

# Post CPA: Restructuring and Enhancing the Sudanese Judiciary as a Means of Preserving Peace

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## Introduction

Sudan has the distinction in Africa in enduring the longest civil war on the continent. The country has been ravaged intermittently by a protracted civil war -the so-called north-south civil war, which has long been perceived as a clash between Muslim northerners and Christian southerners. Ethnicity, religion, identity, the legacy of the exploitative colonial rule<sup>1</sup> and underdevelopment were the issues around which that conflict revolved. One could trace the root-causes of the north-south conflict to the invasion of the south from the north as a result of the Egyptian exploration and expansion southwards, and the simultaneous development of slave trade. In addition, the British rule contributed in different ways to the crystallizing of the north-south dichotomy. During the colonial era, the British administered the Southern Sudan as a separate region from the north,<sup>2</sup> albeit as a part of the Sudanese territory<sup>3</sup> and concentrated development projects in the centre.<sup>4</sup> The segregation policy had resulted in acute economic disparity- thus, greatly fostering the north-south division and sowed the seeds of deep-seated resentment. This was compounded by the emulation of this policy by successive post-colonial governments, which provoked dissatisfaction amongst the southerners and triggered two civil wars that pit the northerners and southerners against each other for decades.

The north-south conflict started just a year before the independence in 1956 and ended in 1972. The conflict broke out once again in 1983 when then President Nimeri abrogated the Addis Ababa Agreement which ended the conflict in 1972. After a series of peace talks, in 9 January 2005, the parties to the conflict – the Government of Sudan (GoS) and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA) – signed a Comprehensive Peace Agreement (CPA) that put an end to the conflict. While it is true that

<sup>1</sup> *Douglas Johnson*, The Root Causes of Sudan’s Civil War, Indiana University Press Publisher, Oxford, 2003, p.1.

<sup>2</sup> *Ibid*, p.26.

<sup>3</sup> *Dustan Wai*, the African-Arab Conflict in the Sudan, African Publishing Company, London, 1981, p. 85.

<sup>4</sup> *Wai*, the African-Arab Conflict in the Sudan, p. 62.

the CPA ended the north-south conflict, a strong and lasting peace between the north and the south may prove elusive unless Sudan can translate the provisions of the CPA into reality. Societies emerging from conflict, have adopted, in their attempt to sustain peace, a myriad of measures, i.e., criminal prosecutions, institutional reform, etc. While criminal prosecution may play a role in sustaining peace; nonetheless, in divided societies with violent pasts tackling the root-causes of the conflict, i.e., reforming the institutions and addressing the status of the past laws may also preserve peace.<sup>5</sup> The CPA attempts to address the root-causes of the north-south conflict. To this end, it provides for measures to uphold the ideals of the rule of law (Bill of Rights),<sup>6</sup> establishes a dual legal system (a *Sharia*/secular system) to exist side by side,<sup>7</sup> a Southern Sudan Judiciary<sup>8</sup> and a State Judiciary<sup>9</sup> besides the existing National Judiciary.

Thus, the underlying question that this paper seeks to address is: to what extent restructuring and enhancing of the judiciary can play a role in sustaining peace in Sudan. While it is too early to judge whether the judiciary would play a role in sustaining peace, it can be said with certainty that the judiciary plays a crucial role in settling disputes, thereby narrowing the chance of inter-communal conflict.<sup>10</sup> The impact of the judiciary on to the preservation of peace is contingent on the Constitution, the character of the substantive law and the efficiency of the court system.<sup>11</sup> In order to assess the impact of a restructured judiciary on the preservation of peace in Sudan, it should be evaluated against the legal framework which has been adopted– that is the Interim National Constitution (INC), 2005.

In doing so, Part 1 provides a general description of the history of the north-south conflict. Part 2 firstly describes the structure of the court system in Sudan, secondly considers the principles that govern the work of the judiciary with reference to the changes that have been introduced to the judiciary, and concludes by evaluating the existing judiciary and its impact on preserving peace in Sudan. Part 3 discusses the transitional justice mechanisms

<sup>5</sup> Cf. *Rosanna Lipscomb*, Restructuring the ICC Framework to advance Transitional Justice: A Search for A Permanent Solution in Sudan, *Columbia Law Review* 106 (2006), 185(195). Cf. *Vivien Hart*, Constitution-Making and the Transformation of Conflict, Peace and Change, 26(2001), 153(166); Cf. *Kirsti Samuels*, Post-Conflict Peace-Building and Constitution-Making, *Chicago Journal of International Law*, 6(2005-2006) 663(664).

<sup>6</sup> Cf. Chapeau of the Comprehensive Peace Agreement; Chapter I “Machakos Protocol” (Art. 1.1); Chapter II “Power-Sharing Protocol” (Arts. 1.6, 1.4); Chapter II “Power-Sharing Protocol” (Art. 1.6).

<sup>7</sup> Chapter I “Machakos Protocol” (Art. 3.2.2 et seq)

<sup>8</sup> Chapter II “Power-Sharing Protocol” (Art. 3.7 et seq)

<sup>9</sup> Chapter II “Power-Sharing Protocol”(Art. 4.6 et seq)

<sup>10</sup> *Jennifer Winder*, Courts and Democracy in Post Conflict Transitions: A Social Scientist’s Perspective on the African Case, *American Journal of International Law* 95(2001), p. 64 et seq.

<sup>11</sup> *Ibid*, p. 64.

under the CPA and the competence of the judiciary to settle past grievances as a means of preserving peace. Part 4 concerns with the relevancy of the international community's rule of law related activities in Sudan to the enhancement of the Judiciary. Finally, Part 5 provides a conclusion by reflecting on the preceding parts.

## Part I Historical Background to Sudan's North-South

### 1. North-South First Civil War 1955-1972

The first phase of the north-south conflict started in 1955, even before the independence of Sudan in 1956, as a local rebellion (*Torit* mutiny) and developed into a full scale of civil war that continued till 1972. Shortly before the independence, a *Sudanization* process of civil service was carried out to replace the British officials by Sudanese ones. That process resulted in appointing northerners in senior positions and left six positions to the southerners.<sup>12</sup> The result of *Sudanization* was compound with a number of additional factors that contributed their share in igniting the conflict. In 1960s, then President Abboud attempted to unite the north with the south. For this, he pursued a policy of assimilation by restricting the activities of Christian missionaries and introducing Arabic in the South.<sup>13</sup> As a consequence, a guerrilla army (*Anyanya*) which later evolved to form the Southern Sudan Liberation Movement (SSLM) demanded the independence of the south from Sudan.<sup>14</sup>

In 1972, the conflict came to a halt when President Nimairi and the leader of SSLM signed the Addis Ababa Agreement, which provided the South with regional autonomy by creating the Southern Regional Government with its legislative (Regional Assembly) and executive (High Executive Council) organs.<sup>15</sup> The Regional Assembly was empowered to elect and remove the President of the High Executive Council, albeit subject to the confirmation of the national president.<sup>16</sup> The South had power to legislate on issues related to the preservation of public order, internal security, efficient administration, and the development of the

<sup>12</sup> *Wai*, The African-Arab Conflict in the Sudan, pp. 55-77.

<sup>13</sup> *Johnson*, The Root Causes of Sudan's Civil Wars, p. 30 et seq.

<sup>14</sup> *Yehudit Ronen*, Religion and Conflict in Sudan: A Non-Muslim Minority in a Muslim State, in: Minorities and the State in the Arab World, Bengio and Den-Dor (eds), Lynne Rienner Publisher, London, 1999, 73(76); Cf. *Barnaba Benjamin*, The Sudan People's Liberation Movement/Army (SPLM/A) and the Peace Process in: Sudan Peace Process Challenges & Future Prospects, Adar, Nyuot Yoh, Maloka (eds), Africa Institute of South Africa, 2004, p.43.

<sup>15</sup> *Hassan El-Talib*, Sudan Government and the Peace Process in: Sudan Peace Process Challenges & Future Prospects, Adar, Nyuot Yoh, Maloka (eds), Africa Institute of South Africa, 2004, p. 25.

<sup>16</sup> Chapter V and Chapter VI of the Self-Government Act (Art. 13 & 19)

Southern Region in cultural, economic, and social fields.<sup>17</sup> As to the participation in national policymaking, the southern Regional Assembly was empowered, by a two-thirds majority, to request that a national law it deemed incompatible with the southern welfare be postponed from entering into force, but the national president 'may, if he thinks fit, accede to such request'.<sup>18</sup> Hence, the Regional Assembly could only request (but not demand) the national president to exempt the southern region from any national legislation it considered detrimental to the south's interests.<sup>19</sup> As such, the Regional Assembly was subordinated to the central government, as the constitutional arrangements of the Agreement fell short of a truly federal structure. The Agreement was embodied in the 1972 Southern Sudan Regional Self-Government Act (constituted the organic law of the Southern Sudan), and which was later incorporated in the 1973 permanent constitution of Sudan.

## 2. North-South Second Civil War 1983-2005

The civil war resumed in 1983. Its beginning was attributed to the general application of *Sharia* law throughout Sudan by President Nimairi, in 1983, and the abrogation of Addis Ababa Agreement.<sup>20</sup> The Sudan Liberation Movement (SPLM/A) was formed and fought the second conflict. Its declared objectives were contrary to those of the Movement that fought the first war. The SPLM/A's demands were linked to the creation of a united Sudan, "based on multi-party democracy, secularism and equality of all people before the law".<sup>21</sup>

A series of peace talks were initiated to end the conflict, but for a long time were in vain and superseded by fighting. In 9 January 2005, under the auspices of the Intergovernmental Authority on Development (IGAD) and the international community, a Comprehensive Peace Agreement (CPA) was reached. The CPA is not a single agreement, but a group of separate protocols on different issues that were negotiated and signed progressively.<sup>22</sup> It is worthy to note that the CPA is significantly different from the Addis Ababa Agreement in that it, *inter alia*, distributes evenly the wealth between the north and the south,<sup>23</sup> fixes a

<sup>17</sup> Art. 11 of Self-Government Act

<sup>18</sup> Art. 14 of the 1972 the Self-Government Act

<sup>19</sup> Art. 15 of the 1972 the Self-Government Act

<sup>20</sup> *Abel Alier*, Southern Sudan: Too Many Agreements Dishonoured, Exeter: Ithaca, 1990, p. 225.

<sup>21</sup> *Yehudit*, Religion and Conflict in Sudan: a Non-Muslim Minority in a Muslim State, pp.79, 83.

<sup>22</sup> The Text of Comprehensive Peace Agreement is Available at [http://www.mpiil.de/ww/en/pub/research/details/know\\_transfer/sudan\\_peace\\_project.cfm](http://www.mpiil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project.cfm).

<sup>23</sup> Cf. the Wealth-Sharing Protocol (Art.5.6) and Power-Sharing Protocol (Arts. 1.3; . 2.5.5)

timetable for determining the future of the south,<sup>24</sup> and establishes a *Sharai'a/* secular system to exist side y side.<sup>25</sup>

### 3. The Impact of the CPA on the Sudanese Legal System

The conclusion of the CPA resulted in the adoption, in July 2005, of a new constitution (the Interim National Constitution (INC)), as supreme law.<sup>26</sup> A National Constitutional Review Commission (NCRC), which was set-up by the CPA<sup>27</sup>, drafted the INC, as a legal framework for the transitional period.<sup>28</sup> As to the constitutional-making process, strong criticisms have been levelled against its exclusivity; especially the Sudanese populace was not consulted in the constitutional-writing process.<sup>29</sup> The exclusivity of the drafting-process might be explained on the grounds that the composition and the mandate of the NCRC itself<sup>30</sup> was inextricably connected to, and derived from the CPA; and the CPA in itself, was strictly bilateral (the ruling Party and SPLM/A), leaving other segments of the Sudanese society unrepresented.

#### a) *The Interim National Constitution*

The INC reflects certain principles as stipulated in the CPA, in particular, the structure of governance,<sup>31</sup> the judiciary<sup>32</sup> and a certain catalogue of human rights.<sup>33</sup> In effect, the CPA

<sup>24</sup> Chapter I "Machakos Protocol" (Art. 1.3)

<sup>25</sup> Chapter I "Machakos Protocol"

<sup>26</sup> Chapter I "Machakos Protocol" (Art. 3.1.1); Chapter II Part II "Power-Sharing Protocol" (Art. 2.12.7); Art. 3 of the INC. The Text of the Sudanese Interim National Constitution and Interim Constitution of Southern Sudan are available at: [http://www.mpil.de/shared/data/pdf/inc\\_official\\_electronic\\_version.pdf](http://www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf).

<sup>27</sup> Chapter I "Machakos Protocol" (Art. 3.1.2)

<sup>28</sup> Chapter I "Machakos Protocol" (Arts 3.1.2, 3.12.5)

<sup>29</sup> Cf. Philipp, Dann/Al-Ali, Zaid , The Internationalized Pouvoir Constituant- Constitution-Making Under External Influence in Iraq, Sudan and East Timor, Max Planck UNYB 10 (2006), Armin von Bogdandy, Rüdiger Wolfrum (eds.), Martinus Nijhoff Publishers, Leiden., 424(458-59).

<sup>30</sup> The Power Sharing Protocol fixes a formula for the composition of the NCRC as follows: 52% for the GoS (the ruling party, that is, National Congress Party), 28% for the SPLA/M, 14% for other northern political forces and 6% for other southern political forces. The NCRC should take decisions by consensus, but if not possible by a two third majority, thus, the parties to the CPA (GoS and SPLA/M) could exclude the voices of other forces.

<sup>31</sup> Chapter II "the Power-Sharing" (Art. 2.12.5, Art. 2.12.9); Compare Chapter II Part V "Power Sharing Protocol Schedules with the Schedules of the INC; Compare Chapter II "Power-Sharing Protocol" (Art.1.3) with Art. 24 of the INC; Compare Chapter II "Power-Sharing Protocol" (Art. 1.4) with Art 25 of the INC

did not only define the substance of the INC, but also “in the event of a contradiction [between the CPA and the INC], the terms of the Peace Agreement … prevail [over the INC]”.<sup>34</sup> Thus, the CPA was considered minimum standards against which the INC was formulated. One can describe the INC “as partly a peace agreement and a partly a framework setting-up the rules”<sup>35</sup> by which Sudan is to be governed period during the interim period.

The INC provides for specific changes in the justice system. In particular, it establishes the Southern Sudan Judiciary and the State Judiciary besides the already existing the National Judiciary.<sup>36</sup> Importantly, it provides for a Bill of Rights<sup>37</sup> that embraces a number of international and regional human rights treaties that Sudan has ratified and a dual legal system (*Sharia/ secular*). National laws applicable in the Northern Sudan have as their source *Sharia* law and consensus of the people, while laws applicable in Southern Sudan are based on the “customs and traditions of the people of Southern Sudan [and the] popular consensus of the people of Southern Sudan”.<sup>38</sup> The drive for a secular-based legal system for the Southern Sudan is an attempt to redress the legacies of past injustice that triggered and fueled the conflict.

Furthermore, the INC restructures the prevailing political powers by establishing a decentralized system of government with four levels of government: the National Level of Government at apex, the Government of Southern Sudan, state level (25 states (sub-units), and local level.<sup>39</sup> The different levels of government exercise their respective sphere of competence in accordance to the schedules that annexed to the text of the INC. The INC, unlike the CPA, does not expressly spell the term “federal”. Instead, the INC describes Sudan as “a decentralized State, with [four] levels of government …”.<sup>40</sup> Close reading of the principles that govern the manner of distribution of power (concurrent, exclusive or

<sup>32</sup> Compare Chapter II Part II “Power-Sharing Protocol” (Art. 2.11.4) with Art. 123-131 of the INC

<sup>33</sup> Compare Chapter II Part I “Power-Sharing Protocol” (Art. 1.6) with Arts 27-47 of the INC

<sup>34</sup> Chapter II Part II “Power-Sharing Protocol” (Art. 2.12.5)

<sup>35</sup> Cf. *Kirsti Samuels*, Post-Conflict Peace-Building and Constitution-Making, *Chicago Journal of International Law*, 26(2005-2006)

<sup>36</sup> Art. 123, 172 & Art. 181 of the INC

<sup>37</sup> Arts 27-47 of the INC

<sup>38</sup> Cf. Art. 5 of the INC

<sup>39</sup> There are three level of government in the North (national, state and local), and four in the South (national, Southern Sudan, state and local). Article 171(1) of the INC

<sup>40</sup> Art. 24 et Esq. of the INC

residual) indicates that the INC creates “asymmetrical constitutional relationship”<sup>41</sup> between the central government, Government of Southern Sudan, state level, as the INC grants the south substantial powers in comparison with other regions.

*b) The Interim Constitution of Southern Sudan*

The CPA provides for the enactment of an Interim Constitution for the Southern Sudan (ICSS)<sup>42</sup> and some 25 transitional state constitutions.<sup>43</sup> Once again, the text of ICSS repeats certain provisions of the INC and the CPA, as the INC is the supreme law with which all other constitutions must comply. What is more, the INC mandates the National Ministry of Justice to ensure the compatibility of the ICSS and the state constitutions with the INC by issuing “certificate of compatibility”.<sup>44</sup> As such, the ICSS and the state constitutions could come into force unless and until the National Ministry of Justice “certified” that there were no conflict between them and the INC. The enactment of the ICSS is a fundamental change in contrast with the Addis Ababa Agreement that resulted in the 1972 Southern Sudan Self-Government Act which was incorporated in the 1973 Permanent Constitution. The south now has a detailed written constitution that gives greater recognition to the peculiarity of the Southern Sudan’s circumstances (culturally, linguistically, and religiously).

## Part II Overview of the Sudanese Judicial System

### 1. The Present Structure of Court Systems in the North and South Sudan

The INC under Arts 119-123 and 172-174 deals with the National Judiciary, the Southern Sudan Judiciary and the State Judiciary and outlines in general terms the structure of the court system. As will be shown later, the structure of the judiciary system, under the INC, can be described as a unique and yet challenging one it creates complexities and linkages between the northern and the southern judiciaries. Thus, the aim here is to outline the main features of the court system in the north and the south and to identify the similarities and dissimilarities thereof. Thereafter, the changes that have been introduced to the judiciary under the new legal framework will be examined in an attempt to assess to what extent the

<sup>41</sup> Von Bogdandy *et al*, State-Building, Nation-Building and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches, Max Planck UNYB 9(2005), p. (598), Armin von Bogdandy, Rüdiger Wolfrum (eds.), Martinus Nijhoff Publishers, Leiden

<sup>42</sup> Chapter II “Protocol on Power Sharing” (Art 1.5.1.2; Art 3.2); Art. 160(1) of the INC

<sup>43</sup> Chapter II “Power-Sharing Protocol” (Arts 2.12.11; 3.2 & 4.4.4)

<sup>44</sup> Art. 226(1)(8) of the INC

restructuring of the judiciary can play a role in preserving peace between north and south Sudan.

Firstly, the structure of the court system in the north, the INC defines in broad terms the National Judiciary as consisting of the National Supreme Court, Appeal Courts and any other courts,<sup>45</sup> and sets up the Constitutional Court as a separate body from the National Judiciary.<sup>46</sup> The Judiciary Act of 1986, which is still in force, arranges the courts into 7 different layers,<sup>47</sup> including the Supreme Court, Appeal Court, General/Public Court, District Court of First Instance, District Court of Second, District Court of Third Instance and Rural and Towns Courts. These courts have general jurisdiction over civil, criminal, administrative and family matters, as prescribed by the laws. These courts are not empowered to exercise any form of constitutional adjudication. The National Supreme Court represents the court of last instance in respect of civil, criminal, administrative and family matters arising under the national laws.<sup>48</sup> Constitutional litigations originate from the northern states, after exhausting all available means of remedies,<sup>49</sup> go to the Constitutional Court, which located in Khartoum and remains the highest court on all constitutional matters nationwide. The Constitutional Court Act of 2005 and the INC fix an exhaustive list on the admissibility and types of the constitutional complaints to be brought before that Court.<sup>50</sup> It has to be noted that the Constitutional Court, in the north, is not part of the appeal process- it only scrutinizes the decisions of the National Supreme Court with respect to their constitutionality.<sup>51</sup>

At the state level (meaning northern states) courts are administered by the Head of a Judicial Organ<sup>52</sup> that is appointed by the national level. The State courts execute both the national laws and the state law.<sup>53</sup> The States are empowered to establish their own court system,<sup>54</sup> yet, a careful reading of Art. 181 (1) of the INC reveals that the State are authorizes to set up their own courts but does not oblige them to do so. At present, the structure of

<sup>45</sup> Art. 124 of the INC

<sup>46</sup> Art. 119 of the INC

<sup>47</sup> Art. 10 of the Judiciary Act (1986)

<sup>48</sup> Art. 125(1)(a) of the INC

<sup>49</sup> Arts 18 and 19 of the Constitutional Court Act (2005). The Text of the Constitutional Court Act (2005) is available at [http://www.mpil.de/shared/data/pdf/cca2005\\_official\\_english\\_-\\_neue\\_version.pdf](http://www.mpil.de/shared/data/pdf/cca2005_official_english_-_neue_version.pdf).

<sup>50</sup> See generally the Constitutional Court Act, 2005.

<sup>51</sup> Art. 15(2) of the Constitutional Court Act.

<sup>52</sup> Art. 12 of the Judiciary Act, 1986.

<sup>53</sup> Art. 181(2) of the INC

<sup>54</sup> Art. 181(1) of the INC

the court system in the north remains virtually unchanged, as the state courts are organized and financed by the national level, since until now none of the northern states has used its right to establish its own courts. It is clear that there is no substantial departure from the pre-INC on the structure of the courts in the north, especially at the state level.

As to the court system in the south, Art. 172 (1) of the INC establishes the Southern Judiciary as an independent institution from the National Judiciary with power to structure its own court system independently.<sup>55</sup> Art. 127 and 171(1) of the ICSS read in conjunction with Art. 125 of the State Model Constitution of the Southern Sudan,<sup>56</sup> the structure of the court system at Southern Sudan level encompasses: the Supreme Court of Southern Sudan and the Courts of Appeal at the level of the Government of the Southern Sudan.<sup>57</sup> At the state level (meaning the states in the Southern Sudan), courts are organized, financed and administered by the States and these courts include: High Courts, County courts, *Payam* courts and any other court that may be established.<sup>58</sup>

The ICSS and the State Model Constitution of Southern Sudan State spell out clearly the structure of the court system at the state level of the Southern Sudan,<sup>59</sup> and they do not, like the INC, leave a room for discretion by the state as whether or not to establish its own court system. The courts at the Southern Sudan Government level and state level execute both national laws (promulgated by the national level) and southern Sudan laws (promulgated by the Government of Southern Sudan).<sup>60</sup> The Southern Sudan Supreme Court is the court of last instance in respect of civil, criminal and administrative matters arising under the Southern Sudan laws.<sup>61</sup> Unlike the National Supreme Court in the north, the Southern Sudan Supreme Court functions also a Constitutional Court for the Southern Sudan and adjudicates on the constitutionality of laws that contradict the ICSS or the constitutions of Southern Sudan states.<sup>62</sup>

However, appeals originate from the Southern Sudan courts (i.e. Southern Sudan Supreme Court) on matters arising under national laws go the National Supreme Court.<sup>63</sup> On the

<sup>55</sup> Art. 172 (1) of the INC; Art. 126(2) of the ICSS

<sup>56</sup> Art. 125 of the State Model Constitution

<sup>57</sup> Art. 131 & 132 of the ICSS

<sup>58</sup> Art. 133 of the ICSS

<sup>59</sup> Art. 132(2) of the ICSS

<sup>60</sup> Art.181(1)of the INC;Art.127of the State Model Constitution of the Southern Sudan;Art.171(2) the ICSS

<sup>61</sup> Art. 130(1)(a) &(d) of the ICSS

<sup>62</sup> Art. 174(b) & (c) of the INC; Art. 130(1)(c) of the ICSS

<sup>63</sup> Art. 125(1)(a)of the INC; Art. 130(1) of the ICSS

other hand, the Constitutional Court functions a Constitutional Appeal Court<sup>64</sup> on decisions originate from Southern Sudan Supreme Court and related to the ICSS and Southern Sudan state constitutions – thus, the Constitutional Court constitutes part of the appeal process with respect to the Southern Sudan. Clearly, then, the INC provides the Southern Sudan with semi-constitutional autonomy as it links the Southern Sudan Judiciary with the National Judiciary by way of giving the National Supreme Court a monopoly as a court of last instance on matters arising under the national laws, and the Constitutional Court with power on appeals originate from the Southern Supreme Court.

## 2. Similarities & Dissimilarities: Court System in the North and the South

There is clearly similarity between the court system both in the north and the south, for instance, the application of the national laws by the courts at all levels of government in Sudan. Again, appeals, especially on matters arising under national laws go to the National Supreme Court. In essence, that there is a parallel structure of the judiciary in the north and the south with the Constitutional Court having jurisdiction on constitutional matters for both regions.

Yet, the north and south judiciaries differ in a number of specific aspects, for example, the source of the legislation.<sup>65</sup> The INC allows for *Sharia* law as one of the sources of legislation in the north and secular-based system in the south. On the appeal system, especially on constitutional matters, the National Supreme Court is not empowered to consider constitutional cases, whereas the Southern Supreme Court functions as a Constitutional Court with respect to cases originate under the ICSS and the Southern Sudan state constitutions. Again, appeals against the decisions of the Southern Sudan Supreme Court on matters related to the ICSS and the state constitutions of southern Sudan can be brought before the Constitutional Court. One can presume that the INC creates such linkages so as to ensure the supremacy of the INC.

## Part III The Principles Governing the work of the Judiciary

The ability of the judiciary in settling disputes is by no means automatic. Rather, this role is contingent on the constitution, which sets certain standards that regulate the work of the judiciary. Thus, the aim here is to explore the constitutional provisions that govern the work of the judiciary, in particular the independence of the judiciary, the fair trial standards

<sup>64</sup> Art. 122 (1) (c) of the INC

<sup>65</sup> Art 5(2) of the INC; Art 6 of the ICSS

and the judicial review of all legislative and executive actions of the state, and, additionally, to examine the changes that have been introduced to the judiciary under the new legal framework.

## 1. Fair Trial Principles

The right to a fair trial is designed to protect the rights and freedoms of the individual in the determination of his/her obligations and rights, in suits at law, or in criminal matters.<sup>66</sup> This right, in criminal matters, embodies certain procedural guarantees, such as the right to remain silent, presumption of innocence, right to counsel, etc, and which are applicable throughout the court proceedings (pre-trial, trial and post-trial stages).<sup>67</sup> Turning to the fair trial under the INC, its core provisions are stipulated in Art. 34. As indicated, the Bill of Rights<sup>68</sup> incorporates into the INC the international and regional human rights treaties that Sudan has ratified<sup>69</sup> (ICCPR, ICESCR, CRC, African Charter, etc) via Art. 27(3) of the INC,<sup>70</sup> and as such the right to a fair trial is further supplemented by the human rights norms.

As to the impact of the fair trial principles on the judiciary, Art. 27(2) of the INC imposes a duty on the judiciary, as state organ, to “protect, promote, guarantee and implement [the] Bill [of Rights]”. Furthermore, Art. 48 of the INC reiterates this duty by stating that “... the Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts ...”. Thus, the judiciary is bound by certain norms (as spelled out in Arts 34 of the INC and 14 of the ICCPR) that are directed at the conduct of the judiciary when presiding over a criminal trial.<sup>71</sup> For example, the exclusion of evidence obtained as a result of a Bill of Rights violation. The INC provides also that judges must observe that non-Muslims are not subject to penalties as prescribed in *Sharia* principles, and alternative

<sup>66</sup> *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2<sup>nd</sup> edition, N.P. Engel Publisher (2005), p. 314.

<sup>67</sup> Cf. *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2<sup>nd</sup> edition, N.P. Engel Publisher (2005), p. 319.

<sup>68</sup> Cf. the Bill of Rights Art. 27-47 of the INC.

<sup>69</sup> So far, Sudan has ratified a number of international and regional human rights treaties. A list of the human rights treaties to which Sudan is a part is available at: [http://www.mpli.de/ww/en/pub/research/details/know\\_transfer/sudan\\_peace\\_project.cfm](http://www.mpli.de/ww/en/pub/research/details/know_transfer/sudan_peace_project.cfm).

<sup>70</sup> Art. 27(3) of the INC states 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”

<sup>71</sup> *Johan De Waal, Iain Currie & Gerhard Erasmus*, The Bill of Rights Handbook, 4<sup>th</sup> edition, 2001, JUTA & Co LTD Publisher, South Africa, p. 54.

penalties shall apply instead of *Sharia* law.<sup>72</sup> This represents an important step in a multi-religious country, like Sudan, especially in the national capital, which reflects the diversity of the country.<sup>73</sup>

However, on the application of the fair trial principles before the Sudanese judiciary, substantial problem might arise. Now, certain human rights norms acquire the status of constitutional law. Yet, a closer look at the INC reveals that it does not delineate a hierarchy between the human rights norms and the Bill of Rights norms. This automatically begs the question of how these norms interrelate to each other. This question stems largely from the discrepancy in the wording of these two norms (Bill of Rights and human rights norms).<sup>74</sup> This discrepancy might give rise to problem upon the application, for instance, what should happen in case the two levels of rights diverge from each other – that is, which level prevails. This tension is likely to arise since the right to a fair trial conferred by Art. 14 of the ICCPR is broader than the list of specific rights sets in Art. 34 of the INC. Unfortunately, the INC does not answer the hierarchy question and the matter is further complicated by the fact the two legal norms enjoy the status of “constitutional law”. The INC leaves open this question for debate.

Whilst there is no bright line to discern the relationship between the Bill of Rights norms and human rights norms, nevertheless, the Bill of Rights will have impact on the role of the judiciary. The application of the Bill of Rights (together with the human rights treaties) by the judiciary will certainly involve changes in the way in which the judicial carries out its tasks of adjudicating on cases related to human rights issues. This may entail expansion of the trial procedures to encompass issues raised by the human rights treaties.<sup>75</sup> The judiciary may turn to the jurisprudence of the United Nations Human Rights Committee for a source of information and guidance on this subject; and encourage the judiciary to review comparable foreign law precedents.

In comparison with the previous constitutions of Sudan, the provisions of the Bill of Rights are by no means an entirely new departure in the Sudanese constitutional law. Although the previous constitutions of Sudan did not contain an explicit Bill of Rights, nonetheless, older Sudanese constitutions contained elaborated provisions which afforded various guar-

<sup>72</sup> Art. 156 (c) of the INC

<sup>73</sup> Art. 152 of the INC

<sup>74</sup> Compare Article 34 of the INC with and Article 14 of the ICCPR

<sup>75</sup> See generally *Sir Gerard Brennan*, The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective, in *Promoting Human Rights Through Bills of Rights: Comparative Perspective*, Philip Alston (eds), Oxford University Press, 1999, 454 (458); Cf. *Gerald Neuman*, The Use of International Law in Constitutional Interpretation, *The American Journal of International Law* 98(2004) 82(84).

antees related to fair trial.<sup>76</sup> Yet, the inclusion of an explicit Bill of Rights that incorporates a number of human rights treaties as directly applicable before the courts is a remarkable shift.

The Bill of Rights is only two years old; therefore, it is too early to give an assessment of its impact on the protection of fundamental freedoms and rights. However, there is doubt that its enactment has led to legal reform. For instance, the Bill of rights has not promoted revision of laws in some areas which were long overdue for reform such as Criminal Code and Procedure Act of 1991. On the other hand, the Bill of Rights has promoted revision of some laws such as the Political Parties Act of 2006.<sup>77</sup> Nonetheless, there are still important areas in which extensive reform of legislation is required to bring the existing laws in line with the Bill of Rights. In this regard, the National Ministry of Justice has announced that it will amend some 61 laws<sup>78</sup> and has established a law committee has been established with a mandate to bring the existing legislation in compliance with the INC.<sup>79</sup> Yet, formal legal mechanisms cannot alone uphold the rule of law<sup>80</sup>, hence, it remains to be seen in the future whether the Bill of rights provisions will be reflected in the future judgments of the judiciary.

## 2. Independence of the Judiciary

### a) Institutional Independence

The independence of the judiciary implies the freedom of the judicial process from interference from other government organs<sup>81</sup> – that is, the exclusion of other state organs from interference in the performance of the judiciary.<sup>82</sup> It also implies the ability of the judges to decide matters before them “on the basis of facts and in accordance with the law, without

<sup>76</sup> Part II “Freedoms, Sanctities Rights and Duties” of the 1998 Sudan Constitution. The 1998 Sudan Constitution is available at <http://www.sudan.net/government/constitution/index1.html>

<sup>77</sup> Cf. The Comprehensive Peace Agreement Monitor, April 2007, available at: [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_apr07.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_apr07.pdf).

<sup>78</sup> Opening Remarks made by the National Minister of Justice in a Law Reform Workshop organized by the United Nations Mission in Sudan, September 2006 (on file with the author).

<sup>79</sup> Cf. The Comprehensive Peace Agreement Monitor, April 2007.

<sup>80</sup> Cf. *Varda Hussain*, Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals, *Virginia Journal of International Law* 45(2005) 548(552).

<sup>81</sup> Cf. *Christopher Larkins* Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, *American Journal of International Law* 44(1996), 605 et Esq.

<sup>82</sup> *Peter Radler*, Independence and Impartiality of Judges in: The Right to a Fair Trial, David Weisbrodt & Rudiger Wolfrum (eds), 1997, Springer-Verlag Publisher, Berlin, etc. 728(729).

restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect".<sup>83</sup> As such, the proceeding sections will consider how the INC regulates this issue, with special focus on appointment and removal of the judges.

As to the National Judiciary, the INC stresses the independence of the judiciary from other state organs,<sup>84</sup> and establishes the independence of the judiciary.<sup>85</sup> This is, however, no change in comparison with the 1998 Constitution, which had already asserted the independence of the judiciary under Art. 99.<sup>86</sup> However, the INC adds another safeguard against the influence of other organs of the state on the independence of the judiciary by establishing a National Judicial Service Commission (NJSC),<sup>87</sup> which supersedes the "High Judiciary Council",<sup>88</sup> to undertake the overall management of the National Judiciary, including the approval of the budget of the National Judiciary.<sup>89</sup> It is also empowered to make recommendations, to the President, with respect to the appointment, promotion and dismissal of judges. The NJSC is a relatively new body; yet, its mandate and composition do not differ substantially from its predecessor<sup>90</sup>, except in the inclusion of three representatives from the Southern Sudan legal entities.<sup>91</sup> Another difference also is that the NJSC is empowered to make recommendations to the President for the appointment of the Constitutional Court judges. As to the fiscal independence of the judiciary, Art. 123(2) of the INC requires that the judiciary should be provided "[...] with the necessary financial and administrative independence." Being one of the state organs, the judiciary is supplied with funds from the national budget, which is according to Article 91 (3) (c) INC approved by the National Legislature on initiative of the National Council of Ministers (72 (c) INC. Since the budget is prepared by the executive and then brought before the legislature for approval, the judiciary is not involved in the devising the budget.

<sup>83</sup> Principle 2 of the U.N. Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nation Congress on the Prevention of Crimes and the Treatment of Offenders and endorsed by the GA Resolution 40/32 of November 1985.

<sup>84</sup> Art. 123(1) & (3) and 172(1) of the INC

<sup>85</sup> Art. 123(2) of the INC.

<sup>86</sup> Cf. Art. 99 of the 1998 Sudan Constitution.

<sup>87</sup> Art. 129(1) of the INC.

<sup>88</sup> Art 4 et Esq. of the Judiciary Act, 1986

<sup>89</sup> Cf. Art. 6 of the National Judicial Commission Service (2005). The text of this Act is available at. [http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/sudan\\_peace\\_project.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project.cfm).

<sup>90</sup> Compare Article 6 of the National Judicial Service Commission with Article 6 of the of the Judiciary Act 1986. The text of the Judiciary Act is available at: [http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/sudan\\_peace\\_project.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project.cfm).

<sup>91</sup> Article 5 of the NJSC Act of 2005.

*b) Appointment of Judges*

Article 130(1) of the INC prescribes the procedure for the appointment of the judges of the National Judiciary. However, for a full picture in respect of the appointment of the judges, Art. 130(1) should be read together with Art. 58(2)(c) of the INC which empower the President, with the consent of the First Vice President and upon recommendation of the NJSC<sup>92</sup>, to appoint the Chief Justice, his deputies and other judges.<sup>93</sup> It is clear then that Art. 130(1) of the INC empowers the President to appoint the judges of the National Judiciary without requiring consensus and/or the participation of the parliament – thus, allowing the President a relatively free hand in selecting the judges. One could argue that leaving the appointment of judges and justices to the executive could compromise the judicial independence. This might be explained on the grounds that the term “recommendation” as contained in Art. 130(1) of the INC is not defined anywhere in the INC; hence, one can construe the term “recommendation” as merely to mean that the President enjoys unfettered discretion when appointing the judges of the National Judiciary – ‘the participation of the parliament could improve the transparency of the appointment process of the judges so to ensure the independence of the judiciary’.<sup>94</sup> However, it is hardly conceivable that the President could reject the recommendations of the NJSC. Contrary to the appointment of the judges of the National Judiciary, the INC sets a higher threshold for the appointment of Constitutional Court Justices, by demanding (besides the consultation with First Vice President) the approval of the Council of States by a two-thirds majority.<sup>95</sup>

It is clear that the centralized nature of the judicial authority has not been substantially changed with respect to the procedure of the appointment of judges through devolution of the power down to the state level, as envisaged by the INC. Thus, there has been minimal change concerning the appointment of judges in comparison with the 1998 Sudan Constitution – that is, now the First Vice-President now participates in the appointment procedure of the National Judiciary judges.<sup>96</sup> However, a welcome step seems to be that the INC attempts to some extent to reflect the racial composition of Sudan by requiring the “[presentation of Southern Sudan] in the National Supreme Court and other national courts that are situated in the National Capital”;<sup>97</sup> thus, redressing some of the root-causes of the north-south conflict.

<sup>92</sup> Art. 6 of the National Judicial Service Commissions Act

<sup>93</sup> Art. 121(1) of the INC.

<sup>94</sup> Cf. *Moshtaghi*, Organization and Jurisdiction of the Newly Established Afghan Courts, Max Planck UNYB 10 (2006), Armin von Bogdandy, Rüdiger Wolfrum (eds.), Martinus Nijhoff Publishers, Leiden, 533(569).

<sup>95</sup> Cf. Art. 121 (1) of the INC

<sup>96</sup> Compare Art. 130(1) of the INC with Art. 104(1)& 140(2) of the 1998 Sudan Constitution

<sup>97</sup> Art. 130(3) of the INC

c) *Removal of Judges*

Art. 131(2) of the INC explicitly provides, in contrast with the 1998 Sudan Constitution, that a judge may be removed from office only by an order of the President if a judge suffers from an incapacity, gross misconduct, incompetent in accordance with the law and upon the recommendations of the Chief Justice and with the approval of the NJSC.<sup>98</sup> Furthermore, Art. 131(1) of the INC provides that “discipline of justices … shall be exercised by the Chief Justice in accordance with the law”. Since the removal of the judges from office is inextricably linked to the discipline of judges, one can say that the language of Art. 131 of the INC suggests that the removal of judges is contingent on the discretion of the Chief Justice, as the Chief Justice is empowered to discipline the judges and additionally to make recommendations to the President for the removal of judges.

Yet, the matter of removal of and discipline of judges of the National Judiciary are dealt with more fully in Arts 55 et seq. of the Judiciary Act of 1986. The discipline of judges is handled by a disciplinary board that conducts a procedure that is grounded upon due process guarantees. The decisions of that board can be appealed, thereby ensuring the impartiality of the disciplinary process of the judges, and the decisions of the disciplinary board must be confirmed by the NJSC;<sup>99</sup> therefore, the NJSC plays an important role in establishing the grounds for removing a judge from office. Offences that can lead to disciplinary action are set forth in the Judiciary Act<sup>100</sup>

d) *Judicial Review*

This section is concerned with the role of the courts in subjecting the legislative and executive actions of the state to scrutiny against the standards of the Bill of Rights to ensure that the state does not infringe upon the individual rights and freedoms. As to the executive, Art. 125(1) of the INC empowers the National Supreme Court as a last court of cassation to review any administrative matters.<sup>101</sup> This means that the INC does not authorize each and every judicial organ to exercise the power of judicial review. It must be recognized that Sudan follows more closely a concentrated model of constitutional control. The complain-

<sup>98</sup> Art. 131(2) of the INC

<sup>99</sup> Art. 6(f)(1) of the National Judicial Service Commission Act; Art 66 of the Judiciary Act (1986)

<sup>100</sup> Art. 57(2) of the Judiciary Act, 1986

<sup>101</sup> The Supreme Court considers contest against the administrative decisions of certain entities, i.e., the President of the Republic, Governors and the State Ministers. These administrative decisions are reviewed by a single judge, and they can be appealed to a Supreme Court panel of three judges. The Supreme Court also holds appellate jurisdiction in respect of contest by cassation against the decisions of the Appeal court on administrative matters. The Appeal Court considers contest against the administrative decisions of other administrative authorities, with exception to the administrative decisions of the President of the Republic, Governors and State Ministers.

ant, challenging the constitutionality of an administrative decision, has to exhaust all other remedies before approaching the Constitutional Court.<sup>102</sup>

Towards the legislature, the National Judiciary has no jurisdiction to strike down unconstitutional laws – that is, the INC does not contain any provision that deals with contentions before the ordinary courts that a law or any of its parts is unconstitutional. It is worthy to note that the National Supreme Court has jurisdiction to decide on constitutional matters that are related only to subsidiary legislation and regulations.<sup>103</sup> Moreover, the INC does not authorize the ordinary courts, if a constitutional matter arises during the course of litigation, to submit any constitutional question to the Constitutional Court for a decision on the constitutionality of any law in question.<sup>104</sup> This means that the lower courts have to assume that the laws they are administering are constitutional whatever the true position might be. The litigants only remedy in this regard is to approach the Constitutional Court, for judicial review of the legislation in question,<sup>105</sup> which has the power to set aside unconstitutional laws.<sup>106</sup>

Prohibiting the lower courts from referring constitutional questions to the Constitutional Court is clearly problematic. This will prevent constitutionalism from filtering down to lower courts, which is essential. Also, there is the danger that people are forced to go through years of expensive litigation, and only thereafter can they show that the point could be disposed of on a simple constitutional issue. A more worrying aspect of such procedure is its implication on the right to a fair trial. One would wonder how the lower courts are supposed to apply the criminal law, if they cannot test its constitutionality. If a charge is invalid, why an accused must be forced to go through the entire trial, face conviction etc, before, the validity of the charge is proved.

#### **Part IV Assessment of the Existing Judicial System as a means of Preserving Peace between the North and the South of Sudan**

The question to be answered here is: has the judiciary changed? If so, can the judiciary have an impact on the preservation of peace between north and south Sudan?

<sup>102</sup> Art. 18 et Esq. of the Constitutional Court Act

<sup>103</sup> Art. 16(d) of the Civil Procedure Act of 1983 states that: “[the Supreme Court] consider[s] contests against the subsidiary legislation on account of alleged inconsistency with the enabling legislation”

<sup>104</sup> Cf. The Administrative and Judicial Act (2005)

<sup>105</sup> Art. 122(1)(e) of the INC

<sup>106</sup> Art. 122(1)(e) of the INC; Art. 15 et Esq. of the Constitutional Court Act

## 1. The Court System in the North and the South

The decentralized system as depicted in the INC has devolved the judicial power to the states through the establishment of a Southern Sudan Judiciary and the State judiciary. This might help to increase the efficiency of the courts in delivering justice through the level closest to the people. Yet, in spite of this formal improvement, the structure of the court system in the north still retains the pre-INC set-up. On the contrary, the courts at the Southern Sudan level are distributed between the level of the Government of Southern Sudan and state level. The INC creates a complex set of interdependencies amongst the northern and the southern judiciaries by placing the National Supreme Court as a last court (on national laws) and the Constitutional Court as the ultimate custodian of all constitutions. On one hand, one can argue that the establishment of the Southern Sudan Judiciary is superfluous because the INC creates interrelation between the south and the north judiciaries that places the Southern Sudan Judiciary within a wider National Judiciary by placing the National Supreme Court and the Constitutional Court at the top of the Judicial pyramid and allowing the Constitutional Court to have the last word on the ICSS and the constitutions of the Southern Sudan states. On the other hand, one can postulate that the establishing of the Southern Sudan Judiciary with its own court system to administer justice that based on a secular system at the level of Southern Sudan makes sense within the overall goal of achieving peace in Sudan – that is, rectifying the root-causes of the north-south conflict.

## 2. Source of Legislation

Allowing a dual legal system (*Sharia* and secular system) to exist side by side is a positive in redressing the causes of the conflict. What is more, the INC elevates a corpus of international human rights norms to the status of constitutional law. On assessing the source of legislation under the CPA, one can argue that sources of legislation in Sudan have always been diverse – during the colonial and post-colonial period until the imposition of September laws in 1983, the legal system in Sudan was a complex mixture of dualism. It had two hierarchies – Islamic and civil law. However, now (in comparison with the 1998 Constitution of Sudan) there is an express constitutional guarantee that the sources of the legislation are diverse.

This will permit the courts, especially at the state level, a room to apply different rules of procedure (be they *Sharia*-based or secular-based rules of procedure) in respect of litigation or prosecution before them, thereby reflecting an attempt to ensure that the varied racial, ethnic, religious and cultural make up of the population in Sudan can be fairly treated by the courts. The challenge for the post-conflict legal system will settle on how to reconcile these conflicting perspectives – the Islamist orientation of the center, the secularist orientation of the south, and the liberal orientation of the marginalized non-Arab areas of the

north. Whether Sudan will succeed in creating a constitutive and legal framework that will accommodate all the diverse trends and transcend the divisions based on race, ethnicity, religion, culture and gender is the question for which the transitional period is to provide an answer.<sup>107</sup>

### 3. Principles Governing the Work of the Judiciary

As regards the principles governing the work of the judiciary, on one hand changes on issues pertaining to the independence of the judiciary (appointment and dismissal of judges) under the new legal framework are minimal. On the other hand, the introduction of a Bill of Rights that incorporates a number of international human rights is a remarkable development that might create conducive environment to reduce the chances of a return to conflict through the protection of the rights of minorities etc. The Bill of Rights might also provide momentum for a profound change in the Sudanese laws where general or particular Bill of Rights provisions have not been recognized. Yet, whether the Bill of Rights will be observed on the ground and lead to upholding of the rule of law in Sudan is not known.

In summing up the assessment, it can be said that a truly devolution of the judicial powers is manifested in the enactment of the Interim Southern Constitution, the establishment of an independent Southern Sudan Judiciary and the State Judiciary. This development defines a break from past political and legal arrangements and one of the essential steps in stabilizing the peace between the north and the south in that the existing structure of the judiciary addresses some of the root-causes of the conflict by way of accommodating the diversity of Sudan by giving the Southern Sudan complete freedom to organize its own judicial system and to legislate on matters pertaining to the South. While all that said, the impact of the judiciary as to the stabilization of peace during the process of transition will rely on the 'behavior of state actors and the degree to which they are willing to respect the rules regarding the makeup of the judiciary and political system during the interim period'.<sup>107</sup>

## Part V Judicial Settlement as Means to Settle Past Grievances

### 1. Post-conflict Mechanisms under the CPA

Sudan has been a scene for a number of civil wars. These civil wars included the north-south conflict (which was ended by the conclusion of the CPA), the Darfur Conflict (one of the fighting factions have signed Darfur Peace Agreement in May 2006) and the Eastern

<sup>107</sup> Cf. *Christopher Larkins*, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, *American Journal of International Law* 44(1996), 605 et Esq.

conflict (which was ended by the signature of Eastern Peace Agreement in October 2006). Hence, it is questionable, at this juncture, whether to describe Sudan as a post conflict situation, as technically, Sudan is still in a state of armed conflict, since the conflict still rages in some parts of Darfur.

As to the transitional justice provisions, the CPA highlights the structural and systematic causes of the north-south conflict and attempts to provide for socio-economic justice through the distribution of power and wealth between the north and the south. The CPA provides for a number of transitional justice measures, including, *inter alia*, measures to redress the “historical injustices and inequalities”;<sup>108</sup> establishment of democratic governance;<sup>109</sup> protection of the fundamental rights and freedoms;<sup>110</sup> promotion of national reconciliation, etc.<sup>111</sup> These measures provide clearly for institutional reform, especially restoration of the rule of law and reconciliation.<sup>112</sup> Yet, the CPA is silent as to how to redress the atrocities that occurred during the conflict. Here, one might narrate the reaction of the Sudanese populace, as to whether Sudan is ready to embark on envisaging a transitional justice strategy. In this respect, some civil society organisations have voiced criticisms with respect to CPA’s silence on “how to deal with past human rights abuses”.<sup>113</sup> The gaps in the CPA concerning the transitional justice mechanisms represent one of its major shortcomings. They now pose the following question: How will this shortcoming can be rectified?<sup>114</sup>

The appropriateness of transitional justice mechanisms at this point is being debated in Sudan, as some say that there has been no drastic change in the structure of governance in Sudan and “the absence of real, solid peace and the lack of a unified leadership seeking political reconciliation.”<sup>115</sup> Nevertheless, some commentators observe that Sudan can indeed benefit from the South African experience, especially the Truth and Reconciliation Commission.<sup>116</sup> In this vein, the Government of Southern Sudan has appointed its own

<sup>108</sup> Chapter I ‘Machakos Protocol’ (Art. 1.7)

<sup>109</sup> Chapter II ‘Power Sharing Protocol’ (Art. 1.4.5)

<sup>110</sup> Chapter II ‘Power Sharing Protocol’ (Art. 1.6)

<sup>111</sup> Chapter II ‘Power Sharing Protocol’ (Art. 1.7)

<sup>112</sup> The Chapeau of the Comprehensive Peace Agreement

<sup>113</sup> *Yasmine Sherif/Noha Ibrahim*, Internal Post Conflict Dynamic in: *Peace in the Balance: The Crisis in Sudan*, Brain Raftopoulos and Karin Alexander (eds.), Institute for Justice and Reconciliation Publisher, 2006, p 43.

<sup>114</sup> *Ibid*, p. 45.

<sup>115</sup> *Sarah Crawford-Browne/Sara Basha/Karin Alexander*, Obstacles to Transitional Justice, in: *Peace in the Balance: The Crisis in Sudan*, Brain Raftopoulos and Karin Alexander (eds.), Institute for Justice and Reconciliation Publisher, 2006, p. 139(139).

<sup>116</sup> *Ibid* 113, pp. 43, 44.

Peace Commission with a view to “facilitate[ing] amicable … resolution to conflicts through traditional and other methods involving conflict management resolution …”<sup>117</sup>

## 2. Competences of the Judiciary under the CPA

Much has been written about the obligation of the state to prosecute the crimes of the old regime for the purposes of facilitating the process of restoring the citizens’ confidence in the new regime;<sup>118</sup> establishing the rule of law and discouraging future violations.<sup>119</sup> Also, serious violations of international law, such as war crimes and crimes against humanity should not be left unpunished<sup>120</sup> and by opting not to prosecute such crimes, the new regime will violate international law.<sup>121</sup>

Considering the scenario in Sudan, the CPA and the INC are silent with respect to the question of accountability. On one hand, it appears that the parties to the CPA felt compelled to compromise over the issue of accountability in order to avoid provoking resistance and rather achieve peace. On the other hand, the involvement of the Sudanese judiciary in carrying out prosecutions (that occurred over the last 4 decades) may be unrealistic. It has been argued that justice must be deferred so to maintain stability, in particular when attempts to prosecute those alleged to have committed crimes might end up in stabilising the peace.<sup>122</sup> Taken this into account the situation in Sudan, one is tempted to say that due to political consideration, the choice of criminal prosecution will be impossible, at this juncture, especially that the parties to the north-south conflict have participated in the peace talks to end the conflict. The need to stop the conflict, undoubtedly, placed limits on the chance of foreseeing accountability measures for the crimes committed in the past.

<sup>117</sup> Ibid 115, p.142

<sup>118</sup> *Jacobson Harold/ Wedgwood Ruth* , Symposium: State Reconstruction: After Civil Conflict, American Journal of International Law 95(2001) (1) (.4); Cf. *Asmal Kader*, Truth, Reconciliation and Justice: The South African Experience in Perspective, The Modern Law Review, 63(2000) (7)(8)

<sup>119</sup> *Richard. Goldstone and Nicole Fritz*, In The Interests of Justice and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, Leiden Journal of International Law, 13(2000) 655(667).

<sup>120</sup> *Donna Pankhurst*, Issues of justice and reconciliation in complex political emergencies: conceptualizing reconciliation, justice and peace, Third World Quarterly, 20(1999) p.242.

<sup>121</sup> *Michael Scharf*, The Letter of The Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes: The Accountability for International Crime and Serious Violations of Fundamental Human Rights, Law and Contemporary Problems, 59(1996) p. 1 et Esq.

<sup>122</sup> *Ben Chigara*, Amnesty in International Law: The Legality under International Law of National Amnesty Laws, Pearson Education Publisher, London, etc, 2002, p. 1.

### 3. Amnesties *de jure* or *de facto*

As already indicated, the CPA does not provide for accountability mechanisms. Then the question here is does the silence of the CPA on the issue of accountability mean that the CPA provides for amnesty? It is worthy noting that during the north-south peace talks, the parties were keen to include an amnesty for war crimes and gross human rights violations in the CPA.<sup>123</sup> However, the final text of the CPA does not neither provide for accountability mechanisms nor pledge for amnesty. Yet, a careful examination of the CPA reveals that a *de facto* amnesty is clearly provided for under a number of provisions. For instance, the provisions of the Power Sharing Protocol provide for procedural impediments that will preclude prosecutions, as the parties to the conflict have now gained seats in the newly formed GoNU and the Government of the Southern Sudan. Other Sudanese laws also place constraints, by providing for amnesty, with respect to the prosecution of certain categories of government officials, such as, the 1991 National Security Forces Act, the 1991 Criminal Act and the People's Armed Forces Act. Therefore, one might conclude, then, that the CPA provides for a *de facto* amnesty for considerations of national reconciliation, reintegration of the parties into society, etc.

While all the said, as Sarah *et al* has rightly pointed out 'nothing in the CPA prevents ... Sudan from instituting transitional justice programmes, using the Sudanese criminal justice system'.<sup>124</sup> In this respect, the CPA requires Sudan to comply with its obligations under relevant human rights instruments to which it is or becomes a party, and, additionally, Art. 27(3) of the INC incorporates all human rights treaties, covenants and instruments that Sudan has ratified. While the ICCPR does not contain specific obligations on the State Parties to punish; yet the UN Human Rights Committee has repeatedly found that States have a duty to investigate and prosecute actions in violation of international law.<sup>125</sup> Further, the duties contained in the ICCPR 'to provide remedy'<sup>126</sup> are clear as to oblige the State to prosecute past crimes.<sup>127</sup>

<sup>123</sup> Sarah Crawford-Browne/Sara Basha/Karin Alexander, Obstacles to Transitional Justice, in: Peace in the Balance: The Crisis in Sudan, Brian Raftopoulos and Karin Alexander (eds), Institute for Justice and Reconciliation Publisher, 2006, p. 139(141)

<sup>124</sup> Ibid, 123, p. 141.

<sup>125</sup> Steven Ratner, New Democracies, Old Atrocities: An Inquiry in International Law, the Georgetown, 87(1998-1999), 707(721).

<sup>126</sup> Cf. Art. 2 et Esq. of the United Nations Covenant on Civil and Political Rights (1966)

<sup>127</sup> Ibid 125, p. 714.

## Part VI Enhancement of the Judiciary: The United Nations Development Programme

In a war-torn society, transformation towards sustainable peace will depend on the strengthening of the institutions that are in charge of maintaining law and order, especially with the help of international community. The UN has been increasingly involved in providing support to post-conflict societies to enhance their legal systems.<sup>128</sup> In Sudan, the UN has played an important role in facilitating the north-south peace negotiations. Soon after the conclusion of the CPA, the UN Security Council established a United Nations Mission in Sudan (UNMIS) to support implementation of the CPA and to play a coordinating and monitoring role and to promote and protect human rights. Presently, Sudan (north and south) is witnessing an increased engagement, by the UNDP and other international organisations, in activities that geared towards the enhancement of the rule of law sector. UNPD has developed a major rule of law strategy for promoting the legal institutions through supporting capacity building and rule of law awareness raising programmes across Sudan.<sup>129</sup> As regards the judiciary, UNDP has formulated a major Capacity Building Project for the Sudan Judiciary that places emphasis on raising awareness on issues related core principles of rule of law.<sup>130</sup>

As to the relevancy of these activities, the new legal order, as depicted under the CPA, requires orientation of the legal profession of the new legal system, including, *inter alia*, the principles enshrined in the CPA, *i.e.*, the Bill of Rights and international instruments. Here, provision of adequate professional training for the judiciary constitutes a pivotal element in enabling the judiciary to be acquainted with the new developments. Currently, the judiciary suffers a lack of adequate training. It is therefore, the above-mentioned UNDP's major project for the judiciary is a project of real importance and might have a significant effect in changing views and shaping attitudes and in providing guidance to the judiciary on particular subjects, especially international law. These activities will also enable the legal profession to benefit from the diverse knowledge and skills available and from the multi-disciplinary approach, thereby strengthening the rule of law institutions.

<sup>128</sup> Hansjörg Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations mission in Kosovo and East Timor, *The American Journal of International Law*, 95 (2001) 43 (63).

<sup>129</sup> Cf. Report of the Secretary-General on the Sudan, 25 January 2007, UN Doc. S/2007/42, para.42, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/211/86/PDF/N0721186.pdf?OpenElement>.

<sup>130</sup> UNDP Project Document entitled "Capacity Building of the Sudan Judiciary", February 2006 (on file with author); Cf. Agreement between UN and the Government of Sudan regarding the Status of UNMIS available at: <http://www.unmis.org/english/documents/sofa.pdf>.

## Conclusion

Some may argue that it is too early to judge whether the restructuring and enhancing of the judiciary, under the CPA, will play a crucial role in preserving peace between the north and the south of Sudan. I think this is not right. For example, the structure of the judiciary, under the CPA, provides for a legal system that addresses some of the root-causes of the north-south conflict, therefore, there is a potential that the judiciary can play a crucial role in averting a relapse into conflict. The success of the newly restructured judicial system will ultimately depend only upon the willingness of the government to respect the Constitution – this will help in re-building the confidence of the populace in the judiciary to resolve their dispute instead of taken the law into their hands. It also depends on an accessible and affordable judicial system and, above all, on the support of the people. Most recent developments suggest that there is recognition, by the GoNU, of the need to enhance the Rule of Law Sector in Sudan and this is illustrated by its engagement of the with the international actors.