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# **Falling between the Cracks? Prospects for Environmental Litigation Arising from Oil Production in Southern Sudan**

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**South African Institute of International Affairs**

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NORWEGIAN EMBASSY

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## **ABSTRACT**

Oil production in Southern Sudan has degraded agricultural lands and caused mass displacement and suffering of local pastoralist and agriculturalist communities. This paper seeks to identify the legal system governing the adjudication of environmental issues arising from oil production in Southern Sudan after the signing of the Comprehensive Peace Agreement (CPA) in 2005. This agreement guarantees the right to compensation to those whose rights have been violated by the activities of the oil companies. However, it is unclear how these cases are to be decided. The CPA provides for two systems of government, one for Northern Sudan and the other for Southern Sudan, with separate judicial bodies. Yet neither the Government of National Unity nor the Government of Southern Sudan has clear jurisdiction to adjudicate these oil company violations. This is a major loophole in the CPA preventing the operationalisation of the provisions on compensation. These cases fall between the cracks of a divided country, failed by the judicial systems of both North and South.

This paper explores the relevant provisions of the CPA and the two interim constitutions relating to the environment, and examines the judicial systems of both governments, as well as their judicial mandates. In order to contextualise the problem with which it deals, this paper provides an historical account of Sudan's political problems and their impact on natural resource governance. It concludes that these issues of environmental compensation for local communities in Southern Sudan need to be clarified urgently, before the referendum is held in 2011 to determine the political future of the country.

## **ABOUT THE AUTHOR**

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## ABBREVIATIONS AND ACRONYMS

b/d	barrels per day
CNPC	China National Petroleum Corporation
CPA	Comprehensive Peace Agreement
ECOS	European Coalition on Oil in Sudan
GNU	Government of National Unity
GNPOC	Greater Nile Petroleum Operating Company
GoS	Government of Sudan
GoSS	Government of Southern Sudan
HRW	Human Rights Watch
INC	Interim National Constitution
ICSS	Interim Constitution of Southern Sudan
NCP	National Congress Party
NPC	National Petroleum Commission
SPLM/A	Sudan People's Liberation Movement/Army
SSIM/A	Southern Sudan Independent Movement/Army

## INTRODUCTION

Sudan is endowed with significant non-renewable natural resources that would have an enormous positive transformational impact on Sudanese communities if policies to exploit them were designed to benefit these communities. These non-renewable natural resources comprise oil as the most significant resource, as well as uranium, copper, diamonds, gold, iron ore, mica, silver, zinc and others.<sup>1</sup>

Although sizeable reserves of these minerals have been proven to exist, a comprehensive exploration has not been undertaken throughout the country due to protracted political conflicts between the North (also referred to as the 'Khartoum government' in this report) and South that pre-date Sudan's independence in 1956.<sup>2</sup>

The Addis Ababa Peace Agreement of 1972, which ended the first Sudanese civil war between Southern Sudan and the Khartoum government, made it possible for oil companies to explore for oil in the south of the country. The American oil company Chevron made the first discovery of oil in the late 1970s and early 1980s. However, Chevron could not continue with exploration and production because the second Sudanese civil war broke out in 1983. Some of the causes of this new round of civil war were associated with the discovery of oil in Southern Sudan.

The next phase of Sudanese oil development was in 1996, when one of Southern Sudan's rebel factions, the Southern Sudan Independent Movement/Army (SSIM/A), signed a peace charter with the Khartoum government in 1996 that led to the Khartoum Peace Agreement of 1997. The Khartoum government dishonoured this deal in the same year, despite its supposed four-year duration. The SSIM/A rebel faction controlled the whole oil-rich area in the South. In 1996 China, through its state oil company, the China National Petroleum Corporation (CNPC), then entered the Sudanese oil industry, exploiting the abovementioned deal between the two warring parties. However, the subsequent involvement of Chinese oil companies in the production of oil has brought devastation to the environment of the Southern Sudanese populations living within the vicinity of the oil exploration and production sites. The oil exploration and production contracts were negotiated between the Khartoum government and the Chinese oil companies without provision for environmental protection or other related rights for the communities who are affected or are likely to be affected in the future by the oil exploration and production activities.<sup>3</sup> While some of the Chinese oil companies claim that they have carried out environmental impact assessments in some oil blocks, these documents are not available for public verification, and generally the national oil contracts between the Khartoum government and the Chinese oil companies are shrouded in secrecy. Moreover, the views of the communities who have rights over land where the oil production is located and are likely to be affected by the oil operations were not taken into account when these contracts were drawn up. It should be noted that Southern Sudanese communities who live in areas where oil fields are located are pastoralists and agriculturists. Oil production has had an extensively detrimental effect on agricultural lands and has brought mass displacement associated with great loss of belongings.<sup>4</sup>

The construction of pipelines passing through many swampy regions has posed a noticeable threat related to oil spilling into the drinkable freshwater used by communities and their cattle. The construction of all-weather roads connecting the oil wells has blocked many streams, causing floods in some areas and drought in others.<sup>5</sup> The basic

issues of compensation and resettlement were either not addressed in these contracts or, if addressed, were not implemented.

Because of these concerns about the impact of the oil industry on the environment and people of Southern Sudan, the Comprehensive Peace Agreement (CPA), signed in 2005, envisages many drastic changes to national policies on oil exploration and production in Southern Sudan. One of the key issues addressed by the CPA is the management of the oil sector through the National Petroleum Commission (NPC) with fair representation in the context of the two governmental partners in the Government of National Unity (the Sudan People's Liberation Movement [SPLM] from the South and the National Congress Party [NCP], which forms the government in Northern Sudan) and the three states governing the area where the oil is produced. The CPA also calls for consultation with and the involvement of the communities living in the oil-rich areas in the negotiation of oil contracts, and on compensation should the need arise.<sup>6</sup>

The CPA guarantees compensation through a judicial process to those communities and individuals whose rights have been violated by the oil companies. However, the NPC is not a judicial structure and the CPA does not provide for the establishment of such a judicial process, which has been a major loophole in the operationalisation of the provisions on compensation. The CPA makes no mention of a specific court that has jurisdiction over oil-related environmental cases. Moreover, neither the Government of National Unity (GNU) nor the Government of Southern Sudan (GoSS)<sup>7</sup> has expressed jurisdiction to adjudicate on these violations.

The two judicial systems (of the GNU and GoSS, respectively) have different jurisdictions, and the CPA has not given either system any express mandate to adjudicate on the environmental cases that arose before the signing of the agreement or after it. Moreover, the NPC, which is co-chaired by the president of the GNU and the president of the GoSS, has no judicial mechanism for compensating victims of oil-related environmental degradation. However, the different judicial jurisdictions of the two judicial systems implies that the judiciary of Southern Sudan has jurisdiction over all the environmental cases originating in the South and that the national judiciary has jurisdiction over the environmental cases originating in Northern Sudan.

A case that illustrates this problem was noted in an interview with the commissioner of Leer County, Western Upper Nile State.<sup>8</sup> Regarding environmental problems created by oil companies operating in his area, the commissioner said:<sup>9</sup>

The displacement caused by the oil production has resulted in squatting in the towns, and the intensification of internal conflicts over resources such as grazing lands in case of pastoralists. In fact, the unwillingness of government to allocate funds to cater for the resettlement of the displaced communities has created great resentment among the people. For example, 261 cows died in one day in Koch County in Block 5A. The cause was alleged to be contaminated water drunk by the cows.

However, the community through their commissioner was unable to raise this case because of a lack of clear legal indication of which of the two judicial authorities — the GNU or GoSS — has jurisdiction over such cases. The oil companies hold that they are answerable to the Khartoum-based government and not any other government. Consequently, given the establishment of the NPC without a judicial organ and the two

overlapping governing systems between Khartoum and Juba (the capital of the South), with each having geographically separate judicial settings, the affected populations are not sure which of the above systems has jurisdictional responsibility to adjudicate on oil-related environmental cases such as the type reported by the Leer County commissioner and the community in Western Upper Nile State.

This paper seeks to throw light on which of the governing systems adopted after the CPA has jurisdiction to adjudicate on the environmental cases caused by oil companies up until the referendum period in 2011.<sup>10</sup> In this referendum, Southern Sudanese will either exercise their right to self-determination and vote for an independent sovereign state or choose to remain as part of Sudan under the two-government system adopted by the CPA. If the latter is the case, then it is important to address the question of who has jurisdiction over cases arising from the environmental degradation caused by oil companies in Southern Sudan.

The methodology used for this research has incorporated primary and secondary sources, including textual analysis of the CPA and the two interim constitutions of Sudan adopted after the CPA was signed in 2005. Interviews were conducted with government officials as well as community elders and leaders of groups affected by oil operations in Southern Sudan.

## HISTORICAL BACKGROUND TO THE SUDANESE CONFLICT

Sudan covers an area of 2.52 million square kilometres, which is equivalent to Kenya, Uganda, Rwanda and Burundi combined. It has diverse cultural identities, beliefs, customs and traditions. Sudan has been characterised by political instability since independence from Britain and Egypt in 1956. Most of these political conflicts were manifested in the form of two civil wars, principally between the South and North of the country. Subsequently, other parts of Sudan joined the Southern liberation movement after realising that they also faced similar socio-economic, political and cultural diversities challenges of the kind that led the South to go to war with the North. The first civil war lasted from 1955 to 1972 and was concluded by the Addis Ababa Peace Agreement, which led to an autonomous government being established in Southern Sudan known as the High Executive Council.<sup>11</sup> The second civil war started in 1983 and was ended by the Nairobi Agreement signed on 9 January 2005, also known as the Comprehensive Peace Agreement, which led to the creation of the GNU and GoSS.

The immediate causes of the two wars were different. However, they had one common underlying cause, i.e. cultural differences. In the early days of independence, Sudan under the leadership of the Northern elites, who asked for the country to be made a member of the Arab League and the Islamic world. Arab Muslim leaders turned down the request on the grounds that in Sudan, Arab Muslims represent only 25% of the population and therefore the majority of Sudanese are neither Arabs nor Muslims. It was Jamaal Abdel Nasser, the president of Egypt at the time, who convinced the Arab League that Sudan is both an Arab and an Islamic state. Based on the above argument, the Northern Sudanese Arab leaders needed to prove to the Arab world that they were Arabs by establishing a state that was ruled according to Arabic Islamic culture, as opposed to the then-prevailing and dominant Christian and customary culture. Due to a strong colonial administrative

influence and ties between Egypt and Sudan, the Egyptian president influenced the Arab League to accept Sudan into its fold.<sup>12</sup>

However, Sudan was colonised by both Egypt and the British under a condominium system. The approach of Egypt during the period prior to independence was to amalgamate Sudan with Egypt politically to secure Sudan's mineral wealth and the source of the waters of the Nile. However, the plans to add Sudan to Egypt gained no support from the other ruling partner, Britain, which was aiming to amalgamate Southern Sudan with East African nations, particularly Uganda and Kenya. The majority of Sudanese people did not support the Egyptian agenda and early Sudanese political parties called for an independent Sudan. Therefore, Egypt had to secure its access to a steady flow of Nile water by adopting several initiatives, culminating in the Nile Water Agreement in 1929. This agreement regulates the use of the Nile water by the countries along the river.

Along with the abovementioned cause of the first civil war was the lack of development in what is today Southern Sudan. Under colonialism, North and South were ruled separately. The development of physical infrastructure was concentrated in the North, leaving the South in the hands of missionaries. The governors of the three southern regions met annually either in Kampala or Nairobi instead of Khartoum. The British plan to add Southern Sudan to East Africa was not supported by Egypt. Instead, Egyptian leaders favoured the unification of Sudan under one leadership in Khartoum. The Egyptian plan was successful because of Egypt's leverage over the Suez Canal water route. Britain needed to secure the flow of raw material from the Middle East through the Suez Canal, thus on the strength of these interests Britain gave in to the Egyptian plan.

Britain manifested this attitude in the momentous Juba conference of 1947 and changed its colonial policy of severance. Subsequently, Sudan adopted a unified government for the first time in 1956, with Ismail al-Azhari from Northern Sudan as prime minister. Since independence, Sudanese leaders have all come from the North. The monopoly of political leadership by the North caused other parts of the country to feel marginalised and led to rebellion by the Southern Sudanese, joined by other people such as the Nubians and Funjs, and later by the Darfurians in the west of the country.

## THE CAUSES OF SUDAN'S SECOND CIVIL WAR, 1983–2005

The primary cause of the second civil war was competition over natural resources. The discovery of oil at the Southern town of Bentiu was a factor that in 1980 led the Sudanese president, Jaafar Mohammed Nimeiri, to dishonour the Addis Ababa Peace Agreement of 1972, dissolving the autonomous government in the South and dividing Southern Sudan into three weak regions. He then redefined the North–South border, annexing the oil-rich area around Bentiu to the North and changing its name to Unity State.

The proposal by the Northern leaders to build a pipeline from the oil fields to the extreme east of Sudan and to build an oil refinery in the North was seen as an attempt at the diversion of the South's wealth by Southern leaders and they reacted negatively to the North's proposal. The Southern leaders proposed a pipeline passing through Kenya to the Indian Ocean and the construction of the oil refinery in the South rather than the North.

In addition, the imposition of Sharia/Islamic law on all Sudanese citizens despite the differences of beliefs in Sudan raised Southern suspicions of Northerners. The idea was



perceived as a revival of the policy of Arabisation and Islamisation, and as an attempt by the Northern Arabs to join the Arab League.

Another significant cause of the second civil war in Sudan was the digging of the Jonglei Canal.<sup>13</sup> This project was pioneered by the Northern-controlled government of Sudan and implemented by France. The canal was projected to cut an almost straight line through Block 5 (see map) with a 360 kilometre canal northeast from Bor town on the White Nile to the Sobat River, draining an estimated 25 million cubic metres of water per day from the Sudd and Toic. The project was interrupted in the early 1980s by the SPLA, which destroyed the mechanical digger meant to dig the canal. The presence of the SPLA in the Jonglei area discouraged the French consortium from building the canal and ended its oil exploration and production in Block 5.

Trust between the North and the South broke down even further as a result of this incident. The possibility of peaceful coexistence between North and South became increasingly fragile and, as a result, the second civil war erupted on 16 May 1983 in the Southern town of Bor, lasting until 2005.

## THE COMPREHENSIVE PEACE AGREEMENT

The CPA ended the second Sudanese civil war — a war that took the lives of 2.5 million people and displaced more than 4.5 million.<sup>14</sup> The CPA gave Sudan an interim period of six years to make unity attractive,<sup>15</sup> at the end of which the people of Southern Sudan were to choose between continuing in the unity framework or opting for an independent state. The agreement accorded the people of Northern Sudan their right to Sharia law. In Southern Sudan, Sharia law was not to be applied during the interim period; instead, the agreement planned for the establishment of a secular democratic state in the South. As noted above, the CPA also established the GNU and a largely autonomous GoSS administering the ten states of Southern Sudan — a ‘one country-two-system’ model with a secular system in the South and a theocratic system in the North. The underlying aim of this system was to accommodate the country’s diversity. The GoSS is linked to the GNU through the Constitutional Court, the Central Bank, the Joint Defence Board for Joint Integrated Units and the Office of the First Vice President, who is also the president of GoSS. The CPA will be discussed in further detail following an outline of issues raised by the oil industry in Sudan.

## HISTORICAL BACKGROUND OF THE SUDANESE OIL INDUSTRY

The exploration for and production of oil in Sudan has a long history. The first oil exploration took place in 1959, three years after independence from Britain and Egypt, and was undertaken by Agip, an Italian oil company. Agip was granted an oil concession in the eastern Sudan region of the Red Sea by the Khartoum government, but the exploration did not result in significant production.<sup>16</sup>

Oil exploration became feasible in 1972 after the end of the first civil war. Two years later, the American multinational oil company Chevron was granted an oil concession in the South by the Khartoum government and established oil wells in Southern Sudan at

Bentiu, Muglad, Heglig and Adar Yale in the period 1979–81. All the oil fields discovered by Chevron are located in the western, eastern and northern areas of the Greater Upper Nile Region in Southern Sudan and the Abyei area.<sup>17</sup> The Greater Upper Nile Region currently consists of three states in Southern Sudan.

A consortium called the White Nile Petroleum Company, comprising the Sudanese government, Chevron, Royal Dutch Shell and the Arab Petroleum Investment Corporation was formed in 1983. The prime endeavour of this consortium was to build a petroleum pipeline from the oil fields in the South to Port Sudan in the east, a distance of 1 540 kilometres, at an estimated cost of \$1 billion.<sup>18</sup> The plan was aborted due to the outbreak of the second civil war in the early 1980s. Chevron's exploration activities in the South could not continue and the company suspended its operations in 1984. Consequently, Chevron sold its interests to the Sudanese state company Concorp in 1992, ending its presence in Sudan after almost two decades of oil investment. Concorp later sold its concession to a Canadian Oil Company, Arakis Energy Corporation. Arakis undertook oil operations in Sudan between 1994 and 1998. However, it refused to renew its contracts with the Sudanese government and sold 75% of its shares to the CNPC in 1996. The Sudanese government maintained that Arakis had failed to secure the agreed financing to carry out oil exploration and production. Arakis' position in oil investment in Sudan became weak and the company finally sold the remaining 25% of its shares in the Greater Nile Petroleum Operating Company (GNPOC) to another Canadian company, Talisman, in 1998.

China entered Sudan's oil industry when it bought the shares from Arakis in 1996. As mentioned earlier, the opportunity for oil exploration at that time was high due to a political charter signed between the Khartoum government and one major rebel faction in the South that was in complete control of the oil-rich region in the South. Both parties (the Khartoum government and the rebel faction) signed a peace deal in 1997.<sup>19</sup> However, the deal was dishonoured by the Khartoum government in the same year and this dragged both parties back to a bitter war with immeasurable destruction that attracted international attention and the involvement of many human rights organisations worldwide.

The CNPC is currently the main player in the Sudanese oil industry. The dramatic rise in demand for oil in China to fuel its booming economy has caused the government to target oil producing nations regardless of their human rights records, with Africa being a major focus. China focuses on countries where American and European oil companies have less presence, and Sudan is the paramount example of this. Despite the UN Security Council's persistent accusations that the Khartoum government is violating human rights in Sudan, China has remained a vital diplomatic ally of the Khartoum government. China has a policy of 'non-interference' in the internal affairs of other countries and regards the protection of human rights as the internal affair of the host state. Indeed, within China's own borders, the Chinese government and Chinese companies have displayed little regard for environmental concerns in their pursuit of rapid economic development.<sup>20</sup> With such an experience at home, it is unlikely that investments by the Chinese oil companies would take much care of either the human rights or the environmental problems of the people of the host state.

## GREATER NILE PETROLEUM OPERATING COMPANY

The GNPOC oil consortium was formed in December 1996 by CNPC (China), PETRONAS (Malaysia), Sudapet (Sudan) and Arakis (Canada). The latter subsequently sold its shares to Talisman (see above). The consortium has exploited the oil fields that were initially discovered by Chevron and made another discovery of oil reserves in Southern Sudan, as well as implementing the plan of building a pipeline from the oil fields in the South to the eastern seaport of Port Sudan on the Red Sea. The oil pipeline was opened in 1999, exporting Sudanese oil to the international market for the first time in history.<sup>21</sup>

Talisman suspended its exploration and production activities in 2002 due to international and domestic pressure in Canada regarding human rights violations in the oil-producing regions and sold its 25% stake in GNPOC to an Indian company, ONGC Videsh. This organisation undertakes exploration and production, as well constructing pipelines.

On the eastern bank of the Upper Nile a consortium was formed by Total (France), Marathon (US), the Kuwait Foreign Petroleum Company (Kuwait) and Sudapet (Sudan). This consortium was granted an oil concession in Block 5 in 1980 by the Khartoum government. It suspended its operations in 1985 as a result of insecurity caused by the second civil war. The contract with the Khartoum government was renewed in December 2004. However, in the meantime, the GoSS had signed a contract with the UK-based White Nile Ltd for oil exploration in Block 5, which is claimed by the Total consortium. This led to a very intricate case between the two Ministries of Energy and Mining in the GNU and GoSS within the two governing systems of Sudan.

Another oil concession in Block 5A was granted by the Khartoum government to a consortium of the Swedish company Lundin, the Malaysian company PETRONAS, the Austrian oil and gas company OMV and Sudapet. The same consortium was granted a concession in Block 5B, south of Block 5A, in 2001. Both Lundin and OMV sold their shares in Blocks 5A and 5B<sup>22</sup> to PETRONAS and the Indian company ONGC Videsh in 2003.<sup>23</sup> Several reasons were given, among them an outcry related to massive human rights violations in these areas.

According to the statement issued by the state Minister for Energy and Mining of the GNU,<sup>24</sup> Sudan has five billion barrels of proven oil reserves as of 2009. Locally, 104 000 barrels per day (b/d) are consumed and 820 000 b/d are exported to international markets, especially Asian markets in China, India, Indonesia, Malaysia, Japan, South Korea and others. The statement also said that according to the *International Crude Oil Market Handbook*, Sudan 'Nile' export crude blend is considered sweet and light, having a gravity of 33 degrees API and a low sulphur content of 0.045%.<sup>25</sup>

Foreign oil companies that have been involved in the Sudanese oil industry at some stage in its history include Agip (Italy), CNPC and the China Petroleum and Chemical Corporation (China), the Gulf Petroleum Corporation (Qatar/Sudan), Royal Dutch Shell (Netherlands/UK), Mobil (US), the National Iranian Gas Company (Iran), Lundin Oil (Sweden), OMV (Austria), Talisman Energy (Canada), Total-Fina (France/Belgium), PETRONAS (Malaysia), ONGC Videsh (India), Sudapet (Sudan), Ascom (Moldavian) and al-Thani (Cayman Islands).<sup>26</sup>

The Sudanese oil industry currently has four refineries distributed as follows.

- Port Sudan oil refinery on the Red Sea in eastern Sudan;
- Jayli oil refinery in Khartoum in Northern Sudan;<sup>27</sup>
- El Obied oil refinery in central Sudan; and
- Abu Muglad/Fulla oil refinery in south-western Sudan.

In summary, the current situation is as follows: GNPOC, with China as a principle player, is the largest consortium in the Sudanese oil industry. The major oil fields in Sudan are; Unity/Bentiu Block 1, Heglig Block 2, Muglad Block 4, Thar Jath and Male Blocks 5A and 5B, Adar Yale Block 3, Poloic Block 7, Jonglei Block 5 and Abu Muglad/Fulla Block 6.<sup>28</sup>

The Khartoum government through CNPC is trying to exploit other blocks, some of which are located in Darfur, but the project is on shaky ground due to the ongoing conflict in the region.

## OIL DEVELOPMENT IN ENVIRONMENTALLY VULNERABLE AREAS OF SOUTHERN SUDAN

There are a number of environmentally vulnerable areas in Southern Sudan that warrant careful attention when developing subterranean natural resources like oil and gas. These areas include the Sudd region and the Machar marshes.

### The Sudd region

The Sudd (swampy) region in Southern Sudan is the largest freshwater wetland in the world, covering an area of 1.7 million square kilometres. It encompasses oil concession blocks that include Block 4 and most of Blocks 5A and 5B and Block 5. All of these blocks are located in the Western, Eastern and Northern Upper Nile states and the Abyei area. The Sudd is home to many migratory birds and animals. Some 350 indigenous plant species have been identified in the region and up to 250 species of birds have been recorded. The region is also rich in fish and wildlife such as hippopotami, crocodiles and the Sitatunga antelope population. There are sizeable numbers of elephants and buffalos, which migrate between the swamp and the Toic (the local name for the grazing grounds). Other wildlife such as zebras, mongala gazelles, reedbuck, giraffes, ostriches and waterbuck also migrate seasonally from the Toic.<sup>29</sup> All these species, as well as the surrounding human population, depend on the freshwater of the Sudd. When this underground and surface water is contaminated in the oil production process, the impact on both animal and human populations is immense. The possibility of oil spills from the pipelines and the construction of all-weather roads connecting the oil wells in the above blocks is a great threat to such species.<sup>30</sup>

Moreover, the use of heavy equipment for oil drilling, the chemicals used in exploration and production, and inadequate waste treatment will also threaten the future of these species. A fragile environment like the Sudd requires development that is based not on financial returns, but rather on careful consideration of the long-term possible impact of such development, so as to avoid or minimise dangerous threats to the future existence of the species that depend on the natural resources of the region.

### **Machar marshes**

Another environmentally vulnerable area is the Machar marshes in the Eastern and Northern Upper Nile states. This area includes oil concessions Blocks 3 and 7. The Machar marshes have been identified to be among the most important freshwater wetlands in the world. This area is inhabited by several populations similar in nature to the Sudd. A pipeline 32 inches in diameter was constructed to Port Sudan in eastern Sudan. Both pipelines in Western and Eastern Upper Nile states meet in Northern Sudan, crossing many rivers flowing northwards. Any breakage of the pipeline that results in a large oil spill can contaminate the water and make it unfit for irrigation and consumption downstream, from Southern Sudan through Northern Sudan to Alexandria in Egypt.<sup>31</sup>

One of the social impacts of oil exploration and production in both regions of the Nile is the connection of people and marketplaces through all-weather roads, a consequence intended by neither the Khartoum government nor the oil companies. All-weather roads would have been of great benefit if the fishing industry could be harnessed for commercial purposes by the local communities. The areas where oil wells are located in Southern Sudan are inhabited by traditional communities who have three sources of livelihood: cattle herding, subsistence farming/agriculture and subsistence fishing. Big fishing companies under Khartoum sponsorship come with large-engined boats and sophisticated fishing equipment to catch the fish and sell them in Khartoum and on the international markets. These all-weather roads have also been used for evacuation from one area of settlement to another as a matter of safety. The SPLA also used these roads to attack government garrisons and checkpoints located in the oil-rich South during the second civil war.<sup>32</sup>

## **ADVERSE IMPACTS OF OIL DEVELOPMENT**

Oil development has numerous potential unpleasant impacts.

### **Oil spillage**

The construction of pipelines and other exploratory and production facilities in swamps and other areas has a highly adverse impact on the surface and underground water, which adversely affects people, fauna, flora and the natural environment.

### **Soil erosion**

This results from construction and exploratory activities such as drilling, which produces mud, effluents and oil, which contaminate water. This leads to loss of vegetation, which leads to soil erosion and the loss of all the benefits associated with good soil, including agricultural productivity.

### **Air and landscape pollution**

This refers to the loss of natural scenery and the visual intrusion caused by drilling rigs, night lighting and gas flaring, as well as offensive odours. Gas flaring causes huge amounts of smoke, which pollutes the air. Ironically, Sudan is a member of the UN Framework Convention on Climate Change and should be held to account for this pollution in terms

of this agreement. If harnessed, the flared gas could be used as liquefied petroleum gas, which could be a substitute fuel for cooking instead of fuel wood and may stop the cutting down of trees and thus prevent deforestation. Gas flaring in Sudan has created a risky situation for the non-industrialised Sudanese communities. It not only pollutes the air, but also kills the vegetation around the flare area such as in Western and Eastern Upper Nile states, where large species of trees and tall grasses have been destroyed as a result of flaring gas.

### **Noise**

Noise from aircraft or helicopters flying to and from oil operations causes great public disturbances, especially at night. Noise from roads and causeways constructed to facilitate drilling and production operations occurs on a continuous basis. Moreover, the vibration from trucks or big vehicles and aircraft and the use of dynamite in exploration has caused cracks in nearby buildings and has driven away all the migratory animals from the sites. The use of explosives in exploration and the clearing of access roads to the drilling sites have led to loss of vegetation, deforestation, drought and crop failure. The use of explosives can also lead to the extinction of certain species of animals and it has huge agricultural impacts.<sup>33</sup>

### **Conflict within communities over resources**

The concentration of different types of communities, i.e. pastoralists and agriculturalists, into one or two villages has brought persistent conflict over insufficient resources and how what resources that do exist are utilised.

### **Displacement**

The involuntary migration of communities is associated with loss of livelihoods. The loss of farmlands, grazing lands and fishing grounds brought about by displacement reduces people to begging and results in acute structural poverty. There is also a loss of cultural heritage as a result of damage to archaeological, historical and cultural sites. The abrupt relocation of rural communities into urban areas also results in cultural shock, leading to conflict between the Northern Islamic cultures and the Nuer/Dinka traditional cultures in the South. The destruction of social cohesiveness by disturbing the previously remote communities is coupled with a loss of the culture of sharing and results in severe social separation. Furthermore, the contamination of vital natural resources used for medication and other purposes, the introduction of new diseases, and the lack of hospitals or clinics is a cause of numerous deaths in displaced populations.<sup>34</sup> In addition, migration to towns creates squatting in urban centres or slums. It also increases unemployment rates, because most of the displaced people have low levels of formal education and lack the skills needed to engage in the urban economy, except for doing menial work. These people end up in slums. The reluctance of the government to rehabilitate the displaced population has also resulted in an increase in crime, which people resort to as a means of survival.<sup>35</sup>

Many villages have been destroyed and their inhabitants displaced by government forces during oil production activities in Sudan. Displacement is carried out by the Sudan regular army infantry backed by helicopter gunships and a high-altitude Antonov bomber (acquired from Russia by the Sudanese government).

During an interview with Chief Majang Badeng of the Leek community in Western Upper Nile (Bentiu), he told of an argument he had with a government security agent during one such raid:<sup>36</sup>

The security officer came to me and told me to evacuate the area within two weeks. When I asked him of where we should go, he baldly said that that was not his problem. He told me, 'If you don't move away within that period, you will be forcefully evicted at gunpoint'. He also said that this was an order from Khartoum and he was there to carry it out.

Chief Badeng also commented tellingly that 'it is a great curse to have oil here'.<sup>37</sup>

Issues like employment, compensation and community development are poorly addressed by the oil companies. Educated Southern Sudanese are generally not employed by the oil companies, and companies tend to bring their oil workers from the North, which has caused great resentment among local communities. Positions that are sometimes given to the Southerners include security guards and cleaners, but they are not offered highly skilled jobs that would afford them the experience needed for future employment. Regarding compensation, the author has never heard of any compensation having been offered or paid to local communities, especially in the county where Blocks 5A and 5B are located, regardless of the disastrous effects of oil exploration and production on the local environment and communities' way of life.

In the area of community development, it is a common practice that oil companies are contractually obliged to allocate funding for community development. However, community development by oil companies in Sudan is mostly limited to the building of schools and emergency clinics for oil workers. The schools built by oil companies offer limited facilities and all are Islamic schools. The question of why Islamic schools would be provided for Christian communities is easily answered: because the Islamic government in Khartoum wants to pursue the policy of Islamisation and Arabisation in the South. Oil companies are not allowed to establish a relationship with the local communities that are supposed to benefit from the resources in the areas where they live. Therefore, although the discovery of oil in Southern Sudan was meant to bring jobs and development to the local communities, instead it has brought sorrow and suffering to the people and pollution of the environment.

#### LAW GOVERNING CLAIMS FOR ENVIRONMENTAL DAMAGE AND ITS JURISDICTION PRIOR TO THE CPA

The laws governing the whole of Sudan prior to the signing of the CPA were those of the Republic of Sudan. They were applied in both North and South, except in the areas controlled by the Southern rebels. However, these laws did not include effective enforcement mechanisms. Articles 9 and 13 of the Constitution of the Republic of the Sudan<sup>38</sup> of 1998 gave the state the duty to protect the environment of the whole of Sudan. Article 9 states:

All natural resources under the ground, on its surface or within the territorial waters of Sudan are public property and shall be governed by law. The State shall prepare plans

and promote the appropriate conditions for procuring the financial and human resources necessary to exploit these resources. The focus in this article is on the utilisation of the resources relating to ownership.

Article 13 states: 'The State shall protect the natural environment, its purity and its natural balance, to ensure safe, sustainable development for the benefit of all future generations.'

Neither article mentions anything relating to petroleum production directly, despite the fact that the Constitution was drafted at the height of oil exploitation in Sudan and at a time when the pipeline had almost reached Port Sudan.

The Republic of Sudan further has over 150 acts and regulations governing the environment.<sup>39</sup> The most recent is the Sudan Environmental Policy Act of 2001.<sup>40</sup> The weakness of this act is that it has no valid enforcement policy or implementing regulations. Moreover, the ministries controlling energy and the investment sector subsequently bypassed the act and drafted separate regulations. These regulations contain some provisions relating to the protection of the environment, but their enforcement is either very limited or non-existent.

Projects sponsored by foreign donors require obligatory environmental impact assessment studies as a basic element imposed by their governments. However, the Sudanese government's projects are marked by the deliberate failure to carry out environmental impact assessments, and the Higher Council for the Environment and Natural Resources remains without any enforcement powers. This council was formed in 2002 before the signing of the CPA and was under the direct leadership of President al-Bashir. It could not work effectively before the CPA because many of the environmental and human rights violations perpetrated at the time were carried out under al-Bashir's orders! The Higher Council for the Environment and Natural Resources is in the process of being restructured to reflect the new political dispensation adopted by the CPA. Before the CPA, protection of the environment was vulnerable under the Khartoum-based laws not only in the South, but also in the Northern states through which the pipelines pass. Several oil spills from the pipelines have been reported in places through which the pipelines pass, but the response of the Khartoum government was to blame the victims of the oil spills, accusing them of sabotaging the pipelines.

#### **LAW GOVERNING CLAIMS FOR ENVIRONMENTAL DAMAGES AND ITS JURISDICTION POST-CPA AND THE ROLE OF THE NATIONAL PETROLEUM COMMISSION**

The CPA established a National Petroleum Commission (NPC),<sup>41</sup> which is co-chaired by the two presidents of the GNU and the GoSS. It comprises of four permanent members from the SPLM, four permanent members, and three non-permanent members from the oil-producing states/regions appointed by both presidents. The decisions of the commission are reached by consensus.

According to article 3.4.1<sup>42</sup> of the wealth-sharing protocol of the CPA, the NPC is assigned to formulate public policies and guidelines in relation to the development and management of the petroleum sector consistent with article 3.1.1 of the CPA. It is also assigned to monitor and assess the implementation of those policies to ensure that they



work in the best interests of the people of Sudan. The NPC is mainly meant to manage the equitable allocation of oil money between the GNU and GoSS, as well to the oil-producing states/regions. It is also supposed to develop strategies and programmes for the petroleum sector and to negotiate and approve all oil contracts relating to exploration for and production of oil, and ensure that these contracts are consistent with policies and guidelines. It is also responsible for developing its own internal regulations and procedures.

In performing its functions, the NPC must consider the extent to which an oil contract provides benefits to local communities affected by the terms of the contract and the extent to which the views of the state/regions and affected groups are incorporated into the proposed contract. If the NPC decides to approve a contract, people holding rights in land who are aggrieved by the decision may in theory seek relief through arbitration or in a law court.<sup>43</sup>

If the non-permanent members (representing the oil states/regions) of the NPC collectively disagree with the decision of the NPC to approve the contract related to their state/region, the national government minister of petroleum shall not sign the contract and shall refer the matter to the Council of States in the National Assembly where each is represented by two representatives from the 25 states of Sudan. If the council rejects the objection by a two-thirds majority, the national minister of petroleum shall sign the contract, and if not, the NPC must refer the matter for arbitration.<sup>44</sup>

A problem with this provision is that the referral of a contentious oil contract to the Council of States in the National Assembly faces a bias towards the Northern Sudanese states. Members of the oil-producing states/regions in the Council of States number eight out of the total of 50. Any decision, therefore, is unlikely to favour the eight members representing the oil-producing states/regions.

A weakness in the NPC lies in its composition. The three members representing the oil-producing states/regions should be permanent members and answerable to their states/regions. They should act in the same way as members of parliament in protecting the overall interests of their states/regions. Since the formation of the NPC in 2005, the three non-permanent members have not been appointed to date. The NPC was envisaged as a powerful body to sort out all the issues between the public and the oil operation companies, but so far has turned out to be a virtually non-existent institution. Since its formation, the ten members (excluding the members from oil-producing states) have met only once, and in that meeting they did not reach any agreements. (In an interview with the state minister of energy and mining of the GNU, who is also a permanent member of the NPC, she said that, 'we as members of the National Petroleum Commission had only one meeting which ended without resolutions, and from there, no other meeting was convened again'.)<sup>45</sup>

The non-permanent members of the NPC should be determined by the community or states/regions that they are representing and should not be subjected to political decisions. In addition, they should be appointed either through popular consultation or election by their states/regions through recommendation from the communities that they are representing in the NPC.

Within the NPC there is no budget allocated to handle compensation issues. Many rights have been and still are being violated by oil companies and no compensation has been granted so far. The point missed by the CPA negotiators was the need for the

creation of a special court with consensus from the SPLM and NCP to adjudicate on the oil environmental cases that had arisen prior to the signing of the CPA. The money to compensate the aggrieved parties prior to the CPA should come from the budget of the 15 states in the North and the companies who signed these contracts. As I will argue later, the logical arrangement is for the legislative assemblies of both the GNU and GoSS to pass laws with a monetary limitation on the amount of compensation that can be paid, depending on the gravity of cases, and, in order to govern the environmentally related cases up to 2011, the national courts and the Southern courts should implement these laws in order to provide remedies through the direct implementation of article 4.5 of the CPA.

Other contentious issues related to the environment are the contracts that were signed between the government of Sudan and the oil companies prior to the signing of the CPA. The CPA provided for the appointment of a small number of representatives from the SPLM<sup>46</sup> to have access to all existing oil contracts. These representatives were meant to have the right to engage technical experts, while all those given access to the contracts would have to sign confidentiality agreements.

To date, these representatives have not been appointed and the SPLM has not had access to the pre-CPA contracts relating to petroleum development signed between the Khartoum government and the companies. The CPA<sup>47</sup> states that the existing oil contracts would not be subject to renegotiation, but those contracts (pre-CPA) that are deemed to have fundamental social and environmental problems oblige the government of Sudan to implement necessary remedial measures.<sup>48</sup> Article 4.5 of the CPA also says:

Persons whose rights have been violated by the oil contracts are entitled to compensation. The establishment of these violations should be through due legal process and the parties to the oil contracts shall be liable to compensate the affected persons to the extent of the damage caused.

The CPA refers to the 'government of Sudan' as being liable for compensation for the violations arising from oil contracts concluded prior to the signing of the CPA. The relevant question is, who is the government of the Sudan in the post-CPA era: the GNU or GoSS? From which budget should the GNU pay compensation? And who will take responsibility for claims against the oil companies that are no longer invested in Sudanese oil, like Talisman and Lundin? These questions require answers from the CPA negotiators.

## INTERIM NATIONAL CONSTITUTION

Since the signing of the CPA, the governing law in the Republic of the Sudan is no longer centred in Khartoum. The GNU and GoSS are linked by the Constitutional Court, which is the custodian of the two interim constitutions, the Interim National Constitution (INC) and the Interim Constitution of Southern Sudan (ICSS). This arrangement will remain in place until the referendum in 2011. However, while the possibility of the separation of the South from the North is very high, as clearly stipulated in the CPA, a complicated situation will arise after the referendum in 2011 if separation does not take place, as the CPA does not mention anything on how to govern the oil sector should the referendum confirm the unity of the country.

Article 222 (2), part 16 of the INC states that the ‘people of Southern Sudan shall either confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this constitution, or vote for secession’.<sup>49</sup>

If the result of the referendum confirms unity, it will affect the current arrangement of the NPC. Should Sudan adopt a democratic, transformative system, the result of the election may bring people from any part of the country to power, doing away with positions reserved on the basis of regional representivity of the North and South. The positions of the two presidents and eight other permanent members from both sides will then be vulnerable. The stable members will be the only three non-permanent members representing the oil-producing states/region, because they represent their states. Article 226 (10), part 17 of the INC suggests a separation of the state through the 2011 referendum. It states: ‘If the outcome of the referendum on self-determination favours secession, the parts, chapters, articles, sub-articles and schedules of this constitution that provide for Southern Sudan institutions, representation, rights and obligations shall be deemed to have been duly repealed.’<sup>50</sup> This is the only part that will not create problems, because it will divide the country peacefully; however, it is silent on what happens to the NPC after the referendum in 2011.

In addition, the creation of two separate Ministries of Energy and Mining in the GNU and GoSS to implement energy policies in the North and South, respectively, is another highly problematic issue. These ministries have conflicting policies on energy. The INC does not embody environmental rights in the Bill of Rights, but recognises them in Chapter II<sup>51</sup> and part one of Chapter III.<sup>52</sup>

Chapter II, article 11 recognises citizens’ rights over environment and natural resources. Article 11 states:

- (1) The people of Sudan shall have the right to a clean and diverse environment; the state and the citizens have the duty to preserve and promote the country’s biodiversity.
- (2) The state shall not pursue any policy, or take or permit any action, which may adversely affect the existence of any species of animals or vegetative life, their natural or adopted habitat.
- (3) The state shall promote, through legislation, sustainable utilisation of natural resources and best practices with respect to their management.

The expectation when the CPA was signed was that many national policies that were pioneered with impunity by the Khartoum government of the time would change, that people would have a clean and diverse environment, and that the environment would be protected by both the citizens and the state. But none of the above commitments has been kept. Sudan’s environment is still vulnerable to unsustainable and irresponsible oil investment, because both the CPA and the INC lack an enforcement mechanism to prevent oil-related environmental degradation. Moreover, citizens have not been given the right to institute a private prosecution against oil companies, but rather have been given the theoretical right to a clean environment where the enforcement mechanism for that right is unclear.

## INTERIM CONSTITUTION OF SOUTHERN SUDAN

The CPA created the GNU and the GoSS with two legislative assemblies, one in the North and one in the South. The Southern Sudan Legislative Assembly enacted a constitution in December 2005 known as the Interim Constitution of Southern Sudan. This constitution serves as a supreme law in the ten states of Southern Sudan, as is clearly stated in its Preamble:<sup>53</sup>

We the people of Southern Sudan, do hereby adopt and promulgate this Interim Constitution of Southern Sudan, 2005, as the supreme law by which Southern Sudan shall be governed during the Interim period, and undertake to abide by it, respect and defend it.

It also states: 'We the people of Southern Sudan, conscious of the need to manage our natural resources sustainably and efficiently for the benefit of the present and future generations.'<sup>54</sup>

Article 2<sup>55</sup> of the ICSS further states: 'Southern Sudan is governed on the basis of decentralisation; its territory consists of ten states and is an all embracing homeland for its people.'

The ICSS entrenches the right to a clean and healthy environment in Chapters I and II. Chapter I, part 3, article 44 (1)<sup>56</sup> says that 'every person or community shall have the right to a clean and healthy environment'. Article 44 (2) says that:

every person shall have the right to have the environment protected for the benefits of present and future generations, through reasonable legislative action and other measures that,

- (a) prevent pollution and ecological degradation;
  - (b) promote conservation; and
  - (c) secure ecologically sustainable development and use of natural resources while promoting rational economic and social development so as to protect genetic stability and biodiversity of Southern Sudan.
- (3) all level of government in Southern Sudan shall promote energy policies that will ensure that the basic needs of the people are met while protecting and preserving the environment.

Chapter II, article 49 (h)<sup>57</sup> states that every citizen in Southern Sudan shall protect the environment and conserve the region's natural resources. This clause only states that the citizens have a right to protect the environment and does not facilitate citizen's legal action against companies that have damaged the environment.

Article 2 (h)<sup>58</sup> states that 'every Sudanese citizen shall preserve the natural environment' and places a duty on every citizen in Sudan to preserve the environment. But it does not empower citizens to bring a case concerning damage to the environment to a court of law for judicial settlement, yet they are in direct contact with the natural environment and are the first to feel any adverse impact of irresponsible development of subterranean resources.

However, the level of environmental awareness in Sudan is very low and many constitutional provisions relating to the protection of the environment are unknown by the public. This is associated with the level of education in a country that underwent a civil war for over four decades. There is a desperate need to promote environmental awareness through civil society organisations, regional and international non-governmental organisations, and the government. Government should not exploit the environmental ignorance of the citizens, but should actively engage in creating awareness to enable the ordinary citizen to be able to report situations that threaten their lives and the lives of animals, plants, and the natural environment.

### LACK OF ENVIRONMENTAL LAW

Currently there is no law governing environmental damage in Sudan. All the defunct environmental laws and regulations, including the Sudan Environmental Act of 2001, are deemed repealed in the post-CPA period. The CPA has not established a law to govern the environment, although it has, as we have seen, guaranteed the right to compensation to those who suffered environmental problems resulting from oil exploration and production in Southern Sudan. The parts of Sudan that are most adversely affected are the Southern Sudan and those parts of northern and eastern Sudan where oil pipelines are located. The CPA provides for compensation for all who have suffered environmental problems regardless of their geographical location.

The lack of a law governing environmental damages is a major barrier to implementing the compensatory provisions in the CPA. The two legislative assemblies of the GNU and GoSS should pass an interim law with a monetary limitation applying to each judicial level to govern cases dealing with environmental damage when awarding the remedies. These laws must be applied retrospectively in compliance with the CPA's mandate. The Ministry of Justice in the GNU and the Ministry of Legal Affairs and Constitutional Development in the GoSS should pioneer the drafting of these laws.

Before these laws are passed, the national judiciary and the judiciary of Southern Sudan should take up the mandate to adjudicate environmental cases dealing with offences committed prior to the signing of the CPA to bridge the legal vacuum in the implementation of the CPA's provisions.

### THE JUDICIAL SYSTEM IN SUDAN IN THE POST-CPA PERIOD

Article 2.11 of the CPA<sup>59</sup> establishes the national judiciary, while article 3.7<sup>60</sup> establishes the judiciary of Southern Sudan. Both judicial bodies in the GNU and GoSS are joined by the Constitutional Court at national level. Chapter II, part 5<sup>61</sup> of the INC established the national judicial authority with jurisdiction in the Northern states, independent from the legislature and executive of the GNU. Chapter V, part 7 of the ICSS established the judiciary of Southern Sudan, which is also independent from the legislature and executive of the GoSS.

The chief justice of the national judiciary is both head of the national judiciary and the president of the Supreme Court, and is answerable to the president of the GNU.

The chief justice of the judiciary of Southern Sudan is also the president of the Supreme Court of Southern Sudan and is answerable to the president of the GoSS. As stated earlier, Islam is the religion of the Northern states and the national judiciary applies Islamic law in its proceedings, while the Southern judiciary applies secular law. This arrangement accommodates the religious diversity in the country. According to article 157 of the INC the rights of non-Muslims living in the Northern states are safeguarded through a commission known as the Non-Muslims Rights Special Commission, established by the presidency.

Article 2.11.3 of the CPA established the Constitutional Court as the main custodian of the two constitutions. It is headed by the president of the Constitutional Court, who is appointed by the president of the GNU with the consent of the first vice president, who is also the president of the GoSS. The Constitutional Court upholds the INC, the ICSS and the states' constitutions, and its composition is meant to be representative of the GNU and GoSS. It has original jurisdiction to decide disputes that arise under the INC and the constitutions of the Northern states at the instance of individuals or judicial entities or of the government. The Constitutional Court has appellate jurisdiction in respect of appeals against the decisions of the Southern Sudan Supreme Court regarding the ICSS and the constitutions of the Southern Sudan states.

From the above, it follows that the Constitutional Court has only appellate jurisdiction in respect of cases in which the Supreme Court of Southern Sudan has jurisdiction. Thus, while the Constitutional Court has either original or appellate jurisdiction to adjudicate violations of the environmental rights guaranteed in the INC or ICSS, one must remember that neither of these texts guarantees the right to compensation for environmental damage that is expressed in the CPA. The right to compensation according to the CPA must be applied retrospectively to address all the environmental damage that resulted from oil exploration and production before it was signed.

## STRUCTURES AND JURISDICTION OF THE NATIONAL JUDICIARY

Chapter II, article 124<sup>62</sup> of the INC established the structures of the national judiciary as follows:

- the National Supreme Court;
- the National Court of Appeal; and
- other national courts.

Article 2.11.4.1 of the CPA establishes the jurisdiction of the National Supreme Court as follows:

The National Supreme Court shall:

- (i) be a court of review and cassation in respect of any criminal or civil matters arising out of or under national laws;
- (ii) have criminal jurisdiction over the justices of the Constitutional Court;

- (iii) review death sentences imposed by any court in respect to matters arising out of or under national laws; and
- (iv) have such other jurisdiction as determined by the Interim National Constitution, the peace agreement [CPA] and the law.

The final clause (iv) does not appear in the ICSS and can be interpreted as an attempt to accommodate the compensatory provisions in the CPA if the link between the two judiciaries is not through the Constitutional Court. But the CPA also created two supreme courts in the two judicial systems without mandating the National Supreme Court to give environmental compensation. In other words, the CPA has granted two separate powers to both the GNU and GoSS with a specific link in the administration of Sudan. The fact that the judiciary in the Northern states (national judiciary) applies Sharia laws also negates the National Supreme Court's ability to adjudicate cases originating in Southern Sudan, which applies a secular system.

A logical question to ask is why the CPA does not clearly identify the process through which environmental compensation is to be awarded, given that it has acknowledged the need for compensation. This requires an answer from the CPA negotiators and implementers (the government of Sudan and the SPLM/A) to provide a practical solution in clearing up the obscurity of this matter of judicial jurisdiction.

Both articles 126 and 127 of the INC established the jurisdiction of the National Court of Appeal and any other national courts. Article 126 says that the number, competence and procedures of the National Court of Appeal shall be determined by law. Article 127 says that any other national court shall be established by law as deemed necessary.

The jurisdiction of the above courts is confined to the Northern states. Southern states have a separate judicial system with exclusive jurisdiction in the ten states of Southern Sudan, as clearly stated in the CPA and discussed above.

## STRUCTURES OF THE JUDICIARY OF SOUTHERN SUDAN

Chapter V, part 7, article 127<sup>63</sup> of the ICSS establishes the structure of the judiciary of Southern Sudan as follows:

- the Supreme Court of Southern Sudan;
- courts of appeal;
- high courts;
- county courts; and
- other courts or tribunals as deemed necessary to be established in accordance with the provisions of the ICSS and the law.

## JURISDICTION OF THE SUPREME COURT OF SOUTHERN SUDAN

Article 130<sup>64</sup> of the ICSS establishes the jurisdiction of the Supreme Court of Southern Sudan. It states that the Supreme Court shall be the court of final judicial instance in

respect of any litigation or prosecution under Southern Sudan law or Southern Sudan state law, including statutory and customary law. Moreover, it has original jurisdiction to decide disputes that arise under the constitutions of the Southern Sudan states at the instance of individuals, judicial entities or the government. It also adjudicates on the constitutionality of laws and sets aside or strikes down laws or provisions of the laws of Southern Sudan or states in Southern Sudan that are inconsistent with the ICSS or the constitutions of the Southern Sudan states, to the extent of the inconsistency. It also has original and final jurisdiction to resolve disputes between the states of Southern Sudan and between the GoSS and states in Southern Sudan; and has any other competences as may be determined by law. The CPA is a part of the current Sudan legal framework, together with the two interim constitutions (the INC and ICSS), but its provisions related to environmental compensation claims need to be further interpreted to be fully implemented. The CPA could be the basis of both supreme courts' jurisdictions to carry out the compensation claims in the absence of judicial powers within the NPC.

The jurisdiction of the appeal courts, high courts, county courts and other courts of Southern Sudan are dealt with in articles 131, 132 and 133 of the ICSS. Article 131 states that the establishment, competences and procedures of courts of appeal shall be determined by law. Article 132 (1) states that the high court shall be the highest court at the level of the state in Southern Sudan and its establishment, competence, jurisdiction and procedures shall be determined by law. Article 132 (2) states that the most senior judge of the high courts, who shall be each court's president, shall be answerable to the governor of the state for the performance and administration of the state judiciary. Article 132 (3) states that the establishment, competence and procedures of county courts and other courts at lower levels in the state of Southern Sudan shall be determined by law.

The jurisdictional nature of both judiciaries sheds light on the problem of which judicial system has the power to adjudicate on environmental cases covering violations committed in Southern Sudan by the oil companies. The CPA, from which the two constitutions are extracted, has not clearly indicated the judicial organ that shall have the jurisdiction to adjudicate on compensation payable to those communities whose rights have been violated by the oil companies within the context of the two judicial bodies. However, the mere fact that two judicial systems have been established implies that the Southern Sudanese judiciary has jurisdiction over environmental cases covering violations committed by the oil companies in the Southern states and the national judiciary has the jurisdiction in respect of environmental cases covering violations committed by the oil companies in the Northern states.

In an interview, the minister of energy and mining of the GNU, who is also a permanent SPLM member of the NPC,<sup>65</sup> said:

The establishment of the NPC was formed on political grounds to take decisions at the political level. The commission has neither the judicial powers to adjudicate the environmental problems resulting from negligence from the oil companies, nor powers to carry out compensation as agreed in the CPA. It is the task of any court that has jurisdictional power in that geographical area.

Clearly, the presence of the two presidents as co-chairs of the NPC has confused the political and judicial mandates of the NPC. In reality, there is a lack of clarity on the



judicial jurisdiction arising from the CPA arrangement. Given that the NPC is a political body formed to manage and direct the fair distribution of Sudan's resources (mainly oil) to avoid mistrust between the North and South, the CPA has not expressly mandated any judicial body to deal with these matters. This paper argues that any citizen or community that has experienced environmental damage arising from the operations of the oil companies should be able to approach any judicial system located in his/her area to seek remedy, until further laws to govern environmental damage are passed.

## CONCLUSION AND RECOMMENDATIONS

While the CPA establishes a two-government system in the South and the North, it does not clearly indicate a judicial mechanism for compensating victims of oil exploration and production activities in Sudan. This lack of a clear legal mechanism for compensating the victims of oil-related activities requires the enactment of laws by the GNU and the GoSS parliaments that will govern the environmental concerns arising from the exploration for and exploitation of oil in Southern Sudan. These laws should provide for, at least, the following:

- a means of compensating victims of oil-related environmental degradation caused by the activities of oil companies;
- a fund for compensating victims of oil-related environmental damage;
- a provision for non-discrimination on the basis of race, sex, gender, ethnicity, political affiliation, language or geographical area of origin when compensating the victims;
- a mechanism for carrying out environmental impact assessments for both existing and new oil contracts;
- a mechanism that enables citizens to bring cases against the oil companies in court; and
- a provision that compels oil companies to rehabilitate exhausted wells and designate waste disposal sites.

However, in the intervening time, the national judiciary and the judiciary of Southern Sudan must take up and execute a mandate to adjudicate environmental cases committed prior to the CPA in order to fill the legal vacuum in the CPA's provisions.

The state minister for energy and mining of the GNU, who is also a permanent member of NPC, put it clearly when she stated that while the institutions established by the CPA exclude the obligation either to protect the environment or provide compensation, it is the duty of the communities concerned to demand their rights through the judicial system under whose jurisdiction they fall.<sup>66</sup>

Regarding the environment and handling of wastes, this is an area that does not need the NPC to be operationalised; it needs the concerned government of the state. They have the constitutional power or obligation to act. It is their right to take action in this area. Communities should really begin to engage their own governments whether it is the state, local governments, the GoSS or the GNU. Any government has its own judicial body and that is the meaning of the devolution of powers — use your constitutional powers.

Based on this interpretation of the law and other suggestions made above, it can be argued that the Southern Sudan judiciary has exclusive judicial jurisdiction in all cases arising in the territory of the ten states of Southern Sudan, including environmental cases arising from the activities of oil companies operating within three states, in accordance with its judicial hierarchy and depending on the gravity of the case.

## ENDNOTES

- 1 Ziada ISH, 'Facts and impact of oil on Sudanese domestic and international relations: A research paper presented at the Universidad Autonoma de Madrid', *Sudan Tribune*, 27 January 2007, p. 3.
- 2 The semi-independent states of South and North Sudan were only officially created by the CPA in 2005; however, for the sake of clarity, the areas that now make up these states will be referred to as such even when the period prior to the CPA is being discussed.
- 3 ECOS (European Coalition on Oil in Sudan), *Oil Development in Northern Upper Nile*. ECOS, 2006, p. 21, <http://www.ecosonline.org/reports/2006>.
- 4 HRW (Human Rights Watch), *Sudan, Oil, and Human Rights*. New York: HRW, 2003a, p. 377, <http://www.hrw.org/en/reports/2003/11/24/sudan-oil-and-human-rights>.
- 5 ECOS, *op. cit.*, p. 15.
- 6 Government of Sudan (GoS) and Sudan People's Liberation Movement/Army (SPLM/A), Comprehensive Peace Agreement (CPA), January 2005, signed between Khartoum Government and the SPLM/A, p. 52.
- 7 The CPA has provided for a Government of National Unity (GNU) with jurisdiction over the 15 states in Northern Sudan and the Government of Southern Sudan with jurisdiction over the ten states in Southern Sudan.
- 8 Western Upper Nile is one of the ten states of Southern Sudan. It is the state where most of the oil blocks are located in the South and where the first discovery of oil in Sudan took place.
- 9 Interview with the commissioner of Leer County, Western Upper Nile State, Bentiu, Southern Sudan, 22 June 2008.
- 10 GoS and SPLM/A, *op. cit.*, p. 2.
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- 17 Interview with the state minister of energy and mining, GNU, and permanent member of the National Petroleum Commission (NPC), 17 June 2008.
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