The document below has been developed in response to frequently asked questions on the role of legislation (national and international) and protection actors in areas of displacement, including Protection of Civilians (PoC) areas, for the CCCM training roll out in South Sudan April – May 2014.

1) Can customary laws play a role in CCCM and Protection in PoC and Non PoC areas?
Customary law is recognized in the South Sudan Transitional Constitution as both a source of “law” and a “dispute resolution” mechanism. But generally, a case which is addressed by customary law can be taken to a court if either party is not satisfied. The definition and substance of customary law varies from area to area and is not widely written down in a formal sense. Given the lack of formal justice actors - such as lawyers and judges – in many areas, both customary law and standards developed by IDPs themselves in their new community groups are providing important methods to resolve disputes. It is important that we all work together to try and reduce community tensions that can escalate into violence and customary law can help. That being said, we need to make sure that community and customary punishments are fair, do not place individuals at more harm and are undertaken with the consent of all parties. Law/order responses to more serious crimes such as rape, willful destruction of property or serious violence, especially in PoC Areas, remains a major challenge with which we continue to grapple. UNMISS are developing guidelines on how these very serious cases can be dealt with in PoC Areas.

2) Are communities in the PoC areas currently refugees or IDPs?
Individuals in the PoC Area might be IDPs, refugees, refugee/IDPs or neither. What is important in terms of the PoC Area is that any person or community may benefit equally from UNMISS protection from the imminent threat of violence if they are civilians, whether inside or outside of PoC Areas, and humanitarians should treat all such persons equally, irrespective of any specific legal or other status they may have.

Internally displaced persons (IDPs) are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border."\(^1\)

Therefore, being and IDP is not a question of citizenship or nationality and many/most persons inside the PoC area may be IDPs if they have left "their homes or places of habitual residence" for the listed reasons, including longer term foreign residents in South Sudan. While some short term foreign visitors to South Sudan may or may not be IDPs, if they are civilians under imminent threat of violence, they may benefit from UNMISS protection.
Article 1 of the 1951 Convention Relating to the Status of Refugees defines a refugee as someone who, ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’ In Africa, the 1969 OAU (now AU) Convention Governing the Specific Aspects of Refugees in Africa includes this definition but also an EXPANDED definition covering also persons who have crossed a national border “...owing to external aggression, occupation, foreign domination or events seriously disrupting public order ...” even if s/he may not have an individualized well-founded fear of persecution. The South Sudan Refugees Act (2012) recognizes both of these definitions.

It is the choice of people inside the PoC areas who are not from South Sudan to decide if they want to seek asylum pursuant to the Refugees Act. UNHCR and the Commission for Refugees Affairs assess these cases, many of which require an individual national legal and/or UNHCR Refugee Status Determination process. We see clearly, however, that many people came to South Sudan to work and live but do not want to become refugees and/or may not meet either of the refugee definitions in the Refugees Act, even if they think or say they are refugees. It is important, however, that their decision to seek refugee status is respected but this does not mean they would eventually be “recognized” as refugees.

As mentioned above, any civilian, including a refugee or foreign visitor or foreign resident, may benefit from UNMISS protection from the imminent threat of violence whether inside or outside of PoC areas, and humanitarians should treat all such persons equally, irrespective of any specific legal or other status they may have.

3) Is the UNMISS compound an international territory or part of the national South Sudanese territory?

The UNMISS compound is in the territory of South Sudan. The Government of South Sudan provided land for UNMISS operations. It benefits from diplomatic and other privileges and immunities including, but not limited to, those defined by the UNMISS/GoSS Status of Forces Agreement. UNMISS is not, however, considered a “State” for purposes of such things as refugee status determination or the IDP definition.

4) What international bodies of law apply to IDPs in the Republic of South Sudan?

While IDPs are not protected under refugee law, they are afforded the same protection as any other citizen of a country, under International Human Rights Law and International Humanitarian Law. Given the very specific vulnerabilities IDPs face, there have been further
attempts to strengthen the protective framework. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, also known as the Kampala Convention, was adopted by the African Union in 2009 as a means of addressing the protection and assistance needs of the millions of IDPs across the continent and preventing future displacement. In 2012, Swaziland became the 15th State to formally ratify the Convention and, as such, it is “technically” binding on all AU member states. Nevertheless South Sudan has yet to “domesticate” the Kampala Convention into a national law, so specific enforcement mechanisms are still lacking. The Guiding Principles on Internal Displacement of 1998 pull together aspects of these legal regimes to address situations specific to displacement. Yet, the Guiding Principles are not legally binding in the way that the Refugee Convention is; there are no enforcement mechanisms to ensure compliance with them.

5) Which treaties have the Republic of South Sudan has ratified?

South Sudan has fully ratified only a few international treaties, including the Convention on the Rights of the Child and the Geneva Conventions. Many others remain “in process”. As we will discuss below, however, South Sudan has some very progressive laws, which explicitly incorporate by reference numerous international instruments and principles, including directly within the Transitional Constitution. South Sudan, as every other country can also be bound what is called “Customary International Law”. This is unwritten law that has, however, been so universally accepted it is generally considered to be binding on States, such a prohibitions on genocide, torture or slavery, even if countries have not ratified treaties on the specific issue.

6) Which national laws of the Republic of South Sudan relate to Protection?

It is important to understand what we mean by Protection in this question: we mean protection from harm but also support for the human rights framework which prevents discrimination and unequal treatment and enables people to live positive and productive lives.

South Sudan has some very progressive legislation which lays out a framework to protect many of the rights of its citizens, including civil and political rights, security, freedom from discrimination and positive legislation on issues such as women, children and land rights. The Transitional Constitution offers the framework for this, with a detailed Bill of Rights. This is supported by other legislation such as the Child Act. What we see in South Sudan is the same challenge faced by many countries -- many very positive human rights instruments but people having difficulties in accessing these rights due to issues such as limited number of courts, few trained lawyers and judges, the cost of going to court, and balancing between customary and statutory legislation. These issues are now of course made even more difficult in the current context.
7) Are national laws applicable in PoC areas?

This is a difficult question to answer, given the very new situation in South Sudan of civilians residing inside UNMISS PoC areas for long periods of time. UNMISS/DPKO are working hard to have these questions answered. The short answer is yes, whether residing inside or outside of the PoC areas, the people living inside South Sudan are both governed and protected by South Sudanese law. The difficult question being answered right now is how to make the law applicable. Many IDPs have expressed concern about enforcement of laws outside of the PoC Areas in the current context, including credible risks of torture and other bodily harm. Both inside and outside PoC areas, some Government officials including judges and lawyers are now IDPs themselves. South Sudan is the first country where peacekeepers have opened the gates to their bases in this way and in the future the lessons learned in South Sudan may impact on how peacekeeping missions address these issues in the future.

8) Who is responsible for ensuring safety and security in PoC areas?

Firstly, the responsibility for safety and security lies with the groups or individuals who wish to cause harm. In the instance of an attack such as that of 17 April 2014 in Bor, UNMISS have a mandate to protect the civilians from being harmed but the first responsibility is for actors to refrain from doing harm, and for government to protect all persons within it borders.

UNMISS is obligated to provide security for the people residing inside the PoC areas. Depending on the security requirements, different measures are undertaken in an effort to guarantee that security. This includes troops patrolling around the perimeter fencing of the PoC areas, having troops positioned around the base; UNPOL or Formed Police Units (FPU) patrolling. UNPOL and FPU are charged with responding to incidents inside the PoC area.

Humanitarian actors, such as the Protection Cluster and CCCM have worked with UNPOL and UNMISS to improve their understanding of the community inside the bases and threats to communities. They also work together for safety and security of humanitarian action inside PoC’s.

The people and communities inside the PoC Areas are also responsible for not doing any harm to other people or communities inside the PoC areas, and we must work closely with community leaders and community groups to reinforce messages that people inside the PoC areas are still governed by the national framework and should treat each other well and not interfere with security measures that are being implemented, e.g. making holes in the perimeter fencing.

9) Protection of IDPs is mainly a role of UNMISS?
The Government of South Sudan has the primary responsibility to protect civilians. The Security Council has created a peacekeeping mission with a Chapter VII mandate, which authorizes UNMISS to use force to protect any civilian in South Sudan from the imminent threat of violence when the GRSS is unwilling or unable to protect its civilians. In connection with the Chapter VII mandate, UNMISS developed Guidelines on the Protection of Civilians in UNMISS bases, outlining what measures need to take place if civilians fleeing violence seek protection from UNMISS. International law has additional protections, including that parties to the conflict cannot deliberately target civilians and must take steps to reduce risks to civilians when conducting military operations. As set forth in both the Guiding Principles and the Kampala Convention, government generally has the primary responsibility of protecting persons within its borders.

10) **What is the role of UNHCR regarding the protection of IDPs?**

General Assembly Resolution A/RES/53/125 (1999), Article 16 specifically recognized the protection and assistance role of UNHCR in the context of internal displacement in providing humanitarian assistance and protection, taking into account the complementarities of the mandates and expertise of other relevant organizations. The Kampala Convention also specifically mentions the role of UNHCR in the African context. As also noted in the IASC Handbook on Internal Displacement, “several international organizations, namely OHCHR, UNHCR, UNICEF and ICRC, have specific protection mandates. All UN and partner agencies however have a responsibility to integrate human rights into their work and to approach their work with due regard to protection issues. See *Renewing the United Nations: a Programme for Reform*, Report of the Secretary-General to the United Nations General Assembly (UN doc. A/51/950) and *Protection of Internally Displaced Persons* (IASC, 2000).” Priority interventions and partnerships may include/address, among others: identification and reporting/monitoring and advocacy on protection risks; needs/gaps/intentions assessments; targeted group/individual interventions and/or referral to respond to identified risks/needs, in particular for persons with specific needs; peaceful co-existence activities such as QIPs, host community projects, and joint host/displaced community activities/dialogue; early warning activities; community/leadership support and mobilization; supporting SGBV prevention/response, safe spaces, law enforcement and community sensitization/training; support for FTR, community based child protection structures and safe/friendly spaces, supporting interim/alternate care; legal advice/counselling; support for civil status and other forms of legal documentation; and activities designed to help create conditions conducive to durable solutions.

In the context of humanitarian reform and the adoption of the “Cluster Process”, different Agencies/organization are designated at the global level as “Lead Agencies” for specific sectors/clusters and for Protection, in particular in the context of armed conflict, this is UNHCR. This means, in practice, that UNHCR undertakes among other obligations to act as a “provider of last resort” where other humanitarian/protection actors are able to respond. It is important to note that this does not extend to the type of “physical protection” undertaken by UNMISS with potential use of force, but is rather “humanitarian and non-political”. In South Sudan, UNHCR is the “Lead Agency” for protection, and co-coordinates the Protection
Cluster with NRC. UNHCR also works in formal and informal partnership with other actors both in direct interventions and in the cluster response context. Similarly, in South Sudan, UNICEF and Save the Children co-coordinate the Child Protection sub-cluster, UNFPA and ARC co-coordinate the SGBV sub-cluster, UNMAS and DDG co-coordinate the Mine Action sub-cluster and UN Habitat and NRC co-coordinate the Housing Land and Property sub-cluster, each of which are recognized at the global levels as defined "Areas of Responsibility" within the “umbrella of protection”.

11) To which protection actors shall the Camp Manager Agency and services providers report protection incidents?

The Protection Cluster has a protection focal point in all area where we are working. If you have any questions on potential protection issues, you can contact the protection focal point. The Protection Cluster may not always provide the follow up service, and many issues are referred to UNMISS Human Rights, RRP or another actor but when you arrive in a new location:
   a) Identify your protection focal point.
   b) Refer any cases of concern to this person and they can follow up.

12) What preventive measures are being implemented in order to prevent protection incidents in sites?

There are different steps being taken to mitigate against protection incidents, by a range of actors. Given the nature of the situation, with people very closely confined inside PoC areas, the potential for violence both inside and from outside the PoC area is very high. There is active work going on to reduce risk from direct physical harm but also reduce community practices, tensions and frustrations that lead to violence. These include the below, but while there are a lot of activities ongoing more can always be done with further resources and support. This includes education activities, initiatives that target youths, more space to provide community areas and services, more patrolling in and around PoC areas etc.

   a) UNMISS patrolling around the parameter fencing of the PoC areas, where many incidents occur.
   b) UNPOL patrolling within the PoC area.
   c) UNMISS Human Rights documenting Human Rights violations for accountability purposes/
   d) Humanitarian protection presence inside and outside PoC areas, including nighttime patrolling in some locations.
   e) Community engagement strategies including regular dialogue with community leaders and other groups.
   f) Protection activities such as provision of GBV services and community messages, reunification of families and providing safe spaces for women and children.
For more detailed answers or further questions, please contact the South Sudan Protection Cluster: trotterp@unhcr.org and lisa.monaghan@nrc.no