



Written Statement on South Sudan's implementation of CEDAW

Submitted by Legal Action Worldwide on 15 June 2020

**For the attention of CEDAW Pre-Sessional Working Group - 13-17 July
2020**

Introduction

The initial report under article 18 was submitted by South Sudan on 3 February 2020. In general, while it represents progress that the Constitutional Amendment Bill and the Revitalised Agreement for the Resolution of the Conflict in South Sudan of 2018 (R-ARCSS) contain gender sensitive provisions aimed at advancing gender equality and addressing discrimination, these provisions are seldom enforced and violations of the provisions are rarely prosecuted, let alone redressed.

Legal Action Worldwide (LAW) is a non-profit organization which works to deliver access to justice to those who need it most – victims and survivors of human rights violations and abuses in conflict-affected and fragile environments. LAW provides creative legal assistance to vulnerable communities, by (i) empowering survivors of human rights violations, including sexual and gender-based violence (SGBV), to meaningfully participate in accountability processes, (ii) working with local civil society and survivor-advocates to deliver holistic access to justice, and (iii) providing technical assistance to state justice actors, including on legislation, to prevent and prosecute SGBV. LAW has worked in South Sudan since 2014. Our work includes the submission of the first ever complaint against South Sudan to the CEDAW Committee for sexual violence perpetrated by Government soldiers. In South Sudan, LAW works with local CSOs in several areas of the countries, and networks of survivors and grass-root level women groups, to pursue accountability for gendered crimes, document SGBV, and support the implementation of the Women Peace and Security (WPS) Agenda and the transitional justice processes as set out in the R-ARCSS.

In preparation of this written statement, LAW has consulted several partner organisations based in South Sudan. LAW will submit a complete shadow report ahead of the session of the Committee on South Sudan to be held in February 2021. However, LAW would like to bring the following initial issues to the attention of the Pre-Sessional Working Group in support of its drafting of a list of issues on South Sudan.

Initial Remarks on the Common Core Document for South Sudan

In the common core document forming part of the reports of State Parties on South Sudan submitted on 30 January 2020, the legal system is described as being headed by the Chief Justice who may, by special warrant, establish special courts to try specific cases.¹ Pursuant to these powers, an SGBV court was set up in 2019 with the support of UNDP. However, the court has yet to take SGBV cases. Instead, the authorities' intention seems to be to use the building and resources to also try juvenile and wildlife cases.

The common core document also refers to the customary courts system, which is recognised as a source of law under the Transitional Constitution and operates alongside the statutory justice system. The document highlights that each customary court applies local customary law at their own discretion.² This is highly problematic in the context of gender equality and ensuring women and girls have access to justice, particularly for SGBV, since it allows harmful customary practices which discriminate against women and girls to perpetuate without control from the central judicial system. During the Universal Periodic Review (UPR) conducted on South Sudan in 2016, Member States recommended that customary laws be amended to ensure

¹ Common core document forming part of the reports of State Parties, South Sudan, para. 16

² Common core document forming part of the reports of State Parties, South Sudan, para. 17

their compliance with the Convention³ and that access to justice for victims of sexual violence be ensured, through the effective implementation of laws protecting women. However, at present, a case of rape brought to a customary judge in South Sudan is likely to be mediated, and a dowry payment of a certain number of cows and the marriage of the victim with the perpetrator will be agreed upon between families,⁴ without procedural protections or trauma-informed treatment of the victim. In addition, some legislations including the Penal Code still provide that some matters can be resolved according to customs,⁵ including child marriage, where it is not uncommon for a family to accept the “booking” of a girl to be married when she comes of age in exchange for a “bride price”.⁶

Article 1

In its General recommendation No. 19, the Committee points out the articles of the Convention which establish a comprehensive obligation to eliminate violence against women by public authorities and any other person, underlining that discrimination within the meaning of article 1 includes gender based violence. The Committee insists that states tend to under report on that particular issue, despite their obligation under the Convention to actively address gender-based violence and report on all forms of it, including data on the incidence of each form of violence and on the effects of such violence on the women who are victims.⁷

In its initial report, South Sudan does recognise that in some areas of the law and in particular in customary practices, the treatment of women and girls is different than that of men, including on questions of rape, wife inheritance, forced and child marriage, divorce, adultery, domestic violence and property inheritance.⁸ However, South Sudan does not describe having taken any effective steps to address the widespread and systematic nature of SGBV in the county. Some progress was made in the field of legislation aimed at eliminating discrimination, such as the Transitional Constitution of 2011 and in the Labour Act of 2017. However, these provisions are still to be tested in a court of law, and South Sudan does not describe the actual steps taken to implement them.

In its report to the Human Rights Council published on 31 January 2020, the Commission on Human Rights in South Sudan (CHRSS) noted the sustained lack of political will to implement the 2018 R-ARCSS provisions, including those related to transitional justice mechanisms, the Hybrid Court for South Sudan and the enactment of the Constitutional Amendment Bill. According to the CHRSS, although the National Constitutional Amendment Committee had submitted a new draft constitution to the Minister for Justice and Constitutional Affairs in April 2017, it is still, as of the date of submission of this written statement, pending review. Additionally, a number of items of legislation addressing human rights, the rule of law, and accountability, including the Sudan People’s Liberation Army Act, the National Security Act, the Police Services Act, the Prison Services Act and the South Sudan Anti-Corruption Commission Act, are also still either pending adoption or under review,⁹ and the draft Gender-based violence bill initiated in July 2019 has not made any progress.

³ Para. 128.31 / A/HRC/34/13/Add.1 - Para. 4a

⁴ “The girl has no rights”: Gender-Based Violence in South Sudan, CARE report, May 2014, p.7

⁵ Legal provisions relating to gender equality and sexual and gender-based violence in South Sudan, Human Rights Initiative, August 2017, p.8

⁶ “The girl has no rights”: Gender-Based Violence in South Sudan, CARE report, May 2014, p.9

⁷ General recommendation No. 19 on Violence against Women, para. 24

⁸ Initial report submitted by South Sudan under article 18 of the Convention, para. 191

⁹ Report of the Commission on Human Rights in South Sudan, 31 January 2020, A/HRC/43/56, para. 20

The CHRSS further highlighted that SGBV, including conflict-related sexual violence (CRSV), continue to be widespread and pervasive, characterized by a recognizable pattern of terror and subjugation used as a tactic of war. The environment remains insecure and deadly for South Sudanese women and girls, and denial and stigmatization, compounded by the lack of accountability for sexual and gender-based violations, remain a grave challenge.¹⁰

Article 2

In its initial report, South Sudan describes its efforts to include provisions calling for gender equality and non-discrimination in its recent legislation, including the criminalisation of rape in the Penal Code of 2008 and protection against forced marriage in the Constitution.

However, it should be brought to the attention of the Committee that, as mentioned above, the SGBV court has not been tested yet and no case was brought to trial. Moreover, one of the recommendations of the UPR was for South Sudan to take steps to hold to account the perpetrators of the human rights violations, including sexual and gender-based violence, and more specifically, the perpetrators of the attack on the Terrain Hotel.¹¹ The Terrain case was indeed judged by a military court in 2018 and alleged perpetrators convicted. However, the appeal of the victims is still pending due to the disappearance of the case file, which went missing in September 2018. UN officials and diplomats strongly suspect the file was lost in the Office of the President. For the case to proceed on appeal, a complete record of the case is required.¹²

Article 5

Under article 5(a) of the Convention, State Parties have an obligation to expose and remove the underlying social and cultural barriers, including gender stereotypes, that prevent women from exercising and claiming their rights and impede their access to effective remedies.¹³ The Committee insists that rights and correlative legal protections are recognized and incorporated into the law and that unhindered women's access to justice systems is improved to achieve de jure and de facto equality.

In a survey conducted in 2013 by CARE International in Upper Nile and Unity states, 37 % of respondents cited examples of physical violence and 14 % knew of cases of sexual violence, 25 % said they had experienced physical abuse and 7% reported forced sex. Given the complexity of SGBV, and all that it encompasses, these numbers are likely to be higher, underlines the report.¹⁴ Another recent report confirmed that one of the main reasons for under reporting of rape or domestic violence are distrust in law enforcement and social stigma.¹⁵ As described by the CHRSS, domestic law and international treaties ratified by South Sudan do contain key safeguards to protect human rights and promote accountability. However, respect

¹⁰ Report of the Commission on Human Rights in South Sudan, 31 January 2020, A/HRC/43/56, paras 72-73 and annex II paras 48 to 51

¹¹ A/HRC/34/13 - Para. 127

¹² Joint LAW, Amnesty International and Human rights watch statement, 6 September 2019,

<https://www.amnesty.org/en/latest/news/2019/09/south-sudan-missing-file-blocks-justice-for-terrain-hotel-rapes-murder/>

¹³ General recommendation No. 33 on women's access to justice, para. 7

¹⁴ "The girl has no rights": Gender-Based Violence in South Sudan, CARE report, May 2014, p. 6

¹⁵ A Rapid Gender analysis on COVID-19, CEPO, RWDSS, the Ministries of Gender, Child and Social Welfare and of Humanitarian affairs and Disaster Management and UN Women, 2020, pp 16-18

for and implementation of these provisions has remained inadequate.¹⁶ For instance, the initiative to form a specialized chamber in Juba to address cases of SGBV to be functional by 31 October 2019¹⁷ has fallen short. Indeed, despite some efforts by the South Sudanese government to address SGBV and improve access to justice, very few perpetrators have been prosecuted for SGBV or CRSV. There is an acute need to improve women's access to justice and to ensure implementation of key legislation on SGBV, but this cannot alone address the fundamental dynamics of gender inequality which allow for the perpetuation of violence against women and girls. The consequential social stigma of SGBV towards the survivor contributes to the very low rate of reporting and treatment of SGBV in general in South Sudan.¹⁸

The CHRSS highlighted that the persistent failure to address violations and abuses, on-going denial, and a profound lack of political will to hold individuals and groups accountable, has been a key driver of violence and has allowed impunity to remain deeply entrenched, with victims still denied their right to effective remedies and reparations.¹⁹ In addition, the SGBV court is not expected, even if it becomes operational, to deal with CRSV cases. The government should therefore implement the transitional justice mechanisms as set out by Chapter 5 on Transitional Justice, Accountability, Reconciliation and Healing of the R-ARCSS, and in particular the Hybrid Court, and ensure proper training of its officers, since it will be qualified to take complex cases of CRSV. This is especially important given the widespread and endemic nature of the issue since the beginning of the protracted conflict in South Sudan, and since the perpetrators of CRSV are often members of the state security forces, which leads to fear of retaliation and constitutes a breach of trust.

In addition, as also underlined by article 2(f) of the Convention, states must take all appropriate measures to modify or abolish existing customs and practices constituting discrimination against women. In its initial report, South Sudan admits in several places that the widespread application of customary laws remains a challenge. However, it does not propose positive actions on how to address the discrepancies between the Constitution and customary law, merely arguing that, since article 3 of the Constitution provides for its supremacy over any law, a customary law that contradicts the constitutional understanding of discrimination and gender equality is automatically void. A pro-active effort must be made by South Sudan to eliminate customary harmful practices, and any customary law that is contrary to the Constitution must be immediately abolished. The Committee states in its Joint general recommendation No.31 that the enactment of legislation alone is insufficient to combat harmful practices effectively and that in accordance with the requirements of due diligence, legislation must be supplemented with a comprehensive set of measures to facilitate its implementation, enforcement, follow up and monitoring and evaluation of the results achieved.²⁰

One example is the question of "marriageable age": while it is clear from the Transitional Constitution and the Child Act 2008 that a child below 18 cannot give informed consent and that both parties need to give consent before entering in a marriage,²¹ interpretation of such a

¹⁶ Report of the Commission on Human Rights in South Sudan, 31 January 2020, A/HRC/43/56, para. 28

¹⁷ Report of the Commission on Human Rights in South Sudan, 31 January 2020, A/HRC/43/56, para. 30

¹⁸ Only 7% of survey respondents who experienced GBV said they immediately reported it to the police; 43% of GBV survivors said they decided to keep quiet out of fear; 57% did nothing because they felt there was no point in reporting cases of GBV. "The girl has no rights": Gender-Based Violence in South Sudan, CARE report, May 2014, p.3

¹⁹ Report of the Commission on Human Rights in South Sudan, 31 January 2020, A/HRC/43/56, para. 87

²⁰ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No.18 of the Committee on the Rights of the Child on harmful practices, para. 41

²¹ Legal provisions relating to gender equality and sexual and gender-based violence in South Sudan, Human Rights Initiative, August 2017, p.11-12

crucial provision for the protection of human rights should not require an analysis of several legislations taken together. This type of unclear provisions protecting crucial human rights must be clarified by the South Sudanese authorities.

Article 7

The participation of women in peace and political processes is crucial for sustaining peace and fostering development. Women bring unique perspectives in fragile countries in post conflicts situations such as South Sudan. While the R-ARCSS does contain important provisions with regards to gender equality, including a 35% quota for the participation of women in important political positions (section 1.4.4), as highlighted in South Sudan's initial report to the Committee, their implementation is scarce. For instance, although women hold key positions in the Revised Transitional Government of National Unity (RTGoNU), they occupy only few top Executive and Council of Ministers positions: 9 out of 35 Ministers are women, 1 out of 10 Deputy Ministers is a woman and 1 out of 6 Vice President is a woman. LAW's consultations with civil society indicate that 35% women quota is likely to be ignored in subsequent formation of other key institutions and structures of governance including Members of Parliament, Council of States, state governments and independent institutions. Politics is still largely considered as a hostile space for women,²² who, in the context of gender discrimination, often lack the confidence and incentive to participate.

Accordingly, whilst it is an achievement that this type of provision is translated into legislation aiming towards more gender equality in political decision-making, South Sudan must take steps to ensure its actual implementation.

Article 16

It is commendable that the law of South Sudan states that “no marriage shall be entered into without the free and full consent of the man and woman intending to marry”. However, South Sudan recognises itself that there are difficulties in implementing national law in a context where marriage is largely regulated by customary law.²³ Further efforts must be made when it comes to child marriage, bride price and protecting women from domestic violence, among other types of SGBV.

In its Joint general recommendation No.31, the Committee addresses the question of harmful practices and the obligation of State Parties to plan and adopt appropriate legislation, policies and measures and ensure that their implementation responds effectively to specific obstacles, barriers and resistance to the elimination of discrimination that give rise to harmful practices and violence against women as described in article 2 and 3 of the Convention, and to ensure, among other issues, that the betrothal and the marriage of a child will have no legal effect.²⁴ The Committee adds that child marriage is a marriage where at least one of the parties is under 18 years of age and that it is considered to be a form of forced marriage, given that at least one of the parties cannot express full, free and informed consent.²⁵ In addition, the Committee

²² President Salva Kiir remarked in 2015 that women could not be appointed now in time of transition and conflict because they are weaker and not capable of handling security at the states. In addition, women involved in the R-ARCSS negotiation have reported harassment and being treated as inferior by men who were represented in a large majority.

²³ Initial report submitted by South Sudan under article 18 of the Convention, paras 203 to 205

²⁴ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No.18 of the Committee on the Rights of the Child on harmful practices, para. 31

²⁵ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No.18 of the Committee on the Rights of the Child on harmful practices, para. 20

describes the payment of dowries and bride prices as increasing the vulnerability of women and girls to violence and to other harmful practices, and as being a form of trafficking in human beings,²⁶ which is prohibited under article 6 of the Convention.

In addition, in its General recommendation No. 35 updating general recommendation No.19, the Committee clearly recommends that State Parties ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances.²⁷

Early marriages are common in some areas of South Sudan,²⁸ due to customary practices that do not take into account the definitions of minimum age for consent, and the absence of any targeted or efficient government interventions. A clear policy to encourage girl education and affirmative action in universities would, for instance, be effective as a part of a policy tackling child marriage. Measures to address poverty, which is a key factor in sustaining the customary practice of bride prices, is also crucial.

Moreover, as stated in the initial report, section 247(1) of the 2008 Penal Code criminalises rape. However, section 247(3) explicitly states that sexual intercourse between a man and his wife will not amount to rape even where there is a lack of consent or one of the spouses is below the age of 18 years.²⁹ This is contrary to General recommendation No. 35 and inconsistent with the Transitional Constitution. For clarity that non-consensual intercourse with a spouse or intercourse with a minor in a marital relationship is both unlawful and a criminal offence, this section of the Penal code must be urgently amended.

Concluding remarks

South Sudan has made efforts to pass gender-sensitive legislation promoting accountability and gender equality. Yet, they are not operationalised and rarely translate to improving the lives of women and girls in South Sudan. Discriminations persists in many fields, such as for women prisoners, women and girls with disabilities, women in politics, or with regards to support to women entrepreneurship, which leads to the perpetuation of harmful and discriminatory practices at all level of society. Indeed, all aspects of women and girls lives in South Sudan are affected by ingrained gender inequality, leading to high levels of multiple forms of SGBV.

One of the central issues for the proper implementation of the Convention in South Sudan is the de facto supremacy of customary law over that of the actual implementation and enforcement of gender-sensitive legislation, particularly relating to SGBV. Measures to implement and enforce this legislation, alongside measures to ensure the supremacy of this legislation over contradictory and harmful legislation and customary law, must be taken urgently by South Sudan.

²⁶ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No.18 of the Committee on the Rights of the Child on harmful practices, para. 24

²⁷ General recommendation No.35 on gender-based violence against women, updating general recommendation No. 19, para. 29(e)

²⁸ "The girl has no rights": Gender-Based Violence in South Sudan, CARE report, May 2014, p.8

²⁹ Legal provisions relating to gender equality and sexual and gender-based violence in South Sudan, Human Rights Initiative, August 2017, p.6