

## **A Review of the Use of Arrest, the use of Detention and Conditions in Detention in South Sudan** Legislation, practice and accountability

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### **Executive Summary**

On 9 July 2011 South Sudan became an independent nation following a 2005 peace agreement that ended decades of civil war between the north and the south. While the future looks promising for the country, and legal frameworks have been put in place to promote this new democracy, the greatest challenges for the rule of law lie in the need to strengthen state structures, train and reform the police, protect human rights and address accountability. This study examines a range of laws and policies in South Sudan relating to arrest and detention within the context of international standards, and reviews these in terms of their ability to act as procedural safeguards. This paper analyses the factors that prevent the criminal justice system from functioning according to written laws and policies, and also looks at accountability and oversight mechanisms.

There are several key pieces of legislation in South Sudan that relate to arrest and detention, most notably the Transitional Constitution of South Sudan (2011) and the Code of Criminal Procedure Act (2008). The Transitional Constitution (2011) sets out a comprehensive Bill of Rights that promotes life and human dignity, personal liberty, equality before the law, the right to a fair trial and freedom from torture.<sup>1</sup> The Code of Criminal Procedure Act (2008) sets out the procedures for arrests and detentions and allocates powers to the relevant authorities.

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<sup>1</sup> Transitional Constitution of South Sudan (2011), article 9(2), <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5133/The-Transitional-Constitution-Of-The-Republic-Of-South-Sudan-2011.aspx>, accessed 15 January 2013

While the laws of South Sudan are consonant with the requirements of the international framework in many regards, a number of factors prevent these laws from being followed in practice. This study examines a number of factors that play a role in arbitrary arrests, including political interference, inadequate training of police, discrimination and corruption. Furthermore, the complications of co-existing customary and statutory systems, and the application of the customary system to cases required by law to be dealt with by the statutory system, is a further factor that influences arbitrary arrests.

In terms of detention, a number of factors influence the inability of the criminal justice system to observe procedural safeguards and these include poor case tracking, an enormous backlog of cases and corruption. Conditions of detention are also far removed from international standards. Detention cells are overcrowded and dilapidated and there is little provision for vulnerable groups. Because of limited infrastructure, police cells are often used as prisons and there is limited access to medical services. Detainees are often left without food and water, either due to a lack of funds or corruption, and rely on families to provide food. There is little oversight in terms of police detention. The right to a fair trial is also problematic as the Legal Aid Strategy is limited only to those accused of serious offences,<sup>2</sup> and the Strategy has yet to be implemented.

While oversight and accountability mechanisms can play an important role in addressing the problems noted in relation to arrest, detention and conditions in detention, both internal mechanisms in the police, as well as external mechanisms such as the South Sudan Human Rights Commission and the Anti-Corruption Commission, are currently inadequate.

## 1 Introduction

After decades of civil war, the Government of South Sudan and the Sudan People's Liberation Movement (SPLM) signed the Comprehensive Peace Agreement (CPA) in 2005, which was comprised of six protocols. These protocols provided for, among other things, a cessation of hostilities; a six-year interim period following which the people of southern Sudan could vote for or against secession in a self-determination referendum; the establishment of an semi-autonomous Southern Sudan; power and wealth sharing agreements; the establishment of a special administrative status for the border area of Abyei with a special referendum for these residents. South Sudan became independent on 9 July 2011, after a referendum held on 9 July 2011 that massively favoured secession.

South Sudan's population was last estimated at 8.3 million (52% men and 48% women). The demographic structure of the country has continued to change due to large numbers of returnees.<sup>3</sup> Fifty-one percent of the population lives below the national consumption poverty line,<sup>4</sup> and the country remains hugely underdeveloped following years of war and neglect, with most of the population relying on subsistence agriculture. Poor health and education also pose development challenges.<sup>5</sup> The country also faces the problems of tribal conflict, proliferation of arms, perceptions of insecurity, cattle raiding and a lack of economic opportunities. Furthermore, some critical provisions of the CPA have not been implemented with regards to the Abyei region and the Blue Nile and Southern Kordofan States. Tension persists between the north and south over the distribution of oil.

South Sudan has instituted a decentralised system of governance with three levels of government: the national level, the state level and the local level. In order to promote a distinct South Sudanese national identity and as a means of maintaining values and traditions, South Sudanese customary law has been instituted in parallel with the statutory court system. Customary law is used throughout

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<sup>2</sup> Government of South Sudan. 2011. *Legal Aid Strategy 2011–2013*. Ministry of Justice, unpublished

<sup>3</sup> 5th Sudan Population and Housing Census (2008), in Government of South Sudan, *South Sudan Development Plan 2011–2013*, p.13, <http://www.jdt-juba.org/wp-content/uploads/2012/02/South-Sudan-Development-Plan-2011-13.pdf>, accessed 15 January 2013

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

the country, and provides alternatives for the resolution of conflict in a country where the formal justice system is overloaded. However, the country faces challenges in aligning the two systems, as well as strengthening formal state structures, rule of law mechanisms and addressing accountability.

The issue of interest for this study is the pre-trial phase of citizens' engagement with the justice system, and its specific issues of interest are: (1) the use of arrest; (2) the use of pre-trial detention; and (3) conditions in detention. This study, firstly, reviews the legal framework in South Sudan in each of these three areas, particularly in terms of international standards. Secondly, this study explores actual realities on the ground in relation to these three areas, and examines the practical factors that affect the implementation of these laws. Finally, this study examines oversight and accountability mechanisms in South Sudan. Throughout the paper recommendations are made relating to how improvements may be made. These recommendations are summarised at the end of this report.

## **2 Methodology**

The methodology is limited to desk-based research. The study utilises the latest legislation available in South Sudan, including the Transitional Constitution, Code of Criminal Procedure Act, Police Service Act and Prisons Service Provisional Order. The study then analyses the structural and practical limitations on achieving these legal norms, using secondary data as evidence to back up these claims. In many cases, legislation has been published but is not widely available, even within South Sudan. There are also a number of documents which are not available online, but have been personally obtained.

## **3 The Use of Arrest**

### **3.1 The legal framework**

From the outset, South Sudan has included similar articles in its supreme law of the land, the Constitution, to provisions contained in international law. International standards require that arrests are carried out according to lawful procedures and that arrests are not the outcome of any form of discrimination. The Universal Declaration of Human Rights (UDHR) prohibits arbitrary arrest, detention or exile,<sup>6</sup> and the International Covenant on Civil and Political Rights (ICCPR), describes arbitrary arrest further:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.<sup>7</sup>

The Transitional Constitution of South Sudan (2011) contains a Bill of Rights that contains an almost word-for-word provision as in the ICCPR, stating:

Every person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his or her liberty except for specified reasons and in accordance with procedures prescribed by law.<sup>8</sup>

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6 Universal Declaration of Human Rights (UDHR), article 9, <http://www.un.org/en/documents/udhr/index.shtml>, accessed 15 January 2013

7 International Covenant on Civil and Political Rights (ICCPR), article 9(1), <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 16 January 2013; see also African Charter on Human and Peoples' Rights, article 6, <http://www.achpr.org/instruments/achpr/>, accessed 15 January 2013

8 Transitional Constitution of South Sudan (2011), article 12, <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5133/The-Transitional-Constitution-Of-The-Republic-Of-South-Sudan-2011.aspx>, accessed 15 January 2013

The Transitional Constitution also corresponds with international law on arrests based on discrimination. It affords citizens:

Equal protection of the law without discrimination as to race, ethnic origin, colour, sex, language, religious creed, political opinion, birth, locality or social status.<sup>9</sup>

While these provisions are promising and indicative of the will of the government to establish a human rights-based approach to governance, international law goes further to set out a number of procedural safeguards that the police must observe. Some of these are not included, or are not precisely formulated in South Sudanese law.

International procedural safeguards require that police officers:

- Identify themselves;<sup>10</sup>
- Give the accused the reasons for their arrest;<sup>11</sup>
- Inform them of their rights and record information about the arrest;<sup>12</sup>
- Inform relatives at the time of the arrest;<sup>13</sup> and
- Inform consular authorities if the person is a non-citizen.<sup>14</sup>

The discussion below reviews to what extent South Sudanese law provides for these procedural safeguards for arrest.

The Bill of Rights in the Transitional Constitution speaks to the right to a fair trial.<sup>15</sup> It states:

Any person who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her.<sup>16</sup>

In addition, the Code of Criminal Procedure enables an arrested person to contact his or her advocate,<sup>17</sup> and provides that an arrested person may inform his or her family. If the arrested person is a juvenile, or suffering from a mental infirmity (so that they are unable to contact their family), the police, Public Prosecution Attorney, Magistrate or the Court shall, 'on its own initiative notify the family or the appropriate body'.<sup>18</sup> While the Police Service Act (2009)<sup>19</sup> requires that police carry on them identification at all times, the law does not spell out that these officials should provide identification at the time of an arrest. It also neglects to include any clauses that require police to inform the consulate of non-citizens.

The Code of Criminal Procedure Act (2008) details further procedures surrounding arrests but, problematically, provides for a range of institutions to be involved in the process. According to this law, cases are to be initiated and overseen by the Directorate of Public Prosecutions (DPSS).<sup>20</sup> Appeals against the initiation of cases are to be made to a Senior Public Prosecutor and then to a Court of Appeal.<sup>21</sup> The police are to carry out investigations according to the directives of the Directorate of Public Prosecutions,<sup>22</sup> and may only initiate an investigation in the absence of a Public Prosecutor,<sup>23</sup> (with absence meaning that no one has been appointed as a prosecutor or that s/he is

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9 *Ibid*, article 14

10 ECOSOC Council, Commission on Human Rights, Civil and Political Rights, including the Questions of Torture and Detention: Torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur, Theo van Boven, UN Doc E/CN.4/2004/56, 23 December 2003, [30]-[31]

11 *Ibid*

12 *Ibid*

13 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 16, and Standard Minimum Rules for the Treatment of Prisoners, rule 92

14 International Convention on the Protection of Migrant Workers and their Families, article 16(7); Vienna Convention on Consular Relations, article 36(1)(b); and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 16(2)

15 Transitional Constitution of South Sudan (2011), article 19, <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5133/The-Transitional-Constitution-Of-The-Republic-Of-South-Sudan-2011.aspx>, accessed 15 January 2013

16 *Ibid*, article 19(2)

17 Code of Criminal Procedure Act (2008), article 93(2), <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

18 *Ibid*, article 93(4)

19 Police Service Act (2009), article 82, <http://www.southsudanpolice.net/wp-content/uploads/2012/10/SSPS-Police-Service-Act-2009.pdf>, accessed 16 January 2013

20 Code of Criminal Procedure Act (2008), article 23(1)(a), <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

21 *Ibid*, article 24

22 *Ibid*, article 27(2)

23 *Ibid*, article 31(1)

absent and no substitute has been appointed).<sup>24</sup> These defined roles require good communication and cooperation between the South Sudan Police Service (SSPS) and the Directorate of Public Prosecutions for arrests to be carried out successfully and in accordance with human rights standards. This is a challenge given the lack of transport, absence of coordination mechanisms and a limited budget for communication. It is recommended that the government prioritise mechanisms of communication and cooperation between these agencies, particularly by the Directorate of Organised Forces.

The powers of arrest have been given to any Public Prosecution Attorney, Magistrate or Court,<sup>25</sup> the police, traditional Chiefs,<sup>26</sup> and private persons (only if directed by a Public Prosecution Attorney, proclamation or if the person has escaped arrest).<sup>27</sup> This can lead to confusion between different institutions and disagreements over jurisdiction. In addition, there may not be consistency in terms of the understanding of human rights standards and procedural safeguards across these institutions. For example, traditional authorities have been known to act without regard to these standards.<sup>28</sup> Although the incorporation of Chiefs into the system may be useful in that they are often in a position to know who the criminals are in a community and because they have a strong social standing, Chiefs require training on how to carry out arrests within the framework of human rights standards. Furthermore, there are no accountability mechanisms for Chiefs who make erroneous or arbitrary arrests. In addition, customary courts often deal with criminal cases and cite provisions from the Penal Code, despite the lack of training on statutory criminal law and procedural rules.<sup>29</sup> It is recommended that the law reflect that a Chief immediately inform the police to be present during an arrest, that Chiefs be trained to effect arrests using the appropriate procedural safeguards during arrests and that the jurisdiction of customary courts be clarified.

Also of concern are some vague clauses that are not properly explicated in the Criminal Code of Procedure, such as:

Any policeman or Chief may arrest any person –

- (c) against whom a reasonable complaint has been made, a credible information has been received, or reasonable suspicion exists of his or her having been so concerned.
- (k) who is reasonably suspected of being a deserter from the Sudan People's Liberation Army, the Joint Integrated Units, Sudan Armed Forces or any other organised force.<sup>30</sup>

This imprecision can lead to differential interpretation over the definitions of 'reasonable' and 'credible'. In addition, the latter clause creates the potential for political arrests and interference.

The disparity between international and domestic standards therefore seems to be predominantly as a result of imprecise laws, further confused by the involvement of numerous institutions, rather than factors such as excessive police powers, since the new legislation is human rights-based. While South Sudan must be credited with having made an effort to prohibit arbitrary arrests in its legislation and to put in place procedural safeguards, it is recommended that the South Sudan Law Reform Commission review imprecise clauses and ensure accordance with international standards.

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<sup>24</sup> *Ibid*, article 31(2)

<sup>25</sup> *Ibid*, article 75

<sup>26</sup> *Ibid*, article 76

<sup>27</sup> *Ibid*, article 77

<sup>28</sup> Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.46; see also United States Institute for Peace. 2010. *Local Justice in Southern Sudan*, p.58, <http://www.usip.org/publications/local-justice-in-southern-sudan>, accessed 17 January 2013

<sup>29</sup> *Ibid*, p.46

<sup>30</sup> Code of Criminal Procedure Act (2008), article 76, <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

### 3.2 The practice of arbitrary arrest

Just before independence, the Deputy Commissioner for Human Rights stated that she had heard 'alarming reports of numerous killings, arbitrary arrests and prolonged pre-trial detention in South Sudan'.<sup>31</sup> A recent study by Human Rights Watch (2012) confirms that arbitrary arrests are widespread.<sup>32</sup> As discussed above, imprecise laws can lead to arbitrary interpretations of the law, however South Sudan faces numerous other challenges that play a role in the failure to adhere to international safeguards.

#### 3.2.1 Political interference

One driving factor leading to the high number of arbitrary arrests in South Sudan is political interference. After decades of civil war and political fighting against the Muslim north as well as the very recent introduction of democratic self-governance, it is not surprising that the country has far to go in terms of the development of its systems of governance. The most important shift that needs to be made is away from a military-dominated regime towards multi-party democracy. This requires the opening up party politics and the transformation of attitudes of government officials towards greater openness.<sup>33</sup>

There are numerous examples of arrests for to political reasons. The United States Department of State reported that by the end of 2011, nine opposition members who had been arrested for allegedly criticising the governor of Northern Bahr el-Ghazal were still being held without charge, and no trial had been scheduled.<sup>34</sup> There have been allegations that political cadres have been attacked and tortured in Western Bahr el Ghazal, according to the Sudanese Peoples Liberation Movement (SPLM) chairperson for Wau and former County Commissioner.<sup>35</sup> There is also evidence of arbitrary arrests of journalists who are critical of the government. The United Nations Mission in the Republic of South Sudan (UNMISS) noted 16 violations of political rights and freedoms and six cases of arbitrary arrest and detention of journalists between 2 November 2011 and 7 March 2012.<sup>36</sup> For example, Peter Ngor was allegedly arrested and detained for 18 days and then released without an explanation after his newspaper, *Destiny*, published a critical opinion piece on the marriage of President Salva Kiir's daughter to an Ethiopian national.<sup>37</sup> Dr James Okuk was also allegedly apprehended at the Ministry of Foreign Affairs by security agents of the Criminal Investigations Department (CID), who accused him of writing critical newspaper articles.<sup>38</sup> President Salva Kiir has spoken out about these arrests,<sup>39</sup> however until individuals and institutions are held accountable for their actions, political interference will continue to play a role in arbitrary arrests in South Sudan. Human Rights Watch and Amnesty International claimed that a new pattern was developing during the April 2010 elections of security personnel arbitrarily arresting people suspected of links to armed opposition groups. They also claimed that the government limited the participation of opposition political parties during the drafting of the new constitution.<sup>40</sup>

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31 Kyung-wha Kang, 'Press statement of the Deputy Commissioner for Human Rights', Sudan Mission, 27 June 2011

32 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012

33 International Crisis Group. 2011. *Politics and Transition in the New South Sudan*, <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/172%20-%20Politics%20and%20Transition%20in%20the%20New%20South%20Sudan.pdf>, accessed 17 July 2012

34 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

35 United Nations Mission in South Sudan. 2011. *Allegations of Arbitrary Arrest and Detention Grow in South Sudan*, <http://www.mirayafm.org/index.php/special-reports/6748-south-sudanese-decry-abductions-arbitrary-arrests-detention-and-torture>, accessed 17 July 2012

36 United Nations Security Council. 2012. *Report on the Secretary-General on South Sudan S/2012/140*, <http://reliefweb.int/sites/reliefweb.int/files/resources/N1225265.pdf>, accessed 10 June 2012

37 Committee to Protect Journalists. 'South Sudanese journalist speaks out after illegal detention', 24 November 2011, <http://cpj.org/blog/2011/11/south-sudan-journalist-speaks-out-after-illegal-de.php>, accessed 17 July 2012

38 *The Sudan Tribune*, 'How, who and why of my arbitrary arrest in Juba', 6 November 2011, <http://www.sudantribune.com/How-who-and-why-of-my-arbitrary,40648>, accessed 17 July 2012

39 Committee to Protect Journalists. 'South Sudanese journalist speaks out after illegal detention', 24 November 2011, <http://cpj.org/blog/2011/11/south-sudan-journalist-speaks-out-after-illegal-de.php>, accessed 17 July 2012

40 Human Rights Watch and Amnesty International. 2011. *South Sudan: A Human Rights Agenda*, <http://www.hrw.org/news/2011/06/30/south-sudan-human-rights-agenda>, accessed 17 July 2012, pp.2-3

### 3.2.2 Inadequate police training and capacity

Another major factor contributing to arbitrary arrests is inadequate police training and capacity for criminal investigations. Limitations on the skills and tools for criminal investigations mean that police may be over-reliant on confessions,<sup>41</sup> which creates the risk for the use of torture and other methods to extract these confessions. Human Rights Watch notes, 'the South Sudan Police Service remains under-equipped, ill-trained, largely illiterate, and insufficiently deployed. The SPLA is often called in to fill the policing void, but instead of upholding the rule of law the soldiers commit further violations against civilians.'<sup>42</sup> It is estimated that 90% of the police are illiterate in both Arabic and English, and many have not been trained on law enforcement, legislation and human rights.<sup>43</sup>

The SSPS includes many former Sudanese People's Liberation Army (SPLA) fighters as well as from former militias,<sup>44</sup> meaning that a military culture continues to predominate in the police. Indeed, in January 2011, a United Nations Mission in Sudan (UNMIS) investigation into the sole police training centre in South Sudan at Rajaf near Juba found serious human rights violations against trainees and showed a culture of guerrilla training practices.<sup>45</sup> While President Salva Kiir issued a presidential decree to convene an investigation committee in response to this report, the findings of the committee have yet to be made public, and no perpetrators of these violations have been prosecuted.<sup>46</sup> It is clear that the police training curriculum at Rajaf must be developed in line with international policing standards and that further training of police must be systematically carried out across all the states, particularly with regard to human rights.

Common examples of arbitrary arrests noted by the UN demonstrate the need for training. Proxy detentions continue to occur. These include arresting the suspect's family members, either because of their mere affiliation to the suspect, or to force them to compensate the victim's family. This is illegal since the arrested person is not the one suspected of having committed the offence.<sup>47</sup> This idea is related to customary law notions of collective responsibility. In some cases, family members are arrested in an effort to put pressure on the suspected person to turn him/herself in.<sup>48</sup> It is recommended that the government clarify the illegality of these actions and that training is conducted on this specific issue.

The SSPS and the SPLA both require training on criminal investigations and human rights. Moreover, it is a vital that they receive English language training, and training on the Constitution, Penal Code and Code of Criminal Procedure. The above-mentioned examples also demonstrate the need for customary law and statutory law to be aligned, and for customary law to conform to international human rights principles.

Traditional Chiefs and police officers should be made aware of their specific jurisdictions and the related provisions in law. Citizens also need education in relation to the law. The police sometimes arrest suspects on the basis of very little or no evidence due to pressure from community members who may want to see immediate punishment or may resort to mob justice if they do not feel that justice has been done.<sup>49</sup> Communities are also distrustful of the police,<sup>50</sup> and in some cases, having only known customary law, prefer to use customary courts to deal with cases that are out of the court's jurisdiction, for example, in relation to crimes such as rape and murder. The subsequent

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41 International alert states that police pressure leads to many questionable 'confessions'. See International Alert. 2012. *Peace and Conflict Assessment of South Sudan 2012*, <http://www.international-alert.org/sites/default/files/publications/201207PeaceSouthSudan.pdf>, accessed 15 January 2013, p.46

42 Human Rights Watch and Amnesty International. 2011. *South Sudan: A Human Rights Agenda*, <http://www.hrw.org/news/2011/06/30/south-sudan-human-rights-agenda>, accessed 17 July 2012, pp.2-3

43 The North-South Institute, *Police Reform in Southern Sudan*, <http://www.nsi-ins.ca/content/download/1893-NSI-v3.pdf>, p.6, as cited in Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.24

44 The North-South Institute, *Police Reform in Southern Sudan*, <http://www.nsi-ins.ca/content/download/1893-NSI-v3.pdf>, accessed 16 January 2013, p.1

45 Human Rights Council, 18th session, agenda item 4, *Human rights situations that require the Council's attention, Report of the independent expert on the situation of human rights in the Sudan*, August 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1_en.pdf), accessed 17 July 2012, p.17

46 Government of South Sudan, GOSS/PD/J/14/2011, 25 March 2011, [http://www.goss-online.org/magnoliaPublic/en/president/documents/2011/mainColumnParagraphs/0/content\\_files/file39/Decree14-110001.pdf](http://www.goss-online.org/magnoliaPublic/en/president/documents/2011/mainColumnParagraphs/0/content_files/file39/Decree14-110001.pdf), accessed 17 July 2012

47 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.51

48 Office of the High Commissioner for Human Rights, *Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Arbitrary arrest and detention committed by national security, military and police*, 28 November 2008, <http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf>, accessed 17 July 2012, pp.26-29

49 *Ibid*, pp.26-29

50 United States Institute for Peace. 2010. *Local Justice in Southern Sudan*, <http://www.usip.org/publications/local-justice-in-southern-sudan>, accessed 17 January 2013, p.58

sentences that are imposed rarely exceed six months,<sup>51</sup> and rape is rarely seen as a serious crime, providing insufficient redress for these crimes. Community education and training is also therefore necessary on the rule of law and the jurisdictions of different courts.

### 3.2.3 *Police corruption and impunity*

Police corruption may also be a factor that leads to arbitrary arrest and detentions. There are already indications of endemic corruption in South Sudan, with President Kiir recently requesting 75 senior officials to return at least USD 4 billion of stolen money.<sup>52</sup> However, no police officials have been found guilty of corruption, and accounts of police corruption are restricted to newspaper articles.<sup>53</sup> It is apparent that a culture of impunity prevails amongst the organised forces in South Sudan, partly because the law in South Sudan overemphasises immunity and underemphasises accountability. The Police Service Act (2008) and the Armed Forces Act contain many clauses that preserve immunities,<sup>54</sup> while giving very little emphasis to the procedural safeguards for detainees.<sup>55</sup> A United Nations independent expert noted the following:

Systematic human rights abuses continue in an environment of impunity, with the most frequent and worst abuses perpetrated by the security forces of Southern Sudan ... Like the SPLA, the Southern Sudanese Police Service (SSPS) commits serious human rights violations in its law enforcement operations.<sup>56</sup>

Inadequate oversight mechanisms for police therefore continue to allow arbitrary arrests to occur. This inadequacy will be detailed later.

### 3.2.4 *Discrimination*

A final issue that threatens the procedural safeguards in South Sudan against arbitrary arrests is discrimination. South Sudan continues to be subject to significant ethnic fighting. For example, the attack by 6 000 Lou-Nuer fighters on the Murle community in Jonglei state in December 2011 displaced between 20 000 and 50 000 Murle community members.<sup>57</sup> Violence in the Abyei region before July 2009 between Sudan Armed Forces (SAF) and SPLA forces led to the displacement of around 110 000 people. In addition, there have been accusations that the government has promoted inter-tribal conflict.<sup>58</sup> Despite government reshuffles, there is still the general perception that the government is Dinka-led and the SSPS and SPLA promote these interests.<sup>59</sup> There is a possibility that arbitrary arrests could be linked to ethnic discrimination, particularly if left unchecked. Justin Ambago Ramba, the Secretary-General from the United South Sudan Party (USSP), has claimed that the non-representative composition of the SSPS requires immediate attention. He has stated:

The SSPS was anomalously designed to favour particular ethnicities and it is no secret that the SSPS Commissioners in the Ten States of RSS all without exception hail from one ethnic group.<sup>60</sup>

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51 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.46

52 BBC News, 'South Sudan MPs suspend officials in corruption probe', 13 June 2012, <http://www.bbc.co.uk/news/world-africa-18421763>, accessed 18 July 2012

53 South Sudan News Agency, 'Prompt weeding needed in our police service', 10 September 2011, <http://www.southsudannewsagency.com/opinion/articles/prompt-weeding-needed-in-our-police-service>, accessed 30 November 2011

54 These include immunity for acts done whilst discharging functions and duties, that no police personnel can be arrested for murder committed whilst carrying out functions unless written authorisation is obtained from the President in the case of officers, and that no police personnel are liable for damages as a result of performing their duties; see Police Service Act (2009), article 51, <http://www.southsudanpolice.net/wp-content/uploads/2012/10/SSPS-Police-Service-Act-2009.pdf>

55 Human Rights Monitor. 2008. *Issue 3*. African Centre for Justice and Peace Studies, [http://www.acjps.org/Publications/Human\\_Rights\\_Monitor-Issue3-FINAL.pdf](http://www.acjps.org/Publications/Human_Rights_Monitor-Issue3-FINAL.pdf), accessed 17 July 2012

56 Human Rights Council, 18th session, agenda item 4, *Human rights situations that require the Council's attention, Report of the independent expert on the situation of human rights in the Sudan*, August 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1_en.pdf), accessed 17 July 2012, p.17

57 *The Sudan Tribune*, 'South Sudan declares Jonglei state a disaster area', 4 January 2012, <http://www.sudantribune.com/South-Sudan-declares-Jonglei-state>, accessed 6 January 2012

58 [www.thesosaneews.com](http://www.thesosaneews.com), 'EES Nimule: Dinka IDPs met with SPLA, guns to be flown to Nimule', 18 August 2011, <http://thesosaneews.com/2011/08/18/ees-nimule-outcome-dinka-idps-met-with-spla/>, accessed 21 January 2013

59 South Sudan.net, 'The root causes of conflicts in South Sudan', 14 May 2011, <http://www.southsudan.net/theroot.html>, accessed 17 July 2012

60 South Sudan News Agency, 'Prompt weeding needed in our police service', 10 September 2011, <http://www.southsudannewsagency.com/opinion/articles/prompt-weeding-needed-in-our-police-service>, accessed 30 November 2011



He has also referred to widespread harassment of foreigners from neighbouring Kenya, Uganda, Eritrea, the DRC and Ethiopia.<sup>61</sup> The composition of the SSPS therefore also needs to take into account the need for greater representation of the different ethnic groups as one approach to addressing discrimination.

Women are particularly at risk of arbitrary arrest due to discrimination, having come from a past where Sharia law and customary law dominated. There have been instances where they have been apprehended 'for their own safety', marital disobedience and dowry-related problems.<sup>62</sup> There are also many instances where under-age children have been arrested. Further to this, people with psychosocial disabilities and refugees/asylum seekers are also very much at risk.<sup>63</sup> An independent expert for the United Nations stated the following:

Serious crimes against women are sometimes settled through the traditional justice system, which very often applies discriminatory customary norms focused more on reconciliation than on ensuring accountability. In Western Equatoria, a man suspected of raping his two under-aged stepdaughters was released on bail after he agreed to compensate the victims' family. Another man suspected of murdering his wife was also released by the police after the families agreed to a settlement out of court.<sup>64</sup>

As may be seen from the discussion above, South Sudan has made important progress in putting in place domestic legislation that prevents arbitrary arrests, and has attempted to institute some of the procedural safeguards found in international law. Nevertheless, more safeguards could be explicated and imprecise laws can be better explained.

## 4 The Use of Detention

South Sudan uses police cells and prisons to detain suspects, however facilities are often in bad condition and suspects are not detained in accordance with international law. Suspects on remand pending investigation are usually held in a police cell, but due to long periods of investigation and limited services at the police station, they are often transferred to prison.<sup>65</sup>

The Prison Service estimated that in November 2011 there were 5 767 prisoners in South Sudan. From this, 93% were male, 30% were on remand and 183 people were on death row. There were 168 children accused or convicted of crimes, while 55 were in prison accompanying their mothers.<sup>66</sup> It should be noted that accurate statistics on pre-trial detention are difficult to obtain due to inadequate record-keeping, and the lack of disaggregated data.

### 4.1 The legal framework

As with arrests, international law includes a number of procedural safeguards relating to detention under the International Convention for Civil and Political Rights, specifically: the right to be informed of a criminal charge;<sup>67</sup> the right of persons detained on criminal charges – the '48 hour rule';<sup>68</sup> the right of *habeas corpus*;<sup>69</sup> and the right to compensation for unlawful arrest or detention.<sup>70</sup>

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61 *Ibid*

62 Office of the High Commissioner for Human Rights, *Tenth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan: Arbitrary arrest and detention committed by national security, military and police*, 28 November 2008, <http://www.ohchr.org/Documents/Countries/10thOHCHR28nov08.pdf>, accessed 17 July 2012, pp.30–35

63 *Ibid*

64 Human Rights Council, 18th session, agenda item 4, *Human rights situations that require the Council's attention. Report of the independent expert on the situation of human rights in the Sudan*, August 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1_en.pdf), accessed 17 July 2012, p. 18

65 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.38

66 *Ibid*, p.30

67 International Covenant on Civil and Political Rights, article 9(2), <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 16 January 2013

68 *Ibid*, article 9(3)

69 *Ibid*, article 9(4)

70 *Ibid*, article 9(5)

The Transitional Constitution of South Sudan affirms the right to be informed of a criminal charge.<sup>71</sup> It also notes the following in relation to the rights of persons detained on criminal charges:

A person arrested by the police as part of an investigation, may be held in detention, for a period not exceeding 24 hours and if not released on bond to be produced in court. The court has authority to either remand the accused in prison or to release him or her on bail.<sup>72</sup>

The Transitional Constitution is the supreme law of South Sudan, but was written in 2011, three years after the Code of Criminal Procedure Act (2008), which was written in accordance with the Interim Constitution of 2005. The Code of Criminal Procedure Act contradicts the above clause of the Constitution as it gives the Public Prosecution Attorney, or in his/her absence the Magistrate, the power to renew the detention of an arrested person after 24 hours for a period not exceeding one week.<sup>73</sup> The Code of Criminal Procedure goes on to say that a Magistrate can, with the recommendation of a Public Prosecution Attorney order that a person be detained for investigation for no more than two weeks and that this should be recorded in the case diary.<sup>74</sup> If a person is charged, a Magistrate can renew the detention every week for no longer than three months except upon the approval of the competent President of the Court of Appeal.<sup>75</sup>

The contradiction between the two laws has the potential of leading to disagreements between the Directorate of Public Prosecutions and the judiciary over jurisdiction. The nature of the relationship between the two institutions will determine how well the current system works, and this may vary from state to state. It is recommended that the two laws be harmonised as soon as possible and be adapted to comply with international human rights standards.

Further to these concerns, nowhere in South Sudanese law is there a provision relating to the procedures for *habeas corpus*. This is an important procedural safeguard allowing detained persons to challenge the legality of their detention before a court. An additional provision is required in South Sudanese legislation to complement current provisions.

The Ministry of Justice estimates that 95% of people do not receive counsel at any point in dealings with the criminal justice system. People are given the right to appeal but do not know how to do so without assistance.<sup>76</sup> An effective system for providing legal aid is vital for ensuring equal access to courts and fair treatment. Currently the Constitution gives the accused the right to a lawyer of the person's choice or to have legal aid given 'by the government where he or she cannot afford a lawyer in any serious offense'.<sup>77</sup> South Sudan has developed a Legal Aid Strategy,<sup>78</sup> and aims to provide a minimum of 300 people with legal aid. However, as of January 2013, this Strategy still required funding and had not commenced implementation.<sup>79</sup> In addition, defendants are still unaware of their right to legal aid and do not know how to apply for it.<sup>80</sup> Unfortunately the Strategy does not address vulnerable groups, such as women and children, but leaves this to Justice and Confidence Centres, which are in the process of being established by the United Nations Development Programme (UNDP). These centres are run by civil society organisations that provide legal advice and support to communities; however full legal aid is not guaranteed, and these centres do not exist in all states.<sup>81</sup> Further to this, there is evidence that even prisoners that have been sentenced to death have not been given access to legal aid. In September 2010, four prisoners were executed in the state of Northern Bahr el Ghazal, and only one was reported to have benefited from legal aid.<sup>82</sup>

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71 Transitional Constitution of South Sudan (2011), article 19(2), <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 16 January 2013

72 *Ibid*, article 19(4)

73 Code of Criminal Procedure Act (2008), article 64(1) and (2), <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

74 *Ibid*, article 64(3)

75 *Ibid*, article 64(4)

76 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.42

77 Transitional Constitution of South Sudan (2011), article 19(7), <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5133/The-Transitional-Constitution-Of-The-Republic-Of-South-Sudan-2011.aspx>, accessed 15 January 2013

78 Government of South Sudan. 2011. *Legal Aid Strategy 2011–2013*. Ministry of Justice, unpublished

79 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.92, and personal communication with UNDP Rule of Law Officer, 17 January 2013

80 *Ibid*, p.44

81 Government of South Sudan. 2011. *Legal Aid Strategy 2011–2013*. Ministry of Justice, unpublished

82 Human Rights Council, 18th session, agenda item 4, *Human rights situations that require the Council's attention, Report of the independent expert on the situation of human rights in the Sudan*, August 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1_en.pdf), accessed 17 July 2012, p.17

In spite of the legislation having no clear clause relating to *habeas corpus*, the Code of Criminal Procedure includes a clause for compensation to persons wrongfully arrested, which is considered a procedural safeguard against wrongful arrests/detentions. Nevertheless, the fines are too low to act as a deterrent, and the sentencing is minimal. The provision states:

When any person causes the arrest of another person and it appears to a Magistrate or Court by whom the case is investigated into or tried that there was no sufficient grounds for causing such arrest, the Magistrate or Court may in his or her discretion direct the person causing the arrest to pay to the arrested person or each of the arrested persons, if there are more than one, such compensation not exceeding SDG 100 which the Magistrate or Court deems appropriate, and may award a term of imprisonment not exceeding thirty days in the aggregate in default of payment.<sup>83</sup>

The court must also record and consider any objection and state in writing the reasons for awarding the compensation. If the court discharges the accused and decides that the complaint was frivolous or vexatious, the complainant can be made to pay another fine not exceeding SDG 100.<sup>84</sup> Not only are these fines and sentencing inadequate compensation for victims of arbitrary arrest and detention, but because there is no clear procedure whereby the accused can challenge the legality of the detention, it is unlikely that a court will ever order compensation. It therefore seems that there is a problem with the enforcement of this law, with such cases having occurred with no recourse. It is recommended that prosecutors and police be made aware of the legal consequences of wrongful arrest and that the fines be augmented to discourage such actions.

As discussed, the legal framework does not permit police custody for more than 24 hours, but there is some legal confusion as to the procedures after 24 hours. Aside from contradictory laws, there are also other factors in South Sudan that lead police to fail to provide these safeguards against detention. In some areas there are no public prosecutors or magistrates.<sup>85</sup> As has been mentioned above, police sometimes make arbitrary arrests where they fail to lay charges or fail to inform the person of the charges brought against them.

## **4.2 The practice of detention**

Illegal detentions are subject to a number of driving factors. One factor is that police do not observe the required time limitations on detention due to mismanagement and/or corruption. Deng Mading Kuc, a private advocate in Juba, has admitted that he often finds that the police are unwilling to accept complaints against soldiers or other security personnel due to the fear of retaliation.<sup>86</sup> The Anti-Corruption Commission (as discussed below) must therefore take a more proactive stance on investigating cases of corruption in the police.

Although efforts have been made to legislate in relation to record-keeping by the police,<sup>87</sup> as previously noted, there are problems of illiteracy and a lack of training in the police. In some of the rural counties, there are also problems in obtaining the most basic resources to create and maintain records, such as stationery and filing equipment.

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83 Code of Criminal Procedure Act (2008), article 302, <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

84 *Ibid*, article 302

85 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

86 *The Sudan Tribune*, 'South Sudan Police pledge support to judicial system', 15 August 2011, <http://www.sudantribune.com/South-Sudan-police-pledge-support,39832>, accessed 17 July 2012

87 Code of Criminal Procedure Act (2008), article 302, <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

There are instances where remands are not renewed in accordance with the Code of Criminal Procedure,<sup>88</sup> or where warrants for remands have expired.<sup>89</sup> The Prisons Service has attributed this to a lack of training, the absence of prosecutors, and the lack of communication systems and transport limitations, particularly if a crime occurs far away.<sup>90</sup> In 2011, 93% of the police budget was spent on salaries; this indicates that little funding was left for other necessities such as equipment.<sup>91</sup> While police require training in record-keeping, it is recommended that the judiciary should adopt a more proactive stance in reviewing the legality and necessity of detentions.

It is also recommended that the Directorate of Public Prosecutions take a larger role overseeing police detentions. Prosecutors do not access police detention cells daily as they sometimes lack the transport and/or are not informed of new detainees by the police. This lack of communication between the two institutions means that it is sometimes difficult for prosecutors to oversee cases of detention. In addition, there are some areas of South Sudan where the police and judiciary have not been adequately deployed, resulting in difficulties in investigating and prosecuting cases within the established time frames.

In November 2011 a UN group on arbitrary detention was formed, comprised of UNMISS and UN country team members, and in December 2012 a UN assessment began to map the population of detainees in police cells and prisons.<sup>92</sup> While the UN can provide a temporary solution in preventing arbitrary detentions, a long-term solution requires the government to take the lead.

There is also an enormous backlog of cases due to weaknesses in the justice system.<sup>93</sup> The justice system lacks general infrastructure, communications equipment and administrative and legal staff. There are only 125 judges in the country instead of the minimum requirement of 250.<sup>94</sup> The state of Northern Bahr el Ghazal, for example, has only five judges covering an area inhabited by an estimated population of over 700 000 people.<sup>95</sup> When trials do take place, they can be subject to repeated adjournments. Sometimes parties do not appear in court; there may be transportation difficulties or they may not know they were expected to attend. Prisoners have even missed their trial dates due to a failure to be presented at court.<sup>96</sup> Judicial corruption has also been said to be a problem.<sup>97</sup> There is currently inadequate oversight and monitoring of customary courts by the judiciary.<sup>98</sup> Indeed, customary courts are regulated and established by the Local Government Act (2008) and many Chiefs also hold positions within local government, raising doubts over their independence.<sup>99</sup> The Judiciary Act (2008) needs to be amended so that it provides clauses for oversight of the customary courts and this needs to be enforced in practice.

In summary, it is apparent that prolonged and illegal detentions do occur in South Sudan. Detainees may be held for longer than the prescribed times for a variety of reasons. Limited resourcing in the prisons, police and judiciary is a major factor.

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88 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.38

89 *Ibid*, p.40

90 *Ibid*, p.38

91 *Ibid*, p.24

92 United Nations Security Council, *Report of the Secretary-General on South Sudan, S/2012/140*, 7 March 2012, <http://reliefweb.int/sites/reliefweb.int/files/resources/N1225265.pdf>, accessed 10 June 2012

93 Human Rights Watch and Amnesty International. 2011. *South Sudan: A Human Rights Agenda*, pp.2–3, <http://www.hrw.org/news/2011/06/30/south-sudan-human-rights-agenda>, accessed 17 July 2012

94 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.27

95 *The Sudan Tribune*, 'South Sudan Police pledge support to judicial system', 15 August 2011, <http://www.sudantribune.com/South-Sudan-police-pledge-support,39832>, accessed 17 July 2012

96 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.41

97 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

98 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.45

99 *Ibid*, p.45

## 5 Conditions of Detention

The section below discusses matters relating to conditions in detention. Each issue is explored in terms of the legal framework, as well as conditions in practice.

### 5.1 Access to medical care; access to judicial authorities; access to food, water and sanitation; and the treatment of vulnerable groups

#### 5.1.1 The legal framework

Internationally, accused persons must be accorded access to medical care;<sup>100</sup> to judicial authorities;<sup>101</sup> to food, water and sanitation;<sup>102</sup> and to special measures for vulnerable groups.<sup>103</sup> The use of force must also be proportionate to the seriousness of the offence.<sup>104</sup> In other words, force must only be applied when strictly necessary to resolve disturbances in the prison. While the Prison Service Provisional Order (2011) does make provision for these during detention in prison, South Sudanese law is silent on these measures during police detention. The Prisons Service Provisional Order contains provisions for the separation of prisoners,<sup>105</sup> provisions for female prisoners and children,<sup>106</sup> juveniles,<sup>107</sup> food, water and nutrition,<sup>108</sup> and health and medical care.<sup>109</sup> It also states that the use of force must be proportional.<sup>110</sup> The Code on Criminal Procedure, on the other hand, is silent on vulnerable groups in detention and on access to medical care, and further states that:

An arrested person also has the right to obtain a reasonable amount of food stuff, clothing and cultural materials, at his or her own cost, subject to the conditions relating to security and public order.<sup>111</sup>

Thus the police are not obliged to provide any food, water or a reasonable standard of hygiene, or to provide access to medical personnel.

Because traditional authorities and communities lack awareness of the rights of women and children under the law, vulnerable groups continue to be discriminated against. Children are often tried as adults and detained with adults.<sup>112</sup> In addition, the prison system is mainly punitive rather than reformatory since the prisons lack the resources to build facilities as required by the Child Act (2008).<sup>113</sup> The Directorate of Public Prosecutions must prioritise juvenile cases and the government must give support and resources to the implementation of juvenile facilities. Training is needed for police and prison officials as well as traditional authorities.

#### 5.1.2 In practice

In practice, South Sudan lacks the infrastructure to provide police and prison detentions at a standard that accords with international law. In most of the state capitals, there are separate police detention cells and prisons but in the more rural areas prisons and police detention are used interchangeably. In 2011, 93% of the budget for the Prisons Service was used to pay salaries,

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100 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, article 22, <http://www2.ohchr.org/english/law/treatmentprisoners.htm>, accessed 16 January 2013

101 International Covenant on Civil and Political Rights, article 9(3), <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 16 January 2013

102 International Committee of the Red Cross. 1949. *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), <http://www.unhcr.org/refworld/docid/3ae6b36c8.html>, accessed 16 January 2013

103 See for example International Covenant on Civil and Political Rights, article 14(4), <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 16 January 2013

104 Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, article 54 (1), <http://www2.ohchr.org/english/law/treatmentprisoners.htm>, accessed 16 January 2013

105 Government of South Sudan, Prisons Service Provisional Order 2011, article 64, unpublished

106 *Ibid.*, article 65

107 *Ibid.*, article 66

108 *Ibid.*, article 67

109 *Ibid.*, article 68

110 *Ibid.*, article 97

111 Code of Criminal Procedure Act (2008), article 93(5), <http://www.gurtong.net/LinkClick.aspx?fileticket=HwVixTfxA0Y%3d&tabid=342>, accessed 15 January 2013

112 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

113 Human Rights Watch and Amnesty International. 2011. *South Sudan: A Human Rights Agenda*, <http://www.hrw.org/news/2011/06/30/south-sudan-human-rights-agenda>, accessed 17 July 2012, p.3

leaving little funding for additional equipment or services.<sup>114</sup> As a result, in many prisons, prisoners rely on food from their families, and medical care is limited. Police detainees are not provided with food.<sup>115</sup> There have been reports of inmates dying due to lack of medical care.<sup>116</sup> The Prisons Service claims that the central government does not allocate any portion of the budget to food, leaving state governments to provide for this.<sup>117</sup> It is recommended that this be addressed in future budgets.

Some prisons also suffer from severe overcrowding. For example, Rumbek prison in Lakes state holds more than 550 prisoners instead of the 200 inmates that is its stated capacity. There are also temperature and ventilation problems and the infrastructure is so basic that in some cases it is damaged and crumbling.<sup>118</sup> Although prisoners are allowed to submit complaints to judicial authorities and to ask for an investigation into prison conditions, action has rarely been taken pending such investigations.<sup>119</sup>

It is recommended that the Code of Criminal Procedure Act be reviewed to include a clause on conditions of police detention that is in accordance with international law. Furthermore, the government should allocate a portion of the budget to building adequate police and prison detention facilities and to ensure prisoners are fed properly.

## **5.2 The right to a fair trial**

### *5.2.1 The legal framework*

The right to a fair trial is outlined in South Sudan's Bill of Rights.<sup>120</sup> It details the presumption of innocence,<sup>121</sup> and the entitlement to a fair and public hearing in accordance with procedures prescribed by law.<sup>122</sup> The accused person is also entitled:

to be tried in his or her presence in any criminal trial without undue delay; the law shall regulate trial in absentia.<sup>123</sup>

As previously discussed, the Constitution provides the right to legal assistance; either the person can have his/her own lawyer, or must be accorded a lawyer by the government if unable to afford it in serious cases.<sup>124</sup>

### *5.2.2 In practice*

The domestic legal framework for the right to a free trial therefore corresponds to international standards but in practice comes across several problems. The problems with the Legal Aid Strategy have already been detailed. In addition, as previously mentioned, conditions of detention are so inhumane that pre-trial detention is a form of advanced punishment that defies the presumption of innocence. Given that there are over 60 ethnic groups in South Sudan, access to interpreters can also be problematic. Furthermore, despite the right to be tried with undue delay, inadequate case tracking and management,<sup>125</sup> corruption,<sup>126</sup> political interference and inadequate training and resources<sup>127</sup> can result in limitations on the application of the right to a fair trial.

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114 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.32

115 Human Rights Watch and Amnesty International. 2011. *South Sudan: A Human Rights Agenda*, <http://www.hrw.org/news/2011/06/30/south-sudan-human-rights-agenda>, accessed 17 July 2012, p.24

116 *Ibid*, p.13

117 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.79

118 *Ibid*, p.76

119 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

120 Transitional Constitution of South Sudan (2011), article 19, <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5133/The-Transitional-Constitution-Of-The-Republic-Of-South-Sudan-2011.aspx>, accessed 15 January 2013

121 *Ibid*, article 19(1)

122 *Ibid*, article 19(3)

123 *Ibid*, article 19(6)

124 *Ibid*, article 19(7)

125 Human Rights Watch and Amnesty International. 2011. *South Sudan: A Human Rights Agenda*, <http://www.hrw.org/news/2011/06/30/south-sudan-human-rights-agenda>, accessed 17 July 2012, p.41

126 International Alert. 2012. *Peace and Conflict Assessment of South Sudan 2012*, <http://www.international-alert.org/sites/default/files/publications/201207PeaceSouthSudan.pdf>, accessed 15 January 2013, p.47

127 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.38

These problems are accurately summed up by an independent expert for the UN who states:

Weaknesses in its law enforcement capacity and the acute shortage of qualified staff in the justice sector have fuelled impunity for crimes. Illegal, prolonged and arbitrary detentions continue to be a major concern. Large numbers of people are put in prolonged detention without mandated legal warrants, very often in overcrowded and dilapidated cells. In Lake and Western Bahr el Ghazal, UNMIS observed that more than half of pre-trial detainees had been held without the appropriate warrant extension.<sup>128</sup>

### **5.3 Freedom from torture and ill-treatment**

#### *5.3.1 The legal framework*

The Transitional Constitution of South Sudan affirms the protection of citizens from torture and states the following:

No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>129</sup>

While the above provision exists, nothing further is stated regarding procedural safeguards, including the prohibition on incommunicado detention, the prohibition on the admissibility of evidence obtained under torture, and accountability for acts of torture.

South Sudan has not ratified the Convention against Torture since it became an independent country. The government has made commitments to ratify key human rights conventions, but has yet to do so.<sup>130</sup>

Finally, no independent police complaints mechanisms are provided for in South Sudanese law. The South Sudan Human Rights Commission and Anti-Corruption Commission exist and make recommendations to the Ministry of Justice, but neither have had notable successes in terms of holding police accountable.

#### *5.3.2 In practice*

Torture by government forces, however, remains a problem and it has been reported that civilians were abused throughout the year as a means of extracting information, although these incidents were rarely reported.<sup>131</sup> Opposition members were allegedly arrested and tortured at party headquarters in Juba on 7 July 2011 but were not charged.<sup>132</sup> Furthermore, rape by government forces is a particular problem. For example, a female detainee claimed that police officers raped her with bottles and stones on 22 July 2011 while she was being held at Juba's Malakia police station in connection with a dispute between her husband and another man.<sup>133</sup> The prisons still use corporal punishment, routinely beating prisoners with sticks, chains and whips and occasionally using chains and leg irons for restraint.<sup>134</sup>

It is recommended that the government follow through on the ratification of key international human rights instruments, including the Convention against Torture, as a matter of urgency so that South Sudan is able to hold perpetrators accountable.

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128 Human Rights Council, 18th session, agenda item 4, *Human rights situations that require the Council's attention, Report of the independent expert on the situation of human rights in the Sudan*, August 2011, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-40-Add1_en.pdf), accessed 17 July 2012, p.17

129 Transitional Constitution of South Sudan (2011), article 18, <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/5133/The-Transitional-Constitution-Of-The-Republic-Of-South-Sudan-2011.aspx>, accessed 15 January 2013

130 Reliefweb, 'Government pledges to ratify key human rights conventions', 10 December 2011, <http://www.reliefweb.int/node/464506>, accessed 6 January 2012

131 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

132 United Nations High Commission for Refugees. 2013. *Freedom in the World 2012 – South Sudan*, <http://www.unhcr.org/refworld/country,,FREEHOU,,SSD,,501fcc098,0.html>, accessed 16 January 2013

133 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

134 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Uupload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Uupload.pdf), accessed 3 July 2012, p.87

It is further recommended that the legal framework be developed in terms of the Criminal Code of Procedure to include procedural safeguards in relation to detention such as the prohibition of incommunicado detention, the prohibition of the admissibility of evidence obtained under torture, and accountability for acts of torture. A detailed custody register would also help limit acts of torture.

## **6 Police Oversight and Accountability**

### **6.1 Introduction**

Oversight and accountability mechanisms are increasingly becoming viewed as vital to preventing arbitrary arrests and detention, and promoting improved conditions of detention. Accountability should be a matter of proactive planning rather than an afterthought. Police training on human rights is only effective when accompanied by measures to deal with violations. It is also necessary to promote a culture of openness to hearing the complaints of the public, and to encourage the reporting of violations.

Oversight and accountability is a major concern in South Sudan. In January 2011, the Deputy Commissioner for Human Rights for the UN stated:

The lack of accountability to date on abuses, including rape and torture of trainees, committed inside the Rajaf Police Training Centre is of concern. I trust the Government of South Sudan will soon make public the findings of its investigations into this matter and will use this case as an example to promote accountability among state agents in all sectors.<sup>135</sup>

#### *6.1.1 Internal police mechanisms for accountability*

In South Sudan the ambit of accountability for arbitrary arrests and detentions falls predominantly within the internal mechanisms of the police. The police service in South Sudan is centralised and controlled at the national level, which means that police are not answerable to local government structures. Administering oversight from a national level requires good coordination and strong linkages between the state and national level.

In terms of internal discipline, the Police Act (2009) makes provision for police courts, and sets out the jurisdiction, type, formation and administration of police courts as well as their competencies and powers.<sup>136</sup>

The police courts make determinations on any criminal acts committed by the police or any other contraventions of legislation committed during the course of official duty.<sup>137</sup> According to this Act:

complaints against police personnel received through a civilian complaint system, established by regulations, shall be referred to judicial courts subject to the regulations.<sup>138</sup>

However, no civilian complaints system specifically for police has been established either by regulations or in practice. Civilian complaints systems in South Sudan are restricted to the South Sudan Human Rights Commission and the Anti-Corruption Commission. The Police Summary Court consists of an officer of a higher rank than the accused and the police summary court consists of a Chairperson having a rank not lower than Major and not lower than the rank of the accused, and other two officers of the same or lower ranks by virtue of an order issued by the Inspector-General or a Police Commissioner. The police summary court decides on the violations and penalties and the

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135 Kyung-wha Kang, 'Press Statement of the Deputy Commissioner for Human Rights', Sudan Mission, 27 June 2011

136 Police Service Act (2009), article 52, <http://www.southsudanpolice.net/wp-content/uploads/2012/10/SSPS-Police-Service-Act-2009.pdf>, accessed 16 January 2013

137 *Ibid*, article 52(1)

138 *Ibid*, article 52(2)



police non-summary court decides on crimes and contraventions.<sup>139</sup> Provision is also made for the Court of Appeal and the Police Supreme Court.

Aside from criminal offences, offences dealt with by the Police Act include crimes committed by force,<sup>140</sup> crimes against detention centres and public properties,<sup>141</sup> disobedience of lawful orders,<sup>142</sup> disposal of weapons and ammunition,<sup>143</sup> desertion,<sup>144</sup> contraventions during operations,<sup>145</sup> false information and accusation,<sup>146</sup> unbecoming conduct,<sup>147</sup> dealing with inmates and partiality.<sup>148</sup>

Interestingly, the Police Act focuses predominantly on police immunities rather than accountability. It states that:

Any act done by a police personnel in good faith while discharging his or her functions and duties, or in performance of his or her functions and duties under any law, regulation, order, rule or instruction of a competent authority or person authorised to issue the same by virtue of the Code of Criminal Procedure Act, 2008, or any other law in force, or any regulations issued thereunder, shall not constitute an offence.<sup>149</sup>

Moreover it goes on to say that:

No police personnel shall be arrested for or charged with murder in connection with acts committed in the course of his or her duty, except with a written authorisation obtained from the President in the case of officers, or a written authorisation from the Minister or Inspector General in the case of non-commissioned officers and privates.<sup>150</sup>

Another clause states that police shall not be responsible for damages resulting from the good faith execution of duty.<sup>151</sup> The Act therefore emphasises immunities and neglects the issue of custodial safeguards. Nowhere in the Act is direct reference made to human rights standards. It is only in the Police Code of Conduct that there is extensive reference to persons in custody and police investigations.<sup>152</sup> The Code of Conduct does not clearly set out the procedures if it is violated.

Pure internal systems of accountability have been criticised by experts as police may have a tendency to overlook the crimes of their colleagues. The United Nations General Assembly has remarked that:

Where police are allowed to effectively police themselves, as in any system of purely internal accountability, there is a strong temptation to 'look after one's own'. Police internal review is vulnerable to bias in all countries, but especially where there is minimal respect for the rule of law, where senior officers fail to push the importance of accountability, and where corruption is rampant.<sup>153</sup>

It is generally accepted by scholars that these internal systems of accountability need to be complemented by external systems, both in government and civil society.<sup>154</sup>

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139 *Ibid*, article 56

140 *Ibid*, article 65

141 *Ibid*, article 66

142 *Ibid*, article 67

143 *Ibid*, article 68

144 *Ibid*, article 69

145 *Ibid*, article 70

146 *Ibid*, article 71

147 *Ibid*, article 72

148 *Ibid*, article 73

149 *Ibid*, article 51(1)

150 *Ibid*, article 51(2)

151 *Ibid*, article 51(3)

152 Southern Sudan Police Service, Code of Conduct (draft), article 5, <http://www.southsudanpolice.net/wp-content/uploads/2012/10/SSPS-CODE-OF-CONDUCT-Draft.pdf>, accessed 17 January 2013

153 United Nations General Assembly, A/HRC/14/24/Add.8

154 Stone C and H Ward. 2004. 'Democratic Policing: A framework for action', *Policing and Society*, 10, pp.11-45

### 6.1.2 External mechanisms for accountability

South Sudan has the benefit of having such external systems, i.e. the South Sudan Human Rights Commission and the Anti-Corruption Commission, yet both of these institutions have not had any real success in enforcing accountability within the police and would do well to increase their monitoring in this regard.<sup>155</sup>

#### 6.1.2.1 South Sudan Human Rights Commission

The South Sudan Human Rights Commission Act came into force in 2009 with the purpose of establishing a body for monitoring the application and enforcement of rights and freedoms enshrined in the Constitution and ratified international and regional human rights instruments. The Commission also has the mandate to investigate complaints of human rights violations, to advise the government on human rights issues, and to raise awareness on human rights.<sup>156</sup> The Commission has the power to visit jails, prisons and places of detention to assess the conditions of inmates.<sup>157</sup>

If the Commission obtains information pertaining to human rights that requires further investigation, an investigation committee is formed.<sup>158</sup> The investigation is conducted in private unless the Commission deems it in the public interest to conduct a public inquiry.<sup>159</sup> The investigation committee has the power to issue summons or orders,<sup>160</sup> and upon completion of the investigation prepares a final report for the Commission. If the findings warrant a prosecution, the case is referred to the Ministry of Legal Affairs and Constitutional Development.<sup>161</sup> The Commission can also delegate investigation powers to the government or state investigation committees.<sup>162</sup> The Act also states that the Commission should collaborate and coordinate with the Ministry of Legal Affairs and Constitutional Development in the enforcement of the provisions of this Act.<sup>163</sup>

The Special Rapporteur for the UN has noted:

If oversight is to be effective, it should be created and should operate according to certain general principles. The most successful external mechanisms will have adequate powers to carry out comprehensive investigations of police abuses, will be sufficiently independent from the police and the government, will be adequately resourced, will operate transparently and report regularly, will have the support of the public and the government, and will involve civil society in its work.<sup>164</sup>

As analysed above, the South Sudan Human Rights Commission has been given extensive powers according to government legislation. Not only does it have the powers of investigation, but it can also order warrants and subpoena documents. Failure to comply with such an order renders offenders liable under chapters IX and X of the Penal Code 2008.<sup>165</sup> The legislation also spells out that there must be cooperation with the Ministry of Legal Affairs to enforce decisions. As such, the South Sudan Human Rights Commission has adequate powers to investigate human rights violations.

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155 Human Rights Watch. 2012. *Prison is Not For Me*, [http://www.hrw.org/sites/default/files/reports/southsudan0612\\_forinsert4Upload.pdf](http://www.hrw.org/sites/default/files/reports/southsudan0612_forinsert4Upload.pdf), accessed 3 July 2012, p.100

156 Human Rights Commission Act (2009), section 3, <http://www.icnl.org/research/library/files/South%20Sudan/SSHHumanRights%20CommissionAct2009.pdf>, accessed 16 January 2013

157 *Ibid*, section 7(1)(c)

158 *Ibid*, section 29

159 *Ibid*, section 30

160 *Ibid*, section 32

161 *Ibid*, section 38(2)

162 *Ibid*, section 39(1)

163 *Ibid*, section 51(1)

164 United Nations General Assembly, 28 May 2010, United Nations A/HRC/14/24/Add.8, article 30

165 Human Rights Commission Act (2009), sections 20, 38, 47 and 49 <http://www.icnl.org/research/library/files/South%20Sudan/SSHHumanRights%20CommissionAct2009.pdf>, accessed 16 January 2013

However, the South Sudan Human Rights Commission faces extreme challenges in other areas. Like most institutions in South Sudan, the Commission lacks both financial and human resources.<sup>166</sup> The geographical size of South Sudan makes accessing rural areas difficult, often requiring specialised transportation. Staff members of the Commission also require specialised training. While in 2011 the Commission had ten offices operating in the ten states of South Sudan, the new budget approved in Parliament in April 2012 cuts the operating costs of the Commission by 46% and could lead to the closure of six offices.<sup>167</sup> In addition, because the South Sudan Human Rights Commission is still in the process of being set up at state level, reports from the Commission are hard to gain access to. In addition, the Commission is meant to produce annual, financial, investigation and periodic reports for the President and the Assembly,<sup>168</sup> but these remain unpublished and unavailable. In a fact finding mission by the International Federation for Human Rights (FIDH) in April 2012, it was noted that the Annual Report for 2011 was about to be released, but that no other official documentation on the human rights situation was available, and there was no data on individual complaints received.<sup>169</sup> These reports are necessary to ensure that the Commission is regarded as transparent. It is questionable as to whether or not the Commission is independent enough to carry out full investigations since the Ministry of Legal Affairs may want to cover up arbitrary arrests and detentions in which prosecutors may have been involved, because police and prosecutors work together on investigations. Finally, the South Sudan Human Rights Commission has a broad mandate, meaning that human rights violations committed by the police are just one aspect of the Commission's work.

#### 6.1.2.2 South Sudan Anti-Corruption Commission

The South Sudan Anti-Corruption Commission also suffers from several problems and has been greatly criticised for failing to secure any prosecutions, with donors, the media and the public taking an increasingly harder line on corruption.<sup>170</sup> Like the Human Rights Commission, the Anti-Corruption Commission Act (2009) gives this Commission the powers of investigation.<sup>171</sup> The investigation committee has the power to issue summons or orders<sup>172</sup> and can seek the aid of the Ministry of Legal Affairs and Constitutional Development to enforce the order if anyone fails to comply.<sup>173</sup> The Commission refers reports warranting a prosecution to the Ministry of Legal Affairs and Constitutional Development.<sup>174</sup> There is a clause for protection of informers and witnesses<sup>175</sup> and the Act specifically orders the collaboration and coordination of the Commission with the Ministry of Legal Affairs.<sup>176</sup>

The Anti-Corruption Commission has still been unable to secure any arrests or prosecutions, partly because the 2009 Act, which gives prosecutorial powers to the Ministry of Justice, has not been repealed and because corruption has not been defined in the Constitution or Criminal Procedure Act. Six cases have been submitted to the Ministry of Justice for prosecution but none has been concluded.<sup>177</sup> President Salva Kiir has just replaced the head of the Commission, prompting allegations of inefficiency and political interference, particularly with regards to a list of 13 MPs in Kiir's new cabinet that have been accused of corruption.<sup>178</sup> In August 2012, MPs had refused to approve South Sudan's first cabinet, demanding that the names of 13 MPs involved in corruption be released, but later approved the cabinet. The outgoing head, Pauline Riak, stated that many cases were not attended to and that officials refused to fill out incomes, assets and liability forms.

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166 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

167 International Federation for Human Rights. 2011. *South Sudan First Anniversary of Independence: Time to Act for Peace and Human Rights Protection*, <http://www.fidh.org/IMG/pdf/sudsoudan591apdf.pdf>, accessed 16 January 2013, p.24

168 Human Rights Commission Act (2009), section 33, <http://www.icnl.org/research/library/files/South%20Sudan/SSHHumanRights%20CommissionAct2009.pdf>, accessed 16 January 2013

169 International Federation for Human Rights. 2011. *South Sudan First Anniversary of Independence: Time to Act for Peace and Human Rights Protection*, <http://www.fidh.org/IMG/pdf/sudsoudan591apdf.pdf>, accessed 16 January 2013, p.24

170 *The Sudan Tribune*, 'South Sudan President replaces head of Anti-Corruption Commission', 26 May 2012, <http://www.sudantribune.com/spip.php?article42718>, accessed 16 January 2013

171 The Anti-Corruption Commission Act (2009), article 24

172 *Ibid*, article 28(1)

173 *Ibid*, article 29(2)

174 *Ibid*, article 32(2)

175 *Ibid*, article 44

176 *Ibid*, article 45(1)

177 United States Department of State. 2012. *Country Report on Human Rights Practices 2011 – South Sudan*, [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=187675#wrapper](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=187675#wrapper), accessed 29 March 2012

178 *The Sudan Tribune*, 'South Sudan President replaces head of Anti-Corruption Commission', 11 November 2011, <http://www.sudantribune.com/South-Sudan-president-replaces,40699>, accessed 17 July 2012

Furthermore, a strong anti-corruption law is not in place.<sup>179</sup> On 3 May, President Salva Kiir wrote a letter to government officials accusing them of stealing USD 4 billion from government funds. Adding that the credibility of the government was on the line, Kiir promised anonymity and amnesty if officials returned the money. This response further entrenches the culture of impunity.

### 6.1.3 Recommendations for improved accountability and oversight of the police

In order to promote and improve accountability and oversight mechanisms in South Sudan, the government has several choices. Firstly, it can improve the effectiveness of the Anti-Corruption Commission and Human Rights Commission in a variety of ways. One of these ways is to increase the resources available for these commissions. The international community can continue to assist by providing training and overseeing the work of the Commission in the short-term. These Commissions must work hard to ensure compliance by the police and Ministry of Legal Affairs of any reports warranting arrests and must release reports to build public confidence in the transparency of these institutions. As civil society develops they must work hand in hand with these organisations to increase their legitimacy and outreach. An alternative proposal is that the commissions are given greater prosecutorial powers so that they can refer matters to the courts directly without going through the Ministry of Legal Affairs and Constitutional Development.

A final option for improving police accountability, and one that this paper recommends, is that a specialised independent body is set up that deals specifically with police complaints. This is a similar model to that of South Africa where the Human Rights Commission focuses on social and economic rights, leaving complaints regarding the police to the Independent Complaints Directorate, a body focusing specifically on police conduct. In this way the broad mandate of the Human Rights Commission is limited to issues where there are no other appropriate bodies. In a country like South Sudan where the police have come from a highly militarised background, there should be a specific organisation to deal with police behaviour. This independent body should have extensive prosecutorial powers and should be given adequate funding and support by the government. This independent body should fully enforce all international guarantees set out in the International Covenant on Civil and Political Rights.

## 7 Summary of Recommendations

Throughout this study, several recommendations have been made to improve conditions relating to the use of arrest, the use of detention and conditions of detention. These recommendations are summarised below:

- South Sudan must immediately ratify human rights instruments – particularly the UN Convention against Torture (CAT) and the Elimination of all forms of Discrimination against Women (CEDAW).
- The South Sudan Law Review Commission (SALRC) must review imprecise domestic laws and disparities between national laws; namely the Transitional Constitution and the Code of Criminal Procedure Act. The Judiciary Act needs to include oversight clauses for customary courts and align this with the Local Government Act. The SALRC must review disparities between international and domestic standards and consider additional clauses/ amendments in accordance with international standards – for example, a clause for *habeas corpus* and increased compensation for wrongful arrests.
- The judiciary should review all detentions on a regular basis and release those unlawfully detained. The Directorate of Public Prosecutions should aim to visit police detention cells daily and monitor arrests and detentions. All cases should be tracked. Coordination mechanisms between different criminal justice sector organisations need to be set up and

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179 Catholic Radio News, 'Lack of political will, outgoing anti-corruption chief biggest nightmare', 16 November 2011, [http://sudancatholicradio.net/index.php?option=com\\_content&view=article&id=5327:lack-of-political-will-outgoing-anticorruption-chief-greatest-nightmare&catid=2:south-sudan&Itemid=84](http://sudancatholicradio.net/index.php?option=com_content&view=article&id=5327:lack-of-political-will-outgoing-anticorruption-chief-greatest-nightmare&catid=2:south-sudan&Itemid=84), accessed 9 January 2011

the linkages between national and state-level police must be strengthened.

- The government should develop police training curricula in line with international standards and extensively train all police on human rights and current legislation (the Code of Criminal Procedure Act, the Penal Code and the Constitution).
- Traditional Chiefs must be trained in human rights. The government should prioritise the alignment of customary law and statutory law, and clarify the jurisdiction of customary courts and their supervision.
- Police, prosecutors and Chiefs should be trained on the legal consequences of wrongful arrest and the penalties for doing so should be augmented.
- National and state-level budgets should prioritise building police detention facilities in line with international standards. Juvenile reformatories need to be built away from adult facilities and women and children must be kept separately. Budgetary provision needs to be made for food and other basic needs of detainees.
- The South Sudan Human Rights Commission should investigate and publish reports on human rights violations, including within the police.
- Legislation should be passed allowing the Anti-Corruption Commission to carry out its tasks.
- An independent police oversight body should be set up to monitor police conduct. This body should be given prosecutorial powers and an adequate budget.
- The government should be encouraged to develop a multi-party system of democracy to prevent political interference during arbitrary arrest, and restructure the South Sudan Police Service to include various ethnicities to prevent ethnic discrimination amongst the police.

## 8 Conclusion

South Sudan has made great headway since its independence but a lot still needs to be done. Laws are in the process of being reviewed, some laws have yet to be implemented and organisations and ministries are still being properly structured and resourced. Developments thus far are commendable; however, any system that requires the rule of law must also have adequate accountability mechanisms in place for police to build public trust and confidence.

This study has noted some of the legislative achievements with regards to arbitrary arrests and detentions, finding that the Transitional Constitution and Code of Criminal Procedure accord with many international human rights standards. Some attention needs to be paid to reviewing contradictory legislation but most issues arise from the implementation of the law. Several factors influence arbitrary arrests; political interference, inadequate training, corruption and ethnic discrimination are all relevant in these considerations. The tension and alignment between statutory and customary law is a factor specific to South Sudan that requires consideration.

Arbitrary detentions are occurring in South Sudan. The legislative framework is confusing at present due to disparities between the Code of Criminal Procedure and the Transitional Constitution. Whilst the Prison Service Provisional Order speaks of conditions of detention for inmates, the law is silent on conditions of detention for police. South Sudan is also yet to ratify the Convention against Torture or to detail legal provisions pertaining to torture. There are also other factors that drive such detentions, including corruption, mismanagement, inadequate case tracking and a huge backlog of cases. Inadequate detention facilities also mean that vulnerable groups are not protected.

Accountability and oversight mechanisms can reduce the number of arbitrary arrests and detentions and can act as a deterrent for those who think that they are untouchable. At present police accountability is mainly dealt with internally. Such systems have been found to be insufficient to prevent a culture of immunity. The South Sudan Human Rights Commission exists but has a very broad mandate and is yet to reach rural areas. The Anti-Corruption Commission has been criticised as ineffective, failing to secure a prosecution since its inception. Given the militarised background of South Sudan and the decades of civil war, it is recommended that an independent body be set up to deal specifically with police conduct and discipline.

This would concur with the statement by the UN's Special Rapporteur that:

An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as fundamental protection against ill-treatment and misconduct. An independent police complaints body (IPCB) should form a pivotal part of such a system.<sup>180</sup>

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<sup>180</sup> United Nations General Assembly, A/HRC/14/24/Add.8



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## ABOUT APCOF

The African Policing and Civilian Oversight Forum (APCOF) is a network of African policing practitioners from state and non-state institutions. It is active in promoting police reform through strengthening civilian oversight over the police in Africa. APCOF believes that strong and effective civilian oversight assists in restoring public confidence in the police; promotes a culture of human rights, integrity and transparency within the police; and strengthens working relationships between the police and the community.

APCOF achieves its goals through undertaking research; providing technical support and capacity building to state and non-state actors including civil society organisations, the police and new and emerging oversight bodies in Africa.

APCOF was established in 2004, and its Secretariat is based in Cape Town, South Africa.

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