

South Sudan, AU Commission of Inquiry on South Sudan

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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.

Final Report of the African Union Commission of Inquiry on South Sudan

[**Source:** The African Union Commission of Inquiry on South Sudan, Report, 15 October 2014, available online at <http://www.peaceau.org/uploads/auciss.final.report.pdf>; footnotes omitted.]

[...]

CHAPTER I

INTRODUCTION

1. As part of its response to the crisis in South Sudan, the Peace and Security Council of the African Union (AU), [...] on 30 December 2013, mandated the establishment of the Commission of Inquiry on South Sudan (AUCISS). [...]

[...]

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. [...]

[...]

11. The Commission's investigative mandate includes an inquiry into violations of human rights and other abuses committed during the armed conflict'. [...] the Commission interpreted 'other abuses committed during the armed conflict' to include violations of international humanitarian law. [...]

[...]

On the genesis of the conflict

[...]

53. [...] The President confirmed that 7500 were recruited. A majority of the newly trained soldiers were not regularly integrated into the SPLA [Sudan People's Liberation Army]. 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.

[...]

On the key events leading up to the conflict

[...]

67. [...] 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.

[...]

CHAPTER III

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

ACCOUNTABILITY

PART A

[...]

356. [...] 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.[...]

[...]

368. [...] 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). [...]

[...]

376. [...] the Commission interpreted 'other abuses committed during the armed conflict' to include violations of International Humanitarian Law (IHL). [...] 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. [...]

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. 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.

[...]

PART B

DOCUMENTING VIOLATIONS AND CRIMES

I. The Commission's Consultations and Investigations

[...]

The Sites of Crimes and Violations: General and Specific

[...]

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.

[...]

387. [...] 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.

[...]

Juba (Central Equatoria)

Testimony of State Authority

[...]

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. [...]

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. [...]

[...]

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. [...]

[...]

Testimony from SPLM/A-IO

423. [...] 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.

[...]

434. 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.

435. [...] 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'état 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'.

[...]

Testimony from Other Sources

[...]

453. **On hate media/incitement to violence:**

[...] 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.

[...]

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.

[...]

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. 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.

[...]

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. [...]

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 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"). [...] 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".

[...]

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 plate. [...]

476. The Commission was also informed about rapes that were perpetrated against civilians in Juba between 16th and 18th December 2013. [...]

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.

[...]

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.

[...]

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.

[...]

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.

[...]

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. [...] 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.

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.

Testimony from State Authority

[...]

516. [...]

When I came (to Bor) the situation was not good in the town. [...] 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. [...]

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. [...]

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). [...] 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 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 Equatoria and others as far as Uganda. [...]

[...]

April attack on Bor UNMISS Compound 17 April 2014 attack

[...] 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 [...] 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.

[...] 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.

[...]

[...] 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). [...]

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.

[...]

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. [...] 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. [...]

566. The evidence of destruction and looting of property was still visible when the Commission visited Bor Town.

[...]

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. [...] The elders among the White Army were given ranks matching government ranks. [...]

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.

[...]

Unity State

577. [...] As is the case for Malakal in Upper Nile as well as Bor in Jonglei, Bentiu town is largely destroyed. [...] 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.

[...]

580. [...] 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.

[...]

Identity of the attackers

585. [...] 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. [...]

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

[...]

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. [...]

[...]

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. [...]

[...]

Testimony from Opposition Forces

[...]

602. [...] He admitted that in Bor, they killed 201 Ugandan soldiers and said that these were the people who claimed to be civilians. [...]

[...]

612. [...] 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. [...]

[...]

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. [...]

[...]

Provision of Humanitarian Assistance

629. The provision of humanitarian assistance has been challenging for the nongovernmental organizations trying to do so. The Commission spoke with international and national humanitarian groups 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. [...]

Sexual & Gender-based Violence

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.

[...]

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. [...]

[...]

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 for many atrocities committed. [...] In Bor, the Ugandan forces were accused of having used cluster bombs and causing severe damage to civilians.

[...]

760. [...] 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.

[...]

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. [...] There has also been refusal of the state authorities to allow the evacuation of Nuers needing medical treatment.

[...]

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.

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. [...]

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. [...]

793. The evidence collected also suggests that war crime of forced enlisting of children in the army were committed.

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. [...]

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. [...]

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.

[...]

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, [...].

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.

[...]

ALLEGED PERPETRATORS

827. The Commission has identified possible alleged perpetrators 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).

[...]

CHAPTER V

CONCLUSION:

FINDINGS AND RECOMMENDATIONS

[...]

C. ON EXAMINATION OF HUMAN RIGHTS VIOLATIONS, OTHER ABUSES AND ACCOUNTABILITY

[...]

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.

[...]

Discussion

I. Classification of the Situation and Applicable Law

1. (*Paras, 378, 788 & 1126*) How did the Commission classify the situation? Who are the parties to the conflict? How would you classify the situation in South Sudan? On what criteria is your determination on

classification based? Does the number of persons killed matter in any way? 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, Art.3; P II, Art.1)

2. (*Paras 514*) Does the involvement of Ugandan People's Defence Forces (UPDF) change the nature of the conflict? Is Uganda a party to the conflict? Did the Commission find any violation of IHL by the UPDF? Assuming that there is a violation of IHL by UPDF, which state is responsible for such violation?

3 (*Paras 377, 378 and 788*) How does the Commission qualify the conflict? What are the applicable laws identified by the Commission? Are the grounds mentioned by the Commission sufficient to trigger the applicability of Protocol II? (GC I-IV, Art.3; P II, Art.1)

4. (*Paras. 8, 67, and 435*) When does IHL start to apply to the situation in South Sudan? Was it on 15 December, 2013 or on 15 April, 2014? How do we determine the specific date from which onwards IHL applies to a given armed conflict? Does IHL apply to the entire territory of South Sudan or is its applicability confined to those areas where armed hostilities are taking place? Does the identification of some specific areas by the Commission of Inquiry, for its investigation, imply anything about the geographic scope of the applicable law? (GC I-IV, Art.3; P II, Art.1)

5. (*Para 513, 516, 570, 571, 585 and 758*) How was the relationship between the White Army and the SPLA/IO described by the Commission? What does 'unconventional fighters' mean? Does IHL recognize such a classification? Who was in the command and control of the White Army? Is there a need to assess the level of organization for the White Army independently of SPLM/IO as long as they have nexus with the latter? What is the status of members of the White Army? Are they persons with continuous combat function or civilian directly participating in hostilities? Does their age matter in such determination? Does the manner in which they were mobilized or purpose of mobilization matter? Assuming that the members of the White Army are not soldiers, does IHL prohibit their involvement in hostilities? (GC I-IV, Art.3; P II, Art.1)

6. 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 the intensity declines?

II. Assessment of Violations

7. In what instances does the Commission conclude that IHL was violated? Does the widespread and systematic nature of the attacks matter for IHL? Why is it more often possible to conclude that IHL has been violated when it comes to the treatment of persons and property under control of the enemy than in the conduct of hostilities? What should the Commission have established in order to conclude whether the rules of IHL on the conduct of hostilities have been violated? Are the obligations to take precautionary measures and to respect the proportionality principle as prescribed in Art.57 of Protocol I the same in international and in non-international armed conflicts? (P II, Art.13; CIHL, Rules 7-24)

8. (*Paras 757 and 788*) Did the Commission make distinction between the violations included under these two paragraphs? How do you explain the relationship between the violations of human rights and IHL?

9. (*Paras.11 and 376*) Do you agree with the Commission's interpretation of 'other abuses committed during the armed conflict' to include violations of IHL? Should the investigation of the violations of IHL be explicit in the Commission's mandate?

10. (*Para.394*) Does the assistance given by Misseriya and militias from Darfur to Dr. Machar forces on the promise of material compensation change anything under IHL of non-international armed conflict? Does the nationality of fighters matter at all in non-international armed conflict?

11. (*Para.377 and 1131*) Are the most serious of IHL regarded as war crimes, irrespective of the nature of the

armed conflict? Does the violation of Common Article 3 constitute war crime? As treaty law? As customary law?

III. Conduct of hostilities

12. (Paras.577 and 1130) How do you evaluate the manner the government forces conducted hostilities in Unity State? Is destroying almost everything, killing civilians, burning houses and farms, killing cattle, committing sexual violence, and killing children and teenagers despite the cessation of hostility agreement a violation of IHL? What rules of IHL are violated by these acts? (P II, Art.14; CIHL, Rules 53, 54, 89 and 93)

13. (Paras.53 & 580) Can the newly trained soldiers who were not regularly integrated into the SPLA be targeted? Does it matter that they were deployed around Juba disguised as 'street cleaners'? Are police forces legitimate targets of attacks in non-international armed conflicts? Were the persons who hid their guns and claimed civilian status legitimate targets? Does the fact that fighters were hiding among civilians justify the killing of civilians? Do such killings constitute collective punishment? (P II, Article 4(2) (b); CIHL, Rule 103)

14. (Para.516) Was the April attack on Bor UNMISS Compound a violation of IHL? Was it unlawful for civilians dressed as soldiers to launch attacks? (P II, Art.13; CIHL, Rules 1, 5 and 6)

15. (Paras.453 and 803) According to IHL, does the Bentiu FM facility constitute a military objective? When it fell into the hands of Machar and used for propaganda? What did the Commission say about acts of incitement of violence? Assuming that it has become a legitimate target, what measures need to be taken before an attack? (CIHL, Rules 7, 8 and 10)

16. (Para.758) Is the use of cluster bombs unlawful? In the Commission's view? Did the Commission find that the use of such bombs in Borby UPDF constituted a violation of IHL? (CIHL, Rules 12, 70 and 71)

17. (Paras. 564, 565, 791, 794, 795 and 1129) How did the commission establish the existence of indiscriminate attack against civilians and civilian objects? Is the prohibition of attacks on civilian objects a customary law? Does the fact that such prohibition is not mentioned in Protocol II have any bearing on its status as a customary law? Does the action of the SPLA/IO and White Army constitute indiscriminate killings against civilians of Dinka ethnicity?

18. (Para.514) Could the acts committed by the White Army be considered as reprisals against Dinkas in Bor? Are all types of reprisals prohibited under IHL of non-international armed conflict? (CIHL, Rule 148)

19. (Para. 467) Does the act of killing Nuer soldiers, tying their hands behind their backs, in the open 'so that everybody sees what will happen to whoever tries to fight the Dinka government' violate rules of conduct of hostilities? (P II, Art.13; CIHL, Rule 2)

IV. Sexual and gender-based violence

20. (Paras.586 & 592) Is sexual and gender-based violence (SGBV) prohibited under IHL of non-international armed conflict? Does IHL protect all individuals against sexual violence? Does it matter whether the rape victim is a civilian, a fighter, a spy, or a terrorist? Walking at night? Does the difficulty of controlling 10,000 troops justify such acts? What about the lack of jurisdiction claimed by the governor? Should the government wait for report by the victims or must it conduct the investigation *proprio motu*? (P II, Art. 4(2) (e); CIHL, Rules 90 and 93)

21. (Paras.476, 659 & 792) Does rape committed in connection (nexus) with an armed conflict amount to a war crime? Are other forms of sexual violence war crimes? In the commission's view? Do the use of stones, sticks or weapons to rape women raise any question regarding the interpretation or adequacy of the

applicable IHL? (P II, Art. 4(2) (e); CIHL, Rules 93 and 156); ICC Statute, Art. 8(2) (e) (vi))

22. (Paras. 612 & 661) Does rape or sexual violence constitute a means of warfare? A method of warfare? What would be the advantages and disadvantages of referring to it as a means of warfare?

V. Recruitment and use of Children in Hostilities

23. (Paras. 393, 594, 789, 793 and 1128) What does the IHL of non-international armed conflicts say about recruitment of children and their participation in hostilities? Does the use of young people who were under the age of 14 in hostilities a violation of IHL? Is the enlisting and/or use of child soldier a war crime? In the Commission's view? Does IHL set age limits for qualifying children? IHRL? Did the Commission make clear who a child is? (P II, Art 4 (3) (c) (d); ICC Statute, Arts 8 (2) (e) (vii))

24. Does the prohibition on recruiting children under 15 into armed force or using them to participate actively in hostilities attain customary law status? (CIHL, Rules 136 and 137)

VI. Treatment of Persons- Protection of civilians

25. Juba

a. (Paras. 462 and 475) Was the killing of the civilian Nuers and disarmed soldiers at J2 palace a violation of IHL of non-international law? Is torture or ill treatment of civilians prohibited under IHL of non-international armed conflict? Were the acts of compelling civilians to eat human flesh and burned dead bodies, and to drink human blood prohibited under IHL? (GC I-IV, Art.3; P II, Art.4; ICC Statute, Art. 8(2) (c) (i) and Art. 8(2) (c) (ii))

b. (Para.387) Did the house-to-house searches by Presidential guard and other security forces and killings of Nuer soldiers and civilians a violation of IHL? What about for killings made in police stations and security installations after arrest?

c. (Para. 436) Does the claim 'a confusion going on as the fighting force comprised of both members of the regular army as well as 'volunteers'' justify any violation of IHL? In which circumstances would civilians lose their protection? Are armed groups under obligation to conduct investigation for the violation of IHL? (GC I-IV, Art.3; P II, Art.13)

d. (Para.465) Is the issue of detention and interrogation regulated under IHL of non-international armed conflict? On what basis can we assess the legality of such detentions? Is human rights law applicable in such situations? (GC I-IV, Art.3; P II, Art.5)

e. (Para. 395) Does IHL of non-international armed conflict deal with fair trial for persons under criminal trial? How do you assess the investigation and proceedings indicated by the president? In such instances, does the imposition of death penalty a violation of IHL? (GC I-IV, Art.3; P II, Art.6, CIHL, Rule 100)

26. Jonglei State

a. (Paras.516, 546 & 563) Were the killings in Bor town, committed at St Andrew Cathedral, Bor State Hospital, Bor Market place, the CID compound (river bank), and the Police barracks violations of IHL? In what respect does the changing of hands of Bor Town matter in IHL? What is the nature of obligation to decent burial of the dead in IHL of non-international armed conflict? Is the use of mass graves prohibited? (P II, Art.8 and 13; CIHL, Rules 7, 8 and 10)

b. (Para.516) Do the irrefutable facts of massive population displacements and large-scale destruction of villages necessarily indicate a violation of IHL? Could the attacks on villages possibly be justified if some or many rebels were present in those villages? (P II, Art.17; CIHL, Rules 15, 18 and 19)

c. (Para 566) Does the destruction and looting of property constitute violation of IHL of non-international armed conflict? (P II, Art. 4(2) (g) and Art. 14; CIHL, Rule 40 and 52)

d. (*Para. 764*) What is the obligation of a party to the conflict regarding medical needs of the victims? Does the refusal of the state authorities to allow the evacuation of Nuers needing medical treatment violation of IHL of non-international armed conflict? Does it matter if the victims were fighters?

27. Unity State

a. (*Paras 602 and 1129*) Did the SPLA-IO commit violation of IHL against civilians? What did the Commission decide on the claim by SPLA-IO? Was the killing of 201 Ugandan soldiers a violation of IHL?

28. Upper Nile

a. (*Para. 627*) Does the rape of the seven women who were in the Catholic Church a violation of IHL? Does the fact that they were South Sudan Red Cross (SSRC) volunteers change anything? (P II, Arts 4(2) (e) and 18; CIHL, Rules 90 and 93)

b. (*Para 629 & 1130*) Is there an obligation to facilitate provision of Humanitarian Assistance under IHL of non-international law? (P II, Art.18; CIHL, Rules 55 and 56)

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