where Dr. Riek Machar was. witness further said that the regional field military commanders report to the Chairman of the movement who is Dr. Riek Machar. Another witness BWF provided corroborating evidence that soldiers who defected from Bentiu moved down to Panyijar and merged with the White Army. The elders among the White Army were given ranks matching government ranks. Confidential correspondence dated 20th June 2014 addressed to Dr. Riek Machar by a well established international humanitarian organization reported atrocities that were committed by SPLA/IO and allied militias in Bentiu. Additionally, Dr. Riek Machar himself claimed victory after capturing Bor on 31st December 2013 and Bentiu sometime in January 2014. This was widely reported by international media houses.[321]

[320] See witness statement of BWT

[321] See further, http:/bbc.com/news/world-africa-25480178, 22 December, 2013.

571. Therefore from the foregoing, Commission is of the view that SPLA/IO was closely working with the White Army and they were under the direct control of their commanders.

Forensic Review

Bor Hospital

572. The Commission's investigative team carried out site visit to undertake forensic reviews at Bor Hospital, Bor Church and UNMISS compound.

573. On 23rd January, on returning to hospital days after fleeing the conflict, staff found the bodies of soldiers and civilians in the hospital. Forensic scene visit showed bullet wounds in the walls of the hospital outpatient building and destruction of property and vehicles



Fig 11 Bullet defect on hospital plaque as
At entrance to outpatient department



Fig 12: Bullet defect at edge of plaque shown on the left





Fig 13 and 14: Bodies as seen on photograph on the left taken on 2014/01/24 by witness showing early mummification stage of putrefaction found outside the wards. Body found inside ward (taken by same camera as that on the left, showing black putrefaction.

The pathological features in both the indoor and outdoor cases above are those of early mummification with largely retained soft-tissue continuity but collapse of subcutaneous tissue with desiccated skin and blackened body fluids soaked into the surroundings, in keeping with the stage of "black

putrefaction" and thus infer a post-mortem interval since death of between **10 to 20 days**[322].

Bor Church (St Andrews Episcopal Church)

574. Two individual graves and a larger mass grave were noted. The smaller graves each contained the body of a pastor killed, whilst the larger mass grave contained the bodies of 18 women and 2 men; all were Dinkas and no autopsy examinations were done. The cartridge case of a rifle bullet was found and retrieved from the wall of a smaller building.



Fig: 15 Graves at Bor Church

575. A mass burial site contained three graves, each 70 x 6 metres wide; in one grave there was seen a body which was exposed and incompletely buried.



Fig 16: Mass burial site at Bor

[322] M. Lee Goff. Early post-mortem changes and stages of decomposition in exposed cadavers. Exp Appl Acarol (2009) 49:21—36

UNMISS compound (April 17 2014 attack)

576. A large mass burial site within the UNMISS compound, at GPS location N 06^0 11 572'and E031^0 36 481'was inspected. It was reported by the UNMISS Human Rights Officer that 46 bodies from the April 17th conflict were buried there (21 adult males, 16 adult females, 3 male children and 6 female children).



Fig 17: Mass burial site at the UNMISS compound at Bor. The white paper markers outline the grave position which has been overgrown with bushy grass and weeds.

Unity State

577. In Unity State, Bentiu, the capital has been the focus of much of the fighting, having changed hands several times between government and opposition soldiers during the course of the conflict. Other areas within the state have also witnessed fighting. As is the case for Malakal in Upper Nile as well as Bor in Jonglei, Bentiu town is largely destroyed. The neighbouring town Rubkona, has also seen much fighting. At the time of the Commission's visit, Bentiu was under the control of government. In Leer county, the Commission heard testimony that government forces destroyed almost everything, killed civilians, burned houses and farms, killed cattle, committed sexual violence, and killed children and teenagers despite the cessation of hostility agreement signed in Addis Ababa. At a meeting of elders in Leer County on 1 August 2014, the Commission was told:

> In the fighting there was killing [of] dogs and civilians together. Something we have never seen… You are lucky that you found us today. It is because there are rivers in this State otherwise you would not have found survivors.

578. On 2nd August 2014, the Commission was provided with a list at Bentiu POC detailing people killed; 3 women were raped on 30th May 2014 when collecting firewood by government troops, 3 women disappeared in the bush when collecting building materials on 30th March 2014 which they attribute to government troops, 3 women were raped and killed by soldiers on 8th May 2014,

12 youths were killed by government soldiers on 8th May 2014, 9th May 2014 and 20th May 2014 respectively, 1 girl was shot and wounded when fetching water near UNMISS camp by government soldiers, 3 boys were captured at UNMISS gate and killed by government soldiers, 2 women from the POC detained in Bentiu town as rebels.

Testimony from State Authority

Meeting with Acting Governor, Unity State

579. The state capital is under government control. The Commission met with the Acting Governor of Unity State who expressed the view that the continuous cycles of fighting and violence were unfortunate. The conflict was perceived as a conflict between Nuer and Dinka from an event that started as what he described as a coup. The fighting had a severe impact on civilians. He added that fighting had extended to Aweil North (now one of the opposition controlled areas).

Events in Juba and linkages with the conflict in Bentiu

580. The Acting Governor put to the Commission his views on the fighting in Juba and linkages with the conflict in Bentiu. It was his view that the conflict did not arise out of the disarmament of Nuer soldiers; in fact the rules of the army required an individual to return their guns to the store if one was not on duty. When they (the group who started the shooting) came, one Dinka and one from Juba, broke the doors of the store, and took the guns, they were defeated by the Tiger Batallion. The anti-tank arrived and defeated them. When the Government fought back, they mobilized civilians living in close by areas, Gudele, Mia Saba, and other areas. The Headquarters is big and there were about 1000 guns. When the stores were opened, civilians, or those posing as civilians, came and took the guns and started fighting. When government came, they hid guns and said they were civilians. They hid amongst civilians and this is how many civilians got killed.

581. The Acting Governor recounted that he arrived in Bentiu on Monday 16th December (2013); at the time he was the County (Rubkona) Commissioner. There was a security meeting held to look at what happened at Headquarters in Juba and the potential of a similar incident happening in Bentiu, Unity State.

582. According to him, an incident took place in the barracks and Maj. Gen. Makul, captured two of his Dinka soldiers and he shot them. When their Commander General Kong asked what happened, Maj. Gen. Makal said that there were two soldiers who ran away. That night, youths who were in a company captured 5 Dinka civilians and killed them. The fighting in Bentiu started between Nuer and Dinka. The Security Advisor sent a vehicle and collected the bodies. On the 17th December, Nuer soldiers captured 6 soldiers in Mukom (location of military police) and killed them. Any soldier who saw a Dinka killed them. When asked why, they said two soldiers had run away. On the 18th December 2013 the Governor was to come to Bentiu from Juba for a meeting. According to the Acting Governor, Nuer soldiers had a plan to capture the Governor from the airport. The Governor came with the Division

Commander. During the meeting the Governor explained that what happened in Juba was not between Nuer and Dinka and he made a decision that no one should kill each other and peace should resume. The meeting was closed soon after that.

583. After the meeting, at about 9 pm, soldiers started to loot the market and killed some Darfuris and a Nuer woman was killed. In the morning, the Acting Governor sent for the Division Commander James Kong Chol and asked him why a civilian woman had been killed. He was unable to answer as he did not know but he did say he could not control the soldiers and that he tried to tell them to stop. That incident occurred on the 19th December 2013. That night, Nuer soldiers captured all Dinkas under Brig Gen Michael Makul; several were killed and many were brought to the State Governor's office. A platoon of national security was brought to the office and the Acting Governor took them to the airport and they were evacuated to Juba. The rest of the officers, even those of captain rank were killed on the 20th December 2013. Brigadier Mang Jok, Colonel Ajang, and other Officers took them and put them in a vehicle to Abiengyom. Fighting in Bentiu started on 20th December. On assessing the situation, it was discovered that once the fighting had started, Nuer soldiers had killed all soldiers and officers and burnt properties. The Acting Governor stated that he suggested to the Governor that they go to his Payam to speak to civilians and was given authorisation to do so. Upon his arrival in Biel, his vehicle was shot at. He told his driver to stop the vehicle, they shot at him and the soldier who was with him. He asked why they were shooting and whether they had been ambushed by soldiers They then fled by foot and were pursued. The Governor left and went to Juba and has been there since this incident. The Acting Governor stated that he has not left Bentiu except for his swearing in ceremony as Minister in April 2014.

Changing of hands of Bentiu town

584. The Acting General noted that government forces captured the town of Bentiu on 10th January 2014. On 14 April 2014 government forces went up to Leer, Mayendit and Lonlon. The government forces had information on when the opposition would come. They informed government forces that they were ready to fight them. He explained that the opposition have weapons, they started fighting, defeated their forces, and advanced closer. The opposition forces camped around the Headquarters. They have knowledge of the area because as he put it, they are sons of this area. When fighting started early in the morning they defeated the government forces. Government forces went up to Mayom and Abieynom and they followed them. The opposition killed Darfuris who have lived there a long time. On 4 May (2014), government forces defeated them, on 5 May opposition forces attacked and captured the state on 8 May (2014). On the 9th of May (2014) the cessation of hostilities agreement was signed but opposition forces attacked the government on 10 May. This fighting lasted until 3 June in Bentiu. The Acting Governor said that the opposition had also launched an attack on government forces in July.

Identity of the attackers

585. The Acting Governor told the Commission that Nuer youths of Unity State are responsible for the attacks, led by Peter Gadet who is the Division Commander. The White Army and the youth were one and the same thing. At the time the opposition

forces went to Loyloy, they called the youth to come and get guns because they were going to fight the Dinka. The people who attacked the government forces were a combination of the Division 4 soldiers who had rebelled/defected and the youth, who, once the crisis started, were collected, organised and mobilized to fight against the Dinka.

Violence against women, sexual and gender based violence

586. The Acting Governor informed the Commission that he did not know of any cases of violence against women or sexual and gender based violence. He did, however, add that some cases had come to the State authority's attention. He acknowledged that there had been incidents where women who had been walking around late at night were raped and that there was a long line between the UNMISS camp and government military lines where no one had jurisdiction. However, the State authorities had not received any reports that their officers had perpetrated these acts. He noted that the only people who government expected to be walking around at night were rebels. A recent problem that had arisen was that of women who were suspected of giving information to rebels about their military strategy. He emphasised that women were being used as spies to give opposition forces information.

Meeting with the SPLA Commander of Bentiu/Rubkona

587. The SPLA Commander informed the Commission that when he arrived many events had occurred in Division 4 in Bentiu including fighting after the signing of the cessation of hostilities agreement. He explained that the rebels kept attacking and since June had attacked twice. Attacks had happened south of the Nile river (a Payam called Mantou) and they had also attacked government forces in Bentiu in June. The impact of the situation in general, could be seen in UNMISS PoC SITE. He added that some of the fighters were being misinformed that the fight was between Dinka and Nuer, but this was not true. He told the Commission that those who were in the bush fighting were sons of Bentiu, the same as those of us fighting on the side of the government.

588. He went on to say that Riek and Taban claimed to have a problem with Kiir. They were all sons of this state. Peter Gadet is a son of the state. Their mothers and fathers were dying. The sons of Warrap (Dinka) were not dying. He said they were coming to attack Bentiu but they (government forces) did not want them to do that and they would not go and look for them. Salva Kiir was not in Bentiu, he was in Juba. He said he could not be forced by the government to go and attack the opposition; they were his brothers. Since his arrival in Bentiu he had opened some of the routes to enable people to come and buy food and return to their villages.

Army reforms and tribal divisions

589. The Commander noted that the army was one army and he refuted claims that it was divided along tribal lines. On the ground in Bentiu, their perception was that those in Juba were fighting over government posts. He added that the claims that the fight was a Nuer and Dinka fight were not true and this was a small component of the conflict that could not be used to explain the entire conflict. There

were 63 tribes in South Sudan that lived together; those dividing the army were those who wanted power. The Deputy Division Commander was a Nuer who was commanding Dinka. The Division Commander himself was a member of the Tiger Battalion and was not a member of the SPLA.

Violations of the Cessation of Hostilities Agreement

590. The opposition forces attacked Bentiu in June regardless of the fact that an agreement had been signed. He expressed the view that the government forces were eagerly awaiting the deployment of the IGAD force that would hopefully ensure the people in the camps found relief.

Fighting in Bentiu

591. The Commander stated that he was in Juba on the 15th of December 2014 and that the politicians had played their political battle in the army. He emphasised that there was never any order for any individual to kill Nuer and Dinka. The politicians were responsible. He came to Mayom on 23 May 2014 and heard allegations of incidents in February and March but there was no evidence, details or reports.

Violations against women and Sexual and Gender based Violence (SGBV)

592. The Commander explained that at the beginning of the war in February and March, there were many reports and incidents of SGBV largely because of the difficulty of controlling 10,000 troops. He narrated that upon his arrival in June, UNMISS personnel had come to him in Mayom, and told him there were people who wanted to collect their food items and they were being prevented from doing so. Before his arrival, he had issued orders that he did not want anything to happen against the women. Since then, he had not heard anything happen against women. He added that when you are at war, you cannot control the forces on the ground if you are not there and you are in Headquarters.

593. He stated that the former Division Commander James Kong Chol was responsible because there was fighting and no order. When he arrived, he did not allow any soldiers to commit acts of rape and it was his duty to defend the women. Acts of SGBV were happening before the Commander arrived in Bentiu but when he arrived he put a stop to it.

Young people involved in fighting

594. The Commander said he believed that General Peter Gadet was recruiting children under the age of 14 and this was as a result of orders from Riek Machar and Taban Deng. It was not possible for children to self-mobilize. Riek Machar claimed to be the leader of Nuer and those who were in the UNMISS PoC Site are Nuer. Why did he not accept peace when those who were dying the most were Nuer. He further added that this was the second time Riek was doing these things.

Young recruits from Northern Bahr el Gazal

595. The Commander stated that he had no knowledge of any young men mobilised or trained in Northern Bahr el Gazal. He was only aware of a group trained by the SPLA who had been graduated by former Chief of Staff (James Hoth).

Testimony from Opposition Forces

Meeting with SPLA —In Opposition

596. The Commission met with Leer County Acting Commissioner — In Opposition (IO), and SPLA — In Opposition (IO) Area Commander and Brigadier General Michael Dit, SPLA-IO.

On the genesis, evolution and impact of the conflict

597. The Acting Commissioner was of the view that the cause of the conflict was the refusal to allow Dr Riek Machar to run as President in the next national elections, his removal as Vice President and the removal of his bodyguards. There was no coup attempt; it was simply a way to get rid of Nuer people.

598. The Leer Area Commander (SPLA —IO) mentioned that he himself was attacked by soldiers in Eastern Equatoria where he had been Area Commander in Torit and had evacuated himself.

599. Brig Gen Michael Dit — (SPLA- IO) stated that he was in Juba and moved Dr Riek Machar from the house around 9.35 pm when the incident started. When fighting started in the military headquarters, some Nuer soldiers were attacked. It started because they were disarming the unit, Presidential Guard. It was started by Major General Marial Chonoung. When fighting started, the first person to be shot was guarding the gate. This was around 9.45pm in the evening. When they attacked the New Side unit, it was 10.15pm. People were fighting until 3am. He went to move Dr Riek Machar to a place called Edem North in the bush. They managed to only take him and had to leave his bodyguards. According to the Brigadier, they fought from morning until 12 noon. Riek Machar's three body guards were killed on 17th December 2013. When the three were killed, the others tried to come out of the house and 17 of them were killed. Even children found in that compound were killed.

600. All three men queried the role of the intervening forces in the form of Justice and Equality Movement (JEM), Ugandan People's Defence Forces (UPDF), SPLM/A North; all to fight their tribe.

On alleged violations in Leer

601. The Acting Commissioner told the Commission that people were killed in Juba, Bentiu, Malakal and Jonglei. Leer was completely burnt down. Civilians were killed. He pointed to a borehole where people were killed and noted that when they arrived there they found remains of people. He told the Commission that they had also buried people in Mayom county. When the government was in Leer, SPLA-IO were in the bush. He told the Commission that Government forces killed civilians in

town. People died on the 27th of March 2014. He also stated that there was a well where people were thrown into. He stated that those who killed people include:

i. County Commissioner Stephen Thiak Riek
ii. Military Commander Brigadier General Deng Mayik - Area Commander
iii. Major General Matthew Pul Jong - Operation Commander for Unity State

On atrocities committed by the IO

602. The respondents stated that there are two counties that belong to the Dinka in eastern and western Upper Nile, from where government forces launched an attack on them. However, they themselves did not go to those communities. With regard to atrocities that had been attributed to the IO such as in churches, mosques and markets, where many people are said to have been killed, the Acting Commissioner accepted that when they came to Leer from Juba, they went through Bor but it was military against other soldiers. They did not see any civilians. It was the dry season. He admitted that in Bor, they killed 201 Ugandan soldiers and said that these were the people who claimed to be civilians. He said that they even captured some of their tanks. He said that they heard on the radio that civilians were killed in Jonglei. As far as he was concerned, if civilians were killed, it was done by the SPLA not IO. The Acting Commissioner said:

> We do not kill people at night. We tell you, we are coming. Go and ask other tribes about how they (SPLA/ Dinka) behave.

Testimony from Other Sources

603. The Commission met with diverse groups, witnesses and alleged victims.

604. At UNMISS PoC Site in Bentiu, the Commission met with a member[323] of the National Liberation Council who attended the meeting in Juba and informed the Commission as follows:

> However, we went back on Sunday, we held that meeting and we were told by the Chairman that the manifesto must be passed and the constitution must be passed and nobody was allowed to talk, only those few members of the National Liberation Council were allowed to talk. The bulk of members, 90% of us, none of us was allowed to talk including our Governors except the Governor of Central Equatorial who had a point to raise. Dr. Riek Machar at that time did not come. His wife called me and told me, *"[Redacted], we are not going to come. You are the delegates coming from xxx State. If you are there, just let it be known to you that we are not coming. Things are not coming well"*. I asked why. She said Riek Machar was asked to come without bodyguards. How come the Vice President just left the office to go without body guards? We were asking ourselves what was the purpose? Madam Angelina told us that this is clearly that Riek Machar talking of militaries and

[323] Witness, Meeting with Men, POC 1-10, Bentiu, 2 August 2014.

the Attorney General, how can he not have even one bodyguard to go? At the same time, he has just been released. He is spending six months according to the constitution of South Sudan that you stay-- Myself I was the Minister [redacted]…and also a Commissioner until I came here I still had my bodyguards.

So this was also an indication that there was going to be a problem. Going on, the whole thing was cancelled. So Riek did not come, Taban did not come, Chairman said that must be passed those who favoured said yes, some of us were just watching until the whole thing was passed without much deliberations. We were surrounded by Nyawame outside, we were surrounded inside by the security and everybody was afraid of the tension. So in the end, we were told to go the meeting is finished, we went to a hotel where we were accommodated. At 9.15 p.m. we heard the roaring of gunshots at the Tiger Headquarters, the bodyguards headquarters and then there was fire rising. The whole fighting went on until 11.00 O'clock and then we were taken again at the SPLA high command. None of us slept even though we were sleeping in the hotel.

On the morning of 16th of December, it was about 7.15 a.m. or 7.20 a.m. we did not look at our watches properly and then the shooting happened in a place called Mangaten and Miyosabar areas where people were residing. The people there were mainly Nuer communities. A lot of shooting took place with high machine guns and we could not go out until 12.00 O'clock or something like that and then again it stopped for a while and then there was again shooting all over the town on the 16th. It went on until the 17th and 18th. **Killing was just going on, no military fighting**. **It was just killing of civilians taking place in town.** I remember somebody who run to the hotel we were living told me that they were coming from an area called Koruriom towards the river southwards. That person was a military person, he was in the military command, his family of 17 members were all killed. It was painful! children, women, old people were killed. Our Governor himself sent his bodyguards to go and check his house. He was staying in the hotel. His four bodyguards dressed in Tiger uniform were all killed. Because they were Nuer they were also killed. We were about to prepare ourselves to go but all the days were days of killing the Nuer. Everybody with scars like this man was to be killed. If he does not have any scars on his face like me and him they will ask him to speak Dinka language. If you don't speak Dinka language you assure them that you are not a Dinka and you are shot down. Even the Dinkas who had the scars were also killed because they thought they were Nuer. Many Dinkas have the same facial scars.

People really suffered a lot.

[T]here was no family that did not get somebody killed. My family lost five university students. They were found in the house murdered with high machine guns killed because they were Nuers… Everybody who is still alive now is because he ran to the [UNMISS] compound in Juba.

On the role of the government he continued and said:

> [W]hat resulted as war is because the Government in Juba opted to kill the Nuers and wipe them out like what happened in Burundi and Rwanda.

On the role of the President he said:

> The person who had initiated this plan for this ethnic cleansing is President Salva Kiir himself.

605. The Commission heard testimony of mass atrocities in Unity State:

> There is an area there near Langil you can get there is a big hole where people were actually killed and damped.[324]

On the consequences of armed conflict for Bentiu, a respondent[325] stated:

> Sincerely speaking there are no people in Bentiu. I hope it should be 00%. Most of the people are in the country side because Bentiu exchanged hands between the government forces and the SRA in opposition.

606. Additionally, the Commission heard evidence that Government forces are hampering humanitarian efforts. A CSO respondent said:

> According to SRA on 15th July there was food distribution that was going on in Nuer in Lukone County. That is where the population gathers. When the driver dropped the food and they were on their way for distribution, the government forces came and attacked the town very early in the morning around 6.00 in the morning. They drove the anti-government forces that were in the town and they took control of the town around 8.00a.m in the morning hours. It was a big challenge because we were having staff from WRP on the ground, we were also having staff from UNICEF that were doing family reunification. It was a big problem because we need to relocate these people to take them where they will take the helicopter lift. So these things are the problems that are facing the humanitarian especially along the areas near to Bentiu town where the government forces are because currently the government forces are in Bentiu town only. They are in control of Bentiu town and part of Maiyo. There are some areas which are being problem people are suffering and there is no accessibility from the government side not to allow the humanitarian to base on those places.

607. At a meeting in UNMISS PoC Site with a group of elders on 1 August, the Commission was told:

[324] Meeting with CSOs, Leer County, Unity State, 1 August 2014.
[325] Mr Mgadwak, Acting Coordinator, SSRA, Meeting with CSOs, Leer County, Unit State, 1 August 2014.

> Yes they have managed to kill Nuer but before then we thought this war was between the government. We did not know that it was going to be Nuer being targeted by the government …

608. At a meeting with Elders in Leer County, Unity State, the Commission was told, variously:

> When the Government killed Nuers, they killed women, young children, girls, when they found old women they would put them in a charcoal and they burn them together. They also abducted women when they were evacuated from there and took them along with them.
>
> Also when they arrived here and found a blind person, they would tie the blind person with grass and set that blind person on fire and then laugh at that.
>
> All the military power or the guns that the Government used to have is what they used against the civilians.
>
> When the incident happened, a lot of civilians were killed.

609. At a meeting with youths in Leer County, Unity State, the Commission was presented with the following views on causes of the conflict and who was responsible:

> If it was not a tribal issue, the Nuer would not have been killed because when these politicians were competing, there were only four Nuers in the meeting. There was only Riek Machar, the Governor, Ezekiel the former ambassador and Luke John Ministry of Justice. Those were the only Nuer. There were other tribes in the meeting but when the incident happened, the Nuer became the victims.
>
> Here we are orphans especially me. I don't have parents. My mother and father were killed and they did not know what the problem was in South Sudan. We don't know the reason. They were just killing us, we don't have soldiers here. It is just the civilians. We lose our fellow sisters, brothers.
>
> [B]ut if a Government is attacking its own civilians and burning their houses to ashes and start looting, raping and torturing its own civilians and calls itself a Government, is that a government?
>
> It was heart breaking killing putting people inside one building like this and then you pull your gun through the window and start shooting just like spraying the insects. Even if you are a coward from that day you will be strong. You will have a chance to avenge the death of your own brothers who were innocently killed without a reason.

Sexual and Gender Based Violence

610. On 2nd August 2014, the Commission held a meeting with women in UNMISS PoC SITE 1, Bentiu who had requested a meeting with the Commission after the group meeting.[326]

> When they (government forces) came, they found us outside near the cattle kraal. I was with my aunt in the *tukul* (hut) and people were shooting guns. When they came, they told us to come out of the *tukul*. I was carrying my daughter. There were three of us, my aunty and another woman, I was holding the child, they called the other woman to come. Another man said "why are you disturbing the woman, can't you hear the guns? Leave the woman alone". He said no, and pulled my aunty under the cover. He pulled my aunty to rape her; those who attacked (opposition forces) were nearby. So he government soldier shot my aunty because he did not have time to rape her. I was safe because those who attacked (opposition forces) were close to us. Me and the other woman — who is also my Aunt - were safe because of this. This happened in Bentiu, in a village called Bieh. This happened in April. It was the government forces that wanted to rape and the rebels came to chase the government. The rebels came and buried all the dead people. The people who raped were soldiers, wearing military uniform, he (government soldier and attempted rapist) was a Dinka, and they were two. The one who said don't disturb the women was from Equitoria. My Aunty left 6 daughters.[327]

The second witness[328] gave testimony to the Commission as follows:

> I have three children, 9yrs, 7yrs and one who is breast feeding. On the 20th July 2014, I wanted to go and grind maize for my children. I went out and found 2 soldiers at the Lich University, near the hospital (in the forest). When I found them, there were many women. They left them in one place and removed everything from them, even money they had in their shirts. I came and just stood because I had nothing with me. They asked me where I was coming from. I told them I was coming from Rubkona and another one said, "can't you see this one is a rebel?". They pulled me and they said let's go to the boss (the Commissioner). They said the rebels are here in the forest. I told them let me talk; I came from where the Commissioner for Rubkona County is. They said "don't talk" and they hit me on the face and the others ran away. They pulled me to the forest and they raped me. Two men raped me. When the fighting started I was in Juba, I came to Bentiu in February. It was my second time to go out to the town. I have spoken to my husband and he has said these things happen in conflict and he will no longer support the government. I went to International Rescue Committee (IRC) who administered medical attention. I am still taking medication now. I was raped at gun point. The reason I got to where they were is

[326] The interviews were conducted in-camera and the women were asked for their consent to voice record their statements. While the meetings were facilitated by UNMISS human rights officers, a female language assistant participated in the interviews to interpret.

[327] Witness 1. Details of this witness and the others are on file with the Commission.

[328] Her details are on file with the Commission.

> that I cannot see well, if I had seen them (from afar off) I would not have gotten so close, but I could not see. I need help with my eyes (to be tested). I sustained injuries (from the rape), tearing (of the vagina) and a wound.

Another[329] said:

> When we ran from Bentiu to Leer, then from Leer we went to the bush, we knew there was no opposition forces, only the civilians (by March it was government forces). They sent bombs and used bullets that can burn where we were hiding. When they bombed us, some of us ran to the water but there was an old lady that burned in the grass (her name was Dakhad Man Bang). This happened in Geny near to Gandor. The old woman was my relative, my uncle's wife. We people who were capable, we ran, but this woman was old and blind, so she could not run and she got burnt. We could not go deeper into the water because we would have drowned. When we came out, we found a young woman who had been raped, she had a child who was about 3 months. They had cut off the arm of the child and put it in the woman's vagina. We came to the UNMISS compound at 8 in the morning and we have been here all day to talk to you (AUCISS). We are suffering and we have become so skinny because of thinking. It is difficult to think about the long term because the present situation is so difficult, we are going to die here, and we cannot even imagine peace. If this problem ends, we will then be able to imagine a future. If there is peace, what will the point be, there will be no people remaining. In the compound here, there are people living in the dirty water.

A 32 year old woman[330] gave testimony to the Commission as follows:

> For us here as women we are suffering, because after they rape you, they push your Adam's apple/ strangle you and you die. They force you to eat the flesh of the dead people. It has never happened before, to make your enemies eat human flesh. Also, it had never happened that you rape a woman and then after you kill her. .. When they found blind people, they caught the young ones and the babies, they would tie them together and then when they clash, they laugh.
>
> Nothing can make us see Salva Kiir as a good person. Even Bashir when he divided the country, he did not do those things to us. If you (AUCISS) want to help us, talk to that person (mediator) from IGAD to take those intervening forces people away. Even now, there are still killings and women being raped. I went home to buy food, I left UNMISS to look for food. When I saw some soldiers, I hid myself in the toilet; they took the others I was with, when I saw it was clear, I ran to UNMISS. When I got there, the ones who had been taken came back and told me that they had been made to eat the flesh of the dead

[329] Witness 3. Her details are on file with the Commission.
[330] Witness 4.

> people. They were told that you always say Dinkas eat people, so now you eat. Some of them went to UNMISS and they went to the hospital. Those who ate and vomited did not die, some had diaharrea. Others who did not vomit died. Some had sores and white things around their mouths. Some of these people did not talk, others are now mentally unwell, when they relate the story of what happened they get lost and lose their train of thought. This happened in Eden, near Mia Saba (107), the garden of Dr Riek Machar.

A 28 year old woman said:

> For us we saw something. We do not just talk, we saw people who died and those who were raping women. When they came to Leer, we ran from there to a place called Kuerlei into a big forest. We could not hear the sound of the cars or see them, they just ambushed us. When we tried to run, they stopped us. There was an old man called Chuol Jak, they shot them and all his intestines were out for two days. He tried to put back his intestines, but he died.
>
> When we left that place, we went to another place called Kueth, they came again and called a woman called Wuang Jang but nothing happened to her, the man was alone and she managed to fight back and escape. For those who have raped they first take medicine and then their private parts become big, when they rape, women are injured and there is blood that comes out of the nose, mouth, eyes and their colleagues have to come and pull them off. It is the Toroboro (JEM) who have these. JEM are the ones who have this medicine. Those who have been raped by those who have taken this medicine die, they do not survive. I saw it happening in Leer and in Kam. Those who were raped and died, I saw them but I do not have their names because I did not know we would be interviewed. That day they killed seven men plus 3 women in a place called Kam in Ger. There was Chang Mut Doup and Kong Mut, their children, plus the daughter's husband were all killed in this place. At the time we were in hiding in Ger, and when we came back to sleep at night we found that the people have already died.

611. The interpreter[331] added that a man called Stephen Taker who came on the radio, Bentiu Radio, said he was Gatbang Chuol, and told people to come out of the forest. He said he was a rebel and that people were safe to encourage them to come out from hiding. And when people came out and they were killed by government forces.

612. Bentiu, having been the focus of much of the fighting, has been severely affected by the conflict. There were clear violations of human rights. The Commission heard testimony that civilians were killed, houses burned, and sexual violence committed against women. The Commission was actually provided with a list of people killed during a visit to Bentiu POC Site; including women who had

[331] Her name is on file with the Commission.

simply disappeared when collecting wood, presumably abducted. Strong testimony was heard in which there was admission that rape was being used as a weapon of war/conflict. Those with whom the Commission spoke indicated that the abductions were by government troops. The Acting Governor of Unity State, conceded that the fighting had a severe impact on civilians. The SPLA Commander admitted that there had been violations against women at the beginning of the war, particularly in February and March. The Commission also heard testimony of mass atrocities and mass burials in Unity State.

Upper Nile

613. In Upper Nile, the capital Malakal has been ravaged by war. It has been the most contested town, changing hands between government and rebel forces at least 6 times during the course of the conflict. The majority of buildings and infrastructure have been destroyed. This includes government buildings and installations, civilian property.

614. Reported violations and crimes committed include: extrajudicial killings and rape. Both sides have reportedly targeted civilians, often conducting extensive house-to-house searches for individuals from rival ethnic communities, mostly Dinka and Nuer. Individuals from other communities, notably Shilluk, the third largest in South Sudan, have also been targeted.

615. Outside Malakal, Baliet County, one of the 13 counties in Upper Nile State, has been the scene of numerous attacks, most of which have targeted civilians. Baliet Town, lies along the Sobat River, which connects South Sudan to Ethiopia. It is the main town between Malakal and Nassir, the opposition stronghold. Much carnage has been witnessed in the town and surrounding areas (Payams)[332], as opposition forces have moved back and forth from Nassir to Malakal either on their own or when pushed back by government forces. Both government and opposition forces have reportedly committed serious crimes targeting civilians.

616. The Commission was unable to meet with representatives from the opposition side because of security reasons despite its best endeavours.

Testimony from State Authority

Meeting with Governor of Upper Nile State — Simon Kun Puoch[333]

617. The Governor informed the Commission that Malakal town had been attacked three times with the last attack being the worst. He characterised the conflict as one between people who want to rule as opposed to an ethnic conflict and suggested that they ought to go through the democratic process if they wish to do so. The town has suffered a lot of destruction as a result of the conflict. He noted that 3 counties in Upper Nile state are presently under rebel control (as at the date of the meeting) including Mayuk with 11 under government control only because the people of

[332] Payams are the various units that constitute a county. Payams are made up of various Bomas (homesteads), which in turn are made up of tukuls (small houses or huts)
[333] 3 August 2014.

those counties have refused go fight. He described the White Army as Nuer civilians who had been convinced to take up arms because the rebels defined the conflict as between Nuers and Dinkas. Had they known it was a fight between the government and the rebels they would not have taken up arms, in his opinion. He said:

> Me I am a Nuer, I would ask the government "why are you killing the Nuers in Juba". Now why are you going to bring youth of 14 and 15 years walking from Nasir (to Malakal) for two days to be shot. They are dying there in the villages. The mothers and fathers are distraught. White army is for the protection of cattle, not for any other purpose. They are called white army because they put ash on their bodies to prevent mosquitoes biting them. The most important question is why it has become defined as a conflict between Nuer and Dinka.

Testimony from Other Sources

618. The Commission met with diverse groups including witnesses and alleged victims. At a meeting with a group of Dinka community on 3rd August in Malakal UNMISS PoC Site about the ravages of the conflict, the Commission was told:

> The patients in hospital were killed…. Those who were mad and [insane] their mentality is not good they were killed… Those who were like dying people who go on the street who are not ok they were killed there in town in Malakal…Those things were happening when the rebels come to Malakal. They come and go to churches, go to hospitals and mosques. They go and look for people, take mobile phones. Like this mobile, they take. They take the money, anything which is very important, very expensive, they take things by force. If you don't want to give, they shoot you, they kill you. At gunpoint they take things. Even some of the ladies they are taken by force.

619. While in Malakal, the Commission initially met with a mixed group of community leaders that represented the Nuer, Dinka, Shilluk and Anyuak communities all amongst the IDPs at UNMISS PoC SITE. The Commission then met the community members as separate groups. The community leaders described how things had settled down amongst the groups within the camp; at the Commission's first visit each community was separate and had their own representatives. Now, they said they describe themselves as South Sudanese. They reported that the security situation in the PoC site was now stable and the UNMISS administration had been responsible for ensuring this. There had been some challenges and difficulties amongst the different ethnic groups which the Commission had been informed of during an earlier visit. Outside the camp in Malakal, the situation was different with inherent challenges. They provided an example the previous week when some people working with international organisations as volunteers were captured by the security (government military) when they went to town. They were very keen that there be accountability for what had happened. One said:

> Accountability is a priority. It is necessary to be open and honest about wrong things that have been done, the same way we tell children what is right and wrong. Reconciliation is also very important; problems should not be solved with guns. Reconciliation should start with Nuer, Shilluk, Dinka and Anyuak and include other people, and then we can approach those who are fighting and disagreeing and demonstrate the need to live together.[334]

620. Another added:

> How do you know who should be held accountable, who committed the violations? If so, then yes, people should be held accountable. It is difficult to reconcile when there is still fighting and we are in a state of emergency. The President is responsible for all these problems. In Malakal there was looting where the government forces took everything and took it to Paloich. They have also burnt property and structures to the ground. We believe the President is responsible for all these things.[335]

621. At a meeting with the Dinka Community in UNMISS, Malakal, on 3rd August 2014, it was evident that the community remembered what happened in 1991 and their comments hailed back to what happened then. The Commission heard the following testimony from various participants:

> When the problem started in Juba, the leader of the Rebel, let me call them like that, Dr. Riep (sic) went to his group and mobilized them and told them that we have a problem with these people. So the people who belonged to him came and attacked like the Dinkas who are around. The thing turned to be tribal. That was what was happening.
>
> In 1991 and 92 up to 99 until the peace was signed, something like this happened. Their people were killed, the blind people, the old people all the disabled they were killed, women and children and things were taken away. The cows and the goat and the sheep. They were taken away so even the homes were abandoned. Even the areas they were left. So such a thing, now when we look at this situation now, he remembers the same thing which happened in 1991 when the situation happened like this in 1991.
>
> It is Nuers community which come and attack us, burn our villages and loot our things. Like now if you go to places they have attacked they have looted all the cows. They have burned down the places. They are the ones who come and attack. In some situations we just stay and then defend. But they come and attack.

[334] Committee Member 3.
[335] Committee Member 4.

> In 1991, 92, 93 to 94 something like this happened. And it was along tribal lines. We need to be very keen on that. And it was against the Dinkas. People were killing each other by tribe and it was Dinkas Dinkas.
>
> They did it in 91 the first time and then this is the second time. So we need the law to take its course. The law should deal with the someone who has broken it.

622. The Commission also met with members of the Nuer community in UNMISS PoC SITE Malakal. They refuted the Governor's claim that people had started coming out of the POC saying that only Shilluk and Dinka people were moving about freely; that they remained at risk. A female community member[336] noted as follows:

> As you have seen us here, all women (from our community) have come. As you can see these men and women are suffering in the POC. Especially Nuer, we are not going outside, we are confined to the POC. As you stated earlier that the peace and how we bring peace about (is important). There are no options (for us) as South Sudanese as women or men, Salva Kiir has to step down from the seat as President. We are crying for peace and need peace, as long as he calls himself the President of South Sudan, this peace will not last (not take root). Our brothers are dying and we do not want the fighting to continue. We need peace. Always in the POCs the women are sitting down and crying. Their children and husbands have been killed, so Salva Kiir needs to go. You see the marks on my face; they mark me as a Nuer woman. When I go outside, it means I am carrying a death certificate and I will be killed. This is why we have been here (in the POC) since December.

623. A 60 year old woman[337] who had memories of Anya Nya I said:

> Previously, Nuer and Dinka used to fight and then they would sit together and reconcile. Previously the way of fighting between Nuer and Dinka was about cattle raiding. After the event, a group would be selected from both sides and sit down and talk. We the people have elected these presidents, and now they want to kill us.

624. They were keen that there be accountability for what had happened. A community member said:

> (You may) have heard that the thing that happened was just government. But the person who is responsible for this country (President Salva Kiir) has turned it around to make it seem as though it is a fight between Nuer and Dinka. The question is why should they just target Nuer alone. If this thing happened in the party, this should be a party issue and not for civilians. If they have a problem with Dr Riek Machar, why are they killing/ targeting Nuer? Do they think they can finish all Nuer in this country? This cannot happen.

[336] Community member 2.
[337] Community member 5.

> … The President used to say in the media "I have been elected by the people of South Sudan", but if you turn on me and want to kill me as my head of state, I cannot remain giving you my support. Please take our voices and make sure they are heard. [338]

625. Another[339] stated:

> …if anyone is found to have committed crimes and human rights violations, they should be taken to appropriate accountability mechanisms. The people need to determine who is responsible for violations; it should involve the top leadership. If people in government are found to be among these, they should be held accountable and removed from government positions. On issues of reconciliation, the present government (whether opposition or current) should be removed and then they can bring new people so that it enables people (on the ground) to reconcile. After there is a new person in government, all the tribes can then sit down and determine how they can live together again and how to rule or govern the country.

Sexual and Gender based Violence

626. On 3rd August 2014, the Commission held a meeting with a group of women leaders from the UNMISS PoC SITE in Malakal, Upper Nile State. Some of the women had been in the camp since December 2013 and described the difficult living conditions in which they found themselves. The meeting was held in UNMISS Compound as part of the AUCISS consultations in South Sudan and was facilitated by UNMISS human rights officers. The women in the group were representatives of the Nuer, Dinka and Shilluk ethnic groups living in the camp. As with all other meetings with women, focus was primarily on violations women had experienced and/or witnessed as well as on a better knowledge of the situation of women in the POCs in order to get a deeper understanding of the impact of the conflict on women (and children) during the conflict. Women narrated events they had witnessed, violations they or their loved ones had suffered and told about the daily struggles they faced in the UNMISS PoC SITE. Women also gave their opinions on how the conflict could be solved, the challenges for reconciling South Sudan and what their immediate and future priorities were. The meetings with women were held in-camera and women were asked for their consent to voice record their statements. The women selected individuals amongst themselves to interpret the discussions and one (male) UNMISS HRD language assistant assisted for the Shilluk community.

627. The Commission was told that there have been many rapes reported and that those perpetrating the rapes are on both sides, local individuals in the opposition and government forces. Seven of the women raped in the Catholic Church were South Sudan Red Cross (SSRC) volunteers. 3 of them came to UNMISS. They

[338] Male, community member 3.
[339] Male, community member 1.

have now gone to Sudan (North), because of the stigma. 4 went with the fighters because they said no one will marry them now[340]. One woman[341] said:

> In) all my years I have never seen such a thing but I saw it during this last crisis. When I first came, my neighbours were all groups, Dinka, Shilluk etc and we were all at peace. Now when the crisis happened, you and your neighbour who had been at peace became enemies. When the problem happened when people ran, people were not like before. I ask myself, when peace comes, how will we go back to living side by side as we did before. I am suggesting if peace comes and we go back to Malakal, we as Christians must bring all those things out of our hearts so that we can live together. As women it pains us and we want our children to go back to school. For those that are Christians they can tell the truth through the churches and the church can lead the process of reconciliation.

628. The Commission heard testimony from a 47 year old woman IDP[342] at the UNMISS PoC SITE 4, Malakal on 4 August 2014 who specifically requested that she speak with its members. She narrated that her 13 years old daughter had been abducted from the Catholic Church where they had taken refuge in Malakia residential area when the town was captured by opposition soldiers. When the shooting started at the back of the Church her daughter was one of the first people to run out and she was captured by 6 men in uniform. She has been unable to locate her daughter since, Her father, uncle and 2 aunts were killed. She said that when the soldiers reached the Church they started shooting people randomly. 2 Nuer boy children, 2 women and 2 other children were killed. She is certain that the soldiers were the opposition. She said:

> The opposition people are also mixed, especially during the last fighting. They were in uniform. After the people in uniform killed those people, we tried to run away from the Church to the UNMISS base. I was carrying small children. When we reached the gate, there were also two young girls who were taken by the same forces. I have three children with me (in the POC), a seven year old, two year old and eleven year old. My husband passed away five years before the conflict. I was living in my husband's house. When the crisis erupted, I ran to the church and met my relatives there, my father, uncle and aunts. When the people were killed, all the people who were in the church who survived came to UNMISS base. After a week, we and some other women went to the church to collect the bones, the dogs and other animals had already eaten the flesh of the dead.
>
> Since this crisis rapes are happening in the town, a lot, we are even used to it now. But I am more concerned about the abductions of girls. Both sides are doing this. This is the first time we see such things. We are facing these issues a lot. I did not think I would survive up to now when the conflict began. Even those who have gone to Khartoum do not think that all of us who remained are alive.

[340] This information was provided to the Commission during a meeting with INGOs on 4 August 2014.
[341] Woman Five, details on file with the Commission.
[342] Further details of the witness are on file.

Provision of Humanitarian Assistance

629. The provision of humanitarian assistance has been challenging for the non-governmental organisations trying to do so. The Commission spoke with international and national humanitarian groups[343] providing various services to the civilians primarily within the POC. There are great security challenges, and the rainy season does not assist. Part of the challenges they face in providing humanitarian assistance include the outbreak of cholera which is compounded by restrictions on movement outside of the POC to source chlorine for treating the water. There is also need for coordination among the local NGOs. Another challenge is collecting bodies and burying them.

630. The Commission also met with local non-governmental organisations (NGOs) based in Malakal, Upper Nile State as part of its consultations in discharge of its mandate. A representative of one[344] said:

> We did not expect such a thing (the conflict) to reach such a magnitude. Events that happened in Juba and came to Malakal have caused a great deal of death and human suffering; it was not easy. It is unfortunate for such a thing to have happened. At least everyone here in Malakal has lost a family member. Others died escaping, crossing the river especially women and children... You cannot go to your home. You will be afraid to enter, not knowing what you will find. Everyone here in Malakal is highly traumatized.

631. Noting that the little psychosocial help available is limited to the POCs, the representative of another NGO stated:

> What happened on 16th December in Juba is a shame for the African continent. We have lost people in Juba. I was in Malakal on 24th December (2014) when Malakal was captured by rebels. We ran to UNMISS and then 10 days later back to UNMISS camps. The worst attack was on 18 February 2014 when the town was captured by the rebels. We ran from Malakal to Wau. We lost many friends and relatives. I witnessed many people being killed, soldiers, civilians and those from the churches. At the main gate from Malakal to the hospital you would find rebels with machine guns. Those who are outside the UN (POCs) would say it is the responsibility of the government to protect them.[345]

[343] The international organisations the Commission met with on 4 August 2014 are Solidarite, an organisation working in Malakal town, and Wau-Shiluk and outside the town. Solidarite deals with issues of WASH (water and access to sanitation and health) programmes, Inter source works on child protection and education, South Sudan Red Cross (SSRC), used to provide first aid to the community before they reached hospital. During the crisis they have been engaged in dead bodies management together with MSF, Red Cross Volunteers' work includes collecting dead bodies, together with UNMISS, OXFAM are undertaking work in the area of protection and WASH, CARE's activities were focused on peace building, WASH and protection before the crisis. Now the organisation has moved to implementing emergency programmes and are working in the POC and just outside.

[344] SOBAD - Organisation for peace and development (Moses), addresses issues of peace building and conflict intervention on water sanitation and nutrition and aspects of protection

[345] Upper Nile Youth Development Association representative.

632. The Commission interviewed a total of 23 witnesses and held focus group discussions with 15 individuals on the events that transpired in Upper Nile State, particularly in Malakal and Melut between 23rd December 2013 and 27th February 2014. The witness testimonies relate to allegations against both government and opposition soldiers committed in sites such as markets, churches, homes and hospital.

633. Witness MWG stated that there was no problem in Malakal until around 23rd of December 2013 when the hospital started receiving wounded SPLA soldiers from Owachy area. The soldiers warned civilians at the hospital about impending attacks and advised them to run away. Witness did not run away. On the 25th December 2013 the SPLA/IO attacked and soldiers were seen in Hay Jalaba which is where his home is located. Further, during the first attack by the SPLA IO witness MWB stated that SPLA soldiers were conducting house to house searches during which many Nuers were allegedly killed. The witness further alleged that SPLA soldiers participated in looting and destruction of property.

634. After that attack, life resumed as normal, people resumed their jobs. Things remained fine until around 15th January 2014 when the SPLA/IO returned to Malakal town again and began shelling it. Witness MWG was at his home when the attack occurred. Following the attack the government administration moved from its base in Malakal to Wau Shulk. During the rebel occupation on 17th January 2014 witness moved his family from Hay Jalaba to Malakal State Hospital where they stayed for around ten days. When the witness arrived he found around 5,000 people seeking shelter at the hospital.

635. The witness further informed the Commission that sometime on a date between 15th and 18th January 2014 ten patients who were admitted at Malakal Teaching Hospital were taken by SPLA IO forces and killed. The Commission visited the hospital and observed smudges of blood on the floor in one of the wards which could be indicative of the fact that bleeding bodies were indeed placed on the floor. The Commission was also informed by witnesses MWG and MWB that during the same period some female civilians sheltering in the hospital were abducted by the soldiers and have not been seen to date.

636. On 19th January 2014 the government captured the town. Witness MWG and his family returned home on 27th January 2014 and continued to work.

637. Corroborating evidence established that, when the government captured the town, some of the soldiers within the SPLA started killing civilian Nuer who had sought shelter at the hospital at night. During this period, witnesses who had sought refuge at the Malakal Teaching Hospital informed the Commission about targeted killings of Nuer men, women and children. According to witness MWE, corroborated by MWD account, soldiers would come into the hospital at night, where about 5,000 displaced persons were sheltering, and identify Nuer victims. These victims would be taken to the riverside at the hospital where they would be shot and their bodies dumped in the river. According to Witnesses MWE, MWD, MWF and MWB, this trend continued for three nights and seemed to have begun on or about 20th January 2014. The Commission was informed by witness MWE that at some point

the governor of Malakal moved to the hospital to rescue displaced persons who were thereafter ferried to the UNMISS PoC Site camp.

638. Therefore the evidence collected by the Commission establishes that there were killings committed by the SPLA government soldiers at the hospital between 20th January and 17th February 2014.

639. The Commission also received information about targeted killing of Nuer civilians by SPLA soldiers in residential areas in Malakal. In one incident reported to the Commission, a group of soldiers entered the witness MWQ's house located in Hay Jalaba area and proceeded to shoot dead her four children. Another witness MWF reported the killing of her relative, a former government official in Malakal, at the gate to her house. Another, MWX reported the killing of her son who was sleeping in their house. Other killings of civilians were reported in Hay Salam and Asosa[346].

640. During the second occupation by government (19th to 17th February 2014) witnesses also alleged that SPLA soldiers abducted and raped women at Christ the King Church. Those sheltering at the church were allegedly Nuers numbering about 300. The Commission spoke to witness MWB who witnessed the rape of seven girls by SPLA soldiers. The witness informed the investigators that four of the girls were taken away by the SPLA soldiers and have never been seen to date. Three of the girls reportedly relocated to Khartoum in Sudan.

641. From this evidence the Commission was able to conclude that SPLA soldiers were involved in killings committed against Nuers in Hay Jalaba, Hay Salaam and Asosa neighbourhoods. The Commission was also able to conclude that government soldiers raped women at Christ the King Church.

642. On 18th February 2014 SPLA/IO soldiers attacked the town and captured it. Witness Steve told the Commission that he received news that the rebels had started killing people in the hospital. Most of those who were killed were Shulks. No Nuers were killed. Dinkas had moved away from the hospital since they knew they were going to suffer. Around 35 people were killed. The witness got this information from his colleagues who had remained in the hospital.

643. Witness MWG later sought refuge at St. Josephina Bakhita Catholic Church at Hai Saha where he stayed for 3 days. During the time that he was there the rebels used to come to the church and loot from the displaced people and abduct women. On the 20th of February 2014 the rebel soldiers came and selected 7 youth among the group seeking refuge and killed them in the streets. These were all Shulk's. In the church the people seeking refuge were Nuer, Chulk, Bari's among others. There were no Dinkas in the church.

644. This evidence was corroborated by witness MAA who stated that while she was staying at the church SPLA/IO soldiers would come and extort money from the displaced. The witness also informed the Commission that she witnessed the killing of six Nuer youth who were identified by the soldiers and shot dead inside the

[346] See witness statement MWM, MWY, MWN and MWZ

hospital. the witness also informed the Commission about the killing of a woman, who was sheltering beside her, allegedly for failing to produce money when requested to do so by the soldiers. She further stated that the same soldiers would come and abduct young girls and she never saw them again. Similarly, witness MWA who was sheltering at Malakia Catholic Church also testified to the fact that SPLA/IO soldiers would come and abduct young girls (not old women like her). She stated that she would never see them again.

645. The Commission observed ballistic damage to the hospital as well as businesses and other buildings gutted by fire and residual human bones in the hospital premises.

646. The Commission learnt that the commander of SPLA IO in Malakal was BRIGADIER GATHOUTH GATKUOTH.

647. Witness MWC testified to violations allegedly perpetrated by the SPLA in Melut County. The forces there were under the command of Brigadier General NAIAL BATOANG. In one incident it was alleged that soldiers killed civilians who were travelling in a bus. It was further alleged that the Paramount Chief in Melut County organized and planned the distribution of guns to other communities in order to kill Nuers. The witness alleged that the guns were distributed to all other ethnicities except Nuers.

Forensic Review

648. The Commission carried out site visits to Malakal Teaching Hospital and Malakal burial site to carry out a forensic review. In addition, witness or survivor injuries were also examined by the forensic doctors. Thus, where some witnesses stated that they had been injured as a result of the conflict i.e. shot, the Commission's investigative team carried out examinations to verify whether it was forensically possible that an injury attributed to a gunshot did in fact occur under those circumstances. While it was impossible for the Commission to verify the circumstances in which any injury may have been obtained, Forensic evidence was collected at crime scenes or incident sites, as appropriate.

Malakal Teaching Hospital

649. According to witness MWY, the hospital was stormed on the 18th February 2014 when the rebels attacked and took control; it was at that time housing about 5000 to 6000 "refugees" from the town as a safe haven.

650. On the scene examination, at least seven (7) blood smudges of slain person's bodies were identified in the female medical and gynaecology/obstetrics wards and in a paved courtyard. Bullet pock-mark noted on external wall of the surgical theatre building, broken windows and glass. Human bones (children) found in hospital grounds and upon the flat-bed truck said to have been used for body transport to burial site, and the paediatric ward building was gutted by fire.


Fig 18: Blood smudge on floor of ward


Fig 19: Bullet hole in wall of surgical theatre


Fig 20: Paediatric ward building gutted by fire

Governor's Residence

651. The residence of the Governor was said to have been burnt during the conflict.


Fig 21: Governor's Residence


Fig 22: Burnt-out verandah



Fig 23: Burnt-out bedroom

Mass Burial Sites

652. Four (4) mass burial sites were inspected within the town's main cemetery, and which were continued to be used as dumping site for any human bones found at different stages; last grave dug in July 2014 when the corpses of 5 persons were buried (skeletonised state). Several human bones found at the graves



Fig 24: Mass burial site: Malakal Cemetery



Fig 25: Exposed human skull bone

(possibly young child/infant)

Witness Interviews

653. The Commission conducted forensic medical examination on alleged victims who claimed that they were targeted by soldiers allied to the government on the basis of their ethnicity. Five (5) witnesses (all Dinka) with injuries from the violence were interviewed and medically examined.

654. One witness showed evidence of a gunshot wound through lower limb with delayed healing of fracture. Witness MWS had his house burned down by Nuer rebels and several people died of burns on February 18th 2014, and he showed evidence on burn scars on medical examination.

655. Witness MWT described the attack on February 18th, where Dinka people were shot in the Roman Catholic Church by Nuer rebels who shot people at the back whilst they were running, looted houses, and when 8 women were taken at gunpoint and never seen again — He showed features of gunshot injury to his knee. Witness MWU, on the same day, described running to Christ the King Church, and

the way six people were killed by rebels (shot on the road when they were coming out of their houses), and he showed evidence of a bullet fragment injury to chest wall with an indurated cystic lesion of chest wall.



Fig 26: One witness



Fig 27: Witness MWS

656. Witness MWV is a retired schoolteacher and described that he knows leader of rebels Gatkuoth ("8 star" officer) who had known the witness as a senior teacher, and the rebel leader asked him to leave town or be killed, then looted the house. Witness was then arrested by Gatkuoth's junior soldier who was called Yien Charlaman ("2-star" officer and son of former Governor) who took him with wrist restraints to be imprisoned at the Presbyterian Church at Bam with others. Another rebel Brigadier called Diang (of Division 7 of the SPLA but who then defected) and his men shot and killed 37 people (civilians) and witness was taken to Fangak County walking on foot for 21 days with 22 other people who he was forced to be a foreman in cattle-rustling activities.

Sexual & Gender-based Violence

657. The Commission's investigation was told of several accounts of rape of women and girls in the sites in which they visited during the conflict, as evidenced by several statements in most of the major incident sites mentioned.

658. Gang rape was (and continues to be) a common feature of the atrocities committed during the on-going conflict in South Sudan. Women and men as witnesses and survivors have given statements with reference to rapes of women and girls by more than one person. The Commission heard numerous statements that included details of the injuries sustained by rape victims because of the multiple perpetrators.

659. There were reports by respondents on the wide use of objects such as stones, guns and sticks to rape women. In most instances, that was reported as a new and horrifying phenomenon. There were also descriptions in which sticks were used for the rapes, to which the victims did not survive. Reference was also made to the use of stones and guns as particularly cruel and retaliatory acts.

660. Attacks on women's reproductive capacity were reported in many consultations, particularly in Unity State. References to women's pregnant bellies being cut open were made in Leer County, although there were no witnesses to verify this. In Leer County and Bentiu, women used the expression "we can no

longer produce" or said that there were no longer any young men remaining for the young girls to produce (children) with. The understanding of the attacked group, in this case Nuer — was that the purpose of the rapes was to prevent the Nuer from reproducing. While not a direct attack on women's reproductive capacity, the Commission also heard that during the government forces first attack on Bentiu in December, the heavy fighting and shelling caused women to have premature births. One respondent said "The heavy gun fire was affecting the pregnant women; it caused them to have premature births. I saw them with my naked eyes at the Power Station Village."[347]

661. The Commission heard of revenge attacks, and the targeting of individuals, in particular women, from certain groups and nationalities, has been a central feature of SGBV in the South Sudan conflict. Many accounts tell of women from certain nationalities (foreigners) and women from the two main ethnic groups around whom the conflict revolves, being targeted. Survivors told the Commission that perpetrators would say they were being raped, beaten or stabbed as a form of punishment against their particular group. In Bentiu, attacks on civilians bearing resemblance to people from Western Sudan (Darfur) region were specifically targeted in the attack on the hospital and the mosque and there were suggestions (though unverified) that Darfuri men were raped by opposition forces in revenge attacks. In addition, there are indications that elderly women (50 years old and above) were not spared. Dinka women interviewed by the Commission narrated how they had not fled during an opposition attack because they believed they were safe in a culture where elders are respected and revered.

662. There are clear patterns of a vicious cycle of violence within violence developing. While numerous reports by international organisations and humanitarian actors in South Sudan detail the vulnerability and insecurity of women, children and the elderly, the AUCISS heard cases of ongoing SGBV. These included rapes occurring outside the POCs, detentions of women suspected to be spying on behalf of fighting groups, abductions of girls and women from POCs and other cases of VAW and GBV within the IDP camps. Some of the incidence of SGBV reported to the Commission also included personalised revenge attacks on women such as stabbing and attempted murder, abduction of children by relatives of deceased husbands and forced marriage.

663. Necessary livelihood activities are increasing the vulnerability of women as in many other conflicts on the continent. The daily necessities of collecting fire wood and finding alternative food options for children and family members expose women to incidence of SGBV.

664. From analysis of photographic material from the town of Bor obtained from witness, there are a few images which are very suggestive of the possibility of sexual assault.

[347] Interviewee from Unity State


Fig 28: Photograph of body at Bor

665. In the above image, the gender of the person is clearly female on basis of the genitalia, and the body, nude below waist, lies supine with the thighs adducted (spread apart). The posture was possibly one which was adopted at death for the body to remain in this position. The inferences that must seriously be considered in this context of lower body nudity and posture are that the female was raped, and also that she was probably dead at the time that the rapist had left her on the ground.

Violence against Children

666. Although the image is unclear, one of the children in the image below Fig 29 taken from images of Bor shows features of possibly a plastic bag around the head.


Fig 29: Dead children in Bor

Consequential Effect on Other States

667. The third mission of the Commission of Inquiry covered the entire country in its efforts to ensure that all parts of the society were given the opportunity not only

to offer their perspectives on the background to the crisis but to also air their views on the way forward for the country to emerge from the crisis. The mission also aimed at obtaining the views of the component parts of the country on the institutional reforms necessary to establish the country on a firm path of sustained development. The following section summarises the outcomes of the Commission's meeting with parts of the country that were not the specific theatres of violence but had been, inevitably, affected by the conflict. This includes the displacement of persons from the affected areas, defections in military formations resulting in mutinies in directly unaffected states thus creating instability and isolated human rights violations in some of the directly unaffected states.

General Humanitarian Situation

668. The conflict that broke out in the country since December 15 2014 has impeded, to an alarming level, the delivery of much needed humanitarian assistance across south Sudan, thereby reducing the humanitarian space. In particular, the situation has led to the increase in the level of looting of both humanitarian convoys as well as warehoused stocks of deliveries across the country. The general state of affairs in the country indicate that states that were hitherto, not affected directly by the violence were being affected by attacks on humanitarian convoys and on humanitarian workers.

669. The effects of all these have manifested in many of the donors withdrawing much needed resources thereby increasing the level of the suffering of the people. Many of the on-going activities which was linked to the development of the livelihoods of the people and the building of the communities' resilience have all been put on hold.

670. Even the little resources coming from the government has been diverted to other ventures such as prosecuting the conflict with the opposition. The situation has further disrupted the supply chain in many parts of the country. Private sector operations are hampered as a result of the situation of generalized violence subsisting in the nation, which has caused untold inflation in the economy.

671. The situation has been further compounded by the seasonal rains coming at a time when a large percentage of the population are displaced within and outside of the country. The planting season for the next harvest has been missed and it is likely that the country will be faced with an acute shortage of food later in the year. All these combine to present a serious humanitarian situation in the coming months for most of South Sudan.

Greater Bahr el Ghazal

Lakes State

672. The Commission met with the Governor of the State, Major General Matur Chut Dhuol, other state officials, including the Police and Army commanders, Internally Displaced Persons, the civil society, humanitarian actors and the United Nations Mission in South Sudan (UNMISS).

673. In all the engagements, there appears to be a concurrence as to the cause of the 15th December crisis, by all the stakeholders; the ambition of the leader of the SPLM- In Opposition, Dr Riek Machar, as the cause of the crisis because he again rebelled against constituted authority. The general consensus was that his act of dissent in the party constituted a rebellion which was tantamount to a coup against the government. It was also noted by most people interviewed that the crisis cannot be labelled as tribal as one of the key supporters of Dr Machar was the former Governor of the state, Engineer Chuol Tong.

674. It was pointed out that the state was outside of the direct sphere of the 15th December crisis, however, the crisis spilled over with a great number of those displaced across the Nile River, in Minkaman IDP Camp. The Awerial County where the camp is located has a population of about 150,000 and was now hosting an additional 110,000 IDPs. The community leaders in the camp acknowledged the fact that there had been, in the past communal strive between the various ethnic groups but they had always managed to settle their differences. However, the current crisis and its extent and intensity surpassed previous experiences. They identified the perpetrators of the violence visited upon victims as General Peter Gadet Yak, Hissan Mar Nyot, Gatwich Duol and Toup Lam.

675. The State itself is in a perpetual state of low level conflict as a result of the phenomenon of cattle rustling which has led to a proliferation of small arms and light weapons in the state. Under age children were in possession of light weapons and small arms of various types. Attempts at community levels to mop up the arms from the community falls far short of the expected result as, it was admitted to the Commission by the community, these arms were usually round tripped back into the community.

676. On the way forward the respondents that the Commission spoke to agreed that what was most needed was for the guns to be silenced and peace to return. They expressed optimism in the IGAD process going on in Addis Ababa, but were mostly of the opinion that Dr Machar should not be rewarded again in the final settlement of the peace talks. They called for a permanent cessation of hostility and favoured a return to constitutionality, while calling for the formation of a Transitional Government of National Unity. On the issue of accountability, the respondents agreed generally that the rebels must be held accountable as they had perpetrated heinous crimes.

Western Bahr el Ghazal

677. Western Bahr el Ghazal was indirectly affected by the December 15 crisis, however, it had other security challenges which were a source of insecurity, characterized by human rights violations. The Commission met with the Governor of the State, human rights group in the state, civil society groups and the leadership of the IDPs in a camp the Commission visited.

678. The Governor of the State noted that the crisis started as a result of political disputation within the SPLM, which he claimed resulted in a coup and the

snowballed into the rebellion. The violence started in Juba and spread into Greater Upper Nile states. He accused the former Vice President, Dr Riek Machar of using his ethnic affiliation to precipitate the rebellion. The Governor noted that the military formation in the state, Division 5, is constituted of about 70% Nuer. The spill over effect of the conflict in Juba was felt in the state when a group of widows of Dinka soldiers attacked Nuer soldiers in Mapel on 25th April 2014, when the latter were accused of slaughtering their Dinka husbands (in reference to the reprisal killings that had taken place in neighbouring state of Unity and in other places in the Greater upper Nile States). This led to desertion by a group of Nuer officers and men, some of whom were persuaded to re-join the mainstream forces. Others left and joined forces with the rebels. And yet others found their way to the PoC Sites. The Governor stated that he managed to contain the effect of the crisis from spreading into the military formation until 25th April 2014. Other than this situation there was no other spill over effect of the national crisis in the state. However, this resulted in bringing to the army formation, the ethnic dimension of the crisis which played out in nation's capital. Apart from this, the State was described as relatively peaceful.

679. Consultations with the civil society revealed that the other ethnic groups in the State had an innate fear of domination of the Dinkas. This fear was given expression when the state government decided to relocate the Wau County capital from Wau to Bagari Payang, which was about 100 kilometres away from Wau. The resistance was expressed through peaceful demonstration by the Ferthit ethnic group, on the grounds that the Dinka ethnic group would grab their land as they had done in Wau. The government responded to the peaceful protest with force, which led to the deaths of several civilians. The situation is indicative of the fact that even though the state was not directly affected by the 15th December crisis, it was still fragile because atrocities committed had not been investigated and redress and restitution were not made to affected persons.

680. Members of the civil society told the Commission that the state is also affected by a poor civil / military relations as soldiers from the Division 5 of the SPLA continue to cause mayhem within the civilian population. They said that these acts of impunity by the SPLA were often triggered by the irregular payment of salaries to the men and officers of the division. This situation often resulted in looting and seizure of the private properties of citizens.

681. There was consensus amongst all the respondents that another challenge in the State was the proliferation of light weapons and small arms, which fuelled the perennial conflict between the pastoralist and the farmers. Attempts at disarmament in the state has been seen as a mascarade by observers, as weapons collected still find its way back to the community.

682. On the general perception of the people of the State on the way forward, it was observed that corruption and nepotism had eaten deep into the fabric of the country. They called for a reform of the country's governance system and federalism was suggested as a means of devolution of powers within the different component States of the country.

683. The respondents felt that real prospect for peace in the country was anchored on a genuine security sector reform that transforms the SPLA as it is currently constituted to truly national army that is not overtly skewed in favour of any ethnic group and is not a means of expressing inclusion into government.

684. Finally, there was a general consensus by a majority of the people interviewed that there was need for accountability to underpin any form of reconciliation and healing. However, the estimation of many people spoken to, including at government level, was that only one side, the side of the opposition, was to be made to be accountable as it was that side that destabilized the country for the second time.

Northern Bahr el Ghazal State

685. The Commission met with the Caretaker/Acting Governor, members of the State Assembly, Chiefs and Elders of Northern Bahe el Ghazal, a women's groups in Aweil, civil society including journalists, law and justice system operators, and humanitarian organisations. Northern Bahr el Ghazal State was described by the Acting Governor as a relatively peaceful state which was not directly affected by the December 15 crisis. However, the state was affected by the incident of the defecting SPLA General from the 5th Division in Western Bahr el Ghazal, Major General Dau during his flight to join the opposition group under the command General Peter Gadet of the Opposition.

686. With respect to the on-going conflict in the country, the Commission was told that it was felt that the international community does not have the requisite confidence in South Sudanese to run the affairs of the new nation. The lack of solid national institution in the country compared to other countries at independence remains the challenge of governance.

687. The general consensus was that the leader of the SPLA-In Opposition, Dr Riek Machar, in his quest for power, had destabilized the country yet again. The people spoken to referred to the 1991 split in which political differences between the late leader of the SPLM/SPLA, Dr John Garang and Dr Riek Machar, quickly degenerated into ethnic violence, leading to the massacre of Bor Dinkas. It was the feeling of many of those spoken to, that the same situation was now playing itself out all over again. The notion of a coup was supported by the action of the former Vice president's attempt to take over power by force. They considered the action of the former Vice President as a violation of the constitution, which was deemed treasonable.

688. The need for caution by sub-regional powers was canvassed. This was due to the current engagement by countries within the sub-region, with the Opposition. The neutrality of the sub-regional organization, Inter Governmental Authority for Development (IGAD), was doubted and respondents wanted the latter and other countries on the continent to desist from entertaining the Opposition.

689. The government's commitment to peace was further expressed by virtually all the people spoken to. This commitment was said to be expressed by the high level

of the negotiators representing government at the Addis Ababa talks, who have all been charged to bring back peace to Juba.

690. All the women spoken to condemned the ongoing violence, as they rightly observed that the victims of the violence invariably were the women and the children. They are the vulnerable, the widows and they lose their children to the conflict. People live amidst constant rumours, which increase the fear of the people.

691. In the area of law and justice, the enormous challenge facing the judiciary was brought to the fore by those the Commission spoke with. The need to widen the knowledge base of judicial officers in the area of international law, international human rights law and international criminal law was highlighted. It was particularly noted that over 90% of the judges were from the Arabic/Sharia legal background. This situation poses two critical challenges. First, judges need to be trained in the use English language which is the official language of the country. Second, the country adopted at independence, the Common Law System. This now meant that there was a need for re-training the judges in the common law system. The poor state of the infrastructure of the courts also remains a big challenge.

692. On the way forward, the respondents all expressed the desire for peace and noted their confidence in the ongoing peace process. The belief in genuine reconciliation amongst the warring ethnic groups was stated by all and it was observed that both the Dinkas and the Nuers were cousins and therefore, the differences between the two ethnic groups which had been exploited by the Arabs and continued to play itself out, should be bridged.

693. The general trend among the groups the Commission spoke to was the need for a comprehensive security sector reform which clearly separates the SPLM from the SPLA. That was highlighted as a prerequisite to sustained peace in the country.

Warrap State

694. The Commission met with the Governor of the State, the civil society including community and religious leaders, women and youth groups.

695. Warrap State is about the smallest in the republic. It is bordered by Unity State and Lakes State to the East and Western Bahr el Ghazal and Northern Bahr el Ghazal to the West and North. It is mainly occupied by the Dinka ethnic group. It also has the only female Governor in the country. The state was said to be relatively peaceful in relation to the violence that visited other parts of the country. However, the state did experience a spill over effect of the crisis as there were displaced persons from the neighbouring Unity State. At the moment, the state is hosting about 46,200 persons in Abyei while there are about 1460 persons in Twitch with others scattered across the state in smaller numbers. The total number of Internally Displaced Persons in the state was said to be about 59164.

696. The general consensus, particularly, at official level was that the crisis arose out of political differences at the leadership level of the SPLM and one of the parties decided to use force to attempt to get its way. This attempt by force led to a coup,

which has now spiralled into a rebellion. It was concluded that the leader of the opposition, Dr Riek Machar wants to rule by force.

697. All the people spoken to also dispelled the belief that the crisis was ethnically motivated. It was pointed out that the victims of the crisis were South Sudanese. There were specific accusation made certain military commanders, Major General James Kon Chuol and Brigadier General Michael Makal, both of the 4th Division of the SPLA and who were now on the Opposition side. The Commanders mentioned were accused of carrying out massacres on January 17 2014. This massacre led to the displacement of 1288 households between January and February 2014.

698. It was reported that the fighting also led to the recruitment of children into the fighting forces by both the SPLA and the rebels. About 36 children were once seen in training with the SPLA. The children were said to be from different parts of the country. Recruitment was done not on the basis of the internationally accepted age for enlistment but on traditional standards of coming of age and maturity. These standards are the tribal markings on the fore heads of the lads and the removal of the lower canine teeth. This indicated that the children were adults and could be enlisted in the fighting forces.

699. The State is a pastoral one and has more than 1.5 million cattle, and is beset with its own share of low level conflict arising from the usual cattle rustling activity in the State. It was noted that cattle raiding and rustling are conflict drivers in the State; further accompanied by the twin challenge of grazing land and water during the dry season.

700. On 8th August 2014, the Commission was provided with written information by Cder James Achiei Akuien Security Advisor, **Warrap State-Kuajok** of the following attacks by rebels and the numbers of those killed or wounded, and cattle raided across the borders of Warrap-Unity States.

- On 20th December 2013, Maj-Gen James Koang, the former Commander of the Fourth Division lured Dinka and other ethnic group SPLA soldiers on trucks to apparently transport them to Bar El Ghazal but they were all ambushed and killed with their families under Commanding officer Bri. Gen. Makal Kuol Deng and the former Commissioner of Mayom County of Unity State, Peter Dak Khan.

- On 15th January 2014, rebels attacked Aliek Payam of Tonj North County, Warrap State killing four and wounding two others, one of whom was a small girls, as well as raiding 326 heads of cattle.

- On 16th January rebels attacked Twic County's Turalei Payam-Ayen Bpma (Akong village) killing one, wounding five others and raiding 450 heads of cattle. Two citizens of Gogrial East County citizens were wounded on the rebels' retreat.

- On 31st January 2014 rebels attacked Tonj North County's Alabek Payam-Lou-Ariik area killing 42 and wounding 28 people.

- On 3rd February 2014 rebels murdered a woman at dawn in her house in Twic County's Ayen Boma-Akong village.

- On 1st March 2014 rebels attacked Twic County's Turalei-Payam-Ayen-Abiel area killing 7 and wounding 10 others.
- On 14th March 2014 rebels ambushed civilians in Gogrial East County's Mayen-Jur-Boma-Kuechguot area killing 1 person.

- On 15th March 2014, rebels attacked Tonj North County's Alabek Payam-Juw area killing 7, wounding 4 and raided over 200 heads of cattle.

- On 31st March 2014, rebels attacked Twic County Aweng Payam-Nyang-Aher area killing 13 women who went to collect grass cutting for thatching.

- On 6th April 2014, rebels raided 15 heads of cattle in Ajak-Kuach Payam in Twic County.
- On 13th April rebels attacked Gogrial East County killing 2 persons.

- On 17th April 2014, rebels attacked Tonj North County's Alabek Payam killing 28 and wounding 17 others.

- On 28th April 2014, rebels attacked Gogrial East County's Mayen-Jur killing 1 person and wounding another.

- On 5th May 2014, rebels attacked Twic County's Makoj-Noon killing 13 and wounding 27 others.

- On 18th May 2014, rebels attacked Twic County's Burgik area killing 1 and wounding 4 others.

- On 13th June 2014, rebels attacked Tonj North County's Akop Payam Gol-Loch area killing a girl and a man.

- On 2nd July 2014, rebels attacked Gogrial East County's Mayen-Jur killing 8 and wounding 11 others.

701. The Acting Governor of **Warrap State-Kuajok**, Hon Akec Tong Aleu, provided the Commission with a list dated 1 May 2014 providing a summary of raids carried out by Nuer Bul cattle rustlers who have joined the rebel groups and setting out the number of people killed to that date and cattle raided. In Tonj East County 170 people were killed and 2022 cattle raided, in Tonj North, 144 people killed and 1620 cattle raided, in Gogrial East 88 people killed and 728 cattle raided and in Twic 44 people were killed and 250 cattle raided. Of the numbers, 28 were women and 40 children.

702. Paramount Chief, Jacob Madhol Lang of Aweng Pyam, Twic County, **Warrap State** reported 16 people died, 1 woman injured, 3 women missing and 250 cows looted as a result of a raid carried out by Nuer cattle rustlers from Mayom county in

Kuouch area in Noon/Akuar on 31 March 2014 at 4pm and 13 people killed and 21 wounded by Nuer cattle raiders at Maagok and Noon in Akuar on 5 May 2014.

703. The Acting Governor of the State, stated that Warrap state supports the President (the President hails from the state) because he was elected democratically and can only be removed through democratic means.

704. The way forward for the country in the estimation of the people of the state was for peace to return through the immediate silencing of the guns, as a concomitant necessity. If this can be achieve, then the country should embark on a programme of institutional reforms in all areas of state building.

705. The need for people to be held accountable for the atrocities and injustices committed against the people was also highlighted. It was suggested that an international process be embarked upon that will ensure that anyone suspected of any form of culpability will be brought to justice.

Yambio, Western Equatoria

706. The Commission visited Yambio, Western Equatoria, to listen to the perspectives and views of the conflict from the non-affected area and met with government officials, representatives of human rights' and civil society groups, women's groups, youth groups, members of the legal administration and traditional chiefs.

707. The Commission met with the Governor of Western Equatorian State (WES) and his cabinet. During the meeting, several issues were discussed. With respect to root causes of the conflict, it was their view that these range from corruption to centralization of power, land grabbing, nepotism, the culture of revenge among the Dinka and the Nuer and a culture of impunity. According to the Governor, the conflict could have been avoided if the Kiir government had followed the recommendations of the 2011-2012 Equatorians' conference. In terms of recommendations, the WES government stressed the need for: a Special Tribunal for South Sudan composed of neutral judges and prosecutors who can help to fight policies of blanket amnesty for perpetrators of human rights violations; a Truth and Reconciliation Commission which in their view would create space for people to heal their wounds from past atrocities and; a Comprehensive Peace Agreement providing for federalism and a proper representation of other tribes and regions. For them, a peace accord between the only warring parties would not be sustainable, but temporary.

708. The Director of Relief and Rehabilitation Commission (RRC), Western Equatoria State, Joseph Salvatore Nzaku, reported on 15th July 2014, that according to the registration and verification of internally displaced persons (IDPS) in the nine counties done by his organisation, the number of IDPs on the ground is 32,102 individuals, 6,897 households as at the end of June 2014, up from 28,884 and 5,492 respectively.

709. All the civil society groups that the Commission met condemned the conflict as a whole. Noting that South Sudan's diversity should be its strength, they

observed the lack of representation of *all* South Sudanese in the Addis Ababa peace process. It was indicated that when the conflict started in Juba on 15th December, the church, state government leaders and traditional leaders within the state played a crucial role in maintaining peace, security and stability of the state.

710. The Commission also met with other groups:

- Traditional and community leaders shared their experience on how they maintain peace and order in the community to the extent that for them impunity is at state not community level.
- United Nations humanitarian agencies and UNMISS substantial sections emphasized on how the crisis impacted their work. While the human rights and humanitarian situation are good in general, at the beginning, there was a restriction of movement because of the general panic. Some humanitarian organizations left WES because the future was unforeseeable. A few individuals in from war-affected zones were received as IDPS but, in order to promote self-reliance and not to develop a dependency on humanitarian assistance, no camp was set up for them. Instead, they were hosted by communities and families.
- Judges stressed the need to ensure judicial independence, to fight corruption and nepotism in the system and, for WES, to increase their numbers and to equip them with cars and other tools.
- Women's rights groups called for education of women and girls given the high illiteracy rate, equal justice for gender based violence and a provision in the constitution on child protection and women's protection against GBSV. They were concerned with the impregnation of young girls and called for the need for awareness campaigns and the intervention of local courts.

711. Although Western Equatoria is regarded as having been relatively peaceful during the conflict, there have been sporadic incidents of violence resulting in some deaths and killings. They reported fighting between cattle raiders from Dinka from Lake State with local agrarian farmers, the invasion of farming plots without any permission; a frequent cause for conflict, resulting death of people, rape and other challenges. In sum, the whole state has, invariably, been indirectly affected. The Commission heard of prolonged, and what was described as arbitrary, detention within the state. The price of goods rose sharply and the ensuing financial constraint has affected the state development project.

Eastern Equatoria State

712. The Commission met with the Governor, Brigadier General Louis Lojore, the Deputy Governor Jerome Gama Surur, the Minister for Local Government, Law Enforcement and Wild Life Conservation, the Minister for Gender and Health, Minister for Education, Community and Religious Leaders the SPLA Sector Commander, the State Peace Commission, the President of the State High Court, the Legal Administrator of Eastern Equatoria, State Police Command, Acting Speaker of the State House of Assembly and civil society organisations.

713. The State borders three neighbouring countries, i.e. Uganda to the south, Kenya to the east and Ethiopia to north east. It also borders Jonglei State and Central Equatoria State. The State is the second largest in the country and it comprises about 17 tribes. The majority of the population are pastoralists while there is a sizeable number of agrarian people.

714. Although the State was not among the affected ones, the impact of the violence that took place in the affected states had direct effect on it. The State is a direct conduit through which those fleeing the conflict to neighbouring countries pass through and, because of its proximity with directly affected States, citizens of those States have found abode in Eastern Equatoria as displaced persons along with their livestock, contesting for grazing land with the host agrarian community for the use of land and water. The State has received about 80,000 households. In Eastern Equatoria State, Relief and Rehabilitation Commission (RRC) provided information to the Commission on 11th August 2014 that 17, 943 households and 80, 977 individuals had thus far been registered as from 17th February 2014, fleeing the conflict; numbers which they expect to increase.

715. Most of those displaced are mostly from Jonglei and Upper Nile States. These people are not necessarily in camps and their interaction with host communities, particularly, the agrarian community creates its own tensions. The impact of this situation therefore, has many dimensions, both in social and security terms. Land is now a source of conflict in the state. The massive displacement of persons has put a lot of strain on the social services in the state which has had to manage with the meagre resources at its disposal to deliver these services to the people. The challenge facing the state government is how to respond effectively and adequately to the gap in service delivery created by the sudden influx, which has been overwhelming for many reasons. Food security is now a challenge as cultivation did not take place this season due to the conflict. The main problem being faced in the state now is the management of the internally displaced. The government is not receiving any financial assistance from the central government to assist it in meeting the additional needs for providing services.

716. There was consensus that the conflict had its genesis in the political struggle within the upper echelon of the SPLM which translated into an ethnic conflict.

717. The SPLA Sector Commander informed the Commission that the major security challenge in the state is related to cattle rustling, that within the barracks the different ethnic composition of the officers and men did not lead to any conflict amongst them and that he and the Brigade Commanders cooperated and maintained the sanctity of the troops. He revealed that the SPLA was currently in the process of reform to become the South Sudan Army and completed by 2017.

718. The State Police Command acknowledged that the incident which began in Juba assumed tribal dimension in the barracks, but authorities in Torit pre-empted such development by speaking directly with uniform personnel the state capital. He further noted that in the SPLA formation in the state there was palpable tension but the Governor of the state successfully doused the tension amongst the rank and file. Nonetheless, in the Military Academy, a situation occurred where a Dinka cadet lured three Nuer cadets into the bush and killed two of them with one escaping to

report the incident. The Dinka cadet officer was duly apprehended and the entire academy had to be separated along ethnic lines. One of the key roles played by the police was in providing safe passage for those fleeing the country to neighbouring countries. The police ensured an orderly movement which did not result in chaos and further loss of lives.

719. Additionally, the security situation in many parts of the country has been adversely affected by a proliferation of small arms and light weapons which calls for a genuine nationwide disarmament programme that will rid the country of the scourge of small arms and light weapons.

720. The Commission was informed that the military in Torit, the capital of Eastern Equatoria, almost split down ethnic lines but for the efforts of the State Governor who mobilized religious leaders and other community leaders in the state to calm the situation.

721. The Acting Speaker of the State House of Assembly confirmed that the structures of governance in the state continue to function, with the state exercising authority down the line to all payangs and bomas, the smallest unit of state structure in South Sudan. There are also appropriate linkages between all arms of government which allows for transparency and accountability.

722. The President of the State High Court and Legal Administrator highlighted the challenges facing the judicial system; lack of capacity both in terms of infrastructure and operational requirements. The need for capacity development was thus brought to the fore as the main challenge facing legal administration in the country. The need to mainstream Sharia legal system with the newly adopted Common law system was highlighted as most of the judges were from the former legal tradition.

723. At the meeting with religious leaders, the Papal Monsignor observed that the country needed healing, justice and accountability for the atrocities committed in these past months. He noted that the country was still bleeding and there was too much hatred amongst the different people in the country. The country and its citizens have to learn to forgive each other. He stated that the citizens of the country lacked patriotism and nationalism. There was so much hatred in the air that leads to revenge killings as an avenue for seeking redress. He commented that the CPA, which ushered in independence did not take into account the interest of the people. This has led to a sense of entitlement and invariably greed on the part of those who took part in the so called liberation struggle. This has engendered a disregard for meritocracy and the system was collapsing under its own weight.

724. Members of civil society organisations noted that the conflict had shaken the very foundation of national unity in the country, while continued mass migration of the citizens to neighbouring countries will not affect agricultural production but also lead to brain drain.

725. On the way forward, the Governor (and there was broad concurrence with this approach amongst the stakeholders with whom the Commission met) stated that the first step to peace is the enforcement of the Cessation of Hostilities Agreement. Thereafter, sanctions and accountability should be used appropriately and

sequenced in a manner that will not be counter-productive. The Governor was of the view that future stability will not be without the participation of both Salva Kiir and Riek Machar in any arrangement that may follow from the ongoing peace talks in Addis Ababa. This would pave the way for a healing and reconciliation process that will precede an accountability process as the last segment and called for national dialogue amongst the different nationalities in the country to fully settle national questions affecting the peace, stability and nation building.

Refugee camps in Sudan, Ethiopia (Gambella), Kenya and Uganda

726. Many people have taken refuge in camps in Ethiopia, Kenya, Uganda and Sudan in addition to the UN protection sites in South Sudan. The Commission has compiled some basic statistics[348] on the various refugee camps in the region. The countries with the highest concentration/ numbers of South Sudanese refugees are Ethiopia and Uganda. The camps in Ethiopia host the largest number of new arrivals and four new camps were opened by UNHCR in 2014. In Uganda, the camps host a large number of Dinka refugees - many having come from Jonglei State (and Bor). The demographics demonstrate that the highest percentages of refugees in all camps are women between the ages of 18 and 59 years, followed by boys between the ages of 5 and 11 years.

Concentration of Refugees in camps around the region

Country	Pre — December 2013	Post — December 2013	Current figures	Demographics
Ethiopia - Gambella	**62,924** Total	**191,041 (new arrivals)** Total	157,570 — total in camps	
Camps breakdown 1. Kule camp (opened May 2014) 2. Tierkidi camp (opened Feb 2014) 3. LEITCHUOR camp (opened January 2014) 4. OKUGO camp (prior Dec 2013) 5. PUGNIDO camp (prior Dec 2013)		50,453 48,447 47,811 1,966 (new arrivals) 1,692 (new arrivals)	50,453 48,447 47,811 1,966 (new arrivals) 1,692 (new arrivals) Total in camps	
Uganda	**22,264**	**124,916**		

[348] These figures are as at September 2014 and are taken from UNHCR statistics.

Camps: **1. Adjumani** **2. Arua** **3. Kampala** **4. Kiryandongo**		**80,173** **11,081** **4,885** **28,018**		
Kenya	**45,239**	**42,680 (new arrivals)**		18.1% - Female between ages 18 and 59 years 14.8% - Male between ages of 5 and 11 years
Sudan		**94,196**		N/A
Camps/ Settlements breakdown 1. Khartoum - 2. White Nile 3. Al Redis 4. El Kashafa 5. Jouri 6. Blue Nile 7. South Kordofan 8. West Kordofan		28,843 6,169 8,805 9,465 12,661 3,661 14,288 3,789		

727. Regrettably, the Commission was only able to visit Kakuma Camp, Kenya between 19th and 23rd September because of time constraints and the difficulty in securing clearance from the necessary government agencies. There are currently 178,000 refugees in Kakuma Refugee camp, approximately 50,000 more than the current capacity of the camp. The Commission was informed thatin September the camp received between 70 to 120 refugees, mainly from South Sudan, on a daily basis. This was a decrease from numbers experienced in previous months since the influx of South Sudanese refugees in December 2013. South Sudanese refugees have prima facie status.

728. The main priority concerning child rights is the identification of unaccompanied minors. More than 90% of refugees in Kakuma 4 are South Sudanese. Of these 29,916 are children as at 12th September, 22,603 accompanied by biological parents, 6,150 separated children and 1163 unaccompanied minors.

Table1.1 Statistics on Children

Category	**Total # of children**	**Boys**	**Girls**
SS Children in Kakuma Refugee Camp	29,216		
Accompanied by one or more parent	22,603		

Separated children/ arrived with an adult that is not their parent	6,150	3,861	2,289
Unaccompanied minors — no living relative	1,163	754	409

By age group

1. Separated Children

	0 — 4 years	**5 — 11 years**	**12 — 17 years**
Male	1117	1220	1124
Female	695	808	786

2. Unaccompanied Minors

	0 — 4 years	**5 — 11 years**	**12 — 17 years**
Male	89	250	415
Female	54	145	210

729. Thus far, 41 unaccompanied minors and reunited 1 with the aunt; most unaccompanied children appear to hail from Bentiu.

730. It was difficult to establish whether there had been SGBV in the camp because of South Sudanese culture and the stigma attached to the violated women. However, the Camp management did note they had received cases of psychological violence, beating and defilement.

731. At a meeting with women community leaders, the Commission heard from witnesses who described killings by government soldiers of Nuer civilians, witnessed violations in Malakal town, and one of them indicating that she had names of people killed by government forces [349], describing people killed by government military forces; she no longer had contact with her husband, one of her children was still missing[350], she had witnessed killing by government soldiers in Juba[351], had seen killings[352], and described some people burnt, had heard of Nuer being tortured and women being raped, had seen Nuer fighting with Dinka, artillery or bombs from helicopter targeting civilians marching toward Bor[353] and described the fighting during 15th December 2015, which resulted in civilians being killed[354].

732. At a meeting with male community block leaders,[355] the Commission was provided with various accounts of wide looting of property in Juba by government forces, of government soldiers bursting into homes and killing civilians, of deliberate targeting of Nuer people by the Presidential Guard and other soldiers, of the presidential address on TV on the 16th December, described as provocative and as the trigger for attack on civilians, as before that, the battle was just between government and rebel soldiers, of the manner in which the Dinka soldiers identified

[349] Meeting of 20 September 2014. Witness 1.
[350] Witness 2 from Juba.
[351] Witness 3, originally from Jonglei but was in Juba when violence erupted.
[352] Witness 4 from Bor.
[353] Witness 5, a Dinka from Bor,
[354] Witness 6.
[355] Nine (9) community block leaders, only one of whom was a Dinka, the rest were Nuer.

the Nuer people (by a greeting in Nuer). The witnesses also described how the precise identification of the government soldiers and their troop or company/battalion was made difficult owing to the extreme fear and panic in which they were placed, described the burning of houses in New Site, the killing of a specific family, which was named, and corroborated by three of the witnesses, described witnessing many bodies of the dead in the streets, the rape of women leaving the UNMISS camp, with one of the witnesses describing the rape of his brother's wife, described the forced eating of human flesh, on the grounds that certain Dinkas are traditionally cannibalistic (a sub-clan of the Aliab called Atuot Abangbar who live in Awerial County), and it may be a process of taking revenge.

733. The Commission met with a number of witnesses who were able to provide first-hand account of various aspects of the conflict as follows:

734. A witness,[356] who identified himself as a Darfuri and who was in Juba on 15th December 2013 stated that he personally witnesses government soldiers fighting Nuer soldiers. He witnessed Nuer soldiers being disarmed and killed after being tied at their backs on return from Tongping. The first people he saw were his Nuer neighbours who were beaten and from whose house a Nuer soldier escaped being killed. The witness described that he heard some of the soldiers threatening rape of the neighbours they were beating up but confirmed the women were not raped. Later he witnessed government soldiers ordering Nuer students to identify themselves and killing the primary schoolchildren identified as Nuer before randomly shooting. About 30 students and two teachers died.

735. A woman witnessed,[357] on 16th December 2013, seven Dinka soldiers killing her brother-in-law (a Nuer soldier) in her house, and also another person. She also stated that she heard Nuer women were being raped but did not witness the rape. She lost 3 children in conflict, who are still missing.

736. A 23-year-old from Bentiu village, near the town of Bentiu, described in detail the witnessing (from between the twigs of the intervening grass fence) of the killing of his neighbour family of four, where the deceased were all slashed with machetes after being made to kneel down, the father first, then the children being forcefully grabbed from the arms of the mother and all killed. The witness described the little toddler children being killed by the wringing of their necks.

737. A 34-year-old Dinka (Aliab sub-clan) — Corporal in the Giada barracks - described persecution at the hands of mainstream Dinka government soldiers because of his sub-clan, the killing of civilians with the government forces claiming that they are really Nuer soldiers without uniform, the collection of bodies in several drives to clean up the area for fear that the United Nations would discover the truth about what had really happened.

738. An 18-year-old soldier trainee at Bilpam described the concentration of violence against Nuer at New Site being due to the predominance of soldiers living in that area, the process that was used by the army to ascertain which were the

[356] Witness 7.
[357] Witness 8 from Juba.

deserters, and the selective persecution and killing of those soldiers considered either rebel or neutral, including some higher-ranking soldiers

739. A 18-year-old Nuer male — student (primary school) from Bentiu, Unity State described the beginning of conflict in Bentiu and fleeing to Leer County where he and his sisters hid for several weeks. He witnessed the killings of his uncle in Bentiu prior to fleeing to Leer and also killings of Nuer by Dinka (and other soldiers) in Leer County. He explained that he escaped death because he was never called by the soldiers and just kept walking as people were leaving the town, although others amongst them were called and shot. He also saw a woman who had survived gang rape in Leer town after an attack by government forces and described the manner in which he found her and that she told him she had been raped by four men (government soldiers).

740. A 24-year-old Nuer, a male student (secondary school) from Bentiu, Unity State described in detail the beginning of conflict in Bentiu and explained that in the process of his journey from Bentiu to Kakuma camp he had been given arms twice (by opposition forces) and participated in fighting the government forces. He also described the effect of the initial fighting on pregnant women. Upon leaving Bentiu, he was part of a large group that fled to Payianjiar County (Unity State), not too far from Leer. He described an attack by government forced who had come from Rumbek in Lakes State and how the former County Commissioner, Abraham Luon Biel, had given all the men in the community weapons to fight the government forces. He narrated how the White Army had been organised, given ranks (similar to those in the government army) and recruited community members. When pressed he said that this group of people were only a self-defence unit and did not have any offensive activity whatsoever. He also noted that Riek Machar may not know of the existence of this Division 4 of the White Army, however, the Division is in regular contact with the SPLA-IO Area Commander based in Leer Town, even attending meetings there from time to time.

741. Two women, 20-year-old and 24-year-old Nuer women refugees in Reception Centre, both described how they had been married to Dinka men (soldiers) who had been killed in the fighting. The 20-year-old described how her brother had killed her husband as an act of revenge for the lost lives of his Nuer friends and relatives. Her brother had threatened to kill her if she attempted to take any action against him. She was now living in fear of her husband's Dinka relatives who had demanded she hand over her children to them. The 24-year old showed wounds of the stabbing she endured at the hands of her brother in law who had attempted to take her children away from her.

Violence against Women and Sexual and Gender-Based Violence (SGBV)

742. The Commission heard and received reports from witnesses and survivors of rape, gang rape, murder, killing, sexual assault, torture, cruel, inhuman and degrading treatment as well as abductions, sexual slavery, disappearances and targeting of foreign women. Further and in-depth investigations to verify these allegations are required but there are several challenges that exist including: limited access to remote areas where women and other vulnerable people are taking

refuge, limited means and resources for investigation and the requisite systems and institutions for pursuing justice.

743. Of great concern are reports the Commission received from various respondents that there are many cases of SGBV occurring in remote areas beyond the PoCs that are inaccessible to the humanitarian actors responding to the South Sudan crisis; the Commission interviewed one witness who testified to being a survivor of such an incident[358].

744. Discussions with various State authorities demonstrated that there is acknowledgement of these acts and that they are not permissible. The AUCISS was however concerned that little is being done by all parties involved in the conflict to ensure the protection and security of vulnerable groups. For instance, in a meeting with the Acting Governor of Unity State in Bentiu, the latter told the Commission that the cases of rape that had been brought to them concerned women who were walking around late at night. This was viewed as unacceptable and such individuals were considered to be part of opposition forces (rebels), who would be the only people walking around at night[359].

745. On the other hand, the Commission found that while there are some potential responses to SGBV, there are cultural barriers that prevent disclosure and reporting, thus hindering response efforts. The Jonglei State Ministry of Gender, Child and Social Welfare noted that while they have heard of cases of SGBV in the conflict, issues of stigma make it difficult to reach the women in the POCs. The Ministry has heard reports but when they send their social workers out to follow up and provide services, survivors and victims do not come forward[360].

746. The attitudes and cultural values around SGBV existing prior to the current conflict persist. One reference to survivors of SGBV in Malakal demonstrates this:

> Seven of the women raped in the Catholic Church were volunteers. Three of them came to UNMISS. They have now gone to Sudan (North) because of the stigma. Four went with the fighters because they said no one will marry them now.[361]

747. The Commission heard numerous stories of women married to Nuer men who were targeted and killed, especially between the 15th and 18th December 2013, in Juba. One mother who lost three sons recounted:

> The wife of my son, [Name of son], who was killed, they went to her house in Gudele and killed her. She is from Equitoria, here in Juba and they killed her simply because she was the wife of a Nuer police officer. She had recently given birth to twin boys and they were also killed.[362]

[358] AUCISS consultation with humanitarian actors, Malakal, 4 August, 2014.
[359] AUCISS meeting with Acting Governor, Unity State, 31 July, 2014.
[360] AUCISS meeting with Jonglei State Minister of Gender, Child and Social Welfare, 6 August, 2014.
[361] AUCISS consultation with humanitarian actors
[362] AUCISS Interview with Witness NTB, August 2014.

748. Reports were also given to the Commission of rapes and other violations perpetrated against female foreign nationals — women from Kenya, Uganda and Ethiopia, especially in Bentiu.

Vulnerable Groups

749. In Upper Nile State, the Commission heard of the severe impact on vulnerable groups. One participant noted that "this crisis has not left anyone out; it killed the mentally disabled, the physically challenged (as well as) the able bodied people[363]." In the town of Nasir, members of the AUCISS met and talked with a group of 25 elderly and disabled people seeking refuge in the small UNMISS compound there. This group of people had survived the continued and severe attacks in Nasir[364] but had been unable to escape to refugee camps in neighbouring Ethiopia. Their conditions in the UNMISS compound are extremely precarious, with one humanitarian worker attending to their needs in the best way possible given the high risk nature of the location[365].

750. This has been a major concern of the South Sudan conflict. Some actors carrying a protection mandate have received information on the movements of IDPs from the camps towards Khartoum (Sudan). Fears are that those who leave the PoCs may encounter traffickers under the guise of paying for safe passage to Sudan. Women, girls and boys are particularly vulnerable in these instances[366].

751. The overall work of the AUCISS has established that some efforts, however limited, have been undertaken by the Government of South Sudan to respond to some serious human rights violations in the conflict. The Ministry of Gender has undertaken specific activities in response to the ongoing conflict within the Peace Framework. These include documenting cases of sexual exploitation, disappearance of children and offering services where possible.

752. While women were adamant that all those who had perpetrated violations had to be taken to court, face judgement and the consequences of their actions, they expressed concern that the South Sudan justice system was not best suited to handle these cases primarily because in their view the government was perpetrating some violations themselves. These women stressed that Commanders should face prosecution through non-national processes because they should have told their forces not to do the things they did[367]. One woman told the AUCISS:

> I do not trust that the government (the national) justice system can manage this. What happened created a lot of fear within the people.

[363] AUCISS consultation with women community leaders, Malakal, 3 August, 2014.
[364] At the time of the AUCISS visit to Nasir, the town was completely empty of civilians save for the group in the UNMISS compound. There were visible signs of destruction to property and the UNMISS Force Protection there informed the Commission that fighting between the government and opposition forces was a daily occurrence; the team heard sounds of fighting during the visit.
[365] AUCISS visit to Nasir, Upper Nile State, 4 August, 2014.
[366] AUCISS meeting with protection cluster, 31 July, 2014.
[367] AUCISS consultation with women community members, Bentiu, 2 August 2014.

> Now people say if peace comes we will go back to Malakal, but unless we are sure that there is security in Malakal, we cannot go back[368].

753. Another woman said:

> There needs to be accountability for lives and property lost. There needs to be accountability from an external body, or external Special Courts, not something by South Sudanese.

754. A key feature of discussions with women was their reference to what they lost in the conflict beyond the lives of loved ones. Women spoke to the Commission about restoration of their means of livelihood and sources of income and reparations for the loss of homes and other property. Women told the Commission they wanted to know the truth about their loved ones and hear acknowledgement from all sides of the conflict for violations against them.

Justice for sexual violence

755. Women acknowledged that part of the difficulty of addressing SGBV in conflict was verifying that it had happened. Stigma and shame would prevent women and other victims and survivors from coming forward. There was need to prioritise the implementation of a process such as going to court that would guarantee a measure of justice for women survivors. Talking about rape in Nuer culture one woman said:

> The system here, Nuer have it (part of the Nuer practise and culture), if it (rape) happens, women may be shy and will not tell. They will tell someone who will have (maintain their) confidentiality. If it was possible to prove that there was force used, people would go to court. There is (can be) no cow for rape. The people must be taken to court, imprisoned or be killed. Cattle are exchanged (only) when there has been adultery.[369]

756. The next section sets out the Commission's consideration of the crimes that happened during the conflict.

II. Consideration of Crimes

757. It was clear from all the interactions of the Commission during the state visits that both sides of the conflict had perpetrated human rights violations. These violations included killings and murder, torture, cruel, inhumane and other degrading treatment, abductions, rape and other sexual and gender based violations, incitement, looting and destruction of property.

758. Violations against civilians were perpetrated during all the attacks on towns, whether government or opposition forces carried out the attack. The involvement of intervening forces and unconventional fighters such as the White Army was blamed

[368] AUCISS Consultation with women community leaders, Malakal, 3 August, 2014.
[369] AUCISS Consultation with women community leaders, Bentiu, 2 August 2014.

for many atrocities committed. In Bentiu the extremely violent nature of the rape of women and girls — that in some instances involved maiming and dismemberment of limbs, was attributed to JEM fighters on the side of government. In Bor, the Ugandan forces were accused of having used cluster bombs and causing severe damage to civilians.

759. While conflict is not a new phenomenon to South Sudan, the majority of those the Commission met with, said that they have never seen the scale and nature of violations witnessed during this conflict. What makes it so much worse for them is the targeting of civilians, which they claim was never a central part of previous conflict.

760. The Commission paid particular attention to the violations experienced by women and recorded numerous statements from women. Experiences of various forms of SGBV, detentions and abductions were recorded and taken note of. These state visits noted what had been previously established by the Commission; that women had been victims of the conflict and had been targeted in various ways.

761. In its consideration of the crimes that may have been committed, the Commission took into account the testimony it heard and the evidence unveiled by its investigation in the main theatres of violence. A summary of the testimony and evidence the Commission considered is now set out below but it is by no means the totality of the information the Commission took into account.

762. Thus, in Juba, the Commission heard testimony from the key players and eye witness accounts that the hostilities spread rapidly. Nuer civilians were specifically targeted by government soldiers swiftly after the break out of hostilities. The Commission spoke to a male from Juba who testified that security personnel came to his house on the night of the 15th because they heard that there were Nuers working there and insisted that he hand over a guard he had working for him. The Commission heard testimony of killings and deaths, and dead bodies. There was looting. The Commission was told that those who targeted, attacked and killed Nuers on the basis of their ethnicity were members of the National Security and the Presidential Guard. The Commission also heard testimony that in the days, perhaps a week, prior to the 15th December, Nuers in the army were being disarmed prior to the NLC meeting and that there were indications that security personnel were prepared and armed. The Commission heard testimony that the President had been training a personalised arm, and with hindsight, a speech he gave in the previous August augured ill. The Commission was informed by former members of government that President Salva Kiir had tried to influence the numeric composition of the Presidential Guard to the benefit of the Dinka ethnic group by recruiting into the Presidential Guard specifically from Warrap and Northern Bahr el Ghazal States in May 2013, deployed outside the command structure of the SPLA. There were eye witness accounts of killings and extra judicial executions by government soldiers in Juba; of people who disappeared and were not heard of again, of looting, land grabbing. There was a well spring of opinion that the President's response on the 16th, rather than exhorting people to calm down, inflamed matters. There were allegations of media interference on the part of the government.

763. The Commission's investigations revealed evidence of torture, rape and killings by elements of security forces aligned to the government in residential areas like Muniki 107, Khor Williams, New Site, Gudele One, Mangaten, Mio Saba, Customs and Nyakuren. The investigations also obtained confirmation by the Senior Prosecutor of Central Equatoria state that he signed off on the mass burial of 258 bodies taken to Juba Teaching Hospital and buried at New Site area.

764. In Jonglei, the Commission heard testimony of killings of civilians in the church and hospital in Bor when the town passed variously between the control of the SPLA and SPLA-IO. The Commission was informed that mass killings happened when the opposition took Bor for the second time, of rapes and defilement of women who leave UNMISS PoC Site in Bor to seek food or firewood and leaving them fearful for their lives, of loss of livelihoods, the attack on a church, that a Minister gave orders that people in the POC should be killed and of the killing of 46 civilians when UNMISS PoC site was attacked. The Commission heard eyewitness account of the killing of 24 women praying in a church and accusations of killings following an attack by a group associated with David Yau Yau. The Commission was told by a victim and witness in UNMISS PoC Site at the time of the attack who was beaten and almost shot but survived only because the bullets ran out, that she saw the beating and shooting of women, and saw pregnant women have their stomachs cut open. She identified the attackers as mixed, some in SPLA uniform, some in police, some in prison, some in wildlife, and others in civilian clothes. The attackers looted some property and when they left, they left in SPLA vehicles. There was testimony heard of incitement to violence in Bor with broadcasts saying that Dinkas don't have a place in Bor and that the land belonged to Nuers. There has also been refusal of the state authorities to allow the evacuation of Nuers needing medical treatment.

765. The Commission's investigations confirmed that following Peter Gadet's defection on the 17 December with mostly Nuer soldiers, there were mass killings committed in the CID neighbourhood offices, near the river bank. The killings targeted civilians of Dinka ethnicity who were trying to flee by crossing the river. Riek Machar arrived in Bor on 18 December by river boat.

766. The Commission heard testimony of incitement to violence in Bentiu, Unity State, through broadcasts from Bentiu FM when it was taken over by the opposition who broadcast in Nuer exhorting Nuer men to rape Dinka women, accusations that government forces killed civilians in Leer by opposition forces and counter accusations by the Acting Governor that Nuer youths, led by Peter Gadet, were responsible for attacks after the cessation of hostilities agreement and that Peter Gadet was recruiting children under 14 years old. The Commission heard reports that government forces were hampering humanitarian efforts, testimony from women in UNMISS PoC Site detailed killings, abductions, disappearances, rapes, beatings, stealing by government forces and being forced to eat dead human flesh. When the Commission met with Leer County Acting Commissioner — In Opposition (IO), he admitted that in Bor they killed 201 Ugandans but denied killing any civilians. He accepted they moved through Bor from Juba to get to Leer but any combat was military; it was the dry season and they saw no civilians. The Commission met with a group of women in UNMISS PoC Site 1 in Bentiu who

specifically requested a meeting with the Commission. They reported rapes and gang rapes as well as serious violations by government forces.

767. In Upper Nile, the Commission heard of eye witness attacks on churches, opposition soldiers killing people, of missing persons, rapes and abduction and testimony that almost every family in Malakal had lost at least one family member as a result of the opposition incursion.

768. The Commission's investigation obtained evidence of alleged killings by SPLA-IO soldiers at Malakal Teaching Hospital following the capture of the town on 15 January. Some female civilians sheltering in the hospital were abducted by opposition soldiers and have not been seen since. The investigation also uncovered reports that when the government captured Malakal on 22 January there were killings of Nuer civilians by SPLA soldiers at the hospital. During the second occupation, the investigation obtained evidence that SPLA soldiers abducted and raped Nuer women sheltering at Christ the King Church. When the SPLA-IO captured the town on or about 18 February, the soldiers started killing people in the hospital, mostly Shilluks as the Dinka people had since fled. No Nuers were reported killed.

769. What is evident that civilians bore the brunt of the atrocities and that the conflict played out primarily amongst the civilian population and civilian targets. Indeed, specific identifiable groups within the civilian population were targeted on the basis of their ethnicity, and gender, as an integral part of the armed conflict.

Human Rights violations

770. From the findings, the Commission has concluded that diverse violations of international human rights law occurred in South Sudan from 15th of December. These were committed by the SPLA (and allied forces) and the SPLA/IO (and allied forces).

771. The murders and executions that were carried out in various sites in South Sudan constitute a violation to the right to life. In particular, the targeted killing of about 134 Nuer men in Gudele joint operation centre; the execution of disarmed Nuer soldiers from the Tiger Batallion at the J2 palace; the killing of 90 Nuer civilians at the J2 Palace; the targeted killing of Nuer civilians in residential areas like Khor William, Munuki 107, Jebel area, Gudele area, Juba town; the targeted killing of Dinka and Nuer civilians from various communities in Bor and Malakal town by the SPLA and SPLA/ IO, all offend the right to life. The Commission observes that the President declared a State of Emergency in the morning of 16th December 2014 following the crisis that began in Juba and spread out in other towns and States.

772. Nevertheless, the State cannot use this situation to sanction the use of extralegal force against civilians[370]. In the case of the opposition, their assertion that civilians who died during the period of their occupation of Bor and Malakal were

[370] The Human Rights Committee has indeed stated in its general comment 6 that the right to life cannot be derogated from even in situations of emergency that threaten public life.

killed during the crossfire between theirs and the government's forces cannot find validity because of the sheer number of fatalities. Additionally the nature of injuries leading to death defeats this argument since most of the victims died through gunshot wounds to the head, abdomen and back — clearly indicative of an intention to kill. Under human rights law, the right to life is sacrosanct and has assumed the status of customary international law. It can only be violated in accepted circumstances such as in execution of a court order[371]. The Bill of Rights in the Transitional Constitution of South Sudan protects the right to life and human dignity and provides at Article 11 that "no one shall be arbitrarily deprived of his life".

773. The right to be free from torture, cruel, inhuman and degrading treatment and punishment was violated when soldiers allied to the SPLA gathered civilians in a confined space in the joint operation centre in Gudele on 16th December 2013 and proceeded to shoot them indiscriminately. As already described earlier, forensic investigations undertaken in the site of the killing concluded that some victims could have died as a result of asphyxiation while others may have died as a result of the injuries inflicted by gunshots. The right was also violated when SPLA soldiers in Gudele area forced Nuer civilians to drink human blood, eat human flesh and jump into lit bonfires. SPLA soldiers also committed acts of rape in Malakal. It was alleged that between 19th January and 17th February 2014, fighters and soldiers affiliated to the SPLA/IO would abduct women from places of shelter such as churches and rape them.

774. The right to be free from torture is absolute and non-derogable. There can be no deviation from the same regardless of the circumstances including war. Under the Convention against Torture the act is defined 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." It is instructive to note that the CAT definition of torture does not apply to non-state actors. To the extent that opposition forces are found to have committed acts of torture, customary international law prohibiting torture would be applicable.

775. In the Transitional Constitution of the Republic of South Sudan, torture and related acts are expressly prohibited under Article 18. Accountability for State perpetrators can be located within the said provision.

776. The opposition also allegedly committed acts of torture. It is alleged that, in Bor, opposition fighters raped women during the hostilities. Further, it was alleged that young girls were abducted and forced to engage in sexual conduct that amounts to rape. In Malakal, it was alleged that women were abducted from the

[371] Even then the Human Rights Committee urges a restrictive application of legal restrictions to the right to life such as the death penalty so that the punishment is seen as a last resort.

churches and forced to engage in sexual acts amounting to rape. Other women were raped in the churches in Malakal. As stated above, accountability for torturous acts committed by the opposition would be anchored under international criminal law frameworks.

777. During its interaction with victims, the Commission heard about the commission of sexual and gender based violence including rape by government and opposition soldiers in the various theatres of violence. The Commission did not receive any information from men regarding similar violations (even though the rape of men is not discounted) and at this point may conclude on a preliminary basis that women were targeted and sexually violated on account of their gender. For that reason, female survivors of rape suffered gender based discrimination which is prohibited in the Universal Declaration of Human Rights as well as the CEDAW. The Transitional Constitution of the Republic of South Sudan protects women's rights at Article 16. In particular, the Constitution provides that women be accorded full and equal dignity of the person with men. The sexual violence meted out on women also constitutes a violation of the right to freedom and security of the person. This right is not expressly provided for in the Constitution but can be purposively extrapolated from the provisions against torture (Article 18) as well as that on life and human dignity (Article 11).[372]

778. In all the sites that were visited, the Commission observed and heard about looting and destruction of property (homes, markets, businesses). Witnesses also informed the investigators that their houses were forcibly occupied by people from other ethnicities. In respect of these violations, the Constitution of South Sudan provides for every individual's right to acquire or own property (Article 28 (1).

779. The Commission visited the UNMISS PoC sites in Juba (Tongping and UN House), Bor, Bentiu and Malakal. Women and children constitute the bulk of internally displaced persons in those camps. Other displaced persons were reportedly in UNHCR administered camps in Minkaman (Jonglei State). The Commission was however unable to visit this camp. Nevertheless, the Commission documented violations that continue to attend the internally displaced persons.

780. For purposes of this analysis, the Commission's adopted the definition of internally displaced persons as set out in United Nations Guiding Principles on Internal Displacement. According to the guidelines, internally displaced persons are described as "persons who have been forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized state border".

781. IDP's in the PoC sites in Bor and Juba are reportedly unable to venture out of the camps and are therefore unable to engage in economic activities. This situation violates the IDPs' right to freedom to move in and out of the camp (Principle 14) and the right to seek freely opportunities for employment and to participate in economic activities (Principle 22). The opposite is true in the case of the UNMISS PoC Site

[372] Of the Transitional Constitution of the Republic of South Sudan

camp in Malakal where IDP's are able to leave the camp and only return in the evening. The Commission heard about IDP's being lured out of the various PoC camps and assaulted or raped. Others were attacked outside the PoC camps and beaten or in extreme cases killed. These acts cumulatively contravened the right of IDP's to life (Principle 10) as well as their right to dignity and physical, mental and moral integrity (Principle 11). Specifically the latter principle provides for protection against acts of violence intended to spread terror among IDP's. The Commission finds that the act of luring IDP's for purposes of killing them, or attacking them in or near the PoC gates as was reported to the Commission amount to acts that were carried out in order to spread terror among the IDP population.

782. On 17th April 2014, there was an attack on the PoC in Bor which directly contravened principle 10 of the guidelines on the right to life and specifically the prohibition against attacks on IDP camps. Children in the PoC's in Juba and Malakal are unable to access education since there are no schools in the camps. This position violates their right to education (Principle 23). In Juba and Bor, IDPs informed the Commission's investigators about their inability to return to their homes as well as the occupation of their homes by other ethnicities. In addition, the Commission observed government officials in Bor registering Dinka properties for purposes of compensation with no effort made to afford the same opportunity to the Nuers in the PoC camp. This amounts to a violation of the IDPs' right to property and in particular their right to have their property protected from pillage, other destructive acts and illegal occupation (Principle 21). The Commission observed that there were no efforts on the part of the government to correct the situation by providing security to IDPs that want to return to their homes, with a senior government official informing the Commission that displaced persons were refusing to leave the camps because they did not have access to "food and mattresses"[373].

783. The continued stay of civilians in PoC sites or UNHCR camps could be indicative of a security gap that makes it impossible for civilians to resume their normal lives under the guarantee of freedom from attacks. This could also be indicative of selective protection afforded to certain communities to the disadvantage of others (being Nuer's who still remain in the PoC' camps in Juba and Bor).

784. The incidence of child soldiers and or conscription of children is pervasive in the hostilities and was narrated to, and observed by the Commission. Further, the Commission has reviewed the re-commitment agreement between the SPLA and the UN regarding the implementation of the Revised Plan of Action halting the recruitment and use of children by the SPLA in the Republic of South Sudan. In the agreement, the parties observe that while progress had been made in releasing children associated was the army since March 2012, these gains were reversed as a result of the December 2013 crisis. Indeed in Malakal the Commission witnessed child soldiers manning the main roadblock from the UNMISS camp to the town and also noted the presence of child soldiers in Giada barracks. The Commission also spoke with a child soldier in one of the refugee camps and learnt that he had been

[373] Refer to witness statement of JWV

conscripted into the SPLA at the age of 15[374]. The SPLA/IO is also accused of recruiting children. Additionally majority of the soldiers fighting under the auspices of the White Army are children. This was confirmed by several witnesses the Commission spoke to such as BWM, BWO, BWP and BWQ. Under the Convention on the Rights of the Child, warring parties are prohibited from incorporating children in their armies/ forces. Both sides to the conflict have offended this right and have therefore breached the rights of the child to the extent that they still maintain children in their forces. South Sudan has a comprehensive legislation on the rights of the child which expressly provides against conscription of child soldiers. Article17 (1) (d) of the Constitution also provides against this practice.

785. Children are unable to attend schools in Malakal since the more than fifty primary and eight secondary schools are not operating owing to the prevailing security situation. Additionally, witnesses informed the Commission that teachers fled from the violence to other areas and have further not been paid their salaries since the violence broke out in December 2013.

786. Although South Sudan is yet to ratify any of the main human rights treaties and conventions, SPLA and SPLA/IO soldiers can still be held liable for violations to the rights to life, freedom from torture, cruel, inhuman and degrading treatment or punishment and freedom from slavery which are peremptory norms or *jus cogens*.

787. Where these violations were committed on a massive scale, those bearing the highest responsibility for their commission ought to be held responsible under international criminal law frameworks. The domestic criminal law framework can be used to try mid to lower level perpetrators. Additionally criminal liability could be anchored in the South Sudan Penal Code as well as the Children Act. Under the Penal Code, offences such as murder, assault, grievous hurt, rape, indecent assault, wrongful detention for purposes of unlawful sexual conduct, kidnapping, kidnapping with intent secretly and wrongfully to confine a person375, kidnapping for marriage, mischief, among others are criminalized.

Other Abuses (Violations of International Humanitarian Law)

788. As noted in the conceptual framework above, the Commission concluded that the conflict in South Sudan is an internal armed conflict to which Article 3 Common to the Geneva Conventions; Additional Protocol II and customary IHL apply. Acts prohibited in all circumstances include, murder, torture, corporal punishment, mutilation, outrages upon personal dignity, hostage taking, collective punishment, executions without regular trial, cruel and degrading treatment.

789. Most of the atrocities were carried out against civilian populations taking no active part in the hostilities. Churches, mosques and hospitals were attacked, humanitarian assistance was impeded, towns pillaged and destroyed, places of protection were attacked and there was testimony of possible conscription of children under 15 years old.

[374] Witness is a Darfurian who came to Juba in 2013, got arrested in June and remained in the forces till the war broke out

[375] Section 206, 247, 250, 269, 272 of the Penal Code

790. Considering the applicable law and case law, and the evidence and testimony the Commission has before it, the Commission believes that war crimes were committed in Juba, Bor, Bentiu and Malakal.

791. Indiscriminate killings of civilians as a war crime were committed in Juba. Indeed, unlawful killings of civilians or soldiers who were believed to be *hors de combat* were committed by element of security forces of the Government. These attacks resulted in massive killings in and around Juba. The people killed were either found during the house to house search or captured on roadblocks.

792. It is the Commission's view that there are reasonable grounds to believe war crimes of rape and torture were committed against civilians in and around Juba. The evidence on record also point to security forces of the government being involved.

793. The evidence collected also suggests that war crime of forced enlisting of children in the army were committed[376].

794. The Commission believes that war crimes were committed in Bor town through indiscriminate killings of civilians by the SPLA/IO and White Army forces allied to Dr. Riek Machar. In one incident indiscriminate killings were committed by forces allied to the Government forces at the Governor's Office in Bor. These crimes were committed by soldiers led by Col. John Ajak.

795. The Commission further considers that there are reasonable grounds to believe that war crimes in relation to massive and indiscriminate attacks against civilian property were carried out in Bor town. Visible evidence of torched non-military objectives like houses, market place, administration houses, hospital, form the basis to believe that these crimes were committed.

796. War crimes were believed to have been committed by Government soldiers in Malakal Teaching Hospital through the killings of civilians by some of the soldiers within the SPLA. The civilians killed were Nuers who had sought shelter at the hospital at night. About six Nuers were killed on diverse dates between 22nd January and 17th February 2014. Some others men women and children were selected, gathered and taken to the river where they were killed.

797. Government soldiers were also involved in the killings in Hay Saha, a neighbourhood in Malakal town, where at least 3 civilians not participating in the combats were killed.

798. After Malakal was captured by rebels on February 18, 2014 there were killings of civilians of Shiluk ethnicity committed by the rebels at Malakal Hospital. Around 35 people were killed.

799. The evidence on record also reflects that around 20th February 2014, rebel fighters frequently came to St. Josephina Bakhita Catholic Church at Hai Saha where they used to come and loot from women and abduct them. On or around 20th

[376] See witness statement of JWR

of February 2014 the rebel soldiers also came and selected 7 youth among the group seeking refuge and killed them in the streets. These were all Shilluks.

800. Rapes were also committed against women by rebel forces at the Malakia Catholic Church between 18th and 27th February 2014.

801. In Malakal, serious bodily injuries were inflicted to at least five civilians who still show scars on their bodies. These equally amount to war crimes.

802. There is no evidence that these civilians were participating in combats. Hence the killing amounts to war crimes committed by both Government and rebel forces.

803. In Bentiu, the Commission heard testimony of incitement to violence through broadcasts from Bentiu FM when it was taken over by the opposition who broadcast in Nuer exhorting Nuer men to rape Dinka women, accusations that government forces killed civilians in Leer by opposition forces and counter accusations by the Acting Governor that Nuer youths, led by Peter Gadet, were responsible for attacks after the cessation of hostilities agreement and that Peter Gadet was recruiting children under 14 years old. The Commission also heard testimony that government forces were hampering humanitarian efforts, and heard testimony from women in UNMISS PoC Site detailed killings, abductions, disappearances, rapes, beatings, stealing by government forces and being forced to eat dead human flesh.

804. It is the Commission's view that there are reasonable grounds to believe that war crimes such as murder, outrages upon personal dignity such as rape and other acts of sexual violence, and cruel and degrading treatment, targeting of civilian objects and protected property have occurred and that violations were carried out by both sides to the conflict.

Genocide

805. Despite the seeming ethnic nature of the conflict in South Sudan, the Commission during its consultations with various groups and individuals did not have any reasonable grounds to believe that the crime of genocide was committed during the conflict that broke out on December 15, 2013.

Crimes against Humanity

806. The Commission notes that a number of reports, including that published by UNMISS, have concluded that some of the serious violations of human rights could amount to crimes against humanity (CAH) and that further investigations are required to establish the identities of individuals responsible for these crimes.[377]

[377] In particular the report concludes, in this regard, that, "In light of the widespread and systematic nature of many of the attacks, and information suggesting coordination and planning, there are also *reasonable grounds to believe that the crimes against humanity of murder, rape and other acts of sexual violence, enforced disappearance, and imprisonment have occurred* (emphasis ours)" UNMISS Report, May 8 2014, para 8.

807. In engaging with the issue of whether CAH have been committed, the Commission has established the parameters in its conceptual framework detailed above. It is noted that crimes against humanity are essentially certain inhumane acts committed against civilians in a certain context: in a fashion or manner that is widespread or systematic pursuant to a policy originated by the state (or a particular level of the state) or by an organization (which could be a rebel movement).

808. The Commission notes that while the 'prohibited acts' can be established with greater ease, the most challenging part is establishing the existence of a State or organizational policy that is indispensible to the commission of crimes against humanity.

809. The Commission is of the opinion that it is reasonable to believe that crimes such as murder, extermination, torture, rape, persecutions on political grounds as well as inhuman and degrading treatment were committed against civilians in various parts of South Sudan. There are also grounds to believe that these crimes were committed in a widespread or systematic manner.

810. The Commission notes that with respect to the government side, there have been suggestions by some of those who provided the Commission with information that at least certain attacks on civilians perceived to belong to a certain community (especially in Juba and other places where there was contestation over territory) could have been planned. Suggestions of evidence of planning are varied and the Commission has considered all the suggestions carefully weighing it with the totality of the information it has, and testimony it heard. On the part of the State, corroborating evidence from various witnesses[378] recounted how Juba was divided in four operational zones. Roadblocks or checkpoints were established all around Juba and house to house searches were undertaken by security forces. During this operation male Nuers were targeted, identified, killed on the spot or gathered in one place and killed.

811. In fact, the Minister of Defense told the Commission of a shadowy "group [that had] organized itself as *Rescue the President*. It killed most people here [in Juba] — from 15th to 18th. It was even more powerful than organized forces. This is a very militarized country."[379]

812. The evidence thus suggests that these crimes were committed pursuant to or in furtherance of a State policy. Indeed, the method under which these crimes were committed prove the "widespread or systematic nature" of the attacks. The evidence also shows that it was an organized military operation that could not have been successful without concerted efforts from various actors in the military and government circles. Therefore the element of the existence of a State policy can be deduced therefrom.

813. The political genesis of the conflict is not in dispute. However the speed with which it degenerated into an ethnicised attack on the civilian population by armed

[378] See Witness JWV, JWU, JWT.
[379] Minister of Defense, Gen Kuol Mayang Juuk, former gov of Jonglei State 21st July, 2014

groups, on both sides, is alarming. The dismissal of key leaders including the Vice President, Secretary General and governors is certainly evidence of political differences within SPLM. The Commission heard testimony that there had been the presence of soldiers on the streets since August/September 2013. However, the military has a strong presence and role in South Sudanese society, and have been used in law enforcement in troubled states. Using soldiers to maintain law and order is not unique, even for stable societies that face crisis. Allegations of recruitment of mainly Dinka youth (the Commission heard testimonies disclose varying figures 3000-6000) without knowledge or approval of Chief of Staff, alleged monetary contributions from businessmen towards training and upkeep of youth seem to point to the creation of a private army. It is indisputable in South Sudanese society that allegiances are highly personalised, and from the testimony heard, key leaders had their own forces which were subsumed into the South Sudan army. Respondents also referred to President Kiir's speech in which he warned that he would not allow a repeat of the events of 1991 (Bor Massacre by Dr Machar-aligned forces). The Commission had to balance this with the alleged deployment of trained Dinka youth (a so-called private army) in strategic areas in Juba. The Commission further considered whether the statement was prompted by intelligence relating to a threat(s); there were also allegations that Dr Machar had stationed tanks in strategic places in Juba. Nonetheless, the targeted manner of arrests and killings of mostly Nuer men in Juba, including soldiers, from December 15, 2013 in large numbers suggests an element of coordination.

814. The speed with which the atrocities spread across the country also compels an inference of coordination. The atrocities were widespread spreading rapidly across a significant breadth of the country. The primary targets appear to be civilians of a particular ethnicity and no distinction was made between civilian population and combatants. In actual fact, it is hard to state with any certainty that there was any combat, as such except perhaps within the Presidential Guards. Even then, the ensuing force — on either side - had a deliberate target right from the onset. The use of force within the immediate environs initially, and thereafter was deliberate, discriminatory and directed at civilians based on their ethnicity be they Nuer or Dinka by both sides to the conflict.

815. During the Commission's inquiry, the State authority/government forces, endeavoured to distinguish between civilians and those, they say, who posed as civilians but were in fact fighters. However, by the admission of the Acting Governor of Unity State, the fighting had a severe impact on civilians. The atrocities were directed at civilians; or to put it in a different way, the combatants were reckless as to whether any attacks were directed against combatants and military objectives only. Additionally, the Commission was informed, for example, in Unity State that a Division Commander, James Kong Chol, said he could not control the soldiers. He was responsible for the supervision and control of the troops and was in control of the areas within the theatre of violence. He was aware that atrocities were taking place, failed to take corrective measure and/or to put an end to the atrocities.

816. With regard to sexual and gender based violence, the Commission heard distressing victim and witness accounts of such acts. Strong testimony was heard in which there was admission that rape was being used as a weapon of war/conflict;

not only to humiliate the victim and stigmatise her but also to stigmatise the community from which the woman came.

817. State authorities conceded that acts of sexual violence did occur and were brought to their attention. Whilst some from which the Commission heard initially demurred at the occurrence of sexual violence, an SPLA Commander admitted that at the beginning of the war in February and March, there were many reports and incidents of SGBV largely because of the difficulty of controlling 10,000 troops. He narrated that upon his arrival in June, UNMISS personnel had come to him in Mayom, and told him there were people who wanted to collect their food items and they were being prevented from doing so. Before his arrival, he had issued orders that he did not want anything to happen against the women. Since then, he had not heard anything happen against women. He added that when you are at war, you cannot control the forces on the ground if you are not there and you are in Headquarters. He went on to state that the former Division Commander James Kong Chol was responsible because there was fighting and no order. When he arrived, he did not allow any soldiers to commit acts of rape and it was his duty to defend the women. Acts of SGBV were happening before the Commander arrived in Bentiu but when he arrived he put a stop to it. Again, according to the testimony of the SPLA Commander in Unity State, Division Commander, James Kong Chol, could not control the soldiers. He was responsible for the supervision and control of the troops and was in control of the areas within the theatre of violence. He was aware that sexual and gender based violence was taking place, failed to take corrective measure and/or to put an end to the atrocities.

818. With respect to the rebels or opposition forces, as they describe themselves, the Commission notes that there are various groupings amalgamated in 'Machar-led forces' including defected SPLA soldiers, some of whom are led by Peter Gadet and the White Army Youth. The Commission notes that, with respect to organizational policy, a particular type of organization is required: a lower threshold that holds that any organization with the capacity to 'offend basic human values' is sufficient, or a higher threshold that requires 'a state-like organisation' in terms of coherence, hierarchy and sustenance. The contradictory evidence received by the Commission on the White Army equally assumes two strands, both suggesting they are capable of meeting the threshold (lower or higher) of an organization that can originate a criminal policy to commit CAH.

819. The Commission believes that the requirement of "organizational policy" is satisfied. Dr. Riek Machar has publicly claimed on several occasions that he is in control of the rebel forces. Also, one insider witness has confirmed that all military field commanders report to "our" Chairman who is Dr. Riek Machar. He further stated that when their forces were defeated in Bor, they retreated to Gadiang where Dr. Machar was. There appears to be a close working relationship between the SPLA-IO and the White Army. The Commission's investigations unveiled an insider witness who stated that the White Army came from Ayod, Yiror, Nyiror and Akobo to reinforce Division 8 soldiers in Bor. He further stated that when the government mobilized its forces against the SPLA-IO and White Army in Bor General Peter Gadet and his White Army pulled out of Bor on 25th December 2013. They retreated to Gadiang where Dr. Riek Machar was. The witness further said that the regional field military commanders report to the Chairman of the movement who is

Dr. Riek Machar.[380] Another witness provided corroborating evidence that soldiers who defected from Bentiu moved down to Panyijar and merged with the White Army. The elders among the White Army were given ranks matching government ranks. Additionally, Dr. Riek Machar himself claimed victory after capturing Bor on 31st December 2013 and Bentiu sometime in January 2014 which was widely reported by international media houses[381].

820. The Commission also heard first hand testimony from a 24 year old Nuer male[382] in Kakuma Camp in Kenya who had been given arms twice by opposition forces and who had participated in fighting against government forces. He also described how the former County Commissioner had given all the men in the community weapons to fight the government forces. He detailed how the White Army had been organised, given ranks (similar to those in the government army) and recruited community members. He stated that this Division 4 of the White Army is in regular contact with the SPLA-IO Area Commander based in Leer Town, even attending meetings there from time to time.

821. By his own account to the Commission, Riek Machar commands the White Army. Indeed, during a meeting with the Commission when he was asked about the killings by his forces in Bentiu, he suggested that he did not know what had happened there until the ICRC came to him with a report, detailing the atrocities there. He stated that what happened there was the work of 10 men carrying machine guns, and that his people are still in the process of tracking them down. He thus accepts responsibility for the forces. The Commission also heard testimony of intelligence that when the firing started it was because an order was given by the former Governor of Unity State, Taban Deng, who was intercepted mobilising youth and confirming they had access to guns. Riek Machar apparently left his house to go to Taban Deng's house before departing for the bush.

822. However amorphous the formation and composition of the White Army, they serve a crucial purpose in South Sudanese society. Originally a force to be mobilised for the protection of a community or otherwise for issues such as cattle raiding and grazing issues, they appear able to serve different political purposes in modern times. They can be easily mobilised on the basis of common interest; implicit in this is an element of organisation and policy, the achievement of which is the purpose of the White Army for the period during which it is mobilised.

823. It is therefore the Commission's view that it is reasonable that crimes such as murder, rape and other acts of sexual violence, enforced disappearance, and imprisonment have occurred from the testimony the Commission heard. The atrocities were widespread and carried out systematically across the country in the key theatres of violence targeting specific groups of civilians based on their ethnicity with consequential effect on the rest of the population resulting in a large scale humanitarian crisis.

[380] Witness JWT

[381] See for example media reports i.e. the BBC, see http:/bbc.com/news/world-africa-25480178, 22 December 2013.

[382] Witness details on file with the Commission.

824. It is also reasonable, on balance, to come to the view that there was some element of organisational policy on the part of both government and opposition forces at some points during the conflict. The manifestation of the conflict, and subsequent geographical spread, gives rise to an inference of an element of coordination that hardly seems possible without forethought. However, the Commission's resources, capacity and mandate limits the further work required to identify with specificity the individuals (the Commission notes that witnesses have mentioned certain persons in the course of their testimony) to which criminal responsibility may be properly attributable.

VICTIMS

825. The exact figure of victims of the crisis that began on 15 December 2013 is still to be determined. This is one of the issues on which further action must be envisaged particularly because the people of South Sudan cannot have a process of healing and reconciliation if they do not account for their dead and wounded.

826. Some of the people interviewed informed the Commission about the numbers of victims in the form of bodies buried and people alleged to have been killed and provided evidence to that effect. The humanitarian agencies and the UNMISS have numbers of those who have been forced to stay in camps inside and outside South Sudan. The Commission also received evidence of property destroyed and looted but, the Commission did not believe it was appropriate to establish a comprehensive list of victims. However, the Commission believes that, in terms of accountability, the witnesses interviewed include survivors of the crisis, some of whom are direct victims of the various crimes committed during the crisis and some know people who are victims.[383]

ALLEGED PERPETRATORS

827. The Commission has identified possible alleged perpetratrors that might bear the greatest responsibility using the standard of 'reasonable grounds' to believe that gross violations of human rights and other abuses have occurred during the conflict (see the highly confidential list not publicly available as part of this report).[384]

PART C

ON INSTITUTIONAL FRAMEWORK AND MECHANISMS FOR ACCOUNTABILITY

828. The Commission was tasked with considering accountability, particularly as it relates to measures that would best suit the specificities of the South Sudanese situation, taking into account their mode of societal organisation, culture and customs, and would properly amount to reconciliation in terms of accountability and ensure that the issue of impunity is adequately and properly dealt with such that the South Sudanese people feel appeased.

[383] A list of the people interviewed is in the annex …

[384] The highly confidential list will be submitted directly to the Peace and Security Council of the African Union

829. As stated earlier, the Commission adopted the understanding that accountability to include four aspects: criminal, civil (reparations), administrative accountability (lustration) and truth telling.

830. A main observation of the state visits is that the South Sudanese society is significantly polarised along tribal and/ or political lines. While caution should be exercised in generalising that one's tribe reflects one's political association, a cursory assessment of the discussions during the visits allows such an explanation as a part of a bigger analysis. Furthermore, responses to most questions including on accountability appear to depend on ethno-regional extraction.

A. POLITICAL/ADMINISTRATIVE ACCOUNTABILITY

831. A view is held by one member of the Commission[385] that with respect to accountability, the Commission should limit itself to political accountability (which approximates administrative sanction), which he interpretes to mean that political leaders identified as a subject for formal criminal investigations should be excluded from holding office for the duration of the investigations and for the duration of any criminal proceedings arising from such investigations.

Criminal Accountability

832. In all of its interactions with all the individuals, groups, representatives and stakeholders with which it met, the Commission sought their views on what they considered necessary to bring peace to South Sudan and a new beginning. All the groups with which the Commission met emphasised a need for accountability for the atrocities committed, particularly given the impunity following the CPA. However, dicussions on accountability invariably raised issues relating to reconciliation. Many took the view that criminal prosecution only is insufficien and that there was a clear need for a process to ensure reconciliation and sustainable peace.

833. The consultations in the most conflict affected states found that a majority of civilians had little to no confidence in the national justice system. Most respondents — in particular civilians — said they did not believe local courts were capable of delivering justice for survivors and victims of the conflict. Some noted that they had yet to feel or see the South Sudanese justice system at work. In some of the discussions, many respondents talked about the international criminal court (ICC) and international tribunals (or referred to the international community) as possible mechanisms to ensure accountability for human rights violations perpetrated in the conflict. Some respondents said the African Union should be responsible for this.

834. What is indisputable is that the people of South Sudan feel aggrieved for historical wrongs for which, they considered, there had been no accountability and reconciliation, which has exacerbated the pain of the current atrocities. The importance of accountability was a constant refrain. The Commission was informed variously:

[385] Contribution of Professor Mamdani n 435 above

About accountability, I am glad to know the existence of ICC, because people who committed atrocity will not going to escape away i.e. Bosnia, Liberia and Sierra Leone are good examples. Impunity should be discouraged, no one shouldn't (sic) be left with his wrong deed.[386]

For reconciliation and healing to happen in South Sudan people has to repent their wrong deeds. Solution will start to come when people able to forgive each other.

Mercy and accountability were always conflicting, but as religious leaders we believe that anyone who committed atrocities has to be tried before court of law, apart from the repentance and forgiveness.[387]

Those who commit this atrocities has to be investigated and held accountable, there has to be some kind of accountability.[388]

There have to be apology and acceptance of one's wrong deed.[389]

835. As captured by the views of respondents, the Commission notes that South Sudan's Judiciary and criminal justice system in particular is emerging from decades of neglect (under Sudan) and decay (associated with the civil war). The Judiciary is slowly building up its capacity in terms of infrastructure and personnel as well as credibility as an independent institution.

836. Notwithstanding the issue of capacity of the criminal justice sector in Sudan, whilst the Penal Code makes provision for a range of crimes there is, obviously, no provision for crimes against humanity or war crimes. In our findings and recommendations, the appropriateness of trying such egregious acts in the context of armed conflict as 'ordinary crimes' is a factor the Commission takes into account, given the historical context of conflict in South Sudan and the expressed dissatisfaction of many stakeholders with the lack of accountability in the past.

837. With respect to military justice, the Commission found that its application limited to the Army. However, the SPLA Act provides that crimes by soldiers committed against civilians are to be tried under civilian justice. The Commission learnt that as currently established, military justice operates under significant capacity constraints.

Traditional Justice Mechanisms: Chiefs' Courts

838. Those that the Commission has interacted with expressed the view that traditional forms of justice should be considered, and appropriately empowered to play a role in establishing accountability. Some passing references were made to the experience of Rwanda, which deployed *gacaca,* a formalized and 'modernised' traditional court to deal with atrocities committed during the Genocide.

[386] A male witness at POC 2 camp in Unity State.
[387] Religious leaders, POC 1 and 2, Unity State
[388] Youth members, Leer County
[389] Members of Shilluk ethnic group, Malakal.

839. Some respondents however acknowledged that there are limits to the jurisdiction of customary courts. When asked what should be done to establish accountability and reconcile communities, many respondents were quick to refer to traditional/customary courts, which they suggested have served communities well in the past. While this is the case, most of the crimes allegedly committed during the current conflict would fall outside the remit of cases handled by customary courts. In response to the Commission's question on whether customary courts could try cases arising out of the current conflict, one chief noted that:

> Our mandate is to handle cases that are local in nature but if something happens in the county, if someone kills somebody, they will take it to the county [court] … but anything to do with the Government, we are not capable of doing it. We can only manage traditional disputes that are happening within that county or […] that we are able to handle.

B. CIVIL ACCOUNTABILITY (REPARATIONS)

840. In considering how amends could be made for the grievous wrongs and injury suffered by individuals and groups during the conflict, the Commission took into consideration the views of the South Sudanese, which broadly encompassed healing, reconciliation, accountability and reparation in a holistic form. Many were of the view that reconciliation would not be possible if certain measures are not undertaken. The failure to address the concerns of victims of human rights violations suffered in past conflicts was cited by respondents as hindrance to reconciliation. In the next chapter of this report, the Commission considers in full detail issues relating to reparations, which includes compensation, restitution, rehabilitation (including psychoscocial assistance) and other symbolic measures such as memorialisation and apology. It also captures further the views of South Sudanese on the subject.

CHAPTER IV

ISSUES ON HEALING AND RECONCILIATION

CHAPTER IV

ISSUES ON HEALING AND RECONCILIATION

Introduction

841. This chapter of the Commission's report combines two interrelated focal areas of its mandate: healing and reconciliation, which are defined in the conceptual part of this report. In terms of content, this chapter reviews previous and current reconciliation initiatives and institutions in South Sudan. The objective is to map the terrain, but also to draw lessons in relation to institutional design and other aspects relating to how to pursue the reconciliation agenda in post conflict South Sudan.

842. The chapter engages with the views of government officials, members of civil society including intellectuals as well as ordinary South Sudanese consulted by the Commission over its mandate period. As such, the report emphasizes the views of those consulted — what the Commission found — rather than what constitutes the Commission's own knowledge or appreciation of key themes considered. While the Commission applies its mind in reaching certain conclusions and making relevant recommendations, the report privileges the views of South Sudanese on relevant issues in keeping with the methodology detailed in the introductory chapter. In terms of themes treated in this chapter, the Commission engages with multiple issues, including: how healing and reconciliation relate to other aspects of its mandate, notably accountability and institutional reforms; the interaction between national and local reconciliation processes and institutions proposed by the Commission; the role of different actors and; international best practice as it relates to all relevant issues considered.

843. In terms of the Commission's mandate relating to healing and reconciliation, expressed in the AUPSC Communique and Concept Note on the Establishment of the Commission, the AUCISS is charged with: the investigation of human rights violations including causes that underlie these violations; recommend the best ways of ensuring healing and reconciliation; and of moving the country forward in terms of unity, cooperation and sustainable development. It is the Commission's view that while reconciliation merits attention as an independent pursuit, when considered as a 'by-product' of other initiatives and processes related to accountability including criminal accountability and reparations as well as institutional reforms, reconciliation finds expression in various aspects of the Commission's mandate.

844. The Commission adopts the understanding that reconciliation is a complex term that includes several relationships, levels and actors. In terms of its meaning, reconciliation' is essentially about mending relationships, bringing together or squaring off after traumatic events such as armed conflict or such other traumatic events that damage relationships at multiple levels. It involves disclosure of truth about the past, acknowledgement of what has occurred, forgiveness, healing and a great measure of

justice. It is in the relationship between all these that the totality of the Commission's mandate is expressed.

845. The challenge lies in exploring the relationship between what is often thought to be discrete processes: reconciliation, truth, justice and healing. The realization that there is not a single but different ways of articulating these processes makes clear that each way of articulating these processes will have profoundly different consequences for the society in question. The Commission understands that this articulation is a matter of choice. Rather than make it in a formulaic and textbook fashion, the choice should flow from an understanding of the historical and contemporary circumstances of South Sudan. Before considering these and other issues, a case is made for a peace and reconciliation process for and in South Sudan.

The CPA and Reconciliation in South Sudan

846. As is the case for many aspects of the Commission's work, the CPA, which provided a framework for the resolution of the north-south conflict, is often the point of departure. One of the grounds on which the CPA has been criticized is its failure to address human rights violations of the past and its half-hearted reference to reconciliation. In relation to national reconciliation, the parties (NCP and SPLM) committed themselves to:

> […] initiate a comprehensive national process of national reconciliation throughout the country as part of the peace building process. Its mechanisms and forms shall be worked out by the Government of National Unity.[390]

847. In spite of this commitment, both the National Government and GOSS did not take up the challenge. The result was that the past remained unexamined, and the official policy of amnesia left the atrocities and grievances related to the liberation conflict unaddressed, and subsequently for Southern Sudan, could have encouraged the conflicts that followed the signing of the CPA. Affirming this view, one respondent stated, in relation to the failure to implement relevant aspects of the CPA:

> But there is an element, the provision of the CPA on national reconciliation and healing which would have meant translating the CPA on this political compromise into peace and reconciliation among the communities were now meant to fight each other as a result of the war. This SPLM and the Government of South[ern] Sudan ignored it and that is why during the whole (sic) … [Interim] period people were fighting, they were insecure, all human right abuses …

848. The Commission notes that because of the amnesty policy, truth, justice and reconciliation were absent in national conversations in the new South Sudan until early

[390] CPA, Chapter II *Power Sharing,* part I, 1.7

2013, in spite of decades of armed conflicts that generated many victims and inter-ethnic rancor, threatening to undermine harmonious co-existence and peace, critical elements for state-building and development. On accountability, part of the reason for this silence is structural: the peace process and the CPA, the instrument that resolved the north-south conflict avoided this critical, yet contentious question. The Commission established from its consultations and the literature that both the NCP and SPLM deliberately excluded the question of accountability and reconciliation during negotiations that produced the CPA, apparently for fear of what any accountability project would portend given that both sides had committed crimes during the war.

849. The CPA therefore operated as a blanket amnesty for atrocities committed between the South and North but also in relation to events in the South during that period, given that the Sudanese civil war had a south-south dimension, which extended beyond the signing of the CPA as demonstrated by the enduring legacy of militia. During the Commission's consultations, the postponement of south-south concerns in the context of the struggle for liberation, and the subsequent failure to address these issues was a recurring theme, to which many attributed the current problems in South Sudan. In this regard, one respondent noted that:

> […] we always said lets finish with the North. We have our own problems but let us finish with the North. Once we finish with the North, we will come and put our house in order but this never happened. There were people who were hurt there was a lot of pain, others are killed children are killed, looted and also we sweep these issues under [the] carpet in the name of 'let us address [deal with] the enemy' [first]. But when we finished with the enemy nobody went back to [honoured] that promise.

850. Consistent with the view expressed above, the Commission heard from many respondents that the consensus among political actors and by extension the general population that the march towards self-determination should be prioritized led to a conscious postponement of some of the immediate concerns that needed to be addressed. As shown in the previous chapter on institutions, many of these problems and concerns remained unaddressed in the post-referendum period.

851. The absence of a structured national reconciliation initiative coupled with the failure to address atrocities committed in the past is one of the legacies of the CPA, which appears to inform the government's approach to security threats, conflicts and human rights violations in the post CPA era. As shown in the discussion below, the preferred approach by the government appears to have been the grant of blanket amnesties and accommodation of dissenting voices and sectoral interests, essentially a conscious choice to 'forgive and forget'.

852. Many ordinary South Sudanese that the Commission interacted with see the lack of dialogue about the past and the preference for amnesia at official level as troubling and problematic, as it leaves the past unexamined, and imposes silence on victims:

> Therefore, there were issues [and the] pains are still there … they will say, when you bring it up, just forget about it … Then she will forget about it but they have not discussed about it. It is not from her heart that '*me I want to forget about it'*. She is forced and because the Committee wants to see you as good person can forget. Then you see (sic) ok let's do it but all the time you see that person his anger is still there. So we did not have that space for dialogue whether at the public or government level.

Making a Case for National Process of Healing and Reconciliation

853. Following its recent historical trajectory, South Sudan is a deeply divided society. However, it is fair to conclude, as we do based on information received that the current armed conflict merely excavated buried cleavages within society. Many grievances linked to the past remained unaddressed. During our consultations with different sectors of society, respondents cited multiple justifications for a structured national process of peace and reconciliation. To begin with, it was argued that South Sudan's long history of conflicts — both internal and with the long civil war with the North — required a systematic inquiry and dialogue among South Sudanese. Indeed, it was suggested that the roots of the current crisis lie in unresolved grievances related to conflicts of the past.

854. Looking to the past, the Commission learnt that the war of liberation negatively impacted relations among South Sudanese communities. In this regard, the factionalism that accompanied the liberation effort and peoples' encounters with violence have inflicted deep wounds that require the institution of genuine efforts of reconciliation to facilitate healing. Just as different communities point to different events in the past to explain current attitudes and actions, events such as the Bor massacre of 1991 evoke much pain in sections of the Dinka community, spur resentment and could continue to serve as a rallying point for destructive forces. It is the Commission's view that the same is likely to apply to the current conflict in view of the pervasive narrative of ethnic targeting.

855. Other events and issues that are said to inflame inter-ethnic relations include: factionalism within the liberation movement (SPLM/A splits) which has had a lasting legacy in the post CPA South Sudan; SPLM and Anyanya II disputes which in part contributed to proliferation of militia and; displacement of populations that accompanied inter-ethnic conflicts.[391] Respondents cite various events and issues related to the civil war that would have to be on the reconciliation agenda, and that must be made subject of inquiry and dialogue. These include: conflicts related to the formation and emergence of SPLA/M as a dominant liberation force: killing of young recruits in 1983; SPLA v Anya Nya II; The SPLA/M Split (1991) and related conflicts, including 'Bor Massacre'; displacement (multiple causes); Khartoum's counterinsurgency policy and the prevalence of militias in South Sudan and the issue of refugees; and Dinka-Nuer political domination over other groups.

[391] See Sudd Institute, *Peace and Reconciliation in South Sudan: A Conversation for Justice and Stability* June 7, 2013, 6-12

856. Other than the current conflict, it is clear that there is a multiplicity of conflicts that merit an inquiry, in order for the truth to be established, remorse to be shown and justice to be done. In this regard, one witness stated as follows:

> […] we have to look at the root causes, not only in December [2013] but prior to December as well. For example the Jonglei conflict. If you go to the Upper Nile we had a conflict, if you go to Rumbek [Lakes State] there was one. So all these different conflicts manifested in different ways, but if you look back, there is so much neglect and these leaders have not been able to respond to some of these problems and they have been piling and blew up.

857. Equally, references to past atrocities — notably the Bor Massacre of 1991 — have had mobilizing effect, serving to galvanize supporters. Speaking to the Commission, a senior SPLM official evoked the lingering memories of the SPLM split, and the associated Bor Massacre, whose consequences have remained unaddressed:

> […] while he [Riek Machar] was fighting Dr. John [Garang] a lot atrocities were actually committed in Bor area. So many families were wiped out. When he came back he joined and then we came together through peace agreement and Dr. John [Garang] died and became the Vice President. All those atrocities that were committed during that time has never been talked about. There was no truth, reconciliation, there was nothing. So that thing remained in the hearts of people.

858. The mobilizing power of past conflicts, and their potential to divide was aptly captured by another respondent:

> I think the biggest conflict between the Dinka and the Nuer that has been on for long which is what the politicians have been pushing for is, whenever it is the former Vice President trying to say something, they will take him back to 1991 and they think that this is overthrowing the government; and if any Dinka hears about 1991, they think the reason the former Vice President has is just negative, just want to remove the Dinka from power.

859. Although hard to achieve, reconciliation and accountability initiatives must address key events [notably 1991, and 2013] which are seared on popular memory of respective communities. In the words of another respondent,

> Reconciliation, I think this is too much what has been going on, because you will never hear [a] politician not mentioning 1991. You will never hear now, still the people who were victims of 2013 will not stop mentioning 2013 massacre in Juba. So I think the perpetrators of 1991 and 2013 must be held accountable really. The cause of this they have investigate

> because those people victims of 1991 they will never forget that, unless justice is done, the same to 2013.

860. Outside the political context, localized conflicts over resources (cattle, land, grazing and fishing grounds), largely underpinned by ethnicity and factionalism appear to have been manipulated, partly explaining the speed at which the violence that broke out in Juba on December 15, 2013 spread to the most affected Northern states. While a good number of South Sudanese that the Commission consulted seemed to be at a loss as to why 'a problem that started so far away in Juba' could become their own, impacting and disrupting their lives, it was acknowledged that access to information through the media, as well as ease of communication facilitated by mobile telephones contributed to the spread of the violence. In this regard, one respondent noted that 'I have ears over the media; people were telling people through telephones what had taken place in Juba'.

861. It is also acknowledged that existing inter-ethnic conflicts provided fertile ground for the national/political conflict to thrive. Having touched on various factors that constitute the background to the current crisis, a senior government [SPLM] official eloquently expressed the link between the political conflict and pre-existing communal conflicts:

> This is the background to December 15th. It just did not happen [out of the blue]. And because there is this regular cattle rustling … you have tension even between communities. One community is not very happy with the other community because they have raided themselves and when something like this [the political conflict] happens, it just goes like wild fire because the recipe for conflict and bigger conflict was already on the ground.

862. The Commission found evidence of manipulation or instrumentalization of pre-exiting grievances and conflicts at the subnational level by actors on the national stage. On one dimension of manipulation of communal, resource-based conflicts by actors at the national level and on the impact of communal conflicts on the political conflict, a similar point was made by another respondent in relation to the violence in Juba, but has wider application to the conflict:

> But I think it [the fighting among soldiers at the start of the conflict] went out of hand because we have grievances … we have issues, old wounds. I think with some soldiers, … [the] opportunity came, you have the gun and you have [the] upper hand, you start doing things that even your boss did not tell you to do, because most of these soldiers, all of them they come from cattle camps, because the Army is dominated by Nuer and Dinka and most of these soldiers have not gone to school, they were cattle camp keepers and they used to raid each other … I think the whole cattle camp issue, somebody wants to score it … [you became a soldier] and now there is opportunity for you to kill the Nuer, then you will just do it …

> There was no opportunity given for the Nuer and the Dinka … to reconcile the cattle camp differences, to reconcile the political differences … So you find these people will have memory of those days where Nuer came ready to his village and killed everybody … and if that opportunity comes, he will just start killing. It is [an] opportunity for revenge ...

863. The view expressed above suggests that multiple issues underpin the political conflict in South Sudan and that, to explain some of the atrocities and events witnessed during the crisis, one must look to personal, rather than political or wider motivations. In this regard, it appears clear that pent-up emotions attributable to failure to address grievances arising from conflicts in the past explain the motivation of some of the actors, particularly perpetrators. It is thus our view that national attempts to resolve national and inter-communal conflicts must have a dimension targeted at the individual. Indeed, the Commission's conception of healing and reconciliation encompasses a personal dimension. The idea of personal reconciliation, by which an individual is assisted to adjust to personal circumstances occasioned by loss or violations suffered, demands special attention. The Commission is aware that many post conflict societies tend to privilege national reconciliation, to the detriment of the interests of victims and perpetrators, which undermines the sustainability of the peace and reconciliation achieved.

864. In the context of South Sudan, the youth provide another vital link between political or national conflict and communal conflicts. The presence of a large pool of youth [reportedly more than 70% of the population] who are uneducated, unemployed and probably unemployable, armed and militarized not only creates insecurity at the local level, but also provides, in the context of the current conflict, an explanation as to why the conflict that started in Juba quickly spread to the states. Noting that this set of circumstances partly provides reason to believe that the current crisis was foreseeable, a senior SPLM official noted in this regard that:

> we also have huge number of youths that have not been engaged in any meaningful activity and already they started engaging themselves in cattle-rustling, they have money and they have cattle they trade with arms and that is there you have huge number of youths and by the way, the population of South Sudan is I think 75-80% youth and that component of the population are not engaged in gainful activities. So they become very vulnerable to anybody who comes and waves money or tempt them with guns or positions in the Army, they become very vulnerable.

865. Some respondents pointed to exclusion and marginalization manifested in what they [respondents] referred to as the 'tribalisation or ethnicization of the state' as a major schism and trigger of inter-ethnic conflict. It was reported that exclusion based on ethnicity 'has created an environment of hatred and distrust thereby deepening divides and creating tensions and ethnic rivalries over power.' Other current issues cited by respondents include the perceived sense of entitlement on the part of some freedom fighters, the sharing of post-liberation struggle spoils and national ownership

of post-independence dispensation and social violence, poverty and economic marginalization.

866. The idea that there is a sense of entitlement on the part of some South Sudanese appeared to resonate with several respondents. Various comments hinted at a sense of dissatisfaction with what could emerge as stratification within society in terms of access to opportunities and services based on perceived or actual role played during the war of liberation. In this regard, one respondent stated that:

> […] there is this kind of expression that we fought and you did not fight. This has been throughout and it has created the differences amongst the South Sudanese who voted for the independence regardless of the achievement that all of them participated from wherever they were. But still the language is there, we fought, and you did not fight. So this also created also some differences between the youth and even the people themselves.

867. Evoking the collective future and common destiny of South Sudanese, one respondent captures the collective sacrifices made by various sectors of South Sudanese society while expressing hope for an inclusive future that appreciates varying contributions made to win liberty and independence:

> When people say but this country belongs to all of us, when the war was being fought 21 years of war which was being fought here my dear people, almost every family lost a member because of that war; and not a single person, not a single family can say we were happy during the war, we lost no relatives. I personally speaking to you, I was personally touched because I lost relatives in this war, everybody. We all contributed to the independence of this nation and the stakes were all very high for all of us.

868. The Commission heard that the idea of entitlement reaches beyond inclusion, and that it has contributed to some resource-related conflicts particularly land grabbing, considered in a separate chapter of this report. In a context in which the rule of law is not fully entrenched and where there is militarization of public and civilian life, some respondents expressed that a generalized lack of accountability — requiring the justification of decisions — had exacerbated conflicts over resources.

869. From its consultations, the Commission established that culture is an important institution in South Sudan and that it plays a vital role in the multiple facets of the lives of ordinary South Sudanese. As described elsewhere in this report, traditional institutions continue to play a role in the delivery of justice, maintenance of law and order as well as peace and reconciliation. In reality, cultural institutions occupy the huge spaces where the state has limited reach.

Linkages between Mandate Areas

870. Above, a working definition of reconciliation was provided. In this regard, it was noted that reconciliation is a complex term involving different notions, levels and actors and that it involves disclosure of truth about the past, acknowledgement of what has occurred, forgiveness, healing and a measure of justice. The Commission concluded that it is in the relationship between all these that the totality of the Commission's mandate is expressed. The context in which reconciliation efforts are carried out is critical, in part because the multiple notions entailed in reconciliation interrelate in particular ways depending on the context, with the possibility of multiple articulations of the relationship between healing, reconciliation and justice. In this part, the Commission engages with these relationships, based on views expressed by South Sudanese on the relevant aspects and on reference to comparative experience.

871. In the Commission's view, reconciliation is both a goal and a process. As a goal, it is a short-term, medium term and long term goal. The Commission engages with these aspects in this report departing from the position that in the case of South Sudan, dialogue must be initiated at multiple levels, including at the local level. Of relevance to reconciliation, the Commission inquired into the extent to which benign differences at the community level could have been manipulated by the antagonistic parties to further the ends of war and the extent to which local differences define and propel the ensuing political conflict. Equally, the report explores how political conflicts at the national level have impacted relations at the local level, and how these should be resolved with a view to fostering healing and reconciliation at both levels.

872. In the Commission's view, healing is closely linked to reconciliation. Healing invokes the idea of remedy, restoration, repair and mending. National healing will entail examining and restoring social relations among and between warring communities. In this regard, the Commission took the view from the start that healing will not begin until the bleeding stops, emphasizing the importance of ceasefire arrangements to the broader process of healing and reconciliation. Many respondents told the Commission-which also established on its own following consultations with different sectors of South Sudanese society-that the political conflict within the SPLM is essentially about power. In this regard, one respondent, speaking in relation to the IGAD mediation process stated:

> This [peace] means different things to different people. For some people … for example the two parties that are fighting now, peace for them is to get military victory, to gain or keep power. This is what peace is to them. But that is transitional peace, because it will never last.

873. Respondents took the view that sustainable peace must be broad-based, not mere elite pacts, one negotiated, it should be 'sold to the people on the ground, generate buy-in from the people:

> [On the peace talks], it is good that they are talking but I feel once they have peace among themselves in Addis that is not solving the problem.

> We have to go to the people, the majority of the people down there who are suffering, we have to go to talk to them, we have to start working on healing them, because a lot of these things happen they make a peace talk, they discuss amongst themselves, the two men will shake and they say South Sudan is back to normal. But the people are suffering, the pain is still there and that pain in the future will cause another war. So I feel we need to go to the people and I feel our government has not gone to the people. They have become hostile towards us, they are not talking to us of finding a solution. They think they are the solution. So we are missing on that part and tomorrow there will be another rebellion from the children and the grandchildren of those who were killed today.

874. To the extent that the political conflict that arose within the ruling party is essentially about power, it is the Commission's view, as explored further in this chapter of its report, that the IGAD-led mediation process that is partly aimed at resolving the political crisis must be vigorously and successfully pursued.

875. At a personal level, healing takes various dimensions, but begins with acknowledgement of wrongs done, restoration of dignity of victims through reparations, including apology At personal and community levels, traditional and customary methods must be employed in addition to judicial and other formal methods. In this regard, this chapter of the Commission's report explores the relationship between formal national institutions and processes and traditional justice and conflict resolution mechanisms deployed by various communities in South Sudan when considering what ought to be done to facilitate healing at personal and community levels.

876. From a gender perspective, healing and reconciliation entail examining social relations that have facilitated and entrenched gender inequalities and bred an environment for gender violations and abuses to thrive. The Commission holds the view that national healing and reconciliation processes must of necessity include women as key stakeholders with a central role to play in bringing people together at both national and local levels. In addition, these processes must address systems and structures that enable exploitation and exclusion of women, and address sexual and gender based violence (SGBV) and the associated social stigma with a view to developing commonly agreed visions of new social structures where women's rights are upheld.

877. Informed by the context of South Sudan and comparative experience, the Commission places emphasis on the conceptual and practical links between truth, reconciliation, national healing and justice, which includes retributive justice, redistributive justice and reparative justice. The Commission's recommendations in relation to healing and reconciliation are based on the assumption that the goal of reconciliation at various levels will remain elusive unless those who have suffered are restored and repaired; unless those who were excluded in society are included in meaningful ways; and unless those who are materially deprived as a result of the

legacy of war and marginalization are facilitated materially in order to reconstruct their lives.

878. While temporally the Commission's mandate relates to events that flow from the eruption of violence on December 15, 2013, it is our view that the appropriate approach to healing and reconciliation requires an examination of events before this date. Indeed, some respondents made the case in their submissions to the Commission. In this regard, one observed that:

> I think the four [mandate areas] are interlinked or intertwined and always when I am asked in a sentence, how do you characterize what happened on the 15th of December, I say that it was a spark of accumulated problems and games. *So it will be a mistake if we just say we can handle what happened on the 15th of December in isolation of the real issues that were facing the country* (emphasis added).

879. For the Commission, such an approach is necessary because it would be difficult otherwise, for instance, to grasp the legacy of marginalization, which predates the current crisis, and to fashion appropriate responses. It is true that looking at antecedents — events that have occurred over time before December 15, 2013 — allow us to better understand the present. Indeed, the Commission takes the firm view that for reasons of legality, only its mandate relating to accountability — which requires an inquiry into violations of human rights and humanitarian law and prescription of appropriate responses — would be time bound.

On Exploring Relationship Between Peace, Healing, Reconciliation and Justice

880. The Commission has concluded that the IGAD mediation process has relevance for healing and reconciliation but also justice. At least three reasons appear pertinent. First, it is fair to conclude, as the Commission does, that the agreements on cessation of hostilities and ceasefire are a first step in the process of national healing and reconciliation. This sentiment was echoed by one respondent, who stated that 'for all of us in South Sudan we want first an agreement for ceasefire to be signed, because you can't do anything when people are still fighting'. Cessation of hostilities stops the bleeding (ending violations) and creates an environment for a political settlement to be negotiated and agreed upon, which agreement could include elements relating to reconciliation and accountability.[392]

881. Second, it is the Commission's view that a negotiated agreement could address concerns around political justice occasioned by real or perceived exclusion, marginalization and discrimination and begins to engender healing and reconciliation. In the context of South Sudan, respondents raised concerns relating to inclusivity within government:

[392] See IGAD Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis in South Sudan, 25 August 2014 signed by Heads of State and Government.

> […] there is an element of tribalism and corruption whereby South Sudan consists of 62 tribes or more but now you only hear of two big elephants and the grass [other communities] is suffering. Most of it came from that … Most of the government comprises of these two tribes, the Army, even government institutions …

882. Third, political settlements may also address what can be referred to as economic justice, which encompasses not only questions of economic inclusion but also constitutional questions that touch on the structure of the state. In the context of South Sudan, these questions could include decentralization and devolution.[393]

883. There is a practical consideration implicated in the relationship between peace, security and justice and reconciliation, informed by the difficulty entailed in initiating reconciliation and criminal accountability measures (particularly mounting prosecutions), before 'the guns fall silent'. Comparative experience illustrates the difficulty of pursuing justice during conflict, or before conflict has waned. These experiences inform that peace must be established first, before attempts are made to address the rest, hence the importance of cessation of hostilities and the attainment of a political settlement which would then make room for justice.

On Justice and Reconciliation

884. The relationship between justice and reconciliation is a contested one, which contestation is often captured in slogans such as 'no peace/reconciliation without justice', 'reconciliation before justice' and so on. Broadly, though, there are two 'schools of thought' on the relationship between justice and peace; one that emphasizes tension between the two notions while the other emphasizes the complementary nature of this relationship. Both schools engage with a set of vitally important questions that, the Commission believes, must be answered with context in mind, but arrives at different conclusions on how they relate, with consequences for a variety of issues.

885. These questions include the following: Can the pursuit of justice, particularly criminal justice, undermine national reconciliation and healing? Can lasting, sustainable peace be attained without justice in its various guises? Are justice and peace/reconciliation in tension, and if so, should a case be made for sequencing the two? Consideration of these and other related questions departs from the position that justice is broader than criminal justice and encompasses other forms, including reparative justice, political, economic and social justice. However, it is noted that contention mostly revolves, as views expressed to the Commission reveal, around criminal justice and reconciliation.

886. A majority of South Sudanese that the Commission interacted with expressed the necessity of establishing accountability for human rights violations and crimes

[393] See IGAD Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis in South Sudan, 25 August 2014 signed by Heads of State and Government.

committed during the current conflict. On this issue, some respondents advised the Commission that 'you must go back to 1991', referring to the now infamous 'Bor Massacre'. While the recommendations of the Commission relating to accountability do not include the events of 1991, references to 1991 by many respondents emphasize the need for genuine reconciliation efforts that include an inquiry into past events.

887. A good number of respondents that expressed themselves on accountability did acknowledge the relationship between peace/reconciliation and justice. Reflecting views associated with one of the major arguments on the 'peace and justice debate', some respondents took the view that 'there can be no reconciliation without justice' and that in their view, justice comes first. The opinion of one respondent aptly capture this view:

> What I have observed is that if this investigation is not going to be taken seriously that those involved in individual crimes will fight again. They should be held to account, if it is not going to be taken seriously, there will be no peace in South Sudan. Something that will bring more killings, the killings will take place.

888. Another respondent expresses the need, in the mould of the 'no peace without justice school', to establish accountability for atrocities committed during the current conflict, suggesting that this would then be followed by expressions of remorse and apology from key leaders in order to re-establish relations and reconcile South Sudanese:

> There are perpetrators all over ... In Juba here, in Bentiu, in Malakal everywhere. So we want those ring-leaders to be brought to book, to be taken for justice really and then after that we reconcile and then forgive each other, because you cannot forgive somebody meanwhile your whole family escaped. There are people who their whole family escaped into Juba here, from house to house. It has happened. In Bentiu the whole family, you were raped and then you were kicked, very painful. So we want those ring leaders to be brought to book then South Sudanese will forgive each other and then we forget what has happened and also we want to see these two people, our leaders really have to apologize to the people of South Sudan.

889. Other respondents expressed the view that pursuing justice before reforms are instituted, and while law and order was yet to be fully restored could be destabilizing. This view makes the sequencing argument that peace should be established before attempts are made to pursue justice. On this issue, one respondent captures the totality of this argument:

> I think accountability comes much, much later in this process, because I think what is important now is really peace, restoring law and order because you cannot have accountability in the absence of law and order.

> So you really need to have peace to normal, you have the courts, you have the police trained, depoliticized, demilitarized, same thing. Then now you can talk of real accountability, those who have committed crimes because they are known, the society would know, even if they have gone out they are still known and they can be brought to book. But I think the first thing is really that we need peace in this country, re-establish law and order and then after that this, is another process. We have the traditional way of forgiveness and reconciliation and peace which is still desired in our society.

890. On the same issue, a senior SPLM official echoed these sentiments, noting that once a ceasefire is achieved, security sector reform should be prioritized, then reconciliation and justice can follow:

> I think for me priority number one is security sector reform. If there is no security, nothing can happen. Those who have been hurt, those who have lost people can only be confident if they know they are going back to their places and nobody will be after them. But of course for people to trust that something has happened, those who committed atrocities must be brought to book. You cannot have any healing, any reconciliation, any hopeful future without justice.

891. A minority view was expressed to the effect that institutional reforms, which are vital in the reconstruction of the structural and institutional foundations of the new state would be difficult to achieve without reconciliation:

> About the institutional reforms, after reconciliation definitely is when these reforms will take place because you cannot reform when the people are still having doubts and mistrust among themselves. So about this reforms, I think if we can succeed in bringing in national reconciliation, again the institutional reforms will take place because by then everybody will accept that he or she has done wrong, so this is how we should move forward and to move forward maybe this is how we would like things to be maybe what they would like the political system, the administrative system to look like. Without reconciliation, doing the national reforms will difficult in other parts where we have seen difficulties with people being killed.

892. The Commission's view is that peace/reconciliation and justice are not mutually exclusive and that their relationship is best understood as complementary. It acknowledges the tensions between justice and peace at multiple levels, but adopts the view that it is difficult to envision a stable society where violations of human rights are normalized and impunity reigns. In our view, creating a peaceful and stable society requires, in part, addressing past grievances, and adopting a set of values including those that advance respect for human rights. Justice and reconciliation, can, and should be pursued at the same time.

893. Equally, it is our view that the relationship between peace[394] and justice should not be considered in a vacuum, but should be context-sensitive. The Commission is of the view that adopting a context-specific approach does not privilege either peace or justice: rather, when context is considered, this may require that a decision be made in relation to the timing of relevant initiatives, particularly criminal justice, given that our conception of justice includes reparative, restorative and retributive elements. In other words, context may dictate the sequencing of peace and justice, with the result that certain aspects of justice allow for the establishment of basic conditions, including restoring stability in a post conflict society and strengthening relevant institutions. As proposed elsewhere by the Commission, the criminal justice system must be reformed and its capacity built in order to implement some of the Commission's recommendations on accountability. These necessary reforms to civilian and military justice would, in the context of broader institutional reforms, facilitate the institution of reconciliation measures.

On Reparations and Reconciliation

894. The conceptual links between reconciliation and reparative justice have been well established.[395] Indeed, it must be acknowledged, as many respondents submitted to the Commission, that addressing the concerns of victims of past human rights violations is critical for reconciliation. In our view, one cannot expect materially deprived victims, those with unhealed mental scars to embrace reconciliation and forgiveness. Deep, sustainable reconciliation and peace requires more than acknowledgement of wrongs and apology. Genuine attempts must be made to address concerns specific to surviving victims, which may include loss of family and relatives, displacement, loss of property as well as physical and mental scars from violations suffered, which necessitate psycho-social support and rehabilitation. The Commission notes that a key feature of discussions with women was their reference to what they lost in the conflict beyond the lives of loved ones. Women spoke to the Commission about restoration of their means of livelihood and sources of income and compensation for the loss of homes and other property. The Commission notes, in addition, that reparations encompasses symbolic measures such as memorialization. As a process, it entails the documentation and honouring national heroes, and the creation of (new) symbols that represent national unity, vision, values and collective aspirations.

895. With respect to rehabilitation, particularly psychosocial assistance, the Commission noted, during its travels around South Sudan, that trauma appears to be a key consequence of the conflict. The Commission heard multiple stories of loss of close family members, children, husbands, wives that left survivors traumatized. The brutality of atrocities witnessed or survived haunts many victims. For mothers, separation from or abduction of children has left emotional and psychological scars and

[394] For the Commission, peace is more than 'negative peace', which connotes the absence of violent conflict. Peace also means harmonious co-existence between and among communities in a polity. It is about political stability, and physical security of all.
[395] See SATRC Report; Sierra Leone; Kenya TJRC Report

that manifest in various including sleeplessness and stress-induced illness. These cases demonstrated the scope of the problem and the need for further inquiry into the scope of trauma and the need for psychosocial interventions in the country.

896. For those who have been uprooted by conflict, their daily lives disrupted in various ways, reconciliation can only make sense once normalcy is restored in their lives. For those in IDP camps for instance, return to normalcy, which entails, in part, restoration of freedom of movement and the ability to access basic needs, would be the beginning of reconciliation. One respondent (woman) expressed this desire in the following words:

> Now they [IDPs in POCs] have no firewood for cooking. They only cook using the jerry can they cut them up and chairs, so if they could be allowed to go out and collect firewood from outside, *that will be part of the reconciliation* and also they say they have nothing here in the POC but sometimes some people can bring goods from the town … Now because those people who bring goods are being stopped at the check point that they do not take these things to the people in the POC … so if you can allow people to come and then we buy that food, our children will also benefit from that, it will also be part of our discussion and then we will now say that we have to make reconciliation even someone from POC can go to town and bring what he wants to bring, then you also in the town can come (emphasis added).

897. On the other hand, a majority of respondents took the view that return to normalcy, however defined, but particularly one that envisions harmonious co-existence, sustainable peace that creates the possibility for people to live their lives would be difficult to attain without a genuine reconciliation process, one that involves addressing collective as well as individual concerns:

> How do we deal with these people? How do we bring these people who are oppressed and these are the people we should be targeting, people who have suffered, people who are happy under their big tree, the women peeling their potatoes, the men playing their *mungula*, all the trees are deserted and that tree now there is nobody in it. How do we bring them back under that big tree?

898. It is the Commission's view that this apparently serene existence — in which citizens can go about living their lives — cannot be achieved without addressing the concerns of those who have suffered physical and mental scars. Victims must be facilitated in a variety of ways, including by addressing suffering and trauma, to make the necessary transition to the new and idealised post conflict society. In this regard, the views of one respondent aptly express this call to action:

> This is a big, big way, because when we are trying to set up peace, let us not look for the layer up, this one is in Addis [the peace process] … Let

> people now go for the reality of really uprooting pain from the hearts of women, uprooting pain from the community … So these are some of the stories you hear [of atrocities, illustrating with SGBV]. So people will need to remove the pain from the hearts of people, especially the women are the ones who have suffered mostly. We also sometime throw the question that what can we do? There should be a mechanism we get of how we can reach these people and talk to them.

899. Other than addressing the material needs of victims, creating avenues where they can share their narratives and have these recorded and acknowledged could be a key demand for victims, from the perspectives of establishing an accurate historical record, but also reparations in its broadest conception. Speaking in the context of the possible root causes of the current conflict, and the apparent policy of amnesia that has prevailed in South Sudan in relation to past events and violations, one respondent makes an eloquent case for justice for victims:

> Therefore, there were issues [and the] pains are still there … they will say, when you bring it up, just forget about it … Then she will forget about it but they have not discussed about it. It is not from her heart that '*me I want to forget about it'*. She is forced and because the Committee wants to see you as good person can forget. Then you say ok let's do it but all the time you see that person his anger is still there. So we did not have that space for dialogue whether at the public or government level.

On Institutional Reforms and Reconciliation

900. Chapter 2 of the Commission's report considered in detail the issue of institutional reforms, setting out the state of relevant institutions and recommending reforms. For purposes of this section, it is worth exploring the links, if at all, between such reforms and reconciliation. While such a relationship is not self evident, international best practice conceives of 'reparations' — which as argued is relevant, if not critical response to the concerns of victims from the perspective of reconciliation —, as including guarantees of non-repetition.[396]

901. One way of guaranteeing victims that violations that they have suffered in the past will not be repeated entails reforming institutions involved in or linked to such violations. For instance, security sector reforms that entail instituting a culture of respect of human rights within the army, police and the organised forces in general partly provides safeguards against a repeat of violations and abuses. Reforms also build up the capacity of relevant institutions to prevent and to promptly respond effectively to violations when they occur.

On Truth and Reconciliation

[396] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law` and Serious Violations of International Humanitarian Law, GA Res., UNGAOR, 60th Sess., UN Doc. A/Res/60/147 (16 December 2005) paras. 19-23.

902. On the necessity of truth about what has happened and healing, many who spoke to the Commission expressed the view that healing will be impossible without the truth being established. This applies not only to events related to the current conflict but also other major events in South Sudan's history, some of which are detailed in the Commission's justification for a nationafl process of reconciliation. With respect to the current conflict, one witness stated, in relation to alleged atrocities committed by government forces that: 'my advice to this government is that they must tell the truth to the people, the healing itself will come from there'. Similar sentiments were expressed in relation to human rights violations committed by rebels, with some respondents demanding that 'Riek must come back to Juba and explain to us what has happened'.

903. A majority of voices are ranged against the policy of amnesty pursued in the past. Many respondents expressed the view that avenues should be created for the people to tell stories about individual experiences and to interact meaningfully with perpetrators. One respondent, a Chief from Malakal suggested that this would provide an opportunity for victims to know the truth, and for perpetrators to acknowledge their transgressions and perhaps express remorse:

> When you are coming to judge something the two parties, the person who is wrong and the one who is right if the two people are not honest, the person who has done something wrong should say I am wrong. The one who has the right [who was wronged] should be there then he will be told that you have the right [I wronged you]. So in the case of any fighting people should be honest. People should accept that I am wrong this person was right. People should be honest.

904. Many respondents, particularly women that the Commission interacted with perceived the opportunity afforded to them by the Commission as an important opportunity to tell their stories and hopefully, for their long-standing concerns to be addressed. Women clearly expressed the desire for dialogue processes that would enable them to talk about matters of importance to them. Appreciative of the fact that the membership of the AU Commission that they met included women, they emphasized the need for any future process of dialogue in South Sudan to adopt procedures and approaches, including the provision of safe spaces for women and girls to tell their stories freely. In a meeting with women in one of the conflict-affected states, one of the participant in an FGD organised by the Commission stated that:

> We want to tell what is in our hearts. Before we thought, we did not have power but when we see women here, we can be comforted. We are comforted to see women here from the AUCISS.

905. It is the Commission's view that while discovery of truth is one of the main pursuits in transitional justice processes (for a variety of reasons), truth can be an impediment to healing and reconciliation, particularly at the personal level. While the

opportunity presented to victims to tell their stories can be cathartic, and the rediscovery of prohibited, stigmatized or forgotten truths can heal and fuel anew feelings of belonging and nationalism, the retelling of past atrocities could, at a personal level, reopen wounds slowing or halting the transition to the new society envisioned by post conflict reconciliation initiatives.

Reviewing Past and Current Reconciliation Initiatives

906. This part reviews reconciliation efforts undertaken in South Sudan (including one from before the signing of the CPA) as well as existing institutional framework established to drive the reconciliation agenda in South Sudan. It has been rightly suggested that such an exercise is necessary as it provides a basis for wide ranging recommendations on institutional design and other relevant issues.[397] While the literature and some of those who spoke to the Commission cite some of these examples as successful 'models' to be emulated (particularly Wunlit, see below) it is necessary to unpack these processes to assess not only their relevance but also suitability to inform our search for a framework to drive the reconciliation agenda. The 'success' of past initiatives is reviewed in this light.

A. The 'big/large tent policy' as Reconciliation

907. Following the signing of the CPA, one of the challenges faced by the GOSS was security and general instability attributed to the numerous militia (other armed groups, OAGs as per the CPA) that existed at the time or that emerged afterwards. To neutralize these groups, the government adopted a policy of integration, one that International Crisis Group has called 'big tent policy', which entailed bringing within the political fold or the military groups and individuals once opposed to the SPLA/M through the grant of amnesty and integration within the SPLA and accommodation of others in a political space dominated by the SPLM.

908. As detailed elsewhere, this policy, which is credited for creating a semblance of stability in post CPA South Sudan saw the integration of armed groups such as SSDF headed by Paulino Matip into the SPLA with the signing of the Juba Declaration in 2006. Equally, the negotiations with dissidents following 2010 elections and the President's Independence Day speech in 2011 are cited as other occasions that President Kiir has offered blanket amnesty to individuals and groups opposed to the SPLM government as a continuation of this policy.[398]

909. The recent peace agreement between the government and former militia leader David Yao Yao, which resulted in the creation of the Special Administrative Area for Pibor known as the Greater Pibor Administrative Area (GPAA) separate from the

[397] See American Bar Association (ABA), 'Assessment of Justice, Accountability and Reconciliation Measures in South Sudan: Final Report and Recommendations' June 2014, 14

[398] LeRiche and Arnold (n 13 above), 160.

Jonglei State government,[399] while breaking new ground, fits the mould of the dominant approach to peace making and reconciliation that has sought the accommodation of group and sometimes individual interests of those opposed to the SPLM and government. It is the Commission's view that creation of separate administrative areas within existing constitutional structures raises multiple problems. Other than the lack of constitutional grounding, our view is that it is arbitrary, sets a bad precedent and is not a sustainable model for dealing with grievances that relate to political and economic inclusion in South Sudan.

910. While the policy of inclusion pursued by the government of South Sudan has served to mollify opposition and to establish a measure of stability, it is said to have created incentives for endless rebellion, and as a result, instability. In this regard, commentators have noted that:

> Unfortunately, this strategy has been manipulated by those accustomed to using violence to gain concessions. In effect, it has created incentives for destabilizing the country rather than for constructive contributions to nation-building.[400]

911. In reference to the current crisis, many of those who spoke to the Commission, particularly from the SPLA and other organized forces while acknowledging the need to 'reconcile with the rebels' and that 'they are our brothers and we shall accept them if they come back', they accepted that the practice adopted in the past of integrating those who take up arms, often assigning high ranks to leaders of rebel groups had created some of the problems that now bedevil the SPLA. Some speakers opposed integration and promotion of rebels, stating that 'if they come back, it should be at the same rank' and that 'we should not reward people for rebelling'. Some thought that integration had turned rebellion into a 'business' for some, pointing to the fact that there are some who have rebelled several times, each time returning with a higher rank, and sometimes reaping financial rewards. This view is not restricted to respondents from the military. In this regard, one respondent stated, in relation to the policy of integration:

> You have seen the negotiations of many rebels in South Sudan, you bring this one today, the other one tomorrow goes. Because there is a routine kind of, no one is accountable. He goes tomorrow he kills, he comes back. For instance, if I today defect … if I have followers, I can just take a few, we fight one, two, three months, we sign a deal and I have a rank, I am promoted to be a General. Is the justice … we want? [It is not just]

912. On the same issue, another respondent made a forceful case for a review of the current policy, noting that focus should shift to resolving the root causes of rebellion and the seemingly endless cycle of violence:

[399] On the Greater Pibor Administrative Area (GPAA), see 'President removes Pibor Commissioner' *Sudan Tribune* August 14, 2014. Available at http://sudantribune.com/spip.php?article52035

[400] LeRiche and Arnold (n 13 above), 160.

> […] the government needs to stop accommodating people, because accommodation is failing us in government. So we accommodate people so not to have a rebellion in another area, but they do not deliver. The more people are accommodated, the more rebellion is caused, because somebody knows tomorrow they rebel, today they will be able to be accommodated. So we are not solving the problem, we are just putting it under the carpet.

913. It is the Commission's view that while political accommodation (integration) may be a necessary short-term measure to establish a semblance of stability as has been the case in South Sudan, perhaps the best approach to ensuring sustainable peace is to address the structural causes of conflict and violence.

B. Initiatives for Change: Aborted National Reconciliation Process

914. Perhaps the first structured attempt at national dialogue and reconciliation was driven by the Vice Presidency, then headed by Dr Riek Machar. Initiatives of Change, South Sudan (IOC-South Sudan), an NGO headed by Angelina Teny Machar (Dr Machar's wife), was registered to drive the process. It is recorded that IOC-South Sudan enlisted the support of veteran South Sudanese war veterans and politicians, including Buth Diu and Joseph Lagu, who have longstanding connections with Initiatives of Change International, a Swiss NGO of which IOC-South Sudan was the local branch.[401] The first initiative undertaken by IOC-South Sudan was the recruitment and training of peace and reconciliation mobilisers, a total of 200 young men and women. While this reconciliation effort dubbed 'the journey of healing and reconciliation' was not government-led, the Vice President lent his support to it, reportedly allowing 'government facilities to remain at the disposal of the facilitators of the course'.

915. While this effort was reportedly applauded by many, with some noting that the Vice President was perhaps the right person to lead this necessary national conversation on South Sudan's traumatic past given his role in past conflicts, the project ran into immediate opposition, with some linking it to his supposed political ambitions within the ruling SPLM.[402] Dr Machar had reportedly expressed his intentions to run for the party chairmanship at its March 5, 2013 Political Bureau Meeting. The initiative would soon stall following the establishment by the President of what would constitute the first national institution — the National Reconciliation Committee for Healing, Peace and Reconciliation Conference — to drive the national reconciliation agenda.

C. The National Platform for Peace and Reconciliation

[401] The Sudd Institute (n 391 above) 3
[402] Ibid, 4.

916. On April 22, 2013, President Kiir signed a decree establishing an independent National Reconciliation Committee for Healing, Peace and Reconciliation Conference.[403] The Committee was announced as the sole driver of national reconciliation process in South Sudan, with the clause in the decree stating that 'all bodies previously formed and established by government and tasked with national reconciliation should immediately hand over all documents, assets, finances at their disposal to the new Committee.[404] In so doing, one commentator notes that the President can be said to have effectively 'nullified' or 'cancelled' the Vice President's reconciliation initiative.[405] This new initiative is important because it provided the basis for the first formal and structured reconciliation process but also streamlines the reconciliation process by designating a body to lead the process. The other two bodies that together with the Reconciliation Committee form what is referred to as the National Peace and Reconciliation Platform (NPRP) are: Parliamentary Committee on Peace and Reconciliation and the National Reconciliation Commission.

917. This development — the 'replacement' of the nascent peace process commenced in 2012 —perhaps serves as an illustration of the fact that transitional justice, and particularly reconciliation, is — as noted by some respondents — a contested space and process in South Sudan. While in this case contestation relates to who should, at the political level, lead national reconciliation initiatives, a number of other issues could be subject of debate and contestation, including the membership of a future mechanism, the mandate period of the commission in terms of how far back in history the inquiry should go etc. However, the Commission notes that this is not unique to South Sudan, but the historical context of the country and recent developments add interesting dynamics. These factors are considered below in the Commission's reflections on a future reconciliation process that builds on the current institutional framework.

918. The mandate of the Committee established by the President is to: develop objectives of national peace and reconciliation; determine short term and medium-term activities; research modern and traditional conflict resolution and; to form a consultative body comprising of South Sudanese elders. To these ends, the committee is empowered by the Presidential Decree, to liaise with the government to provide security, financial support and mobility and; to solicit funding from local and international bodies as well as seek their expertise.[406]

919. Members of the Committee include Archbishop Dr. Daniel Deng Bul (Chairperson), Bishop Paride Taban (Deputy Chairperson), Bishop Rudolf Deng Majak, Bishop Enock Tombe, Moderator Peter Lual Gai, one a representative from the Muslim

[403] See Republican Order No 05/2013 for the Formation of the National Reconciliation Committee for Healing Peace and Reconciliation Conference, 2013.
[404] See Above, clause 4 (stating that all bodies previously formed and established by government and tasked with national reconciliation should immediately hand over all documents, assets, finances at their disposal to the new Committee)
[405] See Sudd Institute (n 391 above) 2.
[406] Ibid, clause 3.

community, one from each of the ten states of South Sudan, one youth representative and one civil society representative. Members of civil society that spoke to the Commission took issue with the membership of the Reconciliation Committee, decrying their limited role. There is a feeling that that civil society is not adequately represented or that their concerns (including those pertinent to women) are unlikely to feature adequately on the agenda. In this regard, one respondent noted that:

> National Peace and Reconciliation Committee … sidelined some women and brought the elders as part of the civil society,that will represent the entire south Sudanese when the names of the people to participate were brought, the names of people like [redacted] and others appeared, to come and be part of civil society. These are people who would (sic) not take (sic) our agenda.

920. Following its establishment, the Committee established a presence in the 10 states, and made attempts to design a program for implementation, which will entail mounting reconciliation conferences with the support of the South Africa-based Institute for Justice and Reconciliation (IJR) and other organisations. Speaking to the Commission, Bishop Taban Toro, a member of the church-led Reconciliation Committee outlined their program and planned activities, which were halted with the onset of the current conflict:

> So there is a program now but this program cannot move ahead when there is fire burning because reconciliations assumes that one puts out the fire [ends conflict] first then you now come and do the healing. But of course we should wait, we should prepare, so there is already a second […] set up, with offices in all the ten States; sub-committees in ten States but they are hoping that if the fire is put off [the conflict ends] then we need to have about 2 year program of mobilization and training so that we can […] put things in place.[407]

921. Below, the Commission reflects on the relevance of the National Platform to the discussion relating to institutional design of a framework to drive the reconciliation agenda in post-conflict South Sudan. The following sections outline and analyse two reconciliation initiatives from the past: Wunlit, which was part of a people to people process initiated by the New Sudan Council of Churches in 1998 before the signing of the CPA and the Jonglei Peace and Reconciliation Process instituted by President Kiir in 2012. These initiatives inform the Commission's reflections and recommendations in relation to several issues at the end.

D. The Dinka-Nuer West Bank Peace & Reconciliation Conference (Wunlit)

922. The Dinka-Nuer West Bank Peace & Reconciliation Conference was convened in 1999 to address the more than seven year devastating conflict between Dinka and

[407] Interview with Bishop Michael Taban Toro

Nuer on the west bank of the Nile which had resulted in many deaths, massive displacement, destruction of property and theft of cattle on both sides.[408] On why Wunlit, and the broader people to people peace and reconciliation process led by the NSCC was necessary (in the face of a lukewarm SPLA/M reception or outright opposition from sections of the movement), one respondent had this to say:

> So the process of going back to the communities and bringing them together because the [civil] war has created this situation that even the same community was fighting each other. They fought among themselves under the leadership of Lam Akol they fought instigated by the Khartoum government, the same with the Dinkas and Nuer. So we really needed to bring these people, conferences and so on [in the lead up to] … the CPA. Really they said you can now embark on social and economic development in this area.

923. The conference itself, which involved a massive construction enterprise to create a conference village, was envisioned as 'major step in a much larger process': the people to people reconciliation process. It was preceded, in 1998, by the Dinka-Nuer Lokichogio Conference (Loki Conference) organized by the New Sudan Council of Churches (NSCC) that resulted in the Dinka-Nuer Loki Accord. The traditional leaders that met in Lokichogio had resolved that there was need for a broader peace process that would involve different sectors of society in the west bank of the Nile.

924. To provide context, the Wunlit peace conference forms part of a wider peace effort initiated by the NSCC in 1995 in the liberated areas under the SPLA. This process, christened 'people to people peace process' was informed by the NSCC's failure to reconcile the political leadership within the liberation struggle following the 1991 split.

925. Although a number of peace conferences were organized in different parts of South Sudan, Wunlit Peace Conference has attracted the most interest, and is perhaps the best known of all conferences organized by the NSCC. The following are the peace initiatives organized by the NSCC as part of the people to people peace initiative (in the order they were held): SPLM/A and NSCC Dialogue (1997); Traditional Leaders Meeting, Lokichoggio (1998); Wunlit Peace Conference (1999); Waat Peace Conference (1999); Yirol West Bank Peace Council (1999); Liliir Peace Conference (2000); Wulu Strategic Linkages Conference (2000); Ganyiel West Bank Peace Council (2001); Kisumu Strategic Linkage II (2001); Chukudum Meetings (2000 — 02), Wunlit II peace conference (2003) and the All Upper Nile Nuer peace conference (2004).

Process and Outcomes of the Wunlit Peace Conference

926. The Wunlit Peace Conference was attended by 360 delegates (chiefs) representing Dinka and Nuer communities (from conflict areas in Bahr el Ghazal and

[408] On Dinka-Nuer West Bank Peace & Reconciliation Conference, see Verbatim Record of Wunlit (NSCC).

Upper Nile) in equal measure. As it has been organized by the New Sudan Council of Churches (NSCC), the various church groups played a critical role in the conference. These groups included the Diocese of Tonj; Church of the Brethren (US, Episcopal Church (USA); German Council of Churches. Several non-governmental organisations provided support or attended the conference, including: Christian Aid, Protestant Organsation for Development; Life and Peace Initiative; Catholic Relief Services (CRS), World Vision and Human Rights Watch. Several South Sudanese intellectuals and members of diaspora were also in attendance. Both the SPLA/M and Riek Machar's USDF endorsed the process and were represented, in the case of the SPLA, by the then Vice Chair Salva Kiir. Armed formations led by Kerubino Kuanyin Bol and Paulino Matip stayed out of the process.

927. Prior to the conference, a chiefs' exchange was arranged between Nuer and Dinka areas. The chiefs would visit opposing areas and get to spend time with the people on the ground. This was meant as a trust-building measure but also to enhance cross-cultural learning. The visits took place in Thiet and Wunlit in Bahr el Ghazal among the Dinka and in Leer in Western Upper Nile among the Nuer.

928. Following the opening ceremony and speeches, stories and narratives from Dinka and Nuer chiefs which lasted for just over two days (with each community allocated just over a day for testimonies and speeches), a period of deliberation followed, following which the conference organisers extracted from the storytelling and speeches six themes/issues for discussion in working groups. For the following day, the Wunlit conference was divided into six thematic groups which deliberated in break-away sessions after presentations (including recommendations) on each issue/theme once the plenary was reconvened. Further discussion followed during which additions and revisions were made to group presentations and consensus sought following which the plenary would approve the resolutions. The six themes were:

- how to monitor borders (areas of contact between Dinkas and Nuer);
- institutional arrangements, including police, border courts, appeal processes and Dinka-Nuer Coordinating Council;
- Missing persons and marriages to abductees;
- People outside the peace process
- reclaiming the land and rebuilding relationships

929. *On how to monitor borders,* it was recommended that: border administrations be established in all relevant areas; each of the nine districts should have a radio operated by the police and chiefs; citizens should be disarmed, or advised to join the army; civilian militias *jiecabul* (Nuer) and *gilweng* (Dinka) should be disbanded once peace is established.

930. Recommendations *on institutional arrangements necessary to implement the resolutions of the conference* related to: police, border courts, appeal processes and Dinka-Nuer Coordinating Council. It this regard, it was recommended that:

- New police posts to be established in identified locations in Bahr el Ghazal and Upper Nile. Local administration would decide on force numbers
- Joint police forces to be formed for border areas during the dry season
- Revival and strengthening of existing border courts and training of paralegals to man the courts. The courts were to consist of 5 to 7 members each
- The applicable law is customary law
- In terms of jurisdiction, the border courts were to be courts of original jurisdiction
- With respect to the Dinka-Nuer Coordinating Council, it was proposed that the Council shall be made up of 3 members nominated by each county and church representatives (total membership: 37). The council was to meet twice every year.
- The Council's functions included: overseeing the implementation of the Wunlit Peace and Reconciliation resolutions; review annual performance and recommend future plans; maintain contacts with the political leadership on security issues

931. *On missing persons and marriages to abductees:* The group dealt with persons that went missing during the war; girls who were abducted and married and boys/men abducted during raids and may have been married during captivity. Detailed 'rules' including payment of dowry where the abducted girl requested to stay with her husband and payment of fines in case of abduction of married women. Abductee identification teams made up of chiefs were to be created on either side.

932. *With respect to those outside the peace process:* The working group had noted that this objective requires a fair amount of work as it related to among others, armed groups that refused to join the peace process. It was recommended that:

- The conference calls on Kerubino Kuanyin Bol and Paulino Matip to join the peace process
- The conference called on Riek Machar and all people of influence to bring the two Nuer leaders to the peace process at Wunlit
- A letter was to be written to both Dr Garang and Machar to reconcile
- An inclusive peace and reconciliation conference was to be convened to bring together all communities in the South

933. *On reclaiming the land and rebuilding relationships*, the devastation of the Dinka-Nuer conflicts having been acknowledged and noted, it was recommended that:

- That a detailed listing of villages that have been abandoned on both sides be written up, organized in terms of chiefs and sub-chiefs or respective areas;
- A technical planning committee on land settlement and reclamation be created to advise on resettlement, including on consolidation and relocation of villages

- Reaffirm freedom of movement in peace and security
- Promote Dinka-Nuer reconciliation and familial co-existence
- A unified restatement of Dinka and Nuer customary law.
- Other recommendations included: the construction of Dinka-Nuer facilities including a shared veterinary center; school, agricultural cooperative;

934. *On Extending the peace process to the East Bank of the Nile and Equatoria,* the conference recommendation that this should be done was based on or informed by several considerations: that Dinka and Nuer on the East Bank are equally in conflict; the entire South needs peace and reconciliation, and that Greater Equatoria is also riven by conflict. It was recommended that a Peace and Reconciliation Conference be held on the East Bank and Equatoria. Two other conferences were proposed as follows: a Mini Conference for Lau & Gawaar and an All South Inclusive Conference.

935. All the resolutions adopted by the conference were incorporated in the covenant agreed upon at the end of the process. The covenant covered a number of issues that were critical to re-establishing peace and reconciling the warring communities on the west bank of the Nile.

936. First, the covenant declared a permanent ceasefire between the Dinka and Nuer, pronouncing on the cessation of 'all hostile acts' between the two communities. Second, an amnesty was declared 'for all offences against people and property committed prior to January 1, 1999' involving Dinka and Nuer on the west bank of the Nile. Third, the conference affirmed freedom of movement and encouraged commerce, trade and exchange of services between the two communities. Fourth, it was agreed that border grazing lands and fishing grounds would be a shared resource, to be accessed by both communities without impediment. Fifth, those displaced by the conflict were encouraged to return home and to begin the process of rebuilding their lives. Sixth, the conference agreed that local cross-border agreements were encouraged and would be respected and implemented. Lastly, in recognition of the fact that the type of conflicts that afflicted communities in the west bank were not unique, it was resolved that 'the spirit of peace and reconciliation' that the covenant represented 'must be extended to all of South Sudan'. The events organized by the NSCC following the conclusion of the Wunlit Peace Conference were in part a fulfillment of the promise made at Wunlit.

Wunlit's Legacy

937. In the immediate aftermath of Wunlit conference, several resolutions were implemented. By ending the seven year war and related violations, many considered Wunlit to have been a success, and have held it out as a model to be emulated to address other conflicts, despite its limited scope and the fact that it did not eventually deliver sustainable peace.

938. On the impact of Wunlit, the Commission found that following the conclusion of the covenant, some abductees and cattle were returned while those who violated the

covenant were punished. Equally, it is reported that the agreement led to the opening of trade routes between the two communities (Dinka and Nuer) while some of those that had been displaced were peacefully received back home and dowry negotiated for abducted girls.[409]

939. The agreement not only brought to an end the fighting, but also created a new atmosphere of trust and harmonious co-existence. While as a response to the agreement, Khartoum escalated its support for Nuer militia (notably Paulino Matip) who in the aftermath went on the attack, displacing many, the newly displaced (Nuer) were hosted on the west bank by the Dinka, something that would have been difficult to fathom before Wunlit.[410] The agreement also resulted in the resumption of sharing of grazing and fishing sites, which had been abandoned due to insecurity associated with the conflict. Although many of those displaced by both sides were able to return, reintegration was hampered by the lack of material support, which undermined the long term impact of the agreement.

940. On the impact of Wunlit on inter-community relations, and the broader north-south peace process, one respondent noted that:

> [Wunlit] had an impact on the whole world because now it enabled people to move about, it also enabled the Nuer Commanders who were fighting on the side of the government to delink themselves from the [Sudan] government and go join the SPLA; and this accelerated in the CPA process, resulting in peace, reunification of the SPLA 2002, signing of the peace in 2005.

Lessons from the Wunlit Peace and Reconciliation Conference

941. The Wunlit peace process has been held out as a model for initiating peace and reconciliation, particularly in relation to the multiple conflicts in South Sudan. In this part, we review that process with a view to establishing what worked, reasons for the assumed success and thus teasing out lessons for a future reconciliation process in South Sudan.

942. First, the process was highly participatory, involving different sectors of society including chiefs, women, youth and leading personalities from respective communities. For Wunlit, while the number of delegates from each affected county was limited to 30 (bringing the total number of delegates to just over 300), the entire process attracted a much larger crowd of citizens/onlookers. In this regard, one commentator who participated in the process as a researcher notes that 'the meeting hall held 400 people during the peace making process, with a multitude of over 2,000 persons crowding

[409] Mariam Ayoti Kundu, 'Traditional Approaches to Peacemaking and Conflict Resolution: The Case of Wunlit Peace Conference, South Sudan' Unpublished MA Thesis in Conflict Resolution & Peace Studies, University of Durban, Natal (2003), p 28; see also Rift Valley Institute, p 44

[410] Mark Bradbury et al, *Local peace processes in Sudan: A baseline study* (2006) 28-58 at 44

outside, peering in and listening to the proceedings on a solar-powered sound system'.[411]

943. Second, the initiation of Wunlit by the NSCC was informed by the failure to resolve the seven-year conflict through political and military leaders. As such, Wunlit was, as noted, a people to people process, a dialogue between civilians. The process, although facilitated by the NSCC which was at the time based in Nairobi, was rooted among the people. It can be concluded that part of the reason Wunlit succeeded was that it was owned by the people, and sought to engage leaders with sway at the grassroots.

944. Third, Wunlit shows that while people to people process could be ideal for resolving conflicts at the community level, it is necessary, even critical, to cultivate political support for the process. In the context of Wunlit, the organisers sought and obtained support from the SPLA as well as Riek Machar and his splinter group. The refusal by Paulino Matip to endorse the process would later threaten and undermine aspects of the agreement following his renewed attacks in Upper Nile with the support of Khartoum. For its part, Khartoum, while initially supportive of the process is said to have sought to undermine the agreement signed by increasing its support for Matip and escalating the warring Nuer sections in the oil producing areas. Equally, on the need for political support for peace and reconciliation initiatives, an NSCC review of Wunlit in 2000 observed that the fragility of the agreement was exposed by the withdrawal of support by the Commissioner for Rumbek in Lakes State.[412]

945. Fourth, the success of Wunlit is attributable in part to the investment by communities involved in the process and extensive mobilisation at the community level. In particular, the NSCC's decision before the process started to seek and obtain the endorsement and participation of chiefs and other individuals with moral sway among the Dinka and Nuer on the west bank was perhaps the main pillar of the process and undergirded its success. It is thus critical to involve all critical actors in any future reconciliation efforts.

946. Fifth, Wunlit shows that the success of such a process is also dependent on the legitimacy of delegates. For Wunlit, it was critical that delegates chosen or invited to attend represented the interests of their communities and could thus speak authoritatively on their behalf. The exchanges between Nuer and Dinka chiefs organised before the conference not only built trust but also legitimated the concerns of each side.

947. Sixth, Wunlit shows that the authenticity of the methodology and approaches adopted is important. The organisers chose to draw on a combination of methods, incorporating traditional rituals and methods, Christian religious rituals and modern (western) methods of conflict resolution. In relation to the first two approaches, the

[411] Kundu (n 409 above) 21.
[412] See Mark Bradbury et al (n 410 above) 45

slaughtering of a white bull at the start of the process, was accompanied by Christian prayers.

948. Seventh, Wunlit demonstrates that community reconciliation initiatives are unlikely to succeed in the absence of concrete support (from political and other quarters) for the outcome of the process. According to the NSCC,[413] Wunlit's impact was partly undermined by the lack of practical assistance for reconstruction and support for the return and integration of those displaced by the conflict. Although as discussed above the return of abductees and IDPs to their homes was one of the immediate impacts of Wunlit, it lacked in sustainability for lack of material support for the process.

949. Lastly, it is suggested that lack of unity within the liberation movement — partly due to the 1991 Split but also Khartoum's counterinsurgency policy of supporting militias — as well as weak rule of law in the South undermined Wunlit's potential impact. In this regard, NSCC warned in its review of Wunlit that 'unless there is greater commitment to unity and genuine attempts to institute the rule of law,' … those seeking reconciliation and peace will be undermined and the liberation struggle threatened with defeat'.

950. It is the Commission's view that this would suggest that apart from the importance of the broader (national) context in terms of ordering local reconciliation initiatives, it is critical that such local initiatives be linked to a national process. While the NSCC's people to people reconciliation process saw the replication of Wunlit in other conflict-prone areas in the South, the impact of the entire process was undermined by the fact that it appeared ad hoc, and did not feed into a uniting national reconciliation process.

951. In the Commissions view, while it is important to evaluate Wunlit's success in proper perspective, we are led to conclude that many of its early achievements were hampered by the structural environment in which the process unfolded. In a recent critical reflection piece, former advisor to the Committee for National Healing, Peace and Reconciliation in South Sudan has observed that the people-to-people peace processes of which Wunlit and Jonglei formed part failed to foster sustainable peace building, in part because they were substantively limited in scope, and did not command the full support of critical actors:

> These processes have been undermined by both politicians and the military, while the designs and frameworks have often explicitly avoided looking at political and social issues together, thus preventing the possibility of sustainable peace-building.[414]

E. Jonglei Peace and Reconciliation Process

[413] Mark Bradbury et al, (n 391 above) at 45

[414] Ferdinand von Habsburg-Lothringen and Briony Jones, 'Reconciliation in South Sudan in the context of the current crisis' Critical Reflection following the KOFF Roundable.

952. The Commission is of the view that perhaps the greatest achievement of the Wunlit peace process was that it developed a model that has since been deployed to resolve various conflicts in South[ern] Sudan. The first time that 'the Wunlit model' has been formally adopted is in relation to the resolution of the multiple conflicts in Jonglei.

953. The Jonglei Peace and Reconciliation Process was initiated by the President with the creation in 2012 of the Presidential Committee for Community Peace, Reconciliation and Tolerance in Jonglei State headed by Bishop Daniel Bul.[415] It was a timely measure meant to address the seemingly intractable conflicts that have been witnessed in South Sudan's largest state over the years. The conflicts, which had their roots in struggle over resources (notably land and grazing pastures), cattle rustling, historical events that have shaped inter-ethnic relations within the state ('Bor Massacre' of 1991) among other factors, pitted various communities against each other: Lou Nuer-Dinka (in Wuror, Nyirol, Duk and Twic Counties); Lou Nuer-Murle (in Akobo and Pibor Counties) and; Lou Nuer against Jikany Nuer.[416]

954. Several peace efforts had failed to resolve these conflicts, which resulted in the deaths of thousands, mass displacement (reportedly over 350,000 people by 2009) and loss of property, including cattle.[417]Some of the peace initiatives that failed to conclusively resolve increasingly deadly conflicts included: Lou Nuer-Dinka peace conference organized by State Governor Kuol Manyang between 10-14 May 2009; Lou Nuer-Murle peace conference (which failed to take off); disarmament of civilians and; Joint Lou Nuer — Murle ceasefire committee supported by UNMISS.[418]

Process and Resolutions of the Jonglei Peace Conference

955. In terms of structure and process, the Commission that Jonglei Reconciliation Committee drew upon Wunlit. The Commission learnt from a highly placed member of the Committte that the peace process combined several events and activities namely the peace conference (All-Jonglei State Communities Peace Conference), an inter-community exchange program for chiefs and mini-conferences and consultations. The exchange program for chiefs and the mini-conferences and consultations were conducted before the main peace conference that was held in Bor between 1st and 5th May 2012. The exchange program entailed visits by chiefs from one community or area

[415] For more on the Committee, see South Sudan Peace and Reconciliation Commission [http://www.peacecommission.org/

[416] For a detailed description of these conflicts, see International Crisis Group, *Jonglei's Tribal Conflicts: Countering Insecurity in South Sudan* Africa Report No. 154, December 23, 2009

[417] As above

[418] As above, pp 4 and 7. On the role of UNMISS, see UNSG, 'Report of the Secretary-General on the United Nations Mission in Sudan', July 14, 2009, S/2009/357

to another community or area, designed in part to build trust and to prepare the ground for the main peace conference.[419]

956. With respect to the mini-conferences and consultations, the Jonglei Reconciliation Committee was divided into four (4) each responsible for one of the areas into which the state was split for this purpose: greater Pibor; greater Akobo; greater Bor and Fiji (the area towards the canal). Each of the four sub-committees met with elders, women and youth in their respective areas for two weeks after which they prepared reports that were presented at the main peace conference and compiled into one on the final day of the conference following discussions and other activities.

957. Participants in the All-Jonglei communities peace conference included 84 chiefs, elders, women and youth from all 11 counties and all 6 communities of Jonglei State. Others in attendance included the State Governor Kuol Manyang, national and state ministers, members of the national and state legislative assemblies, chairpersons of national commissions, county commissioners, religious leaders, intellectuals, international observers and experts as well as UNMISS, which also provided logistical support to the Committee.

958. In terms of issues, the conference identified several problems that needed to be addressed in order to install durable peace in troubled Jonglei State. These included: aggression by Sudan; insecurity attributable to conflict between communities; killing of vulnerable persons; abduction of women and children; theft of livestock; under-development; unemployment; internal displacement; border disputes; food insecurity and trauma attributable to the long civil war. The conference then proceeded to adopt detailed resolutions targeting each of the identified problems.[420] Here, the Commission only highlights resolutions relating to the key issues that can be said to underpin multiple conflicts in the state.

959. With respect to the theft of livestock, the conference recommended: community policing, amnesty for livestock stolen in the past, empowerment of chiefs toallow them to act more proactively to deal with thieves, raiders and abductors. On insecurity caused by conflicts between communities, the following were prescribed: sensitization to create awareness among rural communities; combat abductions and human trafficking; promotion of intra/inter-community interactions through among others sports, workshops, conferences and marriage. The conference recommended further, in relation to insecurity due to conflict between communities that: law and order should be enforced; establishment of effective buffer zone; aerial surveillance; roads and communications; addressing proliferation of small arms, including disarmament and enactment of relevant laws and; implementation of Bentiu Accord (relating to chief's guards).

[419] See Report and Resolutions of the Presidential Committee for Community Peace, Reconciliation and Tolerance in Jonglei State (on file with the Commission)
[420] As above, pp 3-7.

960. The conference outcome document recognized that there had been many peace processes in Jonglei that had generated resolutions and recommendations similar to those proposed in the current initiative, which unfortunately had not been implemented. In this regard, the participants of the conference committed themselves to the implementation of the resolutions and recommendations relating to all issues identified. To bolster this commitment, a Plan of Action[421] detailing actors responsible for the implementation of particular items with suggested timeframes was annexed to the conference outcome document. Recognizing that monitoring and follow-up are critical, the conference requested the President to consider how best this could be achieved, taking into consideration that 'peace is a process'. Following the creation, by Presidential Decree of the National Reconciliation Commission with authority to take over all reconciliation activities, it is presumed that the National Commission is responsible for the implementation of what remains of the resolutions and recommendations of the Jonglei peace process.[422]

Lessons from the Jonglei Peace Process

961. From the Commission's consultations, it was established that some gains had been made following the peace process but the emergence of David Yao Yao in Pibor County reignited instability and disrupted the process of implementation.[423] It is worth noting that Yao Yao, a Murle leader took up arms when he contested and lost elections for the Jonglei State Legislative Assembly. In June 2014, a new peace process between Juba and Yao Yao resulted in the creation of a Special Administrative Area for Pibor known as the Greater Pibor Administrative Area (GPAA), which is to be administered under the Office of the President, effectively falling outside the jurisdiction of the State of Jonglei. David Yao Yao heads the GPAA as Chief Administrator.[424]

962. For the Commission, it is clear that a comprehensive peace and reconciliation process that addresses all the conflicts in South Sudan is critical and that an ad hoc approach is unlikely to yield nation-wide peace. Such a process must address the root causes of conflict and accommodate the concerns of all actors. In Jonglei, the Commission learnt that the Murle did not fully participate in the process for a variety of reasons. The eruption of violence soon after the process was concluded attests to the fact that some had not fully committed to the process. This process also emphasizes the need to cultivate legitimacy for any peace process, and a constitution, particularly the leadership of any future peace and reconciliation mechanism which should be credible and acceptable to the majority.

[421] (On file with the Commission). Also accessible at [URL: South Sudan Reconciliation Commission website]

[422] On the mandate of the National Reconciliation Committee as the sole driver of national reconciliation efforts, see clause 4 of Republican Order No 05/2013 (n xx above) (stating that all bodies previously formed and established by government and tasked with national reconciliation should immediately hand over all documents, assets, finances at their disposal to the new Committee)

[423] Interview with Profs Simon Oromo; Simon Monoja

[424] On the recent developments relating to the GPAA, see 'South Sudan President removes Pibor commissioner' August 14, 2014. Available at http://sudantribune.com/spip.php?article52035

963. In view of suggestions by some of those that spoke to the Commission that any future national reconciliation process should build on grassroots initiatives such as the Jonglei peace process, the Commission reflects on this issue in our discussion of potential mechanisms to be deployed as well as in our recommendations further below.

Institutional Framework Relating To Healing and Reconciliation

964. Echoing the Commission's thinking, some of those that expressed themselves on this question emphasized the need to devise an appropriate institutional framework to drive the reconciliation agenda, taking into consideration the context of South Sudan, including local level needs and concerns:

> This is a big, big way, because when we are trying to set up peace, let us not look for the layer up, this one is in Addis [the mediation process] … Let people now go for the reality of really uprooting pain from the hearts of women, uprooting pain from the community … So these are some of the stories you hear [of atrocities, including SGBV]. So people will need to remove the pain from the hearts of people, especially the women are the ones who have suffered mostly. We also sometime throw the question that what can we do? *There should be a mechanism we get of how we can reach these people and talk to them* (emphasis added).

A. IGAD Mediation, Healing and Reconciliation

965. While some doubts linger, a majority of South Sudanese that interacted with the Commission expressed hope that the IGAD mediation process would yield peace, and return to normalcy, especially for those displaced by the violence. One such voice noted that:

> We are now in the hands of UNMISS waiting for the peace talks in Addis Ababa hoping the talks will bring lasting peace that will allow us to return to our residential homes … we will not go back until the peace comes.

966. Indeed, the Commission has concluded that the IGAD mediation process has relevance for healing and reconciliation. At least three reasons appear pertinent. First, it is fair to conclude, as the Commission does, that the agreements on cessation of hostilities and ceasefire are a first step in the process of national healing and reconciliation, in part because it stops the bleeding (ending violations) and creates an environment for a political settlement to be negotiated and agreed upon, which agreement could include, transitional justice (reconciliation but also accountability).[425]

967. Second, it is the Commission's view that the outcome of the IGAD-mediation process partly addresses concerns around political justice. It is instructive that during the Commission's consultations, respondents pointed to what they considered as

[425] See IGAD Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis in South Sudan, 25 August 2014 signed by Heads of State and Government.

exclusion as one of the root causes of the current conflict. Third, political settlements may also address what can be referred to as economic justice, which encompasses not only questions of economic inclusion but also constitutional questions that touch on the structure of the state (decentralization in the context of South Sudan). The previous chapter addressed these questions.

968. There is a practical consideration in the relationship between peace, security and justice and reconciliation, informed by the difficulty entailed in 'doing' justice, conducting reconciliation before the guns fall silent. Comparative experience illustrates the difficulty of pursuing justice during conflict, or before conflict has waned. These experiences inform that peace must be established first, before attempts are made to address the rest, hence the importance of cessation of hostilities and the attainment of a political settlement. Pointing to some of the challenges of pursuing reconciliation and justice in insecure circumstances, one respondent [a senior government official] emphasized the need to prioritize security sector reform above all else:

> […] the other day I was in Rumbek, we had meetings with chiefs, the chiefs said, we know some of these people [perpetrators] but I am (sic) afraid. Communities know who has been involved in what. They know it. But then how do they guarantee their security if they name somebody, that this has done this and I have seen this happen here. That kind of security, people know who did what but then guaranteeing those who offer information security, all will be well with them, it is very important.

On Views Relating to The Transitional Government and Other Issues

969. Whether this is legally or practically achievable or not,[426] some views were expressed to the Commission that a stable transitional arrangement and ultimately, reconciliation would be difficult to achieve if the current crop of leadership is retained. In this regard, one speaker echoed this view, observing that:

> If you don't remove this entire whole (sic) group from the scenario, then what kind of reconciliation are we talking about and where? There has to be a neutral space created for reconciliation, and that's neither (sic) why we need Riek, or Salva or the [SPLM] eleven nor (sic) anybody who was in government.

970. Other respondents took the view that it would be difficult to envision a stable arrangement that excluded the two principals, while others proposed a 'government of technocrats' with the two occupying ceremonial positions 'to guarantee national unity and cohesion during the transition'. A number of respondents told the Commission that President Salva Kiir must leave before any dialogue about the future of South Sudan can be conducted. In this regard, one women stated that:

[426] Depending on when such a government is to be installed, one must contend with constitutional provision relating the next election, and the mandate of the current government

> The women who remain alive need a new President so that we can return to our normal lives. If the President steps down, Nuer, Shilluk and Dinka will live together harmoniously and the killings will stop immediately.

971. With specific reference to Riek Machar, a number of those that expressed themselves on the subject thought that 'those who rebelled should not be part of government' and that 'they should wait for the elections' when they would be free to 'ask for our votes'. A similar point was eloquently made by another respondent thus:

> The leadership we have in the legitimate government we elected their term will come when we will either lose trust or get them back. But those who rebel and they need to come into power through this umbrella of transitional government, we don't want it.

972. While the Commission considers it important to reflect these varied views on the issue, which is to be resolved by the IGAD-mediated peace process, the Commission is not in a position to weigh in terms of which of these voices is dominant.

B. National Reconciliation Agenda

973. Since it has been concluded that the war of liberation and the multiple conflicts that accompanied that effort wrecked relations among South Sudanese communities, and that these conflicts remain unaddressed, there is an urgent need for the institution of genuine national efforts at reconciliation to facilitate healing. A case for such a process has been made above, reflecting the views of South Sudanese.

974. With respect to which institution should drive the national reconciliation agenda, the Commission considered two options:[427] empowering the existing National Peace and Reconciliation Committee through appropriate legislative, administrative and personnel changes to enable it lead a revamped reconciliation process or creating a new body, a Truth and Reconciliation Commission. In each case, it was suggested that in the interim period, the National Reconciliation Committee should be retained to prepare for a future national reconciliation process, by among other things, beginning the process of documentation of violations.[428] Alongside either body, the majority of views support a role for traditional justice and reconciliation mechanisms organised around chiefs and elders (eg Wunlit), established in some relationship with the national entity or entities established to drive the reconciliation agenda.

975. A number of factors appear to undermine the prospects for a national reconciliation process organised around the Reconciliation Committee. With respect to this option, relevant literature and views expressed by respondents during the Commission's consultations lead to the conclusion that the existing Peace and

[427] See Sudd Institute (n 391 above); ABA (n 397 above); South Sudan Law Society (SSLS), 'Truth and Dignity Commission: A Proposal to Reconcile the Many Truths of South Sudan from 1972 to the Present' A working paper by David Deng, August 2014

[428] As above

Reconciliation Committee is constrained in various ways, and may not be suited to the task of driving the national reconciliation process. These challenges include: [429] capacity constraints; a perception of the process as government-led and exclusionary and; perception of the Committee's leadership as controversial, contested and 'too closely aligned with the President'.[430] The result is that the Reconciliation Committee suffers a significant legitimacy deficit, due in part to the fact that it was created by Presidential decree, which excludes the desirable role of the legislature for such a process.

976. Those that expressed themselves on the subject supported the idea of a Truth Commission empowered to inquire into past human rights violations; document violations; lead the discovery of truth and establish a historical record; address the concerns of victims (or propose how these should be addressed) and lead reconciliation initiatives. Within the context of the IGAD-mediation process, the yet-to-be ratified Protocol on Agreed Principles on Transitional Arrangements Towards Resolution of the Crisis of August, 25 2014, proposes the creation of an appropriately empowered Truth and Reconciliation Commission. In view of the constraints expressed in relation to the existing Peace and Reconciliation Committee, as well as the much-needed legitimacy likely to be generated by the concurrence of the main political actors in South Sudan, the Commission is persuaded that a Truth and Reconciliation Commission should be created to drive the national reconciliation agenda.

C. Traditional Approaches and the National Reconciliation Process

977. A number of those who spoke to the Commission, expressing their doubt that 'elite-led processes' could engender true reconciliation urged that elders should be involved, and that reconciliation should be bottom up and popular process:

> If we need to reconcile our people, we really need to involve the community elders. There is no peace that is going to come from Addis Ababa where they go wearing suits and get allowances. We need to look at how to organize reconciliation conferences starting from the grassroots level coming up.

978. As the discussion in Chapter 2 relating to traditional justice mechanisms as well as the analysis of the people-to-people reconciliation processes in this chapter show, an overwhelming majority of South Sudanese have contact with customary justice and conflict resolution mechanisms. When compared with formal justice, these systems —, which handle more than 90% of cases in South Sudan —, are seen by some as more legitimate for a variety of reasons discussed. During the Commission's consultations, an overwhelming majority of respondents who expressed themselves on the question stated that a role must be fashioned for these systems. Indeed, many preferred that chiefs and elders should play a role in reconciliation at the grassroots level.

[429] As above
[430] SSLS, 'Transitional Justice Strategy for the IGAD-led Peace Talks on South Sudan' September, 2014, at 4

979. For the Commission, what ought to be done is to establish an appropriate relationship between these community-based systems and formal processes at the national level, particularly the Truth and Reconciliation Commission recommended by the Commission to lead the healing, peace and reconciliation agenda. In the discussion above, we outlined some of the work already undertaken or planned by the church-led National Platform on Peace and Reconciliation: a series of conferences are to be held in different parts of the country, culminating in a national peace and reconciliation conference reportedly fashioned on Wunlit. It is the Commission's view that a future Truth and Reconciliation Commission should build on the work already undertaken by the National Platform on Peace and Reconciliation, and that an appropriate role should be fashioned for traditional conflict resolution mechanism, taking into consideration lessons learnt from earlier experiments. The Commission counsels that in establishing an appropriate relationship between traditional and formal systems, traditional mechanisms should not be open-ended: they should be subject to oversight to ensure that they operate in accordance with certain constitutional ideals, including respect for women's rights and vulnerable groups.

D. The Role of Different Actors in Reconciliation

980. While several respondents acknowledged that support of the international community in carrying out a future transitional justice agenda is required, there is recognition that it is the responsibility of South Sudanese to find solutions for their problems, which include the resolution of multiple conflicts and addressing the concerns of victims. On the necessity of home grown solutions, and the role of South Sudanese in bringing peace, a senior SPLM official stated that:

> I personally believe peace in this country will come from us not from anybody else. That is to put my load back to me and that is my belief. Everybody else would be supporting and this process is a support to find out what went wrong and how you can chip in, but peace comes from us, peace cannot be donated, that I believe. It cannot be donated. It cannot be brought by anybody. It is us [our responsibility] … we wanted a country that we can be proud of.

981. One of the recurring themes during the Commission's consultations was the role of leaders. Earlier, the Commission documented the views of ordinary South Sudanese, and their frustration, perhaps anger, that political leaders had plunged them in a destructive conflict that does not concern them. We noted that some wondered leaders in Juba could not resolve their differences, and how a conflict that started 'far away in Juba' could impact their lives as it has done. Many had expressed their hopes that the IGAD-led mediation process would find a quick solution so that their lives could return to normalcy. Many emphasized that it is the leaders' responsibility to find lasting solutions. In this regard, one respondent aptly captures this view:

> That is not going to be a very simple task [return of IDPs, harmonious coexistence]. It means the reconciliation should start from the top and by

> the top I mean it should start from our leaders and they should lead by example. Maybe when we see them reconciling, I think the civilians will not hesitate, they will just follow what they (sic) leaders are saying especially Kiir and Riak, the civilians will follow suit. And we are well aware that what happened has happened, people have died and there is nothing we can do about it. So if a Nuer comes to me, I can just tell him that we are brothers and sisters as before so let us just forget our differences and then we live together as before.

982. It is the Commission's view that while political leaders have an important role to play, the search for home-grown solutions must involve communities impacted by conflict. Experience shows that national reconciliation processes that do not build on, or that exclude community-based initiatives are bound to fail. While agreements or settlements at elite level often create a favourable environment for a broader peace and reconciliation process to take place, elite-dominated processes rarely yield sustainable peace. During its travels around South Sudan, many ordinary South Sudanese expressed their frustration that the mediation 'is taking place far away' and that 'it should be brought back here, among the people'. Commenting on the role of the community in re-establishing peace, one respondent observes that:

> We accept peace in the first place as a community. We do not want any more retaliation or revenge to take place again. What we want is peace but the people should think how this peace should be achieved and that is the more challenging word. How to achieve this peace is very important. We need to know what we want as a community. We need to be involved in that peace process, we need to be involved as stakeholders, as the community contravene in the peace process. This is what we want in the first place so that peace should be achieved.

983. Responding to a question relating to what should be done in relation to violations, one respondent stated that 'that is going to be the question answered by the people, not the Church not even the Government. So if you are asking, you ask the right people, that is the community.' Another respondent emphasized the role of the community thus:

> For me, if I want to see justice prevail, probably it would be the community to decide what should be done with the people. Let the community take control, if they want to forgive them and say it is okay, let us forget and reconcile, fair enough. But if the community feels that the people who are responsible should be prosecuted, should be held responsible and the law takes its course, it should be respected …

984. It is the Commission's view that civil society has a critical role to play in any transitional justice process, particularly peace and reconciliation. The Commission learnt that the Faith Based Organisations (FBOs) and other civil society organisations have been central to peace and reconciliation initiatives in South Sudan. It was noted that the people to people peace process was initiated and driven by the Council of

Churches, which remains active in the peace and reconciliation arena. It is also worth noting that the National Peace and Reconciliation Committee is a church-led process. Reference was made earlier to attempts made by the church leaders to resolve the political conflict in the SPLM before December 15, 2013. Subsequently, the Commission learnt of the role FBOs have played in the provision of humanitarian assistance to IDPs in various parts of the country. One civil society leader captured the potential role of civil society in the following terms:

> I think that the civil society because we are impartial, we are not looking for power and so we believe that we are in the right position not just to participate in reconciliation but we even believe that we should participate in the table of discussion. Because we are really speaking for the sake of the ordinary citizen, I mean we do not care who is in power but all we care about is peace for everybody because if it is only the two parties who are allowed to negotiate without an independent voice, I do not think that South Sudan can reach a solution anytime soon. But we believe that because we do not belong to A or B but we represent the ordinary citizen then we can contribute effectively.

985. Civil society could play multiple roles in the transitional justice process, including sensitization South Sudanese on a variety of issues; providing technical support for a future Truth Commission and any other relevant institution. Civil society also provides an important link between the commission with the broader public, as well as communities of victims. Experience shows that transitional justice process that lack the support of civil society and citizens in general are seen as illegitimate and are unlikely to have the desired impact. In the context of South Sudan, the Commission has interacted with several civil society organisations. The Commission learnt that several of these organisations are already involved on the ground in sensitizing citizens on a variety of issues. A number of high-level conferences have been held to deliberate on options for transitional justice in a post conflict South Sudan, and a number of papers touching on various topics published. The Commission is also aware that South Sudanese civil society continues to lobby and advocate for various options. It is the Commission's view that civil society is key to the success of any of the options to be proposed in our report and urge various actors to support their work.

986. The other important actor is the international community, which includes regional actors. While we do not outline the critical roles of the regional and international actors in the IGAD-mediated peace process, the Commission notes that government officials, civil society and ordinary South Sudanese see the support of the international community as indispensible. This relates, not only to achieving negotiated peace but also in establishing the institutions required to drive the transitional justice agenda. Among ordinary South Sudanese and civil society, the Commission learnt that there is the view that the international community has more deployable assets at its disposal, and that these will be used to facilitate peaceful resolution of the conflict and the implementation of transitional justice agenda.

CHAPTER V

CONCLUSION:

FINDINGS AND RECOMMENDATIONS

CHAPTER V

CONCLUSION:

FINDINGS AND RECOMMENDATIONS

A. INTRODUCTION

987. This concluding chapter of the Commission's report summarizes the Commissions findings relating to various themes and issues under the four mandate areas — institutions, healing and reconciliation and human rights violations, other abuses and accountability — and then makes recommendations. This chapter follows the same approach adopted in the substantive chapters. While it constitutes the Commission's appreciation of the various issues and concerns in comparative perspective, it privileges recommendations made by South Sudanese during its consultations.

988. The Commission's consultations disclose that while considerable progress has been made since the signing of the CPA to build state institutions, the task ahead is daunting: a legacy of neglect had resulted in the absence or decay of institutions. The current crisis has dealt a further blow to fledgling institutions, not only through physical destruction but also the erosion of public trust in those that remain.

989. Building in some cases on reforms that were underway on December 15, 2013, the report details some of the measures that should be undertaken to build strong, functional, effective and accountable institutions. It touches on: the system of government; executive at national and state levels, including the Presidency, security sector reforms, management of strategic resources; legislature at both national and state levels; the judiciary; political parties and; civil society and the media.

990. Having concluded that the multiple conflicts in South[ern] Sudan's history have negatively impacted relations at multiple levels, this chapter recommends a peace and reconciliation agenda that proceeds from the position that a genuine national dialogue — one that past peace initiatives have been unable to guarantee — is imperative. Noting that such an initiative must involve various stakeholders, and build from the grassroots, the chapter reflects on the role of traditional conflict resolution mechanisms, which it suggests should link appropriately with a national institution that drives the peace and reconciliation agenda. The chapter also considers how at both conceptual and practical level, healing, peace and reconciliation process relates with other aspects of transitional justice, notably a broadly conceived notion of justice (that includes reparative, restitutive and retributive justice) as well as institutional reforms.

991. With respect to human rights violations, other abuses commited during the armed conflict and issues relating to accountability, which received comprehensive treatment in chapter III, this chapter concludes that over its

history, South[ern] Sudan has experienced numerous episodes of violations of human rights. However, for a variety of reasons — notably lack of capacity as well as an official policy that privileged peace and stability — seems to have resulted in a seemingly entrenched culture of impunity which was decried by an overwhelming majority of respondents during the Commission's consultations. Specific recommendations are made with a view to addressing this issue, as well as providing justice for victims of violations and alleged crimes committed during the period to which the Commission's inquiry relates. Some of the recommendations are broader: they target the context in which violations have occurred, aiming to prevent future violations and provide guarantees of non-repetition.

B. INSTITUTIONS IN SOUTH SUDAN

Findings on Context of Reforms

992. The Commission found that the crisis in South Sudan is primarily attributable to the inability of relevant institutions to mediate and manage conflicts, which spilt out into the army, and subsequently the general population. Beyond the political conflict, South Sudan faces a challenge of weakness or absence of institutions and that the lack of institutional capacity within the state appears to be a generalized one. Indeed, the absence of institutions is a legacy of history. It is acknowledged that unlike many African states, South Sudan lacked any institutions when it attained independence. Currently, while part of the problem relates to design as other parts of this chapter of our report suggest, the fact that South Sudan is a relatively 'new state' and has been engaged in the process of building institutions for the last eight or so years has a bearing on the strength of institutions. Other institutional problems are discussed elsewhere in this report in relation to individual institutions.

993. Having reviewed state-building initiatives in South Sudan, which largely took the form of 'capacity building' in the post CPA period, the Commission found that they largely reflect that overall, state-building appears to have failed, for a variety of reasons. This conclusion is not made solely by outsiders looking in: the general tenor of a comprehensive internal review commissioned by the Government of the Republic South Sudan (GRSS) through the Office of the President is that the post CPA state, together with most initiatives undertaken to shore up its capacity largely failed to deliver.

994. With respect to the overall state building project, the Commission found that:

a. While there is agreement that 'donors certainly achieved a great deal, especially in terms of technical infrastructure and humanitarian assistance — from building roads and schools throughout South Sudan, to reducing poverty and mortality rates — the achievements towards state-building are less readily apparent'. However, it was the Commission's finding that donors put a lot of money and effort into building institutional infrastructure.

b. Literacy levels as well as the lack of a skilled cadre have proved to be a major challenge that confronts capacity building initiatives. This is a major contextual factor that has shaped the state building process.

c. The comparative lack of experience in governance due to the fact that self-government was attained less than 10 years ago in South Sudan has posed serious challenges for capacity building. The SPLM's lack of experience in governing is partly to blame. Reviews of what has happened in government ministries targeted for capacity building suggest that in part because of this deficiency, some technical advisors (TA) are engaged in performing governmental functions and running affairs within the civil service, including writing speeches for government officials, rather than performing their core task of building capacity through counseling, coaching, partnering, teaching, modeling and facilitating.

d. Although there are exceptions, the Commission finds that the overall result appears to be that there has been limited development of capacity among South Sudanese within target government units. Consequently, result is that there are very few trainings mounted, and that overall, the capacity of target units remains low.

e. Those involved in state building — perhaps overwhelmed by how needed to be accomplished to establish a semblance of a functioning state — appear to have taken on too much at once. While it is true that core ministries and units were targeted in the initial phase of capacity building, the view among international partners involved in state-building were aimed at instituting reforms considered necessary for a modern nation-state.

f. The low levels of economic development have undermined state building. The Commission reviewed literature, suggesting that economic development is a critical background condition that determines whether state-building initiatives succeed or not.

g. The eagerness by the international community to assist the fledgling government in the face of state decay, absence of functional institutions, huge developmental and governance challenges was such that in some governmental units, there were too many capacity builders who did not always coordinate their activities.

Recommendations Relating to Context

995. Having found that state-building success and failure depends on *background conditions*, which includes levels of economic development, the Commission recommends that efforts to build the technical capacity of institutions should be accompanied by broader efforts to accelerate development. In this regard, focus could be directed to the agricultural sector, which is currently underdeveloped.

996. Having learnt that the low literacy levels in South Sudan have negatively impacted the state building project, particularly aspects related to capacity building, it is critical that the government and other actors invest in education.

997. In relation to the intensity of the state building enterprise, it is the Commission's view that it will take a significant amount of time to build strong, accountable, inclusive and efficient institutions, given that initial focus has been on those deemed to be essential for the establishment of a modern state. The Commission recommends a review of past state building efforts to facilitate prioritization. Equally, it is recommended that donors should coordinate their activities better to avoid duplication of efforts and broaden the focus of the state building effort.

I. SYSTEM OF GOVERNMENT

Findings Relating to System of Government (Decentralization and Federalism)

998. The Commission found that the Transitional Constitution creates three levels of government — national, state and local government — and that both national and state government enjoy a sphere of exclusive executive and legislative powers, while judicial power is national. The Commission concluded that the devolved system of government in South Sudan has both unitary and federal elements, and that it is essentially a 'hybrid system', in part because states lack competence in judicial power and that national executive possesses limited control over states. This is expressed in the fact that the President is empowered to remove elected governors, and to dissolve state legislative assemblies.

999. With respect to the third tier of government, it was established that functionally, local government are linked to states, which have the constitutional mandate to create and finance local government units. States receive a share of 15% of national revenue while the national government retains 85%.

1000. The Commission also established that there is disconnect between the legal framework on decentralization and practice, and that several aspects of decentralization have not been implemented or are dysfunctional. Practice distorts the delicate balance of power between national and state government in the sense that national government intervenes in the functioning of state governments in ways that appear to lack constitutional sanction. Equally, the relationship between states and local government is problematic: states exercise de facto control over local government and provisions on election of certain local government officials have not been respected. Local government, which is a key center of service delivery, faces serious financial, human and physical resource constraints, resulting in lack of capacity to deliver services.

1001. With respect to the contentious debate on federalism, the Commission found that there is a sharp divide among South Sudanese on the system of government, and that support for or opposition to federalism appears to take an

ethno-regional pattern. It was also noted that views on federalism are not necessarily informed, and that the context in which the debate is unfolding (during conflict) has a bearing on the direction of the debate. It is however notable that despite this divide among ordinary South Sudanese, there is emerging political consensus among the negotiating parties in the IGAD-led mediation process that a new constitutional dispensation to be established should be based on principles of federalism taking into account the context and the views of ordinary South Sudanese.

Recommendations Relating to the System of Government

1002. It is the Commission's view that whether a system is denominated 'federalism' or 'decentralization', it is the 'content' of the system in terms of adequate devolution of resources, decision-making power and guarantees against undue interference in devolved units by the center as well as commitment to the implementation of the constitutional text that matters. The demands for federalism in sections of society are essentially about popular participation, service delivery, and guarantees for autonomy for South Sudanese in different parts of the country to decide on local priorities based on the principle of subsidiarity.

1003. In view of existing gaps between the constitutional text and its implementation, the Commission recommends that political actors should commit to give full effect to the current constitution (during the transitional period) until a new one is adopted. This should limit or eliminate interference by the national executive in the affairs of state executives and legislative assemblies and facilitate the evolution of functional local governments at county and lower levels.

1004. The Commission recommends that consideration should be given to repealing provisions that empower the President to remove elected governors, to dismiss or suspend legislatures and to summon or prorogue the National Assembly. These changes can be effected through minimal reforms pending the outcome of the constitutional review process.

1005. In view of the expressed desire to consider systems of government cited by respondents such as the United States, Canada, Nigeria and Kenya, the Commission recommends that these systems should be studied, and the best elements that suit the context of South Sudan adopted, taking into consideration 'best practice' relating to issues considered. Political actors and drafters should resist the temptation to import 'models' deemed to have worked elsewhere without due consideration being given to context. It should however be noted that the scope and extent of devolution of executive, legislative and judicial function determines the nature of the federated state.

1006. Irrespective of the devolved system that is eventually agreed upon by relevant actors, the Commission recommends that care should be taken to craft an arrangement in which the rationale for its adoption — empowering the periphery politically and economically through equitable sharing of resources and decision-making power — is not undermined.

1007. While there may be need to create new units to accommodate diversity recommended by citizens and the emerging political consensus, consideration should be given to the risk of spreading resources too thin thereby depleting limited resources meant for development.

1008. The Commission recommends that whatever system is created, care should be taken to ensure the corporate existence of the nation.

1009. The Commission recommends that the constitutional review process should be inclusive and participatory.

II. NATIONAL AND STATE EXECUTIVE

Findings Relating to National and State Executive

1010. The Commission found that the Transitional Constitution establishes a powerful Presidency and while the text of the constitution affirms the doctrine of separation of powers, several factors (including weak legislature, lack of commitment to separation of powers and independence of the judiciary and structural links between the legislature and the executive) result in an overly powerful executive.

1011. The Commission found that the fact that the President has the power to remove some state officials, often without proper controls is one cause of instability.

Recommendations Relating to National and State Executive

1012. The Commission recommends that the future Constitution should establish a well- balanced system of separation of powers with adequate checks and balances. This should be achieved through: empowering and strengthening the capacity of the legislatures at both levels of government; subjecting major executive appointments to legislative approval; strengthening the judiciary (ensuring structural and financial independence from the political branches) and adherence to separation of powers, cultivating a culture of respect for judicial independence and rule of law.

1013. The Commission recommends that the appointment and removal of the Vice President should be subject to the same conditions.

IIA: SECURITY SECTOR: THE ARMY (SPLA)

Findings Relating to the Army

1014. The review of the security sector process in South Sudan disclosed that conceptually, reforms of the army and police have so far been decoupled, with the former being regarded as the security sector, while police reforms have been regarded as part of 'rule of law sector' reforms. It was noted that in view of the emphasis given by international partners to reforms of the SPLA, the narrow conception of SSR has had unintended consequences: the SSNPS and other

organized forces effectively became a 'dumping ground' for personnel demobilized from the SPLA. The result was that the core objectives of the SSR projects — reducing force numbers to enhance efficiency and affordability — were undermined.

1015. Indeed, if a state constitutes a legitimate monopoly of force over a defined territory, then state-building must begin with establishing a monopoly of force in South Sudan by the South Sudanese armed forces and police. While the context has changed, it is our view that efforts undertaken by the Government of the Republic of South Sudan in the post independence period to neutralize militias should be revisited. In addition, removal of arms in the hands of private citizens often justified on grounds of 'self-defence' or even culture must be undertaken. However, the need to create a professional national army and police may require the pursuit of alternative models of neutralizing militia, eschewing the dominant approach adopted in the post CPA period of absorbing fighters into the SPLA and police.

1016. If DDR forms, as it does, part of transformation efforts not only of the SPLA but also of police and other organized forces, there is a need for a comprehensive security review to facilitate planning. Such an unprecedented review is necessitated, in part, by change in circumstances on the ground.

1017. The Transitional Constitution provides a clear vision in relation to the nature and orientation of the armed forces to be installed in South Sudan following transformation. In particular, it provides that the SPLA:

> […]shall be transformed into the South Sudan Armed Forces, and shall be non-partisan, national in character, patriotic, regular, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution and the law.

1018. The Commission found that prior to the outbreak of violence on December 15, 2013, South Sudan had a large standing army estimated at 200,000 and 45,000 veterans. The Commission also heard that there are reportedly 700 generals. It was noted that the necessity for a large army is in part attributed to a doctrine that holds that overwhelming force is required to win military contests, and as such, numbers matter and that view is in part linked to the militaristic philosophy that underpinned SPLA throughout the war of liberation.

1019. The Commission found that the influence of the military appears to pervade nearly all spheres of life in South Sudan, including politics, governance and public life. A significant percentage of elected leaders at the top level are former military. For instance, it was established that 8 out of 10 elected governors are ex-military.

1020. The Commission also found that the implementation of the current DDR program has faced numerous challenges, including inadequate funding, lack of political will. The Commission noted, however, that the DDR program gets the fundamentals right: the core objective articulated in Objective Force 2017 and as well as the Strategic Plan 2012-2017 of creating an affordable, effective and

accountable armed force provides the vision foundation upon which to build the program.

Recommendations Relating to Security Sector Reforms

1021. It is recommended that there should be a conceptual shift, and that a comprehensive view of SSR that includes the armed forces and police as well as relevant aspects of the justice sector that ordinarily fall under 'rule of law sector' be adopted.

1022. In relation to the legal framework, it is the Commission's view that the constitutional commitment to transformation contains all the elements that should shape the ongoing transformation project as well as the future armed force. To achieve these ends, the following sections make wide-ranging recommendations relating to the various elements taking into consideration the history of the SPLA and the various reform initiatives undertaken in the past and those currently being implemented.

1023. It is recommended that part of the transformation process of the SPLA must include not only reducing numbers, but also developing a more professional, specialized, affordable and efficient armed force.

1024. In view of the fact that the entire transformation project is undoubtedly, expensive and long-term process, it is critical that resources be mobilized but more importantly, the political will to transform be cultivated.

1025. While, as described, donors and international partners continue to play a critical role in SSR process in South Sudan, there is a greater need for coordination of the various SSR initiatives, which should align with a locally generated overall strategy and plan.

1026. In view of the fact that effectiveness and cohesiveness of the SPLA have been undermined by the historical reality that the legacy of the civil war resulted in what some have called 'a collection of militias' with over-representation of certain communities in an ethnically diverse nation, the Commission recommends that reform efforts should align with the constitutional commitment to create a diverse, national army under effective centralized command.

1027. Transforming the SPLA into a national army will require not only forging a common ethos to which all adhere but also depoliticizing the armed forces by undertaking a variety of measures, including creating a truly professional force, decoupling military service and politics as well as establishing effective democratic oversight of the armed forces. To create a diverse national army that reflects 'the face of South Sudan', consideration should be given to recruitment quotas by way of a formula to be agreed upon.

1028. To limit the militarization of civilian institutions and public life in general, it may be necessary not only to delink military service and politics but also to undertake concrete measures to reform and delink the army from the SPLM, the most dominant political party with which it has been linked ideologically and in

practice from the start. The Commission is aware that reforms of the SPLM had commenced at the start of the crisis in December 2013 with the adoption of relevant instruments necessary for the registration of the party as a separate entity. It is recommended that these and other relevant reforms should be carried to their logical conclusion.

1029. It is the Commission's view that in a context where the influence of the military appears to pervade nearly all spheres of life, and where a huge percentage of elected leaders at the top level are former military, the necessity for strong civilian oversight is even greater. The Commission found that 8 out of 10 elected governors are ex-military. The Commission recommends the strengthening of parliamentary oversight of the security forces in general and effective measures to structurally delink— other than at the top level of policy direction — political leadership from the military. Equally, the structural conflation of politics and military requires deeper consideration.

1030. The Commission recommends measures to degrade the ability of political leaders to mobilize and arm militias, as has been the case in the past. In turn, removing the incentives to create and maintain militias necessitates the reconstruction of an able and fair state, one capable of guaranteeing security for all. In addition, if one of the root causes of conflicts has been what is seen as an unfair and exclusionary state, the Commission recommends that broader reforms, that institute political and economic justice, strengthen and create a more sustainable SSR.

1031. The government should prioritize the DDR programme. It is the Commission's view that in addition to marshalling resources, what should be cultivated is the political will and resolve to take the hard decisions, entailed in part, in offloading personnel deemed to be fit to serve in the armed forces, police and other organized forces.

1032. It is recommended that in view of the changed internal environment (partly because the current armed conflict has generated more combatants), a comprehensive security review is necessary in order to reorient, not only the broader SSR process, but also the DDR program, which is currently based on force reviews of the Interim Period and the Objective Force 2017 of 2011.

1033. It is recommended that training for the army should include human rights (including women's rights and the rights of vulnerable groups).

IIB. SECURITY SECTOR: SOUTH SUDAN NATIONAL POLICE SERVICE (SSNPS)

Findings Relating to the Police (SSNPS)

1034. The Commission found that reforms of the police, which were included in 'the rule of law sector', were disassociated from reforms of the Army, which was the focus of initial reform efforts and attracted most of the funding from donors.

1035. It was noted that while reforms of the SPLA have impacted the police in the sense that soldiers no longer needed in the SPLA have been largely absorbed by the SSNPS, the transformation program relating to the SPLA has not enjoyed adequate links to the overall SSR, and particularly to reforms of the SSNPS. It is the Commission's view that conceptually and practically, the distinction between SSR (which excludes the police) and reforms of the 'rule of law sector (which includes the police, prisons and judiciary) is problematic and should be eliminated. This would permit a more comprehensive and conceptually sound approach to SSR.

1036. The Commission found that the existing legal framework (anchored on the Police Act of 2009 and the Transitional Constitution) covers the fundamental elements relating to the SSNPS. However, there are critical gaps in the legal framework, in part because the Police Act predates the Constitution.

1037. The Commission found that the SSNPS continues to be the destination of excess SPLA personnel considered fit to serve. This has resulted in low 'force quality' of the SSNPS partly because most of those 'transferred' to the police are no longer fit to serve in the SPLA on account of age and infirmity. Moreover, Those absorbed into the SSNPS do not undergo special training required to perform police tasks.

1038. The Commission found that while defence has enjoyed significant budgetary allocation (40% of national budget), the SSNPS has had to compete with other government units for limited funds. In addition, it was noted that the bulk of the police budget (over 80%) goes to salaries and conditions of service, leaving little for capital outlay equipment and human performance capacity improvement.

1039. The Commission also found that there is a huge discrepancy in terms of remuneration between the SSNPS and SPLA and that the disquiet associated with the transfer of personnel from the SPLA to the SSNPS — where it is reported that some transferred soldiers believe they will eventually return to the SPLA — is linked primarily to the terms of service within the SSNPS.

1040. On the human rights record of the police, the Commission found that the SSNPS has a history of violation of human rights, which is partly a result of the influence of the military and that training has not included human rights.

1041. The experience of South Sudan demonstrates that in the past, there has been reliance on security personnel from outside the SSNPS through Joint Operation Centers (JOCs). This is partly because for the variety of reasons

discussed above, the SSNPS is yet to attain primacy in the provision of internal security.

1042. On gender, it was noted that while by some estimates 25% of SSNPS personnel are female, there are lingering concerns about whether conditions of work have allowed for contribution to the service in view of the positions and roles that they reportedly occupy. The Commission found that female officers are often relegated to lower administrative roles and that there is no meaningful programme to assure meaningful career development.

1043. The Commission found that the SSR sector in South Sudan has enjoyed the participation of various actors including international organizations and individual countries and that as a consequence, the initiatives undertaken by multiple SSR participants have not always aligned with government-led initiatives.

Recommendations Relating to the National Police Service (SSNPS)

1044. It is recommended that the legal framework governing the SSNPS should be reviewed to reflect recent developments. This should include a coordination mechanism provided for in the Constitution. Equally, there is need for clarity in terms of demarcation of jurisdiction between national and state police, including regulation of recruitment and training at both levels.

1045. While it is critical to ensure that police has a national reach, and that it is able to perform all its functions including maintaining law and order, resolving communal conflicts, dealing with street crime, border control among others, maintaining an affordable and efficient police force should be overarching objectives of current reform efforts.

1046. It is recommended that reform efforts to create a modern and streamlined police service should be accompanied by a budgetary increase commensurate to the extensive roles that the SSNPS performs, which now includes border control. In addition, the creation of specialized police units should be prioritized.

1047. To impart a new ethos in the police service, it is recommended that the foundational training for the police should include adequate coverage of human rights (including gender, women's human rights and the rights of the vulnerable in society), particularly its practical application to police work as well as emphasis on its civilian role.

1048. It is recommended that consideration should be given, within a broader reform program, to comprehensive police vetting program for human rights compliance. The Commission notes that ensuring that the force is populated by personnel who demonstrate respect for basic human rights is not only a constitutional imperative, but has the practical function of enhancing public trust in this critical institution. In view of the practical difficulties entailed in vetting a force of over 25,000, a decision should be made in relation to the scope of vetting.

1049. In view of continued reliance on personnel from outside the SSNPS to provide security until the SSNPS attains required strength, quality and competence, it is recommended that appropriate mechanisms be established for coordination of functions between services (including the army) with appropriate channels for sharing of information. Within the police, the Commission recommends a review of the Police Act of 2009, to align with the constitutional provision for a coordinating mechanism.

1050. It is recommended that as an overarching consideration, the broader security sector reforms and particularly reforms of the SSNPS should be gender-sensitive. It is further recommended that all obstacles to advancement within the service should be eliminated and that the full potential of all officers should be explored and utilized. The Commission expresses support for reported initiatives to facilitate the registration of a Staff Association for female police officers.

1051. Appreciating that SSR is a resource intensive and long-term endeavour, the GRSS should work with donors to secure long-term, needs based and demand-led investment in training, infrastructure and equipment for SSNPS.

1052. In the Commission's view, it is vitally important for international actors to align their objectives and coordinate with government-led initiatives. This would facilitate broader coverage and a more efficient use of limited resources.

1053. With respect to training and education, it is recommended that current literacy programs run by both government and international partners should be intensified and expanded and that police training should be performance improvement related and needs-based rather than demand-driven as has been the case for some of the initiatives undertaken so far.

IIC: FINANCIAL MANAGEMENT AND STRATEGIC RESOURCES

Findings Relating to Financial Management and Strategic Resources

1054. It was clear from the various consultations of the Commission that the absence of equitable resource allocation and consequent marginalization of the various groups in South Sudan was a simmering source of resentment and disappointment underlying the conflagration that ensued, albeit the implosion of the conflict was brought about by the political struggle by the two main players.

1055. The Commission found that struggle for political power and control of natural resources revenue, corruption and nepotism appear to be the key factors underlining the break out of the crisis that ravaged the entire country. Economic aspects of the conflict, such as control of natural resource (oil) have been a source of frustration among different tribes and the diaspora, who cannot benefit from the dividend of independence and especially from their country's natural resources. The resources in the country are being used for the personal benefit of top politicians and their families and on one account the oil revenue is becoming a tool of harm.

1056. South Sudan's Transitional Constitution, Petroleum Act and Petroleum Revenue Management Act set out laudable standards for equitable economic development and governance with respect to the management of its oil wealth, and the creation of institutions and legal frameworks for the management of the petroleum industry. The Petroleum Revenue Management Act sets reporting standards for Government and has the potential to ensure an accountable and equitable industry. However, the Commission expresses concern about perceptions and allegations of corruption, inequitable resource distribution and lack of accountability.

1057. Despite a legal and institutional framework that speaks to equitable management of strategic resources, access to the resources is determined by patronage and allegiance to the ruling party and whoever controls political power has advantage over the control of resources.

Recommendations Relating to Financial Management and Strategic Resources

1058. In order to realise the development potential of its oil resource and ensure sustainable development, the Government of South Sudan needs to make key decisions on the implementation of resource governance and the processes of resource management. This requires a willingness to be held accountable for the proceeds and management of the wealth created by the oil and the extractive industry to limit opportunities for corruption, and political will to commit to transparency in the process.

1059. The Commission recommends the implementation of the legal framework that regulates the oil industry, particularly the Petroleum Act, particularly the provisions on environmental and social impact assessments, disclosure and accountability (public access to information) as well as the Petroleum Revenue Management Act.

1060. It is imperative that political actors ensure that the allocation of revenues under the Petroleum Revenue Management Act to the oil producing State of 2% is used for the development of the State and that affected and local communities in oil producing states benefit from these revenues without discrimination. The Commission recommends that consideration should be given to increasing the portion of oil revenues retained by resource-producing states, particularly in favour of affected communities. A portion of these revenues should be earmarked for girl child education and empowerment of women.

1061. The Commission recommends that the government commit to the implementation of the provisions relating to Future Generations Fund.

1062. The Commission also recommends the development of a national strategy for resource management and sustainable development taking into account environmental and community issues, the management of government revenues, and wider economic concerns. Such a strategy should ideally benefit from consultation from a wide range of stakeholders including, but not limited to, relevant state institutions, affected communities and civil society.

1063. To address problems associated with youth bulge, the Commission recommends that the government undertake measures to expand access to education and skills development and to create other programmes that target youth unemployment.

III. NATIONAL AND STATE LEGISLATURES

Findings Relating to the National and State Legislatures

1064. The Commission found that there are structural linkages between the executive and the National Legislature, which weakens separation of powers and the system of checks and balances established under the Transitional Constitution. In this regard, it was noted that the legislature lacks control of its calendar and that the President has the power to summon, prorogue and dismiss the National Legislature. The President is also constitutionally empowered to dismiss State Legislative Assemblies. This has resulted in a weak legislature at national and state level.

1065. The Commission also found that the legislature's performance of its legislative and oversight duties at the national and state level is further hamstrung by lack of human, financial, and physical resources. Added to the foregoing are relatively the low literacy levels among members of both the legislatures and support staff at both levels and serious lack of facilities (including offices).

1066. In terms of oversight functions, the Commission found that the near total control by the ruling party of the legislatures poses challenges for oversight besides the fact that the parliamentary committee system in the National Legislature is inadequately developed and financed.

1067. The Commission also found that there are concerns about the size of the National Legislative Assembly, with a number of respondents urging for a downsizing of the SSNLA. The remuneration of MPs was linked to reported low levels of morale, which impacts the performance of their constitutional functions.

Recommendations Relating to National and State Legislatures

1068. To establish effective checks and balances, the Constitution must provide for separation of powers while adequately empowering the legislature to act independently.

1069. At a normative level, the constitutional design should proceed from the position that constitutional power is shared power, and the right balance of separation of powers between the three branches of government as well as a system of checks and balances should be established, informed by the system of government adopted.

1070. Structural independence of the legislature from the executive should be assured, particularly in the case of a presidential system of government prevailing in South Sudan. This requires that the legislature be able to control its own

agenda and calendar. A review of the president's current powers to summon, prorogue or dismiss parliament is necessary.

1071. The legislature should be enabled to access adequate resources — financial, human and physical — to build up its capacity over time to adequately discharge its legislative and oversight mandates. Capacity building initiatives already in place should be scaled up to empower individual members, as well as staff.

1072. The parliamentary committee system, which is often the mainstay of the legislature's oversight work in representative democracies should be developed further, and strengthened.

1073. Consideration should be given to reviewing terms and conditions of work of members of both national and state legislatures. Improving conditions of work of members is likely to contribute to improved performance, as members would be able to fully dedicate themselves to their core mandate.

1074. On the question of the size of the legislature, the Commission is of the view that ultimately this is a decision that the people of South Sudan will have to make, considering all relevant factors, including the need to ensure adequate representation of all sectors and interests in the highest bodies of democratic decision-making. The ongoing constitutional review process provides an opportunity for these and other issues to be considered.

1075. State legislatures constitute an important institution within the broader architecture of governance, despite the fact that they currently appear to occupy a station of relative obscurity and neglect. It is critical that their capacity be strengthened to enable them serve the vital oversight function at the state level.

1076. In the context of the current debate on devolving more resources and decision-making power to the states, consideration must be given to strengthening accountability and oversight mechanisms at state level, and state legislatures constitute a core pillar in that process. Investment should be made in building their capacities and developing the necessary physical infrastructure.

IV. THE JUDICIARY AND THE JUSTICE DELIVERY SYSTEM

Findings Relating to the Judiciary and Justice System

1077. Based on discussion in the chapter on institutions, the Commission concludes that the political branches do not appear to be fully committed, and have in practice undermined the rule of law, in part due to overreach in the exercise of their functions, failure to fully internalize and effect rule-based governance as well as a habit of exerting overt or covert pressures on the independence of the judiciary.

1078. It was also noted that the limited reach and capacity of the state institutions such as the judiciary are such that huge swathes of the territory and sections of the population live beyond the reach and protection of the law.

1079. The Commission noted in its discussion of the judiciary that at a constitutional level, there is a normative commitment to independence of the judiciary, and that all arms and levels of government are constitutionally mandated to 'execute decisions of the judiciary'. The challenge, it was established, is that rhetorical commitment to the principle is unmatched by practice, and that the independence of the judiciary is undermined by the conduct of various state actors. In this regard, the militarization of public life was identified as a major problem. Equally, it was suggested that at a structural level, there are weaknesses in the normative framework supportive of the principle of independence of the judiciary. The legal regime relating to the appointment of judges was identified as an area of concern.

1080. The inability of the state to establish a monopoly over the use of force has r+-esulted in lawlessness manifested, in part, in the phenomenon of militia, and proliferation of arms, which works against the entrenchment of the rule of law.

1081. The Commission found that South Sudan's justice system is based on legal pluralism, and that the law applied by the Courts is a mixture of rules from different sources: sharia law, civil law, customary law and more recently, common law. It was noted that legal pluralism practiced in South Sudan poses particular problems for legal certainty. It emerged that customary courts presided over by chiefs and elders sometimes apply statutory rules while formal courts refer to and apply customs of various communities in South Sudan.

1082. The Commission found that formal justice has a limited reach, and statutory courts lacks human, financial and physical capacity to deliver justice. To illustrate the challenge, only a few county courts, which form the lower rungs of the formal justice system, have been established. Both the Supreme Court and the three branches of the Court of Appeal are not fully constituted (each has 3 judges). The High Courts established in each of the 10 states also face severe staffing constraints.

1083. It was established that South Sudanese face serious challenges related to access to justice. Some of the problems identified include the limited geographic spread of formal justice as well as lack of human, financial and physical resources.

1084. It was noted that the shift from sharia law to the common law tradition and the adoption of English as the formal language of the statutory courts has caused a number of problems. It was observed that the policy resulted in the sidelining of lawyers and judges trained in the north, exacerbating the judiciary's capacity constraints.

1085. The Commission established that the cost of litigation before formal courts is prohibitive, and in the absence of a national legal aids scheme severely restricts access to justice for a majority of South Sudanese. The discussion of customary courts disclosed that one of the reasons these courts are preferred over statutory courts is the cost of legal services, including filing fees.

1086. The Commission established that although customary courts are structurally not part of the judiciary and the formal justice system (they are established under the Local Government Act and fall under local govern, the third tier of government), customary courts handle 90% of cases (criminal and civil) in South Sudan. These courts have suffered a measure of marginalization and neglect.

1087. It was noted that the Local Government Act provides that customary courts shall not try criminal cases, save for those that implicate a closely related customary issue. In essence, the implication is that a majority of criminal cases should be referred to the relevant county court and when a matter that falls within the jurisdiction of customary court is brought before a statutory court, then it should be referred or 'diverted' (in case customary courts are not brought within the formal justice system). Currently, it does not appear that referral has worked well, in part for the reason that customary courts, which fall under local government, serve as a source of revenue for the third level of government.

1088. The discussion highlighted some of the serious constraints and weaknesses of the customary justice system. It was noted that even though some South Sudanese preferred customary courts for a variety of reasons, their decisions do not always align with rule of law standards and human rights. The Commission cited a recommendation made by practitioners that the Local Government Act should be amended to 'ensure that the traditional justice system does not enforce customary rules and practices that are repugnant to written law and international human rights standards'.[431] The amendment has not been effected.

1089. In the Commission's discussion relating to customary courts, it was concluded that customary courts are central to the dispensation of justice in South Sudan, and that they handle over 90% of cases that enter the justice system. In spite of this reality, these courts, which apply customs and laws of various communities, do not form part of formal justice system.

1090. It was noted that the fact that customary law is for the most part unwritten makes it difficult to ascertain what the law *is.* There is no code of customary law, as custom differs from community to another. During its consultations, the Commission established that there is heterogeneity in the customary law of certain ethnic communities.[432] The problem is complicated by the fact that the majority of courts do not keep a record of their proceedings.

1091. The prosecution and prisons services also face serious resource constraints: human, financial and physical. It was noted that owing to lack of resources, there is a total lack of facilities to hold mentally incapacitated inmates,

[431] ICJ, 25

[432] For instance, the Commission learnt that the customary law of Bor Dinka, differs significantly from that of Dinka from Bahr el Ghazal, necessitating the creation of joint panels to resolve disputes between host communities (Dinka BEGZ) and refugees (Dinka Bor).

and that these are often held in the same penitentiary facilities with other inmates.

Recommendations Relating to the Judiciary and Justice Delivery System

1092. To entrench the rule of law, one must first build a strong and capable state, one that is able to monopolize the use of force, and enforcing the law. As such, the entire state-building project, particularly as it relates to entities or 'actors in the rule of law sector' has bearing on the rule of law.

1093. In view of the role of the judiciary in entrenching the rule of law, it is vitally important to establish a strong, independent judiciary with a national reach. The reflections below relate to this important institution.

1094. In practice, a culture of respect for the independence of the judiciary must be cultivated, beginning with overt gestures from the executive and the legislature.

1095. The Commission recommends that the regime on appointment of judges be clarified, including criteria for such appointment, discipline and removal provided.

1096. While the Commission acknowledges the recent shift in policy that facilitated the recruitment and retraining of judges, more should be done to build up the capacity of the judiciary. Financial resources allocated to the judiciary should be increased to enable the judiciary to recruit more judges and other judicial staff, develop necessary physical infrastructure and expand the reach of mobile courts instituted as an interim measure.

1097. It is the Commission's recommendation that consideration should be given to 're-linking' chiefs' courts with formal justice system, essentially, responding to the constitutional call that recognizes customary law as a source of law within South Sudan's tradition of legal pluralism. It is the Commission's opinion that this would address several problems associated with customary courts and the challenges that hamper their dispensation of justice

1098. Unifying formal and customary courts would facilitate the establishment of a supervisory framework. The natural and logical step to take would be to link these courts to magistrates' courts, which could be empowered to confirm or endorse certain categories of decisions made by the customary courts, especially where human rights issues are implicated or in relation to the imposition of certain sentences or awards by the customary courts. This would build on the existing appellate structure within customary courts.

1099. The Commission recommends align the process and outcomes of adjudication in customary courts with constitutional principles, human rights and other high ideals, including a modern conception of 'justice'. Their independence should be guaranteed. It is the Commission's view that this should not result in higher courts imposing themselves and replacing decisions made by customary

courts. Rather, what is proposed is a system of collateral review,[433] in terms of which the higher court defers to the customary court on the law but ensures that the decision is in keeping with human rights. A process could be established such that whenever a human rights issue emerges during the course of litigation before a customary court, it is removed to the competent formal court for direction on relevant human rights issues and remanded back for final decision on the law.

1100. To address the challenge related to ascertaining customary rules, the Commission recommends the ascertainment of customary law of various communities in South Sudan, which entails 'writing down' in a loose form, rather than a code. This way, judges and magistrates that interact with decisions of customary courts would be able to know what the law is without being required to apply it rigidly.

1101. It is also recommended that chiefs and customary law adjudicators in customary courts should be trained. Such training must necessarily include human rights, management of cases and proceedings in their respective courts. A number of related initiatives (workshops) have been mounted by different organizations in the past.[434]

V. POLITICAL PARTIES

Findings Relating to Political Parties

1102. The Commission found that there is an adequate regulatory framework governing the activities of political parties although several elements require attention.

1103. The Commission also found that for a variety of reasons, the ruling party, the SPLM, is the dominant political party in South Sudan and that opposition political parties are weak, lack a national presence partly for lack of resources and they do not always practice issue-based politics.

1104. Overall, the Commission established that the context of South Sudan manifests a shallow political culture, and that political discourse — like many aspects of public life — display a degree of militarization.

1105. The Commission found that the right to form and join political parties is provided for in the Constitution and that there are currently about 20 legally registered political parties (with several still to be registered). However, the

[433] Pimentel (n 218 above) 23-28. Collateral review differs from appeal in the sense that appeal often results second-guessing the lower court, and in the case of customary law, results in the creation of precedent on *customary law* questions. On how appeals of decisions of customary courts to higher courts have resulted in rigid precedent in a number of cases, see Jok, Leitch and Vandewint, (n 216 above) 49-50.

[434] See Pimentel (n 218 above), 21 referring to training of chiefs by UNDP and United States Institute of Peace. Between 2005 and 2009. See USIP, *Rule of Law — Country Specific Projects: Sudan*

Commission established that their contribution to the political process is severely constrained for reasons canvassed in chapter 2 of this report.

Recommendations Relating to Political Parties

1106. The Commission recommends that all political actors as well as civil society and ordinary South Sudanese should work to expand the democratic space and to cultivate and deepen political culture. The African Union and the international community should support this process.

1107. With the adoption of the Political Parties Act and the National Elections Act, foundational rules for governing the activities of political parties have been established. The Commission however recommends that the Political Parties Council should be activated to facilitate the registration of all political parties in South Sudan.

1108. The Commission recommends that to strengthen the nascent multiparty democracy in South Sudan, consideration should be given to establishing a framework to finance political parties based on appropriate criteria.

1109. Since it has been found that in addition to political parties, civil society and media are not fully developed and thus lack the capacity to hold government to account, it is imperative that the leadership in South Sudan commits fully to principles of accountability, transparency and responsive government. It is however shown that there appears to be a gap between rhetorical commitment and practice.

1110. The Commission believes that South Sudan's multiparty democracy could be strengthened with the emergence of a strong opposition, which is difficult to fathom with the proliferation of political parties.

1111. The Commission recommends that political parties should take responsibility for the evolution of the democratic process and deepening of democracy in South Sudan. The Commission believes that as the dominant political party, the SPLM has a special responsibility in this regard. It is recommended that consideration should be given to building party structures, institutionalization and strengthening of internal democracy.

1112. The Commission recommends the cultivation of a culture of accommodation of alternative views, particularly on important national matters, to enhance political participation, which is critical for a nascent democracy.

1113. The African Union, international community and donors should consider supporting capacity building efforts of all political parties.

VI. CIVIL SOCIETY AND MEDIA

Findings Relating to Civil Society and the Media

1114. The Commission finds that role of civil society as part of the process of engineering a new South Sudan as the country moves forward is key. It was established that during the conflict of the past two decades, civil society, comprised variously of non-governmental organisations, religious groups and charitable organisations, occupying the space between the state and the individual, have worked to fill the lacunae of government in providing both essential and pastoral services to most communities in the area that is now South Sudan. Their role has remained crucial in the newly independent country, particularly in galvanizing citizen' participation in various peace processes. It is therefore inevitable that they are a part of the process of any institutional reforms that will set the basis for healing and reconciliation. To that extent, civil society organisations, traditional leaders, internally displaced persons (IDPs) and refugees, women, youth groups and any key constituency not represented by the government or those in opposition must have a voice. It was also the Commission's finding that certain NGOs have aligned themselves with the warring parties in the conflict.

1115. The Commission also finds that the media plays a critical role in holding government to account, facilitating political participation in multiparty democracies through the provision of information, educating the public particularly in a context of high levels of illiteracy and where the majority lives in hard-to-access rural areas.

1116. The Commission found that in at least one instance, the media has also played a negative role in the conflict through the spread of hate messages and inciting violence thereby facilitating violations of human rights and crimes (the case of takeover of Bentiu FM by SPLM/IO).

1117. The Commission also learnt that the media operates in a increasingly challenging environment where debate has been stifled, particularly as it relates to matters considered contentious by the government. There are reported cased where published newspapers have been seized, certain media houses closed and or advised not to publish news relating to certain topics.

Recommendations Relating to Civil Society and the Media

1118. The Commission recommends that the government respect freedom of expression and of the media, as enshrined it the Transitional Constitution, and remove any restrictive rules, procedures and practices that impede the enjoyment of these rights.

1119. While the government has a right to regulate the space within which civil society operates, it should eliminate rules and practices that impede free operations of civil society organisations and to refrain from alleged harassment of civil society leaders.

1120. Having established that civil society plays a critical role in peace and reconciliation processes both at community level and the ongoing IGAD-led mediation process, the Commission recommends that the government should support the civil society activities aimed at facilitating harmonious coexistence among South Sudanese communities. The Commission believes that such activities contribute to wider efforts to transcend the challenges of diversity and intra/inter-ethnic rancor.

1121. Having found that civil society in South Sudan, particularly in grassroots organisations such as CBOs and FBOs are relatively weak, the Commission recommends that the government, the international community and donors should consider supporting initiatives aimed at building their capacity to hold national and local government to account and facilitate political participation of ordinary at both levels of government. In view of existing capacity constraints, particularly at state and local government level, and in recognition of the fact that many of these organisations already contribute to provision of services, government should consider deploying the capacities of grassroots organisations to facilitate service delivery.

C. ON EXAMINATION OF HUMAN RIGHTS VIOLATIONS, OTHER ABUSES AND ACCOUNTABILITY

1122. While conflict is not a new phenomenon to South Sudan, the majority of those the Commission met with said that they have never seen the scale and nature of violations witnessed during this conflict. What makes it so much worse for them is the targeting of civilians, which they claim was never a central part of previous conflicts.

1123. As set out in its methodology detailed in Chapter 1 of this report, the Commission paid particular attention to the violations experienced by women including sexual and gender based violence (SGBV) as well as violations suffered by children.

1124. As is customary for commissions of inquiry, the standard applied by the Commission to assess facts and evidence, is ‘reasonable grounds’, which is a lower standard than ‘beyond reasonable doubt’ required to sustain a conviction before a court of law.

Findings Relating to Violations of Human Rights

1125. The Commission found that serious violations of human rights have been committed by both sides to the conflict. They include violations of:

h. the right to life (through murders and executions that were carried out in various sites in South Sudan);
i. prohibition of torture and freedom and security of the person (violated variously when soldiers allied to the SPLA gathered civilians in a confined space in the joint operation centre in Gudele on 16th December 2013 and proceeded to shoot them

indiscriminately, allegedly forced Nuer civilians to drink human blood, eat human flesh and jump into lit bonfires

j. women and girls including acts of rape and sexual violence
k. property: through looting and destruction of property (homes, markets, businesses). Witnesses also informed the investigators that their houses were forcibly occupied by people from other ethnicities.
l. Children, including: the right to education, due to closure (occasioned by insecurity) or occupation of schools by armed fighters; use of children in various capacities during the conflict. The recruitment and use of children in hostilities by the warring parties contravenes customary international human rights law.

Findings Relating to Other Abuses Committed During the Armed Conflict (Violations of International Humanitarian Law)

1126. The Commission's investigations as well as information received from various sources, including consultations led the Commission to conclude that serious violations of international humanitarian law (IHL) amounting to war crimes have been committed by both warring parties. In the Commission's view, the context in which these violations and crimes were committed is a non-international armed conflict (NIAC) involving governmental (and allied) forces and SPLM/IO (and allied) fighters.

1127. Most of the atrocities were carried out against civilian populations taking no active part in the hostilities. Churches, mosques and hospitals were attacked, humanitarian assistance was impeded, towns pillaged and destroyed, places of protection were attacked and there was testimony of possible conscription of children under 15 years old.

1128. Unlawful killings of civilians or soldiers who were believed to be *hors de combat* (no longer taking part in hostilities), were committed by elements of the security forces of the Government. These attacks resulted in massive killings in and around Juba. The people killed were either found during the house to house searches or captured at roadblocks. The evidence also leads the Commission to conclude that war crimes of rape and torture were committed against civilians in and around Juba. The evidence on record also points to members of the security forces of the government being involved. The evidence collected also suggests that war crimes of forced enlisting of children in the army were committed.

1129. The Commission concludes, based on the evidentiary standard adopted, that war crimes were committed in Bor town through indiscriminate killings of civilians by the SPLA/IO and White Army forces allied to Dr. Riek Machar. War crimes in relation to massive and indiscriminate attacks against civilian property were carried out in Bor town. Visible evidence of torched like houses, market place, administration houses, hospital and churches form the basis of the Commission's conclusion that these crimes were committed. The Commission also found that civilians were targeted in Malakal, which was under the control of both parties at different times during the conflict. The Commission was led to conclude that war crimes were committed by Government soldiers in Malakal Teaching Hospital through the killings of civilians by some of the soldiers within

the SPLA. The civilians killed were Nuers who had sought shelter at the hospital at night. After Malakal was captured by rebels on 18th there were killings of civilians of Shilluk ethnicity committed by the rebels at Malakal Hospital. Rapes were also committed against women at the Malakal Catholic Church between 18th and 27th February 2014 by rebel forces.

1130. In Bentiu, the Commission heard testimony of incitement to violence through broadcasts from Bentiu FM when it was taken over by the opposition who broadcast in Nuer exhorting Nuer men to rape Dinka women, accusations made by opposition forces that government forces killed civilians in Leer and counter accusations by the Acting Governor that Nuer youths, led by Peter Gadet, were responsible for attacks after the cessation of hostilities agreement and that Peter Gadet was recruiting children under 14 years old. The Commission also heard testimony that government forces were hampering humanitarian efforts, and heard testimony from women in UNMISS PoC Site detailed killings, abductions, disappearances, rapes, beatings, stealing by government forces and being forced to eat dead human flesh. The Commission witnessed firsthand the level of destruction of Bentiu town including the attack on the mosque and the hospital where civilians had sought refuge.

1131. It is thus the Commission's view that there are reasonable grounds to believe that war crimes which constitute violations of Common Article 3 to the Geneva Conventions, relevant provisions of the Additional Protocol II to the Geneva Conventions as well as customary international law have been committed. These include crimes such as murder, torture, outrages upon personal dignity such as rape and other acts of sexual violence, and cruel and degrading treatment, the targeting of civilian objects and protected property and the violations carried out by both sides to the conflict.

Findings on the Crime of Genocide

1132. The Commission finds that based on the information available, there are no reasonable grounds to believe that the crime of genocide has occurred.

Findings Relating to Crimes against Humanity

1133. It is the Commission's view that there are reasonable grounds to believe that the gross violations of human rights committed against civilians in South Sudan amount to crimes against humanity.

1134. Based on evidence collected, the Commission concludes that there are reasonable grounds to believe that acts of murder, rape and sexual violence, extermination, persecution, torture and other inhumane acts of comparable gravity have been committed by both sides to the conflict.

1135. In terms of contextual factors, the Commission is led to conclude that there are reasonable grounds to believe that these crimes were committed in a wide spread or systematic manner, and that evidence points to the existence of a state or organizational policy to launch attacks against civilians based on their ethnicity

or political affiliation. This can be inferred partly from the manner in which alleged crimes were executed by both sides.

1136. The information and evidence before the Commission shows that the manifestation of the conflict could not have been successful without concerted efforts from various actors in the military and government circles. Therefore the element of the existence of a state policy can be inferred therefrom. The Commission heard testimony from senior officials confirming the existence of a group that included civilian leaders bound by the objective of 'protecting the government and the Presidency.'

1137. While opposition forces seem to be in flux, evidence led the Commission to conclude that SPLM/IO or parts of it constitute a coherent organization. The Commission heard from some insider witnesses who confirmed that they report to Dr Machar and obtained evidence of the close working relationship between SPLA-IO and the White Army. Dr. Riek Machar has publicly claimed on several occasions and has personally informed the Commission that he is in control of the rebel forces. Further, the political differences underlying the eruption of the conflict on 15th December provide the *raison d'etre* and organisational policy of the opposition.

Findings on Proposed Accountability Mechanisms

1138. In all of its interactions with all the individuals, groups, representatives and stakeholders with which it met, the Commission sought their views on what they considered necessary to bring peace to South Sudan and a new beginning. All the groups with which the Commission met emphasised a need for accountability for the atrocities committed, particularly given the entrenched impunity in South Sudan. It was evident that criminal prosecution only is insufficient; there was a clear need for a process to ensure reconciliation and sustainable peace.

1139. A majority or respondents on both sides of the conflict were of the view that both principals in the crisis, President Salva Kiir and Riek Machar, were to be held responsible for the crisis, its escalation and the violations perpetrated. While there is lack of clarity from views expressed on the form that responsibility should take, the Commission's conception includes criminal, civil or political (administrative) elements.

1140. What is indisputable is that the people of South Sudan feel aggrieved for historical wrongs for which they considered there had been no accountability and reconciliation, and which has exacerbated the pain of the current atrocities. The importance of accountability for this current round of conflict was a constant refrain.

1141. The Commission carefully considered aspects of criminal and civil accountability and the process which (or a combination of which) would best suit the specificities of the South Sudanese situation, taking into account their mode of societal organisation, culture and customs and the need to not only pursue accountability but also facilitate reconciliation.

1142. The Commission therefore finds that in order for the reconciliation process to begin, those with the greatest responsibility for the atrocities at the highest level should be brought to account and mechanisms should be established to address other concerns specific to victims of violations and crimes, which includes reparations.

1143. In considering how amends could be made for the grievous wrongs and injury done in South Sudan, the Commission took into consideration the view of the South Sudanese which broadly encompassed healing, reconciliation, accountability and reparation in a holistic form. Based on these views, the Commission learnt that people want an acknowledgement of the wrong deeds done, an expression of remorse, as well as accountability in the form of retributive justice; a formal criminal process to end the rooted culture of impunity.

Recommendations Relating to Human Rights

1144. The Commission recommends that the government ratify all major international and regional human rights instruments including those that protect the rights of women and vulnerable groups.

1145. The Commission recommendeds that the government should strengthen the national institutional framework for the protection of human rights. This includes strengthening and assuring the independence of the existing South Sudan Human Rights Commission in keeping with international standards. The national institutional framework on the rights of women, which includes the national and state ministries on Gender, Child and Social Welfare, should be strengthened.

1146. The Commission recommends that both parties to the conflict vacate any schools under their occupation, and restore security to affected areas to facilitate the return of children and teachers who have fled conflict areas due to insecurity and occupation of some schools to resume learning and teaching.

1147. The Commission recommends that the DDR programme include the development and implementation of programmes that will provide young people with alternatives to violence and conflict. The programmes should include, among others, vocational training for the demobilized children. The Commission also recommends consideration for primary and secondary school curricula that emphasizes and prioritizes peace building and human rights.

Recommendations Relating to Accountability Mechanisms

1148. Given the expressed view by many of the respondents that they had little or no confidence in the national judicial and political system to deliver accountability particularly in relation to top political and military leaders, and the current capacity of the national criminal justice system, the Commission recommends an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at

the highest level to account. Such a mechanism should include South Sudanese judges and lawyers.[435]

1149. The Commission believes that with appropriate reforms, both military and civilian justice can and should contribute to establishing accountability. The Commission therefore recommends that immediate reforms of civilian and military justice be initiated. While it is believed that a long-term reform process of the judiciary is necessary (see section recommendations related to the judiciary above), a minimalist approach can be adopted with respect to the criminal justice system.

1150. Based on the central role played by customary courts in facilitating access to justice in South Sudan, and the views expressed by South Sudanese that this institution must play a role in reconciliation at community level, the Commission recommends that an appropriate role should be fashioned for traditional justice and conflict resolution mechanisms, to be established in relationship with formal accountability processes as well as the peace and the national healing and reconciliation. The Rwandan experience with *Gacaca* could be instructive.

1151. The Commission's inquiry established that South Sudanese traditional justice mechanisms combine retributive and restorative remedies which include payment of compensation in modes acceptable by litigants, often cattle. The notion of civil accountability i.e. compensation to an individual for loss suffered, is indeed one of the key features of South Sudan's indigenous justice systems. More importantly, the moral authority and legitimacy inherent in the traditional systems, as understood and valued by the South Sudanese people has a valuable role to play in healing and reconciliation and appeasing the deeply felt grievance occasioned by violations suffered by individuals and communities.

1152. The Commission recommends the creation of a national reparations fund and programme linked appropriately to these traditional justice mechanisms, to benefit victims of gross human rights violations. The design of the reparations programme, approach, and reparative measures undertaken should be gender-sensitive. Eligibility for reparative measures undertaken (including rehabilitation and psychosocial assistance) should not be limited to the period to which the Commission's mandate relates (from December 15, 2013) but can include victims of past human rights violations. While certain elements, particularly psychosocial assistance and other appropriate forms of interim reparations should be implemented immediately the broader reparations programme can be linked to the work of a future Truth Commission. The Commission also recommends the establishment of a framework for memorialization as part of the broader process of reparations. This process should be inclusive and participatory.

[435] One of the members of the Commission, Professor Mahmood Mamdani (***Contribution of Professor Mamdani Mahmood***) was of the opinion that the only and most appropriate option in relation to accountability is political accountability, which he interpretes to mean that political leaders identified as a subject for formal criminal investigations should be excluded from holding office for the duration of the investigations and for the duration of any criminal proceedings arising from such investigations.

1153. The Commission recommends that the mechanisms on accountability, justice and reconciliation must pay particular attention to addressing concerns of SGBV and other violations against women and girls. Investigations, assessment, procedures, processes should be gendered and align with regional and international standards.

D. ON ISSUES RELATING TO HEALING AND RECONCILIATION

Findings Relating to Healing and Reconciliation

1154. The Commission found that the crisis has occasioned massive displacement of South Sudanese (a reported 1.5m). Many of those displaced live in multiple protection sites and IDP camps around the country while others have taken refuge in neighbouring countries. On its visits to many of these sites, the Commission received complaints on limited access to humanitarian assistance, and observed that the conditions in the camps have deteriorated with the onset of rains.

1155. IDPs and refugees told the Commission that for them, healing and reconciliation can only begin with a return to normalcy, which includes the ability to move freely from the camps and to access basic needs. They noted that their movement into neighbouring areas, including towns is curtailed.

1156. The Commission found that the multiple conflicts and repeated violations of human rights experienced in South Sudan have wrecked relations between and among communities, and generated many victims. It also established that the policy of amnesty adopted by the government after the signing of the CPA left the past unexamined, conflicts unresolved and their impacts, partly represented in victims and survivors of human rights violations unaddressed.

1157. The substantive chapter of the Commission's report engaged with various concepts and how they relate to reconciliation. On justice and reconciliation, it established that the two are often in tension, and that two broad approaches exist based on how they relate. The Commission found that the tension between justice and reconciliation is often resolved through sequencing, taking into consideration the relevant context.

1158. The consultations disclosed that many South Sudanese take the view that reconciliation is dependent upon justice, which is broader than criminal justice. The view was expressed that those who have committed atrocities should be held accountable, and that victims and communities are unlikely to embrace reconciliation otherwise, given the culture of impunity in South Sudan. Some respondents expressed the view that those who committed crimes, while some respondents prefer that all those of them who are political leaders, should be barred from holding public office.

1159. Some respondents preferred to 'forgive', taking the view that criminal prosecutions could be destabilizing, and that reform of institutions should be prioritized, before reconciliation measures are undertaken. An overwhelming

number of respondents see a role for traditional justice and reconciliation mechanisms that exist in many communities in South Sudan.

1160. The Commission found that formal national reconciliation efforts were initiated for the first time in 2013 with the establishment by Presidential decree, of the church-led National Peace and Reconciliation Committee. The Commission established that there are perceptions in sections of South Sudanese society that this church-led process lacks legitimacy, its leadership lacks credibility, it leans towards government and excludes key sectors of South Sudanese society.

1161. The Commission also found that several reconciliation initiatives have been initiated among communities in the past. These people to people reconciliation initiatives such as the Dinka-Nuer West Bank Reconciliation Conference (Wunlit) that brought together chiefs, elders and opinion leaders from both communities succeeded in resolving conflicts that had lasted for 7 years, leaving many dead or displaced and property destroyed. The reconciliation process did not yield sustainable peace for a variety of reasons, including the lack of support from government, SPLM and some rebel groups.

Recommendations Relating to Healing and Reconciliation

1162. The Commission recommends that delivery of humanitarian assistance should be enhanced and expanded to those who are yet to be reached. While humanitarian assistance is prioritized, the Commission believes that the only sustainable solution is to facilitate the return of IDPs and refugees to their homes, which is dependent upon a political settlement in the ongoing mediation process. The Commission urges all actors to work towards a speedy resolution of the crisis.

1163. The Commission recommends that warring parties should facilitate the movement of IDPs in and out of the camps in their respective areas of control.

1164. Overall, it is recommended that a structured national process, however organised, be set up to provide a forum for dialogue, inquiry and to record the multiple, often competing narratives about South Sudan's history and conflicts; to construct a common narrative around which a new South Sudan can orient its future; to uncover and document the history of victimization and to recommend appropriate responses. The Commission recommends that such a structured process must involve and include women as key stakeholders, and that processes and procedures operated by a future mechanism should be gender-sensitive.

1165. The Commission urges all sectors of South Sudanese society and relevant regional and international actors to unite around the process of national reconciliation which is necessary for the restoration of sustainable peace, social cohesion, stability and development.

1166. The Commission recommends the establishment of a Truth and Reconciliation Commission with a mandate to investigate human rights violations dating back to agreed cutoff date. The Commission should drive the national peace and reconciliation process. Such a body should lead to truth, remorse,

forgiveness and restitution where necessary, justice and lasting reconciliation being achieved.

1167. The Commission recommends that the Truth and Reconciliation should be established in relationship with 'hybrid' mechanisms such as Wunlit. Unlike Wunlit, such hybrid mechanism should be comprehensive, rather than localized. Such mechanisms would operate under the national mechanism, which should develop guidelines that seek to among others, align the operations of grassroots mechanisms with human rights and other identified ideals.

ON SEQUENCING PEACE AND JUSTICE

1168. The Commission's discussion of the relationship between peace and justice concluded that while they should be conceived as complementary, comparative experience shows that the two notions are often in tension, and that the context in which relevant processes unfold is critical: while some contexts allow for reconciliation processes and justice, particularly criminal justice measures to be undertaken at the same time, multiple factors in other contexts militate against such an approach. In these contexts, sequencing offers an alternative approach that responds to the imperatives of justice and the need to reconcile and establish stability in post conflict societies.

1169. Having considered the specific context of South Sudan, the Commission recommends that consideration should be given to sequencing of peace and justice, with the result that certain aspects of justice allow for the establishment of basic conditions, including restoring stability in South Sudan and strengthening of relevant institutions. This should facilitate necessary reform of the criminal justice system in order to implement some of the Commission's recommendations on accountability. These necessary reforms to civilian and military justice should, in the context of broader institutional reforms, facilitate the institution of reconciliation measures.

ANNEXURES

I. OATHS

a. OATH OF OFFICE FOR MEMBERS OF THE COMMISSION

AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE
UNIÃO AFRICANA

Addis Ababa, ETHIOPIA P. O. Box 3243 Telephone: 251-115-517 700
Fax: 251-115-517844

website : www. africa-union.org

Oath or Affirmation for Members of the African Union Commission of Inquiry on South Sudan

I, ……..., hereby solemnly swear (OR- solemnly affirm)
(Full name)

And declare that:

I will perform my functions as **a Member of the African Union Commission of Inquiry on South Sudan** to the best of my ability, with honour and dignity; and in the service of the African people. I will do so impartially and conscientiously without fear or favour, affection or ill will.

So help me God ***(in the case of an oath)***

OR
I so affirm ***(in the case of an affirmation)***
Done at Addis Ababa, Ethiopia, this ……day of April Two Thousand and Fourteen.

_____
Full name

_____
Signature

Before me: ----------
Prof. Vincent O. Nmehielle

The Legal Counsel of the African Union Commission

b. CONFIDENTIALITY FOR COMMISSION MEMBERS



AU Commission of Inquiry on South Sudan
Addis Ababa, Ethiopia P. O. Box 3243 Telephone: +251 11 551 7700 / +251 11 518 25 58/ Ext 2558
Website: http://www.au.int/en/auciss

CONFIDENTIALITY AGREEMENT FOR COMMISSION MEMBERS

I ……. being a Member of the Commission of Inquiry on South Sudan, commit together with my agents, to hold in confidence any information, communication and documentation classified as confidential that may have come into my knowledge or possession during my term of service as a member of the African Union Commission of Inquiry on South Sudan.

That I shall not publish in any form any such classified or confidential information, communication or documentation for a period of not less than 5 years reckoned from the date of submission of the Final Report of the Commission.

SIGNED

Member, AUCISS

Name: _____

Signature: _____

Date: _____

c. CONFIDENTIALITY AGREEMENT FOR INVESTIGATORS

AU Commission of Inquiry on South Sudan
Addis Ababa, Ethiopia P. O. Box 3243 Telephone: +251 11 551 7700 / +251 11 518 25 58/ Ext 2558
Website: http://www.au.int/en/auciss

OATH OF SERVICE AND CONFIDENTIALITY AGREEMENT OF INVESTIGATORS WORKING WITH THE AFRICAN UNION COMMISSION OF INQUIRY ON SOUTH SUDAN

I ……., an investigator serving as a member of the Secretariat of the African Union Commission of Inquiry on South Sudan (AUCISS) hereby swear or affirm as follows:

That I will perform my duty, sincerely, impartially and without the influence of any person, organization, institution, state or agency;

That I shall not disclose any information relating to my work as investigator/forensic expert to any unauthorized person, organization, institution or entity;

That I shall hold in strict confidence all sources of information as well as identities of witnesses and any alleged perpetrators;

That I shall hold in strict confidence all information, documents or transactions designated as sensitive, confidential or strictly confidential during and after the term of the AUCISS;

And that I or any of my agents commit not to use or publish any confidential, strictly confidential or sensitive material and information that may have come into my knowledge or possession in the course of my work at the Commission for a period of not less than ten (10) years following the release of the report of the AUCISS.

So help me God.

Name: _____

Signature: _____

Date: _____

II. POLICIES

a. POLICY ON OPERATIONAL MODALITIES

WHEREAS the mandate of the African Commission of Inquiry on South Sudan relates to truth, healing, reconciliation, accountability and institutional reforms;

WHEREAS the Concept Note Establishing the Commission contains a section on broad operational modalities (in part VII);

WHEREAS the Commission of Inquiry has constituted a Technical and Administrative Support Team (The Secretariat) in line with the Concept Note to assist the Commission in achieving its mandate;

WHEREAS the Commission has adopted working methods that include investigations, consultations with stakeholders, interviews, Focus Group Discussions, on-site visits;

WHEREAS the Concept Note Establishing the Commission provides that the Commission of Inquiry may modify the operational modalities as necessary in line with the method of work as agreed by the members of the Commission (paragraph 25);

THE COMMISSION OF INQUIRY ON SOUTH SUDAN HEREBY DECLARES:

1. **On Quorum and Decision-Making**

a. Three (3) Members of the Commission shall constitute quorum.
b. The Members of the Commission shall make decisions by consensus, alternatively, by a majority vote. The Chairman of the Commission shall have a casting vote in case of a tie.

2. **On Commission Panels**

a. In order to make use of limited time more efficiently, the Commission shall establish panels comprising of at least one member of the Commission and any number of Senior Secretariat Staff.

b. Panels are constituted for purposes of performing various Commission functions and activities including missions, consultations, interviews and Focus Group Discussions.

c. The work undertaken by a Commission Panel as well as decisions taken by such a Panel shall be deemed to be the work and decisions of the full Commission.

3. On Commission Committees

a) The Commission shall designate members of the Commission to coordinate work in relation to each mandate area.
b) There shall be three (3) Committees as follows: Healing and Reconciliation Committee; Accountability Committee and; Committee on Institutional Reforms.
c) Each Committee shall be supported by an appropriate number of Secretariat Staff.

4. On Submissions by Experts

The Commission may invite individuals or organisations with relevant expertise to make submissions on any issue.

5. On the Role of the Secretariat Generally

a. The key function of the Secretariat is to provide technical and administrative support to the Commission of Inquiry under the oversight of the Office of the Legal Counsel.
b. The Secretariat shall operate under the guidance and overall supervision of the Members of the Commission.
c. Members of the Commission shall sanction all major tasks undertaken by the Secretariat including investigations and consultations.
d. Notwithstanding (c), the Secretariat, under the overall supervision and authority of the Head of Secretariat, has authority:

    i. To conduct research on all aspects of the Commission's mandate;
    ii. To conduct consultations and interviews with 'low-level' respondents, particularly in the absence of Commission Members.

e. The Head of Secretariat has authority to sanction engagements and activities undertaken by Commission staff on behalf of the Commission.
f. The Secretariat shall, through the Head of Secretariat, report promptly to the Commission.

6. On the Role of the Head of Secretariat

a. Coordination of the activities of the Secretariat under the overall direction of the Legal Counsel.
b. Supervise all Senior Secretariat Staff including Legal & Human Rights Expert, Chief Investigator, Chief Researcher and Gender Expert.

7. **On Senior Secretariat Staff (**Chief Investigator; Gender Expert; Chief Researcher and; Legal and Human Rights Expert)

a. Provide technical support to the Commission in their respective areas of expertise.
b. Supervise junior staff.
c. Serve on Commission Panels and Committees as appropriate.
d. Preform any other functions assigned by the Commission Members and Head of Secretariat

8. **On Partnerships and Requests for Assistance**

a. The Commission shall, subject to the terms of the terms of the Concept Note, and with advice from the Office of Legal Counsel, sanction all engagements with (international) partners.
b. Requests for support from the Commission of Inquiry and offers of support from outside, whether financial or technical, shall be subject to the Commission's decision.

PUBLISHED BY THE AUTHORITY OF THE COMMISSION OF INQUIRY ON SOUTH SUDAN ON March 24th 2014

b. Investigations

DRAFT POLICY ON INVESTIGATIONS

WHEREAS, as per the AUPSC Communiqué, the mandate of the Commission of Inquiry on South Sudan relates to truth, healing, reconciliation, accountability and institutional reforms;

WHEREAS the Concept Note on the Establishment of the Commission of Inquiry sets out detailed Terms of Reference (TORs) for the Commission;

WHEREAS the Commission of Inquiry is mandated 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;

Whereas the Concept Note on the Establishment of the Commission contains broad stipulations on operational modalities, including investigations and the Commission of Inquiry has adopted a further Policy on Operational Modalities;

WHEREAS the Commission of Inquiry has developed a Conceptual Framework and Methodology to frame and guide its work;

WHEREAS investigations constitute a vitally important source of information for the Commission of Inquiry;

THE COMMISSION OF INQUIRY ON SOUTH SUDAN HEREBY DECLARES:

2. On Focus of Investigations:

The Commission's investigations shall focus on:

a. Obtaining prima facie proof of human rights violations and violations of humanitarian law.

b. Obtaining prima facie proof of alleged crimes, including war crimes (WC) and crimes against humanity (CAH).

c. Establishing facts and circumstances that may have led to the commission of crimes and violations.

d. Obtaining perspectives on the causes underlying the violations.
e. Obtaining perspectives on institutions linked to violations as well as weaknesses in institutions that could have contributed to violations of human rights and humanitarian law.

f. Establishing the identity of alleged perpetrators.

g. Establishing the identity of victims of crimes and violations.

3. On Places and Sites of Investigations:

a. Investigations shall focus not only on the key areas in the four states that have been the main theatres of violence but also extend to other places where violations are alleged to have occurred or where relevant evidence may be found.

b. Sites of investigations include: Juba and its environs; Bor (Jonglei); Bentiu (Unity); Malakal (Upper Nile); rural areas surrounding these major towns; refugee camps in Ethiopia (Gambella); Kenya and Uganda.

4. On Background Report and the Use of Prior Reports

a. The Research Department shall prepare a background report to guide the work of the Commission and investigators. The report shall touch on various aspects including the nature of violations documented so far and their geographic spread;

b. The background report shall be based on information already received by the Commission, including reports published by various organizations on the crisis in South Sudan.

c. The Commission shall decide on any further uses for reports published on the crisis on South Sudan, particularly those that document alleged crimes and violations of human rights and humanitarian law.

5. On Documentation of Violations and Crimes

a. The Secretariat shall establish an information management system to facilitate the documentation of violations of human rights and humanitarian law.

b. Necessary measures shall be taken to ensure confidentiality and the security of information. The Commission shall take a decision on archiving of information received at the end of its work.

6. Evidence in the Custody of Others and Requests for Assistance

a. The Commission may seek the assistance of the government of South Sudan and other actors to secure the presence of individuals in possession of relevant information as well as facilitate access to sites.

b. The Commission shall make timely requests to various entities that are in the custody of relevant information and evidence. These may include the Government of South Sudan, other states, South Sudan opposition as well as regional and international organizations.

7. On Role of the Commission Members

a. The Members of the Commission shall provide overall guidance and supervision in respect of the activities of the investigators.

b. In line with the Concept Note on the Establishment of the Commission and the Commission's Policy on Operational Modalities, the Commission shall designate a Member of the Commission to coordinate its work on accountability, which includes investigations.

8. On Role of the Investigators and Related Matters

a. Investigators shall, under the supervision of the Chief Investigator, take the lead on the investigations to be conducted by the Commission.

b. The Investigations Department shall, in line with this policy, develop a detailed work plan for approval by the Commission. The departmental work plan shall align with the Commission's Work Plan for the period July — September 2014.

c. The departmental work plan on investigations shall prioritize key incidents during the conflict and include a focus on gender-based crimes.

9. On Principles Relating to victims

In their dealings with victims, investigators and the Commission in general shall ensure that:

a. They afford unbiased audience to victims and treat them without discrimination on any grounds whatsoever.

b. Victims are treated with compassion and with respect for their dignity.

c. Procedures for dealing with victims are expeditious and fair and do not occasion undue inconvenience.

d. Measures are taken to protect victims, including their privacy where appropriate.

e. Victims can communicate in their language of choice.

10. On the Rights of Witnesses

a. Investigators and the Commission shall afford unbiased audience to all witnesses, including potential perpetrators.

b. Investigators shall adopt procedures and methods of work aimed at protecting witnesses. The Commission shall, on its own or through partners, take appropriate steps address witness and victim protection concerns that may arise during and after its work.

c. Witnesses have the right not to incriminate themselves. Investigators shall create the right conditions for witnesses to speak freely.

d. Witnesses may be accompanied by their attorneys/lawyers/next friend. However, this right does not transform the character of the process into a formal judicial inquiry.[436]

[436]Attention to Commissioners: this issue may or may not arise. The possibility remains that some alleged perpetrators may want to appear with their lawyers. This could complicate the Commission's work. If contact with alleged first tier perpetrators is styled

11. On Interviewing Victims and Witnesses

a. Witnesses who testify will give their evidence under oath or upon affirmation unless otherwise directed by the Commission at its discretion.

b. Before commencing the interview, investigators shall inform witnesses of their rights.

c. Investigators shall adopt methods and approaches that display sensitivity to survivors, victims and witnesses' emotional frailty due to their encounters with violence and loss.

12. Recording of Testimony

a. All testimony shall be recorded.

b. Notwithstanding the general stipulation above, the Commission may at its discretion receive information off the record. The Commission shall decide what value to attach to such evidence or information.

c. Investigators shall make copies of all documentary evidence relied on by witnesses.

13. On Gender and Investigations

a. In keeping with the Commission's gender policy investigators shall pay particular attention to allegations of sexual and gender based violence (SGBV).

b. Investigators and the Commission in general shall adhere to internationally accepted standards and practices relating to the investigation of SGBV.

14. Confidentiality

Investigators and all Commission staff shall respect commitments to confidentiality.

15. On Analysis of Evidence and Evidentiary Standards

a. The Commission may seek or receive any evidence or information that it considers to be relevant to the fulfillment of its mandate, regardless of whether or not such evidence or information would be admissible in a court of law.

---

as a consultation (as per current Work Plan) rather than an appointment with investigators, then the complications attendant to introducing lawyers could be eliminated.

b. With respect to decisions on whether individuals have been involved in crimes or violations of human rights or humanitarian law, the applicable standard when analyzing evidence shall be *'reasonable grounds to believe'*. [This standard is lower than 'beyond reasonable doubt', the standard applicable to convictions for a crime by a court of law and 'substantial grounds for believing' which applies to confirmation of charges preferred against a specific individual by a court of law in jurisdictions that have a pre-trial procedure].

c. For clarity, when assessing the evidence, the Commission shall consider, *not* whether there is evidence to prove or demonstrate that an individual *committed* an alleged crime or a particular violation, but *rather* whether there is sufficient evidence to lead to the conclusion that a particular individual *could or might have* committed the alleged crime or violation.