



AU Special Envoy Briefs on Women, Peace & Security South Sudan: Restore the Dignity of Women, Ensure Accountability

In July 2016, as African Union (AU) Member States prepared to attend the 27th Ordinary Summit in Rwanda under the theme, “Year of Human Rights with particular focus on the Rights of Women”, fighting broke out again in South Sudan. This occurred in spite of tremendous efforts deployed by the AU, the international community and national actors of goodwill, to build trust between the parties and to ensure social cohesion through a government of national unity.

In response to this, on 8th July, the Chairperson of the African Union Commission (AUC),

Against this background and in the context of the month of October when United Nations Resolution (UNSCR) 1325 was adopted, to ensure the protection and participation of women in conflict prevention and peace processes, the AUC Office of the Special Envoy on Women, Peace and Security will lead a media campaign that aims to end sexual and gender-based violence (SGBV) in South Sudan, to hold perpetrators accountable for crimes against humanity and to call for reparations for victims.

On 13th October, will run for two months and culminate on Human Rights Day, 10th



“We cannot accept this pervasive and ongoing sexual violence against women.”

– H.E. Dr. Nkosazana Dlamini-Zuma,
AUC Chairperson

H.E. Dr. Nkosazana Dlamini-Zuma, condemned the fighting in Juba, and on 30th July, amidst reports of mass rape of women, including by men in uniform, she expressed dismay following, “continued occurrence of violence in many parts of South Sudan... [and] persistent use of sexual violence against women and girls as a weapon of war.” Referring to the, “very serious incidents involving about 120 documented cases of sexual violence”, she denounced impunity and called for, “leaders to ensure that the perpetrators of these heinous crimes are held fully accountable for their actions in an expeditious manner.”

Women, Peace and Security, H.E. Ms Bineta Diop, also strongly deplored these atrocities and echoed the voices of African women for perpetrators to be held accountable, and for an increase in humanitarian efforts, including solidarity missions to South Sudan, the Democratic Republic of Congo (DRC), the Central African Republic (CAR) and Burundi.

December, following the 16 days of activism for the elimination of violence against women.

The AUC calls on all stakeholders including Member States, women and youth organisations, international institutions, academia, the media, the private sector and individuals, to use all means available to them, including their social media profiles to ask the leaders of South Sudan to restore the dignity of the women of South Sudan and ensure accountability.

To participate, follow:

@DlaminiZuma, @AUBinetaDiop, @AU_PSD
Use hash tag: #4WomenofSouthSudan

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<http://www.peaceau.org/en/page/105-special-envoys>

By Paschal Chem-Langhee



Existing commitments to prevent and address conflict-related sexual violence in South Sudan: A brief overview



The eruption of conflict in post-independent South Sudan in December 2013 and again in July 2016, exacerbated the already dire situation of women and saw worrying levels and forms of conflict-related sexual violence carried out by all sides in conflict. A number of investigations and reports have documented and detailed the extent and magnitude of conflict related sexual violence during this period and beyond, including by the AU Commission of Inquiry on South Sudan, the UN High Commissioner for Human Rights on the situation of human rights in South Sudan – which investigated violations that occurred in 2015, as well as by various NGOs, including Human Rights Watch. These crimes have continued and enjoyed impunity in spite of a wide range of legal, policy, and political commitments by the government and other parties to prevent and respond to conflict-related sexual violence. The below canvasses some of the major commitments in this regard.

LEGAL COMMITMENTS

- South Sudan is a signatory to a number of international and regional gender related instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which it has ratified, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which it has signed but not ratified. The CEDAW General Recommendation 30 links the women, peace and security agenda to CEDAW, including measures to ensure protection of women during and after conflict. The Maputo Protocol specifically recognizes conflict related sexual violence as a crime, and calls on State Parties to prevent and prosecute perpetrators.
- In addition to these instruments, South Sudan is legally bound to a number of United Nations Security Council Resolutions on women, peace and security. Specifically, UNSCR 1820 (2008) which recognizes sexual violence as weapon of war and UNSCR 1960 (2010) which reiterates the importance of ending sexual violence in conflict. South Sudan has recently developed a National Action Plan on UNSCR 1325, operationalizing its obligations under UNSCR 1325.
- The August 2015 peace agreement commits the signatories to a number of provisions of relevance to conflict related sexual violence. Chapter 2 on the permanent ceasefire and transitional arrangements commits the warring parties to refrain from prohibited actions, including "acts and forms of sexual and gender-based violence, including sexual exploitation and harassment" (clause 1.7). Chapter 5 on transitional justice, accountability, reconciliation and healing, establishes a Commission for Truth, Reconciliation, and Healing, which is tasked with "establish[ing] an accurate and impartial historical record of human rights violations, breaches of the rule of law and excessive abuses of power, committed by State and non-state actors from the date of signing of this Agreement to July 2005" (clause 2.2.2.2) and "record[ing] the experiences of victims, including but not limited to women and girls" (clause 2.2.2.6).
- The same chapter also establishes a Hybrid Court for South Sudan, which will have a jurisdiction with respect to the following crimes: genocide, crimes against humanity, war crimes, and other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence (clause 3.2.1.4).

POLICY COMMITMENTS

- South Sudan has also developed and adopted a National Gender Policy (2012) to prevent and address all forms of sexual and gender based violence.

POLITICAL COMMITMENTS

- In early October 2014, the Special Representative of the UN Secretary-General on Sexual Violence in Conflict visited South Sudan to assess the situation of South Sudan with regards to conflict related sexual violence; the obstacles to the prevention and addressing of such crimes; and to come to a consensus with the government on clear measures to respond to this. The outcome of the visit was a Joint Communiqué of the Republic of South Sudan and the United Nations on the Prevention of Conflict-Related Sexual Violence (October 11, 2014)¹. The communique outlined a seven-point plan including the appointment of high level focal points to lead and coordinate government efforts and work with the Special Representative to ensure the full implementation of the Joint Communiqué. Specific institutions, including the Sudan People's Liberation Army and the South Sudanese National Police Service, were singled out for developing Action Plans to address sexual violence. Two months later, the then first Vice-President, Riek Machar, also issued a Unilateral Communiqué (December 18, 2014) on the same. Both contain commitments by both government and opposition to immediately stop and prevent the commission of sexual violence crimes, hold perpetrators accountable, improve services to survivors – including access to justice, and ensure that sexual violence considerations are included in the ongoing processes of security sector reform, disarmament, demobilization and reintegration, and broader peace agreement. These communiqués represent important political commitments by both parties to prevent and respond to conflict related sexual violence. Despite this, sexual crimes have been systematically committed over the course of the conflict, with little or no accountability for them. This, notwithstanding some steps taken by both signatories to put in place implementation mechanisms, including the designation of a high-level focal point, establishment of technical working groups, development of implementation plans, and the signing of undertakings by 53 senior commanders of the SPLA-IO (Sudan People's Liberation Army in Opposition).
- On 21 January 2015, the Intra-SPLM Dialogue resulted in the Arusha Communiqué, which among many other things, stated that the, "SPLM commits to and supports the establishment of comprehensive system of transitional justice – the core elements of which are truth and reconciliation; criminal prosecution; reparations; compensation and institutional reforms – to look into the issues of atrocities, human rights violations, and abuses in the country".
- The foregoing highlight that a number of notable commitments have been made in relation to preventing and addressing conflict related sexual violence in South Sudan. The pervasive and ongoing sexual violence, and continued impunity for the same, calls for a greater focus on accountability for the crimes themselves, as well as holding duty bearers to commitments made. All parties must be committed to a holistic approach to conflict related sexual violence, from prevention, to protection, provision of services, access to justice, and reparations. There must also be concerted efforts at reconciliation and the repairing and renegotiating state-society and society-society relations which have been historically gendered. The people of South Sudan deserve nothing less.

“Women want peace, but can no longer tolerate impunity.”

H.E. Ms Bineta Diop, AUC Special Envoy on Women, Peace & Security

By Semiha Abdulmelik



Legal Remedies for Victims of Sexual Violence in Africa: Brief analysis of the South Sudanese case



INTRODUCTION

There are many legal and practical obstacles existing in many countries and preventing victims of sexual violence in particular in times of conflict, from accessing their rights to truth, justice and reparation, notably the lack of adequate training on sexual violence issues for actors of the judiciary and the lack of information on services and access to justice (remedy) for victims.

As a general principle, the right to a remedy and reparation is affirmed in International Human Rights Law and International Criminal Law. This notably by:

- Article 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹;
- Article 8 of the Universal Declaration of Human Rights²;
- Article 2 of the International Covenant on Civil and Political Rights³;
- Article 39 of the Convention on the Rights of the Child⁴;
- Article 75 of the Rome Statute of the International Criminal Court⁵.

On the specific point of remedies for victims of sexual violence, although Constitutions and Penal Codes are also progressive and do provide guarantees for women's rights and punish sexual and/or gender based violence, it is generally observed that there is little done on the accountability for perpetrators of those acts⁶. At the regional level, gender policies have been adopted to prevent sexual violence namely in times of conflict but the question of existing remedies for victims requires a specific attention. This paper (toolkit) provides accurate details on how the right to remedy for victims of sexual violence in general and specifically committed during conflict in Africa (South Sudan) can be claimed.

General considerations on remedies for sexual violence

The first thing to consider in regards of the punishment of sexual violence is the time when it occurs. In normal times, the crime of sexual violence is broadly penalized under domestic criminal law. It is associated to the crime of rape or sexual assault depending on the circumstances.

States Parties shall undertake to:

- ¹a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;
- b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

²Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

³Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

⁴States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

⁵The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79

⁶The Impact of the Protocol on the Rights of Women in Africa on violence against women, An Advocacy Tool, Gender Unit, Centre for Human Rights, University of Pretoria, 2009.

In times of conflict, rape has been categorised as a crime against humanity and war crime. This is evident from the statutes of major ad hoc international criminal jurisdictions such as:

- The International Criminal Court (Arts 7 (1g)⁷ and 8 (2b) ⁸
- The International Criminal Tribunal for the former Yugoslavia (Art 5 (g)), the ICTY has also classified rape as amongst the most serious crimes of war by defining it as a breach of the Geneva Conventions in case No.IT-94-1-T (May 1997);
- The Special Court for Sierra Leone (Art 2(g));
- The International Criminal Tribunal for Rwanda has qualified rape in conflict situations as an act of genocide case No. ICTR- 96-4-T (Sept 1998)

The specific case of South Sudan: The Hybrid Court to challenge the existing imperfect legal system

Two bodies of law operate side by side in South Sudan. Statutory law and customary law. The Statutory law is generated by the state and consists of the constitution, legislation among which those having a direct bearing on women's security, such as the Penal Code Act (2008), and precedent created through court judgements.

The Customary law consists of numerous unwritten bodies of law that have regulated South Sudan's tribes for centuries. The laws of both systems are binding. The 2005 Comprehensive Peace Agreement, which marked the end of the war, recognized customary law as valid. These two are potential legal avenues for victims of sexual violence in South Sudan.⁹

But the problem is that, there is no specific right to reparation for victims of rape in Sudanese law. From the legal practice in South Sudan, it is admitted that a victim of rape may bring a claim for reparation as a supplementary civil suit in the course of criminal proceedings.¹⁰ In case of bodily injury, he or she may bring a claim for diya (blood money), which is, however, meant to compensate for the bodily injury only and not for the rape as such.¹¹ In civil proceedings, a rape victim or his or her relatives can claim damages for tort, i.e. trespass against the person, under civil law.¹² Where the alleged perpetrator is an official, a civil suit may be instituted against the state but a suit against the perpetrator itself can only proceed if the head of the forces concerned lifts immunity. Formally, customary courts are not supposed to hear serious criminal matters such as rape; they are expected to refer these cases on to the statutory court system. In practice, however, customary courts frequently do try rape cases. If perpetrators are convicted, punishments are often mild. A rapist might be sentenced to a short prison term.

With the limitations of the existing legal system, there is a lot of hope placed on the establishment of the Hybrid Court for South Sudan. This Hybrid Court is established under the August 2015 peace agreement, which will have, following clause 3.2.1.4, a jurisdiction with respect to genocide, crimes against humanity, war crimes, and other serious crimes under international law and relevant laws of the Republic of South Sudan including gender based crimes and sexual violence. The establishment of the Hybrid Court for South Sudan will be decisive step forward into holding all perpetrators of sexual violence during the conflict effectively accountable.

Progress Made by the African Union towards the Establishment of the Hybrid Court

The African Union Commission is responsible, under article 3 of chapter V of the Agreement and the communiqué of the African Union Peace and Security Council of 26 September 2015, for providing broad guidelines relating to the location of the Hybrid Court for South Sudan, its infrastructure, funding mechanisms and enforcement mechanism, the applicable jurisprudence, number and composition of judges, the privileges and immunities of Court personnel and any other related matters. On 2nd November 2015, the African Union held a high-level ad hoc workshop on the implementation of the Agreement, with the participation of members of the African Union High-level Ad Hoc Committee for South Sudan, member States of the Intergovernmental Authority on Development (IGAD) and "IGAD-plus" representatives.

The outcomes of the workshop included the following recommendations to the African Union Commission in relation to the establishment of the Hybrid Court for South Sudan: (a) prepare the African Union position on the elements required for the establishment of the Hybrid Court in line with the provisions of the Agreement; (b) on the basis of the African Union position, engage the United Nations and the South Sudanese parties as soon as the Transitional Government of National Unity had been established; (c) mobilize resources for the Hybrid Court and the Commission on Truth, Reconciliation and Healing, as appropriate; and (d) constitute and convene a technical working group to prepare and provide advice on the above - mentioned tasks. In its communiqué of 29 January 2016, the African Union Peace and Security Council called upon the African Union Commission to urgently implement the outcomes of the workshop. The Commission has mandated the Office of the Legal Counsel to be the central department of the Commission on international criminal justice issues to coordinate the process towards the establishment of the Hybrid Court. The African Union Commission convened the first meeting of the interdepartmental Taskforce on the Establishment of the AUHCSS on 24 March 2016.¹³

⁷For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

⁸For the purpose of this Statute, "war crimes" means: (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

⁹See Government of Sudan and the Sudan People's Liberation Movement/Army). 2005. Comprehensive Peace Agreement. Nairobi, 9 January 2005, ch. 1, para. 6.4) in "women's Security and the Law in South Sudan" available at: http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3562.pdf.

¹⁰Articles 42-45 of the 1991 Criminal Act.

¹¹Article 153 (1) Civil Transaction Act, 1984

¹²Article 33 (b) of the National Security Forces Act, 1999, article 45 (2) of the Police Act 2008 and article 34 (2) of the Armed Forces Act, 2007.

¹³<http://www.refworld.org/pdfid/571dd1b34.pdf>

Remedies available at the supranational level

In times of conflict, rape has been categorised as a crime against humanity and war crime. It can hence be prosecuted by the International Criminal Court (Arts 7 (1g) and 8 (2b)). Amidst of international jurisdiction competent to prosecute cases related to sexual violence, is the African Court on Human and Peoples' Rights. There are meanwhile few points that need to be clarified. The African Court can only prosecute cases pertaining to sexual violence under the following conditions:

- Perpetrators must be from a country that has ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- The country of perpetrators (or where such cases occurred) has to have made a declaration according to Article 34(6) of the Protocol creating the Court ("Special Declaration"), accepting the jurisdiction of the Court to hear cases brought by individuals and NGOs. As of September 2016, only eight countries had made such a declaration, although reports suggest Rwanda has withdrawn its Special Declaration.
- Another possibility is a referral of a case by the African Commission on Human and People's Rights. On the seize of the Commission on the Specific issues related to sexual violence in Africa, there are for now no cases pertaining to women sexual and gender based violence per se. Hence, there are still no case referred to the Court by the Commission in this issue.

Therefore, this call on all Africa Union Member States for:

Criminalizing of all forms of sexual violence, ensure that the perpetrators and accomplices of such crimes are held accountable by the South Sudanese justice system;

- Ensuring that police and military forces, as well as all the members of the judiciary receive adequate training on the principles of international humanitarian law, women's rights and the children's rights;
Putting in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence;
Ensuring that victims of sexual violence have access to medical assistance and psychological support;
- Ensuring participation of women in the elaboration, adoption and implementation of reparation programmes;
Ratifying without reservations and ensure the effective implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Convention on the Elimination of All Forms of Discrimination against Women as well as its Optional Protocol;
- Ratifying the Protocol to the African Charter on Human and Peoples' Rights on Establishing an African Court on Human and Peoples' Rights and make a declaration according to Article 34(6) of this Protocol,
Adopt and implement National Actions Plans on 1325 UNSC Resolution on Women, Peace and Security.

To the International Community to stress all stakeholders- government forces and affiliated militias, as well as opposition forces, parties in the conflict in South Sudan for :-

- 1) Accountability, namely by supporting the AU efforts in the establishment of the Hybrid Court,
- 2) Reconciliation of all South Sudanese based on the full respect of the Peace agreement,
- 3) Healing through the participation of all South Sudanese including women into the peace processes by considering their protection from threats as witnesses assisting the Hybrid Court.

¹⁴These countries are for now: Rwanda, Tanzania, Malawi, Benin, Ghana, Cote d'Ivoire, Burkina Faso, Mali

¹⁵ <http://www.acthrmonitor.org/about-the-african-court-for-human-and-peoples-rights/>