Pre-Assessment Mission, South Sudan
6-13 December 2011

To preliminarily assess the current state of development of South Sudanese legal institutions, together with the assistance currently being provided to those institutions.
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PREFACE

While the following discussion may address a number of areas and institutions relating to the rule of law, it is not intended to be a complete needs assessment. Rather, this report records certain information obtained by the team, and sets forth certain analyses and conclusions relevant to the report’s purpose: to determine if a full ILAC needs assessment mission would be appropriate.
EXECUTIVE SUMMARY

From December 6-13, 2011, ILAC conducted a pre-assessment mission to South Sudan. The pre-assessment team consisted of:

• William Meyer, Chair of ILAC
• Rodger Chongwe, Member, ILAC Executive Committee
• Kalevi Tervanen, Finnish Bar Association

The goal of this mission was to preliminarily assess the current state of development of South Sudanese legal institutions, together with the assistance currently being provided to those institutions. The pre-assessment team met with representatives of the South Sudanese government, judiciary, Bar and civil society, as well as members of the international community in South Sudan, to determine if an ILAC needs assessment mission would be appropriate.

Based on our discussions and observations, the team reached the following general conclusions regarding the rule of law in South Sudan:

• There is tremendous need in every area of the South Sudanese the rule of law sector.
• Currently, there is a limited capacity of the South Sudanese system to absorb technical legal assistance. That capacity may be close to exhausted, and will not be increased in the near to medium term.
• Some South Sudanese are eager for training and assistance. However, others see additional international donors as a nuisance.
• Many South Sudanese working in the rule of law area complain that international organizations or potential providers take up their time, and then do not provide any meaningful assistance.

Based on our discussions and observations, the team reached the following general conclusions regarding the international actors working on rule of law issues in South Sudan:

• There are a large number of well funded international organizations, NGOs and contractors working on rule of law issues in South Sudan.
• Some international organizations, NGOs and contractors are doing good work; others are not.
• A number of these international organizations, NGOs and contractors are extremely turf conscious, jealous of their own prerogatives, and protective of their funding at the cost of properly serving the “client,” i.e. South Sudan.
Based on these observations, the pre-assessment team does not believe that a full-scale ILAC assessment mission to South Sudan is appropriate at this time. The team instead recommends to Council that ILAC:

1. Seek to identify indigenous actors with a personal commitment to effect meaningful change.

2. Follow events in South Sudan and, if conditions warrant at a later date, dispatch a follow-up mission to plan discrete projects in areas ignored or abandoned by existing programs.
BACKGROUND

The territory of the modern Republic of South Sudan is populated primarily by various tribes who migrated to the area sometime before the 10th century. When Egypt conquered northern Sudan in the early 19th century, geographical barriers prevented the spread of Islam to the southerners, thus enabling them to retain their social and cultural heritage as well as their political and religious institutions.

In 1882, the British invaded Egypt and ultimately proceeded to occupy Sudan. Though nominally under Egyptian authority, the British largely took control of Sudanese affairs and effectively administered it as a British imperial possession. Beginning in 1924, the British essentially divided Sudan into separate territories—a predominantly Muslim Arabic-speaking north, and a predominantly Animist and Christian south, where the use of English was encouraged. Though the British ended their occupation of Egypt in 1936, Sudan did not become an independent sovereign state until 1956.

During the early years of British rule, the northern and southern provinces were separately administered. Northern Sudan was administered like Arabic-speaking Egypt, while the south was treated like other British east-African colonies (Kenya, Tanganyika, and Uganda). In 1946, the British began to integrate the two regions, using Arabic as the language of administration in the south, and allowing northerners to hold positions there. Southerners trained in English objected to these changes. After independence, when power was concentrated with the northerners based in Khartoum, armed conflicts began as the South demanded representation and more regional autonomy. Eventually, the Southern Sudan Liberation Movement (SSLM) negotiated the so-called Addis Ababa Agreement of March 1972, which ended the conflict and granted the southerners a single administrative region with various defined powers.

Eleven years later, this peace ended when President Gaafar Nimeiry declared all Sudan an Islamic state under sharia'a law, and abolished the Southern Sudan Autonomous Region, ending the Addis Ababa Agreement. From 1983 to 2005, war again ravaged southern Sudan, led by the Sudan People's Liberation Army (SPLA). This second round of warfare lasted for almost twenty-one years, killing an estimated 2.5 million people and displacing more than 5 million.

The war ended with ended Comprehensive Peace Agreement of 2005 (CPA), which restored southern autonomy with the formation of the Autonomous Government of Southern Sudan. Eventually, as part of the CPA, South Sudanese voted in a January 2011 referendum to determine whether the region should remain a part of Sudan or become independent. According to the final published results, 98.83% voted in favor of independence. On July 9, 2011, the Republic of South Sudan declared its independence.
SOUTH SUDAN AT INDEPENDENCE

Though accurate statistics are impossible to locate, South Sudan is acknowledged to be one of the poorest countries in the world. For example, some estimates indicate that the under-five infant mortality rate is the highest in the world. Other estimates suggest that more than 90% of the population of South Sudan live on less than $1 a day. In any event, international organizations and NGOs remain heavily involved in meeting humanitarian needs, and leading recovery and development activities.

Moreover, decades of neglect by the British and the northern Sudanese, followed by decades more of war, left South Sudan bereft of infrastructure. Though the size of France, at independence South Sudan had less than 100 kilometers of paved streets, no paved highways and no railways. Ground travel outside of Juba is torturous, not to mention dangerous. Many towns and cities lack electricity or other basic utilities, making living conditions extremely difficult. While donor agencies are working to address some of these issues, it will be years – if not decades – before a rudimentary infrastructure will be in place throughout the entire country.

This task is made even more difficult by ongoing conflict both within the country, and with South Sudan’s neighbor to the north. Since independence, the country has struggled with multiple armed clashes between indigenous groups. At the same time, armed conflicts between Sudan and South Sudan continue in disputed border regions such as Abyei, with both sides claiming provocation by the other.

Another complicating factor is the post-independence migration from Khartoum and other parts of Sudan of hundreds of thousands of persons from the South. Many Southerners were raised in and long-time residents of the North. Indeed, given the absence of opportunities for higher education or professional training in the south, a significant number of Southerners were educated in the Arabic-speaking North. While some of them joined the SPLA and fought for independence in the South, others stayed on in the North to take advantage of the opportunities and relative modernity of Khartoum and other northern cities.

With independence, Southerners lost their citizenship and could no longer hold employment in Sudan. Arabic speakers, they nonetheless were forced to move to the English-speaking, poverty-stricken South. There, they encountered a different elite, raised in the bush through decades of war. Many of these new compatriots were English speakers, and had been educated in East Africa or the West. Many were former rebels, fathers of the new country and averse to northern ways. Other, younger Southerners were sent by the SPLA during the war for East African or Western educations, in order to build a class of new South Sudanese not educated in the Arabic-speaking North. As a result, the tiny educated elite within the country
is split between Arabic-speaking migrants from the North, and former rebels striving to build an English-speaking, East African country.

RULE OF LAW IN SOUTH SUDAN

As with most countries, the status of the rule of law in South Sudan is shaped by its history and people. Born of a rebellion against Islamic influences from the north, South Sudan made the political decision to adopt English as its official language, and the common law as its legal doctrine.

The Written Laws of South Sudan

With the signing of the Comprehensive Peace Agreement of 2005, the Government of Sudan and SPLA also adopted an Interim Constitution of Southern Sudan. The Interim Constitution provided that English and Arabic would be the official languages in Southern Sudan. It also divided South Sudan into ten states. These ten states have been further divided into 86 counties

The Interim Constitution provided that all then-existing laws in Sudan would remain in force in South Sudan, unless abrogated as permitted by the Interim Constitution. That document also created a Presidency, and a 170-member Southern Sudan Legislative Assembly, which was empowered to adopt laws for South Sudan. Accordingly, between 2005 and 2011, while the Assembly adopted laws addressing a variety of topics, where no new specific legislation was adopted, the laws of Sudan remained in effect.

On July 7, 2011, the South Sudan Legislative Assembly adopted the Transitional Constitution of the Republic of South Sudan, which came into force with independence on July 9, 2011. While drafts of the Transitional Constitution were circulated before its adoption, a number of people complained to the ILAC team that there was no real debate or deliberation concerning the specifics of the document. In any event, the Transitional Constitution as adopted continued many of the structures created by the Interim Constitution. Apparently, the Transitional Constitution included the principle that, until there was specific legislation passed by the new legislature, laws enacted by the Southern Sudan Legislative Assembly or (if that body had not acted) the laws of Sudan remained in effect.

1 Symptomatic of the problems of starting a new country, when the ILAC team was in Juba, it extraordinarily difficult to obtain a written copy of the actual Transitional Constitution. The document went through various drafts, some of which have been circulated as the “final” version. At this time, the GOSS has been unable to print sufficient copies of the final document, leaving some uncertainty regarding its exact terms.
Since July 9, 2011, the new National Legislature has begun debating and passing new laws for South Sudan. However, at present, depending on the topic, the governing law in South Sudan may be the law of Sudan, a law passed by the now-defunct Southern Sudan Legislative Assembly, or a new law passed by the National Assembly. Given the fact that the National Assembly is only few months old, this transitional approach has left South Sudan with many statutory gaps and problems.

- In some areas, such as gender violence, inheritance, or family law, no laws exist. Customary law (see next section) accordingly governs.
- In other instances, Sudanese law controls, even though it is incompatible with or even antithetical to the present reality in South Sudan. For example, antiquated Sudanese laws governing various professions or entities do not square with the current needs of South Sudan.
- Some laws passed by the Southern Sudan Legislative Assembly or the National Assembly simply do not work, either due poor draftsmanship, gaps, or incompatibility with other laws.
- Regardless of their origin, written copies of most laws are difficult to find. Printing or even photocopying capability in Juba is scarce. Copies are seldom available on line, though the paucity of computers and Internet connections make this gap irrelevant for most citizens.

Such problems are perhaps inevitable in a fledgling nation. Nonetheless, these issues impact the rule of law in Sudan in a variety of ways.

Another glaring weakness in South Sudan is the lack of written legal resources. At present, the Ministry of Justice houses the only law library in the country. This bright, neatly-kept facility contains roughly 2000 volumes, with room for four times that number. The majority of books are statutes and law reports from other East African states, while roughly one-third are law reports and treatises from the United Kingdom. According to the head librarian, all of the volumes in the library are donated.

**Customary Law**

At present, the primary sources of conflict resolution in South Sudan, particularly outside Juba, are customary law and traditional justice. These phrases generally refer to systems of local or community dispute resolution, which have not been set up by the state, and which are based the mores, ethics and traditions of a tribal or ethnic group. At present, these systems provide the only practicable and affordable method of resolving conflicts in the new country.

According to one source, over 60 tribal, non-state systems of justice operate in South Sudan. Both the Interim and Transitional Constitutions recognized custom and traditions as a central source of law, and the role of traditional authorities in the justice system. However, these systems are replete with serious problems. Decades of war and the primacy of militias
with their own harsh “justice” weakened many of these traditional systems. Moreover, the customary rules and practices vary widely according to ethnic group. Perhaps most bothersome, many of the practices are in direct conflict with modern concepts of human rights and gender justice.

For these reasons, a number of international donors have sought to address issues in these systems. This approach has been described as a process of “self-statement,” i.e. the creation of written customary law by each community, coupled with a “soft human rights approach” to regulate and reform these laws. A Customary Law Development Center is being developed in Juba to both work on these issues and train current indigenous leaders. At the time of the ILAC visit, these efforts were in the early stages.

The South Sudanese Legal Community

In discussions with a variety of officials concerning the South Sudanese legal community, four points became apparent. First, there are not enough legally trained personnel in South Sudan to meet the needs of a nation. Though no solid statistics were available, it appears that there are roughly 450 lawyers in the Ministry of Justice, 200 judges, and 200 private lawyers in the entire country. Particularly since the judiciary and prosecution are substantially understaffed and looking to hire, it was clear to the ILAC team that some source of additional, trained legal personnel must be developed.

Second, virtually all of the legal manpower in the country lived in Juba. Some states – with populations of hundreds of thousands of citizens – have no judges, prosecutors or other lawyers. While documents suggest that appointments to outlying state courts have been made, the information provided to the ILAC team indicated that in reality many of these courts are non-existent at present. First instance county courts are even more illusory.

Third, like many other professions in South Sudan, those with legal training can be divided into three groups: (a) a handful of older lawyers trained in the common law in Khartoum prior to the adoption of sharia’a law, (b) those trained in Arabic in Khartoum or elsewhere in the Muslim world after the adoption of sharia’a law, and (c) those trained in East Africa or the West. The first group, though small in number, often hold positions of authority given their ages and positions in the SSLA. The middle group appears to predominate in numbers. Some of these men and women came to Juba only after they lost their positions in Khartoum after independence.

The third group – those trained in East Africa or the West – typically is younger, studied in English, and is trained in the common law. Given the political choices made to use English as the official language and common law as the legal doctrine, one would expect these lawyers to be ascendant. However, the paucity of legally trained professionals has meant that experienced judges, prosecutors and lawyers – though lacking English skills and an understanding of the common law – have assumed positions of significance in South Sudan. Imbued with the innate conservatism of age and Islamic training, and desirous of protecting
their current status, some of these individuals are less than eager to embrace many of the reforms proposed or enacted by the Government of South Sudan (GOSS), and view training in East Africa or the West as “not useful.”

Finally, the leadership of the South Sudan legal community is heavily dominated by those who fought with the SSLA. Many view the current situation through a lens hardened by the battle for independence and the associated need for military discipline. As one perceptive member of this group told the ILAC team, “Our generation was a very violent generation, and we need to phase this generation out.”

**Ministry of Justice**

The Interim Constitution of 2005 established the Southern Sudan Ministry of Legal Affairs and Constitutional Development to take control of many rule of law functions from the National Ministry of Justice in Khartoum. With independence, this institution morphed into a formal Ministry of Justice for the GOSS.

Without question, the Ministry of Justice is the dominant actor at present in the rule of law sector. The Ministry is the largest employer of legal professionals, employing roughly half of all legally trained men and women in the country. As discussed above, a significant percentage of these professionals were trained in Arabic, either in Khartoum or other Islamic countries, in *sharia’a* based legal systems. Some worked in the old Sudanese system, even as bureaucrats in Khartoum. According to the Director General of the Ministry, these personnel were hired despite their lack of training in the South Sudanese system, with a goal of retraining them as discussed below.

While many migrants struggle in good faith to learn English and adapt to the new system, old habits and ways of thought die hard. Some Ministry lawyers were sent to the Legal Development Center in Kampala. At present, the Ministry is training its lawyers on various topics including legislative drafting, prosecution, civil litigation, professional ethics and legal English.

The centerpiece of the Ministry’s plans for the next several years is the proposed creation of a Legal Training Institute (LTI). According to the Director General of the Ministry, the LTI over the next few years would train Ministry lawyers in the new South Sudanese legal system and, where needed, provide instruction in legal English for those trained in Arabic. After completion of this year-long program, graduates would receive a Legal Professional Examination Certificate, which eventually would be a prerequisite to legal employment with the Ministry or as a licensed attorney.

As discussed elsewhere, there appear to be differences of opinion among South Sudanese officials on the nature and function of the proposed LTI. While some have suggested that it would train Ministry lawyers, judges and private attorneys, other officials suggest that there should be separate institutes for judges and Ministry lawyers. Under some
proposals, law graduates and/or private lawyers could be trained at the LTI, while others would not admit such students. Some Ministry officials suggest that whatever the structure, Ministry lawyers must be trained first.

Judiciary

On paper, the structure and functioning of the South Sudanese judiciary is controlled by the Transitional Constitution and a pre-independence Judiciary Act passed by the Southern Sudan Legislative Assembly in 2008. However, at least at this early stage, it appears that not all of the features of the judicial system outlined in those documents have been implemented.

For example, in August 2011, the President issued a decree abruptly removing the Chief Justice of the Supreme Court and replacing him with his Deputy. Later, in October 2011, the President issued another decree appointing four new Justices to the Court. While some observers have lauded the new appointees as more effective than their predecessors, the fact remains that the written protections for judicial independence were ignored.

Beyond these troubling events, numerous structural problems plague the judiciary:

• Perhaps the most significant is the lack of qualified manpower. According to the Chief Justice, the judiciary at present has 125 judges for the entire country. There are many cases fully investigated and ready for trial, but no judges are available.

• Many judges came from the Sudanese system, and thus have neither the training nor language skills to work in an English-language common law system. The Chief Justice indicated that despite the lack of manpower, 16 judges and 173 support staff coming from Sudan were deemed unqualified and had been removed.

• Outside of Juba, state and county courthouses, staff, communications, living space and security are inadequate and often non-existent.

• Written legal resources for the judiciary are very scarce. As previously mentioned, the only law library in the country at present is at the Ministry of Justice. The Chief Justice indicated that some donated books to begin a law library at the court in Juba are in storage awaiting completion of library space.

To a significant extent, these problems may be inevitable in a fledgling nation, particularly one whose violent history precluded pre-independence progress. Nonetheless, various solutions are in progress or have been proposed:

• To address the lack of judicial manpower, the Chief Justice has proposed hiring an additional 100 judges. Given the lack of lawyers in the country, it is unclear where qualified personnel can be found to fill these positions without decimating other institutions. UNDPKO apparently has funding to hire more than 40 new judges and prosecutors, including a majority of non-South Sudanese. These hires would permit assignment of three additional professionals to each state. However, under the current restrictions on the UNDPKO program, these professionals will have limited functionality, and it is unclear if they will provide any significant assistance to the beleaguered judiciary.
Some programs and many discussions are underway concerning judicial training. While supporting the concept of a Legal Training Institute, it appears that the Chief Justice would prefer a judicial training institute separate from the LTI proposed by the Ministry. The Chief Justice also indicated that he is investigating possibilities for having East African judges mentor South Sudanese judges, and having South Sudanese judges spend time observing judges in other systems to gain experience.

To address the lack of facilities in outlying areas, the Chief Justice has proposed a series of self-contained mobile courts. While this concept is under discussion, some donors are assisting in creating permanent infrastructure in the states.

According to various South Sudanese sources, a number of international NGOs have promised assistance in developing law libraries for the judiciary. Such assistance has not yet materialized.

**The Organized Bar**

Like other institutions in South Sudan, the organized Bar reflects the division between the established professionals (mostly trained in the North) and the newer generation typically trained in East Africa or the West.

**History:** During the era of a unified country, Sudanese law established the Sudan Bar Association (SBA) as the principal organization representing Sudanese lawyers. Students from the south typically travelled to Khartoum to study law, and later joined the SBA. According to one source, many of these South Sudanese lawyers who lived in the North abandoned the law and took other jobs when *sharia* law was imposed in 1983.

When the second round of warfare began, a number of students from the South eschewed Khartoum, and began studying law in East Africa. When they returned to the war-torn south, they began a new organization in 1994 known as the South Sudan Law Society (SSLS).

After the signing of the CPA in 2005, no new law governing the Bar was passed. Accordingly, the existing Sudanese statute controlled. As read by the Ministry of Legal Affairs and Constitutional Development (now the Ministry of Justice), this law provided that the Ministry would license lawyers to appear before the courts in the South. All such licensed lawyers, known as advocates, automatically became members of a new South Sudan Bar Association (SSBA), which began in 2007.

Because of their experience in the Sudanese courts, older South Sudanese lawyers trained in the north (many formerly licensed by the Sudan Bar Association) were again licensed in the South. On the other hand, most members of the Law Society who had not been trained or licensed in the North, were not licensed by the Ministry of Legal Affairs, and thus could not become members of the SSBA. Instead, while they could not represent clients in the new courts of South Sudan, they continued under the umbrella of the Law Society.
The South Sudan Bar Association: The successor of the Sudan Bar Association, the SSBA apparently was established by order of the Ministry of Legal Affairs, ostensibly under the authority of the existing Sudanese statute governing the Bar. Apparently, license fees are collected by the Ministry, but passed along to the SSBA for its use. The SSBA has somewhere in the range of 200 members, many of whom are experienced lawyers previously licensed by the Sudan Bar Association. Since the membership of the SSBA is composed of lawyers licensed by the Ministry, its advocates are the only lawyers permitted to appear in court.

During our visit, a number of persons expressed concern about the SSBA. Among these concerns was the control of the SSBA by or its close relationship with the Ministry of Justice. Because the Ministry controlled licensing, it could control the membership of the SSBA. While such arrangements seem antithetical to many lawyers, they were less bothersome to many in the Bar who trained and practiced in old Sudan. Moreover, controls on membership in the Bar tend to create a guild environment, which works to the economic advantage of those admitted to the cartel.

The South Sudan Law Society: The Law Society is a non-governmental organization with approximately 90 members. More than 90% if its members are in Juba.

Members of the SSLS indicate that one of its main areas of focus is human rights. They report that Law Society members man legal aid clinics, monitor human rights violations by rule of law institutions, hold human rights training workshops for government and traditional leaders, assign pro bono lawyers for prisoners in detention, and train paralegals to monitor human rights violations outside rule of law institutions. SSLS members also reportedly work on drafting legislation and were active in advising citizens of their rights during the elections and the referendum. Members reported that the Law Society received some funding from UNDP and the Open Society Institute.

The South Sudan Women's Bar Association: Though not as well recognized as the SSBA or SSLS, the South Sudan Women's Bar Association has been organized to assist its members to help women in the broader population learn and protect their rights. With 56 current members, primarily of women lawyers employed at the Ministry of Justice, the Women's Bar Association meets periodically for training or capacity building. Since a majority of its members were trained in Arabic in Khartoum or other Muslim countries, training in legal English is a top priority.

Like any small, fledgling organization, the Women's Bar Association is struggling to become established. Not only does the Association lack resources, since many of its members work for the Ministry of Justice, finding time for meetings and other activities requires permission from the Ministry. Though the current Minister of Justice has supported the work of the Association, this dependence causes significant concerns for its future.

The Future: At the time of our visit to Juba, changes in the Bar were in the works. A new law governing lawyers in South Sudan had been drafted by the Ministry of Justice and
SSBA. Though we received differing accounts concerning the progress of that draft towards passage, apparently it had not yet been passed but instead had begun the complex process of submission to the legislature. While the team was not given access to a copy of the draft law, at least some members of the Law Society found it unsatisfactory.

When we visited Juba, an alternative draft law was in the process of preparation by members of the Law Society, supported by some international groups. It is unclear whether this alternative draft will garner much support. For example, one international organization apparently attempted to arrange a session among advocates in early December 2011, to discuss the competing drafts. The ILAC team was told that, while 96 advocates signed up for the session, only 12 actually appeared.

In any event, a meeting described as a “general assembly of lawyers” was being scheduled for late January or February 2012. Though descriptions of this meeting varied, it apparently is intended to bring together members of the SSBA and the SSLS to discuss some type of merger of the two organizations, the fate of the SSLS, and the draft law on lawyers.

At present, the future of the SSLS is unclear. One possibility is that it will be merged into the SSBA, and Law Society members will be able to appear in court as advocates. On the other hand, some SSLS members are unhappy with the draft law being circulated by the SSBA, and may not be willing to join that organization. SSBA members privately suggest that some of the SSLS leadership find it financially lucrative to maintain the Law Society structure, and that the current division is not of the SSBA’s making. Yet another perspective is that the Ministry and SSBA will “conspire” to maintain the SSBA’s monopoly, and keep SSLS members from being licensed.

Legal Education

Perhaps the least developed of the South Sudanese rule of law institutions or systems is legal education. As outlined in this report, there is a glaring need for trained legal professionals throughout South Sudan, both inside and outside the government. Moreover, given the issues involved with those trained in Arabic, sharia’a-based systems, it is critical for the country to begin developing a corps of professionals trained in its own legal culture and identity.

Law Faculties: At present, there are no functioning law faculties in South Sudan. The present plan is to establish a Law Faculty at the University of Juba. This University was established by the Sudanese government in 1977. During the second round of civil war, the university relocated to Khartoum. Following independence in July 2011, the university was relocated back to Juba, where it was to add new faculties, including a law faculty.

At the time of our visit in December 2011, the Law Faculty at the University had nominally relocated to Juba. Yet, notwithstanding the obvious needs, the Law Faculty had not yet begun operation. Apparently one or two professors had been retained, but even that was
unclear. Some number of students apparently had been registered, though the ILAC team was unable to obtain any hard information. While we were told that classes had been scheduled to begin in December 2011, apparently the start of classes was delayed because the university staff was on strike. Moreover, it is our understanding that construction of the facilities for the Law Faculty have not been commenced, and that no completion date has been set.

Put politely, legal education in South Sudan is floundering. Both among the Law Faculty and the international community, there was a noticeable lack of enthusiasm and energy. Throughout our discussions with South Sudanese officials, we were repeatedly met with excuses and assurances that “everything is fine,” when in fact the Law Faculty appeared to exist only on paper and be years behind schedule. Rather than finding innovative ways to aggressively solve problems, the Law Faculty appeared content to do little or nothing except to lament the current situation. As a result, years have passed without any meaningful progress in developing an institution that will be vital for establishing the rule of law in South Sudan.

Legal Education Center: While in Juba, the team also visited the Legal Education Center (LEC), a private entity established by one of the law firms in Juba. This LEC had put on some workshops on cutting-edge topics, but its work at present is slowed by a lack of facilities and resources.

Legal Proficiency Examination Certificate: As discussed elsewhere, within the Ministry of Justice, there are discussions concerning a requirement that all law graduates obtain a “Legal Proficiency Examination Certificate” subsequent to graduating from a law faculty, but prior to beginning work as a legal professional. It is unclear if this proposal has widespread support within the relevant South Sudanese legal communities.

Other Institutions

In addition to the institutions discussed above, South Sudan has two other constitutionally-mandated bodies that work on issues directly related to the rule of law:

Anti-Corruption Commission: One of the somewhat unusual provisions in the 2005 Interim Constitution was the explicit constitutional creation of Southern Sudan Anti-Corruption Commission. The Commission's constitutional mandate was to protect public property, and combat nepotism, favoritism, tribalism, sectionalism, gender discrimination, bribery, embezzlement and sexual harassment in public institutions. It also was constitutionally authorized to investigate cases of corruption, with such investigations to be submitted to the Ministry of Legal Affairs for prosecution.

This language was echoed in the 2011 Transitional Constitution. However, neither of these constitutional provisions was followed by any substantive anti-corruption law. Accordingly, there is no specific anti-corruption legislation in South Sudan, only the general criminal laws.
By all accounts, corruption remains a significant problem in South Sudan. Yet, of more than 30 cases referred by the Commission to the Ministry of Justice, none has resulted in the filing of charges. According to the Commission, the situation results from the Ministry's unwillingness to pursue high officials. To resolve this problem, the Commission is drafting a law that would create specific corruption-based criminal offenses, and empower the Commission to file criminal charges without prior referral to the Ministry of Justice.

According to the Ministry, the failure to file cases results from the Commission's shoddy investigations, which requires that all matters be reinvestigated. Others say that the proposed remedy – empowering the Commission to file charges without Ministry participation – will simply result in an additional center of power and potential corruption. Moreover, creating a prosecutorial arm of the Commission will require resources, including trained prosecutors and investigators, which are in very short supply in South Sudan.

As of our visit, the outcome of this debate is unclear. Under South Sudanese legislative procedures, for such legislation to be proposed by the GOSS, it must go through an elaborate process that includes submission to and action by the Ministry of Justice. Given the Ministry's opposition, the Commission may attempt to have the legislation submitted as a private bill by a supportive lawmaker.

Human Rights Commission: As with the Anti-Corruption Commission, the 2005 Interim Constitution contained an explicit provision for the creation of Southern Sudan Human Rights Commission. The Commission's constitutional mandate was to monitor and investigate possible abuses of human rights, and to educate governmental actors and citizens concerning human rights issues. This language was echoed in the 2011 Transitional Constitution.

In addition to the national HRC, separate human rights commissions were established in each state. While there is no direct relationship between these bodies, the national HRC seeks to coordinate its work with the states.

Under this framework, the HRC has no role in enforcing or punishing abuses in human rights. Instead, its primary function is to educate members of the legal community (judges, prosecutors, lawyers) on human rights principles, so that they may apply them in their work.
THE ROLE OF INTERNATIONAL ORGANIZATIONS

The Participants

United Nations Development Program (UNDP). By any measure, UNDP is the largest international player in rule of law assistance to South Sudan. Its 2011 Work Plan is impressive in its size, breadth, and funding. UNDP indicates that it is working directly or indirectly with all major rule of law institutions discussed above. Its programs are implemented both directly, and through a variety of contractors, many of whom are identified below.

In discussions with UNDP and others, it was made clear that UNDP (a) viewed its role in the rule of law area as central and pre-eminent, (b) felt that the expertise and experience in South Sudan of its personnel and subcontractors was superior to all others, and (c) wanted no interference or involvement of any other groups in the areas where it had established its programs.

United Nations Department of Peacekeeping Operations (UNDPKO). Though less involved in rule of law matters than UNDP, it appears that UNDPKO nonetheless has a significant presence in South Sudan. For example, UNDPKO apparently is mandated to hire in more than 40 judges and lawyers (many of them expatriates) to work with the ten state court systems in South Sudan. However, given the requirements of UN internal “jurisdictional” rules, it is unclear to the ILAC team how those personnel can be used. It appears that UNDPKO in upcoming months will use many of these skilled personnel to perform a rule of law assessment based upon “The United Nations Rule of Law Indicators,” developed by the Vera Institute in New York.

Joint Donor Team: The Joint Donor Team was established in 2006, and consists of six donor countries, the Netherlands, Norway, Sweden, the United Kingdom, Denmark and Canada. It has funded a variety of projects in the rule of law area. It is unclear if the Joint Donor Team will continue to function in the post-independence environment.

United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs (INL): The bulk of United States’ rule of law assistance programs for South Sudan are administered by INL. Most programs are directed at prisons and police training, though INL at present also contracted with IDLO, PACT and USIP to work with the Ministry of Justice, judiciary, law faculty and bar association on various issues.

United States Agency for International Development (USAID): Though active in other sectors in South Sudan, USAID is not as active in rule of law sector at this time. However, its democracy and governance programs do address some common issues.

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2 See http://reliefweb.int/node/424665
United Kingdom Department for International Development (DFID): DFID has been working in South Sudan for several years, particularly in police and prisons issues. Recently it announced that it will spend approximately £94 million per year in South Sudan until 2015 on a variety of projects, including anti-corruption and government procurement issues.

Canadian Stabilization and Reconstruction Task Force (START): START is funding several projects in the rule of law area, typically through contractors such as IDLO and RCN.

European Union: According to the Establishment Agreement signed between the European Union and the Republic of South Sudan, rule of law is one of the five priority areas for EU development assistance. However, though on occasion the team was informed by South Sudanese officials that certain EU aid had been promised, we did not encounter any specific EU assistance projects in the rule of law sector.

Netherlands: While in Juba, the team was informed that Dutch assistance had previously been promised to the Ministry of Justice for development of the LTI, but had not yet been delivered. However, on December 16, 2011, the Netherlands’ government announced a pledge of €75 million in development assistance to South Sudan the country each year for the next three years.

International Development Law Organization (IDLO): As a contractor to UNDP, INL and other donors, IDLO has one of the largest implementation operations in South Sudan. IDLO is working on a wide variety of programs with the Ministry of Justice, judiciary, and law faculty.

RCN Justice & Démocratie: Another NGO working in South Sudan, RCN has developed a variety of programs focusing more directly on the police and prosecution services. Many of these programs have offered elementary legal training in English intended to orient personnel towards the common law system/principles.

Pact: According to INL, Pact recently received a grant to work on issues related to the delivery of justice, including traditional justice.

United States Institute of Peace (USIP): USIP has worked on various conflict resolution and customary law issues in South Sudan over the past few years, and recently received funding from INL to continue this work.

Carter Center: The Carter Center was involved in the monitoring the referendum process and in conflict resolution in South Sudan. It continues to work in these areas through an office in Juba.

Public International Law & Policy Group (PILPG): PILPG indicates that it has been involved in advising the Government of Southern Sudan on various legal issues, and has established a program office in Juba to support its work.
Open Society Institute (OSI): Though the details are unclear to the team, it appears that OSI, acting directly or through the Open Society Initiative for Eastern Africa (OSIEA) or the Open Society Justice Initiative (OSJI) has undertaken some grant making activities in South Sudan, directed at the Bar and/or Law Society.

Max Plank Institute: According to sources in Juba, the Max Plank Institute has made a variety of trips to South Sudan in the past, but is not presently providing any assistance in the rule of law area.

Pacific Council on International Policy (PCIP): According to the South Sudanese sources, PCIP agreed to provide books for the Supreme Court Library in Juba.

The Current Situation
To an outsider looking at rule of law issues in South Sudan for the first time, three issues stand out. First, a tremendous number of international organizations, NGOs and contractors ostensibly have worked on constitutional and rule of law issues in South Sudan before and after independence. If their reports and websites are to be believed, each has accomplished remarkable feats, made all the more remarkable by the fact that many seem to have accomplished the same feat.

Second, the amount of resources ostensibly being directed at rule of law issues in South Sudan is staggering, given the extremely limited capacity of the country to absorb technical legal assistance. Assuming that there are only 650 or so legal professionals in the entire county, simple math suggests that each judge, prosecutor, lawyer and government attorney should be overwhelmed with support.

Third, notwithstanding this generous funding and the claims of donors and implementers, in some areas not much appears to have happened on the ground. Unquestionably, building a legal system from the ground up is an agonizingly slow process. Unquestionably, South Sudan is an extremely challenging environment. Yet such facts do not excuse ineptitude or nonperformance.

Why has this occurred? Based on our observations, three reasons emerge:

• Some projects are driven more by the donor/implementer’s needs than the recipient’s needs. In this era of matrices, management theories, and deliverables, donors insist upon tangible results for a project. Goals must be set and met, regardless of the situation on the ground. Accordingly, international consultants “assist” their indigenous counterparts in drafting legislation, creating plans or strategies, and finding more consultants. Boxes get checked for goals and milestones – set by donors – that are met.

At the end of the day, the situation on the ground is essentially unchanged. Draft laws are never passed or even seriously considered. Strategic plans are printed in multi-colored
booklets, and promptly ignored. Consultants’ massive reports, full of charts and graphs, are never even read, let alone implemented. Yet, from the donor/implementer’s perspective, their goals have been met – it is the fault of the South Sudanese for not following through.

- **Particularly in non-infrastructure areas, true success (i.e. actual implementation of a sustainable project) requires the personal commitment of indigenous actors with adequate authority.** When one looks at the past two decades of technical legal assistance programs throughout the world, one salient feature of successful projects is the dedication of an indigenous actor or actors to making the project succeed. International personnel can assist, but only local personnel can implement and sustain a project. Without a local “champion,” with the authority and determination to see the project through to completion, technical assistance projects may move forward while pushed by international personnel, but wither or fail when international support is withdrawn.

While “sustainability” has been a buzzword in development circles for decades, this issue is often glossed over in favor of meeting the donor/implementer’s bureaucratic goals. Most projects are theoretically sustainable if someone on the ground wants to sustain them. One need only look at indigenous heroes who have achieved tremendous results with minimal resources to understand what can be done with persistence and hard work. Yet too often, a donor or implementer creates a project, and convinces some indigenous counterpart (usually a high official who has no time or interest in implementing the project) to agree. The donor or implementer then proceeds to fulfill its project obligations – create a plan, curriculum or draft law, hold training programs, sponsor foreign trips – and meet its goals. Without committed indigenous counterparts, however, the ultimate goal of the project is never fulfilled.

- **In South Sudan, the bureaucratization of the technical legal assistance effort, coupled with the scarcity of committed indigenous partners, often has meant that projects proceed primarily to meet the bureaucratic goals of the donor/implementer, with little meaningful long-term impact on the South Sudanese system.** Good work is being done in South Sudan, both by dedicated South Sudanese and their international partners. Indeed, the team was struck by the energy and activity evident throughout Juba. South Sudanese are genuinely proud of their new country, and want it to grow and prosper. Many are willing to work hard to achieve that goal.

In some areas, at least to the casual observer, progress has been made. For example, many physical infrastructure projects, though undoubtedly plagued by problems of various types, seem to be moving forward. Even in the rule of law area, anecdotal reports indicate that the infrastructure needs are methodically being addressed.

However, the team also was struck by the fact that (a) a number of South Sudanese officials did not appear particularly committed and energized to pursue the development of
their respective institutions, and (b) some international donors and implementers ignored this obvious fact, and continued to pursue essentially pointless projects in order to justify their continued work in the country. The former circumstance is not unusual. In any government or other large bureaucratic system, some actors are interested in accomplishing meaningful goals, while others simply put in their time. The key for donors and implementers in a development situation is to identify those who are legitimate leaders, and work with them to achieve their goals.

At the same time, the international community must recognize that the pursuit of pointless projects – while perhaps serving the institutional needs of donors or fulfilling the contractual obligations of the implementers – often are counterproductive to the overall goals of the assistance effort. Repeatedly while in Juba, we were told by South Sudanese officials that they were tired of having international donors, implementers and consultants peppering them with requests to work on some project that interested a donor. If the project was funded, often the South Sudanese official would agree. The donor or implementer might in fact “accomplish” the project, but because there was no South Sudanese who truly championed the project as his or her own, the tangible results were negligible. To validate this observation, one need only compare, as the ILAC team did, the successes trumpeted on various donor/implementer websites with the actual results on the ground in South Sudan.

As a result, both South Sudanese personnel and international donors become disillusioned. Assistance funds are spent on international organizations and consultants who are superb at defining goals that they can and do meet, and who then blame the lack of results on the lack of follow-through by the South Sudanese. Though mistakes and inefficiencies are unavoidable, the institutionalization of this approach is unacceptable.

**THE FUTURE**

In looking to the future, there can be reasonable optimism that the physical infrastructure needed for a rule of law system eventually will be put in place. International donors are funding a variety of construction projects and, when one drives around Juba, the level of energy is noticeable. Unlike some other developing countries, workers are working and buildings are being finished. While the task is formidable, with time and continued funding, the necessary physical infrastructure will be built.

Less certain, however, is the completion of the human and institutional “infrastructure.” Effective rule of law systems and institutions rely on trained professionals, who understand the system and are empowered by institutions to carry out their respective roles. As with its physical infrastructure, South Sudan came to into being without having a human or
institutional infrastructure capable of meeting the nation’s needs. Too often, in an effort to fill this gap, professionals or institutions were imported from Sudan, even though the Sudanese experience typically was the antithesis of modern, democratic principles. As a result, unlike the progress being made with physical infrastructure, South Sudan does not appear to be making serious progress in its efforts to develop a strong core of legal professionals to bring about the rule of law.

The quandary facing ILAC and its member organizations is that, notwithstanding the undeniable needs in South Sudan, the space for effective action at the present time is largely filled. Indeed, as mentioned above, many South Sudanese rule of law institutions are overwhelmed with an endless procession of international donors/implementers hawking their wares. Other such institutions are controlled by conservative bureaucrats who have little interest in or energy to tackle the immense problems facing them.

At the same time, it is apparent that South Sudan’s position as the “crisis de jour” may be fading. Already, some international organizations reported that personnel have been withdrawn from South Sudan for duty in Tunisia or Libya. If circumstances change in places such as Syria, Iran, Myanmar or North Korea, South Sudan could slip toward the bottom of the list like East Timor or Haiti. The needs will not have been met; the geopolitical imperatives and short attention span of the international community will have shifted.

RECOMMENDATIONS TO COUNCIL

Based upon the ILAC team’s visit to South Sudan, it is apparent that a full assessment mission to South Sudan at this time is inappropriate. In recent months, South Sudanese officials have been interviewed, surveyed and questioned to the point of exasperation. Moreover, the UN in upcoming months will dispatch a phalanx of personnel to perform an assessment based upon 135 different “Rule of Law Indicators.” For ILAC to perform its own full-scale assessment at this time would be counterproductive.

Nor is it productive at this time for ILAC or its members to actively pursue programming efforts in South Sudan. While at least two ILAC members (RCN and PILPG) have worked in South Sudan, it is apparent well-entrenched, well-funded international organizations and large NGOs have ongoing programs that occupy the attention of many South Sudanese rule of law institutions. Given the extremely limited capacity of these indigenous institutions, it makes no sense at this time for ILAC to add to their frustrations.

However, given the needs of the new country, and the eagerness of many South Sudanese to build a country based on the rule of law, the team believes that ILAC should continue to explore ways of providing effective assistance. Several thoughtful international
observers have noted that, notwithstanding the massive influx of assistance providers, portions of the South Sudanese rule of law system remain underserved. In a similar vein, the team encountered a number of less senior, but highly motivated, South Sudanese who expressed frustration at the lethargy in the system. Accordingly, the team makes three specific recommendations to Council:

1. **Seek to identify indigenous actors with a personal commitment to effect meaningful change.** Developing the rule of law, particularly in a fledgling nation such as South Sudan, is a multi-generational process. As one insightful development expert noted a few years ago, assistance providers should “avoid the easy contacts.” Too often, assistance providers seek fly-in, fly-out meetings with Ministerial or other high-level contacts, where grandiose promises are made on both sides. As ILAC’s experience has demonstrated, effective rule of law programs are seldom implemented by such individuals. Instead, the most effective projects are typically built by the tears and sweat of one or more dedicated indigenous individuals, who may not be particularly known or powerful. The team recommends that over the course of the upcoming months, ILAC seek out energetic South Sudanese legal professionals with a passion and vision for change.

2. **Follow events in South Sudan and, if conditions warrant at a later date, dispatch a mission to plan discrete projects in areas ignored or abandoned by existing programs.** As mentioned above, while the current influx of donor resources has attracted a variety of NGOs and for-profit contractors, experience suggests that enthusiasm will wane as new “hot spots” appear and donor resources are reduced. Even now, South Sudanese officials noted several areas where international groups had promised assistance, but had not delivered. One unique aspect of ILAC’s operational plan is its commitment to assisting post-conflict countries whose priority has slipped on the international agenda. In keeping with this mission, ILAC and its member organizations should continue to monitor the situation. If particular needs in South Sudan are ignored or abandoned in upcoming months or years, ILAC should stand ready to step in and assist dedicated indigenous actors in meeting those needs.

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