

# Promoting Human Rights in the Administration of Justice in Southern Sudan. Mandate and Accountability Dilemmas in The Field Work of a DPKO Human Rights Officer

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## 1. Introduction

The last ten years have seen the emergence and rapid establishment of the idea that the promotion of the rule of law and of human rights in post-conflict societies is a central role of United Nations Peacekeeping Operations.<sup>2</sup> The mandate given by the UN Security Council to UNMIS, the peacekeeping mission created to support the 2004 Comprehensive Peace Agreement (CPA) which brought to an end the long civil war between the Khartoum government and the Sudan Peoples' Liberation Movement/Army (SPLM/A) is no exception in this respect. The Security Council decided that the mandate of UNMIS shall be, *inter alia*,

To support implementation of the Comprehensive Peace Agreement by performing the following tasks:

...

To assist the Parties to the Comprehensive Peace Agreement in promoting the rule of law, including an independent judiciary, and the protection of human rights of all people of Sudan through a comprehensive and coordinated strategy with the aim of combating impunity and contributing to long-term peace and stability and to assist the Parties to the Comprehensive Peace Agreement to develop and consolidate the national legal framework.<sup>3</sup>

Two aspects of this paragraph will be at the centre of this paper. Firstly, the resolution establishes a functional link between the promotion of the rule of law and human rights and "long-term peace and stability". Secondly, the role of UNMIS is not to be itself active in law enforcement and criminal justice, but to assist through advice the parties to the CPA in their efforts.

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<sup>2</sup> See Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, [daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement](https://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement), visited on 19 July 2009. See also the *Report of the Panel on United Nations Peace Keeping Operations* (the "Brahimi Report"), A/55/305-S/2000/809.

<sup>3</sup> Security Council resolution 1590 of 24 March 2005, OP 4(a)(viii). OP 4(d) of SC resolution 1590 adds that UNMIS shall "contribute towards international efforts to protect and promote human rights in Sudan." This additional sentence, which does not expressly refer to the parties to the CPA can be understood to cover the UNMIS human rights activities in Darfur, the Darfur conflict not having been addressed by the CPA. In practice, the UNMIS Human Rights section focused nearly exclusively on Darfur until April/May 2007. On 31 July 2007, the Security Council decided the establishment of the African Union/United Nations Hybrid Operation in Darfur (UNAMID). With UNAMID's deployment, UNMIS is no longer competent for Darfur and has been able to focus its attention on the implementation of the CPA, Southern Sudan and the so-called Transitional Areas.

This paper will try to illustrate some of the dilemmas arising in practice for the UNMIS Human Rights Section in carrying out its mandate in Southern Sudan. The first miniature case study concerns the tension between customary law and the protection of women's rights. The second the right to counsel in capital cases in a justice system in which there are hardly any lawyers. The third concerns the absence of any activity or even discussion regarding accountability for atrocities committed during the civil war.

The dilemmas emerging for the UNMIS Human Rights Section in these three areas originate in the variety and inconsistency of the needs, interests and demands it is called to satisfy. As part of the Peacekeeping Mission, the Human Rights Section is required to work in a coordinated and collaborative manner together with the other parts of UNMIS and of the UN presence in Southern Sudan, particularly the UNMIS Rule of Law section and the UNDP Rule of Law section. At the same time, and in this respect it is unique among the civilian components of the Peacekeeping Mission, the Human Rights Section has a double reporting line. It reports not only to the head of the Mission, the Special Representative of the Secretary-General for Sudan (SRSG), but also to the UN High Commissioner for Human Rights.

The UNMIS mandate clearly establishes the claim of the parties to the CPA, in the case of work in the area of administration of justice in Southern Sudan the SPLM-led Government of Southern Sudan (GoSS), to the assistance of UNMIS in the implementation of the peace agreement (as a political process requiring difficult choices and compromises). At the same time, UNMIS Human Rights should address the needs of the human rights "rights holders" in Southern Sudan. UN rule of law work should particularly pay "due attention to the rights and specific vulnerabilities of groups subject to marginalization".<sup>4</sup> The list of stakeholders having legitimate demands vis-à-vis the Human Rights Section does not end here. According to a Guidance Note of the Secretary-General on the "United Nations Approach to Rule of Law Assistance", "UN programmes must identify, support and empower national reform constituencies."<sup>5</sup>

## **2. Brief Background on the Legal System of Southern Sudan and on the Field Presence of the UNMIS Human Rights Section**

The case studies require some information on the background against which they take place. The CPA and the Interim National Constitution (INC) establish Southern Sudan as a semi-autonomous political entity governed by the Government of Southern Sudan (GoSS). In 2006, the Southern Sudan Legislative Assembly (SSLA) enacted the Interim Constitution of Southern Sudan (ICSS). As far as administration of justice is concerned, the CPA, the INC and the ICSS establish Southern Sudan as a completely separate legal and judicial system from the rest of Sudan ("one country, two systems"). The applicable law in Southern Sudan consists of legislation enacted by the SSLA since 2006, legislation decreed by the SPLM Chairman before the CPA, pre-CPA

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<sup>4</sup> Report of the Secretary-General, *Strengthening and coordinating United Nations rule of law activities*, A/63/206, para. 18.

<sup>5</sup> *Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance*, 14 April 2008, p. 4.

Sudanese law, and customary law of Southern Sudan's ethnic communities. International human rights treaties ratified by Sudan are, according to both the INC and the ICSS, directly applicable.<sup>6</sup> They include the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, but not the Convention on the Elimination of All Forms of Discrimination Against Women.

The UNMIS Human Rights Section counted between fifteen and twenty human rights officers based in four offices in Southern Sudan. Other locations were covered through travel. The subjects prioritised by UNMIS Human Rights in Southern Sudan in the years 2007-2008 were administration of justice and violence and discrimination against women. We also worked on supporting the development of the Southern Sudan Human Rights Commission, the "national" human rights institution, and of a network civil society organisations dealing with human rights.

### 3. Customary Law and Chiefs' Courts

A year 2004 study of Customary Law in Contemporary Southern Sudan estimated that over 90 per cent of the day-to-day criminal and civil cases are adjudicated under customary law before traditional justice mechanisms<sup>7</sup>, such as herdsmen, boma courts, and payam courts (in the following "chiefs' courts"). Three years into the implementation of the CPA, little had changed in that respect. The formal justice system was present only in major settlements: in theory down to the level of the county administration seats, in practice there was no judge or prosecutor in about half of the counties. Chiefs' courts dealt with nearly every type of dispute: land disputes, family and personal status matters, criminal offences from the minor to homicide.

The importance of customary law is not only a matter of its de facto predominance in the everyday life of the average inhabitant of Southern Sudan. The right of Southern Sudanese communities to govern themselves according to their customary law is also proclaimed as one of the principal achievements of the CPA. In the words of the first post-CPA Chief Justice of Southern Sudan, Ambrose Riiny Thiuk, "[c]ustomary law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we have fought for these past twenty years. It is self-evident that customary law will underpin our society, its legal institutions and laws for the future".<sup>8</sup> The Machakos Protocol, one of the agreements between the Khartoum Government and the SPLA constituting the CPA, provides that legislation applicable to Southern Sudan shall have its source in values, customs and traditions<sup>9</sup>, particularly

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<sup>6</sup> Article 26(3) ICN and Article 20(4)(b) ICSS provide that the rights set forth in international human rights treaties ratified by Sudan are "integral part" of the constitutional Bill of Rights.

<sup>7</sup> Justice Aleu Akechak Jok, Robert A Leitch, and Carrie Vandewint for World Vision International and The South Sudan Secretariat of Legal and Constitutional Affairs, *A Study of Customary Law in Contemporary Southern Sudan*, March 2004, p. 6, [www.gurtong.org/ResourceCenter/laws/Customary%20Law%20Overview%20in%20South%20Sudan%20March%202004\\_compressed.doc](http://www.gurtong.org/ResourceCenter/laws/Customary%20Law%20Overview%20in%20South%20Sudan%20March%202004_compressed.doc), visited on 22 July 2009.

<sup>8</sup> UNDP powerpoint presentation, *Sudan: Identifying Gaps in Human Rights Protection – Conflict and Post-Conflict Environments*, presented at the Expert Meeting on Human Rights and Traditional and Informal Justice Systems in Africa, organized by OHCHR and the University of Namibia, Windhoek, Namibia, 20-22 June 2007, on record with the author.

<sup>9</sup> The Machakos Protocol, signed at Machakos, Kenya, on 20 July 2002, Article 3.2.3.

in personal status and family law matters<sup>10</sup>. The principle is expressly reiterated in the Interim Constitutions.<sup>11</sup>

UNMIS is called to assist the GoSS in “consolidat[ing] the national legal framework”. That cannot but include customary law. As the authors of the already mentioned study on customary law, however, state, “[t]he majority of southern Sudanese customary law systems show plainly a conflict between international human rights laws and rights granted to women and children in customary law.”<sup>12</sup>

The tension between customary law and human rights can be illustrated with regard to the way domestic violence is dealt with by the authorities. Under international human rights law, a systematic failure of the authorities to protect women who are victims of domestic violence makes them responsible for that violence and may amount to torture.<sup>13</sup> The customary law of Southern Sudanese communities makes it exceedingly difficult for women to escape from an abusive husband. The traditional bride price system means that for the women’s family of origin a divorce could have a disastrous economic impact. Chiefs’ courts frequently impose prison sentences on women who run away from and refuse to return to abusive husbands to prison.<sup>14</sup> In case of divorce, custody over children generally goes to the family of the father, which discourages many women from seeking divorce. The police support this system by refusing to protect women on the ground (well-founded in customary law) that resolving matters of domestic violence is a task of the families, if necessary with the assistance of traditional authority.

UNMIS Human Rights Officers are frequently called to contribute to human rights training for the Southern Sudan police. What message should they convey with regard to domestic violence? Advising police officers that they are under an obligation to intervene in cases of domestic violence and protect battered women and children against abusive men is (or would be, if the advice was followed) tantamount to undermining the authority of traditional dispute resolution mechanisms and of the customary law they apply.

A second of many possible examples: the scope of jurisdiction of chiefs’ courts in Southern Sudan and the procedure followed before them are highly problematic from the point of view of international due process and fair trial rights. The UN Human Rights Committee’s recent authoritative restatement of the right to a fair trial does not envisage a significant role for chiefs’ courts<sup>15</sup>, and appears to require that every chiefs’ court decision be “validated by State courts in light of the guarantees set out in the Covenant”. Government counterparts and traditional leaders in Southern Sudan would most likely perceive insistence by UNMIS on the implementation of this

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<sup>10</sup> *Ibid.*, art. 6.4.

<sup>11</sup> INC Article 5(2), ICSS Article 5.

<sup>12</sup> *A Study of Customary Law in Contemporary Southern Sudan*, *supra* note 6, p. 6.

<sup>13</sup> See UNIFEM, *Not a minute more: Ending violence against women*, 2003, p. 43, and *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, A/HRC/7/3*, pp. 13 *et seq.*

<sup>14</sup> Tenth Periodic Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, 28 November 2008, pages 30-31 and 33 <[www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf](http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf)>, visited on 18 July 2009.

<sup>15</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 24.

principle not only as out of touch with Southern Sudanese reality, but also as incompatible with the role the CPA gives customary law and authority.

The UNMIS human rights and rule of law components are clearly faced with competing, inconsistent expectations. On the one hand, the Secretary-General's Guidance Note and Security Council Resolution 1590 direct that international human rights law must provide the normative framework for their activity. At the end of the day, UNMIS should arguably be held accountable against questions such as: did it provide a meaningful contribution to empowering women to leave abusive relationships? Did it contribute to reducing the number of persons denied legitimate claims or sentenced to fines or prison terms in chiefs' court proceedings which violate international due process standards?

On the other hand, the Government of Southern Sudan and the communities which rely on traditional authority for leadership and dispute settlement have a legitimate expectation that UNMIS use its resources to support and strengthen the traditional order and customary law as a vital aspect of CPA implementation. Their expectation is that the role of chiefs and of customary law, undermined by the decennia of civil war, the resulting displacement and dispersion of communities, by warlordism and by Khartoum's attempts at Islamisation, be strengthened.

In the abstract, there is a clear solution to these conflicting expectations. The ICSS obliges "[a]ll levels of government in Southern Sudan" to "enact laws to combat harmful customs and traditions which undermine the dignity and status of women"<sup>16</sup>. Customary law should evolve to a system in which men and women enjoy equal rights. In the short to medium term, this is, however, only an apparent solution. As the authors of the Study on Customary Law observe, to attempt to impose "individual human rights, particularly those of women, would come in direct conflict with most customary law systems and impact upon the very foundation of the majority of southern Sudanese tribal societies." They add that "[t]he consensus amongst southern Sudanese leaders is [that] change must come from within and at a pace that does not threaten to destabilize a society already under pressure from a myriad of external and internal sources." That pace of change is hardly reconcilable with the time frame in which peacekeeping operations function, or with the cycle in which the UNMIS Human Rights Section reports on the results it achieves.

#### **4. Protecting the Right to Legal Counsel in Capital Cases**

The criminal laws of Southern Sudan retain the death penalty for a number of offences, including murder, which is the only offence for which it appears to have been imposed in recent practice. The International Covenant on Civil and Political Rights, to which Sudan is a party, does not prohibit the death penalty, but surrounds it with strict limitations. One of these limitations is, in the words of the UN Human Rights Committee, that "[i]n cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings."<sup>17</sup>

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<sup>16</sup> ICSS Article 20(4)(b).

<sup>17</sup> General Comment no. 32, *supra* note 15, para. 38.

In Southern Sudan, however, trained lawyers are a scarce resource. According to the Ministry for Legal Affairs and Constitutional Development (MoLACD), there were only 37 lawyers in private practice registered in the whole of Southern Sudan in 2007, 20 of them in Juba, the remainder based in three or four other towns. In seven out of ten States of Southern Sudan there were no lawyers in private practice.

The situation with regard to the death penalty at the beginning of 2008 can be summarized as follows: an apparent lull in executions; dozens of detainees on death row awaiting decisions on their appeals; hundreds of detainees charged with murder held on remand, their trials on hold because of the near paralysis of High Courts and Appeals Courts. The great majority of these capital case defendants were not assisted by defence counsel.<sup>18</sup> The efforts of the Southern Sudanese judiciary to kick start High Courts and Appeals Courts would most likely have resulted in hundreds of persons going on trial for murder without the assistance of a lawyer and being sentenced to death (Southern Sudanese law establishes a presumption in favour of the death penalty in case of conviction on murder charges).<sup>19</sup>

The Ministry for Legal Affairs, which under the Constitution is the government body mandated to “render legal aid” (Article 138(3)) saw no need to act. No requests for legal aid or assignment of counsel from defendants in capital cases had been received. The Ministry’s position was that if donors wished to contribute to the development of a legal aid program, they were welcome to donate funds to a bank account of the Ministry from which attorneys would be paid if requests for legal aid were to be received one day.<sup>20</sup> A majority of the judges and prosecutors with whom I discussed the matter took the view that, as long as the suspect or accused did not request to be assisted by counsel, there was no obligation to inform them of the right to legal aid.<sup>21</sup> A very convenient position, as none of the dozen of capital offence defendants I

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<sup>18</sup> See the letter by four UN independent human rights experts to the Government of Sudan of 10 October 2008, *Report of the Special Rapporteur on extrajudicial, arbitrary or summary executions, Philip Alston, Addendum, Summary of cases transmitted to Governments and replies received*, A/HRC/11/2/Add.1, pp. 398-404, [www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.1.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.1.pdf), visited on 18 July 2009. See also the Tenth Periodic Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, 28 November 2008, page 38, <[www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf](http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf)>, visited on 18 July 2009.

<sup>19</sup> *Report of the Special Rapporteur on extrajudicial executions, supra* note 19, p. 402.

<sup>20</sup> Statement made in the author’s presence at a public meeting at the Southern Sudan Ministry of Legal Affairs and Constitutional Development by the Ministry’s Director for Contracts, Legal Aid and Human Rights, May 2008.

<sup>21</sup> According to several United Nations human rights experts writing to the Government of Sudan in relation to this matter “One important element that is clearly spelled out in the international standards cited above and might not be as clear in Southern Sudanese law is that, where a person accused of a crime carrying the death penalty is not assisted by a lawyer, the investigatory and judicial authorities are under an obligation to inform him of the availability of legal aid.” *Report of the Special Rapporteur on extrajudicial executions, supra* note 19, p. 399.

To be fair, there was some awareness of the issue at the Supreme Court of Southern Sudan, which in August 2007 issued a Judicial Circular advising that defendants sentenced to death or life imprisonment at the conclusion of a trial in which they had not been assisted by a lawyer should be considered to have appealed their sentence, even if they had not filed an appeal. The Circular observes that “[m]any accused persons who are not represented by advocates do not make appeals against the judicial decisions passed against them simply because they are ignorant of their right to appeal. This is their legal and constitutional right which they cannot lose because they are unaware of it.” (Judicial Circular on record with UNMIS Human Rights).

interviewed in Southern Sudanese prisons would have thought on his own motion of asking for the assistance of counsel.

Faced with this situation, UNMIS Human Rights saw an urgent need to raise awareness on the right to assistance by legal counsel and to free legal aid for the indigent, particularly in capital cases (given also the irreversible nature of the death penalty).

The discussion as to how to proceed in practice, however, exemplifies the difficulties arising from the differing demands placed by stakeholders on UNMIS Human Rights. One course of action briefly discussed would have been to directly engage and “empower the rights holders”. Together with staff of a local NGO, UNMIS Human Rights Officers could have gone to prisons (to which they generally enjoyed good access thanks to the work of the UNMIS Corrections Advisory Unit) and informed prisoners of their right to legal aid, thereby potentially prompting a flood of requests for legal aid. This could have convinced the Ministry for Legal Affairs of the need to take the development of a legal aid system seriously. More probably, however, the Ministry would have perceived this as serious interference and resented the attempt to force its hand. Moreover, the expectations thus created among the prisoners by informing them of the right to a defence lawyer were likely to be frustrated. The risk of contributing to the outbreak of prison riots was not negligible. The UNMIS Corrections Advisory Unit was rightly concerned that its government counterpart, the Prisons Service, would have seriously resented this move. Based on these considerations, the idea of directly and systematically informing the prisoners of their entitlement to assistance by counsel and legal aid was dropped as an option.

Instead, in slow negotiations UNMIS Human Rights and UNMIS Corrections Advisory Unit agreed with the Ministry on a program of joint visits to the prisons to raise awareness on the right to legal counsel. It also assisted individual capital defendants in obtaining legal counsel. In the meantime, at least two death row inmates who were never assisted by a lawyer were executed in June and July 2008.<sup>22</sup>

In November 2008, the High Commissioner for Human Rights recommended in a report that “MoLACD should create legal aid centres in each state of Southern Sudan. At least two legal senior counsellors should be assigned to each centre to serve as a public defender in serious cases.”<sup>23</sup> As a realistic time frame for the implementation of this recommendation, the High Commissioner indicated July 2009. As of mid-July 2009, no significant progress appeared to have been made in the number of capital defendants represented by legal counsel, but the Ministry appeared to have acknowledged the need to do its part in the provision of legal aid services.

## 5. Transitional Justice

A driving force behind the surge of UN activities related to the promotion of the rule of law has been the idea that in post-conflict situations durable peace and stability require a coming to terms with massive human rights abuses of the past, whether in the form of criminal proceedings, vetting of public officials, truth and reconciliation

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<sup>22</sup> *Report of the Special Rapporteur on extrajudicial executions, supra* note 19, p. 400.

<sup>23</sup> *Tenth Periodic Report, supra* note 18, p. 51.

commissions, reparations programs, or – ideally – a combination of these instruments, in short, transitional justice.

Security Council resolution 1590 incorporates this principle. It mandates UNMIS “to assist the Parties to the Comprehensive Peace Agreement in promoting ... the protection of human rights of all people of Sudan *through a comprehensive and coordinated strategy with the aim of combating impunity and contributing to long-term peace and stability*” (emphasis added).<sup>24</sup>

In practice, however, UNMIS activities on transitional justice were limited to Darfur (until the establishment of UNAMID). The question of accountability for atrocities committed during the civil war in Southern Sudan<sup>25</sup> was not on the table, neither in practice, nor in UNMIS’s rhetoric and workplans. This complete absence is all the more remarkable in the light of the contemporaneous insistence on combating impunity as a precondition for peace in the context of Darfur. It is of course true that the crimes in Darfur were ongoing, while those alleged to have been committed in Southern Sudan’s civil wars belong to the pre-CPA era. The rhetoric of accountability for serious human rights abuses, however, is based on the assumption that durable peace requires facing impunity. In this respect, it is not indifferent to note reports according to which “[i]n the most deadly spate of intercommunal violence since the end of the 21-year civil war in 2005, more than 1,000 men, women, and children were killed in attacks in Jonglei state in Southern Sudan in March and April 2009. The recent surge in violence prompted UN officials to observe that in 2009 so far the death toll in Southern Sudan has been higher than in Darfur.”<sup>26</sup> In extending the UNMIS mandate on 30 April 2009, however, the Security Council “call[ed] upon UNMIS to strengthen its conflict management capacity by completing as soon as possible its integrated strategy to support local tribal conflict resolution mechanisms in order to maximize protection of civilians”<sup>27</sup>. Bringing those responsible for the March-April 2009 massacres to justice is not mentioned.

The point to be made here is not to criticize the UN’s failure to promote a transitional justice debate in Southern Sudan, which might very well be premature, but to draw attention once more to the tension between different demands UNMIS was required to take into account in this respect. The demands of international human rights standards (which constitute the “normative framework” of UN rule of law work<sup>28</sup>) are exemplified by a Commission on Human Rights resolution on impunity 2005/81. The

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<sup>24</sup> Security Council resolution 1590, OP 4(a)(viii). The resolution is somewhat ambiguous as to whether “combating impunity” is a mandate that is to be exercised primarily with regard to Darfur or also regarding Southern Sudan. The resolution’s preamble recognizes that the parties to the CPA “must build on the Agreement to bring peace and stability to the entire country” and calls on them to “take all necessary action ... to put an end to impunity, including in the Darfur region”. Security Council resolution 1870 of 30 April 2009, which extends the UNMIS mandate by one year, does not mention putting an end to impunity in its preambular paragraphs anymore, which suggests that this demand was intended primarily for Darfur.

<sup>25</sup> Regarding serious crimes against the civilian population in the course of Southern Sudan’s civil wars, see, e.g., Human Rights Watch, *Sudan, Oil, and Human Rights*, 24 November 2003, particularly at p. 132, <[www.hrw.org/en/reports/2003/11/24/sudan-oil-and-human-rights-0](http://www.hrw.org/en/reports/2003/11/24/sudan-oil-and-human-rights-0)>, visited on 21 July 2009. See also D. H. Johnson, *The Root Causes of Sudan’s Civil Wars* (2003), e.g. pp. 205-206, 211, 213.

<sup>26</sup> Human Rights Watch, *No One to Intervene. Gaps in Civilian Protection in Southern Sudan*, June 2009, p. 4, <[www.hrw.org/sites/default/files/reports/sudan0609web.pdf](http://www.hrw.org/sites/default/files/reports/sudan0609web.pdf)>, visited on 22 July 2009.

<sup>27</sup> Security Council resolution 1870, OP 15.

<sup>28</sup> Secretary-General’s Guidance Note, *supra* note 5, page 2.

Commission “[recognised] that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as genocide, crimes against humanity, war crimes and torture in accordance with their international obligations in order to bring them to justice, and urge[d] all States to take effective measures to implement these obligations”.<sup>29</sup>

In Southern Sudan, however, there appeared to be no (audible) call for justice with regard to human rights violations committed during the civil war from any political actor, community, civil society group or other stakeholder. Not only was there no request from the GoSS to UNMIS for assistance in dealing with transitional justice needs, there was complete silence on the issue.

UNDP’s Global Programme for Strengthening the Rule of Law in Post-Conflict Situations provides clear guidance on what UNDP officials in the field shall do in such a situation. UNDP will work to address transitional justice (only) “[w]hen specifically requested by [the] host government”.<sup>30</sup> The Secretary-General’s Guidance Note on the one hand commits UN rule of law activities to human rights principles, including that the UN will not “endorse peace agreements that allow for amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights”.<sup>31</sup> On the other hand, the Guidance Note stresses the importance of “national ownership” and recognizes that “[n]o rule of law programme can be successful in the long term if imposed from outside. Process leadership and decision-making must be in the hands of national stakeholders.”<sup>32</sup>

Under the heading “support[ing] national reform constituencies”, the Guidance Note can be read to demand that UNMIS should “identify, support and empower ... national stakeholders [who will] debate and outline the elements of their country’s plan to strengthen the rule of law and secure sustainable justice. ... The UN must encourage outreach to all groups in society, and support public awareness and education campaigns and public consultation initiatives.”<sup>33</sup> To put this principle into practice, UNMIS could try to promote a nation-wide consultation on accountability for crimes perpetrated during the civil war years along the lines of the consultation carried out by the Afghan National Human Rights Commission to collect the views of ordinary Afghans on transitional justice needs.<sup>34</sup> It is however fair to assume that, even if UNMIS attempts to stoke a debate on accountability for past crimes took the form of “supporting national reform constituencies”, many in the GoSS would perceive it as a threat to CPA implementation and, therefore, as contrary to the central purpose of UNMIS presence.

## **6. Conclusion: The Limits of Accountability for the Policies Pursued and Results Obtained by UNMIS Human Rights**

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<sup>29</sup> Commission on Human Rights resolution 2005/81 of 21 April 2005, OP 2.

<sup>30</sup> UNDP, *Strengthening the Rule of Law in Conflict- and Post-Conflict Situations, A Global UNDP Programme for Justice and Security 2008-2011*, p. 9.

<sup>31</sup> Secretary-General’s Guidance Note, *supra* note 5, page 2.

<sup>32</sup> *Ibid.*, p. 3.

<sup>33</sup> *Ibid.*, p. 5.

<sup>34</sup> See Afghanistan Independent Human Rights Commission, *A Call for Justice, A National Consultation of Past Human Rights Violations in Afghanistan*, <[www.aihrc.org.af/Rep\\_29\\_Eng/rep29\\_1\\_05call4justice.pdf](http://www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf)>, visited on 2 August 2009.

The three case studies on customary law, legal aid and transitional justice show the difficulties of the UNMIS Human Rights Section to “deliver”, jointly with other parts of UNMIS and of the UN presence in Southern Sudan, the tangible contribution to the protection and promotion of human rights expected from them.

Any discussion of the results obtained by UNMIS in Southern Sudan in the field of rule of law and human rights needs to start by acknowledging and, as far as possible, visualizing the disproportion between the promise or claim made and the means available. To deal with the promotion of human rights in the administration of justice (among other human rights and rule of law concerns), UNMIS deployed, on average, less than twenty professional staff in the UNMIS Human Rights and the Judicial Advisory Units in Southern Sudan. The UNMIS Rule of Law Corrections Advisory Unit and UNMIS police, whose role can be described as providing mentoring to the Southern Sudan police service, can be added to the count, although the focus of their work does not lie in the areas discussed in this paper. To these UNMIS staff members we can add another ten professionals working on the same matters for the UNDP Rule of Law unit, UNICEF, UNHCR, and other agencies. In the area of customary law, their task was, or rather would have been, to engage with the traditional justice systems of the more than 40 peoples of Southern Sudan, each with their distinct set of traditional non-codified laws. A task complicated by language barriers, lack of understanding of cultural norms and practices, and the sheer vastness of Southern Sudan, where many areas are cut off completely during the almost 9 months of rain season.

### 6.1. *Accountability Vis-à-Vis Headquarters*

The immensity of the task and the inadequacy of the means at UNMIS’ disposal do not obviate the question whether and how UNMIS Human Rights and other sections of UNMIS in Juba can be held accountable for the results they achieve in carrying out their mandate to assist the Parties to the CPA in the protection of human rights. The UN has placed great emphasis in recent years on asking administrative units, their managers and staff not only to respect laws, rules and regulations, but also to account for the achievement of results. The introduction of so-called “results-based management” and “results-based budgeting” are intended as key tools in this quest for greater accountability.<sup>35</sup>

A review of results-based management at the UN by its own Office for Oversight Services (OIOS), however, points to serious limitations this approach is encountering in practice, which are particularly relevant to the kind of activity and results pursued by a human rights field operation. The actual “results often depend on actions that are outside [the managers’ and staff’s] own control” and “they cannot be reasonably be held responsible”<sup>36</sup> for them. Because “[m]anagers ... are most comfortable with

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<sup>35</sup> According to a review of results-based management at the UN by the UN’s Office of Internal Oversight Services (OIOS), “[r]esults-based management involves focusing on what occurs beyond the process of translating inputs into outputs, namely outcomes (or “expected accomplishments”) to which it seeks to bring accountability.” (Office of Internal Oversight Services, *Review of results-based management at the United Nations*, A/63/268, p. 1).

<sup>36</sup> *Ibid.*, p. 11, para. 18.

result statements that correspond to what they are able to control”<sup>37</sup>, the results to be achieved tend to be formulated in terms of activities to be carried out rather than in terms of impact on the human rights situation. In practical terms of UNMIS’ reality, this means that the organisation of workshops for Southern Sudanese officials and civil society representatives becomes a main focus of work, not only because of their promise for capacity building, but because the workshop’s taking place is a measurable result which can be reported.<sup>38</sup> While I have only anecdotal observations and no hard data to support this, I would argue that efforts to bring more accountability to the work of DPKO human rights field sections are producing a shift from other activities to the organization of workshops. Whether the additional workshops have any added beneficial impact on the human rights situation is a question that is more difficult, not to say impossible, to measure and state.

The multitude and fragmentation of UN actors assigned to the promotion and protection of human rights and the rule of law in Southern Sudan (as in other countries with a DPKO mission), could also be seen as an obstacle to accountability of each section or unit for the results it delivers. The Secretary-General’s Guidance Note on the UN Approach to Rule of Law Assistance explicitly links coherence and comprehensiveness of the strategic approach, coordination between entities across the UN system and the clear assignment of “accountabilities and implementation responsibilities”<sup>39</sup>. The clearer allocation of responsibilities should make it easier to hold the managers of field operations in the areas of rule of law and human rights accountable for the results obtained.

The last three years have seen considerable efforts to develop structures and guidelines for the high-level coordination of the rule of law assistance work done in the UN system. In addition to issuing the Guidance Note, in 2007 the Secretary-General established an inter-agency Rule of Law Coordination & Resource Group (RoLCRG).<sup>40</sup> In the Department of Peacekeeping Operations, an Office of Rule of Law and Security Institutions (OROLSI) was established. OROLSI’s core function is to “provide expertise, integrated guidance and support to United Nations

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<sup>37</sup> *Ibid.*

<sup>38</sup> The same point appears to be made, in general terms and management-science language in the OIOS *Review of results-based management at the United Nations* (*supra*, note 35, at p. 11, para. 19), which observes that “[a]lthough some expected accomplishments do reflect change at the level of outcomes, there are also many expected accomplishments and associated indicators of achievement that have been formulated at the level of activities and outputs, typically the number of meetings organized or website visitors, the volume of documents disseminated, the number of Member States attending meetings ...”.

<sup>39</sup> Secretary-General’s Guidance Note, page 4, para. 7. The Guidance Note states at the outset (para. 1) that “the dispersal of various rule of law entities has made it difficult for the United Nations system to act and deliver in a coherent and coordinated manner. This is a complex field of work, and our assistance to date has suffered from a lack of high-level guidance to address this.”

<sup>40</sup> See the 2009-2011 Joint Strategic Plan of the Rule of Law Coordination & Resource Group, particularly para. 9. It is chaired by the Deputy-Secretary General, consists of the heads of the Department of Political Affairs, Department of Peacekeeping Operations, Office of the High Commissioner of Human Rights, Office of Legal Affairs, UNDP, UNICEF, UN Development Fund for Women, UNHCR and UNODC, and is supported by a Rule of Law Assistance Unit within the Office of the Deputy-Secretary-General. The “DSG’s Rule of Law Unit serves as a system-wide mechanism to enhance coordination and inter-agency collaboration, overseeing a one-UN approach to the Rule of Law.” See also *Strengthening the Rule of Law in Conflict- and Post-Conflict Situations, A Global UNDP Programme for Justice and Security 2008-2011*, p. 29.

peacekeeping operations in support of the development and reform of rule of law and security institutions”.<sup>41</sup>

While these initiatives and newly created structures will certainly bear their fruits, it will be good to also remain aware of the limits of what can be achieved through improved coordination and coherence. It is difficult to see how increased “integrated guidance”, “coordinated delivery” and the clear assignment of “accountabilities and implementation responsibilities”<sup>42</sup> could overcome the fundamental inconsistencies between the demands placed on, for instance, the UNMIS Human Rights Section. The tension between respect for the customary laws of the peoples of Southern Sudan as a central promise of the CPA and the call for equality between women and men as a fundamental dictate of international human rights law cannot be overcome by better guidance and enhanced coordination within the UN. It is an insurmountable part of the reality in which UNMIS operates. Similarly, the UNMIS Human Rights and Corrections Advisory Units cooperated excellently, but that could not solve the tension between the demands of, on the one hand, informing prisoners of their right to counsel and, on the other, of not creating expectations that cannot be fulfilled and thereby arousing tensions between prisoners and authorities.

Indeed, the inconsistent demands placed on the human rights component of UNMIS can be seen as an example of what has been identified as the “conflictual promises” of the United Nations’ rule of law agenda for post-conflict societies. It has been argued that two central components of this agenda, promoting international norms, such as human rights norms, and facilitating national ownership “cannot [in some situations] be satisfied contemporaneously”<sup>43</sup> – an argument which the case studies in this paper bear out.

In the case of transitional justice, high-level policy development and coordination might be able to provide on paper guidelines that are compatible, at the same time, with Security Council resolution 1590, with human rights principles regarding impunity and with UNDP’s Global Programme for Strengthening the Rule of Law in Post-Conflict Situations. The real tension, however, lies not between the slightly different approaches these documents take to the relationship between “national ownership” and combating impunity. It lies between, on the one side, the need not to rock the fragile boat of the CPA implementation process by discussions about the implication of important players in past atrocities and, on the other, the claim that victims and survivors have an inalienable right to see the prosecution of those responsible for war crimes and crimes against humanity.

The inconsistency between various legitimate demands UNMIS Human Rights was confronted with in the fields of customary law, the right to legal counsel and transitional justice raises the question of the extent to which accountability for measurable results in such areas can be meaningfully pursued.

## 6.2. *Accountability Vis-à-Vis the Host Government and Local Stakeholders*

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<sup>41</sup> The Way Forward: A strategic approach for the Office of Rule of Law and Security Institutions, approved 23 July 2008.

<sup>42</sup> Secretary-General’s Guidance Note, page 4, para. 7.

<sup>43</sup> S. Vig, “The Conflictual Promises of the United Nations’ Rule of Law Agenda: Challenges for Post-Conflict Societies”, 13 *Journal of International Peacekeeping* (2009) p. 131.

The above considerations have focused on the question of, managerial rather than legal, accountability of the human rights field operation vis-à-vis headquarters, i.e. the High Commissioner for Human Rights, the Secretary-General and the Security-Council. What about accountability mechanisms available to the other stakeholders recognised as having legitimate interests in the results of UNMIS Human Rights in Southern Sudan?

Where a UN human rights field presence is subject to periodic renewal or renegotiation of the mandate (as OHCHR stand-alone offices in countries such as Colombia, Guatemala, Nepal and Uganda are), this process gives the host government a mechanism to hold the UN field presence accountable for policies pursued and results obtained. This leverage is available to a far lesser extent in the case of human rights sections of peace-keeping missions established by the Security Council. The GoSS retained, however, the possibility to make its views on the performance of the UNMIS Human Rights Section heard. The Technical Assessment Mission (TAM) dispatched by DPKO in September 2007 to review the mandate and activities of UNMIS, including its human rights and rule of law activities, provided an opportunity to the GoSS to voice satisfaction or discontent over the field operation's accomplishments and to state its views on necessary changes. In addition to such ad hoc mechanisms, there are also regular diplomatic channels.

Informal mechanisms available to the GoSS and its departments and agencies interacting with UNMIS Human Rights provide further, and in practice more important, opportunities for the government to make its position as stakeholder felt. The capacity to cooperate with UNMIS Human Rights or withhold cooperation, wielded by the Southern Sudan police, the judiciary, the prisons service and the national human rights institution, is the most effective means to hold UNMIS Human Rights "accountable". The presence of a plurality of donors offering their capacity building services in the areas of human rights and the rule of law strengthens the position of the GoSS in what basically is a "buyers' market".<sup>44</sup>

I have argued above that, also on the basis of the Secretary-General's Guidance Note, a number of other groups are recognised as holding a stake in the activities of UNMIS Human Rights as well. They include the population in general (each individual as holder of rights which UNMIS Human Rights is mandated to promote), and particularly vulnerable groups, such as women, children, detainees, persons who have been victims of grave rights violations, as well as traditional authorities, civil society groups and reform constituencies. In the case of Southern Sudan, because of their weakness, these stakeholders had significantly less capacity to exercise influence over the activities of UNMIS Human Rights.

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<sup>44</sup> In this respect, it could be argued that improved coordination among different parts of the UN system (and between the UN and other donors) in the area of promotion of rule of law and human rights would weaken the host government's possibilities to exercise its position as stakeholder. The Southern Sudan police, for instance, could choose between offers of advice on police reform and capacity building for the police from different parts of the UN field presence and non-UN donors. Because donors (including UN field presences) are under pressure to engage with the host government, this choice, which would likely be reduced by enhanced coordination between the different parts of the UN, gives the government leverage over the aims and contents of UN activities – and thus a form of accountability mechanism.

The capacity of the “rights holders” to informally hold UNMIS Human Rights accountable for its activities is significantly less than that of the “duty bearer”, the GoSS. The case studies discussed in this paper highlight the potential for tension between respect for the interests and aims of Southern Sudanese government institutions and the promotion of international human rights norms to the benefit of rights holders. The difference in capacity to influence UNMIS Human Rights could bring with it the risk that accountability to external stakeholders might result in the interests of the governmental duty bearers prevailing whenever a conflict between inconsistent principles informing the activity of UNMIS Human Rights arises.

In practice, however, the importance and legitimacy of the demands and expectations vis-à-vis the UNMIS human rights field presence advanced by the most diverse stakeholders, from the Security Council and Member States to the formerly warring parties, from traditional authorities to vulnerable groups, including women and children, means that – however incompatible some of the demands may be – none can be entirely sacrificed. All have to be pursued, at the risk of appearing ineffective, inconsistent, or even hypocritical. It may be that the conflicting promises cannot be satisfied contemporaneously, but I would argue that in the work of a DPKO human rights field presence there is no alternative to continuing to pursue them contemporaneously.