Gender-based violence versus human security: Cases from South Sudan

SVF-3901

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Abbreviations

CPA – Comprehensive Peace Agreement

DCAF – Geneva Centre for the Democratic Control of Armed Forces

GBV – Gender-based violence

GoSS – Government of the Republic of South Sudan

GoS – Government of Sudan

HRW – Human Rights Watch

HSBA – The Human Security Baseline Assessment for Sudan and South Sudan

IDP's – Internally Displaced Person's

IPV – Interpersonal violence

IR – International Relations

NRC – Norwegian Refugee Council

SPLM – Sudan People's Liberation Movement

SPLA – Sudan People's Liberation Army

SSR – Security Sector Reform

TC – Transitional Constitution

UN – United Nations

UNDP – United Nations Development Programme

UNFPA - United Nations Population Fund

UNIFEM – United Nations Development Fund for Women = UN Women

UNSC – United Nations Security Council

UNMIS – The United Nations Mission to Sudan

UN Women - United Nations Entity for Gender Equality and the Empowerment of Women

1. INTRODUCTION

This thesis is based upon my interest in the concept of gender-based violence (GBV), violence that mostly targets women due to perceptions about their gender. The reason for my interest is because much violence overwhelmingly affects women and girls all over the world[1]. In general women have been found to be more marginalized and vulnerable to both direct and indirect/structural violence in the extensive research that has been conducted on GBV globally and particularly in areas of conflict[2]. The United Nations has, as an international arena for security issues among states, worked extensively with GBV and issues that falls under this umbrella term either it being gender inequality, sexual violence, physical abuse or other such issues.

Gender is a part of our identity and how people make sense of the world (Hoogensen & Rottem, 2004). It has connections to culture, traditions, biological sex and societal norms. Thus GBV is an attack on a person's identity, which has devastating consequences for its victims. Analyzing GBV aims at uncovering why and how it happens as well as how it is perceived by those who have been subjected to it.

As a case for examining GBV I have found South Sudan to be very interesting due to it being the world's newest state, as well as being a state which has much potential for combating GBV through available laws and policies, both customary and statutory[3]. South Sudan can be said to still be in a transitional phase of (re-)building and shaping a state after decades of war and due to this South Sudan currently has both a customary (informal) and a statutory legal system. The formal legal system is represented by a Transitional Constitution (2011) negotiated with the help from the international community. Hilde F. Johnson, a former UNICEF representative in South Sudan, played a pivotal role in the establishment of the 2005 Comprehensive Peace Agreement between Sudan and South Sudan alongside the UN Mission to Sudan (UNMIS). The customary courts are also still vibrant, a system built on longstanding traditions, cultures and norms of different tribal groups of the south (Danne, 2004).

GBV is something pertaining most of all to women, affecting them on an individual level because they happen to have been born as women in a specific cultural context. This violence

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[1] http://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/ checked 31.08.13
[2] Although there is evidence that men also have been objects of GBV, it is a majority of women who suffer from this type of violence both during and after conflict (Scott, et al., 2013, Haki, 2011, p. 11, DCAF, 2010).
[3] The customary law system refers here to the traditional system while statutory law system is the state's official legal system. While the former is based much upon oral tradition, the latter is based upon written text.

must be examined so that information is collected and spread continuously until men and women are treated equally, have equal rights and equal opportunities all over our globe. This is very normative, but nevertheless it is the standpoint and honest opinion of the researcher here. I do not believe, based upon my knowledge about theories associated with gender and human security, which the world or the individual states can become more peaceful and secure without equal participation of women.

I have chosen to base the analysis on two theoretical perspectives which both are concerned with the individual experience. The first aspect that will be addressed is the 'gender' in gender-based violence (GBV) through an analytical tool that is concerned with the understanding of gender as a concept. The next aspect is pertaining to the violence of GBV and will be looked at through the lens of human security due to GBV being a threat to women's security. Human security is seen here as a part of the bigger security picture in a state, it is believed here that individuals who feel safe and secure in their daily lives will contribute to a secure and stable state, and that these stable states will work for a secure international society.

To reach an understanding of this specific type of violence, in the specific context of South Sudan, the analysis has been conducted by qualitative measures. More specifically by an analysis of documents pertaining to customary courts who handle GBV cases, and the official Transitional Constitution (TC). These documents carry vital information on how gender is understood by the state and by its citizen as well as on how the cases are handled when prosecuted.

1.1. RESEARCH QUESTION

The aim of this study is to shed a light on the current situation of GBV in South Sudan, and the effects of the formal and informal laws on GBV related to women. The main focus will be on the Transitional Constitution (TC) representing the formal law system, and the customary courts representing the informal law system. These systems are both perceived as being the main policymaking institutions within the state. The analysis will entail some understandings of the two systems from the standpoint of a social scientist as well as interpretations of the concepts/categories rape and abuse connected to GBV. Regarding the customary courts I will go in depth on perceptions of gender in relations to violence both in form of direct, physical abuse and marital rape as well as issues which are more of a structural character such as the

unspoken value differences put forward by the customary courts and the tradition of child marriage. All of these issues have been reported to be highly prevalent in South Sudan and are issues which the state also addresses to some degree in the TC.

The main research question in relation to the abovementioned context is:

- *Are the measures for combating GBV in South Sudan a sufficient response to ensure women's security?*

According to the Transitional Constitution (TC) of South Sudan (2011) all citizens are equal before the law, confirming that the rights (and responsibilities) of the citizens upheld through a multi-level system composed of the Government of South Sudan (GoSS), the National Legislative Assembly, a judiciary and an executive (state governor). The local level of governance consists of county, payam (district), boma (sub-district) and village levels (Haki, 2011). These rights are further supposed to be ensuring security of individuals. It is therefore interesting to look at the role of customary courts in the establishment of human security and insecurities through their role as complementary or competing with the judiciary.

By bringing these issues into focus the study hopes to bring the theoretical and practical debates about gender a bit further. This study aims to achieve this goal through a focus on an analysis where individuals are in focus.

Further, the study aims to provide some insight in to the relationship between weak state institutions and an undermining of the everyday lives of women. Moreover, the importance of gender issues and especially women's security comes to mind when this traditionally patriarchal society is in a state of transformation (Ali, 2011)[4]. I am aiming at uncovering general oppression of women through violent practices and structures in the society.

An underlying, normative assumption for this study is that people have to feel basic security if they are going to be able to contribute to society. By this it is meant that by providing its citizens with basic human security from threats to their daily lives, the GoSS and the state will benefit by getting trust from the citizens. My underlying interest is in the capacity of the state, to implement the constitutional rights of its citizens in cases of gender-based violence (GBV).

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[4] According to the Haki report only one of the chiefs in the main customary courts was a woman. Also see HSBA January 2012 – Women's Security in South Sudan.

1.2. THESIS STRUCTURE

The thesis is divided into seven chapters, each with several sub-sections underlining different important aspects. This is done to make it easier to navigate between the different subjects. This introduction provides an overview of the study, the theme and important concepts.

Chapter 2 presents the method used and how the data was collected. It will also discuss the method of qualitative content analysis against other methods of quantitative nature. The impact of triangulating data with the theoretical approaches to get a deeper understanding of the case is also included in this chapter. It also includes criticisms of the sources.

Chapter 3 will details the historical background of South Sudan including civil wars, independence and the current situation of women. It functions as a context for the case.

Chapter 4 goes in depth with the theme and case of gender-based violence (GBV) with general definitions and facts about the situation of GBV in South Sudan.

Chapter 5 contains the conceptual framework of the thesis, gender and human security, as well as a discussion of the concepts.

Chapter 6 entails a short, descriptive data presentation of the Transitional Constitution and customary practices found in the Haki report.

Chapter 7 deals entirely with the analysis of the case in light of the theoretical perspectives.

Chapter 6 summarizes the study and gives some concluding remarks.

2. RESEARCH METHODS

2.1. INTRODUCTION

This chapter focuses on the chosen method for research and data collection technique used in this thesis. It will further explain the justification for this selection as well as include some reflections and some potential challenges of the research.

2.2. QUANTITATIVE VERSUS QUALITATIVE METHODS

There is often a line drawn between qualitative and quantitative data collection due to their different approaches to data. Since many scholars have devoted their time extensively to these methodological issues this chapter will only briefly go through the differences before moving on to explaining and discussing the chosen method for this study.

Quantitative methods are methods where the researcher is basically concerned with measurements and interpretations of those measurements. By this it is meant that they use specific techniques such as statistics, experiments and surveys to measure how often a phenomenon occurs across a population. Social surveys can for example be used for finding out how many girls and how many boys go to school, or it can be used to measure the prevalence of child marriages in a society. These statistics are often used by researchers as an entry point for deeper and more qualitative studies. In this case, statistics found on the prevalence of girl child marriages and their consequences spiked an interest for gender issues (Raj, et al., 2009). Statistics are further seen to be more value-free and objective than qualitative methods in that they often use predetermined questions, structured observations, random samples and variables which can be measured (Silverman, 2006, pp. 36-37). Many international organizations gather big sets of data from the states so that they can measure and keep track of developments and/or backlashes. For example, The World Trade Organization (WTO) is tracking international trade and keeping extensive statistics on a wide array of trade related issues (World Trade Organization, 2013). Quantitative data is thus a good source for information, although also numbers can be manipulated or chosen selectively to for example portray a specific reality of a state (Silverman, 2006, p. 36). Statistics is as such an important stepping stone for building further research, which can be done by qualitative methods.

In qualitative analysis scholars are concerned with the not so easily measurable aspects of social life such as people's actions in a specific setting (Holliday, 2007, pp. 4-7). Social life

here refers to people's daily lives, their work situation, educational possibilities and social issues with which they are concerned (Holliday, 2007, p. 23). These situations have to be capitalized on while they are available, as they are not as structured and controlled as in quantitative research (Holliday, 2007, p. 22). An overview by Adrian Holliday lists the following ten types of data used in qualitative data collection:

1. Description of behavior
2. Description of event
3. Description of institution
4. Description of appearance
5. Description of research event
6. Personal narrative
7. Account
8. Talk
9. Visual record
10. Document

The aim of qualitative research methods, is to get in contact with people on the ground and it suggests "…that there are areas of social reality which statistics cannot measure" (Silverman, 2006, p. 43). Without the accounts of people one might not know if the categories or variables used are correct and might end up with measuring a phenomenon incorrectly or using wrong concepts. By interviewing people one can for example reveal how a phenomenon like gender-based violence is perceived in a society and which concepts are connected to that phenomenon. One can also use this type of qualitative method to uncover why girl child marriages are prevalent in some societies while not prevalent in other. This is to uncover social meaning.

As I was not able to travel to South Sudan for my data collection however, many of the traditional and commonly used methods in qualitative research, such as interviews and other personal accounts mentioned above proved to be less suitable for this thesis. Instead I have used document research, or what is also called qualitative content analysis[5], which focuses on written text arising from a specific social setting (Holliday, 2007, pp. 72-73). The job of me as a researcher using this method is to make sense of different documents, from different social

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5 This is different from the quantitative content analysis where the focus is on counting how many times a predetermined category occurs in a text (Silverman, 2006, p. 159).

settings, using them as sources for linking together information regarding my research question. Any decisions made about the data collection method were made during the beginning of the writing process as they depended on the knowledge of the research setting (Holliday, 2007, p. 71). Thus, the lack of availability of the South Sudanese society was for me a deciding factor in deciding upon which research method to use.

By using qualitative content analysis as my research method I have to rely on sources which are founded on differing research methods, often a combination of interviews, statistics and focus group discussions. Thus I have to assume that the data is correct and authentic as it is research which I have not carried out myself. The 'raw material' is currently available in textual form and all sources available online and can be found in the bibliography. Written sources, like mine are constant and must be analyzed with that in mind, meaning that they will most probably stay in the same condition as when I found them unless the websites are taken down. An important note that must be made about written documents is that they are written for another purpose than they will be used for here, they mere representations of reality or a social phenomenon (Silverman, 2006, pp. 154-155). Thus they must be understood as representing a social context and cannot speak to the realities of all South Sudanese.

2.3. MY DOCUMENTS AS SOURCES

Further, the two primary sources which have been used for the analysis are both 1st and 2nd hand sources, which tell us something about their position in relation the case. One of the main sources is the Transitional Constitution (TC) which is a 1st hand source which includes information on the formal laws of South Sudan (Duedahl & Hviid Jacobsen, 2010, pp. 66-67).

The other main source is a report describing customary practices, based upon interviews, observation and focus group discussions. Here the participants were 1st hand sources for the report, but they are 2nd hand sources for me as I am re-using their information to build my analysis (Duedahl & Hviid Jacobsen, 2010, pp. 66-67). In this report the focus is on describing the informal legal system of South Sudan.

The interpretation of these documents is dependent on my position as a researcher, as well as the chosen theoretical approaches, as the data is triangulated and compared several times during the writing process. Triangulation has worked as a means of getting a deeper understanding of the data and the implications the data has had on (Silverman, 2006, pp. 290-292). The most important thing is what the data say about the case in question and that the

data controls the process of finding an answer to the problem statement. Data is derived from something, from someone's thoughts, ideas, cultural background etc. The purpose of this study and of triangulating the data is to uncover this veil and find the meaning which I am searching for.
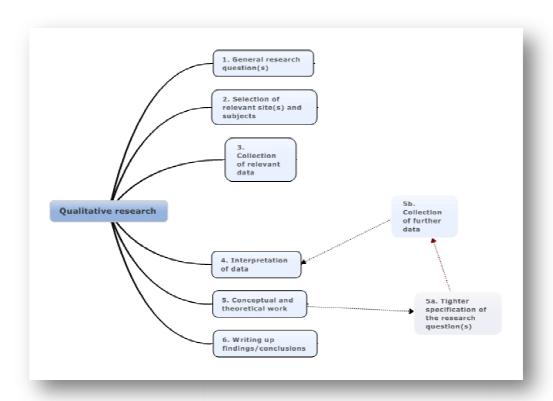

FIGURE 1INSPIRED BY BRYMAN *(BRYMAN, THE NATURE OF QUALITATIVE RESEARCH 2012: 384)*

According to the human security perspective, discussed later in the theoretical approach, the focus should mainly be on the understanding of security from below or at least from the perspective of individuals. My understanding of this has been to look at documents representing the institutions with a responsibility of securing people in their daily lives. Of these documents the most important one is the TC because it is a 1st hand source to the state's perspective on security. Except for the TC I have chosen one other source as a primary source. It is a report that has sought to document the practices of handling GBV cases in the customary courts of South Sudan. This document is the only recent study that has been done on the relationship between GBV and customary courts, which means that it is an essential source for understanding the case. Other studies have been done on customary courts, but few of this scale have been conducted after independence. One such case study on the customary courts and indigenous law in South Sudan from 2004 will however be used as a supporting

document as it provides important information that can enlighten the current situation (Danne, 2004).

Other sources that have been important for this study are of a more historic character. As the history is not the main focus of this study I have limited my sources in this area to two main sources. One book, by Douglas H. Johnson, is mainly presenting an overview over the root causes of the South Sudanese civil war (Johnson, 2011). The other book, by Hilde F. Johnson, is more concerned with the agreements before and during the Comprehensive Peace Agreement (CPA) which established a ceasefire between people's of Sudan and South Sudan (Johnson, 2011).

2.4.   SOURCE CRITICISM

In this section the reliability, validity and relevance of the sources will be of importance as it says something about the analysis that will be done (Duedahl & Hviid Jacobsen, 2010, pp. 51-71). This can be said to be a type of quality control grounded in a general suspicion in relation to all sources. The question is simply put: To what extent can these sources be trusted to account for reality?

2.4.1.   THE TRANSITIONAL CONSTITUTION (TC)

The study of the TC is not a study of an objective source as it is a normative document that contains constructed ideas about the behavior of the individuals in a state. The word 'constitution' is often used as a wide definition of a "…collection of particularly stable and/or basic legal and/or social norms (my translation Smith, 2009, p. 65). More formally one would say that it is a part of the formal legal system in so far as it is contains some of the main rules which refer to how the state is governed, and that the constitution is the form of decision in the state (Smith, 2009, pp. 66,73). The constitution is a part of democratic Rule of Law, which determines who has the power to sanction misbehavior or illegal acts (the state/government), as well as being a constraint on the power holders so that power is not misused (Plunkett, 2005, pp. 76-77).

In the case of South Sudan, the constitution is built upon norms brought to the table by international partners as well as the South Sudanese diaspora and it is based upon the CPA and the Interim Constitution. The United Nations played a pivotal role in the implementation of the CPA during the period of 2005-2011 (S/2005/579, 2005). As Alexander P. Danne has

put it, there was "an internationally brokered peace process" that produced the framework in which the constitution later would be founded on (Danne, 2004, p. 201). This does not mean that the TC is not coming from the 'inside', but it can be understood as reflecting the international community. The TC more specifically also forms how individuals perceive the value given to gender due to its focus on giving women an extra Bill of Rights (Transitional Constitution, 2011, p. 5)

This specific constitution has given special attention to women in an own *Bill of Rights for Women*, but not to men, which establishes an assumption here that women need extra protection through specific rights. The analysis must build on the text as it stands and in connection to the context of which it is applied to in this analysis, namely GBV. I do not believe that this online edition of the constitution is false or in any other way rendered, since it has been found on the website of the GoSS, thus it is considered a credible and valid source representing the formal legal system in South Sudan. It must however be kept in mind that this is a transitional constitution, which is undergoing some changes in the next few years. A permanent constitution will probably not be in place in a few years[6], and the Oslo Center for Peace and Human Rights have suggested the permanent constitution to be finished in late 2015 (The Oslo Center for Peace and Human Rights, 2013).

2.4.2. THE HAKI REPORT

The next main document of this thesis is the Haki report on 'Combatting gender-based violence in the customary courts of South Sudan' (2011)[7]. This is a different type of written text as it is a research report. The Haki Network is a global coalition and non-profit organization that focuses their work and research on "legal empowerment approaches to international development" (Haki Network, 2011). By reading this statement we can find that their focus (or agenda) is on rights. The Haki report is carried out by people that openly have an agenda with their approach, which have affected their way of asking questions, and then again, the answers that are the basis for the report. This must be taken into account when

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[6] According to Luka Biong Deng, a former member of several interim commissions in Sudan/South Sudan, the review process has proven to be challenging in many aspects. His article in the Sudan Tribune can be found here: http://sudantribune.com/spip.php?article45798 (checked 19.08.13)
[7] The research done by the Haki Network for this report has been recognized by Human Rights Watch in one of their reports on GBV from 2013, by Cheryl Hendricks in an article on Women, Peace and Security from 2012 and by the Internal Displacement Monitoring Centre: http://www.internal-displacement.org/idmc/website/countries.nsf/%28httpEnvelopes%29/E176BC38075344AAC125796F00028445?OpenDocument (checked 28.08.13)

doing an analysis of the report. The report is used here as a source of information to a phenomenon which is difficult to approach from a distance to the actual context. The Haki report provides a very wide definition of GBV based on their observed cases:

> "The definition of a GBV case ranged from murder of a spouse to beating a girlfriend for cheating. Any case that contained physical or mental abuse by a member of one sex to another was considered a GBV case, even if the abusive act was not the issue under adjudication" (Haki, 2011, p. 11)

The reliability of the report lies in that it does not seem to have any alternate agenda that enlightening the legal situation of women. The importance of this report however, is that it highlights the role of customary courts in handling GBV cases, making evident that there are what you might call loopholes, in the TC. The Haki report seems to be credible as far as it is not controlled by the Government of South Sudan (GoSS), but is an outsider and a non-profit organization. I trust in its authenticity because there does not seem to be any particular reason for a non-profit organization to make up such a study. It does not appear to be falsified or altered.

2.4.3. CUSTOMARY COURTS

Customary courts have existed in South Sudan for centuries, and it is a "symbolic affirmation of Southern Sudanese culture, tradition and indigenous identity" (Danne, 2004, p. 200). It is built upon the tradition of African customary law which "refers to a body of unwritten traditions, norms, social conventions and rules that through usage and widespread acceptance, direct and govern traditional African society" (Danne, 2004, p. 202). These are thus the informal laws of the society. Although these rules or laws are not yet written down, there is the possibility that it could crystallize into written form or merge into the formal legal system in the future. According to Danne the customary laws are based upon African customs which are originating from the following four primary sources (Danne, 2004, p. 203):

- 'Practice': A custom or tradition that has been repeated over many generations at the community level.
- Binding or persuasive decisions from 'Courts': Here it is referred to both customary (informal) and statutory (formal) courts
- 'Religious beliefs': In which matters such as incest and adultery are treated.
- 'Morality': Refers to moral principles of the community.

In addition to these customs he points out the importance of old colonial law codes that are still influencing South Sudan, as well as the pure forms of traditional laws (Danne, 2004, pp. 203-205). This system is quite complex, and thus it is important that such organizations as the Haki Network are studying and uncovering the local practices. As the Haki report has taken the approach of GBV as a case, many of the differing practices become evident, as well as many similarities. It must be underlined that the customary courts are not the first instance of conflict resolution in GBV cases, as they often have to go through the clan or tribe mechanisms first (Haki, 2011, p. 12). The existence of customary courts has also been addressed by Human Security Baseline Assessment for Sudan and South Sudan (HSBA) in their report from 2012 on "Women's Security and the Law in South Sudan" where they emphasized that "Operating alongside the statutory system is that of customary law, which consists of numerous unwritten bodies of law that have regulated South Sudan's tribes for centuries" (p. 2) This means that the report only covers the cases that reach a customary court. As there are approximately 50 different tribes[8] in South Sudan (Danne, 2004, p. 204) it is understandable however that the Haki Network left out some of the tribes attempting to not include too much information.

In a Peaceworks report conducted by the United States Institute of Peace (USIP) and the Rift Valley Institute (RVI) however, there is extensive information on the possibilities for collaboration between customary courts and the statutory courts, which will be used in the analysis to enlighten the Haki report as they are overlapping in many aspects (USIP and RVI, 2010). This report is highly detailed and focuses more on the general practices of customary courts than on GBV and has therefore been chosen to be a supporting document to the analysis.

2.5. SUMMARY

This chapter has strived to prove the legitimacy and credibility of the sources while acknowledging challenging aspects of them. Both the TC and the Haki report are the most likely to shed light on the research question and have been chosen for that specific purpose. Alongside these the historical sources used for the brief introduction in the next chapter are also very useful, although it must be taken into account that history can be manipulated. The

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[8] This number varies between approximately 50 and approximately 30, depending on the sources.

sources on history do contain information that is in accordance with each other and with the sources on customary courts.

3. HISTORICAL BACKGROUND

3.1. INTRODUCTION

The history of the South Sudanese people is long and complex[9], and like many burgeoning nations before them, they have gone through many struggles to gain independence and autonomy over their own land. Hilde F. Johnson has called the history of Sudan a battleground, a struggle between intellectuals from both sides to institutionalize their own versions of the background and events (2011, p. 4). In this case I refer to the South Sudanese people or the South in general, rather than just the state, because the idea of South Sudan as a modern state seems to be quite new. While the people have been struggling for centuries under different regimes, much of the "Western" history of the South Sudanese people starts in 1820 with the influx of Western and other colonial powers (Johnson, 2011). As demonstrated by historical records and other sources chronicling the recent history of the South Sudanese history. The actual states, when I refer to them, will be referred to as Sudan and South Sudan in the rest of this thesis. History is important if one seeks to understand and build knowledge about the current situation. It especially plays an important role when researching the current situation in a country, and a culture, which is not well-known to the researcher. In this particular context the people have a history which has colored the development from the pre-colonial era to self-governance.

As the main sources for this chapter I will rely on the extensive elaboration given by Douglas H. Johnson (2011) on his perception of the root causes of Sudan's civil wars, as well as the history of Hilde F. Johnson (2011) which depicts her contact with the two parties to the longstanding conflict during the peace negotiations leading up to 2005. In addition the history of indigenous and customary legal system will be presented as by Alexander P. Danne (2004). Figure 2 and 3 below show maps of the two respective states as of 2011. The pictures are included to provide an overview over the territories which have had such a long history, as will be presented in the next chapter.

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[9] Douglas H. Johnson underlines that although the norm has been to see the divide between North and South Sudan in either cultural, ethnic, racial or post-colonial terms, these issues are inextricably linked (Johnson, 2011, pp. 1-2)
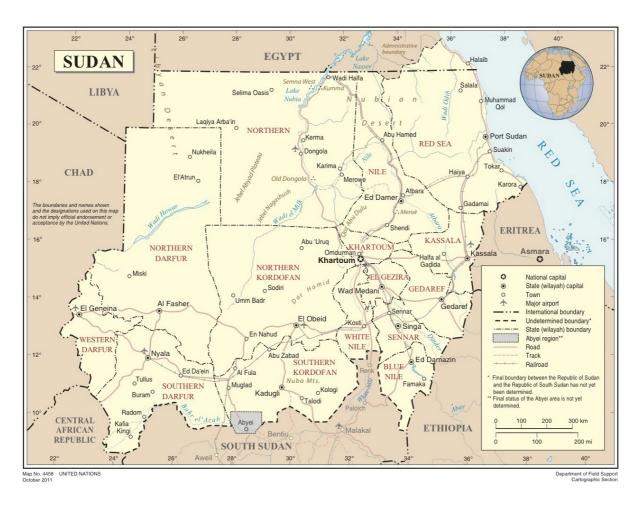
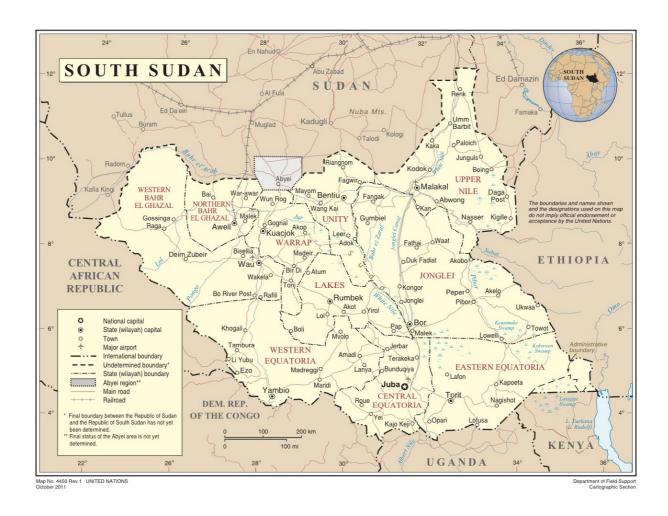FIGURE 2 MAP OVER THE CURRENT SUDAN (UN FIELD SERVICE, CARTOGRAPHIC SECTION, 2011)

FIGURE 3 MAP OVER SOUTH SUDAN (UN FIELD SERVICE, CARTOGRAPHIC SECTION, 2011)

Under different regimes the South Sudanese people have experienced slavery, oppression and being marginalized. As far as is known the history of modern Sudan started around 1820 when colonial powers were racing for the control over Africa[10]. Before the modern history of the state it is known that there was a treaty between Egypt and Christian Nubia[11] in 652 AD regulating the trade of slaves (Johnson, 2011, p. 2). It is also known that the sixteenth century Sennar kingdom raided the Ethiopian foothills, the Nuba mountains and the plains of the White Nile, while in the seventeenth century the Darfur sultanate of western Sudan raided parts of what today is South Sudan (ibid.). Although this history is very interesting in itself I find it challenging to include this history. It must however be kept in mind that slavery was a part of the reality for people also in the centuries leading up to modern colonialism.

The written sources chosen for this brief historical account focuses on the period between 1820 and 1956 as being influential in the evolvement of the two states, and as the modern history is more interesting in relation to my case I have chosen to focus on the newer history. In 1820 Egypt invaded and colonialized Sudan and before this point in time little is actually known about the organization of the state. This lack of knowledge seems to have been prevailing in different African regions prior to the colonial period (Danne, 2004, p. 206) which can have something to do with the oral traditions of the Sudanese and South Sudanese people (Haki, 2011, p. 13). Egyptian rulers were accompanied in their colonization first by the Turks, named the Turco-Egyptian regime. The Turco-Egyptian regime lasted from 1820 to 1883 and started by raiding the northern areas of Sudan for slaves and cattle before they moved to the southern parts. Through the period the regime also introduced new forms of taxation and land ownership in the North which contributed to the south being further exploited due to hardships in the North (Johnson, 2011, pp. 4-5). The regime also introduced their religious hierarchy which benefited Muslims in Sudan over others.

The Turco-Egyptian regime was followed by a revolt by a Sudanese, charismatic religious leader in 1883, named the 'Mahdi', which led to the overthrow of the former regime. The Mahdi was a man named Muhammad Ahmad and although he died in 1885 the Mahdiyya regime existed until 1898 (ibid. p.6). The Mahdiyya was characterized by a standing army of slaves as well as the 'Mahdist' successor, Khalifa Abdellahi, who gathered the power around

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[10] This is thus a 'natural' limitation of the period with which I am concerned historically as I am not sure that one can read too much into the past when it comes to present issues.

[11] Nubian is a language in current South Sudan, but the terms 'Nuba', 'Nubian' and 'Sudanese' have been found to represent 'slave' in the colloquial Arabic language spoken along the Nile river.

the capitol in the North. Actually the regime is said to have lost control over the South early in the period (ibid.). During this period, the divide between the North and the South became even more evident due to Islam gaining grounds in the North while the South mostly was left to itself. Hilde F. Johnson points out that the Mahdist state (1881-1893) has been portrayed as internal colonialism by the Northerners over the South Sudanese (Johnson, 2011, p. 4).

Then in 1898, there was a new invasion by a combination of British and Egyptian powers[12] which is referred to as the Anglo-Egyptian regime which lasted until 1947. This regime played upon many of the now well established patterns of division between the people of the North and South, but since the 1870's the slave-trade had been declining due to international pressure making it less of a priority of the Anglo-Egyptian colonial regime (D. Johnson, 2011, p. 5). The Anglo-Egyptian regime feared a new 'Mahdist revolution' in the North so they reinstated many tribal leaders and cooperated with them to implement their own form of civil administration. In the South however, the situation was different as the administration was placed in Khartoum, in the North (ibid.). As the former 'Mahdist' regime did not have control over the South, the new regime met many challenges in trying to secure the submission of the South Sudanese. The South remained the periphery of the central government in praxis until 1930 when the Civil Secretary of the regime delivered a statement declaring that "the South was to be developed along 'African', rather than 'Arab' lines…" making it policy (D. Johnson p, 10-11). This part of the regime was called "Native Administration" and meant basically that the South was to be developed along the lines of their indigenous traditions, law system and other ways of structuring their societies as long as it did not interfere with the regime or with the orthodox Muslim traditions (ibid. 10-13). Thus today's multiplicities of traditional and customary courts seem to have been encouraged during the Anglo-Egyptian regime.

3.3. CIVIL WARS

Being underdeveloped and feeling unfairly treated in many spheres of daily life can easily be seen as a source for people to fight for their rights, and in 1955-6 the first civil war broke out in Sudan, by a mutiny among the South Sudanese soldiers which included widespread killing of Northerners (H. Johnson, 2011, p. 4, D. H. Johnson 2011, p. 21-29)[13]. This marked the start

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[12] I recommend Hilde F. Johnson and Douglas H. Johnson as good sources on the history of South Sudan/Sudan, but for a short resumé I can recommend this website: http://africanhistory.about.com/od/sudan/p/SudanHist1.htm checked 25.05.13

[13] This period was characterized by a nationalist movement in the North and the establishment of a Legislative Council in the North. The council included South Sudanese participants in 1947, but the South was not prepared

of what has been seen as the longest civil war in the history of Africa even though the state Sudan became independent from the colonial powers in 1956 (D.H. Johnson, 2011, pp. 1-23, 26-27). This civil war can be seen as two separate civil wars as there was a period of ceasefire due to the Addis Ababa Agreement in 1972, an agreement of autonomy for the South Sudanese through regional governments and which also included a promise of economic development for the Southern parts of Sudan (D. H. Johnson, 2011, pp. 39-41). This agreement however failed, autonomy was not attained in the South and the period of 1972 to 1983 was marked by recurring guerilla warfare until a 'new' Civil War broke out in 1983. In 1983 the Sudan People's Liberation Movement/Army (SPLM/A) was founded as rebel group with a political wing under their leader John Garang (D. H. Johnson, 2011, pp. 61-62), but the SPLM/A went through a hard period in the 1990's due to ethnic tension between the Dinka and the Nuer[14]. The 1990's was a period in which the South Sudanese people not only suffered from the civil war against the North, but also from their fellow compatriots in ethno-nationalist strife (Hutchinson & Jok, 2002, pp. 90-96).

This civil war lasted until the signing of the Comprehensive Peace Agreement in 2005 and it is estimated that 2 million people lost their lives (Martin, 2002).

3.4. SOUTH SUDANESE INDEPENDENCE

The Northerners have blamed their problems on the Anglo-Egyptian regime which started the implementation of foreign policies, and have believed that the violence which emerged after independence was rooted in animosity towards interference in Sudan's internal affairs (H. Johnson, 2011, p. 5). The South Sudanese, on the other hand, blame the Northerners and the ruling elites of Khartoum from the 19th century onwards for the violence after independence, because the Northern merchants were involved in the massive slave trade alongside foreigners and during the 'Mahdist' regime (ibid.).

Despite of this long and violent history South Sudan finally became a sovereign state July 9th, 2011[15], as the CPA had included a referendum on secession from Sudan, through a democratic process. One year previous to the secession the first government elections were

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for self-governance in the same manner as the North who had been under closer administration (D. H. Johnson, 2011, p. 25).

[14] The Dinka and the Nuer are two of the major tribes in South Sudan and while Garang belonged to the Dinka group, his opponent Riek Machar belonged to the Nuer group (Hutchinson & Jok, 2002, p. 86).

[15] http://www.goss.org/ Information about the history of the state can be found under the "About South Sudan" and "History".

held in South Sudan. The Government of South Sudan (GoSS) after independence consisted of a large percent SPLM members[16], as they were the democratically elected winners of the 2010 elections, making SPLM the main pillar of government and their leader Salva Kiir the president of South Sudan[17][18]. The SPLM has governed the state since the Comprehensive Peace Agreement (CPA) between Sudan and South Sudan was signed in 2005 and their leadership was reaffirmed by the 2010 government elections. Mentions of the elections in the media and other sources states that Salva Kiir from the SPLM won the presidency with over 90% of the votes and that SPLM got 160 of the 170 seats in the National Legislative assembly[19].

It has been said that "No peace treaty can undo the past; it can only address and attempt to redress the consequences of the past" (D. H. Johnson, 2011, p. 167), but several donors have had enough belief in South Sudan being able to move forward in democratic manner, that they continue their financial support to the state[20].

3.5. WOMEN IN THE HISTORY OF THE SUDAN/SOUTH SUDAN

The Human Security Baseline Assessment (HSBA) has reported on women's role during the armed violence based upon fieldwork in South Sudan. They have commented that the status of women has in fact changed during the civil wars, and that this was due to a change in how ethnicity was perceived (HSBA, 2012). Earlier, before the 1955 mutiny and the civil war, women were not seen as legitimate targets, but as internal strife over power within the SPLA began in the 1990's, ethnicity gradually became a source of animosity between two of the major tribes[21] in South Sudan who for centuries had been intermarrying and lived in peace. While intentionally killing women (as well as elders and children) before the war was seen as "a direct affront against God as the ultimate guardian of human morality" (Hutchinson & Jok, 2002, p. 90), the ethnic identity, rather than the person, at some point became the target and with that women were also legitimate targets (Hutchinson & Jok, 2002, pp. 92-97). The unwritten ethical code had considered women as sources of refuge for fleeing or wounded

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[16] The 'movement' and 'army' have been separate entities since the pre-election period.
[17] http://www.ssrresourcecentre.org/2012/12/14/switching-gears-from-concepts-to-implementation-defence-transformation-in-south-sudan/ found 18.02.13
[18] For more information on elections in Africa and South Sudan:
http://africanelections.tripod.com/ssd.html#2011_Referendum checked 25.05.13
[19] http://www.sudantribune.com/spip.php?article44200 found 13.02.2012
[20] The US, Norway, UK and EU have supported South Sudan with 1.3 billion dollars in 2013, see:
http://www.state.gov/r/pa/prs/ps/2013/04/207623.htm found 24.06.13
[21] These were the Nuer and the Dinka.

men during pre-war times, but as the norms changed and weapons kept flooding into South Sudanese societies killing women and children became 'standard practice' (Hutchinson & Jok, 2002, p. 98).

Although it might seem like women only were the pacified victims of violence, it has also been put forward by scholars and others that women have had other and more active roles in the militarization of the South Sudanese society (Hutchinson & Jok, 2002, p. 102, HSBA – Women and Armed Violence, 2012, p. 1). The HSBA has found evidence that women took part in the SPLM/A during the civil war, and although most of them probably were nurses, cooks and carriers, some of them were also fighters alongside the men (HSBA – Women and Armed Violence, 2012, p. 2).

It is this side of the story, about the female fighters, Annette Weber discusses when she makes a point about women not being included in the DDR and CPA discussions after the civil war(s) because women were not recignized as parts of the war as the men had been. The CPA was very much an extensive agreement in which the two main parties to the civil war (the Government of Sudan and the SPLM) represented the fighting sides. The interesting part is that this process in South Sudan, even with the engagement of the United Nations Mission to Sudan (UNMIS) did not recognize the female fighters and members of the SPLM/A. Annette Weber, argues that the exclusion of female fighters was problematic. She states that as a result of the failing to recognize female fighters in the DDR process:

> *"… exclusion from active recognition in the armed movement denied women in southern Sudan the right to participate and have a voice in ceasefire and peace negotiations, in the architecture of state-building, and in vital decisions concerning the political, economic, legal, and military future of the country."* (Weber, 2011, p. 363)

This says something about women's place in society and recalls old and traditional views of the roles of women as nurturer and men as combatants, and does not take into account the stories of women. It is telling of how the concept woman is constructed and re-constructed after the conflict, as a non-fighter, excluded from power and maybe even as having a lower value (Weber, 2011, p. 363).

These differing images of women will be a part of the analysis as they are important for how GBV is handled in the current customary courts.

3.6. CURRENT SITUATION

South Sudan is currently in a political transitional phase where they strive to establish a democratic state after achieving their independence in 2011. South Sudan is striving to become a multi-level democracy that with decentralized power. In 2009, the GoSS wrote the following about the political constellation of South Sudan:

> "*Many political movements and armies operated in Southern Sudan prior to the signing of the CPA. However, after the CPA, they all transformed into political parties and joined SPLM in the new government. SPLM currently enjoys wider support and membership*" [22].

The different formal political levels in the state are state, county, *payam* (district), *boma* (sub-district) and village levels. Customary courts are currently not functioning at state level, but they are to varying degree handling cases at all the lower levels (Haki, 2011). There are reports on over 60 tribes and reports on 40-50 tribes currently existing in South Sudan, making it a complex society of differing groups with differing ethnic affiliations, cultural practices, customs and languages (Jok, 2011, p. 2 Haki, 2011).

In the aftermath of the civil war(s) and secession, South Sudan has been increasingly in focus both in academic circles, the media and among its donor countries. In particular the interest has been on the transition from a state of chaos with several rebel groups, to a democratic, multi-party state built upon "justice, freedom, equality and dignity" (Transitional Constitution, 2011, p. preamble). According to the Transitional Constitution of South Sudan (TC) these are objectives chosen by the legislative assembly after the democratic elections in 2010, when the Government of South Sudan was elected, and which was confirmed by the overwhelming 'yes to secession' in 2011[23].

Currently establishing equality between women and men, and making women's rights familiar to all parts of the society seem to have an exceptionally long way to go. Gender is often deeply internalized and is connected to the culture and traditions, not only to government and/or laws (Shepherd, 2008, p. 53). Gender inequality is prevalent in all areas of

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[22] www.goss.org/ Found under the tabs "About South Sudan" and "Politics".
[23] http://www.sudantribune.com/spip.php?article44200 found 13.02.2012

life for the people in South Sudan, and as is often the case also in other, more 'developed' states women are the most marginalized (Ali, 2011). In post-conflict settings violence against women has been found to be even higher than during the conflict itself, which has led to extra focus on the integration of gender among people working with security sector reform (SSR) in post-conflict settings (Bastick, 2008, pp. 4-5). Observations done by a UN group of independent experts demonstrate that violence towards women becomes an accepted norm during conflict (ibid.).

To briefly mention a few facts on the current gender situation in South Sudan I will rely on some empirical work from HSBA and Human Rights Watch (HRW)

- According to HSBA 59 % of the women they interviewed reported that they had experienced violence in their own home (HSBA 2012 - Threats in the home).
- According to the Statistical Yearbook for South Sudan the illiteracy rate for women over the age of 15 was at 84 % while 60 % for men in 2010 (Southern Sudan Centre for Census, Statistics and Evaluation, 2010, p. 43).
- The HSBA have found that men's interests to a greater extent are safeguarded by customary chiefs over those of women (HSBA, 2012 – Women's Security and the Law).
- A report by United States Institute of Peace (USIP) estimates that two in five girls marry before the age of eighteen and 11 % marry before age fifteen, making girls especially vulnerable and disadvantaged (Sommers & Schwartz, 2011).
- Human Rights Watch have reported amongst other things that "…The absence of statutory family legislation means that most matters relating to marriage, divorce, child custody, maintenance payments and domestic violence are handled by customary courts that frequently discriminate against women and girls. Widespread discriminatory attitudes that see women as second class citizens perpetuate the practice" (Human Rights Watch, 2013, p. 5).

These facts tell us something about the case of GBV in South Sudan and the situation for women's daily lives. It also tells us what the threats towards women's lives are. To fully understand GBV as a concept it needs more theoretical depth both in terms of what gender is, and what is considered threats and security towards gender.

4. THE CASE: GENDER-BASED VIOLENCE

4.1. INTRODUCTION

The theme of this study is gender-based violence (GBV), violence that is based on assumptions about gender. To get a deeper understanding of what GBV is empirically, for those affected by the violence, it is necessary to dive into the written sources and research done on GBV. Defining GBV can be a major task as it can be understood as a very wide concept that seeks to cover all violence undertaken on the basis of someone's gender.

To gain a better understanding of what GBV is, it is useful to examine a specific case. This way the complexity of the issue can be enlightened and one can better grasp how GBV is conducted, experienced and addressed on different levels[24]. After all, GBV is based on empirical studies, and as such, I have chosen to focus my thesis on the experiences of GBV in South Sudan, a state that has been reported to have a high incidence of GBV and acceptance of violence against women (Scott, et al., 2013).

In relation to GBV in South Sudan specifically it is worth noting some facts here. Several reports have found that there is widespread acceptance of violence directed towards women (Scott, et al., 2013, Human Rights Watch, 2013, pp. 45-46, 53). South Sudan also have two different legal systems in place, where the official constitution on one side, and the customary laws on the other side, are contributing to security and insecurity. For women, the situation is almost exclusively more insecure than that of men as women already are on the margins of society (Ali, 2011). My intention is to compare the constitutional legal system to the customary law system to inform the security debate about women in South Sudan.

The incidences of GBV that are most commonly referred to in the case of South Sudan are rape, wife beating, abuse and child marriage. These issues threaten the lives of young girls and women directrly and as part of the surrounding structures. To analyze these specific issues of GBV and how GBV is addressed by the two legal systems, the concepts of gender and security will be utilized due to their specific applicability to issues pertaining to the individual. Using human security combined with a deeper understanding of gender as a concept I strongly believe there is a possibility to ensure greater security for women.

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[24] Here I refer to the local, regional, national and global levels of policy.

The research question (see section 1.1 above) goes to the heart of the nexus between GBV the TC and customary courts aiming at examining to which extent the TC and/or the customary courts protect women and her human security when the issue of GBV is taken into account.

The UN has conducted extensive research on the incidence of GBV globally and in particular in areas of conflict. Several resolutions and conventions on GBV have been ratified at the UN, many of them on issues such as gender equality, human rights and violence against women. The UN Security Council (UNSC) has ratified four important resolutions regarding GBV, which are essential for the work on preventing GBV globally and empowering women. These are UNSC 1325 (2000), UNSC 1820 (2008), UNSC 1888 (2009), UNSC 1889 (2009) and UNSC 1920 (2010) which all are focused on women, peace and security in broad terms. What these resolutions do not include is clear definitions of the concept GBV, which means the definitions must be found elsewhere. I will in this chapter, present some definitions of GBV, starting with definitions used by the United Nations (UN) and the Norwegian Refugee Council (NRC) who are working directly with research, prevention and information of/about the issue.

4.2. DEFINING GENDER-BASED VIOLENCE

Numerous international agencies have taken up the cause of GBV. It has gained increasing attention, but there is no consensus on definitions. According to the United Nations Population Fund (UNFPA) GBV is defined as a phenomenon that:

> "...reflects and reinforces inequities between men and women and compromises the health, dignity, security and autonomy of its victims. It encompasses a wide range of human rights violations, including sexual abuse of children, rape, domestic violence, sexual assault and harassment, trafficking of women and girls and several harmful traditional practices". (UNFPA, 2013)

It is evident here that UNFPA connects GBV to men and women as well as a range of specific issues. The definition is useful for setting some boundaries around the concept, but more information is definitely needed in order for their definition to be operational in relation to my study of customary courts. UNFPA does however further elaborate their definition by adding that

> "gender-based violence also serves – by intention or effect – to perpetuate male power and control. It is sustained by a culture of silence and denial of the seriousness of the health consequences of abuse. In addition to the harm they exact on the individual level, these consequences also exact a social toll and place a heavy and unnecessary burden on health services (UNFPA, 2013).

UNFPA defines GBV in a way that identifies structures (culture) that perpetuate male power over women, which is in accordance with most research on GBV, and relates this to the (in)security of women.

UNFPA is however not the only UN agency which offers a definition of GBV, as several of them seem to be working with GBV in different fields. There is not any one definition it seems, that applies to all UN agencies. For example the United Nations Educational, Scientific and Cultural Organization (UNESCO) has wider notion of who they consider targets of GBV, and they include also homosexuals, lesbians as well as bi-sexual and transgender people, stating that GBV "…whether physical, sexual, psychological, or of any other form, is a blunt violation of human rights" (UNESCO, 2013).

The organization United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) states in a summary report that they consider GBV to include "…physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty" (UN Women, 2011). This organization overwhelmingly and understandably focuses mostly on women, as is their aim. Several of these UN agencies also refer to the *Beijing Declaration Platform for Action*[25], the *Convention on Elimination of All Forms of Discrimination Against Women* and *the Declaration on the Elimination of Violence Against Women* as decisive for their work on GBV. What this signals is that GBV is something that mainly concerns women, and that violence against women should be the focus of the work of UN member states as well as the UN agencies. While I agree with this interpretation and focus on women, I find it interesting that men sometimes are overlooked as objects of GBV.

Outside the UN system there are also other organizations working with GBV. One of them is NRC who works with refugees that come to Norway, as well as internally displaced persons (IDP's), refugees and returnees all over the globe. NRC defines GBV as:

> "…an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially-ascribed (gender) differences between males and females. The term SGBV (sexual and gender-based violence) is also used to define these acts of violence"
> (Norwegian Refugee Council, 2008, p. 313).

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[25] http://www.un.org/womenwatch/daw/beijing/platform/ checked 10.7.13

This definition states that it is an "umbrella term" which means that it contains all harmful acts against an individual. The concept defines GBV as being an attack on 'socially-ascribed differences', which somewhat distances 'gender' from the biological 'sex'. In the same context NRC continues to list the following examples of GBV relating to both genders:

- Sexual violence, including sexual exploitation/abuse and forced prostitution
- Domestic violence
- Trafficking
- Forced/early marriage
- Rape
- Harmful traditional practices such as female genital mutilation, honour killings, burning of brides for dowry or other family disputes and widow inheritance.

What I would like to emphasize regarding all these definitions is that the focus of GBV mostly pertains to women, and that gender is a socially constructed concept to which people connect certain positive or negative traits. I would like to apply a wide perception of GBV to this thesis based on the information given in this section, and I understand GBV as structural and physical harm to a person due to socially constructed norms and ideas. The concept GBV is further based on the two concepts of 'gender' and 'violence', and to fully understand the concept and its content in the South Sudanese context, it is essential that the basics are theorized and operationalized.

4.3.   GBV IN SOUTH SUDAN

South Sudan is home to a considerable number of GBV cases. A recent report conducted by the Haki Network (see section 2.4.2 above) provides a complex and comprehensive overview of the problem in South Sudan. The Haki report covers a significant caseload of GBV cases where the subject has been female, and which can be used for the analysis in this study. Among five of the major tribes of South Sudan, the Haki Network has interviewed women, attended courts and surveyed a total of 609 cases where 173 of these (28 %) included elements of GBV (Haki, 2011, pp. 10-11). A reason for choosing this report is that it focuses on the customary courts and their local practices on handling GBV cases. Customary courts, as have been touched upon earlier have a strong position in the South Sudanese society, and are perceived to be a provider of restorative justice in and between tribes, as well as being a

source of traditional and cultural practices. They also almost exclusively handle all GBV cases in the South Sudan, but the courts differ in what they perceive as criminal law and family law and often GBV falls in between these (Haki, 2011, pp. 3-42). It must be emphasized that the report does not deliver any clear definition of what they consider as GBV, but rather exemplify it by the use of the observed court cases of the Juba, Rumbek, Bentiu and Yambio areas.

FIGURE4 OVERVIEW OFTHE AREAS OF STUDY FOR THE HAKI REPORT (HAKI, 2011, P. 12).

The main focus of GBV for this study will be on issues of inter-personal violence (IPV), especially violence that occurs within a marriage or between known victim and perpetrator, as this has been shown to be prevalent in South Sudan by several of sources. IPV is a direct form of intimate partner violence according to a definition by the World Health Organization (WHO), but the WHO also embrace assault rape and other types of abuse as part of the definition. In combination with structural violence, (which have been highlighted in Haki 2011 and elsewhere) from the structures which promote the power of men over women, IPV emerges as an important part of GBV. The categories chosen for the analysis, on the background of this information are rape and abuse.

4.4. SUMMARY

To summarize, I have outlined the case of interest for this thesis, namely to examine gender-based violence (GBV) in South Sudan. It has been empirically shown by the HSBA and others (see chapter 3 above) that women in South Sudan are currently being marginalized and victimized in their own communities and that they are targets of a range of violent acts because of their gender. What this suggests is that there exists both direct (rape, assault, wife battering) and structural threats (lack of access to education and ownership, being a man's property), to the lives of women in South Sudan. Also, GBV has been defined to be *structural and physical harm to a person due to socially constructed norms and ideas,* placing the study close to the tradition of social constructivism without becoming relativistic. The concept of gender has been lifted up as essential for the understanding of GBV and thus it must be discussed further. As will be further explained in the data presentation, the choice has been to focus on rape and abuse as categories.

In the following chapter the concept gender therefore will be further elaborated on the basis of different theoretical approaches and the gender discourse.

5. GENDER AND HUMAN SECURITY AS CONCEPTUAL FRAMEWORKS

5.1. INTRODUCTION

This chapter consists of an explanation of the chosen theoretical framework for the analysis. The two analytical 'lenses' that have been used in the study are gender and human security, both bringing important knowledge about how the data is understood.

Gender is an essential concept in relation to GBV, and has been widely discussed in academic and activist circles for decades, and some will say for centuries (Rothschild, 1995). It is a concept that has a long and rich history which must be taken into account for the concept to be understandable and thus operationalized. Some draw the line by the modern feminism debate while others see gender as being an important concept dating back to the 18th century philosophers (Holst, 2011, Shepherd, 2008).

The other theoretical perspective, upon which the analysis has been executed, is human security. This concept is best understood in relation to its history and the wider theory of International Relations (IR). Here it will both be seen in relation to its main opposite concept,

state security based in Realism, as well as the historical developments leading up to the formulation of human security as a theoretical approach to security.

Both the concept of gender (and its associated theories) and human security have received some criticisms, specifically by IR scholars, for being too individual-focused and/or for being too broad. Thus, criticism will also have to be included.

5.2. GENDER IN A HISTORICAL PERSPECTIVE

Gender is essential for an analysis of GBV because it is a perspective that focuses on people their experiences, and why they experience things the way they do. It is a bottom-up approach where people's perceptions are in focus (McKay, 2004, p. 160). Gender is often connected to the concrete biological sex of a person, but it is also an abstract concept which cannot be measured by statistics or surveys, as there are no clear cut answers to what gender consists of or how it should be understood. Therefore it must be enlightened through a theoretical discussion of its limits and boundaries. I have found that a common presentation of the history is to look at the works of previous philosophers and other scholars, as has been done by Cathrine Holst (2011).

By making use of the history we can see how the concept has developed over time. Many previous scholars who are known for introducing the importance of women and women's experiences into the academic debate, specifically the security debate, have not been "feminists". Ranging from Jean-Jacques Rousseau, Mary Wollstonecraft, and Immanuel Kant in the 18th century, via 19th century thinkers such as John Stuart Mill and Karl Marx to Talcott Parsons in the 19th century, women have been an aspect of theoretical debate (Shepherd, 2008). This is often referred to as the first wave of 'feminism', seen in retrospective (Holst, 2011, pp. 46-49). Although some operate with 1850 as the start of this wave, Mary Wollstonecraft published her book *A Vindication for the Rights of Women* as early as in 1792. Rousseau and Kant, the well-known enlightenment philosophers, both were of the perception that women, although being subordinate to the man as the nurturing and less moral person, were capable of reason and thus were perceived as equal human beings (Holst, 2011, p. 41). Karl Marx published his socialist texts in the 1840s, and his perception or idea of capitalism as a system especially oppressive of women (and men) became a part of the establishment of the working women's movement (proletariat) in the 19th century who fought against male dominance in the workplace, for equal pay for men and women and for

economic independence for women (Holst, 2011, pp. 46-49). John Stuart Mill, the liberal philosopher, influenced the liberal women's movement that focused more on the individual, equal rights (rights to vote, rights to land etc) and freedoms (of mobility, of expression etc) for women compared with men (bourgeois) (ibid.).

The second wave is said to have started around 1960-1970, in the aftermath of the Second World War when the focus had been on women as housewives and men as workers. This perception of gender roles is what is called the traditional gender stereotype which the well-know sociologist Talcott Parsons exposed in his writings. During this period the radical feminists were in the forefront of the battle, building upon the socialist idea of the capitalist system as specifically oppressive towards the person either woman or man. The focus of the feminists was that women should collectively stand up against the patriarchal system (dominated by men) as unequal and oppressive to women, further enhancing the impact of the capitalist system on women specifically. The focal point became a fight to change economic and social conditions and oppressive structures which prevented women from accomplishing equality by permeating all parts of society (Holst, 2011, pp. 49-54).

The third wave is understood as being a phenomenon starting in the 1990's which both has built upon these earlier notions of women and gender as well as attempting to distance itself from it. Now we do not only have liberal feminists, socialist or radical feminists, but also individualist feminists, post-feminists and other labels (Holst, 2011, pp. 55-58). I will further draw on the work of Laura Shepherd to enlighten three interesting ways of understanding gender currently.

5.3. NEWER GENDER DISCOURSE

The work that will be presented in this section is Laura Shepherd's discourse analysis of *gender* and *violence* and her inquiry into the use of these concepts by different feminists and other scholars on gender, both in theory and practice. Instead of focusing on the different feminist approaches she focuses on the underlying assumptions found in the literature of feminism and gender in academia without going through them chronologically like it has been done above. Shepherd focuses on three linguistic categories ranging from 'violence against women' via 'gender violence' to 'the violent reproduction of gender'. What I find most intriguing by this perception is that it adds depth and insight into the importance of how language can be used to produce and reproduce gender differences and inequalities.

5.3.1. VIOLENCE AGAINST WOMEN

Some feminist approaches have focused mostly on the 'violence *against* women' and that the existence of a violent and oppressive patriarchy[26] is taken for granted (Shepherd, 2008, p. 37). Shepherd says that theorizing women within this perspective has focused on addressing violence "…perpetrated against individuals who are socially identified as women, perpetrated as a result of this identity" by men towards women (Shepherd, 2008, p. 38). By continuing to point the research towards 'violence against women' the focus is kept on the marginalized women and their stories, and the unveiling of their experiences, which has led to a focus on women as victims (ibid. 39). This is a very interesting approach as it is a focus on the structural violence that surrounds women in many societies and where women are struggling on a daily basis for their rights and freedoms as human beings. Violent structures have not only been addressed by the feminist scholars per se, but also by peace researchers such as Johan Galtung. He refers to *structural violence* as exploitation and repression by social and world structures where "patriarchy is then seen as an institutionalization of male dominance…legitimized by culture…often emerging as direct violence with males as subjects and females as objects" (Galtung, 1996, p. 40).

It can however be problematic to focus only on women as victims while excluding the possibility of men being victims of violence, further enhancing the notion of men as active agents who are predestined for violent behavior, while women are pacified and seemingly unable to act on their own behalf. This view is problematic is it said, not only because of its one-sided focus on women, but also because it alludes to narrative notions about 'men' as a positive and powerful category while 'women' are weak and vulnerable group (Shepherd, 2008, pp. 40-41).

Although the inclusion of men is a valid argument it is an inescapable fact that women are the most marginalized and more often than men are subjected to violence due to their gender (see earlier chapter on GBV).

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[26] Shepherd refers to 'men' as being empowered, controlling and active, as well as having power over women (Shepherd, 2008, p. 40).

5.3.2. GENDER VIOLENCE

Continuing forward we get to what Shepherd has called the discourse of 'gender violence'. Scholars of this perspective have a specific focus on the negative construction of gender, varying according to social contexts (Shepherd, 2008, pp. 42-43). These scholars have broken out from the strict focus of gender as equal to 'women' and opened up for other possible focal points of violence such as different sexualities, violence against men and other genders (ibid.). Here the main focus is not on violence itself, but on *power* as "integral to the conceptualization of gender and the conceptualization of violence" (ibid.). The focus is on the experiences of individuals as the basis of policy recommendations regarding 'majority violence' towards minorities, or the abuse of power.

Research on 'gender violence' is often collected through case-studies of different contexts, claiming they are consisting of the subjective truths of victims of violence. They further focus on, according to this discourse analysis, structural inequalities (through power relations) which can only be overcome by having knowledge about each and every social context and how power is exercised in a society or community. This makes 'gender violence' quite a comprehensive concept to research as the exercise of power on all levels (at the societal, communal, interpersonal and individual level) is understood as acts of normalized violence either implicitly or explicitly (ibid. 45-46). By focusing on power this approach ascribe violence as mostly an expression of the masculine, but it also opens up for the possibilities of women being active agents or being perpetrators, while men and/or others are the objects of that violence. This makes the concept of gender more adaptable and fluid, but still the main threat to women is men, and women are continues to be seen as vulnerable and passive.

5.3.3. THE VIOLENT REPRODUCTION OF GENDER

Laura Shepherd's analysis is what she refers to as post-structuralist, moving away from the two abovementioned perspectives and focusing on the *language* as violent productions/re-productions of gender, meaning that "gender can be understood as a form of identity for the ordering of society, one that is culturally specific, but globally recognized" (Shepherd, 2008, p. 50). Gender must not be taken for granted or depicted as a static concept as it produces differences by dividing individuals into constructed categories within the language, as we have seen above. Gender is here understood by Shepherd as performative through *identities* and with that she explains that there is a possibility of change within the social context

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through a change in how people write and think about gender. This analysis is very important as it highlights the specific use of language for the formation of norms, and the connotations constructed in conjunction with the concepts people use. It views taken for given concepts that differentiate between men and women, from a critical perspective.

Definitions of 'women', 'men' and 'gender', are clearly something we should question, we should not merely accept these concepts as truths or facts generalized to all societies at all times (2008, p. 50). By analyzing how the language is used to describe actions such as rape or child marriage[27] (or other GBV cases as is the case in this study), either in light of experiences or in academic theorizing we can uncover underlying and taken-for-granted assumptions about gender which affect perceptions of rape and child marriage. It is undoubtedly important to analyze the 'violent reproduction of gender' which one can find in both written text and oral accounts, and the effects they have on people's daily lives. As has been pointed out by other scholars gender was perceived as an achieved status which was separate from the biological sex in the 1960's and 1970's. Later this perception had to be revised as the empirical data revealed a much more complex reality (West & Zimmerman, 1987, pp. 125-126).

Although discourse analysis is not the focal point of this thesis it is important to mention this part of the current debate to understand the importance of 'gender' as a concept and the importance of language as an influencing factor on the perceptions and constructions of gender. The use of the concept 'gender' is informed, in this thesis, by the case (GBV) and the data which has been collected in that regard.

Inspired by the work of Shepherd (2008), Hoogensen et al. (2004 and 2006), Holst (2011), West & Zimmerman (1987) as well as the feminists who have made gender an important issue during the past century, the next section will focus on defining gender in relation to the case of GBV. The theory becomes, in this respect, connected to the data.

5.4. DEFINING GENDER

Defining gender is not an easy task, but it can be understood "…as a form of identity for the ordering of society, one that is culturally specific but globally recognized" (Shepherd, 2008, p. 50). This definition is quite broad and challenges the boundaries of gender, not only

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[27] In some research (although not in most of my sources) child marriages is referred to as 'early' marriage giving it other connotations.

because it openly refers to gender as part of our identity, and thus opens up for many gender categories, but because it has no specific mentions of 'woman' or 'man'. Most importantly it points to the context of local culture as an important factor in shaping 'gender' and gender identities. Gender is seen as being embedded with meaning both from within the individual and from an outer social context (community or state). Shepherd further states that in "dominant social constructions of gender, masculine behaviours are associated with aggression, control and action, femininities with their antonyms" which means that we are basically establishing and re-establishing a myth of a 'natural' gender order through the (more or less) unconscious use of the language as a bearer of opinions (2008, p. 53).

Another important definition which essentially connects gender identity to power and sexuality is derived from Hoogensen and Rottem: "Gender is the ways that sex and sexuality become power relations in society" (Hoogensen & Rottem, 2004, p. 164). They have further stated that "gender pertains to the construction of relationships between male and female, and the attendant power dynamics found within these relationships" (ibid.163). The construction of gender is linked to patriarchal power structures which impose certain identities on both men and women, through the recognition of 'men' as having one type of value and 'women' as having another type of value. Gunhild Hoogensen and Kirsti Stuvøy, see gender as also linked to the empowerment of the individual and further that "gender analysis attempts to expose one of the most basic and pervasive inequalities that exists both across and within other inequalities…" (2006, pp. 207, 212).

Thus, by using gender as a lens for analysis it allows us to look at how and why threats affect people differently and also how threats are perceived subjectively due to the ascribed gender identity. Gender can thus be seen as the performance or fulfillment of a normative conception of what is 'masculine' and what is 'feminine' in a society through an "ongoing activity embedded in everyday interaction" (West & Zimmerman, 1987, pp. 127, 130) . By using gender as a lens for analysis it becomes possible to uncover the power structures which are oppressive and the cause of GBV. Identity is something the individual holds and knows in opposition to other identities (kinship, community, national identity). Gender identities are both something which is chosen by the individual as well as something which is attributed to the individual, meaning that people are threatened because of who they *are*[28] (Hoogensen &

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[28] 'Gendercide' is the most extreme case of violence perpetrated on the basis of someone's gender. For example the willful neglect, starvation and murder of baby girls, gender-based abortions and the eradication of women or men during war is seen as 'gendercide' (Hough, 2008, p. 122).

Rottem, 2004, p. 164). Gender is here used to inform the human security approach outlined in the next section as a combination of these two approaches has proven to be useful.

5.5. WHAT IS SECURITY?

Security studies are a sub-discipline within the wider discipline of International Relations (IR) that seek to portray "a simplified version of a complex reality" (Daddow, 2009, p. 17). IR scholars study the political interaction between all international actors from states to international organizations[29]. The interesting thing with the field of security studies is that it includes several different perspectives of what security is and for whom security applies. It is multifaceted. What is defined as security and threats depends on the *referent object,* whether it be used for analysis of such units as states or nations, organizations, society or the individual (Hough, 2008, pp. 2-20 and Buzan, et al., 1998, pp. 5-7).

Peter Hough has in his book outlined the historical development of the securitization[30] of issues by dividing them into four main paradigms of security studies who all offer their own conceptual frameworks for understanding what security is, who security regards and who the main actors are. These four dominant approaches are Realism, Marxism, Pluralism and Social Constructivism, and of these the view of Realism has been the dominant paradigm which still is commonly used in many instances (Hough, 2008, p. 2). I position the choice of theoretical perspective made for this thesis by presenting its opposition, Realism[31] due to limited space and for the differences between the two perspectives to be best enlightened. Also, other scholarly work on human security has done this comparison, so it is very well documented elsewhere if more information is needed (Hough, 2008, Snyder, 2012, Burgess & Jonas, 2012, p. 95). Here this comparison between the traditional and the new perspective is combined with a historical overview given by Emma Rothschild in her article *What Is Security* (1995). Rothschild adds some information which is very important for the understanding of security in a historical context from the Latin expression "securitas" via the French Revolution and the Liberal Enlightenment of the nineteenth century to the two World Wars and the Cold War. The basic information she gives is that extended security or human security is not as new as

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[29] a few wealthy private individuals might also be an object to study within IR, but mostly it is concerned with states, organizations of different affiliations and groups of people.

[30] Securitization is a process where issues are lifted out of the regular politics and given extraordinary concern. These issues are also demanding extraordinary solutions (Buzan, et al., 1998, pp. 23-33).

[31] It must be said that this is a theoretically constructed opposition. I believe that in theory and politics both of these perspectives have to be seen as complementary, based on the existence of the state.

some scholars have been putting forward as it stems from liberal thought (Rothschild, 1995, pp. 60-65).

Realism provides the foundation for what is basically '*state* security', or what some has called military security (Buzan, et al., 1998, pp. 49-70). The security of the state's territory is in this manner institutionalized through its system of the military. In this view the states are the most important 'referent objects' or let us rather call it actors, which can be threatened, and the threats almost exclusively derive from other states. To realists the world seems to consist of a system of states fighting to gain power as "power is a means to the end of survival…" (Lynn-Jones, 2012, p. 23). In this view one could end up with states trying to maximize their own gains on the behalf of other states like we saw during the colonial period where the North exploited the South[32]. As has been pointed out by scholars such as Emma Rothschild "All great postwar settlements of modern times have since been accompanied… by new principles of international security" (Rothschild, 1995, p. 53). Meaning that the World Wars and the settlements in their aftermath have had an important impact on how security has been perceived. It seems that these major clashes between states have connected security to the foreign affairs of states over that of individuals. This is an understandable effect of how threats have been perceived on the international arena throughout the 20th century as threats to nation states.

Realists further claim that they can measure the quality of states' foreign policy decisions by how it enhances the security of the state in regard to the rationality of the decisions (Daddow, 2009, p. 89). Still, as many scholars have pointed out, the Cold War was also a major international conflict, which did not end with a clash between the Soviet Union and USA, as had been predicted by realists (Rothschild, 1995, pp. 53-54, Snyder, 2012, pp. 5-8). Up to that point much focus had been on security maximization on the behalf of the state, but during the Cold War the focus shifted towards nuclear deterrence and limiting war (Snyder, 2012). This shift in thinking makes it clear that major international events have an impact both on international affairs and on academic theorizing (Snyder, 2012, pp. 4-7).

As the military strategists failed to predict the end of the Cold War, and the revival of liberal notions of multi-lateral cooperation, new perspectives of the understanding of security came to the surface and influenced the security discourse by challenging the realist perspective on

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[32] This is what is referred to as the classic Realist security dilemma where the securing one state leads to insecurity internationally (Daddow, 2009, p. 83).

analysis of security (Snyder, 2012, pp. 1-2, 9). Some perspectives focused on the global and regional level, while others focused on the societal and individual security[33]. The dominant perspective of states as prone to war, and states as the only actors has continued to be challenged also after the attacks on the World Trade Center (9/11) from terrorists who are not state representatives, but rather function like loose networks (Snyder, 2012, p. 10)[34].

Although it is much criticized and contested, realism is still commonly regarded as the dominant paradigm of security studies. The realist view of security will not be applicable here due to its very narrow and limiting focus on states as the most important actor and referent object, while the focus of this study is on women as individuals. However it is acknowledged here that there is value to state perspectives in analysis of states' and government's approach to security and that the state is a leading provider of security for its citizens. In this thesis it has been a bigger emphasis on letting the case has influence the choice of a theoretical focus. And as I find it difficult to apply realist notions of security to the relationship between GBV, women and the judicial systems, it is more appropriate to use human security as an analytical lens due to its focus on the individual as referent object.

5.6.   HUMAN SECURITY – THE APPROACH

Human security as a security perspective fits into the broader fields of social constructivism and liberalism, established in newer times as an opposition to Realism's view of international politics, emphasizing the individual as a referent object complementary to that of the state (Burgess & Jonas, 2012, p. 89). As Hough has pointed out "The meaning of 'security' is not just an arcane matter of academic semantics. The term carries significant weight in 'real world' political affairs since threats to the security of states have to be a priority for government,s and threats to the lives of people are increasingly accepted as more important than other matters of contention" (2008, p. 13). By this Hough refers to a switch in thinking from mere state politics to a concern with threats to the daily lives of individuals. The term human security emerged from empirical research done in the 1990's, specifically the UNDP report on the *New dimensions of human security* (UNDP, 1994) which emphasized that insecurity was "caused by civil conflict, failed states, natural disasters, poverty, disease and small arms, rather than by inter-state wars" (Smith 2010, in Burgess & Jonas, 2012, p.90).

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[33] See for example Buzan, et al., 1998 for an introduction to security analysis on the societal level.
[34] For more information on insurgency and terrorism I would suggest reading chapter 12 in Snyder 2012 on Terrorism and Insurgency by Michael Boyle.

Threats can no longer be seen as confined to states as actors, but must be dealt with on multiple arenas either social, economic, environmental, moral or cultural.

The idea of security as something concerning the individual is not something new, although it has been highly discussed in the theoretical debate of the 1990's and onward. As pointed out by Emma Rothschild security as an individual good has existed in liberal thought since the eighteenth century, and also reflected political ideas preceding the French Revolution and the era of Enlightenment (Rothschild, 1995, p. 61). During the Elightenment period the libearlist notion of individualism got a foothold in academics, which although the content of newer human security in current IR theory, and the central liberal idea of individual security to make decisions "without fear or favor" are somewhat different they follow the same basic notion of individual security. Thus liberalist thought of individual security has existed for long time. Realism is essentially more of a newer mechanism that created a gap between the people and the state where human or individual security could (re)surface (Rothschild, 1995)[35].

Human security as it is known today is basically centered on the individual's perception of threats and security and varies according to different social contexts (Burgess & Jonas, 2012, p. 91). Theoretically it stretches from scholars focusing on violent threats to individuals and communities that need immediate intervention capability, to scholars who emphasize a broader definition that includes human rights abuses, poverty and underdevelopment (Burgess & Jonas, 2012, p. 93). Empirically human security can be defined as both 'freedom from fear' and 'freedom from want', which quite clearly defines human security, as something subjectively perceived (Burgess & Jonas, 2012, pp. 91-92).

Hoogensen and Stuvøy have emphasized that they understand security as connected to individual identity in "…an ever-changing process which makes theoretic approaches to security to be susceptible to changing contexts and structures" (Hoogensen & Stuvøy, 2006, p. 214). By saying that security is connected to identity, context and structure they make a point of security and threats to security as being a part of our perception about how the world is and ought to be. As such human security can be said to be normative and at the same time applicable to a broad variety of events.

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[35] For more information on the historical developments of human security and its connection to liberalist thought I strongly recommend reading the cited sources.

5.7. HUMAN SECURITY AND GBV

So, if security is the goal we must analyze threats from the perspective which is most applicable to the *level* of analysis, the individual or small group. Human security, as a theoretical approach, aims to widen the scope of security studies, including several aspects of how threats and security is perceived, and deepen it, for the sake of inclusion of individuals' perspectives. Scholars, I believe, are better equipped to grasp complex relations of individuals if they use human security as a perspective instead of using the state or its government as the referent.

Human security is the perspective which lays closest to the understanding which the thesis seeks to uncover, namely the connection between the Transitional Constitution as the formal legal system (see section 3 above), and the customary courts as providers of informal rules and laws, being currently the main body handling GBV cases in South Sudan.

One reason for the use of human security here is that seem to be a lack of research in this field relating to South Sudan. While there have been written many reports on gender issues researchers have often chosen to look for specific human rights abuse, problems with state building and similar issues, separating issues into different categories. In the broad definition of GBV used here issues such as the exclusion of women from the CPA process (Weber, 2011), women's economic empowerment and women's rights (Ali, 2011), gender inequitable norms by gender, age and education (Scott, et al., 2013) would be considered threats to the security of women. Preferably all these issues should be examined in a holistic matter and from the perspective of the women, but since it is not possible here the focus will be on GBV as abuse and beatings, rape and child marriage as these are the issues with which information is available (Haki, 2011).

5.8. CRITICISM OF HUMAN SECURITY AND GENDER

One of the well-known critics of human security is Roland Paris. He has stated that human security makes everything a security issue, and asks "what is it not?" (Paris, 2001, p. 92). He further states that human security as a concept has no clear definition making it problematic for scholars to operationalize (Paris, 2001, pp. 95-96). What I have suggested is to let the case steer both the research and the use of theoretical approaches, but Paris and others have suggested that human security must be redefined so as to include less for it to be operable. If one tries to redefine human security to a more narrow and measurable concept, the point of

widening and deepening the security concept is lost. The narrow security concept already exists in traditional realism. Human security has been criticized by scholars who are skeptical of the normativity of human security as a concept, underscoring that it is not useful as a rigorous analytical tool (Newman, 2004). What this portrays is that other theoretical approaches might be more objective and therefore better. Although this is a valid argument I do not find it to be an argument against using human security, but as a warning that must be considered during research.

I would not say that either approach is 'wrong' or 'right', but that the approaches are more or less useful depending the case. At this point it might be fruitful to think about the structural violence perspective of Johan Galtung again as was done in section 5.3.1 above. Structures can bring about threats to people and create insecurity by being unstable or marginalizing some people for the sake of others. Economical disadvantages might be quantifiable by the counting of people above or below the poverty line. At the same time it is not as easy to measure GBV, which also is an expression of structural and/or cultural marginalizing. What *can* be agreed upon is that the individual often is the object of violent acts, not only the state, and that analyzing these security issues also have value for the state and academia in so far that the state still is conceived to be a security provider for its citizens. Thus both perspectives are important.

Internally in the gender discourse there has been much debate among the different feminist scholars and activists about which priorities are the most important. Liberal feminists have been arguing for their perception and radical feminists have argued for their perception. Today, while some feminists are still arguing about how to understand women's role, the broad gender perspective has been used by other scholars. Most prominently the proponents of a human security perspective have raised a debate of the inclusion of gender into the security debate. However "feminist security literature addresses the role of women (or lack thereof) in the 'corridors of power'(Blanchard, 2003), as well as the gendered structure within IR theory itself" (Hoogensen & Rottem, 2004, p. 167).

Human security has been said to lack a precise definition and being too wide and all-encompassing, making it difficult to operationalize for students and practitioners (Paris, 2001, p. 88). Much of this type of critique is based upon the United Nations Development Programme Report on human security which widely defined human security as 'freedom from fear and freedom from want' (UNDP, 1994). However, the holism of the approach is the point

of using it, making the personal political and setting the focus on subjectively experienced threats on an individual level (Hoogensen & Rottem, 2004, p. 163). Also, by using a specific case in a specific social context such as is done here one realizes that security is context specific and cannot be easily generalized from state to state or from state to community or individual (Hoogensen & Stuvøy, 2006, p. 217).

5.9.   CHAPTER SUMMARY

By choosing to look at gender-based violence in interpersonal relationships portrayed in the Haki report, the data led the research to the theoretical perspectives. The use of the theories here is thus supplementary and a help to understand and uncover the meaning of these very specific types of violence. By proceeding with an analysis built on these perspectives I am also providing what one would call a normative understanding of 'the real world' as I am well aware that many of the choices made in terms of theory has been an expression of personal preference (Daddow, 2009, pp. 113-114).

6. DATA PRESENTATION

This chapter includes two sections of descriptions of the data which is specifically pertaining to the case of GBV in South Sudan. The first section will provide information about the Transitional Constitution and its Bill of Rights for Women. The second section describes customary court practices which have been observed in GBV cases. Then follows two sections, one on rape and one on abuse, which will be the categories of analysis. These categories have been chosen with the background in the sources and with knowledge about the prevalence of GBV presented in chapter 4.

6.1.   WOMEN IN THE TRANSITIONAL CONSITUTION

First state here what the TC is in general (general description, when it came into force, any background info, etc – sort of the Wikipedia quick and dirty overview – just don't quote Wikipedia and cite proper sources!) The most important section of the TC is the 'Bill of Rights of Women', which is evidence that women have specific support of their state. As this particular bill is not very extensive it can be included in full here:

 "(1) Women shall be accorded full and equal dignity of the person with men.

(2) Women shall have the right to equal pay for equal work and other related benefits with men.

(3) Women shall have the right to participate equally with men in public life

(4) All levels of government shall:

(a) promote women participation in public life and their representation in the legislative and executive organs by at least twenty-five per cent as an affirmative action to redress imbalances created by history, customs, and traditions;

(b) enact laws to combat harmful customs and traditions which undermine the dignity and status of women; and

(c) provide maternity and child care and medical care for pregnant and lactating women.

(5) Women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased." (Transitional Constitution, 2011, part two, point 16, p. 5)

Inserting such a section of rights indicates the value of women for the South Sudanese society and state as equal to men in terms of dignity, land ownership, being able to take jobs they want and participate in the public life. These are rights give by law to all women of South Sudan independent of race, ethnicity, religion or language. The rights are very general and what one could expect to find in a constitution heavily influenced by the UN and Western powers. If one wants to know more about sanctioning of criminal behavior however, the TC does not provide this information. The Penal Code Act (2008) is instructive in such a manner, adding an extra source of knowledge on approximately 200 pages which all judiciaries are supposed to know and have training in.

As the TC is the main focus of the analysis, the Penal Code Act must be included to some degree. Unfortunately the TC is not very clear on GBV although it secures women's right to equality, which leaves much up to the discretionary assessments of the judiciary, or the police.

The TC, although not very explicitly, has tried to secured women's rights in so far as their rights now are included in the formal legal system.

6.2. CUSTOMARY PRACTICES

As there are no written documents on the practices of customary courts I will here briefly go through the Haki report's cases on the two categories which were reported most often and in all major customary courts. Both categories include different aspects of GBV, but have been merged for the sake of simplification.

6.3. GBV CATEGORIES: RAPE AND ABUSE

There were 103 cases of wife beating and 16 rape cases brought before the customary courts. The reason for merging these two categories is that there is a very clear notion of a wife's lack of control over her own body in marriage found in the Penal Code Act.

In the category 'abuse' I include girlfriend abuse, military beatings, genital cutting, random violence and non-family related violence. These are the different sub-categories which the Haki report has worked with during their research period. It is more comprehensible for the analysis to categorize all incidents as abuse. In total there were 37 cases of abuse brought to the customary courts.

7. ANALYSIS AND DISCUSSION

7.1. INTRODUCTION

This chapter includes both an analysis of the Transitional Constitution of The Republic of South Sudan (TC) and the Haki report, seen in light of the conceptual framework of gender and human security. The focus is the research question which is:

> ➢ *Are the measures for combating GBV in South Sudan a sufficient response to ensure women's security?*

The chapter starts with an examination and discussion of the TC focusing on the 'Bill of Rights for Women', but it will also include a discussion about what is regarded criminal law in the Penal Code Act. This inclusion is done to show where South Sudan draws the line between matters which can be solved in a private manner and those which are regarded as part of the official judicial system. It is important because there must be some clarification about which laws are existing and possible to apply in statutory courts. After a discussion of the general rights, the categories of rape and abuse will be utilized to enlighten the use of statutory courts in specific cases.

The next section will focus on the Haki report "Combatting gender-based violence in the customary courts of South Sudan", discussing what the report has emphasized and noted regarding the current situation of GBV in terms of rape and abuse in the customary court system.

The last section includes a discussion of the two main sources combined and how they are ensuring women's security, as well as indicate whether this is a sufficient response.

7.2. TRANSITIONAL CONSTITUTION – A SOURCE OF SECURITY FOR WOMEN IN SOUTH SUDAN?

The Transitional Constitution and its 'Bill of Rights for Women' seek to ensure women to be treated equally to men in many aspects of their lives (see section 6.1 above). Like many theories related to the concept of gender have done throughout history, the TC has included both rights and freedoms of women into current law, making it possible for women to seek justice on their own behalf for incidents that are deemed criminal by law. Women are ensured the right to participate in public life, which means they can hold public office or in other ways be a part of the public debate and express their opinions (Transitional Constitution, 2011). I believe this is an attempt to overcome traditional notions and practices where women's lives are understood as part of the private. This belief stems from the knowledge that Western powers have been a part of the CPA process and had their influence on shaping the new South Sudanese state and society (see chapter 3 above). It is also rooted in my theoretical understanding of what a patriarchal society is, as an oppressive system where men are dominant and women are passive, and that empowerment of women is a part of overcoming such a system (see section 5.2 above). Women are further ensured protection by the state if they are subjected to harmful traditional practices and they now have the same rights as men to their dignity, to land and to being free persons. In light of human security theory an inclusion of women's rights can be understood as aiming at ensuring women's individual security within the state, as it is making women visible as possible referent objects of security, which the state is responsible for protecting.

Further according to the TC all *criminal* acts are supposed to be brought in front of a formal, local level judiciary and given the possibility of a fair trials and judgments (Transitional Constitution, 2011, p. chapter II). But the TC does not explicitly say what is considered criminal or not, for that it is necessary to know the Penal Code Act (2008) a supplement to the TC. It is in the Penal Code Act the penalties or sanctions of different crimes are explained, thus it is essential to also have knowledge about that.

7.2.1. RAPE – A CASE OF GBV

By reading the Penal Code Act and looking for any mentioning of what is considered criminal or harmful acts against women, there are some interesting disparities. Chapter XVII of the Penal Code Act on *Offences relating to bodily injury and intimidation* lists many violent acts as criminal and does not directly differentiate between women and men. Chapter XVIII on

Rape, other sexual offences and offences against morality specifically describes in section 247 that rape is considered to be any form of sexual and carnal intercourse against the will of a person and without their consent (2008). Rape is further considered an offence with the possibility of being sentenced for up to fourteen – 14 – years. This is also applicable to any form of intercourse with a person under the legal age of eighteen – 18 – years. What is interesting is that forced sexual or carnal intercourse *within a marriage* is not considered rape (section 247, subsection 3, 2008).

What this seem to mean is that the state is protecting its individual citizens from specific GBV cases such as rape, as long as they are not married. Within marriage, it seems, the individual woman's value changes and the state is no longer willing to extend its human security to her. What this means in practice is that security only applies to one group of women, and that women who are married do not have the state's support to bring their case in front of a statutory court, if they are raped by their own husband. The TC thus seems to ensure the security only of women who are not married, as they distinguish so clearly between the two groups, but there is no explanation of why this clear distinction is made.

There is a sign in the TC that the family unit is valued over that of the individual, as the family is seen as the "…natural and fundamental unit of society…", and that "…all levels of government shall promote the welfare of the family and enact the necessary laws for its protection" (Transitional Constitution, 2011, part three, chapter 1, section 39).

Looking at this from the perspective of Laura Shepherd (2008), the language used to describe women's position as different within a marriage and outside a marriage, has an impact on the formation of ideas about threats and security in a society. There is a clear disparity between what the constitution says about women's value (equal to men) and the praxis described in the Penal Code Act. Thus although the TC looks, at first glance, as ensuring women's security, the whole picture is not visible until the Penal Code Act is examined as well as the TC in its entirety. By Shepherd's standards this use of language confirms more profound beliefs in the local context (ibid.). The TC is mostly written by former soldiers and members of the SPLM/A, and women have to a great extent been excluded from the process (see chapter 3 above), which is evident in the way women within the marriage is considered something 'less' than those who are part of a family unit.

Such a distinction indicates to me that there is a line between public and private spheres. There is unfortunately no existing specific family law in South Sudan, but it has been indicated that GBV cases often are understood as something in between the two spheres (USIP and RVI, 2010, p. 36).

7.2.2. ABUSE – CASES OF GBV

Abuse, as has been underlined in the former chapter, is a comprehensive category. Thus the TC and its Penal Code Act have been searched for indications of direct violence as criminal acts. What is found except the 'Bill of Rights of Women' is that Chapter XVII on *Offences relating to bodily injury and intimidation* lists assault or 'criminal force' as illegal, meaning that violence against another person, but if the person is provoking the assault the assailant's sentence drops from being up to three months, to up to one month. It is not given any directions to whether it is distinguished between men and women, or that GBV is a specific type of violence. The focus seems to be on justice in form of sentencing the perpetrator.

7.3.   CUSTOMARY COURTS – THE RECONCILIATORY PROCESS

Customary practices are in no manner possible to generalize from as there are so many different tribes with a variety of different traditions, but they are useful for the purpose of enlightening the different practices that exist in terms of sentencing rape and abuse cases. This is not an exhaustive analysis of all practices in South Sudan.

7.3.1. RAPE

Among the rape cases brought before customary courts, the Haki report reported the following outcomes[36]:

- Bari jurisprudence, Juba area: An average of 1 year imprisonment in statutory prison, 25 lashes and between 300 and 500 SPds (old system of Sudanese Pounds) in compensation. More compensation was given if the raped woman was married. No punishment was registered for the woman either wife or not.

    Some of the courts in the Juba area refer their rape cases to the statutory system, while those who still hear rape cases distinguish between married and not married girls. If the

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[36] No rape case was brought to court in the Bentiu area of Nuer jurisprudence.

girl is not married when she is the victim of a rape, her assailant might be forced to marry the girl to avoid jail and compensation and to avoid public stigma of the girl (Haki, 2011, pp. 18-19). If the girl is married the compensations and punishments are higher. This is reinforces the idea that married women are of more value than unmarried women, and it is also a sign of deeply rooted notions of how women are to be treated.

- Dinka jurisprudence, Rumbek area: An average 3 months imprisonment for the perpetrator along with cows as compensation in the. No punishment for the woman either wife or not.

The report states that rape is compensated either by paying the parents (of an unmarried woman) or the husband (of a married woman) cows, while imprisonment is low for unmarried women. Also here there is a very clear distinction between married and unmarried women.

- Azande jurisprudence, Yambio area: Between 1 and 3 years imprisonment on average for the perpetrator, along with compensation between 130 SPds and 3,000 SPds. No punishment was registered for the woman either wife or not.

Rape cases in Yambio applies a mixture of customary law and statutory law and the biggest court (county level) the criminal code. This is the only area where there was evidence of extensive use of statutory laws, indicating knowledge about the state system. Also, the more severe the injuries were, the higher the penalties and compensation were, indicating to me a different understanding of GBV and its implications for the woman.

All customary courts have sentenced the perpetrators for their actions, while at the same time securing justice for the woman as well as compensation. The system is not perfect and it relies on old notions often regarding women as less worth if they are unmarried, but the fact is that most people still use this system. There is evidence that the system of customary courts is able to change as the Yambio cases indicate.

7.3.2. ABUSE

Abuse is prevalent in all four areas and has a high variety of compensations as well as being less focused on justice.

Bari jurisprudence, Juba area:

Before a case between family members is brought to a court they have to attempt conflict resolution at the family or clan level (Haki, 2011, p. 20). In the courts it is differentiated between abuse by a stranger, spousal abuse/beating with reason, spousal abuse/beating without reason and psychological abuse or neglect. In cases of beating a wife, with or without reason, both the husband and wife were sometimes punished. It is not so clear why women were punished in the different cases. Their main focus is to preserve the family unit, thus as far as it is possible women are not granted divorce (Haki, 2011, p. 21).

Dinka jurisprudence, Rumbek area:

Here referrals to the statutory system were well documented, but that did not count for abuse cases. In these courts wife beating was permitted as a form of discipline and thus mostly cases of beating a pregnant woman was punished as it is strictly forbidden in Dinka law (Haki, 2011, p. 25). However, if the woman is not pregnant and is said to have provoked her husband in some way, either by not providing water or insulting him, she can be punished with up to 30 lashes (ibid.)

Nuer Jurisprudence, Bentiu area:

Men are regularly not punished for instances of abuse even though the courts keep records of the violent incidences. Women are rarely if ever granted divorce (only where adultery was documented) and if a man claims his wife had committed abuse first the woman gets punished (Haki, 2011, p. 31)

Azande jurisprudence, Yambio area:

The most common form of abuse was girlfriend abuse and wife beating was to some degree accepted. A case of wife beating in this jurisprudence would have to be presented six times before it is considered "a harmful pattern" thus able to present to court. Divorce is often granted, probably because a case of abuse has to rely on much evidence before presented to the court (Haki, 2011, pp. 37-38).

Based upon this knowledge about how rape and abuse are handled in the customary courts and how it is treated in the statutory system I will now enter into a discussion on women's security in South Sudan – the research question.

7.4. DISCUSSION

The abovementioned examples of jurisprudence shows that women are born into a society where a variety of practices exist for handling GBV, and where their security depends on many factors ranging from the chiefs knowledge about statutory laws, to whether one is married. The word of a woman is nearly ever weighted in cases where their own perception, at least in accordance with a gender perspective, should be heard. With my background I perceive this as an expression of male dominance through direct and structural violence, where women almost exclusively are targets.

It is very interesting however, that among all cases of GBV the Haki Network observed during their study, almost all men and women who responded to their survey considered the punishment to be fair (51 out of 59 respondents) (Haki, 2011, p. 11). This indicates that there is a sense of 'fairness' in the way GBV cases are handled by customary courts. Their findings also indicated a strong faith in the customary court to provide justice in accordance with traditional and customary practices (Haki, 2011, pp. 11, 42) and a strong preference for the use of customary courts as arbiter in civil cases (61 of 64 respondents). It might be that this system, which has been a source of stability during the civil war, is something which I cannot understand fully as an outsider, but according to gender theories presented earlier the negative impact of GBV is seen as an expression of women's voices being silenced.

What is evident is also that although the sanctioning in these courts varied from case to case there is a consistent focus on *reconciliation and the preservation of family units* (ibid.). There is a strong focus on the collective in many cases, and the individual is seen as a part of a wider kin-group (the tribe or family) which makes cases between married individuals a part of 'family law' (ibid., 43). Family law has been best presented as accepting polygamy and 'family' also includes the deceased and any unborn child. In addition, women are perceived as married to their husband even if he has passed away (Jok, 2004). What I understand by this, in light of gender perspectives is that women's value is strongly connected to their family and husband. In itself that is something which has a negative impact on the life and security of

women across the whole state as women are not able to be independent or empower themselves, thus they are deprived of the power over their own lives.

A major threat to women's security seems to be that there are quite many different understandings of GBV existing both between the two systems and within them. There is no predictability when it comes to sentencing in the customary courts, and the TC and Penal Code Act differentiates between groups of women. One source is also written and the other relies on oral accounts. Additionally, the Haki report as well as other sources report that women are considered the property of their husband as the man pays dowry for his wife when they marry (Sommers & Schwartz, 2011, Haki, 2011, p. 11). This seems to me as an underlying case which has ripple effects later in the lives of the women. If paying for a young girl is normalized in society it has effects on the way women are treated and valued later in life as a thing that can be owned. Child marriage is a form of GBV which affects the individual woman over time, sometimes from a very young age, and which probably can be prevented through education and the spread of knowledge as well as empowerment of women (Hendricks, 2012). This is what one could consider the state's responsibility as they have made child marriage illegal and criminal. The problem might be the capacity of the state to enforce the laws concerning GBV issues, as the state is still in a phase of building its infrastructure, but as this is outside my analysis I will not go further into such a discussion here.

Rather I would turn back to assessing the situation from a human security perspective, which makes me inclined to say that women are not secure in South Sudan and that they are constantly living with threats of GBV, despite the fact that they have a significant amount of rights on paper, which are supposed to ensure security from such threats (Transitional Constitution, 2011). Also, illiteracy rates in South Sudan are among the highest in the world, making it nearly impossible for women (and men) to read and understand their rights in the TC and Penal Code Act (Southern Sudan Centre for Census, Statistics and Evaluation, 2010). Thus illiteracy is indirectly a challenge to gender security and individual security.

Looking at the TC as affecting society through its structural manner, the dominant view of patriarchal society is unveiled as a deeply entrenched part of culture and practice. Married women are constructed as 'non-victims' in instances of rape by their own husband, in the official legal system, which in terms of gender conceptualization is how women through language is deprived of power and placed in a passive state (see sections 5.3 and 5.4 above). It

is challenging to understand how women are supposed to gain trust in the statutory courts as long as the women are not able to present their rape cases there and also have practically no power. This further enhances the impression of women being perceived as a passive and submissive group, not as empowered individuals with a value in their own person.

The evidence of extensive use of customary courts indicates that women do not trust statutory courts and the official system (Haki, 2011). A major problem with the customary courts however, is that each case has its own sanctions, depending on circumstances, traditions and culture and very few of these outcomes are written down. Still, the customary courts are seen as reliable reconciliation and justice mechanisms because they are known to the people, while statutory courts and their laws seemingly are unknown. In customary courts much depends on the chiefs, who have no or little formal training in the sensitive issues of GBV and who value conflict resolution over the constitution (Haki Network, 2011, pp. 42-43). Thus, the importance of each individual chief's knowledge must be acknowledged.

A rather interesting point[37] about GBV found in both systems is the extraordinary situation of pregnant women. Violence towards pregnant women is not tolerated in any of the customary courts, which indicates that old notions of women as nurturing and care-takers are deeply entrenched in the society. As has been presented in the chapter on the historical background earlier, this was how women used to be perceived in pre-colonial times. According to gender conceptualizations, this is how gender is violently reproduced (see Shepherd 2008), but in this context it is seemingly providing women with security from abuse during a period in life where they are very vulnerable. It indicates that some of the customary practices have survived the different regimes making it a resilient system.

8. CONCLUDING REMARKS

The constant devaluation of women which is evident in the case of GBV in South Sudan appear to be structurally rooted with directly violent consequences, as it would be stated by scholars such as Johan Galtung. This means that there is a possibility to change the structures which have placed men over women. Through focus group discussions with the chiefs of customary courts it became evident that they were open to discussions of women's rights and

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[37] This is not included in the data presentation as the information about "lactating and suckling women" in the TC is too comprehensive. Thus this is only a brief compilation of the facts.

the protection of women from violence (Haki, 2011, p. 44). This is a sign that there is a possibility to change the way women's security is conceived of in these courts.

The TC could have benefited from including more depth to the perspective of GBV and not let this be up to the discretionary assessments of customary chiefs. Although I am a strong supporter of constitutional rights, I cannot see that the current statutory system is enough on its own in terms of being a security provider. The state is currently being built from the ground up (Ali, 2011) and this is important as it might explain why societal norms and customs are prevailing as the state is a very new notion in South Sudan. During the civil war(s) the customary courts filled a void where there were no legal system, thus it is an important institution for the people (Danne, 2004). To change the societal norms, customs and cultural practices which promote GBV, tells women that they are less worth and which promotes differences, I do not think it is a good idea to remove the customary courts completely from the equation. I do however believe in the empowerment of women and sensitizing of men, which much gender-related theories have focused upon as the only way to change the system from the inside. Changing the constructed perceptions of gender is a possibility if the chiefs and judges in the statutory system establish a platform for the exchange of perspectives, and where women's own perceptions are included and heard. This way, I believe that the society can break out of their violent reproduction of gender and the system can be changed from the inside (Shepherd, 2008). It is my understanding, on the basis of my knowledge about the case that much of women's insecurity originates in and between the systems which both are policymakers. It is further my perception, based on the analysis, that the state is currently failing to ensure the security of women as the GBV cases are not heard in the statutory courts.

Gender-based violence (GBV) is a complex matter which is specifically evident in South Sudan much because of the very clear differences in how women are perceived in the two legal systems. I have in this thesis tried to enlighten this very specific social context where customary law meets modern statutory law where GBV is the issue, and how gender and human security are the theoretical perspectives most appropriate for an examination of these issues. Human security is a perspective which seeks to uncover issues of GBV and I believe an insertion of such a perspective into policies is essential for abolishing these practices. We cannot expect human security to flourish where GBV is so highly prevalent.

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