

South Sudan, Attack in Malakal UN Protection Site

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. The State of Human Rights in the Protracted Conflict in South Sudan

[**Source:** Report of the United Nations Mission in South Sudan, OHCHR, 4 December 2015, available at: http://www.ohchr.org/Documents/Countries/SS/UNMISS_HRD4December2015.pdf]

[...]

Executive summary

[...]

[...] Following the initial outbreak of hostilities, which started in Juba on 15 December 2013, the violence became concentrated throughout most of 2014 and 2015 in the Greater Upper Nile region, which consists of Unity, Upper Nile and Jonglei states. As the conflict lingers, violence and insecurity have spread to other states, with serious escalations observed in Central and Western Equatoria that have become more pronounced in the second half of 2015. The violence has largely been perpetrated by Sudan People's Liberation Army (SPLA) and the Sudan People's Liberation Movement/Army in Opposition (SPLM/A-IO), with both sides using armed groups and militias in the conduct of hostilities.

[...]

I. Introduction

1. Almost two years after the outbreak of violence in December 2013, the relentless fighting and its manifold consequences have continued to have a significant impact on human rights and living conditions for civilians generally [...].

[...]

4. The picture has thus far been bleak. Gross violations and abuses of human rights and serious violations of international humanitarian law have been attributed to all parties to the conflict and have occurred in all areas where fighting has taken place. Entire towns, such as Malakal and Bentiu in Greater Upper Nile, have been destroyed, with their populations on the run or seeking shelter in sites for the internally displaced. Very few places have been safe, as the parties have intentionally attacked traditional safe havens, such as places of worship, hospitals and occasionally United Nations bases. [...]

[...]

II. Overview of alleged abuses and violations of human rights and violations of international humanitarian law

i. Patterns of violations associated with the conflict

11. [...] Hostilities have continued, despite the signing of the Cessation of Hostilities Agreement by the SPLA and SPLM/A-IO, on 23 January 2014, and their 'recommitment' to this agreement on 9 May 2014 and September 2015, as part of the implementation of the ARCSS [Agreement on the Resolution of Conflict in South Sudan]. The fighting has largely been confined to the states of Jonglei, Unity and Upper Nile comprising the Greater Upper Nile region. The fighting in late 2014 and early 2015 occurred at a relatively low level of intensity compared to the first half of 2014, but fighting again increased during the surge that began in late April 2015.

[...]

18. At the end of April 2015, the SPLA launched a robust offensive in the southern counties of Unity that were under SPLM/A-IO control [...].

[...]

B. South Sudan, MSF condemns outrageous attack in UN Protection site in

Malakal

[Source: MSF Press Release, “*MSF condemns outrageous attack in UN Protection site in Malakal*”, 2 March 2016, available at: <http://www.msf.org/article/south-sudan-msf-condemns-outrageous-attack-un-protection-site-malakal>]

[...]

[1] Juba – The attack in the Malakal protection of civilians site (PoC) on 17 and 18 February is another horrifying instance of brutality in a two year conflict marked by utter and unacceptable lack of respect for the lives and dignity of South Sudanese civilians.

[2] According to multiple, factually-consistent reports received by MSF in the aftermath of the fighting in the Malakal PoC, one of the MSF staff who died was killed while trying to provide medical assistance to people wounded in the fighting. MSF has received further reports that other people who tried to put out fires or help the wounded were deliberately targeted and shot.

[3] These callous acts of reprehensible violence occurred against a backdrop of two years in which civilians have been subject to indiscriminate levels of violence leading to death, irreparable wounds and the devastation of already extremely vulnerable communities in South Sudan.

[4] “This brazen violence and terrorization of civilian populations cannot continue. We are heartbroken and devastated by the senseless killing of our two colleagues,” says Raquel Ayora, MSF Director of Operations. “The violence in the Malakal PoC clearly demonstrates that protection of civilians and provision of humanitarian assistance can only be attained with a change of course in the conduct of hostilities by all parties to the conflict. The struggle confronted by civilians just to survive this crisis amidst the absolute chaos we witnessed two weeks ago and throughout this crisis should not be tolerated. All of those with power to prevent this from continuing and to protect human life should take action.”

[5] During the fighting, armed actors engaged in widespread and intentional destruction of humanitarian services and the shelters of displaced persons in the PoC. The 47,000 people living in the camp, who had already suffered through two years of violence, were forced to seek shelter nearby amid inhumane, substandard conditions in an overcrowded UNMISS site prone to outbreaks of disease. As a result of this attack, many are now left with nothing.

[6] MSF has confirmed at least nineteen fatalities, including two South Sudanese members of MSF’s staff. In total, 108 injured people were received in the MSF hospital for treatment, including 46 with gunshot wounds. But the trauma and massive increase in humanitarian needs resulting from the attack will continue to affect this extremely vulnerable population for months to come.

[7] “People are terrified, gathering as close as they can to the areas in the camp perceived to be most safe,” says Ayora. “The dire situation and medical needs of the population will continue to worsen unless their security and protection is assured, in conjunction with rapid improvement of conditions in the camp.”

[8] Presently, the thousands of people remaining in the camp are sheltering in areas of the camp not equipped for human habitation. The population only has access to an average of ten liters of water per person per day, little or no shelter and insufficient access to sanitation services.

[9] In the MSF hospital, medical teams are treating patients for diseases associated with these dire living conditions, including respiratory tract infections, diarrhea and malaria. A further 4,500 people formerly sheltering in the Malakal PoC are now relocated to Malakal town, where there is very little access to any humanitarian assistance.

[10] One of MSF’s main concerns is the fate of 43,000 internally displaced people (IDPs) who took shelter in the UNMISS compound. They have been squeezed into a very tight area and access to water and sanitation is of real concern. *[Photo caption, the photo has been omitted]*

C. Protection of Civilians sites: a new type of displacement settlement?

[Source: The Humanitarian Practice Network (HPN), Humanitarian Exchange Publication: ‘Protection of Civilians sites: a new type of displacement settlement?’ by Damian Lilly, Number 62 September 2014, available at: <http://odihpn.org/magazine/protection-of-civilians-sites-a-new-type-of-displacement-settlement/>]

[1] [...] The conflict in South Sudan since 15 December 2013 has arguably produced yet another type of IDP settlement to add to the humanitarian lexicon: Protection of Civilians (PoC) sites. These settlements have hosted more than 100,000 IDPs within UN premises for several months, and look set to continue for the foreseeable future. [...]

Not entirely a new phenomenon

[2] PoC sites are not the same as the safe havens established in the former Yugoslavia, Iraq and Rwanda in the 1990s, which were on a far larger scale and constituted preplanned, designated areas where civilians could be protected, albeit with often terrible consequences. In contrast, PoC sites refer to situations where civilians seek protection and refuge at existing United Nations bases when fighting starts. Although most UN peacekeeping missions have encountered this phenomenon at one stage or another, the creation of PoC sites on such a scale at the bases of the UN Mission in South Sudan (UNMISS) is arguably unprecedented in UN history.

[3] Since the start of the UNMISS mandate in July 2011, the mission has frequently provided refuge to civilians seeking temporary protection. For example, between October 2012 and November 2013 more than 12,000 civilians sought protection at UNMISS bases on 12 separate occasions. In one incident, from 19- 21 December 2012, 5,000 civilians were sheltered at the UNMISS base in Wau in the west of the country. Based on these experiences guidelines were developed for managing such situations, outlining the roles and responsibilities of the actors involved, including coordination with humanitarian agencies. The guidelines state that providing protection for civilians at UNMISS bases should be a last resort and a temporary solution before more sustainable protection and assistance can be provided.

[4] Each UNMISS base was required to develop (within existing budgets) contingency plans to prepare for such eventualities. However, the mission did not foresee the scale at which this phenomenon would manifest itself when fighting between factions of the Sudan People's Liberation Army (SPLA) broke out in the capital, Juba, on 15 December 2013. As the fighting spread to other major towns, thousands of civilians poured into UNMISS bases across the country. Because of the ethnic dimension of the conflict between South Sudan's two main ethnic groups, the Dinka and the Nuer it quickly became apparent that displacement would not be temporary, and civilians would require protection and assistance for weeks, if not months.

What's in a name?

[5] As the response to the crisis has evolved several different terms have been used to describe the settlements developing within UNMISS bases. The primary concern of UNMISS was to implement its protection of civilians mandate while resisting the creation of IDP camps within its bases. UNMISS therefore proposed and has used the term protection of civilians (PoC) sites as opposed to IDP camps. Humanitarian actors agreed with this terminology because they also hoped that providing assistance on UNMISS bases would be a short-term phenomenon, before business as usual resumed.

[6] There are several implied consequences of the term PoC sites. In theory, they should only provide refuge for civilians under threat of physical violence, rather than the broader definition of IDPs who are forced from their homes due to conflict. In reality, though, there was little difference between the status of IDPs sheltered at UNMISS bases and those in other settlements elsewhere. There was concern that the PoC sites could act as a magnet for some of the 800,000 IDPs in other parts of the country. Because it was envisaged that the PoC sites would be temporary, humanitarian actors did not provide the same level of assistance that they might have done in a typical response in more traditional IDP camps.

[...]

[7] One of the main principles of the UNMISS guidelines on civilians seeking protection at its bases was that the mission should only offer protection if it had the military capability to provide physical security. This was the tragic lesson learnt by the UN in Srebrenica in 1995. However, on 19 December 2013 two UNMISS peacekeepers were killed along with several civilians when the UNMISS base in the town of Akobo was overrun by 2,000 armed Nuer. In another incident, on 17 April 2014, more than 50 civilians that had sought refuge at the UNMISS base in Bor were killed in an attack on the PoC site. UNMISS was forced to extract civilians from other bases and reinforce its military presence. On three occasions fighting near the UNMISS

base in Malakal resulted in casualties in the PoC site. On 24 December 2013, Security Council Resolution 2132 increased UNMISS troop levels to 12,500, with an additional 5,500 troops, not all of whom have as yet arrived. The police component was also increased, to 1,323.

Lack of civilian character and security concerns

[8] As with other displacement contexts, maintaining the civilian character of the PoC sites has been a major challenge. A significant proportion of the people seeking refuge were former combatants. By relinquishing their weapons and uniforms they became civilians and eligible for protection. However, there was always the risk of these individuals rejoining the fighting, and UNMISS was criticised by both sides in the conflict for harbouring potential adversaries. A clear 'no arms on UN premises' policy was implemented. While screening was conducted by UN police at entry and exit points to ensure that weapons did not enter the PoC sites, this was not foolproof and some weapons were brought in. UNMISS conducted searches for firearms, ammunition and other weapons in each of the PoC sites.

[...]

Discussion

I. Classification of the Situation and Applicable Law

1. (*Document A*)

a. How would you classify the situation in South Sudan? On what criteria is your determination on classification based? Who are the parties to the conflict? Does Protocol II apply to the conflict? How are the conditions for applying Protocol II different from those under Common Art.3? (GC I-IV, Common Art.3; P II, Art.1)

b. Using the information in Document A, would you say that IHL began to apply from 15 December 2013? Is the duration of a conflict an independent additional criterion to trigger the applicability of IHL? Compare the ICTY cases, *Delalic* (para. 184), and *Haradinaj* (para 49). (See ICTY, *The Prosecutor v. Delalic*, IT-96-21-T, Trial Chamber, Decision, 16 November 1998; and ICTY, *The Prosecutor v. Tadić*, [Doc. E])

c. Does IHL apply to the entire territory of South Sudan or is its applicability confined to those areas where armed hostilities are taking place? (GC I-IV, Common Art.3; P II, Art.1)

2. (*Document A*) Does the cease fire agreement concluded between the parties to the conflict affect the applicability of IHL? Once the requisite level of intensity to trigger the applicability of IHL has been met, what happens if it later decreases?

3. Assuming that the conflict between these parties extended into a neighboring country, would Common Art.3 still apply? P II? (GC I-IV, Common Art.3; P II, Art.1)

4. Is there a possibility for the rules of IHL to continue to apply after the end of a non-international armed conflict? (GC I-IV, Common Art.3; P II, Art.5 (3))

II. Conduct of Hostilities

5. (*Documents B and C*)

a. (*Document B, paras [1], [4] and [5]*) Does IHL of non-international armed conflicts prohibit indiscriminate attacks? Did the attack in the Malakal protection of civilians site (PoC) on 17 and 18 February violate IHL of non-international armed conflict? Does IHL contemplate and provide for international protection of such zones? Does IHL prohibit fighting in such sites? Does the obligation to respect civilians depend on their

location? (GC I-IV, Common Art.3; P II, Art.13; CIHL, Rules 7, 11, and 35)

b. (*Document C, paras [2], [7] and [8]*) What is the difference between protected zones in IHL and UN Protection of civilians (PoC)? Sites? Does IHL envisage special protection for UN premises and personnel? Does general public international law? Is the UN under an obligation to provide protection for civilians during armed conflicts? Are former fighters who relinquished their weapons and uniforms eligible for protection at UNMISS PoC sites? (GC I, Art. 23; GC IV, Arts 14 and 15; P I, Arts 59 and 60; GC I-IV, Common Art.3; CIHL, Rules 33, and 35-37)

c. What would be the difference between such special protection and that normally offered to civilians and hospitals under IHL? Would this difference have mattered in our case?

d. Is it a war crime to attack a Protection of Civilians (PoC) site found in UNMISS base? (ICC Statute, Art 8 (2) (e) (iii) [See The International Criminal Court [A. The Statute]])

6. (*Document B, paras. [2] and [4]*) Does the killing of medical personnel violate IHL of non-international armed conflict? Is it legal to target persons engaged in providing assistance and treatment to wounded and sick? Do the circumstances in which such persons are killed matter? (GC I-IV, Common Art. 3; P II, Art.9; CIHL, Rule 25)

7. (*Document B, para. [5]*) Did the destruction of humanitarian services and the shelters of displaced persons violate IHL of non-international armed conflict? Is it reasonable to claim that forcible displacement of the population occurred in this case? Under IHL of non-international armed conflict, do IDPs have a right to return to their places of origin? (P II, Art.17; CIHL, Rules 7, 35, 131 and 132)

III. General Protection of Civilians

8. (*Document B, para. [4]*) According to the press release, are the attacks on PoC sites acts of terrorism? Is it referring to single incident or patterns of actions of the parties to the conflict? Does IHL prohibit such acts? How do you distinguish the prohibitions under P II Art.4 (2) (d) and Art.13 (2)?

9. Does the protection under Common Art.3 extend to all civilians regardless of whose power they are in? Does it extend to cover a party's own armed forces?

10. (*Document B, paras.[7]-[10]*) What are the obligations of parties to a non-international armed conflict with regard to the provision of humanitarian assistance to the civilian population? Is the consent of the government necessary for relief actions?(P II, Art.18; CIHL, Rules 55 and 56)

IV. Protection of Medical Personnel

11. How are medical personnel protected in non-international conflict? Is there a difference in the extent of protection provided for medical personnel under treaty rules and customary law? (P II, Art.9; CIHL, Rules 25)

12. Are MSF staff protected by IHL even if they are not medical personnel? Is there a difference in the protection they enjoy as compared with other civilians?

13. (*Document B, para. [2]*) Is the role of the population to provide assistance to wounded and sick recognized in IHL of non-international armed conflict? Does IHL of non-international armed conflict provide protection for persons acting on their own initiative? (P II, Art.18 (1))

V. Relevance of IHL

14. Is the bleak picture of the realities in South Sudan described in this case an indication that IHL rules are not adequate? Which of the problems mentioned are in your view not adequately regulated by IHL?

15. How could the respect of existing rules of IHL be improved?

