

South Sudan: An Independent Judiciary in An Independent State?

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Executive summary

On 9 July 2011, the Republic of South Sudan became an independent State, and a few days later, the 193rd Member State of the United Nations. Independence came after 50 years of almost continuous civil war with the North, rooted in deep cultural, ethnic and religious differences.

Since independence, South Sudanese authorities have taken some meaningful steps towards ensuring that the new-born country has institutions and a legal framework that complies with rule of law principles. However, as far as the justice sector is concerned, significant institutional challenges remain and several gaps in the constitutional and legal order need to be addressed for South Sudan to comply with international human rights standards on the administration of justice.

As regards South Sudan's international human rights obligations, it should be noted that at present the country is not party to any international human rights treaty. Between October and November 2013, the Legislative Assembly passed bills for the ratification of the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child. The Government has pledged to ratify all core international human rights conventions.

At present, the highest legal authority in South Sudan is the *Transitional Constitution of South Sudan 2011*, which came into force on 9 July 2011. The *Transitional Constitution* provides for its own replacement by a permanent constitution, setting out the process and timeframe for drafting and adoption. However, the constitutional review process is far behind schedule: the main reason for the delay has been identified by the Legislative Assembly as a shortage of financial and human capacities assigned to the Constitutional Review Commission. As a consequence, the timeline for the constitutional review process under the *Transitional Constitution* has been amended, and the mandate of the Constitutional Review Commission extended till 31 December 2014.

Since independence, the legislature of South Sudan has passed a number of important laws related to the justice sector, and several others are at different stages in the legislative process. However, in spite of the remarkable pace of legislation, there appears to be a mismatch between the financial and human resources allocated for the performance of day-to-day legislative work and the amount of legislative work still to be done.

On one hand, the task is made particularly challenging by the coexistence in South Sudanese legal tradition and culture of legal concepts and procedures that derive mainly from two distinct and very different legal systems: one statutory and the other customary in character. Local and national laws and procedures percolate both up and down the judicial hierarchy: some chiefs sentence according to written laws, while some statutory judges apply principles and procedures derived from local cultures. The inconsistency of approach undermines South Sudan's ability to deliver justice in accordance with the principle of legal certainty. Primarily for practical reasons, the present report focuses on the compliance of the statutory court system with international law standards on judicial independence. At the same time, it must be acknowledged that the vast majority of legal cases in South Sudan are decided outside the statutory court system. Indeed, despite lacking jurisdiction to do so, customary courts on some occasions even pass criminal sentences, including for serious crimes.

Another essential feature of South Sudanese justice system under the *Transitional Constitution* is its departure from the inquisitorial procedures traditionally followed by customary courts – which are characterized by an active engagement with the parties by the local chief – in favour of the adoption of more adversarial features. In fact, since the entry into force of the *Transitional Constitution*, the statutory justice system in South Sudan has officially moved from an approach inherited from the older Sudanese system, in which Sharia was a source of law and the courts operated in Arabic, to a common law system that operates in English. The

change has not yet however been entirely integrated into the actual practices of judges and lawyers.

In terms of institutional arrangements, although the principle of separation of powers is provided for in unambiguous terms in the Constitution and ordinary laws, in practice a culture of judicial independence seems not yet fully to have taken root in South Sudan. On more than one occasion, the ICJ heard of incidents involving representatives of other state powers, and particularly the Executive and the army, reported to have exercised undue pressures on and illegitimate interference with the exercise of judicial functions.

The main challenges that the judiciary of South Sudan faces derive from the shortage of human and financial resources; material resources, including copies of laws and other legal materials; and infrastructures, including adequate courtrooms (or indeed the unavailability of any buildings suitable for holding hearings in some parts of the country), and centres for judicial training and continuous professional development.

According to official figures, only 124 judges operate in South Sudan. Entire regions of the country are deprived of any statutory judicial presence, which inevitably affects the awareness of individuals from those areas about the work and functioning of the statutory courts system and their ability to access justice in the those courts. The first recruitment of candidates to judicial positions to be carried out in South Sudan since the end of the end of the civil war was conducted in February 2013. However, the criteria for recruitment do not appear to have been made public, and the procedure was widely criticized for lack of transparency, in violation of international standards.

In those places where statutory judges are operating, judicial capacity is overstretched, with delays resulting from case backlogs. In turn, such delays undermine public confidence in the work of the statutory judiciary, and may lead to human rights violations, such as the right to trial without undue delay, and lack of access to a court to challenge the lawfulness of detention or inhuman and degrading conditions of detention in detention centres that do not comply with international standards.

On the basis of the information available it seems that, to date, no code of judicial ethics exists in South Sudan. No South Sudanese judge seems ever to have been disciplined or removed, which makes it difficult to assess whether proceedings under the existing provisions would in fact comply with international standards on judicial independence. In any event, the minimum guidance that the *Judiciary Act* provides as regards the composition of the body deciding in the first instance on the alleged misconduct, and the review of disciplinary decisions, falls short of guaranteeing an independent review.

As to the legal profession, the legal text that formally regulates it in South Sudan, the *Advocacy Act 2003*, was either never implemented, or fell into disuse. As a consequence, until new legislation is enacted, the legal profession in South Sudan finds itself acting in a legal vacuum.

One important consequence of the protracted absence of established rules and uniform practices governing the access to the profession appeared to the ICJ to be that the title of lawyer is being attributed in South Sudan without systematically applying verifiable and predictable criteria as to the person's competency. The completion of a period of pupillage with a senior lawyer, as provided for under Sudanese law, appears to have been maintained as a practice in South Sudan also after independence. However, the ICJ did not find evidence that this or any other conditions of access to the profession are being uniformly applied. The persistence of a lack of clear, coherent and uniform norms and procedures for admission to the bar clearly risks undermining to the overall quality of the services provided by the legal profession.

The legal profession operating in South Sudan appears largely fragmented between on the one hand lawyers with a civil law and Sharia background (mainly trained in Arabic in Sudan), and on the other foreign lawyers and legal practitioners trained in the diaspora under a variety of

legal systems. To date, no functioning professional association representing the entire legal profession exists in the country. Among other challenges, creating a unified regulatory framework and body for the profession as a whole will require finding a structure and professional culture that brings together a wide range of linguistic and legal professional backgrounds.

In the course of the civil war in South Sudan, the operation of the University of Juba was suspended and its courses were moved to Khartoum. Recently the Law Faculty has moved back to Juba, but enormous challenges remain, mainly related to the paucity of human and material resources available. As to legal training, bar courses and other post-graduate studies, in each case either no structures responsible for its provision seems yet to exist, or providers have not been functioning regularly, or the provider is seriously understaffed and under-resourced. No programme of continuing legal education appears to be in place.

South Sudan lacks a centralised programme of legal aid. A pro bono legal aid programme has been recently initiated, administered by the Ministry of Justice; however, it does not seem to reach all of those who are entitled to have legal assistance provided in accordance to the international standards.

Based on its findings, the International Commission of Jurists makes 40 recommendations to South Sudanese authorities pertaining to constitutional and legal reforms, South Sudan's international human rights obligations, court structure, judicial independence in the statutory courts system, and the legal profession. These recommendations appear in full at the end of this report. The primary recommendations are as follows:

- In the process of reviewing the current Constitution, all constitutional provisions should be reviewed to ensure their consistency with core international human rights treaties.
- All possible efforts should be made to guarantee that the Constitutional Review Commission is provided with the human and material resources necessary to complete its tasks by the new deadline of 31 December 2014.
- South Sudan should immediately deposit instruments of ratification of the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child; should promptly complete the legislative steps for the ratification of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and should formally start the process for becoming a party to the remaining core international human rights instruments. An open and comprehensive process should be launched to determine, and promptly to adopt, legislative and other measures to ensure the implementation of the provisions of those treaties.
- A comprehensive survey and study of customary courts should be commissioned by the government, which includes an assessment of the degree to which such courts are operating in accordance with South Sudanese statutory and constitutional provisions governing their establishment and operation, as well as the consistency of their composition and operations with international standards on human rights, the rule of law, and the independence and impartiality of the judiciary.
- If South Sudan does not abolish the death penalty altogether, the Government must ensure that the death penalty is not imposed by customary courts (particularly since under South Sudanese law, customary courts should not be exercising criminal jurisdiction at all).
- Judicial appointments and promotions should be made according to predetermined, clear and measurable objective criteria, based uniquely on merits and relevant professional qualifications and training. The selection of candidates to the position of judges must ensure equal access to the profession, without discrimination on any ground. In particular, selection procedures should take into account that, although the Transitional Constitution calls for a "substantial representation of women" in the

- judiciary, there are very few women appointed as judges in South Sudan, with no representation in the Supreme Court.
- The increase of judicial capacity through recruitment of judges and supporting staff who meet selection criteria consistent with international standards should be an absolute priority.
 - The adoption and promulgation of a new law regulating the legal profession, in line with international standards on the independence of the profession and relevant best practices from other countries in the region, should be treated as a priority. The process for drafting and adoption of the law should be finalized urgently.
 - The members of the legal profession in South Sudan should establish an independent, self-regulating and fully functional professional association, preferably as a unifying body representing the entire South Sudanese legal profession. For this purpose, they could seek guidance and assistance from other bar associations in Africa and elsewhere in developing their working practices, which should be consistent with international standards and best practice. Also, the design of the internal structures and governing bodies of the professional association will need to be informed by, and oriented towards, the respect of the standards for independence and the principle of a self-regulating profession.
 - The Government of South Sudan must establish and ensure adequate resources for legal aid throughout the country. The legal aid system must at a minimum ensure the provision of quality legal assistance and representation to people suspected of or charged with a criminal offence, particularly on charges carrying a possible term of imprisonment, and those deprived of their liberty, whether or not charged with a criminal offence, without discrimination. Such legal aid must be available without charge to those who do not have the ability to pay.

I. Introduction

A. Objectives of the present report

The present report is based on research conducted on and in South Sudan, including but not limited to a high-level fact-finding mission, a two-day National Consultation Conference on the theme of *Judicial and Legal Professional Independence and Accountability*, and the ICJ workshop on fair trial guarantees, all undertaken by the International Commission of Jurists (ICJ) in Juba between September and October 2012.

The report analyses the current state of the judiciary in statutory courts and the legal profession in South Sudan, in light of international standards on the independence of judges and lawyers. While most legal proceedings in South Sudan today are in fact handled by customary courts rather than statutory courts, this report, the first ICJ project covering the territory since the ICJ report on Sudan in 1986,¹ focusses on statutory courts in so far as information relevant to the statutory court system and its functioning was far more readily accessible within the timeframe and resources available to the ICJ for its visits to the country. It should also be noted that statutory courts in South Sudan are under South Sudanese laws the exclusive bodies authorised to adjudicate crimes, including the most serious crimes and the most severe sentences.

The report makes concrete recommendations to relevant authorities in South Sudan. Overall, the report seeks to ensure that ongoing justice reforms achieve the following:

- The establishment of an independent and better resourced statutory judiciary throughout the country, consistent with international standards on the rule of law, human rights, the principle of separation of powers and the independence of the judiciary;
- Securing the independence and competence of the legal profession throughout the country, consistent with international standards on the rule of law, human rights, and the independence of the legal profession.

The ICJ wishes to thank all members of the high-level fact-finding mission to Juba, which consisted of Justice Moses Chinhengo, former judge of the High Courts of Botswana and Zimbabwe and ICJ Commissioner, Head of the mission; Justice David Wangutusi, judge of the Anti-Corruption Division of the High Court of Uganda; Justice Thomas Masuku, former judge of the High Courts of Swaziland and Botswana, and member of the Advisory Committee to the ICJ Centre for the Independence of Judges and Lawyers (CIJL); Mr Arnold Tsunga, Director of the ICJ Africa Regional Programme; Mr George Kegoro, Executive Director of ICJ-Kenya; and Ms Ilaria Vena, CIJL Associate Legal Adviser.

The ICJ also wishes to express its particular appreciation to the following office-holders at the time of the mission for meeting with the ICJ mission and sharing their views: the Vice-President of South Sudan; the Chief Justice, Deputy Chief Justice and Justices of the Supreme Court of South Sudan and of the Juba Court of Appeal; the Minister of Justice, his Deputy and Undersecretary; the legal advisers to the President of South Sudan and the Legislative Assembly; the Deputy Speaker and Chairperson of the Legislative Committee of the Legislative Assembly; and Chairpersons of the Anti-Corruption, Law Reform and National Human Rights Commissions and members of their Commissions. The ICJ further wishes to thank members of the legal community in South Sudan with whom the ICJ mission met, particularly the members of the South Sudan Law Society, for the cordial and insightful discussions and invaluable contributions they provided.

¹ See International Commission of Jurists, *The return to democracy in Sudan*, 1986. In June 2007 the ICJ also published the report *The administration of justice in Sudan: the case of Darfur*, which specifically focussed on developments in the administration of justice in Darfur.

Except where a later source is indicated, this report takes account of developments up to July 2013.

B. South Sudan: country background

On 9 July 2011, the Republic of South Sudan became an independent State. Independence came only after 50 years of almost continuous civil war. The region was long marginalized and southerners faced discrimination deeply rooted in historic, cultural, and ethnic differences. Such pre-existing differences between North and South, also marked by the slave trade, were further entrenched by the actions of Britain in making Sudan's south and some southern parts of the north, a closed district that northern Muslims could not legally enter without a permit. This policy, intended partly to stop the spread of Islam, was only ended in 1946. In addition, religious friction was exacerbated by the fact that education was largely left to Christian missionaries.

Before independence southerners appealed for federation and increased economic and educational development to allow them to catch up with the North. The demands were ignored by the British and refused by the northern elite. Before Sudan's independence some southern army units mutinied, fearing to be disarmed and transferred to the north, and fled to the bush. After a military takeover in Khartoum from 1958-64, repression of southern diversity intensified through a policy of Arabization and Islamization, and a resistance movement, Anyanya, whose military wing was headed by former mutineers, was set up in 1963 to fight for separation.

The 1972 Addis Ababa agreement was the first attempt to bring peace, after a military coup d'état led by Colonel Nimeiri in 1968 overthrew governments arguing over an Islamic constitution. The agreement gave regional government to the south with an unfulfilled promise of accelerated development. The discovery of oil in the south in the 1970s was one factor in President Nimeiri's decision to abrogate the agreement in 1983. He subdivided the three southern provinces, taking away their regional powers. With the safeguards of the Addis Ababa agreement gone, he announced that traditional Islamic punishments drawn from Sharia law would be incorporated into the Penal Code (these are known as the 'September Laws').

By this time South-based Sudan army units in Jonglei Province had mutinied and formed the Sudan Peoples' Liberation Army (SPLA) led by a southern Sudan army colonel, John Garang de Mabior. He claimed that he was not fighting for separation but for a 'New Sudan' that would be secular and democratic, and that would end marginalization not only of southern groups, but also of groups in the north. Supported and armed by Ethiopia, the SPLA won important victories; by 1986, the fighting had expanded into the northern border areas of Blue Nile and South Kordofan, inhabited by non-Arab ethnic groups and by 1989 ninety percent of the South, including many major towns, was under SPLA rule. As the democratically-elected government in Khartoum opened peace talks in June 1989, General Omar al-Bashir seized power and established an Islamist military government, which has since remained in power.

After 1991 the SPLA was weakened by the overthrow of President Mengistu of Ethiopia, and a major split formed within the movement. One group, SPLA/Nasir, tried to oust Garang; it advocated southern independence, yet was soon being armed and encouraged by Khartoum. Khartoum also supported many other commanders who split from the SPLA/M (acronym used to indicate jointly the SPLA and the Sudan People's Liberation Movement, or SPLM, initially founded as the political wing of the SPLA), reflecting ethnic divisions. As the export of oil became more and more important, the North increased its military actions in the northern border states of the South, depopulating the area in order to secure the oil-rich regions, which were nearly all within the South. They followed the same policy of massive forced displacement in south Kordofan and northern Bahr al-Ghazal – and were later to follow the same policy in Darfur in 2003-5.

Meanwhile, after earlier attempts at mediation failed, peace talks under the auspices of the Inter-Governmental Authority on Development (IGAD, consisting of Kenya, Uganda, Ethiopia

and Eritrea), received a new impetus from greater involvement of the United States of America in the peace process after 2001. The Government of Sudan and SPLM/A committed to direct dialogue aimed at ending the civil war. As a result, in March 2002, a ceasefire in the Nuba Mountains was agreed and in July the *Machakos Protocol* was signed. This reaffirmed the principle of a united Sudan based on equality, respect and justice, while it stated the South's right to self-determination. It provided for an internationally monitored referendum to take place at the end of a six-year 'Interim Period' starting from July 2005, through which the people of the South would be asked to either confirm the unity of Sudan by voting to adopt the government system established under the Comprehensive Peace Agreement (CPA), or opt for secession.

There were five Protocols to the CPA, in addition to the *Machakos Protocol*. The *Protocol on Security Arrangements*, signed in September 2003, laid the foundations for incorporating combatants into the police and military forces in the south, but without forcing them to merge with northern forces. The *Protocol on Wealth Sharing*, signed on January 2004, divided oil revenue from the southern oil fields. The *Protocol on Power Sharing* set out the government system during the Interim Period, and contained a section on human rights and fundamental freedoms that included the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, the right to a fair trial, the rights to freedom of thought, conscience and religion, freedom of expression and freedom of association and equality before the law.

The last two protocols, the *Protocol on the Resolution of Conflict in Southern Kordofan/Nuba Mountains and the Blue Nile States* and the *Protocol on the Resolution of Conflict in Abyei* were both signed in May 2004. The former addressed the two regions bordering on the south, setting up power-sharing administrations of the NCP and SPLM in both states with 'public consultation' at the end of the interim period to determine what changes should be made. Both these areas have now returned to conflict, the NCP governments having managed to smother change and bypass any real consultation. The *Protocol on the Resolution of Conflict in Abyei* outlined the administration of that area and provided for a special referendum on Abyei's status in the event of the South's secession at the end of the Interim Period. This has not taken place.

The CPA was formally signed on 9 January 2005. Six months later, on 9 July 2005, the presidency was inaugurated, with Dr John Garang de Mabior (SPLM/A leader) installed as First Vice-President of Sudan under President Omar al-Bashir. John Garang's constructive relationship with Ali Osman Taha, the previous First Vice-President of Sudan and negotiator for the Government of Sudan who became Second Vice-President after Garang's appointment, had played a key role in the successful conclusion of the CPA. Garang's stated intention to reform the entire country into a "New Sudan" based on equality, secularism and democracy, rather than to demand secession, made him particularly popular in the north. However, his death in a helicopter crash three weeks after his inauguration as Vice-President meant that separatism took over from the project of a New Sudan and strongly affected the implementation of the Peace Agreement. Garang's deputy, Salva Kiir Mayardit, was sworn in as his successor as Vice President of Sudan and President of the Government of South Sudan.

Elections in April 2010 were largely peaceful, although widespread irregularities were reported during the polling and counting periods. The SPLM leadership under Salva Kiir Mayardit refused to allow the SPLM to put the CPA (and the eventual referendum on southern independence) at risk by fighting the NCP in the elections in the north. The National Congress Party headed by President al-Bashir won the overwhelming majority of electoral seats in the north, while the SPLM won the majority in the south. The incumbent Omar al-Bashir was elected as President of the Government of Sudan and Salva Kiir Mayardit was elected as President of the semi-autonomous Government of South Sudan.

The *Machakos Protocol* had expressed the hope that a Peace Agreement should be designed and implemented "to make the unity of Sudan an attractive option especially to the people of South Sudan", but the Government of Sudan was ultimately not prepared to take steps to this end, which would have included recognizing the diversity of peoples, religions and ethnic groups in Sudan. Instead, the government continued its quest for uniformity through the

imposition of an Islamic State under Sharia Law. In addition, by the time of the referendum, the government's mass displacement and killings in Darfur had led to President al-Bashir's indictment for war crimes and crimes against humanity before the International Criminal Court. On 9 January 2011, the week-long 'unity or secession' referendum began; those voting included southerners in the North and in the diaspora (polling stations were set up in UK, US, Canada, Australia). The official results were announced on 7 February 2011. With more than 3.85 million people participating – 97.5 per cent of registered voters – an overwhelming 98.8 per cent voted for secession.

II. The legal system in South Sudan

A. The Constitution and the constitutional review process

1. *The Comprehensive Peace Agreement and the Interim Constitution of Southern Sudan 2005*

During the Interim Period (9 July 2005 to 9 July 2011), the *Comprehensive Peace Agreement* (CPA) provided the basis for governance in South Sudan. The CPA also stated that the Government of South Sudan was to operate in compliance with a constitution for Southern Sudan.²

The CPA provided for the establishment of an *Interim National Constitution*, applicable to all of Sudan, as the legal framework and supreme law, with which the constitution of Southern Sudan, as well as state constitutions and ordinary legislation at all levels of government, would have to comply.³ For the South, an inclusive Southern Sudan Constitutional Drafting Committee was mandated to draft the *Interim Constitution of Southern Sudan 2005* (hereinafter *Interim Constitution*), for adoption by the Transitional Assembly of Southern Sudan by two-thirds majority.⁴

The *Interim Constitution* provided for its supremacy throughout South Sudan, without prejudice to the *Interim National Constitution*.⁵ In the event that the referendum on self-determination confirmed unity, the system of governance set out in the *Interim Constitution* was to remain in force. In the case of secession, the *Interim Constitution* was to remain in force as the Constitution of the independent South Sudan.⁶

The *Interim Constitution* provided for Southern Sudan to be founded on “justice, equality and respect for human dignity” and to be “governed on the basis of a decentralized democratic system”.⁷ According to the *Interim Constitution*, sovereign authority was vested in the people and to be exercised through “democratic and representative institutions”, which were “elected by [the people] in regular, free and fair elections”.⁸ Governance “shall promote democratic principles and political pluralism, and shall be guided by the principles of decentralization and devolution of power to the people through the appropriate levels of government where they can best manage and direct their affairs”.⁹

The *Interim Constitution* further elaborated on the principle of decentralization by articulating three levels of government: the Government of South Sudan; the state level; and local government.¹⁰ It also enshrined the principle of separation of powers between the legislature, the executive and the judiciary¹¹ and included provisions on the composition and functions of each of them: the legislature (Part Five), executive (Part Six) and judiciary (Part Seven).

² Section 3.2 Power Sharing Protocol.

³ Section 1.5.1.2 Power Sharing Protocol.

⁴ Section 3.2 Power Sharing Protocol.

⁵ Section 3(1) Interim Constitution.

⁶ Section 208(6)-(7) Interim Constitution.

⁷ Section 1(3) Interim Constitution.

⁸ Section 2(1) Interim Constitution.

⁹ Section 39(1) Interim Constitution.

¹⁰ Section 50 Interim Constitution.

¹¹ Section 54 Interim Constitution.

2. The Transitional Constitution of South Sudan 2011

The *Interim Constitution* was replaced by the *Transitional Constitution of South Sudan 2011* (hereinafter *Transitional Constitution*), which came into force on 9 July 2011.¹² The *Transitional Constitution* was drafted by a technical review committee without public participation. The committee began work on 21 January 2011 after it was established by presidential decree. Its approach was limited to reviewing the *Interim Constitution* for the purpose of eliminating all references to a united Sudan, and converting government structures already existing in the South into institutions of a sovereign state. After submission to the Southern Sudan Legislative Assembly, the “recommendations on the transitional constitution” were transmitted to the then-Office of the Presidency of Southern Sudan, along with the technical committee’s “proposals for the making of a permanent political charter”.¹³

Upon the promulgation of the *Transitional Constitution*, international commentators as well as local opposition parties warned that it concentrated too much power in the hands of the central government and the President. In contrast, the Minister of Information claimed that the “people of the South Sudan were consulted through their representatives in the parliament”, and the Chairperson of the Information, Culture and Communications Committee of the Parliament asserted that the *Transitional Constitution* “represents the will and rights of the people of South Sudan”.¹⁴

Under the *Transitional Constitution*, executive power lies with the President, who is the head of State, head of Government, Commander-in-Chief of the Sudan People’s Liberation Army and Supreme Commander of all regular forces.¹⁵ Among many other powers and responsibilities, the President appoints numerous officials, thus extending his influence throughout the most important institutions of the country. Within the judiciary, the President of South Sudan has the powers to appoint the Chief Justice, his or her Deputy, and all judges and justices operating in statutory courts;¹⁶ the President is also competent for their removal for serious misconduct.¹⁷

The country has a bicameral legislature consisting of a 332-seat National Legislative Assembly and 50-seat Council of States; members serve four-year terms.¹⁸ South Sudan has ten states, each of which is administered by elected governors, state cabinets, and elected state legislative assemblies.¹⁹ Each state has its own constitution and may enact laws, so long as they conform to the *Transitional Constitution*.²⁰

To a certain extent, however, the new Constitution also represented a move away from the principle of federalism. For example, under the *Transitional Constitution*, the President can remove a state governor and/or dissolve a state legislative assembly in the event of a crisis in the state that threatens national security and territorial integrity, and may in such

¹² Sections 198 and 201(1)(a) Transitional Constitution.

¹³ United Nations Mission in Sudan (UNMIS), *InSudan. Special Focus: New Nation*, 2011, p. 7, available at <http://unmis.unmissions.org/Portals/UNMIS/2011Docs/inSUDAN-June-2011-eng-web.pdf>

¹⁴ *South Sudan passes interim constitution amid concerns over presidential power*, 8 July 2011, available at <http://sudaneseonline.org/cs/blogs/english/archive/2011/07/08/south-sudan-passes-interim-constitution-amid-concerns-over-presidential-powers.aspx>

¹⁵ Sections 97(3) and 101 Transitional Constitution.

¹⁶ Section 133(1) and (2) Transitional Constitution.

¹⁷ Section 134(2) Transitional Constitution. The selection, appointment and removal of members of the judiciary in South Sudan will be examined *infra*, in Chapter IV of the present report.

¹⁸ See Part Five Transitional Constitution.

¹⁹ See Part Eleven, Chapter One Transitional Constitution.

²⁰ Section 3(3) Transitional Constitution.

circumstances appoint a caretaker governor who is then charged with preparing for elections. None of these provisions were present in the *Interim Constitution*.²¹

3. Constitutional review process

The *Transitional Constitution* is to remain in force until the adoption of a permanent constitution.²² To this end, it provided for a National Constitutional Review Commission to be established within six months of independence. The President was entitled to appoint its members, after due consultation with the political parties, civil society and other stakeholders. The main tasks of the Commission were, first, to review the *Transitional Constitution*, after having collected views and suggestions from "all stakeholders", with a view to "including any changes that may need to be introduced to the current system of governance"²³ and second, to raise awareness on constitutional issues, involving the general public.²⁴

The *Transitional Constitution* directs the Review Commission to adopt and present a Draft Constitutional Text and an Explanatory Report to the President within six months of its establishment. The Draft Constitutional Text must then be approved by the National Constitution Conference before being sent to the legislature. The legislature is then provided with three months to enact the Constitution and forward it to the President for assent and signature.²⁵

The constitutional review process is far behind schedule. On 6 January 2012, a consultative meeting was convened under the chairmanship of the then Vice-President of South Sudan, in the presence of representatives of political parties. The then Minister of Justice presented a memorandum on the Framework for Establishment of the Constitutional Review Commission spelling out the criteria for appointment to the Commission of permanent and non-permanent members and for identifying "legitimate" stakeholder groups and civil society organizations. However, no stakeholder groups or civil society organizations were invited to the consultation, in apparent contradiction with Section 202(2) of the *Transitional Constitution*.²⁶

Civil society was subsequently under-represented in favour of the SPLM in the composition of the Constitutional Review Commission (only one seat was allocated to civil society, out of the fifteen-to-twenty-five permanent seats initially foreseen), sparking considerable criticism of the Government of South Sudan and the SPLM. Dong Samuel Luak of the South Sudan Law Society (SSLS), representing civil society, refused to take the oath as a member of the Commission. Subsequently, the then Vice-President called upon South Sudanese civil society to submit the names of four additional potential members of the Commission. This opening to civil society did not prevent further accusations of lack of transparency, with the Government also accused of repeating the same errors committed with the adoption of the *Interim Constitution* and *Transitional Constitution* by favouring over-representation of the SPLM.²⁷

²¹ Compare Section 101(r)-(s) Transitional Constitution with Section 103(2) Interim Constitution. In the course of 2013 President Salva Kiir invoked his powers under Section 101(r) of the Transitional Constitution and dismissed two governors, in Lakes and Unity states, before appointing replacements. Many, including Vice President Riek Machar, complained that the concerned states were not in crisis: see Sudan Tribune, *Cracks in South Sudan presidency over dismissal of Unity state governor*, 9 July 2013, available at <http://www.sudantribune.com/spip.php?article47237>

²² Section 201(2) Transitional Constitution.

²³ Section 202(6) Transitional Constitution.

²⁴ Section 202(8) Transitional Constitution.

²⁵ See Section 203(6)-(8) Transitional Constitution.

²⁶ Ministry of Justice of the Republic of South Sudan, *Framework for Establishment of the Constitutional Review Commission*, Ref. MOJ/J/RSS/2011, 5 January 2012, available at <http://www.southsudannewsagency.com/news/top-stories/constitutional-review-process-kicks-off-in-juba>

²⁷ See FIDH, *South Sudan. First Anniversary of Independence; Time to Act for Peace and Human Rights Protection*, 2012, p. 19-20. The members of the South Sudan Civil Society Alliance – the first NGO umbrella network in the country – protested their exclusion from consultation prior to Presidential Decree

In February 2013, the Constitutional Review Commission, at that point comprised of 55 members (of which 44 represented political parties), had not yet started working.²⁸ On 25 February 2013, the Legislative Assembly enacted the *Legal Affairs and Human Rights of the Council of States on Transitional Constitution (Amendment) Act*, identifying the shortage of financial and human capacities as the main reason for the protracted delay in the work of the Constitutional Review Commission, and extending its mandate to 31 December 2014.²⁹ The work to be carried out by the Commission until that date will consist of, in parallel to preparing the first draft of a permanent constitution, undertaking “a concerted education and public consultation effort to solicit views and suggestions from around the country” to ensure that the final draft reflects the needs and views of South Sudanese citizenry.³⁰

B. Sources of law and elements of legal reform

1. Legal pluralism in South Sudan: domestic customary law and other sources of law

Domestic customary law is a primary source of social order and stability within Southern Sudan, and acts as the basis of adjudication in the vast majority of civil and criminal cases. During the civil war between the North and the South, customary law was also part and parcel of the conflicting identities coexisting within the borders of the country, with the dominant group in the North, who viewed themselves as Arab and Islamic, wanting to project those elements as features of national identity for determining the distribution of power, wealth and development opportunities.³¹

Each tribal group has its own discrete body of customary law, resulting in over fifty separate bodies of customary law existing within South Sudan. However, the customary law of many tribal groups tends to have commonalities.³² Furthermore, related in part to the existence of large groups of internally displaced persons, customary courts regularly collaborate to adjudicate inter-tribal disputes. It is important to note that the customary law in South Sudan is not static and that the adoption of the CPA and the introduction of new layers of statutory law have influenced the evolution of customary laws in recent years.³³

Different legal systems and concepts in South Sudan have merged to such an extent that it is sometimes impossible to distinguish which laws originate from pre-existing judicial culture and

No. 03/2012, which appointed full- and part-time members. Women activists also complained that women’s rights organizations were not consulted and that the number of women on the Commission only constituted 22% instead of the 25% mandated in the affirmative action adopted for strengthening women’s representation in public offices (ibid.).

²⁸ See Zacharia Diing Akol, *A Nation in Transition: South Sudan’s Constitutional Review Process*, The SUDD Institute, 2013, p. 4, available at <http://www.suddinstitute.org/assets/Publications/POLICY-BRIEF-3.pdf>

²⁹ See Report of the two Committees of Legislation and Justice of the NLA and Legislation, Legal Affairs and Human Rights of the Council of States on Transitional Constitution (Amendment) Bill, 2013 (Second Reading), 25 February 2013.

³⁰ U.S. Embassy Juba, South Sudan – Office of Public Affairs, *Media Note: Inauguration of the National Constitutional Review Commission’s New Facilities*, 1 May 2013, available at

<http://photos.state.gov/libraries/juba/895/pdf/2013-04-30%20-%20Press%20Release%20-%20Inauguration%20of%20the%20New%20NCRC%20Facilities.pdf>

³¹ Francis M. Deng, *Customary Law in the Modern World: The Crossfire of Sudan’s War of Identities*, Routledge, New York, 2010, p. 7.

³² See Justice Aleu Akechak Jok, Robert A Leitch, and Carrie Vandewint, *Study of Customary Law in Contemporary Southern Sudan*, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, 2004, p. 13; Alexander P. Danne, “Customary and Indigenous Law in Transitional Post-conflict States: a South Sudanese Case Study”, in *Monash University Law Review*, No. 30, 2004, p. 201.

³³ Tiernan Mennen, “Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan”, in *Hague Journal on the Rule of Law*, 2010, p. 225.

which have emerged through interaction with national laws and other legal cultures. Local and national laws and procedures percolate both up and down the judicial hierarchy: some chiefs sentence according to written laws, while some judges apply principles and procedures derived from local cultures. As a consequence, the principle of legal certainty is undermined, as it becomes difficult to know what law will be applied in a given case in a given place.

One of the consequent challenges faced by the negotiators of the CPA was how to create a legal system that embraced the cultural identities enshrined in coexisting bodies of law, while providing the stability necessary for reducing ethnic tension and fostering investment and development. The *Machakos Protocol*, which explicitly acknowledges that “religion, customs and traditions are a source of moral strength and inspiration for the Sudanese people”,³⁴ therefore provides that “all personal and family matters, including marriage, divorce, inheritance, succession and affiliation may be determined by the personal laws (including Sharia or other religious laws, customs or traditions) of those concerned”.³⁵ Furthermore, “nationally enacted legislation applicable to the Southern States and/or the Southern Region shall have as its source of legislation popular consensus, the values and the customs of the people of Sudan (including their traditions and religious beliefs, having regard to Sudan’s diversity)”, as opposed to legislation only in effect outside the South, for which “Sharia and the consensus of the people” are listed as sources.³⁶ The *Power Sharing Protocol*, in turn, determined that “human rights and fundamental freedoms... including respect for all religions, beliefs and customs... shall be enshrined in the Interim National Constitution”.³⁷

Under the *Transitional Constitution*, sources of law are identified as: (a) the *Transitional Constitution*; (b) written law; (c) customs and traditions of the people; (d) the will of the people; and (e) any other relevant source.³⁸

2. The shift towards the English language and common law system

The Sudanese criminal law system operating in the north includes elements from British colonial penal law, the Egyptian civil code and the 1983 ‘September Laws’ (under which penalties are prescribed by Islamic law). Religious laws govern personal matters, while civil matters are formally governed by statute, although individuals outside Khartoum more often resort to unwritten rules and traditional community justice mechanisms.³⁹ In 1998, the Government of Sudan adopted a new Constitution that designates Sharia as the primary source of Sudanese law.⁴⁰ This direct reference to the religious background of the majority as the interpretative source of the law had great impact on the courts, as judges infused their rulings with Islamic principles in order to interpret and apply religiously-neutral laws in accord with Sharia principles. South Sudan chose to break away from this approach following independence, in so far as Sharia law is no longer a source of law in the Republic of South Sudan.

³⁴ Section 1.4 Machakos Protocol.

³⁵ Section 6.4 Machakos Protocol.

³⁶ Section 3.2.2-3.2.3 Machakos Protocol.

³⁷ Section 2.4.3 Power Sharing Protocol.

³⁸ Section 5 Transitional Constitution.

³⁹ Sharanjeet Parmar, *An Overview of the Sudanese Legal System and Legal Research*, 2007, available at <http://www.nyulawglobal.org/globalex/sudan.htm>

⁴⁰ Section 65 Constitution of the Republic of Sudan 1998, consulted at [http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/d728f18be88d9482c1256dc600507f33/\\$FILE/Constitution%20Sudan%20-%20EN.pdf](http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/d728f18be88d9482c1256dc600507f33/$FILE/Constitution%20Sudan%20-%20EN.pdf). As to Sudan’s future new Constitution, which the country has been supposed to draft following the South’s secession, President al-Bashir stated that will be an Islamic one, rejecting secularism and saying that the new text will serve as “a role model for all people who have aspirations to apply religion in all aspects of their lives” (Sudan Tribune, *Sudan’s upcoming Constitution will be ‘Islamic’ Bashir says*, 7 July 2012, available at <http://www.sudantribune.com/spip.php?article43187>).

The justice system in South Sudan under the *Transitional Constitution* also departs from the inquisitorial procedures traditionally followed by customary courts – which are characterized by an active engagement with the parties by the local chief – in favour of the new statutory courts system, which includes more adversarial features.⁴¹

Under the *Interim Constitution*, English and Arabic were the two official working languages of the Government of Southern Sudan, and any discrimination against the use of either English or Arabic was prohibited.⁴² With the coming into force of the *Transitional Constitution*, it was determined that only “English shall be the official working language in the Republic of South Sudan”.⁴³

The reform of the justice system towards an adversarial model has not yet penetrated into the daily functioning of the justice sector across South Sudan. During the mission, the ICJ delegation was left with the clear impression that many trials are still conducted through inquisitorial means.

The mission also repeatedly heard that the switch from Arabic to English as the language for the administration of justice still causes significant practical problems, as many judges, prosecutors and legal practitioners who received their legal and professional training in Khartoum are not familiar with legal terminology in English.

In the courts, the use of the English language has led to misunderstandings on the part of judges about the meaning of submissions made by the parties. The mission learned that some lawyers submit written pleadings and other documentation in Arabic, either due to the lack of the necessary linguistic skills or with a view to ensuring that the other lawyers and judge involved all understand the submissions.

3. Challenges related to law reform

The national parliament of South Sudan continues to face an enormous task in enacting new laws and amending outdated ones. The ICJ delegation was told that between July 2011 and September 2012 over ninety laws had been passed, and several others were in the second reading. Important laws enacted in the first half of 2013 include laws on elections and political parties.⁴⁴ In spite of the remarkable pace of legislation, it is clear that there is a mismatch between the financial and human resources allocated for the performance of day-to-day legislative work and the amount of work to be done.

⁴¹ See Justice Aleu Akechak Jok, Robert A Leitch, and Carrie Vandewint, *Study of Customary Law in Contemporary Southern Sudan*, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, 2004, p. 16. It is interesting to note the context of the choice of the new system upon the signing of the CPA in 2005, and the rationale behind it: “[Government of Southern Sudan] officials, including members of the newly appointed Supreme Court, faced the challenge of establishing rule of law norms and institutions in Southern Sudan. The pre-existing formal court structure, set up to apply Shari’a law, symbolized everything the SPLA had fought against. Accordingly, GOSS’s priorities for the justice sector involved starting from scratch with an entirely new legal and judicial system. The new government opted for a common-law system akin to that of their southern neighbors, Kenya and Uganda. [...] There may be some irony that the newly autonomous GoSS would choose a legal system so largely reflective of a colonial-era imposition; yet there are compelling reasons to embrace a legal system that conforms with the systems of political allies and trading partners and that signals a clear break from the Shari’a system of the North”, in David Pimentel, “Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan”, in *Hague Journal on the Rule of Law*, Volume 2, Issue 01, March 2010, p. 13 and footnote 51.

⁴² Section 6(2)-(4) Interim Constitution.

⁴³ Section 6(2) Transitional Constitution.

⁴⁴ UN Human Rights Council, Report of the UN High Commissioner for Human Rights. Progress of technical assistance and capacity-building for South Sudan in the field of human rights, UN Doc. A/HRC/23/31 (2013), p. 8.

During the mission, it emerged that the difficulty of pursuing a clear legislative strategy and setting an agenda was an added obstacle that hindered the work of the Legislative Committee and of the office of the Legal Advisor to the Legislative Assembly. These structures appear to be understaffed, and do not receive adequate resources for the tasks they perform. The need for specialised training and capacity-building in the legislative branch were also identified by the mission's interlocutors as pressing priorities.

Section 137 of the *Transitional Constitution* prescribes the establishment of a Law Reform Commission, designated as an independent commission whose "structure, composition, functions, and terms and conditions of service" are to be set out in law. The 'Law Review Commission Bill 2013', aimed at the "establishment of a legal framework and organizing the work of the law review commission in the country", was presented by the Ministry of Justice for parliamentary discussion in May 2013.⁴⁵ As of September 2013, no information was publicly available on any progress made towards the adoption of the Bill.

On the website of the Government of South Sudan, the functions of the Law Reform Commission are described as "identifying anomalies in the law and recommending the repeal of obsolete or unnecessary laws; incorporating international human rights conventions to which South Sudan is a party into the laws of South Sudan; harmonizing the laws of South Sudan with the Bill of Rights in the Transitional Constitution of South Sudan (2011) or subsequent constitution replacing the same", among others. Its general mandate is "to study and keep under review the laws of South Sudan with a view to making recommendations for their systematic improvement, development, modernization, and reform".⁴⁶ For these purposes, the Commission is directed to conduct public hearings, provide briefings to the Executive and Legislature and prepare proposals for law reform.⁴⁷

As to the actual existence of the Commission, it seems from conversations during and after the ICJ mission that the Commission has been established, but it is not clear what it has achieved to date. Regarding its membership, it is known that for some time the Commission operated with an Acting Chairperson, as the permanent Chairperson had also been nominated to chair the Constitutional Review Commission.

C. South Sudan's international human rights obligations

1. Accession to international human rights treaties

Both the *Interim Constitution* and the *Transitional Constitution* contain a Bill of Rights. In addition to enumerating specific rights, they both referentially incorporate international law. Under the *Interim Constitution*, the Bill of Rights of Southern Sudan provided that: "all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill".⁴⁸ This provision was amended in the *Transitional Constitution*, with the corresponding provision replacing "Republic of the Sudan" with "Republic of South Sudan".⁴⁹

⁴⁵ *Justice Minister Presents Bills To House*, 9 May 2013, available at <http://www.southsudanankara.org/newsDetail.aspx?ID=163>

⁴⁶ See section relevant to the South Sudan Law Reform (Review) Commission (SSLRC) on <http://www.qoss-online.org/> (last updated: 2012).

⁴⁷ According to media reports, over the next two years the Commission will prioritize laws on constitutional implementation, and legal reforms in the fields of criminal law, commercial law, land property law and social law, in addition to customary law reform and education; see All Africa, *South Sudan: Law Reform Commission sets priorities*, 9 September 2011, available at <http://allafrica.com/stories/201109090600.html>.

⁴⁸ Section 13(3) Interim Constitution.

⁴⁹ Section 9(3) Transitional Constitution.

Currently, South Sudan is a party to the Geneva Conventions and their Additional Protocols,⁵⁰ but not to any international human rights treaty. Its Government has been encouraged to ratify and implement key international human rights treaties by several United Nations bodies and institutions,⁵¹ and has pledged to do so.⁵²

As evidenced in the report of the UN High Commissioner for Human Rights, *Progress of technical assistance and capacity-building for South Sudan in the field of human rights*, the first half of 2013 saw preliminary steps undertaken for the country to become party to some of the core human rights treaties.⁵³ Following the approval by the Council of Ministers of Resolution No. 72/2013 of 24 May 2013, concerning the ratification and accession to such treaties, the matter was referred to the Legislative Assembly for further action. As specified by the Permanent Mission of South Sudan to the UN, the list of international instruments to which the process of accession is currently being undertaken includes the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁴

On 21 October 2013, South Sudan National Legislative Assembly passed the bill to ratify the

⁵⁰ Accession on 25 January 2013. See database on "Treaties and States Parties to such Treaties" of the International Committee of the Red Cross (ICRC), available at <http://www.icrc.org/applic/ihl/ihl.nsf/vwSearchResults.xsp?fieldToSort=TRINOT&key=south%20sudan> (last accessed on 2 December 2013).

⁵¹ In its Resolution 1996/2011, that established the United Nations Mission in the Republic of South Sudan (UNMISS), the UN Security Council "[e]ncourage[d] the Government of the Republic of South Sudan to ratify into law and implement key international human rights treaties and conventions, including those related to women and children, refugees, and statelessness", and requested UNMISS to advise and assist the Government of South Sudan for that purpose (UN Security Council, Resolution 1996/2011, UN Doc. S/RES/1996 (2011), para. 11. See also S/RES/2057 (2012), para. 13). UNMISS Head of Mission Hilde F. Johnson also called on the government to hasten the ratification of human rights conventions; see *Government pledges to ratify key human rights conventions*, 10 December 2011, available at <http://unmiss.unmissions.org/Default.aspx?ctl=Details&tabid=3465&mid=6047&ItemID=19393>. See also *Pillay welcomes South Sudan commitment to human rights, but says much still to be done in world's newest state*, Statement by High Commissioner for Human Rights Navi Pillay on 4th day of her mission to South Sudan, 11 May 2012, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12148&LangID=E>

(where the UN High Commissioner confirmed to have "urged the Government to ratify all the main international human rights treaties as soon as possible").

⁵² In his speech on the occasion of South Sudan's independence on July 9, 2011, the President of South Sudan Salva Kiir Mayardit declared that the government of South Sudan "would move quickly to ratify the core international human rights treaties that proscribe the minimum standards by which states may treat their citizens." (http://www.nyulawglobal.org/globalex/South_Sudan.htm). Also, see for instance the statement by Government of South Sudan Legal Affairs Advisor Telar Ring Deng, 10 December 2011, available at <http://unmiss.unmissions.org/Default.aspx?tabid=3465&ctl=Details&mid=6047&ItemID=19393&language=en-US>. Replying to a question posed by the ICJ delegation in September 2012, the then Minister of Justice stated that, although the political goodwill existed, normative hurdles and delays due to the "young age" of the government had up until then deferred accession to international treaties. The mission learned of a series of commendable initiatives of collaboration between the Ministry of Justice, the Ministry of Foreign Affairs of South Sudan and UNMISS, in the context of a capacity building programme, to help South Sudanese authorities understand the implications and requirements for implementing international treaties.

⁵³ Human Rights Council, *Progress of technical assistance and capacity-building for South Sudan in the field of human rights*. Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/31 (2013), p. 9.

⁵⁴ See UN Human Rights Council, Note verbale dated 31 May 2013 from the Permanent Mission of South Sudan to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/G/4 (2013), p. 3.

African Charter on Human and Peoples' Rights,⁵⁵ and on 20 November 2013 the bill to ratify the Convention on the Rights of the Child.⁵⁶ As of November 2013, the other legal instruments cited above are reported as being "before South Sudan National Legislature at different reading stages, for enactment into enabling legislation and ratification by the Republic of South Sudan".⁵⁷

2. South Sudan Human Rights Commission

The South Sudan Human Rights Commission (SSHRC), along with the Supreme Court, is the guardian of the rights and freedoms enshrined in the constitutional Bill of Rights. Its creation as an independent body was first envisaged in the *Protocol on Power Sharing* of the CPA.⁵⁸

As a constitutionally-mandated body under the *Transitional Constitution*, the SSHRC is charged with monitoring the enforcement of constitutional rights and national compliance with international human rights treaties to which South Sudan is a party. The SSHRC is tasked with performing a number of further additional functions, including: investigating human rights violations, whether on its own initiative or as a result of complaints made to it; visiting police jails, prisons and related facilities; making recommendations to the Legislative Assembly for the strengthening and the promotion of human rights; and establishing programmes for research, education and information to enhance public awareness.⁵⁹ In accordance with the *Transitional Constitution*, the SSHRC is required to publish periodic reports on its findings and submit annual reports to the Legislative Assembly on the state of human rights and freedoms in South Sudan.⁶⁰

Under the *Transitional Constitution*, the SSHRC has the power, in the discharge of its functions, to summon any person, organization or public official at any level of government to "appear before it or produce any document or record relevant to any investigation by the Commission", and it may request a government representative or any person or organization to take part in the Commission's deliberations if and when necessary.⁶¹ Pursuant to the *Human Rights Commission Act 2008*, the law that currently regulates its functioning, the SSHRC must report to the Minister of Justice upon conclusion of any investigation that reveals potential criminal conduct. The Minister is then responsible for deciding whether or not the case should be investigated further or brought before the judiciary. Where the facts have no criminal dimension, the Commission must try to mediate the matter.

During its September 2012 mission, the ICJ delegation was told by members of the Commission that consultations had begun with a view to revising the *Human Rights Commission Act*. Some important amendments are under consideration, concerning for instance the conferring of prosecutorial powers to the Commission. In the course of the first half of 2013, however, no progress was reported in this direction.

From the second half of 2012 to the first half of 2013 inclusive, the resources allocated to the Human Rights Commission were drastically reduced, due to budget cuts applied under national

⁵⁵ *Parliament ratifies African Charter on rights of workers bill*, 21 October 2013, available at

<http://www.radiomiraya.org/news-202/south-sudan/12299-parliament-ratifies-african-charter-on-rights,-workers-bill.html#qsc.tab=0>

⁵⁶ See *South Sudan National Legislative Assembly passes the bill for Ratification of UN Convention on the Rights of the Child*, 20 November 2013, available at http://www.unicef.org/southsudan/media_ratification-CRC.html

⁵⁷ Beny Gideon Mabor, *Can South Sudan qualify for a seat at UN human rights body*, 1 November 2013, available at <http://www.sudantribune.com/spip.php?article48649>

⁵⁸ See *Power Sharing Protocol*, Sections 2.1.4 and 2.10.1.2.

⁵⁹ Section 146(1) *Transitional Constitution*.

⁶⁰ Section 146(2) *Transitional Constitution*.

⁶¹ Section 145(4) and (5) *Transitional Constitution*.

austerity measures. In June 2013, the UN High Commissioner for Human Rights reported that the lack of resources meant that the Human Rights Commission “has not been able to conduct investigations into gross human rights violations, issue public reports or receive and process individual complaints for many months”.⁶²

⁶² UN Human Rights Council, Progress of technical assistance and capacity-building for South Sudan in the field of human rights. Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/31 (2013), pag 13, para 62.

III. Court structure

A. The statutory courts system under the Transitional Constitution and the Judiciary Act

In the course of the civil war, the SPLM developed a parallel judicial system to that of Sudan. It had a structure of “county magistrates”, “county judges”, “regional judges” and a “court of appeal”. However, in practice, units of the armed forces and militias ruled the country by the force of arms, and alleged perpetrators were often executed without trial.⁶³

Following the entry into force of the *Transitional Constitution*, the judiciary of South Sudan was established as an independent institution, made up of a Supreme Court (as the highest court), Courts of Appeal, High Courts (one in each of the 10 states), County Courts, and other courts or tribunals as deemed necessary to be established in accordance with the Constitution and the law.⁶⁴ The Supreme Court is located in Juba; the three branches of the Court of Appeal (regional Courts of Appeal) are located in the cities of Juba, Malakal and Rumbek; the ten branches of the High Court are located in the State capitals. As to County Courts, a report published by SSLS in March 2013 affirmed that “only a fraction” of County Courts have been established in practice, with the result that in many counties there were no County Courts.⁶⁵

Pursuant to the *Transitional Constitution*, the Supreme Court, presided over by the Chief Justice, is “the custodian” of the Constitution and the State Constitutions.⁶⁶ It has powers of original jurisdiction to decide on disputes that arise under the *Transitional Constitution* itself and state constitutions, at the instance of individuals, legal entities or governments. Among other things, it also has the competence to interpret constitutional provisions and adjudicate on the constitutionality of laws, with powers to set aside or strike down laws or provisions that are inconsistent with the *Transitional Constitution* or the constitutions of the states; it has criminal jurisdiction over some members of the Executive and Legislature; depending on the subject matter, it may act as a final court of appeal; it reviews instances where the death penalty is imposed; and it is responsible for “uphold[ing] and protect[ing] human rights and fundamental freedoms”.⁶⁷

The *Judiciary Act 2008* regulates “the establishment and governance of the Judiciary of Southern Sudan, and any other issues related thereto”.⁶⁸ It provides for the establishment of the Courts of Appeal, High Courts, County Courts and Payam Courts.⁶⁹ The *Judiciary Act* in fact predates the *Transitional Constitution*, and some differences exist between the two texts.

⁶³ Mareike Schomerus, Tim Allen, et al., *Southern Sudan at Odds with Itself: Dynamics of conflict and predicaments of peace*, 2010, p. 27, available at <http://www.lse.ac.uk/businessAndConsultancy/LSEConsulting/pdf/southernSudan.pdf>

⁶⁴ Section 123 Transitional Constitution.

⁶⁵ See David K. Deng, *Challenges of Accountability. An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 18, available at http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf

⁶⁶ Section 126(1) Transitional Constitution.

⁶⁷ Section 126(2) Transitional Constitution.

⁶⁸ Section 3 Judiciary Act.

⁶⁹ The Payam Courts are the “lowest government court”. They have the most limited territorial competence among the statutory courts. Some have the authority to impose prison sentences of up to three years and fines up to 2500 South Sudanese Pounds (SSP), while others can only impose fines up to 300 SSP, depending on whether they are presided over by second-class or third class judges according to the classification established by the Code of Criminal Procedure Act 2008, Chapter II, Sections 13-14; for more information, see Paul Mertenskoetter and Dong Samuel Luak, *An Overview of the Legal System and Legal Research in the Republic of South Sudan*, November/December 2012, available at http://www.nyulawglobal.org/globalex/South_Sudan.htm

Among the most significant discrepancies is that while the *Judiciary Act* makes reference to Payam Courts, they are not envisioned in the court structure described in the *Transitional Constitution*.⁷⁰ Also, on the operation of the Supreme Court, the *Judiciary Act* diverges from the *Transitional Constitution* on the number of serving justices.⁷¹

Further, some significant discrepancies exist between the *Transitional Constitution* and the *Judiciary Act* as regards the prerogatives of the Chief Justice. Under the *Judiciary Act*, the Chief Justice has the power to “grant temporary judicial power to any Judge or person for a specified period of time and may renew such powers”,⁷² an authority that had not been set out in the Constitution. Significantly, the *Judiciary Act* also prescribes that the Chief Justice is answerable to the President of the Republic for the administration of the judiciary, which is not mentioned in the *Transitional Constitution*.⁷³ This is a matter further considered below.

The *Code of Criminal Procedure Act 2008* provides that “the criminal courts of Southern Sudan shall have the power to try all criminal cases, impose sentences and other penalties, and to award compensation to victims of offences”.⁷⁴ It foresees the following six levels of criminal courts (each with circumscribed original and appeal jurisdiction) to deal with “all offences under the Penal Code”: (a) the Supreme Court; (b) the Courts of Appeal; (c) the High Courts; (d) County Courts of Magistrates of the First Class; (e) County Courts of Magistrates of the Second Class; and (f) Payam Courts.⁷⁵ The *Code of Civil Procedure Act 2007* established the same hierarchy for the judicial organs adjudicating civil litigation.⁷⁶

In October 2012, the Judiciary of South Sudan announced it was going to introduce mobile courts as an experimental initiative for reducing judicial backlog and “to solve problems related to a lack of judges and judicial infrastructure that have left some defendants languishing in prison for five years without trial” in some parts of the country.⁷⁷ In March 2013, the SSLS reported that individuals in South Sudan were generally pleased by the services provided by mobile courts – “a travelling band of police officials, judges, and ministry attorneys”, as they have been described⁷⁸ – which visit rural areas to hear cases in rapid succession.⁷⁹ Although this program is experimental, mobile courts have so far proved effective as a way “to accelerate legal proceedings and to compensate for the shortage of judges”.⁸⁰

⁷⁰ Section 7(e) Judiciary Act.

⁷¹ Compare Section 10(1) Judiciary Act and Section 125 Transitional Constitution.

⁷² Section 19 Judiciary Act.

⁷³ Compare Section 6(2) Judiciary Act and Sections 122(8) and 127 Transitional Constitution.

⁷⁴ Section 7 Code of Criminal Procedure Act 2008 (hereinafter: Criminal Procedure).

⁷⁵ Section 8(1) Criminal Procedure

⁷⁶ Sections 18-22 Code of Civil Procedure Act, 2007 (hereinafter: Civil Procedure).

⁷⁷ 'Mobile Courts' Coming to South Sudan, 15 October 2012, available at http://www.theroot.com/articles/culture/2012/10/mobile_courts_coming_to_south_sudan.html

⁷⁸ 'Mobile Courts' Coming to South Sudan, 15 October 2012, available at http://www.theroot.com/articles/culture/2012/10/mobile_courts_coming_to_south_sudan.html

⁷⁹ David K. Deng, *Challenges of Accountability. An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 30, available at [http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.p df](http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf)

⁸⁰ UN Human Rights Council, Progress of technical assistance and capacity-building for South Sudan in the field of human rights. Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/31 (2013), p. 6.

B. The Local Government Act and customary courts

The *Local Government Act 2009* (the *LGA*) provides for four levels of customary law courts: town bench courts and A, B and C courts.⁸¹ The *LGA* specifies that customary courts must do justice without discrimination⁸² and in an independent manner, “without interference, fear or favour”.⁸³ The *Transitional Constitution* recognises the “institution, status and role of Traditional Authority, according to customary law”, and provides that courts shall apply customary law subject to the Constitution itself and the written law.⁸⁴ Pursuant to the Constitution, the Supreme Court is “the court of final judicial instance in respect of any litigation or prosecution under National or state law, including statutory and customary law”.⁸⁵

Under the *LGA*, customary law courts have “judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities”. The *LGA* further specifies that “A Customary Law Court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent Statutory Court”.⁸⁶

In practice, however, customary courts have reportedly adjudicated criminal matters - including homicide - that fall outside of their jurisdiction. Most litigants reportedly do not understand the formal distinction between civil and criminal cases. The SSLS recently reported that “in at least one case, a customary court has sentenced an accused murderer to death” and that, “Due to the lack of oversight and monitoring mechanisms in customary and statutory courts, it is difficult to know precisely how many times customary courts have issued death sentences”,⁸⁷ even though criminal procedure law explicitly states that only statutory courts may do so.⁸⁸ According to Death Penalty Worldwide, from independence on 9 July 2011, to the end of 2012, South Sudan carried out at least 10 executions. It also imposed new death sentences in 2011 and 2012.⁸⁹

The *LGA* provides for the establishment of Customary Law Councils in every county, to act as the highest customary law authority in that county.⁹⁰ The Act charges each Customary Law Council with the obligations to protect, promote and preserve the traditions, customs and

⁸¹ Section 97 Local Government Act 2009 (hereinafter: “LGA”). “A” courts should be found at boma level, while “B” and “C” courts are envisioned at payam and county level respectively. Boma indicates the lowest level of local government, corresponding to a chief’s area; payams constitute intermediate administrative level of local government between the county and the boma.

⁸² Section 98(3) LGA.

⁸³ Section 103(1) LGA.

⁸⁴ Section 167 Transitional Constitution.

⁸⁵ Section 126(2)(b) Transitional Constitution.

⁸⁶ Section 98(1)-(2) LGA.

⁸⁷ David K. Deng, *Challenges of Accountability. An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 21, available at http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf

⁸⁸ Section 8(4)(a) Criminal Procedure.

On December 20, 2012, the Government of Southern Sudan voted in favor of the fourth UN General Assembly Resolution on a moratorium on executions with a view towards abolishing the death penalty; see Joint NGO letter on South Sudan’s candidacy for UN Human Rights Council, 11 November 2013, available at <http://www.ishr.ch/news/joint-ngo-letter-south-sudans-candidacy-un-human-rights-council>

⁸⁹ Available at <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=South+Sudan> (updated as of 26 April 2013).

⁹⁰ Section 93 LGA.

values of the communities, as well as to regulate, maintain, monitor and ensure the proper administration of customary law.⁹¹

The vast majority of day-to-day criminal and civil court cases in South Sudan are adjudicated by traditional courts according to customary law, and therefore outside the system of statutory courts.⁹² At county level, where county courts are meant to operate, justice is in practice almost always administered by a local chief acting as a “customary court”.

In a recent report, the SSLS offers a range of explanations for the predominant recourse to customary courts, including both rural customary courts and town bench courts, instead of statutory courts. The SLSS points to the higher cost of statutory courts proceedings, considering both the “occasional imposition of high court user fees” and the fees charged by lawyers (who are not involved in proceedings before customary courts); traditions and greater familiarity with procedures before customary courts rather than statutory courts; and lack of access to statutory courts due to their limited number around the country and the difficulties related to the transport from one place to another. The SLSS also argues that “customary courts are also durable and better equipped to function in areas prone to insecurity”.⁹³

The relationship between statutory and customary courts is complicated by public perceptions of the two systems. A common complaint is that statutory courts are particularly vulnerable to bribery, and that the system of statutory courts disadvantages the poor. People frequently express a preference for negotiated, flexible settlements by the chief’s courts over a rigid application of written law. However, the choice of the means of dispute resolution made by the parties is often influenced by some confusion and uncertainty about the court system rather than necessarily being based on a conscious and informed decision. Even more frequently, statutory courts are simply not an option in reality. Due to the shortage of judicial officers and judicial infrastructure in some areas of the country, the closest statutory court facilities might be located at an inaccessible distance from the concerned individuals’ place of residence.

Obtaining an accurate assessment of public perception of the functioning of the South Sudanese justice sector and the statutory or customary courts system is further made difficult by the lack of comprehensive information. As reported by the SSLS, many individuals prefer to bring their disputes informally to local government officials or chiefs rather than either of the formal court systems; at the same time, the study found that in provinces where more judges are working, individuals say they are satisfied with the judges’ performance.⁹⁴

In November 2012, a workshop was organised in Juba for the purpose of exploring avenues for the harmonization of the *Judiciary Act* and the *LGA*. Workshop participants adopted a *Recommendation* that identified the main challenges ensuing from the coexistence of the two justice systems. Among the most significant shortcomings that the document noted were the failure of customary courts properly to function, the absence of any supervisory organ with oversight powers over customary courts, and the “proliferation of customary law courts all over the country”.⁹⁵ Among the main factors hampering the good functioning of customary courts, the *Recommendation* highlighted, first, the fact that customary courts start operating without so-called “warrants of establishment”, an order issued by the Chief Justice “which indicates the substantive jurisdiction of the court and other matters concerning its

⁹¹ Section 95(1)-(2) LGA.

⁹² See David K. Deng, *Challenges of Accountability. An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 20, available at http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf). According to several sources, the percentage of court cases handled by customary courts in South Sudan is more than ninety per cent.

⁹³ *Ibid.*, p. 23.

⁹⁴ *Ibid.*, pp. 74-75.

⁹⁵ *Recommendation of the Workshop to Harmonize Customary Law and Statutory Law Systems*, 13-15 November 2012, Juba.

operation”.⁹⁶ The mixture of statutory and customary judicial prerogatives, the underfunding and the understaffing of customary courts were also listed in the *Recommendation* as problematic. The *Recommendation* advocated for the systematization of customary courts in “C”, “B” and “A” courts. It also recommended that standardised procedures be introduced, with fixed criteria for the establishment of each court, involving a request by the local authority to the Chief Justice.⁹⁷ As of September 2013, the ICJ has seen no indication that the systematization of customary courts and the standardisation of their establishment procedures, as advocated for in the *Recommendation*, had been commenced.

The *Judiciary Act* and the *LGA* were also criticized for not clearly delimiting the territorial and material jurisdiction of courts within the two judicial systems. One of the recommendations of the workshop was that the Law Reform Commission review the *Judiciary Act* and the *LGA*, with a view to harmonizing their provisions with the *Transitional Constitution*.⁹⁸ In the interim, the *Recommendation* explicitly states, “While the review process is under way, the *Local Government Act, 2009* MUST be implemented as was intended by the legislature, to establish all the institutions of traditional authorities, particularly the customary law courts”.⁹⁹

Following the workshop, a process to amend the *LGA* was started with the objective to harmonize the *LGA* and the *Judiciary Act* with the objective to “ensure that the traditional justice system does not enforce customary rules and practices that are repugnant to written law and international human rights standards”.¹⁰⁰

Under international human rights law, everyone has the right without discrimination to a “fair and public hearing” in criminal and civil matters “by a competent, independent and impartial tribunal established by law.”¹⁰¹ Both the African Commission on Human and Peoples’ Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, based on the African Charter of Human and Peoples’ Rights, and the UN Human Rights Committee’s *General Comment No. 32*, interpreting the International Covenant on Civil and Political Rights, emphasize that judges of customary courts must be both independent and impartial, and that proceedings before traditional courts must respect international minimum standards on the right to fair trial and respect the equality of all persons, without discrimination.¹⁰² The *Principles and Guidelines* and the *General Comment* also specify that decisions of customary courts must be reviewable by a higher court. Further, Principles Q(c) and (d) of the *Principles and Guidelines* also provide that States are to ensure and respect the independence and impartiality of such courts.

Given the high proportion of overall cases that are handled within the customary court system, the quality of justice in South Sudan today depends in very large measure on the quality of

⁹⁶ Operational paragraph 4. The *Recommendation* specifies that the warrant of establishment should be issued by the Chief Justice if he or she decides to uphold the request to establish a customary court formulated by local authorities, specifying “the reasons for the necessity of the court and other matters concerning its operation” (ibid.).

⁹⁷ Cf operational paragraphs 3 and 7.

⁹⁸ Cf operational paragraph 1.

⁹⁹ Operational paragraph 2.

¹⁰⁰ See UN Human Rights Council, Note verbale dated 31 May 2013 from the Permanent Mission of South Sudan to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/G/4 (2013), p. 5.

¹⁰¹ See International Covenant on Civil and Political Rights (ICCPR), Article 14(1). See also African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle A(1), interpreting articles 3, 7 and 26 of the African Charter of Human and Peoples’ Rights (which similarly refers to a “a fair and public hearing by a legally constituted competent, independent and impartial judicial body”).

¹⁰² See *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle Q (a) and (b); Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 24.

justice provided by the customary courts. In the course of the ICJ mission and on the basis of conversations and research undertaken before, during and after the mission, it became clear that significant challenges arise from the coexistence of statutory and customary courts. The ICJ's research to date however has focussed on the statutory court system and does not yet allow any assessment of whether the customary court system in South Sudan complies with international standards on independence of the judiciary and the right to a fair trial. This is clearly a matter worthy of further investigation.

IV. Judicial independence in the statutory courts system

International human rights law requires that the judiciary be independent of the executive and legislative branches of government: first, as a specific facet of the right to fair trial; and second, as a means by which all individuals can seek protection for their human rights, and obtain effective remedies for any violation thereof, from the other authorities of the state.¹⁰³

The independence of the judiciary is also inherently connected with the principle of separation of powers. The principle of separation of powers, which is the cornerstone of the rule of law, is reaffirmed in a number of international instruments, particularly with regard to the judiciary.¹⁰⁴

To these ends, states must guarantee respect for judicial independence by enshrining the principle of judicial independence in the Constitution or the written laws of the country.¹⁰⁵ Judges must be independent and impartial.¹⁰⁶ To be independent, judges must be free to decide cases “without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”.¹⁰⁷ The right to

¹⁰³ See ICCPR, Articles 14(1) and 2, and Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 19; African Charter of Human and Peoples’ Rights, Articles 3, 7 and 26, and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles A and C. See also Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government, as agreed by the Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003 (hereinafter: Commonwealth Principles on the Three Branches of Government), Principle IV(d); Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998 at a meeting of the representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers’ Association and the Commonwealth Legal Education Association (hereinafter: Latimer House Guidelines), Guideline I) 5.

¹⁰⁴ See, inter alia, Article 3 of the Inter-American Democratic Charter; Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also UN Commission on Human Rights, Commission on Human Rights Resolution 2003/36: Interdependence between democracy and human rights, 23 April 2003, UN Doc. E/CN.4/RES/2003/36; and Inter-American Court of Human Rights, Judgment of 31 January 2001, *Constitutional Court Case v. Peru*, para. 73.

¹⁰⁵ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 19; UN Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (hereinafter: UN Basic Principles on the Independence of the Judiciary), Principle 1. See also Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, Principle 4; The Universal Charter of the Judge, Article 2; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A: General Principles Applicable to all Legal Proceedings, Principle 4(a) and Principle Q: Traditional Courts, Paragraph (c); Council of Europe Recommendation CM/REC(2010)12E on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers, 17 November 2010, Chapter I.7.

¹⁰⁶ See ICCPR, Article 14.1, and Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 19; Universal Declaration of Human Rights, Article 10; Universal Charter of the Judge, Article 1; UN Basic Principles on the Independence of the Judiciary, Principle 2; African Charter, article 26 and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A.

¹⁰⁷ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 19; UN Basic Principles on the Independence of the Judiciary, Principle 2; Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Article 2.

adjudication by an independent and impartial tribunal “is an absolute right that is not subject to any exception”.¹⁰⁸

Beyond affirming independence of the judiciary as a concept and principle enshrined in law, States must also have in place safeguards and guarantees aimed at securing the independence of judges in actual practice. Examples include: procedures and criteria for appointment and promotion of judges; irremovability of judges and security of tenure; remuneration and protection of judges.

The immediately following section of this report evaluates South Sudanese law and practice in terms of recognition and respect for the general principle of judicial independence. The subsequent sections assess compliance with key practical safeguards and guarantees for judicial independence, measuring the situation in South Sudan against relevant international standards.

A. The principle of separation of powers and judicial independence in South Sudan

Although the principle of separation of powers is provided for in the Constitution and ordinary laws of South Sudan, in practice a culture of judicial independence seems not yet fully to have taken root in the country. On more than one occasion, members of South Sudanese executive and military powers have been reported to have exercised undue pressures on and illegitimate interference with the exercise of judicial functions, in violation of international standards.

The *Transitional Constitution* affirms that judicial power “is derived from the people and is exercised by the courts in accordance with the customs, values, norms and aspirations of the people and in conformity with the Constitution and the law”.¹⁰⁹ The *Transitional Constitution* and the *Judiciary Act* also explicitly state that “[t]he Judiciary shall be independent of the executive and the legislature”.¹¹⁰ The Constitution adds that: “[t]he executive and legislative organs at all levels of government shall uphold, promote and respect the independence of the Judiciary”¹¹¹ and that all organs and institutions of the State are bound to execute judicial decisions.¹¹²

The Constitution states that the judiciary and its members shall be subject to the Constitution and the law, which judges must apply impartially and without political interference, fear or favour.¹¹³ Judges are to uphold the Constitution and the rule of law and administer justice without fear or favour. To these ends, they are to be protected from reprisals consequent to their judicial decisions,¹¹⁴ and enjoy the necessary immunities for fulfilling their professional functions, as prescribed by law.¹¹⁵

Despite the unambiguous terms employed in the constitutional text and the *Judiciary Act*, the ICJ mission was informed of a number of incidents involving representatives of other state powers, and particularly the Executive and the army, which indicate that in practice the principle of separation of powers is yet to be either fully entrenched or internalized by all branches of State power. For example, the ICJ mission was told of an incident relating to a case that was pending before a court involving a military general. Once the case was heard, and while judgment was pending, the General was reportedly seen parking his vehicle, full of

¹⁰⁸ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

¹⁰⁹ Section 122(1) Transitional Constitution.

¹¹⁰ Cf. Sections 124(1) and 122(2) Transitional Constitution; Section 6 Judiciary Act.

¹¹¹ Section 124(5) Transitional Constitution.

¹¹² Section 122(7) Transitional Constitution.

¹¹³ Section 124(4) and (6) Transitional Constitution.

¹¹⁴ Section 124(8) Transitional Constitution.

¹¹⁵ Section 124(7) Transitional Constitution.

armed military personnel, outside the courthouse. The General reportedly intermittently knocked on the window of the judge's office to ask when the judgment would be ready. The judgment, the mission learned, was hurried and ultimately went in the General's favour.

It appears, from information available to the ICJ, that such incidents are common.

The mission was also told of cases where representatives of the administration at county level purported to dismiss judicial officers serving in the local court, without having any statutory authority to do so. The mission also heard of influential individuals abusing justice institutions for personal ends. In one such case it was reported that a top military official, who apparently suspected his wife of not being faithful, had requested local police to take his wife into custody during his travels, in the absence of any allegations that she had committed any offence under the law.

Conclusions

The principle of separation of powers is the cornerstone of an independent and impartial justice system. Having regard to the legal provisions in force, in South Sudan the constitutional provisions and laws affirm the principle of independence and impartiality of the judiciary. The *Transitional Constitution* and the law on the judiciary enshrine the independence of the judiciary as an institution, and include safeguards for its protection from undue interference. However, other State institutions, including members of the government and police, in practice appear not yet fully to respect the principle of judicial independence and the rule of law.

B. Safeguards and guarantees of judicial independence

1. Judicial appointments and promotions

a. Criteria for the selection and promotion of judges

In South Sudan, the *Judiciary Act* spells out a number of alternative requirements for appointment to the South Sudanese courts, either by way of promotion from inferior courts or by appointment from outside the judiciary. For those judicial positions for which such requirements are spelled out, the requirements appear to be consistent with international standards, which state that the evaluation of judicial candidates shall be based on professional merits and experience. However, for the selection of candidates to judicial positions, who are called "judicial assistants" in the *Judiciary Act*, the *Act* does not include clear criteria for appointment, and only prescribes the appointment shall take place "by way of selection".¹¹⁶ In practice, the only recruitment of future judges that has taken place in South Sudan during recent years was based on criteria that do not seem to have been disclosed, and through a procedure that has been widely criticized for its lack of transparency, in violation of international standards.

The adoption of clear criteria for the selection of members of the judiciary, based on merit, is a prerequisite for judicial independence.¹¹⁷ International standards state that individuals selected for judicial office shall be "individuals of integrity and ability with appropriate training or qualifications in law".¹¹⁸

¹¹⁶ See Section 26 Judiciary Act.

¹¹⁷ See European Court of Human Rights: Judgment of 22 June 1989, *Langborger v. Sweden*, Application N° 11179/84, para. 32; Judgment of 28 June 1984, *Campbell and Fell v. United Kingdom*, Application N° 7819/77; 7878/77, para. 78. See also Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc. A/HRC/11/41 (2009), para. 24; and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles A(4)(h) and (i).

¹¹⁸ UN Basic Principles on the Independence of the Judiciary, Principle 10. See also Singhvi Declaration, Article 11(b).

The Principles and Guidelines on Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights interpreting states' obligations under the African Charter, provide in particular as follows in Principles A(4)(h) and (i):

The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.

Appointments should therefore be based on an individual's ability to assess freely and impartially the legal matters that will be referred to them, and to apply the law to those matters with respect for individual dignity,¹¹⁹ taking into account the specific professional duties necessary for the position of a judge.¹²⁰

Similarly, as regards promotions of judges, Principle 13 of the *UN Basic Principles on the Independence of the Judiciary* provides that "[p]romotions of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience".¹²¹ In principle, objective criteria for promotion should be predetermined in the law.¹²²

International standards also prescribe that selection of judges must not discriminate against any candidate on the basis of "race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status".¹²³ In this sense, the adoption of methods of judicial selection based on objective criteria also serve the purpose of ensuring equal access to the profession.¹²⁴ In selecting from among qualified candidates, judicial appointments to all levels of the judiciary should however be made "with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination". In South Sudan, the *Transitional Constitution* guarantees the equality of all individuals before the law¹²⁵, and calls for the "substantial representation of women" in the judiciary.¹²⁶ Yet, in the course of its visit, the ICJ mission was disappointed to learn that, in

¹¹⁹ Paragraph 2.1 of the European Charter on the Statute for Judges.

¹²⁰ Inter-American Court of Human Rights, Judgment of 30 June 2009, *Reverón-Trujillo v. Venezuela*, para. 72.

¹²¹ See also Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(o).

¹²² See Statute of the Ibero-American Judge, Article 17.

¹²³ Singhvi Declaration, Article 10; UN Basic Principles on the Independence of the Judiciary, Principle 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(j). See also Paragraph 2.1 of the European Charter on the Statute for Judges; ICCPR Articles 2, 25 and 26; and Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para 64. The UN Basic Principles and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa both note that only permitting nationals of the country to serve as judges can however be acceptable.

¹²⁴ Cf. Inter-American Court of Human Rights, Judgment of 30 June 2009, *Reverón-Trujillo v. Venezuela*, para. 72.

¹²⁵ Section 14 Transitional Constitution.

¹²⁶ Section 122(6) Transitional Constitution. Very significantly, concerning the representation of women in the legislative and executive organs in the country – but not the judiciary – the Constitution provides that "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" (Section 16(4)(a) Transitional Constitution). In practice, the situation of women in public offices has been described as follows: "The SPLM ruling party has since 2005 given women 25% of government positions, this was increased to 30% in recent years but this target has not been reached partly due to lack of capacity as more men are educated than women in South Sudan, which is an illiteracy rate of over 70%"; see *South Sudan's second lady urges women to*

reality, few women serve as judges in South Sudan, and that there are no female members in the Supreme Court.

Concerning the general requirements to qualify for appointment to the judiciary, in South Sudan under the *Judiciary Act* an individual must be a citizen “of sound mind” who holds an LLB degree or equivalent qualification from a recognized University or higher institution of law. Criminal offenses involving dishonesty or moral turpitude disqualify an individual from appointment to the bench.¹²⁷ The *Act* also outlines detailed information regarding the age of potential candidates for judicial posts in County or Payam Courts, High Courts or Courts of Appeal and the Supreme Court,¹²⁸ and details for each court the minimum length and the kind of previous professional experience required for appointment from outside the judiciary.¹²⁹ Judicial promotions are codified and linked to objective and measurable criteria, also in line with international standards. Promotions “shall be based on competence and seniority”, with the former being assessed on the basis of judicial performance¹³⁰ and the report of a direct superior on the conduct of the judge. A minimum duration of service is required before a judge may be promoted.¹³¹

In February 2013, the first round of recruitment of future judges carried out in South Sudan since the entry into force of the *Interim Constitution* took place. It led to the appointment of 78 judicial assistants, who may subsequently be appointed to the judiciary on a permanent basis before the end of 2014, after an 18-month probationary period, as prescribed by the *Judiciary Act*. However, both the selection procedures and the outcomes of the recruitment process were widely criticised for lack of transparency and nepotism in the choice of the candidates. In particular, it was asserted that the criteria upon which the selection was based had not been given sufficient publicity, and the fact that one of the daughters of the Chief Justice was among the appointees raised allegations of nepotism.¹³²

b. Selection processes and the Judicial Service Council

The Judicial Service Council is theoretically competent for formulating recommendations to the President of South Sudan for appointments to some, particularly more senior, judicial offices. It does not however appear currently to operate in this role. In practice, the only judicial recruitment in South Sudan to date was carried out without respecting the general standards of transparency and publicity.

International instruments recognize the existence in different legal systems of a variety of procedures for the selection and appointment of judges, and do not prescribe in detail a specific methodology. However, the need to ensure that the process for appointments to

push for affirmative action, 6 March 2013, available at <http://www.sudantribune.com/spip.php?article45735>

¹²⁷ Section 20 Judiciary Act.

¹²⁸ Ibid.

¹²⁹ See Sections 22, 23, 24 and 25 Judiciary Act for the requirements for appointment to the Supreme Court, Courts of Appeal, High Court and County and Payam Courts respectively. See also S. 26 Judiciary Act on the appointment of judicial assistants.

¹³⁰ Note that Sections 36-39 Judiciary Act provide for “inspection and evaluation of performance”, but only as regards procedure and institutions (and hence not on substance).

¹³¹ Section 40 Judiciary Act.

¹³² Sudan Tribune, *South Sudan chief justice denies nepotism in appointment of his daughter*, 2 March 2013, available at <http://www.sudantribune.com/spip.php?article45695>. The text of the judicial order of appointment of the selected candidates read as follows: “Pursuant to the powers conferred upon me under section 26(1) of the Judiciary Act, 2008, I Chan Reec Madut, Chief Justice and President of the Supreme Court do hereby appoint the people list below as Legal Assistants with effect from 1st March, 2013. The appointee shall remain under probation for eighteen (18) month with effect from the date of their appointment as provided under section 26(2) (a) and section 26(3) (b) of the Judiciary Act, 2008”.

judicial bodies is transparent and accountable is consistently affirmed by international standards.¹³³

In this regard, responsibility for the selection, recruitment and appointment of judges should be attributed to an independent authority¹³⁴ with “substantial judicial representation”.¹³⁵ For instance, European standards translate this principle as requiring that “at least half of the members of the authority should be judges chosen by their peers”¹³⁶, adding that membership “should ensure the widest possible representation”.¹³⁷ Allowing some role for members of the Executive or the Legislature in the process of selection or appointment does not necessarily violate the principle of separation of powers, provided that it is provided by law or by the Constitution and “an independent and competent authority drawn in substantial part from the judiciary” is “authorised to make recommendations or express opinions” which the relevant appointing authority ultimately “follows in practice”.¹³⁸

In South Sudan, pursuant to the *Transitional Constitution* and the *Judiciary Act*, the President of the Republic of South Sudan has the formal authority to appoint the Chief Justice and the other justices of the Supreme Court; the President and justices of the Court of Appeal; and the judges of the High Courts and Payam Courts. The Judicial Service Council is tasked with recommending candidates to the President for appointment to the Supreme Court and Court of Appeal, while the Chief Justice recommends candidates to the President for appointment to the High and Payam Courts.¹³⁹

The law does not indicate any grounds or criteria against which the President may reject recommendations formulated by the Judicial Service Council or the Chief Justice. Presidential appointments to the Supreme Court must be confirmed by a two-thirds majority of the Legislative Assembly.¹⁴⁰

As to the Judicial Service Council, its establishment was envisioned under the *Judicial Service Council Act 2008* (hereinafter: *JSC Act*).¹⁴¹ Pursuant to the *JSC Act*, the Judicial Service

¹³³ See Principle A(4)(h), (i) and (k) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Article 9 of the Universal Charter of the Judge; Article 11 of the Statute of the Ibero-American Judge; Chapter VI.48 of the Recommendation CM/Rec(2010)12 on judges: independence, inefficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe.

¹³⁴ See inter alia: Principles 13-17 of the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region; Principle A, paragraph 4 (h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Council of Europe Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, Chapter VI.46; Article 9 of the Universal Charter of the Judge; Article 11 of the Statute of the Ibero-American Judge; Operative paragraph 1.3 of the European Charter on the Statute for Judges; Principle II.1 of the Latimer House Guidelines. See also inter alia Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK (2005), para. 17; Congo, UN Doc. CCPR/C/79/Add.118 (2000), para. 14; Honduras, UN Doc. CCPR/C/HND/CO/1/CRP.1 (2006), para. 16. See also Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc. A/HRC/11/41 (2009), paras. 27 and ff.

¹³⁵ Article 9 of the Universal Charter of the Judge.

¹³⁶ Chapter VI.46 of the Recommendation CM/Rec(2010)12 on judges: independence, inefficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe.

¹³⁷ Chapter VI.48 of the Recommendation CM/Rec(2010)12 on judges: independence, inefficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe.

¹³⁸ Chapter VI.47 of the Recommendation CM/Rec(2010)12 on judges: independence, inefficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe. See also, in analogous terms, Standard 3 of the Minimum Standards of Judicial Independence of the International Bar Association (that additionally provides for the further hypothesis that “Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily”).

¹³⁹ Section 133(1)-(2) Transitional Constitution; Sections 21-25 Judiciary Act.

¹⁴⁰ Section 133(3) Transitional Constitution.

¹⁴¹ Section 3 JSC Act.

Council shall comprise the Chief Justice, his Deputy, and two Justices of the Supreme Court on the basis of seniority, as representatives of the judiciary. The Ministers of Justice and of Finance, and the Chairperson of the Legislation and Legal Affairs Committee of the Legislative Assembly, are also members. The remaining positions are reserved for the Dean of the Law Faculty of the University of Juba and the President of the South Sudan Bar Association.¹⁴² As such, while members of the judiciary comprise the largest single group within the JSC, they do not constitute an outright majority. In addition to issuing recommendations on judicial appointments, the Council's assigned functions include approving the judiciary's general policy and annual budget, and deliberating, examining and deciding in disciplinary procedures.¹⁴³

In function of the *Transitional Constitution*, which postdates the *JSC Act*, the Judicial Service Council is to be renamed the National Judicial Service Commission.¹⁴⁴ Whatever its name or composition, however, the Judicial Service Council / National Judicial Service Commission does not seem to have fulfilled in practice all the tasks that the Constitution and the laws assign to it, nor to be fully operational. Clearly then, this is an area where South Sudan is falling far short of international standards.

The concerns raised around the February 2013 recruitment of candidates to judicial positions, mentioned earlier, raise doubts whether the procedure for appointment of judges to the High and Payam Courts, which the legislation contemplates will happen through the recommendation of candidates directly from the Chief Justice alone to the President, can meet international standards for independence, impartiality, and transparency in the appointment process.

Conclusions

The provisions in the *Judiciary Act* that regulate the entry into judicial positions by way of selection as judicial assistants fall short of international standards that state that selection is to be based on professional qualifications and merits. In practice, the only recruitment of potential new judges that has been undertaken so far by the judiciary of South Sudan does not appear to have complied with the requirements of transparency and public accountability. It does not appear that the Judicial Service Council (or Commission) played any role in the process of selection; indeed, that body does not seem to be fully operational in South Sudan. In any event, reading together the provision of the *Judicial Service Council Act* on the functions of the Council, and Section 26 of the *Judiciary Act* on the procedure of selection of judicial assistants, it is not clear whether the Judicial Service Council would be involved at all in the selection process for that level of court. Further, even if it were fully operational, it is not clear whether the Judicial Service Council (or Commission) would satisfy international standards guaranteeing the independence of the judiciary, given the lack of clarity about the role the executive and legislature would in fact assert for themselves.

c. Judicial training and continuing professional development

The lack of a regular programme of induction courses for new judges and continuous legal development for practicing judges in South Sudan is inconsistent with international standards.

International standards emphasize the importance of ensuring that those selected as judges have received proper training.¹⁴⁵ Continuing professional development of judges throughout their careers is also supported by international standards.¹⁴⁶ The Special Rapporteur on the

¹⁴² Section 9 JSC Act.

¹⁴³ Section 7 JSC Act.

¹⁴⁴ See Section 132 Transitional Constitution.

¹⁴⁵ See for example Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principles 4(B)(a) and (b); UN Basic Principles on the Independence of the Judiciary, Principle 10.

¹⁴⁶ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 4(B)(c): "States shall ensure that judicial officials receive continuous training and education throughout

independence of judges and lawyers has also frequently noted the importance of sufficient and ongoing training for members of the judicial profession.¹⁴⁷ The *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence* state that judicial training “should be organized, systematic and ongoing and under the control of an adequately funded judicial body” and that the training “should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.”¹⁴⁸

In South Sudan the *Transitional Constitution* states that the judiciary “shall be responsible for the maintenance of professional standards and training of judicial personnel”.¹⁴⁹ However, both the *Judiciary Act* and the *Judicial Service Act* remain silent on how to operationalize such provision.

During the ICJ mission, the inadequacy of judicial training and education emerged as an issue of great concern. On the part of South Sudanese authorities at all levels there was an expression of sincere interest and requests for international assistance to improve the quality and quantity of judicial training. During the mission, ICJ delegates were told that the judiciary was working on establishing a training unit within the judiciary, as a first step towards the establishment of a judicial training institute, since the judicial branch had declined to join the Legal Training Institute (a project already underway for the centralization of all legal training in South Sudan, which will be examined in Chapter V).

On the other hand, a number of individual training modules have been ongoing in the country since the Interim Period, as the result of the collaboration between the judiciary of South Sudan and intergovernmental and international organizations. Over the years, training has been provided to several groups of judges on topics such as English language, and common law principles.¹⁵⁰

After the February 2013 judicial recruitment, it is not clear what steps were taken to train the selected candidates. As of September 2013, no judicial training institution providing courses to new and practicing judges was in place in South Sudan. In November 2013 it was announced that 17 out of the 78 selected judicial assistants, including five women, “were officially graduated” in Wau “after eight months training, while in Central Equatoria State and Western Equatoria state, 61 completed their training”.¹⁵¹ However, no information was made available on the contents of such training, which would permit an assessment whether or not the training provided complied with international standards.

Conclusions

Since the entry into force of the *Transitional Constitution*, South Sudan has moved to a common law and English-language system. Practical shortcomings include the fact that many judges and lawyers are not fluent in English legal terminology. The shift to common law also means that the approach from inquisitorial to adversarial system needs to be entrenched. Due to the profound changes introduced in the judicial system of South Sudan and the need to incorporate international human rights principles into judges’ vocabulary and knowledge,

their career including, where appropriate, in racial, cultural and gender sensitisation”. See also Singhvi Declaration, Article 12.

¹⁴⁷ See for instance Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum: Mission to the Democratic Republic of the Congo, UN Doc. A/HRC/8/4/Add.2 (2008), para. 79; Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Addendum: Mission to Tajikistan, UN Doc. E/CN.4/2006/52/Add.4 (2005), para. 62.

¹⁴⁸ Latimer House Guidelines, Guideline II.3.

¹⁴⁹ Section 122(3) Transitional Constitution.

¹⁵⁰ Sudan Tribune, *EU envoy calls for independent judiciary in S. Sudan*, 7 March 2012, available at <http://www.sudantribune.com/spip.php?article45750>

¹⁵¹ *South Sudan Graduates 78 Judicial Assistants*, 16 November 2013, available at <http://www.gurtong.net/ECM/Editorial/tabid/124/ID/13790/Default.aspx>

specific additional and continuous legal training for practicing judges is an immediate need. Induction courses for prospective judges are also required. It is not clear whether the basic requirements are currently being met, but in any event it seemed that interlocutors from all quarters agreed more should be done and that assistance would be welcome.

2. Judicial discipline and irremovability of judges

International standards provide that discipline against judges shall only be taken if a judge violates established standards of judicial conduct; for instance as contained in a written code of conduct.¹⁵² The *UN Basic Principles on the Independence of the Judiciary* require that "judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".¹⁵³ The *Singhvi Declaration* notes that "[j]udges shall accord respect to the members of the Bar, as well as to assessors, procurators, public prosecutors and jurors as the case may be".¹⁵⁴

Disciplinary proceedings against judges must not be used to compromise judicial independence.¹⁵⁵ Complaints against judges should be processed "expeditiously and fairly", and the proceedings must comport with basic principles of fairness.¹⁵⁶ The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, for instance, provide in relevant part as follows:

Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

The procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.¹⁵⁷

All decisions in disciplinary matters, with very limited exceptions, should be subject to independent review.¹⁵⁸

Concerning the entity responsible for handling disciplinary proceedings against judges, some international standards suggest that if it is not itself a court, it should be a specialized body set up by law whose decisions should be controlled by a superior judicial organ, or which is a superior judicial organ itself,¹⁵⁹ and on which in principle at least half of the members should be judges.¹⁶⁰

¹⁵² Singhvi Declaration, Article 27; UN Basic Principles on the Independence of the Judiciary, Principle 19. See also the African Principles and Guidelines on Fair Trial, Principles A(4)(p) and (r): "Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties. ... The procedures for complaints against and discipline of judicial officials shall be prescribed by law."

¹⁵³ UN Basic Principles on the Independence of the Judiciary, Principle 8.

¹⁵⁴ Singhvi Declaration, Article 86. The Universal Charter of the Judge states that "[t]he judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved", Article 5.

¹⁵⁵ Universal Charter of the Judge, Article 11.

¹⁵⁶ UN Basic Principles on the Independence of the Judiciary, Principle 17; Singhvi Declaration, Article 28. See also Commonwealth Principles on the Three Branches of Government, Principle VII(b).

¹⁵⁷ Principles A(4)(q) and (r).

¹⁵⁸ UN Basic Principles on the Independence of the Judiciary, Principle 20; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(q). The possible exception would seem to be where the decision has been taken by the highest court, or by a legislature in impeachment or similar proceedings.

¹⁵⁹ Recommendation No. R(94) 12, Principle VI.3.

In South Sudan, the *Transitional Constitution*, the *Judiciary Act* and the *Judicial Service Council Act* place primary responsibility for the discipline and removal of judges with the Chief Justice¹⁶¹ and the Judicial Service Council (or Commission).¹⁶² Once appointed, a person legitimately exercising judicial functions cannot be held liable for any act done in the course of the discharge of his or her functions, "whether or not the act was within the limits of his or her jurisdiction".¹⁶³ Judges may not be arrested, searched or detained, nor be the subject of an investigation or criminal proceedings, except with permission of the Chief Justice or when they are 'caught in the act'.¹⁶⁴ In such instances, the Chief Justice or the President of the relevant Court of Appeal may suspend the person.¹⁶⁵

Disciplinary measures can be imposed when a judge "contravenes his or her duty, or the ethics of the profession, or conducts himself or herself in such a way as may degrade his or her judicial position or absents himself or herself from work without permission or acceptable reason, or is convicted in the court of law of any offence or commits an act of insubordination".¹⁶⁶

When the Chief Justice believes that an investigation into judicial misconduct is necessary, she or he may delegate this responsibility to an individual judge or a Board of Discipline.¹⁶⁷ The composition of the Board is not specified in the *Judiciary Act*. The Act points out, however, that its establishment may follow either from a decision by the Chief Justice, or from an order by the Judicial Service Council upon recommendation by the Chief Justice; the latter might presumably occur if the judicial officer who is the subject of the proceedings is a justice of the Supreme Court.¹⁶⁸ The *Judiciary Act* recognizes the right of the judge under disciplinary proceedings to be heard by the Board of Discipline, and to present his or her defense, personally or through a lawyer of choice.¹⁶⁹

The Board may recommend imposition of the following five penalties: warning; reprimand; deprivation of increment or promotion for a period not exceeding a year; cut of pay for one month's salary; or dismissal.¹⁷⁰ The decisions of the Board related to the discipline of justices of the Supreme Court are subject to review by the Judicial Service Council; the Chief Justice reviews the decisions of the Board pertaining to the other judges. The Judicial Service Council upon recommendation by the Chief Justice (of her or his own volition, or upon request of the judge against whom proceedings have been brought) may dismiss, amend or confirm the decision of the Board. In any event, the Council's decision is final, and can only be submitted for review to the Council itself once, on the recommendation of the Chief Justice.¹⁷¹

A judge or justice may also be removed in case of gross misconduct, incompetence or incapacity. For the dismissal of a judge or justice, a specific request from the Chief Justice needs to be approved by the President of South Sudan.¹⁷² Provisions concerning removal

¹⁶⁰ European Charter on the Statute of Judges, operative paragraph 5.1; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A(4)(u).

¹⁶¹ S. 134(1) Transitional Constitution.

¹⁶² See Section 8(c) and (d) JSC Act.

¹⁶³ Section 47 Judiciary Act.

¹⁶⁴ Section 59 Judiciary Act.

¹⁶⁵ Section 60 Judiciary Act.

¹⁶⁶ Section 50 Judiciary Act.

¹⁶⁷ Section 49 Judiciary Act.

¹⁶⁸ Section 51(1) Judiciary Act.

¹⁶⁹ Section 53(3) and (4) Judiciary Act.

¹⁷⁰ Section 54 Judiciary Act.

¹⁷¹ Section 55 Judiciary Act.

¹⁷² See Section 56(1) Judiciary Act and Section 134(2) Transitional Constitution.

proceedings are silent on the issue of complaints levied against the Chief Justice, leaving regrettable ambiguity about the relevant procedures should such a case occur.

On the basis of the information available it seems that, as of September 2013, no South Sudanese judge has been disciplined or removed under these procedures. No Board of Discipline has ever been convened.

Judges cannot engage in trade or associate their office with any other employment or business incompatible with their duties and that compromise the independence of the judiciary. The *Judiciary Act* indicates that a judicial code of conduct shall specify such incompatibilities.¹⁷³ However, as of September 2013, no code of judicial ethics yet existed in South Sudan.

Conclusions

To be fair and transparent, and to secure the independence of the judiciary free from undue influence particularly by the executive branch of government, the grounds and procedures for disciplinary proceedings must be regulated by law. It is a good practice to set out the grounds in a written code of judicial conduct. No code of judicial ethics has yet been adopted in South Sudan. South Sudanese law recognizes the right of judges to a fair proceeding, including the right to be represented by counsel. The lack of any specified procedures in the event of disciplinary proceedings against the Chief Justice creates the possibility of a constitutional crisis or other damage to the rule of law and independence of the judiciary should such a situation ever arise. As no case of disciplinary proceedings against a judge under the provisions presently in force in South Sudan is known to have occurred, it is difficult to assess whether proceedings under the existing provisions comply with international standards. However, what emerges clearly is that the minimum guidance that the Judiciary Act provides as regards important aspects of the proceedings, such as the constitution of Boards of Discipline and review of disciplinary decisions, falls short of guaranteeing an independent review.

C. Lack of judicial resources

The inadequacy or complete lack of material facilities, equipment, services and resources for judges in South Sudan is inconsistent with international principles.

It is axiomatic that the judiciary must have the necessary resources in order to administer justice. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* state that the judiciary must have "adequate resources for the performance of its functions".¹⁷⁴ The judiciary should also play an active role in the preparation and implementation of its budget.¹⁷⁵ Likewise, the *Singhvi Declaration* states that "the budget of the courts shall be prepared by the competent authority in collaboration with the judiciary",¹⁷⁶ and makes clear that providing adequate funding for the judiciary to function "shall be a priority of the highest order for the State".¹⁷⁷ The *UN Basic Principles on the Independence of the Judiciary* also provide that: "[i]t is the duty of each Member State to provide adequate resources to... the judiciary".¹⁷⁸

The lack of judicial resources can lead to justice being delayed if not denied, impacting on respect for the rule of law and human rights. A failure to ensure that a person is able promptly to access a court, and that the court has the necessary resources, to decide *without delay* on the lawfulness of a person's detention and order release if the detention is not lawful, can

¹⁷³ Section 28 Judiciary Act.

¹⁷⁴ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 4(v).

¹⁷⁵ Ibid.

¹⁷⁶ Singhvi Declaration, Article 34. Universal Charter of the Judge, Article 14.

¹⁷⁷ Singhvi Declaration, Article 33.

¹⁷⁸ UN Basic Principles on the Independence of the Judiciary, Principle 7.

result in or exacerbate arbitrary detentions.¹⁷⁹ Prolonged proceedings in criminal cases in which the accused is deprived of his or her liberty can result in prolonged pre-trial detention, in violation of the right to liberty and the right to trial without undue delay, as well as the right to the presumption of innocence.¹⁸⁰ It can also lead to impunity and impact on the rights of the victims and society as a whole.

In terms of the management of judicial budget, South Sudan's Judicial Service Commission is to draft the judiciary's yearly budget, which is sent to the President for approval;¹⁸¹ in practice, this seems to be one of the few tasks actually performed by that body. Once the President approves the budget, money is allocated to the Chief Justice, who is tasked with administering the funds.¹⁸² Pursuant to both the *Transitional Constitution* and the *Judiciary Act*, it is made clear that, as a counterweight to the judiciary's "self-accounting", the judiciary remains subject to periodic public audits.¹⁸³

At present, only 124 statutory judges serve a population in excess of 11 million people.¹⁸⁴ One of the main consequences of the lack of judges is a significant backlog of cases. The emergence of this backlog, in turn, has meant that the length of detention of people detained pending trial may be prolonged, in a manner that is inconsistent with their rights, including their rights to liberty and the presumption of innocence. The backlog may lead to protracted proceedings, resulting, on the one hand, in the violation of the rights of individuals to be tried within a reasonable time and, on the other, in the appearance of impunity. In a study on conditions of detention in South Sudan published by Human Rights Watch in June 2012, some concrete examples were reported to illustrate the repercussions of the insufficient number of judges sitting in statutory court on the frequency of cases of arbitrary detention.¹⁸⁵ According to the same report, "Official figures put the figure of inmates on remand at 30 percent of the total number of inmates".¹⁸⁶

The undue delays that result from grossly inadequate availability of judges to conduct trials and hear applications for pre-trial release leave individuals in prolonged pre-trial detention in conditions falling far below international standards. Based on official figures provided by the Prisons Service and reported by Human Rights Watch, prison population in South Sudan has surged from approximately 1,500 in 2005 to almost 6,000 at the end of 2011, with little expansion of prison infrastructure. According to the report on detention conditions by Human Rights Watch, "In the overcrowded prisons, inmates sleep in tightly packed cell-blocks, and as a result have difficulty sleeping at night. Facilities rarely allow convicts to be fully separated from remands, children from adults, or even women from men... In Juba prison, male inmates with mental disabilities are housed together in a section of the male ward... In Malakal, four

¹⁷⁹ See for instance ICCPR, Article 9(4), emphasis added; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle M(5), including its reference to a "prompt and effective" remedy.

¹⁸⁰ See for instance ICCPR Articles 9(3) and 14(3)(c), and Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N(5).

¹⁸¹ Section 124(2) Transitional Constitution; Section 6(3) Judiciary Act.

¹⁸² Sections 75-79 Judiciary Act.

¹⁸³ Section 124(3) Transitional Constitution; Sections 77-78 Judiciary Act.

¹⁸⁴ See David K. Deng, *Challenges of Accountability. An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 19 and No. 25, available at http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf

¹⁸⁵ See Human Rights Watch, *Prison Is Not For Me. Arbitrary Detention in South Sudan*, June 2012, p. 41: "In Northern Bahr el Ghazal state, Human Rights Watch was told in April 2011 that there had not been a sitting of the high court in six months as its president was abroad receiving medical treatment. Both Western Bahr el Ghazal and Unity states have only one high court judge, leaving all murder cases in each state to be handled by a single individual".

¹⁸⁶ *Ibid.*, p. 38.

inmates with mental disabilities are naked and tied outside to trees during the day... Because of overcrowding and insufficient infrastructure, none of the 12 prisons visited by Human Rights Watch properly segregate remand from convicted prisoners, and children from adults.... Not a single prison visited by Human Rights Watch was equipped with a clinic able to provide basic health care".¹⁸⁷

As said above, apart from Juba and some state capitals, where one can find a judicial presence of some substance, there are very few judges in the rest of the country, with some areas that have no judicial mechanisms nearby. Physical accessibility of statutory courts is a problem throughout the country, as a result of, on the one hand, their limited number and location and, on the other hand, the lack of roads and poor conditions of the existing roads, and the lack and prohibitive cost of means of transport. This adversely impacts on people's access to justice in statutory courts, by making it practically physically impossible for individuals for victims and/or potential plaintiffs to visit the courts. The South Sudan Law Society recently reported that individuals in South Sudan were generally pleased by the services provided by mobile courts that visit rural areas to hear cases in rapid succession.¹⁸⁸ Although this program is experimental, mobile courts have so far proved effective as a way to mitigate some effects of the shortage of judges.¹⁸⁹ It remains clear, however, that this initiative is not meant to replace efforts to recruit more judges and other judicial officers for permanent assignment to the various states.

Where statutory courts exist, the general lack of resources available to the judiciary is reflected in the lack of adequate infrastructure, including adequate court buildings. The mission learned that due to the inadequate size of court buildings, very often lawyers and other individuals waiting to appear before the court have to stand outside under a tree, even in intense heat or heavy rains, because there is no space within the court premises. The configuration of some courts is such that judges do not have chambers to work from, nor secure facilities where confidential documents can be kept. In locations in which there are no court premises, judges have been known to hold hearings under trees.

Members of the judiciary often do not have access to the laws they are required to interpret and apply in the course of their work. Many judges do not have physical copies of relevant laws, and electronic copies generally do not exist, or are not always accessible due to difficulties related to the Internet connection in the country. The lack of accessibility of statutory law is compounded by the fact that there is no system for printing and distributing court decisions, which is a particularly key gap as knowledge of judicial precedent is key to the operation of the common law-based system that has been adopted in South Sudan.

Conclusions

Entire regions of the country are completely deprived of any statutory judicial presence, which inevitably affects the knowledge of individuals from those areas about the work and functioning of the statutory courts system and their ability to access justice in the those courts. In places where statutory judges are operating, judicial capacity is overstretched, which means that there are delays resulting from case backlogs, and such delays undermine public confidence in the work of the judiciary. In some parts of the country, mobile courts have been piloted, with positive results.

¹⁸⁷ See Human Rights Watch, *Prison Is Not For Me. Arbitrary Detention in South Sudan*, June 2012, pp. 13, 61, 62, 78, 82.

¹⁸⁸ David K. Deng, *Challenges of Accountability. An Assessment of Dispute Resolution Processes in Rural South Sudan*, 2013, p. 30, available at [http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.p df](http://www.pactworld.org/sites/default/files/Challenges%20of%20Accountability_FINAL%20May%2016.pdf)

¹⁸⁹ UN Human Rights Council, Progress of technical assistance and capacity-building for South Sudan in the field of human rights. Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/31 (2013), p. 6.

The lack of judicial infrastructure is of concern, including in relation to the critical economic situation of South Sudan and the further reduction of public investments after the adoption of the austerity budget in April 2012. Facilities, services and equipment made available to judges are utterly inadequate, where they exist at all. Apart from in Juba and some other cities, Internet access is generally completely absent or very rare. Copies of national laws, texts of international conventions and other necessary legal materials are not available for all judges.

V. The legal profession

A. Lack of operational regulatory framework for admission to practice law

The absence of any operational regulatory framework for the practice and admission to the practice of law in South Sudan is inconsistent with international standards.

Lawyers are, with judges and prosecutors, fundamental to human rights protection and respect for the rule of law in any country. Therefore it is essential that access to the profession, its exercise and the duties of its members be regulated only in conformity with international standards. Lawyers have a right and a duty to protect and promote human rights. As stated in the *UN Basic Principles on the Role of Lawyers*, "lawyers shall at all times maintain the honour and dignity of the profession as essential agents of the administration of justice"¹⁹⁰. Vis-à-vis their clients, all members of the profession have a duty to provide objective and candid legal advice, defending the legal rights and interests of the individuals represented, assisting them and taking legal action before any appropriate fora.¹⁹¹

Regulations must set out objective, clear and coherent rules for admission to the practice of the profession, so as to ensure that each individual having "the necessary qualifications, integrity and good character" is entitled to become a lawyer.¹⁹² The relevant procedures must be designed and implemented in such a way as to guarantee that "there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status", with the possible exception of the requirement that the lawyer has the nationality of the country in question.¹⁹³ The standards for admission to the profession should include "not only the requisite elements of intellectual qualification, such as competence and ability to supply the service, but also those elements of ethical and moral qualification that are essential to the preservation of the integrity of the profession and, indeed, of the legal system itself".¹⁹⁴

Additionally, if admission to legal practice is made subject to mandatory affiliation to a professional association charged with regulating the profession, the association must preserve the self-governing character of the profession,¹⁹⁵ and admission to the association must be "[s]trict and clear admission procedures", which are "paramount to preserving the integrity of the legal profession and gaining credibility among the public and the relevant branches of government".¹⁹⁶ Mandatory affiliation can never be permitted to become a means, whether by design or in practice, of prohibited discrimination, for instance on the basis of political opinion, as described above.

¹⁹⁰ UN Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (hereinafter: UN Basic Principles on Lawyers), Principle 12; see also Principle 26. Article 17 of the Draft Principles on the Independence of the Legal Profession (Noto Principles); Principle (d) of the Charter of Core Principles of the European Legal Profession.

¹⁹¹ UN Basic Principles on Lawyers, Principle 13. See also Rule 10 of the IBA International Code of Ethics.

¹⁹² Singhvi Declaration, Article 80.

¹⁹³ UN Basic Principles on Lawyers, Principle 10.

¹⁹⁴ See International Bar Association, Standards and Criteria for Recognition of the Professional Qualifications of Lawyers, agreed/adopted at IBA Council Meeting, Istanbul, June 2001 (hereinafter: IBA Standards on Professional Qualifications of Lawyers), Standard 3(a).

¹⁹⁵ See UN Basic Principles on Lawyers, Preamble and Principle 24; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I(l). The independent and self-governing character of the legal profession, beyond admission to practice, is dealt with in more detail below.

¹⁹⁶ See Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Addendum: Mission to Mozambique, UN Doc. A/HRC/17/30/Add.2 (2011), para. 89.

In South Sudan, the *Transitional Constitution* enshrines the guarantee of the independence of the legal profession (in the terms of the Constitution, “advocacy”) and spells out lawyers’ duties to “promote, protect and advance the fundamental rights and freedoms of citizens”.¹⁹⁷ It also provides that the profession shall be regulated by law.¹⁹⁸

The *Advocacy Act 2003* formally purports to regulate the legal profession in South Sudan. In practice, although the *Act* was never formally abrogated, most of its provisions have never been implemented, or are not followed any longer. A new piece of legislation, the ‘Advocates’ Act’ (also frequently referred to as ‘Lawyers’ Bill’), has been under discussion for some time. The ICJ heard discordant views concerning the progresses of the parliamentary debates for the adoption of the bill. It seems clear, however, that until new legislation is enacted, the legal profession in South Sudan will find itself acting in a legal vacuum.

In practice, then, no standardised procedure for admission to the bar presently operates in South Sudan. Under the *Advocacy Act 2003*, in order to be entitled to practice as an advocate in South Sudan, one must be a citizen of good character, hold a law degree or any other higher qualifications from a recognized university or legal institution, hold a Legal Professional Certificate (or be exempted by the Ministry of Justice from this requirement) and have been awarded a license to practice.¹⁹⁹ The *Act* assigns the responsibility to issue Legal Professional Certificates to the Body of Advocates, which should comprise the Minister of Justice, the Chairperson of the Law Society, a judge of a Court of Appeal and any other person appointed pursuant to a decision by the Body to increase its membership.²⁰⁰ This system prescribed by the *Advocacy Act 2003* was never systematically implemented. In any event, the fact that the representative of the legal profession, i.e. the Chairperson of the Law Society, would appear to be in the minority in this Body, and particularly given the inclusion of the Minister of Justice as a part of the executive government, indicates that even if it were functioning in practice, the system prescribed by the *Advocacy Act 2003* would not meet international standards for the independent and self-governing character of the legal profession.²⁰¹

The completion of a period of pupillage with a senior lawyer, as provided for under Sudanese law, appears to have been maintained as a practice in South Sudan also after the Interim Period. However, conversations with members of South Sudanese legal profession held before, during and after the ICJ mission did not offer evidence that this or any other conditions of access to the profession are currently being uniformly applied. Indeed, the mission heard conflicting information concerning the competent authority for admission to the pupillage and issuing the licences to practice, some referred to the Ministry of Justice, while others said an *ad hoc* committee chaired by the President of the South Sudan Bar Association was responsible. The ICJ was also informed of plans to replace any such *ad hoc* committee, of provisional nature, with a permanent organ under the upcoming ‘Advocates’ Act’. The mission was told that foreign lawyers wishing to practice in South Sudan need to apply to the Ministry of Justice, although some people asserted that the examination of those applications by the authority is often only a formality.

One important consequence of the protracted absence of established rules and uniform practices governing the access to the profession appeared to the ICJ to be that the title of

¹⁹⁷ Section 140(2) Interim Constitution and Section 136(2) Transitional Constitution.

¹⁹⁸ Section 140(1) Interim Constitution and Section 136 (1) Transitional Constitution.

¹⁹⁹ See Section 5 Advocacy Act 2003. Pursuant to Section 9 of the Act, an advocate has the right of audience in all courts of law, provided he or she has paid the yearly practicing fee of USD 500. The Ministry of Justice may change the amount of this fee.

²⁰⁰ See Sections 6 and 7 Advocacy Act 2003.

²⁰¹ See UN Basic Principles on Lawyers, Preamble and Principle 24; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I(l) ; Human Rights Committee, Concluding Observations on Belarus, UN Doc CCPR/C/79/Add.86 (1997), para 14, objecting to a law giving the Ministry of Justice competence in relation to the licensing of lawyers.

lawyer is being attributed in South Sudan without systematically applying verifiable and predictable criteria as to the person's competency. In this regard, the ICJ heard reports about lawyers, whether of South Sudanese or foreign origin, holding law degrees from foreign countries, and operating in South Sudan without ever having been asked to prove familiarity with or expertise on South Sudanese laws.

Additionally, the lack of clear, coherent and uniform norms and procedures for admission to the bar risks undermining to the overall quality of the services provided by the legal profession. International standards unambiguously express the existing link between regulating access to the profession and ensuring on the one hand that only individuals who have the necessary qualifications and skills become members, and on the other that all qualified individuals have access without discrimination. The present situation in South Sudan does not in practice comply with these standards.

The mission also noted the heterogeneity of professional and personal backgrounds among the lawyers operating in South Sudan. A variety of factors - including inadequate salaries and personal security concerns - were cited as leading significant numbers of South Sudanese lawyers to practice abroad. The majority of the lawyers working in the South before independence had Northern origins, and went back to the North after the independence of South Sudan had been declared. The creation of a legal community in the newly independent South Sudan was thus started with a significant influx of foreign lawyers, especially from Eastern Africa, with a background in common law and knowledge of the English language. The legal profession operating in South Sudan thus appears largely fragmented between some lawyers with a civil law and Sharia background (mainly trained in Arabic in Sudan), and foreign lawyers and legal practitioners trained in the diaspora, with differing backgrounds. Creating a unified regulatory framework and body for the profession as a whole will therefore require finding a structure and professional culture that brings together a wide range of linguistic and legal professional backgrounds.

Conclusions

The statutory regime currently purporting to regulate the legal profession in South Sudan, including access to the profession, falls short of international standards on independence and self-government of lawyers and is not in any event followed in practice. The absence of an operational legal framework further undermines the quality of the services provided by the legal profession in South Sudan. Proposals to establish a new legal framework are not advancing with any urgency. Any regulatory regime must take account of the wide range of professional and linguistic backgrounds of lawyers practicing in South Sudan today.

B. Legal education and training

The lack of systematic and regular programmes of legal education and training in South Sudan is inconsistent with international standards.

Proper legal education and training are of the highest importance, and international standards emphasize that "no individual should enter into the legal profession without appropriate training".²⁰² Adequate education and training should prepare lawyers to appreciate their ethical, moral and legal obligations to society and empower them to become "essential agents of the administration of justice"²⁰³ and promoters and defenders of human rights and fundamental freedoms. Also, legal education should not be limited to new lawyers. Rather, a

²⁰² International Bar Association, Policy Guidelines for Training and Education of the Legal Profession, adopted by the IBA Council, 3 November 2011 (hereinafter: IBA Policy Guidelines for Training of Lawyers) Guideline 1. See also Council of Europe, Recommendation No. R (2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers' Deputies, Principle II.

²⁰³ UN Basic Principles on Lawyers, Principle 12.

culture of continuing education for lawyers, as well as a culture of judicial education should be developed, which is "organised, systematic and ongoing".²⁰⁴

The *UN Basic Principles on the Role of Lawyers*, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, as well as other instruments at the international and regional level, attribute joint responsibility to governments, professional associations of lawyers and educational institutions (including universities and bar schools) involved in legal training, to guarantee access to adequate legal education, at the entry level and as continuous legal education.²⁰⁵

The pivotal importance of designing legal education programmes that "promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms" is explicitly recognized in the *Singhvi Declaration*.²⁰⁶ The African Commission on Human and Peoples' Rights has repeatedly underscored the importance of training for legal professionals, emphasising in particular that the training needs to include human rights and international human rights law, and has called upon bar associations and other professional associations of legal practitioners to provide comprehensive training in this regard.²⁰⁷

In the course of the civil war in South Sudan, the operation of the University of Juba was suspended and its courses were moved to Khartoum. Recently the Law Faculty has moved back to Juba, but enormous challenges remain, mainly related to the paucity of resources available. First, the fact that the vast majority of the faculty members are not permanent significantly affects the regular holding of the classes, with repercussions on the overall quality of the courses. Second, physical facilities and material equipment were described to the ICJ mission as seriously inadequate. Among others, the shortage of resources in the library – which is one of the only three libraries existing in Juba, together with the library of the Ministry of Justice and the one of the Legislative Assembly - was noted as a serious impediment to the development of course materials.

At the moment there are no continuing education opportunities or institutions for lawyers.

A project to establish and build the capacity of a Legal Training Institute (LTI) is one of the main reforms currently being implemented in the justice sector of South Sudan. Once created and working at full capacity, it is intended that the LTI will perform the functions of a post-graduate institution responsible for quality control, streamlining and coordinating all legal training in South Sudan, including the bar course. The issuance of certificates for the admission to pupillage will also fall within the mandate of the Institute. LTI training programmes will target all categories of legal professionals, except for members of the judiciary; in practice, this includes lawyers working in the private sector and for the government, including prosecutors and lawyers working in government administrations. Though this is not yet explicitly stated as part of its mandate, it will be important that the LTI ensure that the training provided to prospective and exercising lawyers is in line with relevant international standards, and includes international human rights norms.

²⁰⁴ Latimer House Guidelines, Guideline II.3.

²⁰⁵ UN Basic Principles on Lawyers, Principles 9 and 10; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I, letters (a) and (l).

²⁰⁶ Singhvi Declaration, Article 78.

²⁰⁷ See African Commission on Human and Peoples' Rights, Resolution on the Respect and the Strengthening on the Independence of the Judiciary, ACHPR /Res.21(XIX)96 (1996), preambular paragraph 4; Resolution on the Role of Lawyers and Judges in the Integration of the Charter and the Enhancement of the Commission's work in National and sub-Regional systems, ACHPR /Res.22(XIX)96 (1996), operational paragraph 3.

Conclusions

In South Sudan there is not yet any institution or set of institutions responsible for and capable to ensure systemic and regular provision of legal education and legal training in accordance with international standards. The structures responsible for the provision of legal education and training either seem not to exist yet, have not been functioning regularly, or are seriously understaffed and under-resourced. The ICJ has been unable to ascertain whether a bar admission course exists at present. No programme of continuing legal education appears to be in place presently.

C. Organized legal profession in South Sudan

1. The absence of an operational bar association

International instruments on the independence of the judiciary and the legal profession highlight the functions to be performed by professional associations of lawyers. Such associations help establish a cadre of lawyers, promote cohesion within the profession and improve the quality of legal services.²⁰⁸ Principle 24 of the *UN Basic Principles on the Role of Lawyers* explicitly recognises the entitlement of lawyers “to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity”. This is also reflected in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*.²⁰⁹ The importance of bar associations, along with professional associations of judges, for the defence of the independence of judges and lawyers, is further recognized in a number of UN Human Rights Council Resolutions.²¹⁰

Bar associations must be truly independent and self-governing and operate in accordance with international standards. As the *Singhvi Declaration* clearly states that “[t]here may be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person”, without prejudice to the right of all legal professionals to join or form other associations.²¹¹ Once established, the bar association should be independent of executive interference.²¹² The self-governing nature of bar associations has been regularly emphasized by the UN Special Rapporteurs on the independence of judges and lawyers²¹³ and by the UN Human Rights Committee.²¹⁴

²⁰⁸ See Recommendation No. R (2000)21 of the Council of Europe, Principle V.4-5.

²⁰⁹ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I, letter (l). See also International Bar Association Resolution on Standards for the Independence of the Legal Profession, adopted 1990 (hereinafter: IBA Standards for the Independence of the Legal Profession), Standard 17; International Association of Lawyers, Turin Principles of Professional Conduct for the Legal Profession in the 21st Century, preamble.

²¹⁰ See for instance UN Human Rights Council, Resolution 15/3 on Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, UN Doc. A/HRC/RES/15/3 (2010), preambular paragraph 6.

²¹¹ Singhvi Declaration, Article 97.

²¹² Latimer House Guidelines, Guideline VII.6; Human Rights Committee, Concluding Observations on Azerbaijan, UN Doc. CCPR/CO/73/AZE (2001), para. 14; Human Rights Committee, Concluding Observations on Belarus, UN Doc. CCPR/C/79/Add.86 (1997), para. 14.

²¹³ See for instance Report of the Special Rapporteur on the Independence of Judges and Lawyers Dato’ Param Kumaraswamy, submitted in accordance with Commission on Human Rights Resolution 2002/43, Addendum: Report on the Mission to Italy, UN Doc. E/CN.4/2003/65/Add.4 (2003), para. 114; Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Addendum: Mission to Maldives, UN Doc. A/HRC/23/43/Add.3 (2013), para. 87.

²¹⁴ See for instance Human Rights Committee considers report of Ukraine, 9 July 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13524&LangID=E>.

In South Sudan, the *Advocates Act 2003* provided for the establishment of a so-called Advocacy Committee “to manage and supervise Advocacy” in the country.²¹⁵ Pursuant to the *Act*, the Advocacy Committee should consist of six members, including the Minister of Justice or a representative, the Chairperson of the South Sudan Law Society (SSLS) or a representative, one elected member of the Law Society and three members of the judiciary to be appointed by the Chief Justice.²¹⁶ The *Act* also envisaged the creation of a Body of Advocates, with the competence to issue practicing licenses and make regulations for the legal profession; also, such body was empowered to revoke advocates’ licences for misconduct on prescribed grounds.²¹⁷

As explained above, the *Act* was never implemented, and no permanent body with these characteristics and powers currently exists. In any event, the fact that the majority of membership of the Advocacy Committee is made up of judges and the Minister of Justice indicates that even if it were in operation, the Committee would not meet international standards on the self-government and independence of the legal profession.

In the Interim Period, a 15-member interim committee was reportedly created in the South, whose functions included overseeing the debates on the drafting and adoption of the ‘Advocates’ Act’. Upon the independence of South Sudan, some members of the committee who had Northern origins moved back to the North, which left the committee short of a quorum.

On the basis of the information gathered, the ICJ mission concluded that there is no professional organisation of lawyers operating in South Sudan. On the one hand, the meetings held by the mission revealed that the basic structure contemplated by the law exists more in name only than in concrete terms. On the occasion of two successive visits to Juba, the ICJ delegation was introduced to the President and the Secretary-General of the bar association; also, some of the lawyers whom the mission met declared to be members. However, when the mission members inquired about the concrete functions performed by the bar association, and the modalities of its functioning, the recurrent answer was that the bar association was “not operational”.

On the other hand, a number of the lawyers met declared their affiliation with the South Sudan Law Society (SSLS). Other than the possible ambiguity created by the name, the SSLS does not play the role of a professional association for the representation and self-regulation of the legal profession. In fact, the SSLS is a civil society organization working with lawyers on access to justice and rule of law issues in South Sudan.

The lack of a functioning bar association representing the legal profession in South Sudan contributes to there being no official statistics concerning the total number of practising lawyers in the country. The ICJ received information that there are approximately four hundred lawyers working at the Ministry of Justice, and more than one hundred in private practice. The vast majority of lawyers practice in Juba. The ICJ was informed that in some states and many counties there are no practicing lawyers at all, which makes it virtually impossible for many citizens living outside of Juba to access lawyers when they seek representation or advice.

Conclusions

The absence of an operational bar association mandated by legislation to self-regulate the profession is one of the most evident manifestations of the legal vacuum in which the legal profession in South Sudan is operating. Additionally, the lack of an active association

²¹⁵ Section 3(1) Advocacy Act.

²¹⁶ Section 3(2) Advocacy Act.

²¹⁷ Section 6 Advocacy Act.

representing the profession contributes to further deepening the fragmentation that already exists in the South Sudanese legal community, and hinders the implementation of systematic quality control over its members.

The vast majority of the meetings held by the ICJ mission delegates with members of the South Sudanese legal community revealed a widespread feeling that a unitary body mandated to represent the legal profession in the country is needed. Several interlocutors made reference to the important role played in the past and nowadays by the SSLS as the most visible among the organizations working on issues related to the administration of justice in South Sudan. However, because of its distinct nature and function of regulating body of the profession, a professional association with these characteristics cannot necessarily simply be replaced by other sorts of civil society organizations.

2. Legal aid and educational programmes for the general public

There is no centralized system of legal aid in South Sudan, and a recently-established pro bono programme does not reach all of those in need of legal assistance. More must be done to bring South Sudan in line with international standards on legal aid.

Building on fair trial guarantees under article 14 of the ICCPR, the *UN Basic Principles on the Role of Lawyers* provide that all individuals in criminal proceedings have the right to call on the assistance of a lawyer of their choosing in all stages of the proceedings, to guarantee the protection of their rights, including to the presumption of innocence and to a defence. To better respect and ensure the exercise of the right to be represented by a lawyer without discrimination - including on grounds of an individual's ability to pay - governments are under an obligation to ensure that adequate funding is made available for the provision of legal aid to the poor and, as necessary, other disadvantaged people.²¹⁸

As it is expressed in the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, legal aid "is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law", as well as a foundation for the enjoyment of other rights, including the right to a fair trial.²¹⁹ The *Principles and Guidelines* further provide that, at a minimum, "States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process" and that, "Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty."²²⁰ Beyond the context of criminal justice, legal aid should also be provided where the interests of justice so require in light of the complexity or gravity of consequences of certain civil cases.²²¹

International standards encourage professional organizations to collaborate with the government to provide legal aid. The *UN Basic Principles* emphasize that associations of lawyers and States' executive branches should work together to establish and administer pro bono legal aid systems, and to promote legal literacy and civic education programmes that increase public awareness of individual rights.²²² The *UN Principles and Guidelines on Access to*

²¹⁸ UN Basic Principles on Lawyers, Principles 1, 2 and 3. Also Singhvi Declaration, Articles 76 and 84.

²¹⁹ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2013), Principle 1, para. 14.

²²⁰ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2013), Principle 3, paras 20 and 21.

²²¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle H.

²²² UN Basic Principles on Lawyers, Principles 3, 4 and 25. The Latimer House Guidelines likewise state that "[l]egal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious" (Guideline VII.5).

Legal Aid in Criminal Justice Systems insist on the desirability of establishing partnerships with bar or legal associations for this purpose, and suggest a vast range of measure that States might take to incentivize professional associations and individual lawyers to take part in legal aid schemes.²²³

The *Singhvi Declaration* further elaborates on the “social responsibilities of the lawyers”²²⁴ referring to the establishment of structures for providing free legal aid as a “necessary corollary of the concept of an independent bar”,²²⁵ and affirming a shared responsibility of lawyers and bar associations concerning the education of the public on human rights and the rule of law.²²⁶

South Sudan lacks a centralised programme of legal aid. The provision of legal aid is characterised in the *Transitional Constitution* as both a guarantee of fair trial and an obligation for all advocates.²²⁷ According to the latest information made available by the Government of South Sudan, a pro bono legal aid programme has been recently put in place and is administered by the Ministry of Justice. A “Legal Aid Strategy” has reportedly also been adopted, but has seemingly not been implemented yet.²²⁸ As to private sector initiatives, the ICJ delegation was told that in Juba there was only one law firm that provides pro bono legal aid.

Under the *Transitional Constitution*, for people suspected or charged with “non-serious” crimes, the services pro bono of a lawyer are not guaranteed. In theory, this should mean that in South Sudan pro bono legal assistance in criminal proceedings is available to individuals charged with “serious crime”, in cases in which the accused do not have their own counsel or cannot pay for a lawyer.²²⁹ In practice, it appears that legal aid is provided only in death penalty cases and not as a general rule for other serious offences, for instance punishable with imprisonment. In fact, the only case of which the ICJ is aware where the legal aid scheme under the Ministry of Justice has been applied so far is in relation to a homicide trial in Wau involving fourteen accused, as reported by the Government of South Sudan.²³⁰

Such practice, if not the constitutional provision per se – and indeed, depending on how the concept of “serious crimes” is interpreted in South Sudanese law - appears to be inconsistent with Principle 3 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, which provides that is entitled to legal aid at all stages of the criminal justice process “anyone who is arrested, detained, suspected of or charged with a

²²³ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187 (2013), Principle 1, para. 14.

²²⁴ Singhvi Declaration, Article 79.

²²⁵ Singhvi Declaration, Article 94; see also Article 99, letter (e).

²²⁶ Singhvi Declaration, Article 81. See also International Bar Association, IBA Pro Bono Declaration, October 2008.

²²⁷ Section 136(3) Transitional Constitution.

²²⁸ UN Human Rights Council, Note verbale dated 31 May 2013 from the Permanent Mission of South Sudan to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/G/4 (2013), p. 5.

²²⁹ Section 19(6) of Transitional Constitution – titled “Fair trial” - reads: “Any accused person has the right to defend himself or herself in person or through a lawyer of his or her own choice or to have legal aid assigned to him or her by the government where he or she cannot afford a lawyer to defend him or her in any serious offence.”

²³⁰ See UN Human Rights Council, Note verbale dated 31 May 2013 from the Permanent Mission of South Sudan to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/23/G/4 (2013), p. 5. A report published by The New Sudan Vision in September 2013 defined the provision of legal aid in South Sudan as “virtually non-existent”; see The New Sudan Vision, ‘*Guilty until proven innocent*’: *pretrial detention in South Sudan*, 22 September 2013, available at <http://www.newsudanvision.com/articles--publisher/2752-victor-lowilla-the-new-sudan-vision-nsv-newsudanvision-com>

criminal offence punishable by a term of imprisonment or the death penalty”²³¹ What emerges clearly is also that there are vast numbers of individuals detained or arrested on, suspected of, or charged with offences carrying a potential sentence of imprisonment, or even death penalty, who are not presently being reached by the Ministry of Justice legal aid scheme.

Further, due to lack of knowledge among the public regarding the functioning of the formal legal system in the country in general, and their individual human rights in particular, people accused of criminal offences rarely request legal assistance, even in those cases in which they would qualify for the legal aid scheme. Incidents were reported of non-South Sudanese nationals who were tried and convicted without being provided with legal representation and without interpretation services.

Conclusions

By characterizing the provision of legal aid for the disadvantaged people as both a guarantee of fair trial and an obligation for all advocates, the *Transitional Constitution* implicitly requires the state to respect the right, and provides for state responsibility to ensure its provision. Accordingly, the responsibility of ensuring legal aid is available throughout the country first and foremost lies with the government. In South Sudan this is made more acute by the difficulties that the public legal aid scheme adopted by the Ministry of Justice is encountering in addressing the vast number of cases in which legal aid should be provided as a guarantee of fair trial.

International standards also attribute a prominent role to bar associations in promoting legal aid, through the collaboration with governments for setting up and ensuring the good functioning of pro bono legal aid systems. The absence of a unifying body representing the legal profession in South Sudan, together with the lack of financial resources, has to date hampered such collaboration. It is to be hoped that, once concretely established, the bar association of South Sudan will fulfill this task, with the support of lawyers in private practice.

D. Disciplinary system and code of ethics

The absence in South Sudan of a written code of ethics, and of a functioning disciplinary system that complies with international standards on fairness of the proceedings, is inconsistent with international standards. The composition of the decision-making body theoretically responsible for adjudicating disciplinary cases (but which does not seem currently to operate in practice in any event), also does not fully respect the independent and self-governing character that the legal profession should be guaranteed.

Codes of professional conduct for lawyers play an essential role in providing guidance, inspiration and uniformity to legal practice. The *UN Basic Principles* stress that self-governing bar associations, whether through their own organs or by providing input to legislators, are responsible for adopting and revising codes of conduct which incorporate and are consistent with international standards and reflect lawyers’ fundamental obligations to promote and protect human rights.²³² The same provisions are reflected in the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the African Commission.²³³

Beyond representing a set of guidelines that should inspire and orient the conduct of the members of the legal profession, codes of conduct for lawyers that are consistent with and

²³¹ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3, para 20.

²³² UN Basic Principles on Lawyers, Principle 26. The International Bar Association likewise writes that “Lawyers’ associations shall adopt and enforce a code of professional conduct of lawyers”, IBA Standards for the Independence of the Legal Profession, Standard 21.

²³³ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I, letter (m).

reflect international standards must also be treated as the legal benchmarks for evaluating lawyers' conduct, and judging allegations of professional misconduct.²³⁴

In the case of disciplinary proceedings instituted against legal professionals, the lawyer whose conduct is being investigated is entitled to a fair procedure, in which his or her rights, including fair trial guarantees are respected and protected. Such proceedings should be conducted "before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court";²³⁵ the lawyer should have the right to be adequately informed of the allegations against him or her, the right to be represented by counsel of choice and to defend themselves and present evidence. Decisions should be reasoned and the sanction, if any, proportionate to the circumstances. The lawyer must enjoy the right to have the outcome of the disciplinary proceeding reviewed by an independent judicial body.²³⁶ The *Singhvi Declaration* explicitly proscribes any disbarment, disqualification or suspension of lawyers not based on the specific provisions in the statutes or other regulations applicable to the legal profession,²³⁷ and outlines the functions and composition of the disciplinary committee that needs to be established by the national bar association(s) to administer disciplinary justice.²³⁸

In South Sudan, the duties of lawyers to observe professional ethics is enshrined in the *Transitional Constitution*.²³⁹ As was mentioned earlier, under the *Advocacy Act 2003*, an Advocates Disciplinary Committee is mandated with considering and determining cases where it is alleged that a lawyer whose name is on the roll has misbehaved in his or her capacity as an advocate. Under the *Act*, the Disciplinary Committee – that appears never to have been established in practice – should consist of the Chairperson of the Law Society, three advocates appointed by the Body of Advocates (which, as noted earlier, by default has only one lawyer who is in the minority, with the Minister of Justice and a judge together having the majority), and two nominated by the Advocacy Committee (on which, again, the majority of members are the Minister of Justice and judges, not lawyers).²⁴⁰

Pursuant to the *Act*, the Disciplinary Committee can order the Registrar to strike a person's name off the roll, suspend a person from practice by way of direct order, or admonish a person including by requiring the refund of money paid or the handover of documents or any other things, as the circumstances require. It exercises this function when a person: is found guilty of misconduct in any professional respect; has been convicted in a final verdict by a court of an offence incompatible with the status of advocate; or was fraudulently inscribed on the roll.²⁴¹ If a person is found responsible for simple misconduct, he or she may be admonished.²⁴² The respondent advocate is given notice of the decision ("direction") of the Disciplinary Committee and may appeal to the Appeals Committee of the Body of Advocates

²³⁴ UN Basic Principles on Lawyers, Principle 29; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I, letter (p). See also Recommendation No. R (2000)21 of the Council of Europe, Principles III.1 and VI.

²³⁵ UN Basic Principles on Lawyers, Principle 27; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I, letter (n).

²³⁶ UN Basic Principles on Lawyers, Principle 28. See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle I,(n-p) letter (o), See IBA, Guide for Establishing and Maintaining Complaints and Discipline Procedures, paras. 7 and 8.

²³⁷ Singhvi Declaration, Article 80.

²³⁸ Singhvi Declaration, Articles 102-106.

²³⁹ Section 136(2) Transitional Constitution.

²⁴⁰ Section 11 Advocacy Act.

²⁴¹ Section 12(1) jo. Section 12(5) Advocacy Act.

²⁴² Section 12(2) Advocacy Act.

within 28 days.²⁴³ The *Act* does not seem to contain any provision attributing to the concerned lawyer the faculty to answer the allegations against him before the Disciplinary Committee takes its decision, either in writing or appearing before the Disciplinary Committee. Once the Appeals Committee has decided on the appeal, its decisions can be appealed to the Court of Appeal.²⁴⁴

As regards the code of ethics, the ICJ mission was told that no code of professional ethics or conduct has ever been drafted or put in place for lawyers in South Sudan.

Conclusions

The elaboration and implementation of codes of professional conduct and discipline for lawyers is essential for offering normative guidance to the members of the profession. Additionally, codes of ethics shall provide the legal basis for the administration of disciplinary justice in cases of professional negligence, ensuring that the eventual sanction is proportional to the professional misconduct committed.

As international standards clearly state, the exercise of fair trial guarantees, including the right to be informed of the allegations of misconduct, to be represented by a lawyer and to be heard and present evidence, must be respected also in disciplinary proceedings. As it was repeatedly highlighted, the legal text formally regulating the profession in South Sudan, i.e. the *Advocacy Act 2003*, was either never implemented, or fell in desuetude. However, it is worth mentioning that, in its formulation, the section of the *Act* relevant to disciplinary proceedings does not seem to envisage any opportunity for the legal professionals to answer the allegations against them, nor is any reference to a hearing before the Disciplinary Committee made, which would have put the *Act* in line with relevant international standards. The Disciplinary Committee also would not have been constituted by a means that fully respected the independent and self-governing character of the legal profession, as the selection of members of the Committee would ultimately be subject to the influence, if not outright control, of the Minister of Justice and judges, rather than lawyers themselves.

²⁴³ Section 12(6)-(7) *Advocacy Act*. According to Section 13(2), the Appeals Committee is appointed by the Body of Advocates and consists of five of its members, i.e. three advocates and two members of the Law Society.

²⁴⁴ Section 13(5) *Advocacy Act*.

VI. Conclusions and recommendations

After decades of armed conflict, the establishment of the rule of law and enhanced protection of human rights in South Sudan are a great opportunity and challenge for the government and its people.

In this new state, the institutionalization of the separation of powers; the establishment of sufficient numbers of adequately resourced courts; law reforms; the building of an independent judiciary and the establishment of an independent legal profession, in sufficient numbers throughout the country; as well as the establishment of a functioning nation-wide legal aid system are a work in progress.

While limited resources does not constitute an excuse for any failure by a state to ensure an independent and effective judiciary and legal profession, the work being done and to be done in South Sudan is impacted by the state of development and the available infrastructure and resources.

In light of the challenges, one cannot overestimate the importance of constitutional, legal and institutional reforms that are currently under discussion in South Sudan, or whose implementation has just started.

With that in mind, and on the basis of research conducted on and in South Sudan, the ICJ formulates the following recommendations.

On constitutional and legal reforms

The ICJ recommends that

- *In relation to the constitutional review process:*
 - It should be ensured that the work of the Constitutional Review Commission is as transparent and inclusive as prescribed by the *Transitional Constitution*, including with respect to the breadth and depth of the relevant consultation processes.
 - In the process of reviewing the current Constitution, all constitutional provisions should be reviewed to ensure their consistency with core international human rights treaties.
 - All possible efforts should be made to guarantee that the Constitutional Review Commission is provided with the human and material resources necessary to complete its tasks by the new deadline of 31 December 2014.

- *In relation to the challenges of law reform:*
 - In the development of a coherent legislative strategy, comprehensive reform of the system for the administration of justice should be prioritized.
 - The legislative reform should ensure harmonization and consistency of the domestic legal framework with international human rights and international standards on the administration of justice. As a basis for such reform, a review of the existing legislation should be undertaken with a view to assessing conformity of existing legislation with human rights and ensuring its harmonization.
 - Reform efforts should include the enactment of enabling legislation for the Law Reform Commission, including to ensure its effective functioning.
 - For the Law Reform Commission to be operational and effective it is necessary that the Commission be given adequate human and financial resources to carry out its tasks. In particular, the staff of the Law Reform Commission should include a number of individuals with expertise in international human rights law and policy, including civil, cultural, economic, political and social

rights. Additionally, the number of staff should reflect the very important and ambitious legislative reform efforts the Law Reform Commission is constitutionally tasked with.

On South Sudan's international human rights obligations

The ICJ recommends that

- *In relation to the accession to international human rights treaties:*
 - South Sudan should immediately deposit instruments of ratification for the African Charter of Human and Peoples' Rights and the Convention on the Rights of the Child;
 - South Sudan should promptly complete the legislative steps for the ratification of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
 - The Government of South Sudan should start the formal process for becoming a party to the remaining core international human rights instruments, i.e. the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention on the Rights of Persons with Disabilities, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
 - South Sudan should initiate an open and comprehensive process to determine, and promptly to adopt, legislative and other measures to ensure the implementation of the provisions of those treaties.
- *In relation to the South Sudan Human Rights Commission:*
 - Adequate funds and facilities should be secured for supporting the work of the South Sudan Human Rights Commission and allowing it to make full use of its investigative and reporting powers in conformity with the *Principles relating to the Status of National Institutions* (the *Paris Principles*). Further consideration should also be given to the attribution to the Commission of prosecutorial powers.

On court structure

The ICJ recommends that

- Renewed efforts should be made to ensure that statutory courts attain the necessary credibility, visibility and accessibility for exercising their exclusive jurisdiction over criminal cases prescribed by law.
- A comprehensive survey and study of customary courts should be commissioned by the government, which includes an assessment of the degree to which such courts are operating in accordance with South Sudanese statutory and constitutional provisions governing their establishment and operation, as well as the consistency of their composition and operations with international standards on human rights, the rule of law, and the independence and impartiality of the judiciary.
- If South Sudan does not abolish the death penalty altogether, the Government must ensure that the death penalty is not imposed by customary courts. For that matter, customary courts should not be exercising criminal jurisdiction at all.
- Capacity building initiatives on international human rights standards should be undertaken in parallel to the above recommendations, especially targeting local chiefs.

- Such initiatives should aim at ensuring that the proceedings before traditional courts respect international minimum standards on the right to fair trial, and ensure respect the equality of all persons, without discrimination, with a view to ensuring the compatibility of customary law and its implementation with human rights principles.

On judicial independence in the statutory courts system

The ICJ recommends that

- *In relation to the principle of separation of powers:*
 - Efforts should aim to build and spread a culture of judicial independence, including within the judiciary, and empower members of the judiciary to resist all undue interferences in their exclusive functions.
- *In relation to judicial appointments and promotions:*
 - A transparent procedure of selection of judges should be put in place, with a central role attributed to a commission constituted by a majority of judges. A functioning Judicial Service Council could play such role, although consideration should be given to modifications to the *Judicial Service Council Act* concerning the composition of the Council so as to ensure that the majority of its members consist of representatives of the judiciary.
 - A mechanism for appealing against decisions related to the selection procedure or its outcomes should be established, in line with international standards.
 - Judicial appointments and promotions should be made according to predetermined, clear and measurable objective criteria, based uniquely on merits and relevant professional qualifications and training. The selection of candidates to the position of judges must ensure equal access to the profession, without discrimination on any ground. In particular, selection procedures should take into account that, although the *Transitional Constitution* calls for a “substantial representation of women” in the judiciary, there are very few women appointed as judges in South Sudan, with no representation in the Supreme Court.
 - The increase of judicial capacity through recruitment of judges and supporting staff who meet selection criteria consistent with international standards should be an absolute priority.
- *In relation to judicial training and continuing professional development opportunities:*
 - The judiciary should be ensured that judges practicing in South Sudan receive training on the operation of the adversarial system, at a very minimum starting from training on the code of criminal procedure and civil procedure. Particularly in light of the profound legal reforms recently adopted, practicing judges should also receive comprehensive training on trial management and legal terminology.
 - Efforts should also be made to ensure that judges are properly trained in the interpretation of the constitutional Bill of Rights in accordance with the relevant principles of customary international law and applicable international treaties.
 - Specific attention should be paid to designing induction courses for newly appointed judges in line with international standards, especially in light of the need for South Sudan to undertake intense recruitment. In the medium- to long-term, a centralized institution responsible for all judicial training should be considered.
- *In relation to judicial discipline and irremovability of judges:*
 - A Judicial Service Council composed as prescribed by international standards should consider specifying in greater detail grounds for removal from office,

- for instance by drafting a code of ethics for judges, in line with international standards on judicial independence.
- The provisions governing disciplinary proceedings in the *Judiciary Act* and the *Judicial Service Council Act* should be amended with a view to integrating an independent review of the decision. Also, the amended provisions should specify that, whenever it is decided that a Board of Discipline should be convened, at least half of its members should consist of judges.
 - As an interim measure, in light of the low number of judges, the judiciary of South Sudan might consider introducing a mechanism for judges from other countries to assist with disciplinary proceedings.
- *In relation to the lack of judicial resources:*
 - The use of mobile courts which administer justice in accordance with international standards should be extended to cover as many regions of the country as possible as an interim measure;
 - Also as an interim measure, recruitment of trial judges from foreign countries with a similar legal system based on common law could be considered, as already done by Zimbabwe, Kenya, Botswana and other African countries.
 - An adequate budget should be allocated to the judiciary to ensure that all its members have access to laws and other reference documents, as well as training materials and textbooks required for the effective performance of judicial functions.
 - Court buildings must be adequately structured and equipped, and court personnel must receive security clearance and ad hoc security training.

On the legal profession

The ICJ recommends that

- *In relation to the admission to practice law:*
 - The adoption and promulgation of a new law regulating the legal profession, in line with international standards on the independence of the profession and relevant best practices from other countries in the region, should be treated as a priority. The process for drafting and adoption of the law should be finalized urgently.
 - Among other crucial aspects, the new law on the legal profession must spell out in a clear and coherent way the requirements for access to the profession, and regulate its modalities. The body responsible for licensing must be constituted in a manner that respects the independent and self-governing character of the legal profession, without external influence. It must bridge the range of professional and linguistic backgrounds found in the legal profession in South Sudan today. The requirements for admission to the practice of law should be drafted in consultation with lawyers operating in the country, including those in private practice.
- *In relation to legal education and training*
 - The necessary resources, in terms of human resources, physical facilities and material equipment, should be provided to the Law Faculty of the University of Juba, to ensure its regular and adequate functioning for the provision of legal education.
 - A system of professional legal training, both at the entry level and as continuous legal education, must be put in place in South Sudan for all legal practitioners (including as was mentioned above, for judges), in line with the requirements of relevant international standards. In particular, it should be ensured that the curricula of all legal training includes international human rights law and standards. To the extent that the Legal Training Institute has been selected as the vehicle for delivery of the system, at least as regards

lawyers, its establishment should be expedited and accompanied by an appropriately broad mandate and adequate resources.

- *In relation to the bar association:*
 - The new law regulating the legal profession must recognize the competence of an independent association of lawyers to self-regulate the profession.
 - The members of the legal profession in South Sudan must establish an independent, self-regulating and operational professional association, preferably as a unifying body representing the entire South Sudanese legal profession. For this purpose, they could seek guidance and assistance from other bar associations in Africa and elsewhere in developing their working practices, which should be consistent with international standards and best practice. Also, the design of the internal structures and governing bodies of the professional association will need to be informed by, and oriented towards, the respect of the standards for independence and the principle of a self-regulating profession.
- *In relation to legal aid and educational programmes for the general public:*
 - The Government of South Sudan must establish and ensure adequate resources for legal aid throughout the country. Such legal aid system must at a minimum ensure the provision of quality legal assistance and representation to people suspected of or charged with a criminal offence, particularly on charges carrying a possible term of imprisonment, and those deprived of their liberty, whether or not charged with a criminal offence, without discrimination. Such legal aid must be available without charge to those who do not have the ability to pay.
 - All persons suspected of or charged with of a criminal offence, and all persons deprived of their liberty, whether or not on a criminal offence, must be promptly informed in a language that they understand, of their right to legal assistance, including legal assistance free of charge for those without sufficient means to pay, and be provided with information about concrete modalities for the exercise of this right.
 - The organized legal profession should take a prominent role in promoting and providing legal aid, by supporting the Government of South Sudan in running the pro bono legal aid system, and encouraging its members to engage in the legal assistance scheme.
- *In relation to the disciplinary system and code of ethics:*
 - Once established, and after a broad consultation with members of the profession, the self-governing professional association of lawyers of South Sudan should elaborate a code of legal ethics for the lawyers of South Sudan that is consistent with widely accepted standards of quality and ethics profession, including with regard to the composition of the organs administering disciplinary justice.
 - Once the code of conduct is adopted, the professional association of lawyers of South Sudan should take appropriate steps to ensure its wide dissemination within the country through all the available means. The bar association should also take the initiative for the organisation of courses to familiarise all legal practitioners with the rules of professional conduct.

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