

This briefing paper is part of “Accountability for Starvation: Testing the Limits of the Law,” a joint project of Global Rights Compliance (GRC) and the World Peace Foundation (WPF).

The project aims to identify how international law may be used to advance the prevention, prohibition and accountability for mass starvation.

This paper was produced by World Peace Foundation affiliated researcher Tong Deng Anei, Alex de Waal, Bridget Conley, with special thanks to World Peace Foundation research assistant, Scott Hoag.

International advisory firm, **Global Rights Compliance**, specialises in services associated with bringing accountability for violations of international humanitarian law and international human rights law.

**The World Peace Foundation**, an operating foundation affiliated solely with The Fletcher School, provides intellectual leadership on issues of peace, justice and security.

Additional information and resources are available at:

[Starvationaccountability.org](http://Starvationaccountability.org)

## Accountability for Starvation Crimes: South Sudan

### OVERVIEW

1. This memorandum addresses the issue of starvation crimes committed during the civil war in South Sudan (2013-18) including the goals and methods of the perpetrators, the outcomes for the victims, and the possibilities for legal redress. It includes an overview of the use of starvation during the war and three case studies. Fuller legal analysis of starvation issues is addressed elsewhere.<sup>1</sup>
2. South Sudan is, in peacetime, food secure but has high levels of poverty and poor health infrastructure. The 1983-2005 civil war witnessed numerous incidents in which all parties used starvation as a method of warfare. These occurred in the context of sieges, and also included scorched earth, forced displacement and large-scale looting (especially of cattle), and the strategic manipulation of humanitarian operations in order to selectively attract relief supplies to feed soldiers and allied civilian populations while denying civilians under the control of the other side. These tactics led to recurrent famines.
3. The recent war reprised this experience. Both government and opposition forces used starvation tactics, causing hunger, disease, social breakdown and heightened mortality. Humanitarian aid was also blocked, stolen and manipulated, and aid workers were attacked. While only a few locations descended into ‘famine’ conditions according to the Integrated Food Security Phase Classification (IPC) scale, very large populations suffered ‘emergency’ and ‘crisis’ levels of food insecurity. An estimated 383,000 people died between early 2014 and mid-2018.
4. Unity State was the worst hit by starvation due to massive and repeated depredations by both parties. Another case was Wau/Baggari in Western Bahr al Ghazal State, where people were forced into an inhospitable location, leading to extremely severe localized famine conditions. A third case is Yei in Central Equatoria

State: a breadbasket reduced to 'emergency' status by government attacks.

5. The conduct of hostilities in South Sudan includes actions that undoubtedly constitute a grave violation of international laws across IHL and ICL including starvation crimes. As such they should be considered for prosecution in the envisaged hybrid court. The memo concludes with reflections on possible avenues for this.

## Background

6. South Sudan possesses some of the most agriculturally productive land anywhere in the world and in times of peace and stability, communities rarely experience hunger. The history of scarcity, hunger and disease is closely related to the depredations inflicted on the people by raiding and warfare.
7. The 1983-2005 civil war witnessed numerous incidents in which the Government of Sudan, allied militia and the Sudan People's Liberation Army (SPLA) (and its various factions) used starvation as a method of war. These included violations perpetrated during sieges of towns, scorched earth tactics inflicted on rural areas, the blockade and disruption of trade, forced displacement and large-scale looting (especially of cattle). Combatants not only destroyed food, farms, livestock herds and livelihoods, but also sometimes went so far as to prevent desperate people from foraging for wild foods or finding casual labour. The combination of destruction and deprivation led to some of the highest mortality rates ever recorded in modern times.
8. The Sudanese Government's aims were to deprive the SPLA of a civilian base, punish communities that supported the rebellion, incentivize pro-government militia, and drive people off their lands. The government's modus operandi was to treat counter-insurgency operations as an 'ethics free zone' in which army and militia commanders would not be held accountable for their actions, and in which they were encouraged to pursue local vendettas, land-grabbing, cattle theft and looting, and other profiteering, including from exploiting cheap or coerced labour.
9. The SPLA command was indifferent to the plight of

stricken civilian communities, and used starvation to force garrison towns to submit, supply its own forces, and punish communities whose leaders had allied with the government. Some of the most serious depredations occurred during internecine warfare among South Sudanese armed factions, whose commanders and members appeared to have no greater regard for the rights or welfare of civilians than militiamen and soldiers from northern Sudan.

10. South Sudan became the focus of one of the largest and longest-running relief programmes. All parties manipulated humanitarian operations in order to selectively attract relief supplies to feed soldiers and allied civilian populations while denying civilians under the control of the other side. Relief was routinely blocked or stolen and relief workers were harassed and sometimes killed. Some of these attacks were targeted and constituted violations of the codes of conduct and humanitarian principles that were developed during the conflict by the United Nations Operation Lifeline Sudan, or were clear violations of IHL.
11. These tactics led to recurrent famines, notably in 1987-89 (Northern Bahr al Ghazal and Unity, also Torit), 1993-94 (Jonglei and Unity), 1998 (Bahr al Ghazal), and 1999-2000 (Unity) and localized food crises elsewhere. The people also suffered some of the worst health outcomes anywhere in the world, including epidemics of diseases such as visceral leishmaniasis. The famines caused major social breakdown.
12. Following a general ceasefire in 2003 and the Comprehensive Peace Agreement in 2005, South Sudan enjoyed approximately a decade of relative tranquility along with a transition from emergency relief to economic development. South Sudan rapidly returned to food security and progress was made in developing health services.
13. A significant exception to this was a localized insurgency in Jonglei. In repressing a rebellion by an ethnic Murle militia, government forces destroyed food supplies and health facilities, causing a humanitarian crisis in 2012-13.

## Starvation and the 2013-18 Civil War

14. The civil war began in December 2013 with a massacre in Juba and very rapidly spread to the states of Greater Upper Nile. There was intense localized fighting and massacres in the early part of 2014, after which the war became more diffuse and multi-sided, spreading in particular to parts of Greater Bahr al Ghazal. The first attempt at a peace agreement, the Agreement on the Resolution of the Conflict in South Sudan (ARCISS) failed in 2016, leading to an escalation of fighting in Juba and in the states of Greater Equatoria, which had previously been relatively calm.
15. Conduct of the warring parties was redolent of the previous war, especially the internecine fighting of the 1990s. All fighting was accompanied by violence against civilians including destruction of houses and small businesses, forced displacement, and comprehensive looting of assets, especially livestock. Crops were burned or stolen, and fear of violence prevented farmers from cultivating crops. People were often forced to seek sustenance by foraging for wild foods, but sometimes could not do so in safety.
16. The military tactics used meant that deprivation was over-determined. Acts of starvation were perpetrated with different, often overlapping purposes: to deprive 'hostile' or 'enemy' communities of their resources in order for them to submit; to do so in order to punish them; to allow soldiers and militiamen to provision or reward themselves; and to forcibly displace communities from rural lands and urban properties that could then be expropriated.
17. Starvation perpetrated for military purposes occurred alongside, and sometimes intersected with, other economic factors that caused extreme hunger. The war took place at a time of economic crisis, hyperinflation, and large-scale movements of displaced people and refugees. Urban people reliant on waged employment or trade were impoverished. Some government-supporting communities had become highly reliant on salaries paid to soldiers and government officials, and suffered severe distress when those salaries became almost worthless, or when soldiers died in the war and their widows and orphans were left without material support. Economic crisis thereby made it impossible for some people to buy what was necessary to sustain life. The government prioritized high-status military and security units in its reduced spending, and continued to purchase weapons.
18. International agencies mounted a huge relief operation. Without this there is no doubt that conditions would have been far worse. Indeed, the Integrated Food Security Phase Classification (IPC) Technical Working Group introduced a new category into its classification which was '4!', with the exclamation point indicating that conditions would be worse in the absence of humanitarian assistance.
19. South Sudan was one of the most dangerous places in the world to be a humanitarian aid worker. More than 100 were killed between the outbreak of the war and mid-2018. Some of these were deliberately targeted for violence. In one incident in July 2016 government forces attacked the Terrain Hotel, a humanitarian aid compound in Juba. One South Sudanese aid worker was killed and at least five international aid workers were raped. More generally, humanitarian aid was frequently restricted or blocked and often stolen. Other tactics used seemingly to further military or political purposes, have been detailed by international inquiries. One example is the April 2018 report by the UNSC Panel of Experts which references:

**[d]eliberately creating an environment of restricted physical access, including through intimidation, harassment and detention of humanitarian staff; looting or destroying humanitarian supplies and assets; and denying access to areas with populations suspected of supporting other warring parties. The parties also apply indirect impediments by devising an increasingly complex and unpredictable bureaucratic system; interfering in programme implementation; and diverting aid resources to fund their war effort or to benefit actors that support them.**<sup>2</sup>
20. Prior to the outbreak of the war, South Sudan was mostly food secure. On the eve of independence (September-December 2010) there was no lo-

cation in the country that was in IPC phase 3 or higher (i.e. all were in phase 1 and 2, 'minimal' or 'stressed.') In December 2013, southern Jonglei was in IPC phase 3 ('crisis') but the remainder of the country was in phases 1 or 2. Over the following two years, virtually all of the country except Central and Western Equatoria, Lakes and Western Bahr al Ghazal descended into level 3 and level 4 ('emergency'). In 2017, two counties (Leer and Mayendit) were identified as having descended to IPC Level 5 ('famine'), though there were several other locations that could probably also have qualified. More than half the country was in level 3 or level 4 for prolonged periods.

21. A demographic assessment based on a survey of surveys indicated that between the outbreak of the war and mid-2018, an estimated 383,000 excess deaths could be attributed to the crisis. Of these, approximately half were due to violence and half to hunger and disease. Depending on one's definition of 'famine mortality', upwards of 200,000 people died in the South Sudanese emergency.
  22. The places worst-affected by starvation included Unity State (especially Leer and Mayendit), parts of Jonglei, and the 'Greater Baggari' area near Wau. Some previously productive locations, notably in Equatoria, were also plunged into emergency conditions. (The following two sections provide a brief overview of illustrative case studies.)
  23. The most senior political leaders in South Sudan, in government and opposition, were well aware from the experience of the 1983-2005 war, in which they themselves had played important roles as commanders, that the conduct of hostilities using starvation as a weapon, would lead to massive deprivation including excess mortality and famine conditions. There is no evidence that they took even the most basic steps to avoid a repeat of these processes of deprivation. In many cases, emergency aid was selectively provided to communities regarded as loyal and not to those considered to be sympathetic to the opposition (a case in point is Wau, below). Whether under military command, or whether acting on their own behalf, military units and militias appear to have perpetrated numerous starvation crimes, warranting further investigation from those tasked with a
- mandate in investigating violations in South Sudan or accountability courts and mechanisms on the national and international level.

## Unity State

24. The southern counties of Unity State (Koch, Leer, Mayendit, and Panyijar) suffered the most egregious abuses during the first two years of the civil war. This was due to several factors. First, a large contingent of the SPLA's Fourth Division rebelled right at the start of the war, joining the SPLA-IO and occupying the state capital Bentiu. Second, this invited a major government military response, in part because Unity State has South Sudan's largest oil reserves. Third, Leer is the home town of the leader of the SPLA-IO, Riek Machar, and so was the target for ethnically-motivated attacks. Fourth, the politics of the state are also a fulcrum of the conflicts that tore South Sudan as a whole. Not only has there been inter-communal violence between ethnic Dinka and ethnic Nuer, but also internal conflict among the Nuer, related in part to conflicts over control of the state government and its revenue from oil. Many violations (notably cattle raiding) were conducted by Bul Nuer militia against other Nuer clans. Machar's deputy, Taban Deng, joined the government in 2016 with his personally loyal forces.
25. Between 2013 and 2015, the SPLA and SPLA-IO conducted repeated offensives through the southern counties of Unity state. The frontline moved backwards and forwards with towns being captured and recaptured. The SPLA-IO had numerous recruits, but few weapons; the SPLA was better armed and was able to overrun the territory during dry season offensives. The SPLA forces, in alliance with other groups, including Darfuriian rebels, found themselves largely unable to engage the SPLA-IO in direct combat and instead waged their war against civilians. They systematically destroyed villages. According to the UN, more than 10,000 civilians were directly killed by violence in Unity between late 2014 and late 2015 alone. Soldiers on both sides were poorly supplied with food and fed themselves at the expense of the civilian population. Militia from the pro-government Bul Nuer group also used these offensives as an opportunity to steal cattle and loot other goods, as well as abducting women. The timing of

the attacks also prevented people from planting crops. Every military action appears to have involved actions intended to destroy the means of sustenance for the civilian population.

26. It is not conclusive whether military commanders explicitly authorized cattle raiding by auxiliary militia. There were instances in which SPLA commanders arrested local youths who accompanied military offensives in order to steal cattle. However, there are many more instances in which cattle rustling was tolerated or encouraged; orders to steal, loot and abduct were not issued because they were not necessary, commanders and militiamen simply assumed that this was how hostilities would be carried out. Thus, the conduct of the war in Unity State overall appears to follow the principle of the 'ethics free zone' of the civil war of the 1980s-90s in which such behaviour was foreseeable and was tolerated insofar as it furthered the overall objective of destroying the social fabric and livelihoods of communities deemed to be supportive of the rebels.
27. By the end of 2015, nearly 560,000 people (90 percent of the state's population) had been forcibly displaced. Many of those sought refuge in the UN Protection of Civilians Site at Bentiu (where conditions were particularly deplorable in the rainy season due to flooding), across the border in Sudan, or in other towns. Others hid in the swamps and many cases of drowning were reported as people sought to collect water lilies for food, or to hide from soldiers. (There was a controversy among aid officials whether deaths from drowning should be counted among 'famine' deaths or not, resolved in favour of them being excluded as the immediate cause was neither hunger nor hunger-related disease.) The southern counties of the state were persistently in IPC level 4 ('emergency') throughout this period, and Leer and Mayendit descended into level 5 ('famine') in 2017.
28. The SPLA repeatedly blocked the delivery of humanitarian supplies to the area. One government commissioner is on record saying that because the humanitarians provided supplies to the SPLA-IO, they needed to be removed from the area.

## Wau/Baggari, Western Bahr al Ghazal

29. Wau and its environs have had a long history of

inter-communal conflict exacerbated by the 1983-2005 war, principally pitting the ethnic Fertit against ethnic Dinka. Unrest and violence occurred in 2012. In late 2015, the violence of the civil war reached Wau, with Fertit militia aligning with the SPLA-IO. Fighting escalated in 2016, with SPLA forces targeting Fertit communities in Wau and its environs.

30. The military strategy of government forces included violence against civilians, forced displacement (targeted on the basis of ethnicity) and destruction of property and the means of livelihoods. Many Fertit civilians who had been targeted in Wau were driven into nearby localities collectively known as 'Greater Baggari.' In May 2016, the UN estimated that 21,400 people had been forcibly displaced into this area, and were living deep in the bush out of fear of attacks, and surviving on wild yams, leaves and berries. The UN report also noted that health facilities had been vandalized and no health workers were present.
31. Three rounds of violence in June-July 2016 led to additional forced displacement. Following an attack by the SPLA-IO on 23 June, ethnically-targeted sweeps of neighbourhoods by the SPLA's Fifth Division forced 80,000 people to flee over the following days. On 28 June, following another attack, jointly by SPLA-IO and the Fertit militia, SPLA forces rampaged and displaced a further 120,000. A third round of violence in July displaced more. Some of those affected sought refuge in the UN Protection of Civilians Site and adjacent areas; others in church compounds; while many fled the town for the relative safety of the Greater Baggari area.
32. Between January and September 2017, the SPLA forces enforced a siege on Greater Baggari, affecting both local people and (especially) the displaced. An estimated 21,000-38,000 people were affected. Throughout this area, SPLA forces destroyed food stocks and crops, including uprooting root crops such as cassava which are cultivated in part because they keep for long periods without being harvested, and are therefore a useful reserve crop for times of hunger. This continued into 2018 with systematic looting and burning of villages and food stores.

33. Humanitarian access was severely restricted, with the SPLA permitting just a few airdrops in March and overland access for short windows of time in August-September. These restrictions were imposed in the face of strong and credible information about humanitarian conditions and pleas by aid agencies for access. The SPLA did allow (and encourage) relief to communities in Wau it considered friendly.
34. Conditions afflicting the affected population were extremely dire. There was a concentration of oedema cases among children under 5, which is a clear indication of mass starvation. By September 2017, the IPC assessment placed 10 percent of the Greater Baggari area in level 5 (catastrophe) conditions. After considerable debate, the South Sudan IPC Technical Working Group did not issue an explicit famine warning for this location, but conditions among the hardest-hit subpopulation undoubtedly met the criteria for such a designation.
35. With specific reference to the Greater Baggari episode in 2017, the UN Panel of Experts found that the Government of South Sudan had 'deliberately prevented food assistance from reaching some citizens. Such actions amount to using food as a weapon of war, with the intent to inflict suffering on civilians whom the Government views as opponents to its agenda.' This is a clear case in which government military commanders bear clear responsibility for starvation crimes.

## Yei, Central Equatoria

36. Yei County in Central Equatoria State was a breadbasket for South Sudan, blessed by fertile soil, plentiful rainfall, productive farms, a variety of crops, and access to markets. Along with most parts of Equatoria it was spared the ravages of the first phases of the civil war. However, in 2015-16, Equatorian groups began military mobilization to join the SPLA-IO and in July 2016, Yei was abruptly thrust into the front line of the war due to the fact that the leader of the SPLA-IO, Riek Machar, fled through the area to seek exile in the Democratic Republic of Congo, pursued by government forces. Subsequently, Yei County has been the site of ongoing insurgency with SPLA-IO-affiliated guerrillas controlling the countryside and government forces controlling the town and the main roads.
37. The first round of government military actions (July-September 2016) included treating civilians in Yei as enemy accomplices. These were conducted by the Sixth Division with additional forces drawn from the Mathiang Anyoor militia. There was a high level of directly violent attacks against civilians, including burning houses and other property, driving people from their homes, and destroying food crops. Yei town itself was besieged with an estimated 100,000 confined there and unable to pursue agriculture or other livelihoods. In the continuing conflict, soldiers and security officers have targeted civilians' houses, businesses and farms, and fear of attacks including killing, rape and torture has prevented people from moving which has restricted their ability to farm, trade and gather wild foods. Officers and men from the National Security Services have been deployed in Yei town where they are reportedly responsible for arbitrary arrests and detentions.
38. These attacks produced hunger almost from the beginning. People were reported as eating just once a day as early as August 2016, and resorting to eating wild foods. Tens of thousands fled to Uganda as refugees. By way of an example between July and September over 4,000 people were arriving into Uganda every day, many died en-route from starvation, thirst and a lack of medical care. Refugees at the end of June 2018 hosted by Uganda were in excess of one million, of whom 63 percent were children.
39. The cultivated areas and the size of harvest fell precipitously: in 2016 Yei produced food equivalent to 184% of local requirements but in subsequent years it suffered a deficit of 40-46%. Humanitarian assessments showed Yei rapidly reduced to crisis and emergency status. Extreme deprivation and hunger-related deaths were reported among groups fleeing to Uganda. While the levels of malnutrition and excess mortality were considerably lower than in some other parts of the country (including for example Greater Baggari and Leer and Mayendit counties), this was a particularly rapid descent into food insecurity.
40. The government restricted humanitarian access. In addition to general insecurity that affected aid

deliveries, the government blocked relief supplies to areas in which people were believed to be sympathetic to SPLA-IO.

41. Although Yei County did not descend into famine conditions to the same degree as elsewhere, many individuals died from lack of food, water and essential medical care during as a result of military actions, and the acts of deprivation by military commanders responsible are clearly evident.

## Options for Redress

42. The hunger, destitution and deaths in South Sudan since December 2013 are overwhelmingly the product of starvation crimes committed by the belligerent parties, especially the government. They are not the product of environmental or climatic factors, or economic crisis (though the latter played a role). Nor are they a failure of aid donors. The outcomes in terms of mass suffering and death were wholly predictable, especially so because of the experiences of war-famine in recent decades.
43. Options for redress include: prosecution; transitional justice mechanisms; and utilizing avenues for investigation leading to policy options such as sanctions. Sustained engagement with the relevant South Sudanese actors, notably civil society groups, is required to determine the appropriate mechanisms and processes.
44. On *prosecution*, this memo has identified potential starvation crimes that should be prosecuted:
  - The deliberate and systematic destruction of objects indispensable to the survival of a population, in Greater Baggari and in Yei County; and other prohibited acts including the forced removal of people into an area that cannot sustain human life;
  - Attacks on humanitarian aid workers, who are a protected category of persons.
45. Detailed analysis of the applicable law and potential avenues for prosecution are contained in a separate memorandum entitled 'The Crime of Starvation and Methods of Prosecution and Accountability'. For the purposes of this memoran-

dum, we draw attention to the principal formulation of the prohibition on crimes of starvation, as contained in Article 8(2)(b)(xxv) of the Rome Statute ('Article 8 starvation'):

**Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.**

46. The relevant considerations are the following:

- The crime of starvation does not require that the victims should die from starvation, only that they should intentionally be deprived of objects indispensable to survival (OIS). There are numerous instances (some of them outlined above) of the destruction, removal, rendering useless or otherwise depriving civilians of OIS in South Sudan.
- The term 'method of warfare' should be construed as akin to a contextual element that not only links the criminal acts to the conduct of hostilities, but becomes part of the conduct of hostilities. There are strong indications that the SPLA are using the destruction of OIS as a specific way of conducting hostilities, suggestive of the intentional use of starvation of civilians.
- The Article 8(2)(b)(xxv) crime of starvation may occur when a perpetrator acts with the knowledge that his conduct will as a virtual certainty cause starvation, regardless of the military purpose of the action. Circumstantial evidence will likely be critical in establishing the material elements of the crime. An example may be, if it is clear that a military commander or senior official is aware that there is a dire humanitarian situation and escalating food insecurity, and is aware that continuing to destroy OIS, prevent humanitarian relief or forcibly displace thousands of civilians, would as a virtual certainty result in civilians starving. This may lead to an irresistible inference that starvation was intended or would result in the ordinary course of events.
- Perpetrators often harbor other intents and

concurrently or concomitantly pursue other criminal and non-criminal purposes. The existence of any personal motives will not preclude a finding that the perpetrator also holds the requisite intent to starve. Any attack directed at the civilian population is prohibited, regardless of the military motive. In sum, in the circumstances where an alleged perpetrator pursues a lawful purpose but, in that pursuit, adopts criminal or non-criminal means, this will not preclude Article 8 from being engaged.

47. There is a range of factors or indices that will prove important indicators of intent in circumstances where a complex range of factors and intents require identification and assessment. Four factors appear most relevant and probative:

1. Awareness of the risk that an interference with OIS would lead to starvation (including whether the deprivation occurs in pursuit of an ostensibly lawful purpose);
2. Respect for the full range of relevant IHL prohibitions (e.g., the prohibition against terrorising the civilian population; the prohibition against collective punishment; the prohibition on the use of human shields and the prohibition against displacement);
3. The respect for IHL principles that create positive obligations applicable in the context of the conduct of hostilities; and
4. The concrete steps taken (or not taken) by the alleged perpetrator to ameliorate civilian suffering, particularly through the facilitation of OIS to affected civilian populations.

48. In assessing these four factors, relevant considerations will include: the nature, manner, timing and duration of any deprivations or attacks on civilians, including whether such attacks were long-term, persistent and/or indiscriminate; whether the attacks were widespread or perpetrated by single or many military components; and whether they took place as part of a campaign that systematically targeted the victims, including on account of their membership in a particular group. The analysis will encompass all relevant issues, including the general context, the repetition of destruction and

discriminatory acts, attacks against civilians more generally, involving a range of modes of perpetration, the scale of those attacks, and relevant policies or speeches encouraging the targeting those civilians.

49. IHL will provide a useful prism through which the intent of the alleged perpetrator may be viewed. The degree of adherence (or non-adherence) to these principles will tell their own eloquent tale about the existence of intent. In sum, however lawful the overall or initial purpose, any prosecutor seeking to establish intent would be logically and cogently able to rely upon the risk and awareness of starvation and the approach taken to those risks as evidenced, in part, by good faith attempts to abide by IHL precepts to ameliorate the effects of any (allegedly, incidental) deprivation.

50. In all cases, the individuals directly responsible for ordering these attacks and actions should be investigated and an assessment of the prospects of a prosecution considered. Additionally, senior leaders or commanders could be prosecuted internationally on the basis of joint enterprises or common purpose modes of liability or a range of other modes of liability such as aiding and abetting. Individual leaders or commanders who are remote from the scene of the crimes, but who can be shown to have in one way or another to have contributed to the crimes of others and to a degree that attracts individual responsibility will not escape accountability. At the ICC, co-perpetration entails establishing that two or more individuals worked together in the commission of the crime, including an agreement between these perpetrators, which led to the commission of one or more crimes under the jurisdiction of the Court. Co-perpetration requires the existence of two objective elements: (i) an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime.

51. There is a range of options for prosecution which could potentially be adjudicated domestically, nationally or internationally.

- On the domestic level, Chapter V of the ARCISS

contains provisions for transitional justice including a hybrid court, authorized to investigate war crimes and crimes against humanity committed during the course of the war, and to bring perpetrators to justice.

- On the international level there may be scope for an ICC investigation and prosecution. Uganda ratified the Rome Statute in 2002 and following the recent decision at the ICC on the Rohingya,<sup>3</sup> if the ICC were to apply the same reasoning to the case of South Sudan, namely that the court may exercise jurisdiction if an element of a crime contained in the Statute or a part of the crime is committed on the territory of a State that is party to the Statute, (in that case the element of the crime was the crossing of the border in the context of deportation) occurred on the territory of a State party, a preliminary examination could feasibly be opened. Given the vast number of South Sudanese civilians (in particular children) who have been forcibly deported to Uganda, this trans-border feature to South Sudan's criminal matrix may well be ripe for exploration.
- A prosecution could also be effected through a universal jurisdiction claim.

52. On *transitional justice mechanisms*, there are several avenues for consideration:

- Truth-telling: acknowledging that starvation is a crime and documenting its nature and extent, and those responsible, while also providing for the recognition and memorialization of its victims;
- Reparations and restitution, by the individuals or institutions responsible;
- Guarantees of non-repetition, in the form of public naming and shaming of those responsible, along with public education about responsibilities for starvation crimes. This can be either domestic (using South Sudan's National Assembly) or international (at the AU or UN).

53. On *utilizing avenues for investigation*, it is important to ensure that starvation crimes continue to be investigated and prominently featured across the relevant investigatory and inquiry apparatus of

the UN and AU. Well investigated and documented commissions of inquiry and panel of expert reports robustly highlighting starvation crimes and calling for accountability play a critical role in preventing and prohibiting starvation related conduct.

54. A fourth option is the complaint mechanisms available through various treaty bodies. Whilst conceding that this mode of redress may not necessarily effect visible or tangible results, in the way a prosecution may, it does offer an immediate option for redress.

55. The South Sudan case highlights the dilemmas faced by humanitarian agencies that wish both to provide immediate assistance, which requires obtaining the cooperation of the military authorities, and also document, expose and condemn the starvation crimes that are causing the humanitarian crisis. The case shows how all instances of negotiating access to conduct surveys and obtain humanitarian data, analyzing these data and choosing what label to use (e.g. IPC level) are all matters of sensitive judgment. There is no hard-and-fast rule for determining what decision to make. However, assessing potentially criminal responsibility for acts of starvation is one important consideration to include.

56. International organizations and aid donors will need to evaluate their assessment of crisis in South Sudan and response to that crisis in line with their legal obligations. These include UNSC Resolution S/RES/2417 ('UNSC 2417') of May 2018 on armed conflict and hunger, and obligations under IHL, International Human Rights Law, and compliance with the Rome Statute. The African Union and its Member States have an obligation to consider their actions with regard to South Sudan in accordance with Article 4(h) which concerns the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.

## BIBLIOGRAPHY/RESOURCES

---

### History of starvation/starvation crimes in South Sudan:

- David Keen, 2008, *The Benefits of Famine: A political economy of famine and relief in southwestern Sudan*, (2<sup>nd</sup> edn.) Ohio
- Luka Biong Deng, 2010. 'Social capital and civil war: The Dinka communities in Sudan's civil war,' *African Affairs*, 109/435, pp. 231-250.
- African Rights, 1997. *Food and Power in Sudan: A critique of humanitarianism*, London.
- Human Rights Watch, 1999, *Famine in Sudan 1998: The human rights causes*, New York.

### Overview of the outbreak of the war:

- Douglas Johnson, 2014, 'Briefing: The crisis in South Sudan,' *African Affairs*, 113/451, pp. 300–309.
- Alex de Waal, 2014, 'When Kleptocracy becomes Insolvent: Brute causes of the civil war in South Sudan,' *African Affairs*, 113/452, 347–369.

### Documentation of violations including starvation crimes:

- Joshua Craze and Jérôme Tubiana with Claudio Gramizzi, 2016. *A State of Disunity: Conflict Dynamics in Unity State, South Sudan, 2013–15*, Geneva, Small Arms Survey.
- United Nations, 2018. Final report of the Panel of Experts on South Sudan 12 April 2018, S/2018/292.
- African Union Commission of Inquiry, 2015. *Final Report*, Addis Ababa.
- Human Rights Watch, 2014. *South Sudan's New War: Abuses by Government and Opposition Forces*, August.
- Human Rights Watch, 2015, 'They Burned It All,' *Destruction of Villages, Killings, and Sexual Violence in Unity State South Sudan*, July.
- Report of the Commission on Human Rights in South Sudan, A/HRC/40/69, 12 March 2019
- Interim report of the Panel of Experts on South Sudan submitted pursuant to resolution 2428 (2018), S/2018/1049, 26 November 2018
- Report of the Commission on Human Rights in South Sudan, 13 March 2018, A/HRC/37/71
- Final report of the Panel of Experts in accordance with paragraph 2 of resolution 2353(2017), S/2018/292, 12 April 2018
- Report of the Commission on Human Rights in South Sudan, 13 March 2018, A/HRC/37/71
- Report of the Commission on Human Rights in South Sudan, A/HRC/34/63, 6 March 2017
- Geneva, Small Arms Survey. <http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP42-Unity-Dec-2016.pdf>. See below for reference to how similar destruction of crops and homes has been interpreted by the African Commission of Human Rights.

### Documentation of humanitarian/demographic outcomes:

- REACH, see: <http://www.reachresourcecentre.info/countries/south-sudan>
- IPC reports, see <https://reliefweb.int/country/ssd>
- Francesco Checchi, Adrienne Testa, Abdihamid Warsame, Le Quach, and Rachel Burns. 'Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018.' London School of Hygiene and Tropical Medicine, September 2018. <https://www.lshtm.ac.uk/newsevents/news/2018/war-south-sudan-estimated-have-led-almost-400000-excess-deaths>

### Relevant Law

- SERAC v. Nigeria case 155/1996 (2001),
- Decision of the African HR Commission, Communication No. 296/2005, Centre on Housing Rights and Evictions v. Sudan, adopted during the 45th Ordinary Session (held 13-27 May 2009)
- M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?* Second edition, Vol. I (ICRC pub, Geneva, 2005), p. 280.

- N. Melzer and G. Gaggioli, *Methods of warfare*, Chapter 9, *Oxford Guide to International Humanitarian Law*, Ed. by D. Akande and B. Saul, p. 6 (forthcoming, not published yet)
- Col PJ Cameron, *The limitations on Methods and Means of Warfare* (1980), 9, *Australian Year book of International Law*, 247, available at: <http://www.austlii.edu.au/au/journals/AUYrBkIntLaw/1980/49.pdf>
- S. Casey-Maslen, S. Haines, *Hague Law Interpreted, The Conduct of Hostilities under the Law of Armed Conflict* (Bloomsbury Publishing, 2018)

## ENDNOTES

---

- 1 Memorandum, 'The Crime of Starvation and Methods of Prosecution and Accountability'.
- 2 [Final report of the Panel of Experts in accordance with paragraph 2 of resolution 2353\(2017\), S/2018/292, 12 April 2018](#) para 50 and footnote 74 of the report.
- 3 Bangladesh situation, Pre-Trial Chamber: Decision on the Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute (6 September 2018) at para. 53

### Global Rights Compliance Group

Laan 20  
Den Haag, Netherlands  
info@globalrightscompliance.co.uk  
[www.globalrightscompliance.com](http://www.globalrightscompliance.com)

### World Peace Foundation

169 Holland Street , Suite 209  
Somerville, MA 02144  
worldpeacefoundation@tufts.edu  
[worldpeacefoundation.org](http://worldpeacefoundation.org)



*The Kingdom of the Netherlands Ministry of Foreign Affairs funds the "Accountability for Mass Starvation: Testing the Limits of the Law" Project implemented by Global Rights Compliance and The World Peace Foundation. The views expressed in this paper are those of the author(s) and may not coincide with the official position of The Kingdom of the Netherlands.*