Accountability for Sexual Violence by Security Forces in the East and Horn of Africa

Minutes
Day 1: Accountability of Domestic Actors

Welcome

The purpose of this roundtable is to look at what legal interventions have been taken to date to address sexual violence committed by the security forces in Somalia, Sudan and South Sudan and to determine what more could be done to reduce impunity for these crimes. The legal interventions that will be discussed include working with local government and non-government actors, strategic casework and legal advocacy. Questions about which strategies have been the most effective will be addressed— for example, what has been the result of taking cases to the African Commission? Can legal advocacy change the behaviour of international actors? Can forums such as this one be used to push these legal interventions forward? Is there room for joint action or cooperation? A series of recommendations will be developed for action to be taken at the conclusion of the roundtable.

Sessions I and II: Context and domestic legal system in Somalia, Darfur and South Sudan

Some of the scheduled presenters for Session I, on the context and history of each region, were absent. Presentations instead began with Session II, on domestic legal systems. These presenters included information about and in some circumstances focused on the context in each region, thereby incorporating both topics into Session I.

Presentation One: Darfur
Mohamed Elmahjob (Advocate, Darfur)

The first presenter discussed the ongoing conflict and current state of the legal system in Darfur. The conflict began in 2003 and is ongoing. The parties to the conflict are the government of Sudan and various rebel groups. The government is supported by the military, the police and the Janjaweed, a rebel group loyal to the state. The most prominent rebel groups fighting against the government forces are the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). Hundreds of thousands of people have been killed throughout the conflict and many more displaced. Crimes committed during the conflict have included sexual violence, with actors on both sides committing acts of rape against women and children.

After the war started in Darfur in 2005, the Sudanese Ministry of Justice issued a decree which
effectively ensures the immunity of the security forces, including the Janjaweed and other militias. Many steps need to be taken to file a case against a person from these forces, including requesting and obtaining permission from the Minister of Justice. This may take years to obtain. Amendments made in 2015 to the 2005 interim constitution further consolidate the absolute power of President Omar al-Bashir, who can now appoint and remove people from almost all executive, military and judicial roles. The President also made a declaration in November 2014 establishing a ‘Rapid Response Force’, which reports not to local military force commanders but directly to the Sudanese government in Khartoum. This Force is generally accepted to comprise of and formalise the Janjaweed militia. Survivors of rape and other human rights abuses in Sudan are denied justice for two reasons: firstly, inadequacies with the legal system itself, and secondly, because of the immunity of security actors, who comprise a large percentage of the perpetrators.

In October 2014, Sudanese army forces allegedly raped women and girls in the north Darfuri town of Tabit, which is situated close to a military base. Certain sources have claimed that around 200 women and girls were raped. However, as there are 80 staff members stationed at the base, this number is likely to be less. The military surrounded the village from 9pm on October 30 and committed the rapes throughout the night and the next day.

There are allegations that when members of the UN Assistance Mission in Darfur (UNAMID) attempted to report the incident to Mission Headquarters, it took it five days to respond. When UNAMID was eventually granted permission to enter the area in which the rape allegedly occurred, they were only able to do so with a military escort, who prevented them from carrying out an effective or impartial investigation. The Sudanese government will only carry out effective investigations and prosecutions against members of the opposition. It will not conduct impartial or effective investigations into its own troops.

**Presentation Two: South Sudan**

Linda Tyego (Advocate, South Sudan)

Sexual violence in South Sudan is widespread. Systematic rape is commonly used as a weapon of war. Under the South Sudan Penal Code, rape is punishable by 14 years imprisonment and a fine payable by the perpetrator. However, this punishment is not adequately enforced. Marital rape is legalized under the Penal Code. The Penal Code does not explicitly criminalise sexual harassment, but does contain a provision in section 250 that criminalises ‘acts intended to insult the modesty of a woman’, making it punishable by two years imprisonment and a fine. These types of acts should be more effectively defined and criminalized, because such behaviour can evolve into more serious sexual violence. Domestic violence is common in South Sudan and is not effectively addressed by the law. Underage marriage is also common, and parents have legal rights to sell their daughters or to give them away as gifts. This is the case because there is no legal right conferred on the girl to resist such a procedure, even though it is known to be
common. Forced marriage may also occur when to widows who are seen to be ‘inherited’ by the male relatives of their deceased husbands.

At present in South Sudan, levels of sexual and gender-based violence (SGBV) are higher in regions that are not under government control. Tribal conflict is one of the primary factors driving up the rates of SGBV. Most SGBV cases go unreported for numerous reasons, including fear of being blamed for the incident, of being mistreated by family, of having to marry the perpetrator and of being unable to find a husband.

The presenter ended with a discussion on what needs to be done to reduce the rates of sexual violence in South Sudan. Firstly, rules and policies aimed at enforcing legal prohibitions on sexual violence should be incorporated into all government institutions. Secondly, lawyers, judges and prosecutors must be trained in the law relating to sexual offences. Finally, women’s groups need to be empowered.

**Presentation Three: Somalia**

Clare Brown (LAW)

The presenter on the legal framework in Somali concentrated on South-Central Somalia. The relevant domestic legal framework applicable to the commission of rape consists primarily of the Somali provisional constitution and the Penal Code, along with procedural laws such as the Criminal Procedure Code and the Organisation of the Judiciary Act.

The Penal Code criminalises rape and other forms of sexual violence in Articles 398, 399, 408 and 409, the latter two provisions of which relate to the facilitation of prostitution. Its provisions relating to sexual offences are piecemeal and weak and fall significantly short of international best practice standards. There also appears to be significant misunderstanding within the Somali legal and judicial community about the concepts of rape and consent. The Somali constitution protect rights of equality, liberty and security of the person, protection against cruel, inhumane and degrading treatment and rights to redress for human rights violations and due process. It specifically prohibits all forms of violence against women in Article 15. Articles 127 and 128 outline the roles and responsibility of the security forces. Article 128 provides that human rights violations allegedly committed by members of the security force against civilians must be tried in civilian courts.

Legal responsibility for sexual violence will normally be borne by the individual who perpetrates the crime. However, Somali law also recognizes command responsibility, meaning that commanders within the military or police can be held legally responsible for the acts of their subordinates. The constitution also confers obligations of the Somali government, allows for public interest cases and mandates the establishment of a Constitutional Court, indicating that government agencies can also be held responsible for abuses committed by public actors. However, the Constituional Court has not yet been established.
Questions and Discussion

Is the situation in Darfur getting better or staying the same?

Armed forces have had full immunity since 2005 and there has been impunity for government actors since this time. The situation has gotten worse since the amendments made to the constitution earlier in 2015 which transfer powers to appoint all government actors to the President. In the period between 2005 and 2015, there have been some years when the situation has been calmer and some where it has become more violent.

A lot of sexual violence has been committed in recent months, including in Khartoum. The Janjaweed have a base north of Khartoum and frequently harass women in the village.

Has the ICC indictment made any difference?

The main effect of the ICC indictment is that it has given the government increased motivation to silence people and crack down on individual freedoms. The newspapers cannot publish anything about the trial. Anyone accused of collaboration with the ICC will be imprisoned. A policeman was accused of collaboration and sentenced to jail for seventeen years. The UN Security Council is not taking meaningful action to ensure the case is successfully prosecuted.

If militias from South Sudan cross the border into Sudan and commit crimes, can they be tried by Sudan?

Under South Sudanese law, people who commit crimes across the border must be tried in South Sudan. However, many of the South Sudanese militias who commit crimes across the border are doing so because they are mobilized or have the tacit approval of the South Sudanese government and are therefore unlikely to be prosecuted.

For cases in which nationals of another country commit a crime within Sudan, the Sudanese criminal procedure law differentiates between two types of offences: those that are criminalised in the home country of the alleged perpetrator and those that are not. The law states that if the act is criminalised in the other state, it should be prosecuted there; if it is not criminalised in the other country, then it should be prosecuted in Sudan.

Are private prosecutions possible in these countries?

They are possible in South Sudan and Sudan. They are not possible in Somalia.

Is it possible to challenge the system of immunity in Darfur?

It would be technically possible to bring a case to challenge the immunity of certain actors in certain circumstances. However in practice, if the immunity was challenged through a political case, it would require the agreement of the government. This would be extremely unlikely in
cases involving military or police forces. The question of bringing a civil case was not discussed at this stage.

Is it possible to challenge crimes committed by the military in the civilian courts in Sudan?

If the military commits human rights abuses against civilians, the case should be tried in a civilian court. In practice, this does not happen. Crimes committed by the military are often committed on a military base and are therefore easily dealt with through military system. There are no systems in place for witness protection, so it is rare that cases are reported.

Who are the main perpetrators of sexual violence?

In all three regions, sexual violence is primarily committed by two groups of people: men known to the survivor and armed men in uniform.

What is being done to uphold the rule of law in South Sudan?

The situation in South Sudan is similar to that in Sudan: it is very difficult to bring cases, especially against government forces; permission from relevant authorities must be granted; beginning prosecution is an extremely long procedure; and there is very limited awareness of how to access the formal justice system. It is also very difficult to challenge government action due to the security risk involved.

What is the basis of Somali law? Do the rules of Sharia law- for example the fact that the evidence of a woman is worth half of that of a man’s- present a challenge in terms of protecting the rights of women?

Though it is sometimes stated that there are three systems of law in Somalia, in practice there are two that are enforced- formal and customary. According to the constitution, both of these legal systems must comply with Sharia law, and many legal practitioners are trained only or primarily in Islamic jurisprudence. However, Sharia law is usually not strictly applied in itself. A strict interpretation of Sharia law would award more rights and freedoms to women than the current customary law (Xeer). For example, under Sharia law, women will inherit less land than their male counterparts; but under Xeer, they cannot inherit land at all.

The requirement that a sexual act must be witnessed by two males to be considered proven can actually be beneficial to women in the case of adultery cases, though it is detrimental in rape cases. However, under the customary system, rape cases may result in the survivor being forced to marry the perpetrator, which is not mandated under Sharia law.

In rape cases in Somalia, what evidence other than witness testimony can be used?
To prove rape in Somalia, survivors will usually require a medical certificate. However, this is extremely difficult to obtain. At present, only one hospital in Mogadishu will provide survivors with medical certificates that are admissible in court.

**Is the South Sudanese conflict tribal or political?**

It is complicated. It began as a political dispute but there are many factors at play, including tribal tensions.

**What is the role of UNAMID and UNMISS role in protecting civilians?**

It is very difficult for peacekeepers to protect civilians in these countries. In South Sudan, there are allegations that UNMISS has not done enough. However, it is also known that if UNMISS is not present in a certain area, people are killed. In UNAMID, it is clear that the peacekeepers themselves need protection. President al-Bashir has said he may refuse to extend the mandate of the peacekeepers. It must be asked what the effect of this would be.

**Is it possible in any of the jurisdictions to take an anonymous public interest case against the government for abuses committed against civilians?**

In Somalia, it is not possible to take a case where the claimant remains anonymous. The constitution allows for public interest cases to be taken against the government for violating the constitution. However in practice the Constitutional Court has not yet been established.

There are provisions in the South Sudanese Child Act that allow witnesses to remain anonymous in certain offences involving children. However, to the knowledge of the South Sudanese attendees, these have never been applied in practice.

In Darfur, it is possible for witnesses to remain anonymous. Since 2013, no details relating to sexual violence cases involving children have been made public.

**Innovative strategies to strengthen domestic legal systems and institutions**

**Presentation One: Strategies employed in Kenya**

Samwel Mohochi (Mohochi and Company Advocates)

The first presenter discussed innovative legal strategies to address sexual violence committed by the security forces in Kenya. Kenya has high levels of sexual violence and remains a highly tribal and patriarchal society. Rape is rarely reported. The first time sexual violence was discussed publicly by doctors and lawyers was 1999 at a medical-legal conference. The conference lead to the creation of a taskforce which produced a report inclusive of recommendations on how to better address sexual violence in Kenya. These recommendations included the establishment of gender units within the police, training of police and other actors...
on how to handle sexual violence cases, severely punishing police officers for failing to effectively investigate cases and establishing an office of a Special Rapporteur on sexual violence. Most of these recommendations are yet to be fully implemented.

Another strategy put into place for addressing sexual violence came after the post election violence of 2007, which involved many allegations of sexual violence, in the form of a joint enquiry into the violence by civil society and the police. However, many NGOs pulled out of the process, alleging that the police were using it to sanitise their record of abuse.

In the last fifteen years, rates of sexual violence have remained the same. Policing and security operations have increased, often at the expense of measures aimed at protecting human rights. At least two security operations carried out in Nairobi since 2006 have involved allegations of sexual violence by the Kenyan authorities. The strategy employed by civil society after these operations is to provide medical and legal services to the survivors and to conduct legal advocacy highlighting violations of the Constitution and international law.

The debate surrounding the Kenyan Sexual Offences Bill, which was passed in 2010, was extremely challenging in terms of the arguments mounted by those who opposed its passage. These included that African women ‘said no when they meant yes’ and that the criminalisation of sexual harassment would constitute a serious impediment to men trying to find a wife. The Sexual Offences Bill originally contained a section that made it a crime to make false allegations of rape, which represented a serious threat to survivors wishing to report a crime. However, this section has now been repealed.

Ultimately, the most important strategy in addressing sexual violence in Kenya has been the development of a comprehensive legal and policy framework which is cross-cutting through all relevant sectors. This framework includes:

- The domestication of relevant international instruments;
- The Sexual Offences Bill;
- A National Policy on Gender and Development;
- Guidelines to inform service provision and training manuals for practitioners, including medical, psychosocial and legal support staff;
- Guidelines to outline who can be held accountable and for what;
- Guidelines for the medical management of sexual violence;
- Development in forensic capabilities of Criminal Investigations Departments;
- A framework through which the Department of Public Prosecutions can gazette private lawyers from sexual violence NGOs to prosecute sexual violence cases on behalf of the government.
Presentation Two: Strategies employed in Somalia
Nerida Nthamburi (LAW)

The second presenter concentrated on innovative legal interventions to increase accountability currently being employed in Somalia. The presenter outlined three objectives underpinning work being undertaken in Somalia: increasing the capacity of governments to uphold human rights; improving the capacity, quality and integrity of justice institutions; and expanding legal services for marginalized communities. In achieving these objectives, it is important for civil society organisations to use what is already available within the community being targeted, including leaders in the field and existing institutions.

Projects currently underway in Somalia include the drafting of the Sexual Offences Bill, Female Genital Mutilation Bill and the ratification of the Convention on the Elimination of Discrimination against Women. It is important that for any act of drafting legislation of ratifying a convention, it is accompanied by an enactment and implementation plan, including the drafting and adoption of policies and guidelines for relevant actors. These actors will generally include legal, judicial, prosecutorial and medical actors, along with relevant civil society organisations. In the context of sexual violence, the implementation of legislation particularly targeting SGBV offences is important. The impact of such legislation should be to ensure all reporting and investigation systems and procedures are survivor-centered, to place positive obligations on public officials to implement the laws, and ultimately increase the number of successful prosecutions of SGBV.

In regards to violations committed by the security forces, it is possible to increase accountability and bring about change by engaging with the bodies responsible for their actions. This includes the government of the territory in which they operate, the peacekeeping mission present, the UN and international donors. These activities are currently being undertaken in Somalia with positive results.

Access to legal redress may be increased by providing support to legal aid providers and other legal actors such as lawyers, investigators, prosecutors and the judiciary. Activities that may be conducted in this area include specialised training for SGBV responders, the establishment of one-stop medico-legal response centres, advocating for an increase in the number of female investigators and prosecutors and increased engagement with customary legal systems. The presenter used examples of strategies that have been employed to increase the capacity of legal actors in Somalia, including the production of a report into all legal aid providers in Somalia identifying challenges and making recommendations for how to address these, the establishment of Somalia’s first legal aid network, strengthening the referral pathway between SGBV response providers and ensuring appropriate oversight bodies are in place.
It is possible to change behaviour by undertaking strategic casework. This may range from civil litigation to criminal prosecution to complaints lodged with relevant domestic, regional or international bodies such as the UN Human Rights Committee, African Commission on Human and People’s Rights, the East African Court of Justice. The aim of such casework is to establish important legal precedents, effect changes in legislation or policy and to directly provide legal redress to affected individuals and communities. Finally, legal advocacy can be an effective way to increase pressure and create changes in law, policy and practice.

Presentation Three: Strategies employed and attitudes towards justice in South Sudan
David Deng (South Sudan Lawyers Association)

The current conflict in South Sudan began in December 2013. It began as a political dispute within the Sudan Peoples Liberation Movement (SPLM) and quickly spread throughout the country. It escalated because of numerous underlying factors; the initial political dispute was only the trigger. These underlying factors include the lack of separation between the political and military spheres, a culture of impunity and a failure to address past violations and violence.

There is little to no access to justice through the formal justice system, especially for sexual violence. This is because of a lack of political will as well as difficulties presented in the context of conflict. For example, in January 2014, one hundred people were arrested and detained in a military compound; several months later, the compound was invaded by opposition forces and all of the detainees escaped. Incidents like this are common.

Another option for accessing some kind of justice from within South Sudan is the possibility of a reconciliation process. This issue has been highly politicised. Riek Machar and John Garang discussed the possibility of reconciliation before the adoption of the Comprehensive Peace Agreement (CPA) in 2005. However, after the adoption of the CPA and the attainment of independence in 2011 there was a conscious decision to defer the question of reconciliation.

All options for addressing ongoing human rights abuses now come from outside South Sudan. These options are as follows:

AU Commission of Inquiry into South Sudan: The AU Commission of Inquiry into South Sudan (AUCISS) is mandated to investigate human rights abuses and other violations of international law and to provide recommendations on the best means via which to ensure accountability and access to justice. The Commission published a report in June 2014 which did not make any concrete conclusions, which many took as a sign of its weakness. However, there are rumours that a strong final report will be issued which will include a list of names of those responsible for abuses going to the highest levels of government. This report will be considered at the AU Summit in 2015.
*Intergovernmental Authority on Development (IGAD) mediation in Addis:* The IGAD discussions have focused on a number of different issues, one of which is the establishment of a Truth Commission, the mandate of which would be to document and report on human rights violations over different periods of history. This would be a non-judicial process that would aim to provide some measure of accountability.

On 25 August, IGAD held a summit in Addis Ababa with the warring parties and other stakeholders. A protocol on resolving the ongoing crisis was signed by the government and other IGAD member states but not by the rebels.

*Independent tribunal:* Discussions are currently underway regarding whether a criminal tribunal should be established. AUCISS may include recommendations on how this would work in practice. Outstanding issues for determination include whether such a tribunal would have international involvement or whether it would be a wholly national process.

*Agreement in Arusha:* In January 2015, three factions of the SPLM signed a reunification agreement in which they make some mention of accountability for war crimes committed since December 2013.

**South Sudanese Perceptions of Justice**

A study has recently been completed on South Sudanese perceptions of justice, reconciliation and accountability. The core question underlying the study was what the people most affected by the South Sudanese conflict think needs to be done to address the legacy of violence and to destroy the culture of impunity. The study describes the results of a survey conducted throughout South Sudan but targeting the areas most directly affected by the conflict since December 2013. For further information on this study, contact the South Sudan Law Society.

**Policy considerations**

There is a gap between demand for accountability and mechanisms that supply it, with very little being done to service that demand. How to address that disparity involves important policy considerations, including how to broach the subject of accountability without raising expectations, how to ensure institutions are gender inclusive, and in the context of sexual violence, how to identify the optimal outcomes for survivors. The presenter in this session offered the assessment that it has become clear that national systems are unable to provide systems of accountability and access to justice on their own. The formal system is not sufficiently functional, and the customary system does not effectively deal with violations of human rights. Obtaining access to justice for survivors requires international involvement.
Questions and Discussion

Several Committees have been formed to address the violations in South Sudan. What has the effect of these been?

These Committees have had little effect. One was established under the Supreme Court of Justice. It produced a report which was submitted to the President. Nothing has been heard since. The military produced its own report into allegations of violence, but this has not been made public and there has been no suggestion that it will be. With regards to the many different forums in which the conflict is being addressed, forum shopping is a significant concern. Involved actors will engage most with the forum they perceive to be most beneficial to their own interests. The agreement in Arusha in January 2015 has had the effect of buying the negotiators more time, as they have made a small number of concessions that will allow the discussions to continue indefinitely.

Have efforts been made to establish transitional justice mechanisms in South Sudan?

This has been discussed but nothing has been established as yet. Any attempts at transitional justice would have to be modest, targeted and manageable. It should go back to 1992, when the current government was first established. However, the parameters of any such mechanism has not been discussed in South Sudan.

The South Sudanese people are split between those who strongly favour reconciliation and those who favour retribution. It is unclear how these two groups can be brought together.

A further issue that must be considered is that of timing. Many people think that conversations about transitional justice or reconciliation are premature, given that South Sudan is still at war. However, there are activities that can and should start now: the documentation of crimes, the preservation of evidence. The strategy to date has been to focus on key individuals, to build demand for local strategies and to create space to have a conversation about these issues. It is important to make determinations about certain issues now. For example, the issue of victor’s justice is a real concern in South Sudan. It is difficult to imagine any post-conflict government being fair or accountable. Civil society should already be having conversations about how to address this.

Has the ability to gazette private lawyers to act as prosecutors in for cases relating to sexual violence in Kenya improved access to justice for survivors? This has been suggested in the Somali context but met with significant opposition.
At the height of the election violence in Kenya there was a near total collapse of the state. The police were not able to function effectively and cases were not referred to them fast enough. Many of the cases that alleged police abuse were not investigated at all. In general, there were over 5000 cases relating to the election violence that were commenced and then closed due to lack of evidence. The government did not have the capacity to deal with these cases itself. Of cases involving sexual violence that were prosecuted, there were always complaints about the quality of the prosecution.

The office of the DPP is empowered under Kenyan law to gazette lawyers to prosecute criminal cases. After large numbers of allegations of sexual violence committed during the post election violence surfaced, institutions like FIDH, COVAW and other women’s NGOs were invited to submit names of lawyers capable of prosecuting sexual violence cases. It is unclear if this in itself has contributed to an increase in the ability of sexual violence to access justice. It is clear however that in recent years, sentences for SGBV have increased. It is most likely because the legal infrastructure surrounding such cases has improved in general, and the gazetting of private lawyers to hear such cases is part of this improvement. One of the reasons it is advantageous to involve NGOs in the prosecution of offences is because they will often have been involved from the beginning: they may have been the first responders, involved in providing medical services, documented the crimes committed and collected the evidence. This allows for effective and efficient prosecutor-led investigations into these crimes.

Another participant compared this to the situation in South Sudan, in which many if not most criminal cases are brought by private lawyers for profit. The state in South Sudan has effectively abdicated its responsibility to prosecute. This has had a negative impact on the overall ability of the South Sudanese people to access justice.

However, there may be an intermediate solution. Not all cases should be prosecuted by private lawyers. However, it may be beneficial to have that option available if certain criteria are met. It may also serve as an incentive for the government to better train and support public prosecutors.

Could the strategies used in Somalia work in Sudan? Is it possible to ensure that there is ownership of such strategies by local communities?

In Somalia, it was important that all stakeholders were included in the planning of all activities from the beginning. These stakeholders include civil society groups, traditional and religious leaders and different government agencies. The movement comes from the community itself. In Puntland, for example, religious elders released a fatwa prohibiting FGM before drafting of the Bill began. In all regions, all stakeholders have been involved in the drafting process of both the Bills and the implementation plans. It is possible to transfer this strategy to other contexts.
**Comment on female police officers, prosecutors and judges**

One participant pointed out that although having more women in the police and judiciary may be an effective strategy for increasing women’s access to justice, it must also be considered that putting women in these positions exposes them to significant danger. For example, in Afghanistan, many women were hired to join the police force to improve the situation for female Afghani civilians. Of these women police officers, 60% were physically or sexually assaulted.

Another participant discussed the need for more female judges in Somalia. There is currently one female judge in Mogadishu, but she is unable to hear important cases because she will be harassed and discriminated against by the authorities and customary leaders. She judges on some cases, but must do so only for minor issues and without drawing attention to herself. There are many qualified and intelligent women in Somalia who should be allowed to join the judiciary.

**Comment on best practice strategies for reporting and investigation allegations of sexual violence**

In most fragile and conflict-affected states, survivors of sexual violence will be afraid to file a complaint with the police. The best practice model is therefore to allow civil society organisations to file complaints on behalf of the survivors. A law allowing this was recently implemented in Burundi.

Further, it is important to ensure that there is appropriate oversight given to the implementation of all new laws and policies. In Burundi, a lot of money was allocated to security sector reform, including the drafting of new policies and to trainings. However, it was realised after some time that these had very little impact if there was no oversight. Civil society organisations should play a significant role in providing that oversight.

**Concluding observations**

The study done on perceptions of truth and justice in South Sudan is very interesting as it allows legal interventions to be tailored to the perceptions and wishes of local communities. It would be interesting to know whether similar surveys have been conducted in other regions.
Another interesting consideration is how might societies in which there is very little rule of law encourage or move towards criminal investigations. It is unclear whether the ICC has the capacity to make a difference in these countries. Other options may need to be explored. This includes the collection and documentation of evidence now for possible prosecutions at a future time. However, in these countries there is very little capacity to collect or analyse forensic evidence. Options for addressing this issue must be considered. For example, it may be possible to collect evidence in one state and send it to another state to be stored and analysed.

Finally, it is important to address the question of how women in the legal sector can be empowered to undertake their duties in the face of low capacity, lack of trust in the formal justice system by survivors and serious security threats. This will require building the capacity of public prosecutors and judges as well as private legal actors and NGOs.
Customary mechanisms

Presentation One: South Sudan
Frederique van Drumpt (Cordaid)

The South Sudanese customary system is very broad and contains many different element and interpretations. Overall, it does not provide strong protections for women, but this is a very general observation. Some elements of the customary system could be viewed as pro-women. Considering that 80% of cases are dealt with through the customary courts, there is a strong incentive to strengthen the system that currently exists, or at least use it as a referral system, rather than to concentrate solely on the formal system.

It is important to find points of engagement between the formal and customary systems. At present, there is confusion and contention about how these interact. This is made more complicated by the fact that there any many different types of customary law. In some areas, customary actors say they always refer sexual violence cases to the formal courts. However, this does not happen everywhere. Customary law also recognises witchcraft, and cases that try women for this ‘offence’ are inherently unjust and discriminatory.

Customary and statutory justice systems

The presenter shared perceptions from South Sudanese actors of the relationship and tensions between the formal and customary systems. Some actors commented on the strengths of the customary system: for example, customary authorities are better equipped to enforce judgments, the customary system includes a focus on the survivor as well as the perpetrator; and the customary courts are more familiar and accessible to the majority of South Sudanese people. Some actors in South Sudan however, including those from the customary governance system, pointed to the flaws in the customary law, including that it not follow procedural fairness rules and that those distributing justice could not be challenged.

When developing projects focusing on the customary system, the presenter warned against focusing on due process for all people rather than a target group. Projects designed specifically to assist women obtain legal services, for example, may have a detrimental effect on procedural fairness standards by providing one group with legal representation while refusing it to male defendants, who are more likely to be accused of the crimes. This had the effect of encouraging women to make false claims of sexual violence, men not having legal representation etc.

Presentation Two: Somalia
Ibrahim Ahmed Ali (Somali Women’s Development Centre).

Customary law in Somalia is called Xeer. Three categories of people constitute the decision makers through the customary system: religious leaders, clan elders and traditional leaders. These leaders sit together and reach agreement on social norms that can be used as a governing
tool and to determine the outcome of particular cases. Each clan has its own formulation of customary law. For inter-clan disputes, many norms are agreed upon between clans and hark back to the 1950s and 1940s. For intra-clan disputes, these norms will vary from clan to clan. This means that the customary system has a different effect on the rights of women depending on what clan system the woman’s case is heard under. In some clans, for example, a survivor of sexual violence will be given compensation. In other clans, it will lead to violence between male clan leaders, which is in itself likely to have a negative effect on women and children within the community.

Sometimes, the customary law is successful in protecting the rights of women. In January 2015, for example, a Somali woman was arrested for the murder of her daughter. She was heavily pregnant at the time. She was arrested and it was expected that she would be hung. The case was then referred to the customary system. Through this system, religious leaders and paralegals worked together and concluded that Islamic jurisprudence provides that a person cannot be sentenced to death for murdering their child, but can be sentenced to fifty years imprisonment. This was an example of the customary system working together with the formal system.

However, this does not always happen. The customary system is often detrimental to the rights of women. For example, women cannot inherit land. They are also generally unable to inherit anything which generates an income; the male relatives will inherit such items and the customary system will uphold this.

**Questions and Discussion**

*What is the role of paralegals and legal advisors in the Somali customary system?*

Only religious and cultural elders are permitted to be decision-makers in the customary legal system. However, formal legal actors can sit within customary courts to provide assistance, support or advice. In this way, they can provide some input, and in some cases may be able to improve the outcome of the case for vulnerable members of society. However, in most cases, the elders will resist external interference and the result of cases involving women will be to their detriment. Most of the time, disputes are resolved through the payment of compensation. In sexual violence cases and other cases involving women, this compensation will often go to the male leaders of the clan rather than to them directly.

*In South Sudan, customary law review centers were established to bring customary law in line with the Constitution. Are these or can these be successful?*

There does not seem to be any progress made on attempts to streamline formal and customary law, or in codifying the customary law. One participant said that in South Sudan, it would be very difficult to do this given the differences in the customary systems between the regions. Another participant said that in Sudan, it is important to write down the customary law.
In recent years, there has been increased competition between the formal and customary law. This also has to do with breakdowns in communication and information about the spheres in which each may operate. Community leaders feel increasingly threatened by the formal law. Young people are more informed about the formal system, and because of this there is some forum shopping when initiating a legal case. This is particularly obvious in land disputes. If a local chief divides up land in a way that is to the detriment of one person, they may then go to the formal courts to attempt to get a more favourable judgment. This creates more conflict.

In South Sudan, the norms around sexual violence have changed. Historically, there were customary laws equivalent to International Humanitarian Law that prohibited rape and other forms of violence against women and children, but these have eroded over time. Is this the case in Sudan or Somalia?

These laws exist in Somalia and may have existed in Sudan.

Can cross-clan customary mechanisms be used to facilitate wider, nation-wide reconciliation processes?

These mechanisms are well-suited to resolving bilateral disputes between clans but have not developed in a way that would make them suitable for resolving politically and socially complicated nation-wide conflicts.

Is the customary law in Somalia likely to change to better accommodate the specific needs of women in the future?

There have been some small developments made but real change is likely to take an extremely long time.

If traditional leaders are better able to enforce judgments, has any consideration been given to involving them in an enforcement capacity in the formal legal system?

This would be problematic and may be seen as hiring people to act as vigilantes. The ability of customary leaders to enforce judgments stems from the fact that there is significant community pressure to comply with judgments made through the customary system. This pressure does not exist in the formal system but is an area that should be focused on.

Closing remarks

In societies where the customary system is used to resolve the vast majority of complaints, it seems necessary to engage with it in some way. If it is used to address serious criminal offences, how can this engagement be used to ensure that human and women’s rights are taken into account and upheld? One way may be to involve women in customary mechanisms. This does not happen in any of the countries currently being focused on but has happened in other contexts.
Another strategy may be to identify a champion elder who advocates for women’s and human rights issues. Another may be to establish Community Oversight Boards that link elders to paralegals and therefore to the formal legal system.

Session V: African regional mechanisms

Presentation One: African Union mechanisms
Elizabeth Deng (Amnesty International)

The first presenter in this session discussed different regional mechanisms that can or could be established in the African context, focusing on the Commission of Inquiry in South Sudan but also addressing other mechanisms.

AU Commission of Inquiry on South Sudan

The first of these mechanisms is the AU Commission of Inquiry on South Sudan. Though this was discussed in a previous session, the presenter in this session focused on the procedure involved in establishing the Commission and the challenges with this process. The Commission was set up by the AU Peace and Security Council in December 2013, soon after the outbreak of violence on the 15th. This initially inspired much optimism. However, it was not until March that Commissioners were sworn in, despite the obvious urgency of the situation, which was a disappointment to many people. Initially, the Commission was given a three-month mandate: from March until June 2014. An interim report was submitted in June, which did not make any conclusions. It was not until the end of August that investigators actually arrived in South Sudan. These investigators included an expert on sexual violence. However, while the experts were highly qualified in appropriate fields, it was widely agreed that it took too long for them to be deployed.

A final report was submitted to the AU in October, but has not yet been released. A lot of advocacy is being undertaken to ensure the report is made public. The UN has recently called on the AU to release the report. There is general optimism about its quality and content.

The government generally did not cooperate with the investigators and writers of the report but made some attempts at doing so in the final days that investigators were in the country, including by allowing them into an area in which people had been massacred to conduct investigations there.

The Chair of the Commission, former Nigerian President, Olusegun Obasanjo, has made statements about accountability including that no South Sudanese leader can claim innocence and that nothing can move forward until justice is done and seen to be done. This is seen as a positive sign by many observers.
However, there is a concern that the report will not be published. It is believed by some that the threat of publishing the report is being used as leverage in the ongoing political negotiations. There is also a fear that releasing the report may disrupt negotiations, for example by releasing the names of people to be prosecuted, which may involved politicians and others involved in the talks. It may therefore provide a disincentive to pursue peace.

Possibility of hybrid court

In May 2014, Ban Ki Moon made comments indicating he supported the establishment of a hybrid court to address the atrocities in South Sudan, similar to the court established in Senegal. The AU Commission then released a statement saying it also supported the establishment of a hybrid court. However, numerous people are of the opinion that this remark was not planned and did not necessarily enjoy the support of all of the commissioners.

Other ad hoc mechanisms

Numerous other mechanisms can be established at the regional level to look further into certain contexts. In Mali and the Central African Republic, for example, human rights monitors were sent in. In Darfur, an AU High Level Panel was established, which produced a comprehensive report and recommendations that were not implemented. AU Special Rapporteurs may also make visits to certain places and produce reports. FIDH has recommended that the AU come up with a permanent mechanism to deploy monitors to conflict, though this has not yet received traction.

All of these mechanisms are difficult to utilise in South Sudan, as South Sudan has not deposited its letter of accession to African Charter with the African Union. AU bodies are therefore prevented from making visits to South Sudan in an official capacity.

At the AU session in April and May 2014, a resolution was adopted on ‘the Situation of Women and Children in Armed Conflict’. The Special Rapporteur on Women and IDPs and Refugees is also writing a special report on this issue which may be utilised by actors in the field.

Presentation Two: International Conference on the Great Lakes Region
Deirdre Clancy (UN Monitoring Group on Somalia and Eritrea; however speaking in her personal capacity)

The second presenter discussed the International Conference on the Great Lakes Region (ICGLR). This conference produced a voluminous set of texts including new instruments which were ratified by states including Sudan and South Sudan. The framework contains the most progressive approach to addressing allegations of SGBV that has been seen any region, though the provisions are legally ambiguous and there has to date been little implementation of the ground. The Pact Framework consists of interlocking legal frameworks and instruments, including a special committee on international crimes with investigative powers. The Pact must
be signed in its entirety - it is not possible to sign individual instruments. By signing the Pact, the presidents of Sudan and South Sudan are therefore signing treaties designed to hold people accountable for war crimes.

The Pact was developed over a period of 10 years and ratified in 2008. The UN, AU and civil society organisations were all deeply involved. The long gestation period for the pact gave many people the opportunity to be involved, to the extent that sections of the instruments were drafted by members of civil society. The Pact consists of the Dar es Salaam Declaration as its foundation, ten legally binding protocols, a programme of action, a fund and a political mechanism. The specific Protocols within the Pact include a Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (‘Protocol on International Crimes’) and a Protocol on Judicial Cooperation. All of the protocols that make up the Pact include a strong focus on gender violence and discrimination between the sexes. The Protocols establish a series of mechanisms with provisions governing how certain crimes may be responded to, including by providing guidance on appropriate forum and allowing for joint commissions of inquiry. The many cogs that come together to create the Pact means that it is extremely comprehensive but also hugely ambitious, multidisciplinary and difficult to implement.

The Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children:

- It recognises a broad range of acts that can be subject to criminal penalty, covers extradition matters and urges maximum sentences.
- Is also relevant to situations in which violations are committed outside the territory of a county.
- Defines SGBV very broadly and clearly defines it as an international crime. In fact, it defines it so broadly that there is debate about whether the definition should be considered international best practice.
- Requires that states remove all statutes of limitations. However, there are complicated legal issues with this related to the distinctions between national and international law.
- Contains a comprehensive set of measures relating to the investigation and prosecution of sexual offences and compensation to be given to survivors.
- Provides for modified procedures to take into account the emotional state and need for anonymity of victims.
• Focuses on the treatment of offenders, which is an area generally not included in other international instruments focusing on SGBV.

• Comes with model legislation is attached, which includes provisions on elements such as committees that oversee how claims are processed and mechanisms to ensure the safety and security of survivors.

• Mandates the recreation of a regional facility to for training police, judicial officers and others who handle cases of sexual violence.

The establishment of the regional facility in particular indicates that the state parties of the Pact see SGBV as a collective concern, rather than an individual state concern.

SGBV is also a key element of the Committee for the Prevention of Genocide set up by the Pact to oversee and monitor allegations of war crimes and crimes against humanity. The Pact framework also allows for the establishment of national committees to inquire into allegations of the commission of international crimes and suggest other special measures such as the deployment of a response team. The Committee for the Prevention of Genocide was approached to look further into crimes committed in Southern Kordofan and Blue Nile. There was initially great interest by the Committee in this, but the issue was extremely political and there was significant backlash. Ultimately, the pressure to look into the issue was lost and no monitoring activity took place.

There are some gaps in the focus given to SGBV within the Pact, including: sexual violence against men; that issues of state immunities are not dealt with; and that issues of amnesty are not dealt with. Otherwise, it is a very comprehensive framework.

The question then is how this framework can be used. Firstly, many of the treaties included in the Pact are directly applicable within member states and are in force. Secondly, the model legislation can be used to improve approaches to investigating and criminalising SGBV in member and other states. Finally, these Protocols can be used as source of law in certain circumstances within the African Court and Commission system.

Presentation Three: The African Commission
Mohamed Badawi (African Centre for Justice and Peace Studies)

The next presenter discussed the African Commission, with a focus on six cases between 2010 to 2013 on the situation in Sudan. The presenter said that since being referred to the ICC, the Sudanese government has been increasingly responsive to local mechanisms. Before the referral, it would ignore petitions made to the Commission. However, it has now realised that the Commission is the best option for it. It accuses and arrests people for collaboration with the ICC but not with the African Commission.
In one of the six cases taken to the Commission, a human rights activist was accused of collaboration with ICC and captured and raped by security agents. The other cases do not involve sexual violence, but also relate to people opposing the Sudanese government. Local courts in Sudan would be incapable of trying such allegations. The African Commission accepted the cases on the basis that for those accused of opposing the government there is a denial of access to the courts and torture had become common practice. This argument negated the need to prove that local remedies had been exhausted.

The African Commission is one of the only tools that can be used to promote access to justice in the context of Sudan. However, it has certain drawbacks: it is extremely slow, disorganised and may on occasion even lose information and submissions. However, the Sudanese government will not accept any other mechanism. We should therefore be using the Commission and simultaneously conducting advocacy to push it to move faster and more effectively.

Questions and Discussion

What was the case selection process for the cases submitted to the African Commission relating to the situation in Sudan?

Legal organisations have turned to the Commission for all allegations of human rights abuses by the government because there is no other option. The ICC case is not achieving anything and the local system cannot be used to try abuses.

In South Sudan, are there tradeoffs between justice and peace?

The culture of impunity in South Sudan is well known. The result of this culture is continued perpetration of violations of humanitarian and human rights law. There is an argument currently that the report by the AU Commission of Inquiry should not be released because it names prominent political figures as perpetrators of abuses, and this would be detrimental to the peace process. However, the participant answering this question believes that there can be no peace when there is impunity and the most credible way to threaten impunity at present would be to publish the report. The participant disagrees that the named individuals are necessary for peace. On the contrary, if people who have perpetrated international crimes have participated in the peace process, it would be better to exclude them from continued involvement now.

Could the ICGLR play a mediation role? What clout does the review committee of the Great Lakes Pact have?

To date, the ICGLR has been more engaged with micro issues, for example the return of refugees in the Democratic Republic of the Congo. It was also very successful in its operations in Kenya after the post election violence. In that instance, it played a responsive role- it was the first to arrive in the region and the first to seriously address the issue. The Pact is an interesting and comprehensive package but doesn’t have political prowess. At this stage, it should be considered
a secondary mechanism that can be used to bolster legal frameworks and support engagement with political processes.

**Are there still advantages in taking cases over abuses committed in Sudan to the African Commission when the government has so little will to change its behaviour?**

The Sudanese government does not significantly change its behaviour as a result of cases taken to the Commission. It can also seem as though taking a case to the Commission entails a lot of work with little reward. However, at the very least, taking cases to the Commission raises attention about certain issues and keeps in conflict in Sudan on the regional agenda. There was also one case where the Sudanese government agreed to release people identified by the Commission from prison. However, generally, the Commission should be seen as a tool for advocacy and standard setting, rather than a mechanism that can be used to prevent ongoing abuses.

**Does the Great Lakes Pact have territorial effect and is it applicable to conduct of, for example, Ugandan troops in Somalia?**

Yes, the Great Lakes Pact has extra-territorial effect. As Uganda is a state party, the Pact will apply to the actions of its troops in Somalia, or in South Sudan. The Pact is particularly important for abuses committed in South Sudan, which is a state party to it, as it has not effectively ratified any other international instrument.

**Are hybrid courts a viable option for South Sudan?**

There is a real risk that people will see a hybrid court as an attack on their sovereignty. This was the reaction had by many people in Sudan when the situation in Darfur was referred to the ICC. It will therefore be important to carefully consider what kind of hybrid court should be established. It is a viable option if this is negotiated effectively.

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**International legal framework**

**Presentation One: International Human Rights and Humanitarian Law**

Irene Nyakagere Thomas (Pan African Lawyers Association)

The first speaker focused on the international legal instruments relevant to the commission of SGBV in conflict. Focus was given to the Declaration on the Elimination of Violence Against Women. This instrument is currently only a Declaration, which cannot confer legal obligations, but may become a convention. It requires states not to commit SGBV and to adopt positive measures to prevent and punish violence against women. Another relevant instrument is the Optional Protocol to the Convention on the Elimination of Discrimination Against Women,
which emphasizes the role of the state to prevent violence against women and prosecute those responsible, whether that violence is committed as a public or private act.

Other relevant instruments include the International Covenant of Civil and Political Rights (ICCPR) and its first Optional Protocol, the Convention Against Torture and the African Charter. Each of these instruments effectively, though not explicitly, prohibit SGBV. If states have signed the first optional protocol to the ICCPR, then individuals from those states can submit complaints alleging violations of the treaty to the UN Human Rights Council. The African Commission and the African Court also have an advisory jurisdiction. This could potentially be a tool that could be used from the lawyers from Somalia, Sudan and South Sudan to request opinions on certain actions by the governments in each state.

Most international legal instruments do not specifically focus on sexual violence, though they can be interpreted to prohibit it. Lawyers working in these areas could therefore advocate for a new instrument that explicitly prohibits SGBV, or to push for the ratification of CEDAW and its optional protocol.

Presentation Two: Legal Framework Applicable to Sexual Exploitation and Abuse (SEA) Committed by Security Actors
Elizabeth Deng (Amnesty International)

Sexual exploitation can be defined as any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including profiting monetarily, socially or politically from the sexual exploitation of another. Sexual abuse is the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

The need for a framework addressing and criminalizing SEA was brought forefront in 2002 following allegations of widespread SEA committed against of refugee and internally displaced women and children by humanitarian workers and peacekeepers in West Africa. In 2003, the UN Secretary-General released a bulletin on Special Measures for Protection from SEA, applies to humanitarian workers, peacekeepers and other representatives of the international community. Under the Bulletin, SEA constitutes an act of serious misconduct and is grounds for disciplinary measures including summary dismissal. Acts of SEA may include trading sex for food and other non-monetary items or services, verbal sexual abuse, forced prostitution and forced nudity as well as more obvious examples of rape and sexual slavery. Under international criminal law, SEA will usually constitute rape and therefore may also constitute torture or cruel, inhuman and degrading treatment, a crime against humanity or a war crime.
Jurisprudence from the Special Court of Sierra Leone (SCSL) touches on the issue of SEA. The Revolutionary United Front and the Armed Forces Revolutionary Front used sexual violence designed to destroy entire communities, including gang rape, rape with weapons and other objects, rape in public, forced rape between family members, forced nudity and so forth. Forcing women to undress in view of the public and forcing sexual abuse between family members were decided to constitute outrages upon the personal dignity of civilian women as a war crime.

The Inter-Agency Standing Committee (IASC), the primary mechanism for coordination of humanitarian assistance, has developed core principles to be incorporated into agency codes of conduct, including:

- Codes of conduct of national armed forces, foreign forces
- Code of Conduct for Blue Helmets:
- African Union Commission Code of Conduct for peacekeepers

Each of these codes of conduct define and prohibit SEA.

Despite this legal framework, there are numerous difficulties in ensuring protocols prohibiting SEA are effectively incorporated and mainstreamed in peacekeeping missions and other security structures. The power differentials at play in a military occupation, peacekeeping mission or in police custody can also affect the independence and impartiality of the judicial process. The judge may be reluctant to rule against powerful or government forces and may have the same fear of reprisal as survivors who report the offence. There are also significant difficulties arising from the immunity of peacekeeping forces in local courts. There may also be jurisdictional difficulties. For example, extensive sexual violence committed by the JEM rebels in Sudan has been documented. However, Sudan is unlikely to assist in prosecuting the rebels in Sudanese court.

The UN Due Diligence Policy on UN support to non-UN Security Forces may be helpful for actors who want to advocate for greater accountability within security forces, including peacekeeping forces, supported by the UN. The policy provides that UN support cannot be provided if there are substantial grounds to believe that the security forces are committing serious violations of international law. In such circumstances, the UN must take measures to try to change the behavior of the security forces; and if this is not effective, must withhold support. Certain groups have used this policy to advocate that the UN refuses support to international or domestic forces who are engaged in such abuses and who have not taken measures to address this.
Domestic accountability for violations of international law

Presentation One: Civil case in the United States
Allison White (Ballard Spahr)

The Torture Victim Protection Act (TPVA) and the Alien Tort Statute (ATS) are federal laws in the US that allows a civil claim to be brought in a federal court for international crimes committed abroad. The presenter in this session focused on the TPVA, which provides a civil remedy for two international law torts: torture and extrajudicial killing. The law gives redress where these crimes were committed by defendants who acted under apparent authority or under the ‘color of law’ of a foreign nation. The perpetrator under the TVPA must be a natural person, rather than a state or a corporation.

According to US jurisprudence, to constitute torture, an act must cause severe physical or mental pain or suffering and be intentionally inflicted on that individual for a specific purpose, such as punishment obtaining information, intimidating them, coercing them or ‘for any reason based on discrimination of any kind.’ Courts have generally held that an individual can be secondarily liable under a "command" liability theory for aiding and abetting in violations of the TVPA.

Challenges to bringing a case under the TPVA include: whether the defendant is immune due to being a state official; the ‘political doctrine’ question, whereby the court cannot intervene in a question that may be considered political; whether the case would be better dealt with in another forum under the ‘forum non conveniens’ doctrine; whether the act was committed within the last ten years, as required by the Act; whether local remedies in the territory the crime occurred in have been exhausted; and importantly, whether the defendant can be considered to have ‘minimum contact with the US’.

‘Minimum contact’ will be most easily established where the defendant is present within the United States. It also may be established in other circumstances, though these are poorly defined within the Act and subsequent jurisprudence. In one case, Ahmed v. Magan, the Court awarded $15,000,000 under the ATS and TVPA despite a jurisdictional challenge based on the fact that the defendant was outside the jurisdiction. It did this because the defendant was a permanent resident of the US. However, numerous cases have been dismissed due to the court finding that it did not have personal jurisdiction over defendants who were outside the country.

Presentation Two: Universal Jurisdiction
Adam Hundt (Deighton Pierce Glynn Solicitors)

Universal jurisdiction (UJ) is the term used to describe laws that give a court jurisdiction over crimes committed outside the territory in which it operates. Crimes that trigger international jurisdiction vary from state to state but are informed by international criminal law, codified in the
Rome Statute. Under the Rome Statute, Article 7(1)(g) provides that rape and other sexual violence of comparable gravity constitute crimes against humanity, and Article 8(2)(b) and 8(2)(e) provide that rape and sexual violence may also constitute grave breaches of the Geneva Conventions. Prohibitions of torture and cruel, inhuman and degrading treatment are also included in the African Charter.

Under UK law, torture is defined under Section 134 of the Criminal Justice Act as the intentional infliction of severe pain or suffering on another, where it is either performed as part of a person’s official duties or where it is done with the consent or acquiescence of a public official. The offence can be committed “in the UK or elsewhere”, regardless of the nationality of the accused. Unlike the rules under the TPVA, there is no requirement that the defendant have any connection with the UK, though the prosecutor may decide there is little to be gained from commencing a case against someone outside the territory. Domestic UK jurisprudence increasingly supports the position that rape and sexual violence is, or at least can be, a form of torture. The UK is a state party to the Convention Against Torture (CAT), as are Somalia and Sudan. CAT imposes a duty on state parties to either prosecute those who have committed torture or to extradite them to a more appropriate jurisdiction for prosecution.

The UK has UJ over a small number of serious offences under the Geneva Conventions Act and the Criminal Justice Act. These offences include war crimes, genocide and crimes against humanity. Under these UJ laws, the UK has a duty to prosecute people who are alleged to have committed or ordered these crimes. The legislation also provides that police should investigate even if the suspect is not in the country. These laws were little used before the arrest of General Pinochet of Chile in 1998. Though numerous cases have been taken under UJ laws in recent years, there has only been one successful UJ case in UK history: a conviction of an Afghani mujahadeen military commander for torture and hostage taking in 2005. This case was politically viable to take and to win at that time. Other cases present a more significant political challenge.

There are two UJ cases currently underway. The first is against Colonel Kumar Lama, a former Nepalese army officer charged with torture allegedly committed during Nepal’s civil war. This case is currently going through the appeals process.

The other case is that of Prince Nasser bin Hamid al-Khalifa. Prince Nasser was due to visit London to attend the 2012 Olympics. A dossier of evidence was sent to the DPP asking him to investigate allegations that the Prince had committed torture Bahrain. The fact that the allegations related to his personal and direct commission of torture made the case more viable, as it was not necessary to prove a chain of command. Initially, the DPP refused to investigate on the basis that Prince had state immunity. This gave the lawyers on the case the opportunity to challenge that concept.
A Bahraini activist brought a case in the High Court challenging the Prince’s immunity. The activist had suffered torture in Bahrain, though not by the Prince himself. There were many procedural problems with the case, including extreme difficulty in serving papers on the Prince. This alone took about a year. Eventually, just before the hearing, the DPP agreed that the Prince did not have immunity. The Judge on the case recorded the DPP’s agreement that the immunity did not exist, so that a judgment now exists on which arguments against the existence of such an immunity may rely.

There are significant obstacles to the use of UJ laws in the UK. Due to recent changes in the law, all issuances of arrest warrants and all prosecutions require the consent of the Attorney General. For members of current governments, the UK may also issue ‘special mission’ immunity, which provide that the holder of the visa cannot be subject to prosecution in UK territory.

There are other opportunities for promoting accountability even where attempts to take UJ cases fail. It is possible, for example to refer cases to the Home Secretary to ensure that the person the allegations are made against is excluded from the UK for immigration purposes. If the UK government is complicit in the abuses, a civil case may be brought against it. It may also be possible to bring a civil claim against UK companies whose employees commit claims abroad.

Questions and Discussion

Can a case under the TVPA and ATS be taken against members of a current administration?

It depends on which member of government. Current heads of state and some ministers will not be able to be held liable in a human rights lawsuit. However, once they leave office, they may be sued for abuses committed while they were in power. The other hurdle is that the member of the foreign government has a sufficient connection to US territory, which generally requires them to be present in the jurisdiction. This is less likely for current members of foreign administrations.

Are there different categories of rape under UK law? Are survivors given medical, psychosocial and legal support like they are in Somalia?

There are different categories of rape under UK law. Under UK law, the police have a duty to refer survivors to medical and psychosocial services, though they do not have a duty to refer them to legal services.

Under UJ laws in the UK, the requirement that the suspect be present within the territory to actually arrest them presents a hurdle. Is it possible to extradite someone to the UK for the purpose of prosecuting them? Has the UK ever sent investigators outside the country?

It is unclear whether the UK could legally extradite people to the UK to face trial for crimes committed outside the UK. This requires more research. However, it is very unlikely the UK would do it even if it could for political reasons. The UK can and does send investigators outside
the UK. How likely it is to do this in practice depends on whether or not the case has received significant publicity and attention.

**How will the proposed changes to judicial review laws in the UK affect the ability of people in the UK to access justice?**

The proposed laws narrow the circumstances in which someone can apply for judicial review of an administrative decision. It also reduces the space for NGO involvement. This will make it harder for people to initiate a case and to access justice, but it will not make it impossible.

**In the UK, if an individual perpetrator cannot be tried, can their commander be tried in their place?**

Yes, if you can establish that the commander had an official connection to the conduct that forms the basis of the allegation. Even if such a connection is established, the complicity of the commander will not be automatic, as the commander could mount an effective defence. However, if you can provide that the conduct happens regularly and the commander knew or should have know about it, he or she should be able to be held responsible.

**When will a state actor have immunity?**

State actors generally have immunity for acts committed in their official capacity. However, it is possible to argue that offences such as sexual violence cannot have been committed in an official capacity and are therefore not subject to the immunity. This question is complicated and political. Courts are generally unwilling to adjudicate on the actions of other states.

**Why is it easier to challenge corporations than government officials?**

It is easier because they do not have immunity laws to protect them. However, they are also not considered capable of committing a criminal offence. This means that only civil compensation claims can be taken against corporations, rather than criminal prosecutions.

**How did the Bahraini activist in the Prince Nasser case have standing when he wasn’t himself tortured by the Prince?**

The court was satisfied that had a close enough interest to the actions of the Prince to justify giving him standing: he had been tortured in Bahrain for anti-government activity; he remained active in Bahraini politics; and his family was still there and at risk of being tortured. The lawyer for the defendant did not challenge the activist’s standing to bring the case.

**If a prosecution is ongoing and the suspect escapes but later returns, will the prosecution be able to continue?**

This depends on the internal systems and policies of the police.
Day 2: Accountability of International Actors

Welcome and overview

Day 2 focused on how international actors, including international donors, peacekeepers, the African Union and the United Nations, may be held accountable for sexual violence committed by security forces. It also covered legal advocacy both locally and within the international community.

Session I: Criminal accountability for violations of international law

Presentation Two: Domestic Prosecutions
Angela Mudukuti (Southern African Litigation Centre)

The first speaker in this session focused on the case of Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others (the “Zimbabwe torture case”). The facts of that case occurred in the run up to the 2002 elections in Zimbabwe. The election was between the ruling party and the Movement for Democratic Change (MDC). Government supporters raided the MDC Headquarters, rounded up those who supported or were suspected of supporting the MDC and subjected them to torture. Many of these people then fled to South Africa.

The Southern African Litigation Centre (SALC), which took the case, collected a dossier of evidence supporting these allegations from doctors and lawyers who provided services to the victims on the ground. The document put together by SALC for the South African National Prosecuting Authority (NPA) argued that this torture was widespread and systematic and therefore constituted torture. Under the South African Implementation of the Rome Statute of the International Criminal Court (ICC Act), a person may be tried for crimes against humanity committed outside state territory so long as the perpetrator is present in South Africa. The dossier argued that as Zimbabwean officials traveled regularly to South Africa, South African courts had jurisdiction to try the crimes they allegedly committed.

Originally, the NPA decided not to investigate the case, presumably because of the political sensitivities involved. SALC challenged this decision by the NPA through judicial review. This challenge eventually went to the Constitutional Court, which ruled that the NPA must begin an investigation. Because SALC had collected the evidence immediately following the allegations of torture, all relevant evidence was in South Africa and readily available to the NPA.

This case was taken strategically; the evidence was overwhelming and readily available and it will be used to develop important precedent within South Africa. It was also a creative method of ensuring some form of accountability in Zimbabwe. Zimbabwe is not a signatory to the Rome
Statute and does not have an independent judiciary willing to make decisions against the government, leaving very little opportunities for legal redress within the country. This case went for eight years and was heard by three courts. There is now solid precedent set for the investigation of crimes against humanity committed in a foreign territory within South Africa.

This case is also useful because it demonstrates how the civil and criminal law can be used effectively to initiate the investigation of offences. In South Africa, legal organisations can submit evidence to the prosecutorial authorities to prompt an investigation, and any decision made by those authorities not to investigate despite the existence of that evidence can be called through judicial review. This strategy can be employed elsewhere. It is also a good example of civil society bodies working together to collect evidence on the ground and then use that evidence for the purpose of pushing for a case to be heard.

To improve accountability for international crimes, it is also necessary to work with countries that demonstrate political will to ensure such crimes are tried. This includes working with state parties to the Rome Statute to ensure it is effectively domesticated into their national law.

**Presentation Two: ICC Case on Darfur**

Mohamed Elmahjob (Advocate, Darfur)

The next presenter discussed the current ICC investigation into Sudanese President Omar al-Bashir. The Security Council referred the case to the ICC in 2005. Seven people have now been indicted by the court in relation to the ongoing conflict in Darfur. The Security Council has been unable to enforce the warrant for al-Bashir’s arrest. Since his indictment, he has traveled to countries that have an obligation to arrest him and transfer him to the ICC but have not done so. The ICC case has had many negative consequences for those committed to the cause of justice within Sudan and has taken up time and resources without delivering real results. In the opinion of the presenter, there is real will within the ICC to try al-Bashir. However, as the ICC itself does not have the power to arrest anyone, this will is unable to be translated into meaningful action. The mandate and powers of the ICC should be expanded so that it has the ability to enter a country for the purposes of arresting those it has indicted.

**Questions and Discussion**

*Is there a possibility for looking into criminal liability for multi-national corporations, including private security companies, currently operating in Somalia?*

Participants were not aware of which companies currently operate in Somalia that could be argued to be involved in criminal activity, but this may be a possibility. SALC would be interested in looking into whether any South African companies are currently operating there, whether they have been complicit in any abuses and whether it may be possible to hold them accountable.
Has the ICC case inspired any confidence in the Sudanese people that justice may be done? Is there any hope for the future?

At first, Darfuri people believed that the ICC case may achieve something. However, at this point, Darfuri people do not want any more people referred to the ICC. To date, it has had a negative impact on the lives of human rights defenders, has expended a lot of time and resources and it seems as though justice may never be done.

If the ICC has failed in providing access to justice, can the Sudanese legal system step in to fill this gap?

There is currently no capacity or ability within the Sudanese legal system to hold people accountable for serious crimes in an impartial and effective way.

Session II: Legal obligations and strategies to ensure accountability of peacekeepers and bilateral forces

Presentation One: Overview of abuses by and accountability of foreign actors
Dierdre Clancy (UN Monitoring Group for Somalia and Eritrea; but speaking in her personal capacity)

The first presenter in this session introduced this topic by discussing the different ways in which foreign actors may have legal responsibilities for their actions within the states in which they operate. For example, multiple security forces and militias are supported and trained by third party states. There are also security forces present and operating in these countries independently from the peacekeeping forces there, including for example Ethiopian forces in Somalia. These forces may have a constant presence in the country or may cross the border periodically to deal with certain issues.

Another issue is the presence of private security companies operating within these states. In many conflict and post conflict contexts, the weakness of police and other security actors create a vacuum that is frequently filled by such companies. In some instances, this may amount to mercenary activity. These companies generally if not always insert immunity clauses into their contracts with the host government. It is very difficult to hold them accountable. Questions of the most appropriate jurisdiction in which to do so may also arise. For example, it could be asked whether the government of the host state has any residual legal responsibility to ensure private security actors within its territory.

One instrument to look to when considering strategies for engaging with security actors including peacekeepers is the UN Human Rights Due Diligence Policy for UN Support to Non-UN Security Forces. This was discussed in an earlier presentation. It does not ensure
accountability as such but it can make a difference by applying pressure to create behavioural change.

Presentation Two: Legal Framework Applicable to Peacekeepers and Bilateral Forces
Moses Sande (LAW)

The second presenter in this session discussed the role of peacekeepers and bilateral forces in Somalia, Darfur and South Sudan. In Somalia, there have been allegations against both the African Union Mission in Somalia (AMISOM) and bilateral forces for committing sexual violence; in Darfur, the UN Mission in Darfur (UNAMID) recently conducted investigations into an alleged mass rape of Dafuri women which many, including the UN, have stated were not independent or impartial; and in South Sudan, there have been allegations by INGOs and NGOs that the UN Mission in South Sudan (UNMISS) has failed to protect the civilians under its control. It is therefore relevant to examine both the legal obligations on peacekeepers not to commit sexual violence and their role in responding to allegations that have been made.

The presenter began with a brief overview and history of peacekeeping operations. When the UN began deploying peacekeepers in the 1950s, operations were characterised by three guiding principles: the requirement for consent from the host country, the impartiality of the peacekeeping troops and the non-use force except in self defence or in defence of the mandate. Peacekeeping operations have now developed from operations designed to observe, verify and report to operations with a more assertive role in both ‘enforcing’ the peace and engaging in political and state-building activities. Most peacekeeping operations are now multinational and multi-disciplinary, and include a focus on building the rule of law and promoting respect for human rights. All such operations must be approved by the UN Security Council pursuant to Chapter Seven of the UN Charter.

The laws applicable to peacekeeping missions differ from the laws applicable to bilateral forces that invade a country without the permission of that country’s government. Invading forces are subject to IHL, ICL and international human rights law, though the extent to which IHRL applies is subject to debate. In some circumstances, the applicable rule of IHL will be those that apply in occupied territories. These legal frameworks will also apply to peacekeeping forces. However, an internal legal framework will also apply to these operations, consisting of the Status of Force Agreement (SOFA) between the host country and the peacekeeping force, Memorandums of Understanding (MOUs) between the international organization and the troop contributing country, Standard Operating Procedures (SOPs) and various policies and Codes of Conduct.

The SOFA describes the relationship between the peacekeeping force and the host state. It specifies that peacekeeping force will respect all local laws and regulations, but gives non-civilian members of force immunity in local courts for criminal matters, providing instead that allegations against military personnel must be investigated and prosecuted by the troop contributing country. Military personnel also have immunity in from civil claims arising out of
activities carried out in the line of duty. Conduct not carried out in the line of duty should be heard by a Standing Claims Commission established for that purpose. In reality, however, in most if not all UN peacekeeping missions, that Commission has not yet been established. The MOUs reiterate these obligations and duties and are signed by each troop and police contributing country. The SOPs set out pre-deployment requirements, the duties of the military police, rules relating to the establishment of Boards of Inquiry and may include a Code of Conduct. The UN and the AU also have specific policies relating to certain areas, including the prohibition of sexual exploitation and abuse.

These instruments set out a procedure for the investigation of allegations of crime or misconduct against peacekeeping personnel. The presenter discussed this procedure in the context of AMISOM. Generally, allegations are initially subject to a Board of Inquiry (BoI) at the contingent level. If the offence requires further investigation, the matter is then referred to AMISOM Headquarters, which will also establish a BoI. This BoI produces a report which should be sent to the Head of Mission and the Peace Operations Support Divisions (PSOD). These bodies will then make a recommendation about whether the allegation should be investigated and prosecuted by the Troop Contributing Country (TCC). If so recommended, the TCC should investigate the allegations and report back to AMISOM on the progress of those investigations. In reality, this process is followed within AMISOM but the TCCs rarely report back on the progress of cases. It is also uncommon that sexual offences are referred through the AMISOM system, at least partly because there is no mechanism through which Somali civilians can lodge complaints within the AMISOM structure.

Both the AU and the UN have policies specifically relating to the prohibition of SEA. The UN Secretary-General has released a Bulletin on Special Measures for Protection from SEA, and the UN has produced a ‘Comprehensive strategy on assistance and support to victims of SEA by United Nations staff and related personnel’. The Code of Conduct for UN peacekeepers has also recently been updated to include a specific prohibition of SEA. AMISOM has also adopted a Policy on Prevention and Response to SEA.

As the internal legal frameworks for peacekeeping operations provide that troop members must be tried under their own laws, the domestic law of each TCC is also relevant. This includes military codes, criminal codes and the constitution of each state. IHL and ICL apply to sexual violence that constitutes war crimes, and ICL applies to sexual violence committed as a crime against humanity. Relevant human rights treaties signed by each TCC will apply in most cases. Domestic and international law also prohibit torture. Sexual violence has now been found to be a form of torture by human rights courts in the African, Inter-American and European systems as well as the International Criminal Tribunals or Rwanda and the former Yugoslavia.
The final presenter discussed the legal framework applicable to the bodies responsible for peacekeeping operations, including both the troop-contributing country and the international organisation responsible for their deployment. According to Article 3 of the Draft Articles on the Responsibility of International Organisations for Internationally Wrongful Acts, every international wrongful act by an international organization entails the legal responsibility of that operation. ‘Internationally wrongful acts’ in this context refers to grave breaches of the Geneva Conventions or other serious violations of international law. The next question which must be considered is what happens when an agent of a state is placed at the disposal of an international organization, as happens in the case of peacekeepers. Article 7 of the Draft Articles provides that the act of a body placed at the disposal of another international organization shall be considered an act of the latter organisation if the organisation exercises effective control over that conduct. International jurisprudence generally holds that effective control should be determined by ‘factual control’ over ‘specific conduct’, determined on a case-by-case basis.

The fact that an international organization is legally responsible for certain conduct does not mean however that they can be held legally accountable. Under Article 105 of the UN Charter, the UN and all UN staff members acting in an official capacity enjoy ‘all privileges and immunities’ necessary to fulfill the purpose of the organisation. Section 18 Convention on the Privileges and Immunities of the United Nations further provides that this includes immunity from all legal process. Article 40 of the African Charter and the General Convention on the Privileges and Immunities of the Organisation of African Unity give the same immunity to the AU. However, the AU statute does not include the limitation that the immunity must be necessary for the organisation to fulfill its purposes. This indicates that there may be room to argue that UN peacekeeping personnel have limited immunity. It could be asked whether having immunity in local courts for allegations involving sexual violence is necessary for the peacekeeping force to fulfill its mandate.

Another potential avenue for challenging the immunity would be to argue that the survivors of abuse by peacekeeping forces have a right to a remedy under international law. The UN Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide that all victims of such violations should have ‘equal access to an effective judicial remedy’. However, it does not state who this remedy should be provided by. Bodies that may provide remedies include national courts, Standing Claims Commissions such as those supposed to be established by UN peacekeeping operations, human rights courts and international tribunals. Where domestic courts have no jurisdiction and international bodies do
not have the means to order and enforce remedies, as in many conflict-affected states, it may be argued that the UN has the legal obligation to provide the remedy as it is the only organization capable to doing so.

This is what was argued in the Dutch case of *Mothers of Srebrenica v the UN*. In 2007, a civil action was filed before the District Court of The Hague by 10 women whose family members died in the genocide as well the Mothers of Srebrenica, an association representing 6000 women who lost family members. The claim was brought against the UN and the government of the Netherlands. The Netherlands sent a Dutch peacekeeping force to form part of the UN peacekeeping force in the 1992-1995 Bosnian war. Thousands of Bosnian Muslims sought shelter at the Dutchbat-controlled UN compound while Bosnian Serb forces overrun Srebrenica on 11 July 1995. On 13 July, the outnumbered Dutch peacekeepers forced hundreds of Muslim families out of the compound. These civilians were then massacred. The UN claimed its absolute immunity under the UN Charter. This argument was accepted by the court. The claim against the Dutch government went to the Supreme Court and the government was found liable in July 2014, after the decision in Nuhanović v The Netherlands.

Nuhanović v The Netherlands was brought by Hassan Nuhanovic, a UN translator whose mother, father and brother were forced out of the compound, and the family of Rizo Mustafić, an electrician at the UN who was forced out by his employers, against the Dutch state. They were initially unsuccessful at the District court, who held that the UN had effective control over the troops at the time of the massacre, rather than the Dutch government, and was immune from suit. The case was appealed to the Supreme Court and in this instance was successful. The court ruled that even though Dutchbat was working under the UN, top military and government officials in The Hague also had effective control over their actions at the time they forced the victims out of the compound. This decision was arrived at for a variety of reasons, including that the commanders in Holland had the ability to change the behaviours of the troops on the ground, but did not do so. The court held that both the UN and the Dutch government could be held to have effective control over the same troops at the same time.

The presenter also discussed the ongoing US case of *Georges et al v. UN*, originally heard in the District Court, Southern District of New York (Manhattan) USA. In that case, civil society brought a case against the UN for negligently causing a cholera outbreak during a peacekeeping mission in Haiti, on the basis that those affected would be denied a remedy unless the UN provided one. The peacekeeping mission there have not established a Standing Claims Commission, meaning that there is no mechanism through which those affected can claim compensation. The UN again claimed its total immunity from suit. The District Court in the US agreed to hear the case. However, in January 2015, it upheld the UN’s immunity. The civil society group who took the case are currently appealing this decision.
**Questions and Discussion**

*Is there any way to push AMISOM TCCs to prosecute members accused of crimes or human rights abuses?*

The process of referring cases from the time they occur to the time of prosecution and conviction requires increased capacity for oversight within AMISOM, including the Gender Office and the Security Office. The decision on whether to begin a prosecution lies exclusively with the TCC. While the Mission may take a proactive approach to following up on cases that have been referred to them, no individual person or role is tasked with this duty. The civilian component of AMISOM moved from Addis Ababa to AMISOM in 2013 and people within that component are now better placed to take on this role.

It would also be easier to track the progress of cases if the Court Martial that hears them were based in Mogadishu rather than in the territory of the TCC. It was pointed out that it is difficult to make an argument in a domestic or international forum that a TCC has failed in its obligation to prosecute without the existence of sufficient evidence. In the UK, a case made about human rights violations occurring due to drone strikes in Afghanistan failed because there was a lack of evidence, due to a dearth of people on the ground. The Ugandan Court Martial was based in Mogadishu in 2013 but has since been moved back to Kampala. There are ongoing discussions about the possibility of reintroducing Mogadishu-based Courts Martial.

*Could a case against the TCC be taken to the African Commission or one of the treaty bodies?*

An allegation could be made that where a country fails to effectively prosecute credible allegations of human rights abuses, it violates it duties under both the agreement with the mission and under international law. It may be possible to make this case through a submission to the African Commission or the CEDAW or CAT treaty bodies, for example.

*Is it possible to use the law of the TCC to compel them to send a report on the progress of the case back to the mission?*

The obligation to send a report on the progress of the case to the mission is contained in the SOMA, not in the domestic law of the TCC. However, it may be possible to argue within the TCC that the state is breaching its private and public international law obligations. A pattern of cases is starting to be built which is stripping TCCs of their immunity in this area, and this could be expanded to cases that challenge failures to report back to the mission.

*If peacekeeping missions made under Chapter Seven aim to assist a country in rebuilding, why did they change their mandate to exclude a capacity building function?*

The peacekeeping mission in South Sudan is now limited to providing purely humanitarian assistance. It no longer provides development assistance, on the basis that it does not want to
provide support or assistance to a government made in widespread abuses of human rights and international law. This is a decision that was made at the UN Security Council level. The point was made that UN peacekeeping missions cannot assist the countries they operate in on a long-term basis unless they also provide capacity building, assistance and security to civil society, which was inadvertently and significantly affected by this change in mandate.

**Comment on AU peacekeeping missions**

In the context of Somalia, the overlap and interplay between the mandates of the UN and the UN present a specific challenge. AMISOM is the body mandated with peacekeeping tasks, including accountability for alleged abuses committed by troops. The UN Mission in Somalia (UNSOM) remains the body mandated to work on statebuilding. Issues of accountability and access to justice are included in this mandate. The number of AU peacekeeping missions will increase in the future. The relationship of these missions to the UN Mission in the country must be better defined. Best practices in this respect should be subject to further research and advocacy.

**Is the UN policy on SEA effectively enforced?**

A report is currently being conducted into the effectiveness of the UN’s zero tolerance policy on sexual violence. This report will be made public soon. In Somalia, the UN’s policies on SEA do not bind the AU, which has its own policy. No UN personnel in Somalia have had accusations of SEA made against them. However, the policy requires the UN to have a community reporting structure, which is not yet in place.

AMISOM has a code of conduct on SEA in place. However, the code is non-comprehensive and does not clearly specify roles for implementing the policy or consequences for if it is breached. There is also no independent reporting mechanism, making it near impossible for survivors of sexual abuse to access the investigation process. LAW is having discussions with AMISOM the week of 2 February 2015 to discuss amending and improving these policies and procedures.

**There have been numerous instances of AMISOM vehicles causing deaths by driving negligently through populated areas. Why has no-one been held accountable for this?**

There are two possible legal avenues that apply to this situation. If the people driving the car were civilians, they do not have immunity in Somali courts. The case could therefore be taken domestically. If they were military troops, the case should be referred to AMISOM. Under the current system, the cases can only be referred by the Somali government the AMISOM Head of Mission (HoM). The HoM will then initiate a Board of Inquiry (BoI). After the BoI, recommendations will be forwarded to the Force Commander. The Force Commander will consult with an internal legal advisor to make a determination about these issues. To date, six or seven cases have resulted in compensation payments. Whether this compensation has been adequate is another question.
Does the AMISOM SOMA specifically mention SGBV?

No. Troops have general immunity in domestic courts for allegations of criminal offences, which must be heard by the TCC, but SGBV is not specifically mentioned.

Is there a problem with people who are accused of SGBV offences being rotated out of their place in the contingent before they can respond to these claims?

Many positions are posted for a maximum duration of one year. The Force Commander and Deputy Force Commander for example can only be posted in one location for a year and then must be rotated out as a requirement of duty under their own military laws. The Mission does not have the power to keep these positions in one place.

In instances where another state bilaterally invades a country, such as the case of Kenya or Ethiopia in Somalia, laws apply- particularly in circumstances where their presence does not amount to an occupation?

Certain laws of IHL apply where the invading force can either be said to be occupying the territory or where it has a certain level of ‘effective control’ over an area. However, more extensive research needs to be done to determine the parameters of this legal framework.

Closing remarks

One of the most important considerations in terms of ensuring that survivors of SGBV including SEA allegedly committed by peacekeeping operations is to ensure that an independent complaint mechanism exists through which survivors can make complaints in a safe and anonymous way. These independent complaints mechanisms must be established in Missions that have not yet done so.

In terms of the investigation of complaints, this is the joint responsibility of the TCC and the Mission. Clearer distinctions must be made between the roles of each body and each must be subjected to proper oversight. Within UN Missions, there is some oversight within the UN. This does not yet exist in a meaningful sense in AU missions and further thought must be given to who could play this role.

Finally, more research needs to be given to certain elements of the applicable legal framework to bilateral forces who do not have an agreement with the government of the host country.
Presentation One: Strategies for Engaging with Donors
Nyagoah Tut (Amnesty International)

The first presenter in this session discussed strategies for engaging with donors who fund security forces in these regions. To begin with, it is important to attain a level of clarity in terms of what their level of involvement is in the country in question. Donor accountability means that they themselves are aware of what their involvement in the country means on the ground, taking action where this involvement results in human rights abuses and taking positive actions to ensure international laws and standards are complied with. Government agencies are accountable to the state government, and the state government is responsible for explaining its actions to the host country.

Accountability can be promoted within these government structures in a variety of ways. They could be held legally accountable in their own courts or international forums. Legal accountability may include contractual accountability, whereby legal action is taken against donor agencies for breaching the terms of their contract with the host government. It could also include taking civil action against agencies for violating their own internal control systems or domestic or international law. Financial accountability refers to the use and allocation of donor finances.

It is much easier to hold donor agencies accountable in their own country than within the host country. The presenter gave the example of human rights abuses committed by the US in South Sudan. There is very little ability or capacity of actors on the ground to challenge these abuses. It is unlikely that the US as a state could be challenged in South Sudanese courts. Individuals from US agencies will generally have immunity.

It is possible in some countries to bring legal action against the state agency in their own courts. There is a case proceeding through the UK courts at the moment challenging the actions of the Department for International Development in the UK for providing funding to a villagisation project in Ethiopia in which many people were forcibly displaced from their homes, women were subjected to sexual violence and some people were killed.

For engagement with donors that does not amount to legal action, it is important for the organisation engaging with the donor to first decide what they want the result of that action to be. The end objective must be identified: whether it is to suspend funding, to change the behaviour of the security forces, to provide reparations to survivors of abuses or to change the focus of the donor. It is important to first pressurise the government to enter into bilateral discussions so that
these issues can be raised and the reaction of the donor and their willingness to engage can be ascertained.

**Presentation Two: Strategic Casework**  
Adam Hundt (Deighton Pierce Glynn Solicitors)

The second presenter discussed the possibility of taking cases against donors for violating their domestic and international legal obligations, with a focus on the UK. The presentation covered legal obligations on the state and on private companies. With regards to the obligations on the state, the Overseas Security & Justice Assistance Guidance (OSJA) applies to all government departments. This policy requires an assessment of the human rights implications of assistance given to third party states, and requires ministerial approval if there is a significant risk that funding will contribute to serious violations of international humanitarian or human rights law. The state also has clear obligations when granting arm export licenses under the Consolidated Arms Export Criteria (CAEC). However, in 2014 this policy was amended to remove the passage, “An export licence will not be issued if the arguments for doing so are outweighed… by concern that the goods might be used for internal repression.”

Under UK law, the doctrine of legitimate expectation holds that if a person has a legitimate expectation that an administrative decision will be made in a certain way, that person may seek judicial review of the decision if it is decided in another way without reasons or explanation. Legitimate expectations can be set by public statements and policy. The existence of the OSJA policy creates a legitimate expectation that UK funding will not be put towards activities with a significant risk of violating international law. Breaching that policy may therefore constitute a breach of administrative law.

A case is currently underway in the UK challenging a decision by the UK government to provide training to Sudanese security forces. The government in that case argued that the training was confined to human rights issues. However, this is inconsistent with evidence received on what the training actually involved. Judicial review is being undertaken on the grounds that the funding violates the OSJA policy and therefore frustrates the legitimate expectation that the funding will be allocated in a certain way without explanation or Ministerial approval. This case is ongoing.

Other laws may be used to encourage accountability of donor bodies in the UK. This includes s417(5)(b) of the Companies Act 2006, which requires company directors to ‘have regard’ to such matters as ‘the impact of the company’s operations on the community and the environment’. Vicarious liability and common law negligence can be used to bring claims against UK-based private companies whose employees commit crimes whilst posted abroad. This is the type of claim brought against G4S for the allegedly negligent hiring of a person
with obvious mental health issues who opened fire on his colleagues when in Iraq. It may be possible to use these laws to take a case against private security contractors in Mogadishu, depending on the existence and nature of allegations against such companies.

Third State Responsibility

Under the principle of third state responsibility for breaches of international humanitarian law, all states have a duty to ensure that other states uphold the principles of IHL. Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that a state will be legal responsible for an internationally wrongful act if they provide aid or assistance to another state committing such an act, where:

a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

b) The act would be internationally wrongful if committed by that State.

The UK Government has accepted in legal proceedings that the Draft Articles are reflective of customary international law. However, it is difficult to persuade a domestic Court to enforce the principle of third state responsibility, both because domestic courts are reluctant to enforce customary international law generally and because it is seen to represent a threat to the principle of state sovereignty. The case of Belhaj, decided in 2014, may indicate some loosening in the courts’ traditional strictness in this area.

OECD complaints

A final strategy for increasing donor accountability is to use the OECD complaints process. This does not have a legal enforcement mechanism. However, it can be used for the purpose of advocacy and to change cooperate behaviours. The OECD guidelines for multi-national enterprises state that firms should respect human rights in every country in which they operate, and have appropriate due diligence processes in place to ensure that rights are upheld in practice. Complaints can be submitted by civil society organisations to National Contact Points (NCPs) within each country. The NCP will the either accept or reject the complaint. If accepted, the case will proceed to either mediation between the parties or a decision by the NCP, which may include recommendations to be implemented by each party. These recommendations are not binding.
Questions and Discussion

In the case challenging UK assistance to the UK security forces, is the argument being made that the UK should stop funding the forces altogether or that the nature of the funding be changed?

The lawyers in the case are not presenting an alternative. They are simply challenging the funding as it is currently being given. The argument being made by the UK government is that the training is to ensure that the troops comply with international law. However, this does not match the nature of training given on the ground, according to evidence and testimony collected. The argument is therefore that the funding of the trainings currently being given is unlawful.

The due diligence guidelines that apply to DfID and the FCO require that a human rights assessment be carried out, but do not specify what will constitute a breach of that assessment and what action must be taken in the case of a breach. Did this cause any difficulties?

The government defendants in the case do not contest that they can continue funding notwithstanding the existence of serious human rights regulations. They accept that the policy prevents this. Rather, they argue that the funding does not contribute to human rights violations and in fact contributes to the reduction of such violations by the Sudanese army. The applicability or enforceability of the policy is therefore not contested.

Comment on OECD complaints

One participant agreed that at first glance OECD complaints may seem toothless. However, in situations where there are very few if any other options for accessing redress, they may present a very useful option. The focus on mediation and agreement is non-threatening to companies and may result in better outcomes for the victims that a more confrontational approach.

Session IV: Strategic casework through UN mechanisms

Samwel Mohochi (Mohochi and Company Advocates)

This session discussed how UN mechanisms could be used to increase accountability for sexual violence by state actors. Certain international instruments, including the Convention Against Torture, Committee for the Elimination of Discrimination Against Women, International Covenant for Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, have committees that monitor their implementation. State parties to each of these instruments are expected to submit a report describing their progress on implementing the instrument on a periodic basis. Further, if state parties have signed Optional Protocols indicating their acceptance, these committee may also receive complaints from individuals from within
their territories. However, even where states have not signed such Protocols, it may still be possible to strategically engage with certain UN mechanisms to ensure certain issues are addressed.

For example, Kenya signed the Convention Against Torture (CAT) in 1997 and submitted its initial report to the Committee on the Convention Against Torture in 2007. Civil society organisations within Kenya had real concerns about the complicity of Kenyan authorities in conduct amounting to torture. However, Kenya had not signed the Optional Protocol that would have allowed for complaints to be submitted from individuals within the state. The strategy employed by civil society was to compile and submit a shadow report to the one submitted by the state. The report was developed by 18 NGOs, included accounts of nine separate incidents of torture gathered from the Kenyan courts and went for over 800 pages. It dealt with every article under the CAT and compared the accounts they had received to the version of events presented by the state.

When these reports are submitted, a half a day is set aside for the presentation of the report and input from relevant stakeholders. State parties and non-state parties are allowed to participate in these sessions. The rest of the report is reviewed in private session where the main issues are not brought to the public domain. This results in a lack of transparency.

For determinations or recommendations by UN mechanisms to be effective in practice, they must be followed with targeted legal advocacy and negotiations with the government on how the recommendations may be implemented.

Questions and Discussion

What is the best way to engage with these mechanisms?

If a Rapporteur or mechanism is due to visit a country or submit a report, NGOs should cooperate to develop a shadow report, make a joint submission or do panel side discussions to coincide with a visit or event.

However, it was pointed out that where the mandate of a special mechanism is politically sensitive, the government in question may intervene to block visits and events and will reject the findings of any report. In the case of Kenya, the Kenyan government rejected the findings of the Committee Against Torture’s report and threatened to contain or crack down on activists assisting with the production of such reports. Two human rights defenders were killed in 2009. It is extremely important to do a lot of advocacy around activities supporting or contributing to special mechanisms, as this will reduce the ability of most governments to block or interfere with the NGO undertaking those activities. The UN must also produce a periodic report outlining the measures it is taking to ensure human rights defenders to cooperate with it to produce reports and documents are adequately protected.
Comment on using UN mechanisms where other forums cannot be utilised

In 2013, LAW and its partners filed a complaint with the UN Human Rights Committee against Canada regarding the construction of settlements and selling of confiscated land in Bil’in village in the occupied Palestinian territories. The villagers being represented in the case first tried to take it in Israeli courts. However, as Israeli courts refuse to rule on the legality of Israeli settlements, this case was dismissed. The villagers then tried to sue the Canadian corporations involved in the construction on and appropriation of the confiscated land in Canadian courts. This case was dismissed on the grounds of forum non conveniens - that Israel, rather than Canada, was the appropriate forum for the case to be taken in. As both Israeli and Canadian jurisdictions refused to hear the case, there were no domestic options left for the villagers.

However, Canada is a state party to the ICCPR, which has extra-territorial application. LAW and its partners submitted a complaint to the Human Rights Council, which is the treaty body overseeing implementation of the ICCPR. The case is still being heard. It demonstrates where such mechanisms may be particularly useful in the face of limited alternatives.

Session V: Legal advocacy

Presentation One: South Sudan
Angelina Daniel Seeka (End Impunity Organization)

The first presenter discussed legal advocacy strategies employed relating to sexual violence in South Sudan. The presentation began with an overview of the context of sexual violence in South Sudan. Such violence includes rape and sexual exploitation and abuse as well as early marriage and the giving of girls as compensation or gifts. The conflict that began in December 2013 has caused the levels of sexual violence to rise significantly. There is very little access to justice.

In South Sudan, to address these issues it is important to work with relevant Ministries, such as the Ministries of Justice and Gender and Social Welfare. It is also important to operate through the media, for example by engaging frequently with journalists, running radio programmes and through social media. The presenter also discussed grassroots advocacy for the purposes of educating the community on their rights and obligations, including by visiting women in prison and working with women groups and civil society. UNMISS also has a Human Rights Division which can be engaged on issues relating to women and access to justice.

It is also possible to conduct advocacy with international actors. For example, in South Sudan, the presenter’s organization has met with the High Commissioner of Human Rights and Advisor for Secretary on Genocide. The Security Council visited South Sudan in 2014 and civil society organized an online petition focusing on sexual violence to coincide with this visit.
In South Sudan, it is very difficult to make any impact on government practice or policy. Legal advocacy undertaken by civil society is more likely to result in increased media attention given to sexual violence, increased services provided to survivors, more support for legal actors and more targeted engagement by the international community. UN Resolution 2155 (2014) on UNMISS, for example, stresses the “urgent and crucial need to end impunity in South Sudan and to bring to justice perpetrators of such crimes”, which is in part a result of the legal advocacy on this issue that was conducted during their visit. Public interest litigation may be possible in South Sudan.

Challenges in successfully communicating these messages include a lack of commitment from donor agencies to commit resources to provide technical support to civil societies and government in addressing these issues; lack of political will; lack of Parliamentary will to ratify relevant international treaties; lack of enforcement of domestic laws to protect women and children; lack of access to rural areas and a lack of capacity amongst legal actors.

Though the presenter did not have an opportunity to go through the recommendations made by the represented organization in full, these recommendations were provided to LAW and are discussed here. They are as follows:

**General:**
- Establish a fast track legal process to hear sexual violence cases
- Establish a legal aid system;
- Engage women in peace negotiations;
- Train police officers in the receipt of complaints and investigation of sexual violence;
- Develop the family law to protect women;
- Provide trainings to traditional leaders on women’s issues;
- Encourage Churches, mosques and other religious institutions to engage with the community on eradicating sexual violence.

**GBV Protection Sub-Cluster:**
- Include continuous legislative review in the 2015 workplan, and legal members should provide technical assistance on drafting new laws;
- Consider join activity with child protection sub cluster;
- Hold a special session with Constitutional review commission and South Sudan Human Rights Commission on the inclusion of the prohibition of SGBV in the constitution;
- Increase the availability of information on the existing legal protections from SGBV;
- Produce training and outreach material in Arabic and local languages.

**Ministry of Gender:**
- Develop a roadmap for the implementation of CEDAW;
• Develop specific SGBV legislation.
• Begin development of the family law to better protect women.

Parliament
• Ratify and enforce the Maputo protocol, Rome statute and all other human rights treaties pending before parliament;
• Pass implementation plans for CEDAW and CRC;
• Pass comprehensive legislation criminalising SGBV.

Donors
• Provide resources for technical assistance to civil society, Parliament and key ministries to revise and develop laws to combat all forms of SGBV;
• Assist Government to determine where and how resources could better be allocated to combat SGBV;
• Support the special protection units of South Sudan National Police Services (SSNPS), Public prosecutors and the judiciary.

Presentation Two: Strategies used in Somalia
Roisin Mangan (LAW)

The second presenter described advocacy as the most overused term but most underused tool within the realm of human rights. The term ‘advocacy’ is widely misunderstood and is used out of context the majority of the time. Advocacy has been mentioned continuously throughout the roundtable as an important strategy. However, legal advocacy cannot be added as an afterthought to a given project; it requires a well thought-out strategy with clear targets, objectives and a detailed action plan.

In the context of Somalia, there are two different types of legal advocacy that can be undertaken: that focusing on the individual and that focusing on systematic change. Individual advocacy refers to efforts taken to change the situation of one person to protect his or her own rights or improve individual services. Systemic advocacy aims to change laws, policies or procedures applicable to entire groups of people. Before an advocacy strategy is developed, target identification or ‘power analysis’ needs to be undertaken. This includes asking questions such as: who are the decision makers? Where are the decisions happening? How are they taking place? This will determine the targets for advocacy endeavours, including both target individuals and systems. Overall and specific objectives then need to be identified. This requires taking into account the circumstances and situation surrounding the issue, as well as examining the skills and tools one has and which one needs to gain. After these factors have been considered, an advocacy strategy should be developed.

In Somalia, there are four main areas in which advocacy is being undertaken:
1. Engagement with donors;
2. Engagement with AMISOM;
3. Engagement with Somali National Army and Police; and
4. Sexual Offences Bill.

Position papers, high level panel discussions and bilateral and public consultations are tools used as points of engagement for each of these targets.

The purpose of advocacy is to change behaviours in the people or groups that are the targets of those advocacy measures. For example, as a result of advocacy undertaken in 2008 regarding funding made to the Somali National Police Force (SNPF), DFID withdrew from providing stipends to SNP officers. This advocacy was conducted through various human rights reports including a Human Rights Watch Report, ‘So Much to Fear’, and a Dispatches documentary titled ‘Warlords Next Door’. DFID has only recently announced that it will restart payments to the SNPF, and will now demand proof that the money will not be misused.

Recommendations

The presenter ended with the following recommendations:

• Identify target group;
• Establish an advocacy strategy;
• Always positively engage with the targets- never use hostile language;
• Work with partners on the ground; and
• Ensure messages are harmonised.

Presentation Three: Using Sanctions Regimes for Legal Advocacy Purposes

Dierdre Clancy (UN Monitoring Group for Somalia and Eritrea; but speaking in her personal capacity)

The presenter in this session discussed the sanctions regimes in Somalia, Sudan and South Sudan, with a particular focus on Somalia. The sanctions regimes in each of these countries have a particular scope. On the basis of this scope, groups and individuals may be singled out for targeted sanctions such as asset freezes. This is not a judicial exercise but it does need to follow rules of due process in terms of deciding who should be targeted and explaining the reasons for that decision. If used in the correct way, it can create some measure of accountability for perpetrators of international crimes in these countries.

The presenter then described the sanctions regime in Somalia. This regime was established in 1992 and is the oldest in the world. The initial regime consisted of an embargo on arms dealing with Somalia. Since then, its mandate has been progressively expanded to include targeted sanctions against listed individuals and entities. The basis on which people can be sanctioned includes that they committed serious violations of international humanitarian or international human rights law. However, to date, no individual or entity has been sanctioned as a result of human rights violations committed. It is useful to compare the regime in Somalia to the one
currently operating in the DRC, where sanctions have been imposed on people on the basis that they assist in the recruitment of child soldiers or commit serious violations of international law targeting women and children, including the commission of SGBV.

The Monitoring Group for Somalia and Eritrea, which assist the Security Council in its oversight of the sanctions regime, has a wide mandate in terms of which violations of international law to focus on. Violations that could trigger sanctions include obstruction of humanitarian aid and all violations of international law which target civilians. The first of these categories has been used to identify and sanction individual members of Al-Shabaab. The second is what could be used to sanction perpetrators of SGBV, but to date, despite some SGBV investigations, no-one has been targeted for sanctions.

Within the sanctions regime, Monitoring Groups carry out in depth investigations into the situation on the ground. The mandate of these groups goes beyond a commission of inquiry, as sanctions regimes have tangible and punitive effects on individuals. The standard of proof required by the Monitoring Groups is between a civil and criminal standard. In addition to presenting the findings of their organisations, reports produced by the Monitoring Groups can make recommendations on how the issues outlined in the report may be addressed, including both sanctions and any other recommendation it would be appropriate for the Security Council to make. This includes requesting that the Security Council expands mandates where appropriate.

Monitoring Groups may also recommend individuals for sanction through confidential statements of case which they prepare for the UN Security Council. The Security Council will then decide whether to sanction the individual or entity according to the case.

It is possible for civil society to engage with these groups to ensure that recommendations are appropriately made and targeted. The Monitoring Group has relied on cooperation from NGOs and civil society to carry out their mandate, ensuring while doing so that confidentiality is always preserved. This engagement is also important for the Monitoring Group to understand when sanctions regimes are going to have a positive impact, and when they are going to do harm.

There are also thematic sanctions regimes, which may be used to target abuses across regions. Two that are relevant to the current context are the sanctions regime on children in armed conflict and that on sexual violence in armed conflict.

Questions and Discussion

How does the Monitoring Group for Somalia and Eritrea engage with the government?

The Monitoring Group ensures it provides as much visibility on its work within the government as possible, including directions of investigations and findings made, unless these would compromise the security of the people they were working with. For example, there is a difficult balance to be struck between investigating corruption and supporting the government to comply with sanction. It is therefore important that the Group has a mix of diplomatic and investigative capacity.
Which groups can be sanctioned?

Both states and non-state entities can be sanctioned. The understanding is that the sanctions have to be practically implementable, meaning that the individuals or entities sanctioned must be able to be targeted and sanctions must be able to be imposed. It is possible to sanction companies. Sanctions are, however, dependent on political will. For example, despite many detailed piracy investigations, no pirate has ever been sanctioned.

Group Work

Participants broke into groups for discussion and feedback on five set questions asked about each region. These questions are as follows:

1. **Legal Frameworks**
   - Can legal frameworks be strengthened by drafting new legislation, policies and guidelines or amending current ones?
   - If so, which legislation and policies and how can they be implemented and enforced?
   - How can Security Council Resolutions be enforced?

2. **Strategic Casework**
   - Can strategic domestic, regional or international casework be undertaken?
   - Who, where and how?
   - Can UN Mechanisms- thematic, individual or committee- be employed?

3. **Legal Advocacy**
   - Target?
   - Who, how and what message?
   - Impact expected?

4. **Customary mechanisms**
   - Can the customary system be engaged with? How?
   - Who should engage and who should they engage with?

5. **What is not known?**
   - What do we not know or what do we need to find out more about?
   - How do we go about finding out?
     - Where is research needed and how can this be undertaken?
     - Where is further expertise needed? Can roundtables be held- with who and for what purpose?
Do reports need to be written? What on and for who?

Group One: Sudan

Legal Framework

There are significant problems with the legal framework in Sudan that could in theory be addressed. These include:

- The Criminal Code and Criminal Procedure Code specify a five year limitation period, which may deny access to justice
- Problem of immunity of armed forces
- Emergency law in border areas gives full authority to the governor, who can delegate to the local government, to do whatever they want without any supervision from the judiciary

These problems could be addressed via legislative amendments and judicial review of government decisions if there was political will and/or an independent judiciary. However, at present both of these are lacking. Identifying what laws to amend or challenge could form part of a very long-term strategy, but cannot be realistically pushed for at the present time.

Security Council Resolutions

All previous resolutions have failed. Any new resolution must be innovative and creative; it cannot be a repeated call for the ICC arrest warrant to be enforced. To better understand how this could be used, victims of abuses and civil society must be consulted.

Strategic Casework

More cases could be taken to the African Commission, including one on the gang rape allegations in Tabit. It may also be possible to identify and create a database of dual nationals who could be subject to civil claims or UJ cases in other jurisdictions. Finally, it may be strategic to begin pushing the constitutional court on certain issues, at least to demonstrate that the government cannot make unconstitutional laws without scrutiny from civil society organisations who want those laws to be challenged. There may also be a time in the future where there is a court in Sudan capable of hearing such cases.

Legal Advocacy

Domestically, it may be possible to advocate for the National Human Rights Commission to make recommendations relating to non-state actors. Internationally, advocacy bodies could demand an independent and impartial investigation into the allegations of mass rape in Tabit, by
either UNAMID or another international actor. They could also advocate with donors providing support to the Sudanese security forces to develop red lines around funding to ensure it it is not used to aid or assist bodies involved in human rights abuses. Finally, may be possible to begin documenting cases of rape and sexual violence in the 32 IDP camps in Darfur and to map and publicise this information.

Customary mechanisms
The customary law could be codified and used in future transitional justice mechanisms.

Group Two: Somalia

Legal framework.
It was agreed that it was key to have a legal framework established. The provisions in the Penal Code in particular are old, outdated and need to be amended and modified. When reforming legislation, it is paramount that training, capacity-building and the establishment of oversight mechanisms are simultaneous. Training manuals and guidelines need to be developed for law enforcement, legal and judicial actors. The challenge of practice versus law was also highlighted as currently a medical certificate is required before the case is prosecuted.

The following recommendations were made with regard to the development of legislation:

- Identify legislative targets in the upcoming 2016 elections;
- Develop guidelines training manuals for law enforcement, legal and judicial actors;
- Conduct trainings for all actors on new legislation;
- Specific code of conduct needs to be developed specifically for lawyers, judges, prosecutors and oversight bodies;
- Introduce legislation to reform security sector; and
- Introduce legislation creating a vetting system for the police and army.

Strategic casework
It was first discussed whether it would be beneficial to pursue cases using UN mechanisms. These cases would have to be taken against the Somali state. There is already a lot of cooperation between the government and the UN in addressing sexual violence. A National Action Plan on addressing sexual violence in conflict was developed in consultation with security sectors, civil society and various Ministries. The UN is also working with donors to ensure the key actions from the Action Plan are implemented. It was decided the best way forward at the present time would be to continue using the softer approach of collaboration and capacity-building to assist the government in addressing sexual violence, rather than pursuing cases against them.
In relation to domestic casework, there has been little success for prosecution of sexual violence. In 2013, there was a case where three journalists, including a female journalist who got raped got arrested for reporting rape.

The group then considered using regional mechanisms. It was decided this was not the most effective way as currently there is a total lack of capacity within the Somali government to effectively prosecute sexual violence and therefore to implement any recommendations of the Commission. Some discussion was had around the potential to take cases to the African Commission on Human and Peoples Rights on the violations committed by Ugandan or Burundian soldiers within Somalia.

**Customary mechanisms**

The customary mechanisms are engaged with in Somalia. Currently there are national guidelines on Alternative Dispute Resolution (ADR) being developed in collaboration with the Ministry of Justice, Ministry of Religious Affairs and the United Nations. These guidelines will divide the cases that should go to the customary system and the formal system. It is still in the preliminary stages. Public consultations will take place when a draft has been finalised.

The main challenge raised was that the survivor is not allowed to be present for mediation through the customary system. One of the members also raised the challenge of the exclusion of paralegals or lawyers from the process.

The following was concluded:

- An oversight body needs to be established to ensure rights are respected within the customary system;
- A paralegal/lawyer should be involved in the customary process from start to finish;
- The need to have the survivor present at these discussions is of paramount importance.

**Legal Advocacy**

It was felt that civil society and the international community are undertaking a lot of legal advocacy in Somalia. Of paramount importance is the need to harmonise messages amongst civil society groups. Using the sanctions regime as a tool for advocacy needs to be researched further.

**What is not known/what needs to be researched further**

The main area for further research is the benefit of using the customary law when lawyers are engaged throughout the process, as happens in other jurisdictions. Using the sanctions regime as an advocacy tool should also be researched further.
Group Three: South Sudan

Legal Frameworks

Domestic law

Family law was identified as a major gap in South Sudan’s legal framework. Most cases referred to the customary system are on family related issues. There is no formal law which addresses these. Addressing this gap should be prioritised. New legislation and tools for implementing and enforcing family law should be explored and developed.

There is also a need to draft a comprehensive Sexual Offences Bill. It was suggested that the development of this Bill should be followed by the establishment of a monitoring body, along with different courts that specialise in cases of sexual violence. However, it was generally agreed that there is currently no body that is in a position to push this forward.

The possibility of drafting international crimes legislation to lay the foundation for prosecution in South Sudan was also discussed. One hurdle is that South Sudan has not ratified key international treaties. Although there is a Geneva Conventions Act, there are no definitions of genocide, torture, or crimes against humanity. This act also refers to IHL rather than international criminal law, which is applicable to individuals. These need to be covered in domestic law. One option would be to amend the Geneva Conventions Act to define genocide, torture, and crimes against humanity, and to develop a separate international crimes act.

It was emphasised that rape as a violation of IHL should be tried in civilian courts.

International law

Ratification of international human rights conventions should be prioritised. UNMISS previously had a line in their mandate about promoting ratification of key international instruments, however this has been taken out. One participant stated that UNMISS should be lobbying for and facilitating ratifications.

Internal laws and codes of conduct

Internal codes of conduct, such as the SPLMA act, may potentially provide another way to hold armed forces accountable for sexual violence.
Strategic Casework

Domestic casework

Strategic casework is not being undertaken in a targeted or strategic way in South Sudan. The legal framework exists, but the judiciary is not independent, and it is therefore difficult to undertake strategic casework domestically. The example of the ‘G4’ case against four SPLM leaders after the outbreak of violence in December 2013 was raised. In that circumstance, the judiciary was told to drop the case by the Ministry of Justice, who received order from the President.

In order for a case to be successful then the right judge, complainant and argument are needed, along with a strong media strategy. The G4 case was an exceptional case, and this was partly because it was high profile – the public came to the court and watched.

It was suggested by a participant that the focus should be on private lawyers and civil society. There was one case where a petition was filed calling for an injunction against elections. Although this isn’t an SGBV case, could this principle be used?

Hybrid court

The need for a hybrid court was discussed, along with the possibility of bringing in foreign, independent judges.

Trainings and capacity building

There may be some ability to do trainings and capacity building within national judiciary. There is already a lot of judicial cooperation between South Africa and South Sudan.

Regional casework

There is no place to take complaints at a regional level because South Sudan has not ratified the necessary international and regional instruments.

Extraterritorial casework

A case where a former US marine was killed on streets of Juba was raised. The identity of the perpetrator is common knowledge within Juba. It was suggested that this case could form a starting point for bringing a civil case in the US under the TVPA.
The case of Mothers of Srebrenica was discussed and it was suggested that contributing countries to UNMISS could be challenged in their own jurisdictions for failure to protect civilians. It was suggested that the case of IDP killings in Bor would be an interesting place to look at the question of whether peacekeepers effectively provided protection.

Legal Advocacy

There is a need to include men in efforts to curb sexual violence.

What is not known/what needs to be researched further

There is a lack of baseline information in South Sudan. The census is flawed, it is difficult to gain information from government institutions, and case opinions are not published. This is also the case with regard to the customary courts.

One participant also flagged access to UN information as difficult and slow, as one has to wait for the publication of a report every year. A participant also commented on the very limited statistics in available reports.
Recommendations for Ways Forward

Participants agreed on a number of concrete ways forward for addressing accountability for sexual violence committed by security forces in each of the three regions. These include:

1. **Annual Roundtables**

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<th>Responsible</th>
<th>LAW and Nuhanovic Foundation to facilitate</th>
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<td>Timeframe</td>
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Participants agreed that the conflicts in the East and Horn of Africa are closely intertwined. This is self evidently true for Sudan and South Sudan and also true for Somalia, in which the government of Sudan is providing capacity building for the security forces. Given these linkages and similarities in the types of abuses occurring, it was agreed that lawyers working on access to justice issues in these regions would benefit from closer engagement and collaboration. Legal actors could coordinate messages and strategies around strategic casework and legal advocacy, as well as sharing lessons learned in the drafting and implementation of law and policy and in engagement with the customary systems in each region.

It was agreed that an initial mechanism through which to encourage this type of collaboration would be to hold annual roundtables bringing together local, regional and international actors to discuss these issues. At each roundtable, participants would discuss progress made on ideas discussed at the previous roundtable and provide updates on cases, advocacy and research. Those involved in the roundtables could create a plan of action which could be updated and which participants could provide feedback on in terms of progress made throughout the year. LAW is experienced in holding these types of roundtables; it currently hosts an annual roundtable of this kind focusing on the occupied Palestine territories. It could take this forward.

2. **Research and mapping**

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<th>Responsible</th>
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<td>Mohamed Badawi- sharing mapping of sexual violence in Darfur</td>
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<td>Timeframe</td>
<td>Those interested should contact Nuhanovic Foundation and Badawi</td>
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It was agreed that it would be helpful to create a mapping of useful cases, reports and other materials that could be shared on an online database. Nuhanovic Foundation has begun compiling such materials and made them available on their website. Many of the participants at the roundtable represent organisations that produce reports, case summaries and position papers which could be stored, with permission, in that database. Nuhanovic Foundation can take this forward with the cooperation of identified legal organisations. The African Centre for Justice and Peace Studies has a mapping of sexual violence in IDP camps in Darfur and can share this with interested participants.
2. Drafting legal frameworks, policies and guidelines

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<th>Responsible</th>
<th>LAW to conduct fact-finding mission in South Sudan</th>
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<td>Timeframe</td>
<td>March/ April 2015</td>
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This seems to be most relevant at present in Somalia and South Sudan. In Somalia, this process is going ahead, lead by various local, regional and international agencies. In South Sudan this process is in its very initial stages and requires further technical support. This could include drafting a law on gender-based violence and addressing gaps in the existing family law. LAW is interested in reaching out to South Sudanese lawyers to assess the need for such instruments and how this process could begin moving forward.

3. Strategic casework

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<th>Responsible</th>
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<td>Regional case- Mohamed Badawi</td>
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<td>Transnational case- LAW, Ballard Spahr, South Sudan Law Society</td>
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<td>Research of security corporations- SALC</td>
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<td>Timeframe</td>
<td>In next year- update to be made at 2016 roundtable</td>
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The potential for a number of different types of cases was discussed.

a. Domestic cases: At present, it seems that the place in which domestic strategic litigation would have most impact would be South Sudan. The South Sudan Law Society is interested in taking this forward. There may also be potential in Somalia, though perhaps at a later date.

b. Regional mechanisms: There is interest amongst certain participants to submit a communication to the African Communication relating to allegations of mass gang rape in Tabit. This is being moved forward by certain actors and these organisations and individuals should reach out to other participants should they require further support.

c. Transnational criminal case: There is interest in using UJ laws to prosecute abuses committed in Darfur. Those who are interested should reach out to LAW’s No Safe Haven project, which focuses on using UJ laws to reduce impunity of those accused of committing international crimes.

d. Transnational civil case: There is interest in taking a case under the TVPA in the US to address abuses committed in South Sudan. There are many South Sudanese Americans who may be able to act as the plaintiffs in a case and who could indentify a suitable defendant. It may also be possible to use transnational civil litigation to address failures to protect by the peacekeeping force, funding of South Sudanese security forces by the
Diaspora and the use of social media to engage in hate speech and incite violence outside of South Sudan. The South Sudan Law Society is interested in exploring these options further. Finally, it may be possible to take a civil case against a multinational corporation operating in the security sector in any one of these three countries. SALC is interested in looking into whether South African corporations are complicit in the human rights abuses in these regions.

e. **UN mechanisms:** The Universal Periodic Review for Somalia is currently being compiled for the UN. Participants should consider how use the release of the UPR for legal advocacy and engagement purposes. The possibility of using a UN special mechanism to address violations in Somalia was considered but not expanded on. Participants should consider whether this would be a viable option.

4. **Creation of a report on South Sudan**

LAW is going to compile the information from the roundtable relating to South Sudan into a report which will contain a list of practical recommendations for further action to be taken and will be shared with participants working on South Sudan and any other participant who requests it.

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