

South Sudan, Activities of Oil Companies

Introductory text: *In its March 2019 report to the Human Rights Council, the Commission on Human Rights in South Sudan discussed the role of oil companies, domestic and foreign, in the ongoing conflict. This case focuses on the applicability of IHL and IHRL to the activities of such oil companies during armed conflict.*

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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. Report of the Commission on Human Rights in South Sudan

[Source: “Conference Room Paper on the Report of the Commission on Human Rights in South Sudan,” Human Rights Council, Conference Room Paper of the Report, A/HRC/40/CRP.1, 20 February 2019, available at <https://www.ohchr.org/en/hrbodies/hrc>, footnotes omitted]

[...]

III. Background

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

37. The 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) between the Government and the opposition, established the Transitional Government of National Unity (TGoNU), a power-sharing government, tasked with leading a 30-month Transition Period, and implementing the

commitments contained in the ARCSS. The Peace Agreement declared a permanent ceasefire applicable to all forces of the warring parties, armed groups, and all other forces or militias allied to either party.

[...]

B. Breakdown of the ARCSS

[...]

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

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

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

[...]

VI. Thematic Human rights Issues

[...]

E. Political Economy and the Conflict

2. South Sudan's Oil Sector: Economy, Conflicts and Human Rights

[...]

d) Oil as a trigger for continued conflict and human rights violations

646. In the more recent years of armed conflict in South Sudan, the economic and strategic importance of the oil producing areas in Unity and Upper Nile States has been a major driver for the continuing violence, the ensuing human suffering, and the violations of international humanitarian law witnessed there. This is also manifested in the fact that, following initial clashes in Juba in late 2013, fighting almost immediately spread and was waged with brutal intensity in oil-rich regions, taking into account also the long-standing ethnic tensions existing in these areas.

[...]

649. The more recent armed conflict in South Sudan has also mirrored the past, as many of the military and security modes of operation, including the perpetration of human rights violations that accompanied the initial period of oil exploration and the second civil war have once again been witnessed in these areas several decades later. In particular, the militarization and securitization linked to the oil production involves the intertwining of regular military and security forces and paramilitary engaged in fighting in and around the oil fields has been a feature of all these conflicts. [...]

650. [...] At a later stage, as noted in the Commission's 2018 Report, armed conflict in Upper Nile State in mid-2017 was linked to an SPLA offensive to remove SPLA-IO from the area, including the Palouch oil field, resulting in acts of killings, sexual violence, and pillage committed against the civilian population.

651. The Government offensive in Unity State in April to June 2018, appears to have been undertaken to a large degree for the purpose of gaining control of the road going south from Bentiu to Koch and Leer Counties, leading to Adok Port on the White Nile river, and either pacifying or removing civilian population from the areas near the oil fields by using extremely violent methods. This road passes the Thar Jath oil fields, in what is now Northern Liech State. As detailed elsewhere in this report [...], the renewed conflict in Unity in the first half of 2018 led to widespread and serious human rights violations by Government forces and affiliated militias.

652. The desperate human rights situation in oil-rich areas is closely and directly linked to the past and more recent armed conflict. South Sudan's oil industry currently remains overwhelmingly militarized and even securitized, with the National Security Services increasingly expanding their involvement in oil production and management: the NSS is mandated by law to provide security at oil fields, in cooperation with the South Sudanese national police. The Commission has received information indicating that NSS officers are seconded to the joint ventures and appear to co-locate with oil company's staff both in their central headquarters as well as in the oil regions. [...]

e) Oil financing the conflict

653. Since the outbreak of the conflict in December 2013, significant oil revenues have been channeled into paying for the war effort, depriving key sectors of much needed financing. At the same time, the armed opposition has targeted several of the oil fields, leading to their closure and in some cases damage to the infrastructure. South Sudanese Government officials, have, in their announced plans to revive the oil production, made frequent references to the oil belonging to the people of South Sudan, as explicitly laid down in the Transitional Constitution of 2011 [...] and the CPA [Comprehensive Peace Agreement]. Nevertheless, there have been consistent and detailed reports that revenues have been used to benefit members of the political and ethnic elite and their factions for warfare purposes and personal enrichment.

654. A key player in this misappropriation of funds is the state-owned petroleum company Nilepet, which, only in the period between March 2014 and June 2015, is reported to have facilitated the payment of over USD \$80 million – of assumed oil revenue – to both official and private actors and organizations, including for the Government's war-related expenses. Financial and material support, sourced by oil revenue, was reportedly also provided to some of the Government's proxy militias, involved in the guarding of the oil fields, the above-mentioned Dinka Padang militia.

[...]

h) Corporate accountability – South Sudan's national petroleum company Nilepet

668. A key player in the production and management of oil in South Sudan is the state-owned national petroleum company, the Nile Petroleum Company Ltd. or Nilepet. The company was conceived in 2003 and incorporated under the New Sudan Companies Act in 2009, and is also specifically mentioned under the Petroleum Act (2012). According to the Petroleum Act, the provisions of the Act apply to the national petroleum company "to the same extent as this Act is applicable to any other licensee or contractor, unless otherwise expressly described by legislation." [...]

669. As the national oil company, and given the history and context in which oil production has been carried out in South Sudan, Nilepet should be expected to conform to the highest standards of corporate accountability and institutional transparency. However, core features of the company's management and operations indicate that it is to a large extent controlled by South Sudan's National Security Service, and consequently acts in the interests of this body, or of senior members of the South Sudanese Government. While there have been regular changes in the composition of Nilepet's Board of Directors, the Director General of the Internal Security Bureau of the NSS has reportedly been a member of the board since 2014, although this has never been publicly confirmed by the company. Other information received by the Commission indicates that another General, who reportedly held a senior position in the NSS [National Security Service] in early 2016, may currently be part of Nilepet management. [...]

670. Nilepet has been used repeatedly by the South Sudanese Government as an instrument to finance the

ongoing inter-ethnic armed conflict in the country. For example in January 2016, a report by Global Witness indicated that Nilepet's Managing Director was instructed by the then Minister of Petroleum and Mining, as well as by the Director General of the Internal Security Bureau of the NSS, to provide payments for expenses by the South Sudan's security services, which at the time were engaged in armed conflict in the oil-rich areas of former Upper Nile State. Nilepet has also been named in several reports by the UN Panel of Experts as being complicit in diverting oil revenue to finance the Government's war efforts.

671. Nilepet appears to have been used to channel oil money to finance the war without any difficulty given the lack of independent oversight of its commercial and financial activities, possibly because of its ambiguous status as a private company that is wholly state-owned, the company has been able to circumvent relevant legal obligations for public reporting and auditing of firms in the oil sector. Information on the company's net income from its oil-related business, its accounts, and expenditure has reportedly never been publicized. Furthermore, for example, the company has admitted to the use of crude oil for purchasing (refined oil) fuel, even though transparent business practices would ensure that these two processes are separate.

[...]

i. Corporate accountability – International oil companies

673. International companies historically have owned the majority of shares in the oil producing joint ventures, since oil was first produced in southern Sudan prior to its independence. All of the companies listed above [...] have been doing business in Sudan and South Sudan for many years, while some Western European and Canadian companies that had operated there pulled out because of well-publicized public outcry in their home countries over oil-related human rights abuses in Sudan. Consequently, international companies operating in South Sudan should be well aware of the legacy of unaddressed human rights violations associated with oil explorations in the South.

[...]

675. On several occasions over the years, international companies have reportedly been complicit either directly or indirectly in assisting Government forces and their proxies in the fighting that has taken place in the oil regions, especially by allowing them to use their facilities, in particular, air strips and road infrastructure. For example, the Canadian company Talisman, which in the late 1990s was part of the Greater Nile Petroleum Operating Company joint venture (with the Government of Sudan) and operated in the north of former Unity State, allowed the Sudanese Armed Forces to use its air strip and other facilities, despite knowing of the Sudan Government's policy of forcibly displacing civilians and its commission of other human rights violations in the area. In a more recent case, the DPOC [Dar Petroleum Operating Company] company, engaged in exploitation of the Palouch oil field, reportedly allowed a South Sudanese private company that supplied it with food and equipment to also carry cargo for SPLA units in the area.

[...]

678. The exposure to potential criminal liability of international companies for human rights violations committed in connection with their business operations has been highlighted by the recent case of the Swedish oil company Lundin, which was operating in Block 5A in Sudan in the late 1990s and early 2000s. During this period, widespread and serious human rights violations were committed against the local population, as part of military operations to forcibly displace hundreds of thousands of inhabitants for the purposes of oil exploration. In October 2018, the Swedish Government approved a request by the Public Prosecution to indict the company's Chief Executive Officer and Chairman for crimes against civilians committed on the territory of what is now South Sudan. The case is an example of states exercising extraterritorial jurisdiction to indict their nationals over crimes committed in other states, and as such presents one of the first such cases where prosecutions may be brought implicating oil companies for their involvement in human rights violations. On 1 November 2018 Lundin Petroleum issued a press release explaining that:

The Swedish Prosecution Authority has issued a notification of a corporate fine and forfeiture of economic benefits against Lundin Petroleum in relation to past operations in Sudan from 1997 to 2003.

The notification indicates that the Prosecutor may seek:

- a) a corporate fine of SEK 3 million; and
- b) forfeiture of economic benefits from the alleged offense in the amount of SEK 3,282 million, based on the profit of the sale of the Block 5A asset in 2003 of SEK 729 million.

679. The Lundin Press Release continues by explaining that any fines and forfeitures would only be imposed after any trial of the individuals, and in "June 2010, the Swedish Prosecution Authority initiated a preliminary investigation into alleged complicity in violations of international humanitarian law in Sudan during 1997–2003."

680. As demonstrated by the Lundin case, attempts to hold transnational companies and their representatives criminally accountable for human rights violations have been painstakingly slow, complex and difficult. It has been noted however, that such prosecutions are not only a useful tool in bringing corporate officials to justice, they also can be "an effective means of shaping corporate conduct, particularly pointing to the systems and procedures companies should put in place to build a culture of compliance and prevention." This is especially relevant in the context of South Sudan, where transnational companies with majority stakes in the oil corporations such as CNPC [Chinese National Petroleum Company] and ONGC [Indian Oil and Natural Gas Corporation] have reportedly not shown great concern for the legacy of human

rights abuses linked to oil production in the areas where they have been operating.

[...]

B. South Sudanese army downplays rebel threats on oil fields

[Source: “South Sudanese Army downplays rebel threats on oil fields,” Sudan Tribune, 6 September 2017, available at <http://www.sudantribune.com>]

[1] [...] A South Sudanese army (SPLA) official has downplayed threats from rebels, saying adequate security would be provided to oil workers operating in the oil field areas.

[2] The assurance came barely a week after South Sudanese rebels warned workers in the oil-producing areas to vacate or risk being attacked in a planned operation to disrupt oil production.

[3] “We have the ability to defend the oil fields and there should be no reason for the rebels to think that they will disrupt oil production and compromise the facilities in the oil fields at this particular point when they have become more vulnerable,” the army spokesperson, Lul Ruai Koang told *Xinhua* on Tuesday.

[4] “Those threats don’t carry any weight. They have been doing it to ensure continuation of economic sabotage,” he added.

[5] The government, the official further stressed, has boosted security in the oil fields and that normal oil production is expected to continue.

[6] Rebels had, in the past, issued such warnings to oil workers. In March this year, the rebels abducted a number of oil workers, but released them after negotiations involving the oil companies and the rebels.

[...]

Discussion

I. Classification of the situation and the applicable law

(Document A, paras [37]-[44])

1. Based on the information provided, how do you classify the situation in South Sudan since July 2016? Is

there an armed conflict? if yes, is it international or non-international? Who are the parties to it? (GC I-IV, Arts 2, 3)

2. What is the law applicable to the situation? Is APII applicable? What conditions need to be fulfilled for it to be applicable? Can it apply to the fighting between SPLA-IO(TD) and SPLA-IO(RM)? Is IHL applicable to the entire territory of South Sudan? (GC I-IV, Art. 3; P II, Art. 1)

II. Conduct of Hostilities

3. (*Document A, paras [646]-[652] and [669]; Document B, paras [1]-[6]*) Can Oil fields be considered as military objectives? How do you define the notion of a military objective? What are the criteria for determining a military objective? Does the control of the fields by the military and government secret services of the production and management of the oil sector described in the report have any bearing on your determination? Why/why not? (; CIHL, Rule 8)

4. (*Document A, paras [652]-[654] and [670]; Document B, paras [1]-[6]*) Can oil fields become military objectives just because the revenue from the oil produced there is used by a party to the conflict? (;CIHL, Rule 8)

5. (*Document A, para. [675]*) Had the permission of international oil companies to use their road and airstrip facilities by the government been issued during the current conflict, would that make such companies' assets legitimate targets? What about the supply of Cargo to the SPLA unit by DPOC trucks? (; CIHL, Rule 8, 9)

6. (*Document B, paras [1]-[3] and [6]*) Can employees in the oil fields be targeted under IHL? Could working in the oil fields be an act of direct participation in hostilities? In what circumstances? Can the workers described in the document be considered to have participated in hostilities? (; P II, Art. 13; CIHL, Rule 6; ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)

III. IHL and Human rights

(*Document A, paras [668]-[680]*)

7. Is there anything in IHL that obliges states to regulate the conduct of business enterprises in armed conflict? Within its territory? Outside its territory? If so, what is the nature of such an obligation? Does this obligation depend on the classification of the conflict? Would your answer depend on whether or not it is state owned? (GC I-IV, Art.1;; CIHL, Rule 144)

8. Does international human rights law apply to the situation described in the report? Do states have an obligation under human rights law to regulate the conduct of businesses? If so, what is the nature of this obligation? Does the nature of the obligation differ whether such businesses are operating within or outside

their own territory? Does it differ based on whether or not such businesses are state-owned or private? (UN Guiding principles on Business and Human rights, Principles 1-10, 25-31)

9. Are business enterprises bound by IHL? Why/why not?

10. Are business enterprises bound by human rights law? If so, what is the nature of their obligations? (UN Guiding Principles on Business and Human rights, Principles 11-21)

IV. Accountability for IHL violations

11. (*Document A, paras [668]-[671]*)

a. Based on the information in the report, how do you evaluate the conduct of Nilepet, as a company, under human rights law and IHL? May its conduct be attributed to South Sudan?

b. Are there any rules under IHL and human rights that make NilePet as a corporate entity distinct from South Sudan accountable for their actions described in the report? (UN Guiding principles on Business and Human rights, principles 22-24)

12. (*Document A, paras [673]-[680]*)

a. Assuming that the actions described by the report amounted to violations of IHL, would the South Sudanese government have an obligation to investigate, prosecute those responsible? What about respective home states of the companies? Would the obligation of the two differ? (; CIHL, Rules 157, 158)

b. Is there a concept of corporate complicity for war crimes under international criminal law? If so, can businesses be prosecuted before domestic courts for being complicit to international crimes? Would the actions of the companies detailed in the report amount to complicity in war crimes? What additional criteria, if any, should be fulfilled?

c. Based on the information in the report and in your opinion, would Lundin's action constitute complicity in the commission of war crimes and crimes against humanity?

d. Assuming South Sudan's case was referred to the ICC, can the companies mentioned in the case be charged with complicity to war crimes? (ICC Statute, Art. 25)