

ARTICLE

UN Peace Operations and the Role of the Local in (Re)Building the Rule of Law

Alexander Gilder*

UN peace operations undertake a broad array of rule of law activities aiming to rebuild the justice system and end impunity. Rule of law activities in UN peace operations have matured over the last 20 years since the UN experiments with statebuilding in Kosovo and East Timor. Today, rule of law activities can often clearly be seen to advance the broader goal of establishing the host state as the legitimate authority. This paper first discusses the UN's understanding of the rule of law and why the UN has chosen to underpin its peacebuilding agenda with ending impunity. Second, transitional justice in MINUSCA is discussed including the establishment of the Special Criminal Court. Third, UNMISS is investigated where the UN had an unprecedented challenge of ensuring the rule of law on protection of civilian sites. Lastly, the promise of local justice is assessed. It is suggested that while ending impunity and strengthening formal institutions can be important to ensure human rights violations do not persist, there needs to be an overarching, bottom-up strategy in place to engage and empower local communities, and other civil actors, to be part of the rule of law process.

Keywords: rule of law; UN peacekeeping; hybrid courts; local justice; MINUSCA; UNMISS

1 Introduction

Contemporary UN peace operations have an undeniable focus on (re)building the rule of law. Peace operations achieve this by supporting the host state in rebuilding the justice system through activities such as training judges, refurbishing courts and prisons, and in the case of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) assisting with the creation and operation of a hybrid court under unique powers found in the mandate. For 'stabilization' missions in particular, re-establishing the rule of law forms part of the stabilization process where the UN builds peace in the power vacuum left behind after displacing armed groups where often the state infrastructure is left in tatters.¹ Rule of law activities in UN peace operations have matured over the last 20 years since the UN experiments with statebuilding in Kosovo and East Timor. Rule of law activities today can often clearly be seen to advance the broader goal of establishing the host state as the legitimate authority.

Drawing on examples from two missions, MINUSCA and the United Nations Mission in South Sudan (UNMISS), the mandates for both make specific mention of supporting the rule of law and have carried out numerous activities to end impunity and re-establish the rule of law. However, these missions work alongside the host state to varying degrees. MINUSCA is branded as a stabilization mission with a closer relationship to the host state and express strategies (and mandates) to 'extend state authority.'² State authority is advanced by providing assistance with the Special Criminal Court (SCC) and by utilising urgent temporary measures 'to maintain basic law and order and fight impunity' not found in other mandates.³ Conversely,

* Alexander Gilder is Lecturer in Law at Royal Holloway, University of London, UK; email: Alexander.Gilder@rhul.ac.uk.

¹ See Alexander Gilder, 'The Effect of 'Stabilization' in the Mandates and Practice of UN Peace Operations' (2019) 66 *Netherlands International Law Review* 47–73, 51–2; Denis M Tull, 'The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo' (2018) 25 *International Peacekeeping* 167–190, 186.

² UN Security Council, Resolution 2149 (10 April 2014) S/RES/2149 para 30(f)(ii),

³ *ibid*, para 40.

the challenges are markedly different in South Sudan where the host state has bemoaned their 'relegation to the status of a protectorate of the United Nations' and have resisted the establishment of a Hybrid Court by the African Union.⁴

For much of its deployment UNMISS has not directly assisted with the re-establishment of the rule of law due to human rights violations, committed by South Sudanese forces, since the outbreak of civil war. Nevertheless, what has been unique about UNMISS were the special measures taken to ensure the rule of law on its protection of civilian (PoC) sites which, until late 2020, housed approximately 170,000 civilians.⁵ Since September 2020, the UN has been working towards the redesignation of its PoC sites to internally displaced persons camps under the jurisdiction of the South Sudanese government. The Secretary-General reported in December 2020 that the Bor, Wau and Juba sites had been redesignated and the Malakal and Bentiu sites are scheduled to be redesignated in 2021.⁶ During the UN's period of control of the sites, rule of law initiatives were undertaken that involve both traditional leaders at the local level and United Nations Police (UNPOL) cooperation with the South Sudanese government. A commonality is that different civil actors in both conflicts are involved in rebuilding the rule of law at local, regional, and national levels.

This study is both descriptive and normative. The article first briefly explains the role of the rule of law in peacekeeping and outlines the UN's understanding of the rule of law as part of the organisation's peacekeeping activities. Second, the article brings together examples of rule of law practice in MINUSCA and UNMISS to show the differing approaches adopted by the UN in the pursuit of the rule of law. Lastly, drawing on the descriptive examples, normative suggestions are made in light of the evident shift towards an enhanced rule of law focus. The local turn in peace and conflict literature values the engagement and empowerment of the local.⁷ Engagement 'means providing space for local people to communicate' their views on the peacebuilding process.⁸ Whereas empowerment means giving the local agency to have a voice that can be heard, and to become active participants in the (re)construction of rule of law structures.⁹ Assessing the rule of law in light of where the local have and have not been engaged and empowered, it is suggested that while ending impunity and strengthening the state can be important to ensure human rights violations do not persist, there needs to be an overarching, bottom-up strategy in place to allow local communities, and other civil actors, to be an active part of the rule of law process.

2 The rule of law and its role in UN peace operations

The rule of law is said to be 'at the very heart of the [UN's] mission.'¹⁰ According to Hans Kelsen, law is an order that promotes peace and ensures groups can peacefully co-exist.¹¹ In a similar fashion the UN's work on international peace and security is underpinned by the notion that peace is pursued through law.¹² The definition given by the UN is that the rule of law is,

[a] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹³

⁴ UN Security Council, 7754th Meeting (12 August 2016) S/PV.7754 p.6 as per Mr. Toro-Carnevali.

⁵ UN Security Council, Situation in South Sudan' (8 September 2020) S/2020/890 para 45.

⁶ UN Security Council, 'Situation in South Sudan' (9 December 2020) S/2020/1180 para 44; International Peace Institute and Stimson Center, 'Prioritization and Sequencing of Security Council Mandates: The Case of UNMISS' (February 2021) <https://www.stimson.org/wp-content/uploads/2021/03/The-Case-of-UNMISS_2021.pdf> accessed 10 June 2021, 3.

⁷ For an explanation of the local turn and an assessment of engagement, empowerment, and vulnerability see Alexander Gilder, 'The local turn and the framing of UNOCI's mandated activities by the UN' (2020) 23 *Journal of International Peacekeeping* 226.

⁸ *ibid*, 236.

⁹ *ibid*, 239.

¹⁰ UN Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) S/2004/616 para 6.

¹¹ Hans Kelsen, *Law and Peace in International Relations* (Harvard University Press 1942), 1.

¹² Augusto Lopez-Claros, Arthur L. Dahl and Maja Groff, *Global Governance and the Emergence of Global Institutions for the 21st Century* (Cambridge University Press 2020), 210.

¹³ S/2004/616 (n 10) para 6.

The UN understands its role in the rule of law to be strengthening legal and justice systems at the national level, which in turn contributes to the adherence to the international rule of law.¹⁴ Joris Voorhoeve has also provided a list of what comprises a complete rule of law system and activities including, an independent judiciary, independent human rights institutions, free elections, government power determined by law, a security sector governed by law, and more.¹⁵ Many efforts to support these areas of activity can be found in a multitude of peace operations since the 2000s.

During the 2000s the UN began to undertake much more rule of law work after its early efforts beginning in 1999 in Kosovo. When the UN established the United Nations Interim Administration Mission in Kosovo (UNMIK) a small team was tasked with appointing judges, starting judicial proceedings, and laying the foundations for future institutions with 'chaotic' results.¹⁶ Taking into account the early experiences of UNMIK, the Brahimi Report in 2000 recommended that rule of law teams be deployed as part of the UN Standby Arrangement System and a Criminal Law and Judicial Advisory Unit was established in October 2000.¹⁷ A template emerged where the UN's civilian personnel focused on three areas: reforming laws, enhancing adjudication, and human rights protection and police reform.¹⁸

Some have argued that 'there is widespread agreement on the essential elements of the rule of law' and thus the UN can implement the rule of law in a variety of legal systems where they are operating.¹⁹ Such a view has been criticised because Western ideals are then being imposed on the global South under a liberal peacebuilding agenda. For example, the UN itself noted in 2001 'that it would not be desirable for the Secretariat to elaborate a model criminal code, given the diversity of country-specific legal traditions.'²⁰ Following the missions in Kosovo and East Timor the UN took a much lighter touch with suggestions that 'foreign experts, foreign models and foreign-conceived solutions' could be detrimental.²¹ That being said, with most UN staff trained in Western legal systems the missions simply did not have the in-depth knowledge of traditional methods of justice needed to engage with local actors on the rule of law.²²

Today the rule of law is an integral feature of current peace operations following the belief that 'more needs to be done to ensure that United Nations leadership at the country level places the rule of law at the centre, rather than the periphery, of our initiatives in the field.'²³ The High Level Panel on Peace Operations (HIPPO) Report in 2015 makes links between a mission's aim to improve the protective environment for civilians and assisting with strengthening the rule of law.²⁴ The rule of law is listed by the HIPPO Panel alongside core activities such as advocating human rights, political engagement, and protective actions.²⁵ One of the Panel's recommendations specifically relates to the linking of human rights and the rule of law,

United Nations peace operations should work to ensure that the rule of law operates in a manner that protects human rights. That includes addressing impunity through supporting appropriate mechanisms of transitional justice in situations where past violations have not been resolved and will be an obstacle to lasting peace.²⁶

¹⁴ Kenneth J Keith, 'The International Rule of Law' (2015) 28 *Leiden Journal of International Law* 403–417, 403; This article does not debate the differences between the international and national rule of law, but see e.g. Bardo Fassbender, 'What's in a Name? The International Rule of Law and the United Nations Charter' (2018) 17 *Chinese Journal of International Law* 761; Paul Burgess, 'Deriving the international Rule of Law: an unnecessary, impractical and unhelpful exercise' (2019) 10 *Transnational Legal Theory* 65.

¹⁵ Joris Voorhoeve, *From War to the Rule of Law: Peacebuilding after Violent Conflicts* (Amsterdam University Press 2007), 91.

¹⁶ Thorsten Benner, Stephan Mergenthaler, Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?* (Oxford University Press 2011), 115–6.

¹⁷ Nina Lahoud, 'Rule of Law Strategies for Peace Operations' in Jessica Howard, Bruce Oswald CSC, *The Rule of Law on Peace Operations* (Kluwer 2002), 131–2.

¹⁸ Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 *Journal of Conflict and Security Law* 65, 78.

¹⁹ David Tolbert and Andrew Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 *Harvard Human Rights Journal* 29, 32.

²⁰ UN General Assembly, 'Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects Programme Budget Implications of Draft Resolution A/C.4/55/L.23' (8 August 2001) A/C.5/55/46/Add.1, para 22.15.

²¹ Benner et al. (n 16) p.119; S/2004/616 (n 10) para 15.

²² *ibid*, 139.

²³ UN General Assembly, 'Strengthening and Coordinating United Nations Rule of Law Activities' (6 August 2008) A/63/226, para 16.

²⁴ UN Security Council and UN General Assembly, 'Identical letters dated 17 June 2015 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council' (17 June 2015) A/70/95–S/2015/446, para 88.

²⁵ *ibid*, para 83.

²⁶ *ibid*, para 158.

The HIPPO Panel's mention of impunity has fed its way into the practice of many operations today and the below example of MINUSCA will show the importance of ending impunity in the mandate. From an early stage the UN decided a functioning criminal justice system is '[a]n essential element for the restoration of security and public order.'²⁷ Security and rights-based issues can be caused by the executive curtailing the judiciary and high levels of corruption, and especially local level conflicts can be caused by corruption and disputes over water and land rights.²⁸ This has led to the rule of law and ending impunity being linked to the overarching security and human rights related purposes of the UN peace operation.

Despite being previously described as 'vague and uninformative' the implementation of the rule of law has been solidified as an area that is 'critical to success' of a peace operation.²⁹ A common cause of conflict is the absence of the rule of law and the sustainable resolution of that conflict requires functioning rule of law institutions that support human rights standards, the implementation of peace agreements, and peaceful dispute resolution.³⁰ By reinstating the rule of law the peace operation is able to ensure the population have confidence in the government and wider state structures for addressing grievances.³¹ Larry May notes the importance of rebuilding people's respect for the rule of law because 'the bulk of the people must support the idea of the guiding ideas of the rule of law.'³² For long-term peacebuilding the rule of law is then crucial as a remedy for resolving conflict without physical violence.³³ Insecurity can be caused by crime, insecurities involving work, social vulnerability, health and illness, and more. Rule of law institutions can also help address past wrongs and atrocities by providing a functioning judicial system with an independent judiciary.³⁴ The overriding purpose is for rule of law assistance to ensure adherence to human rights and both a secure and just environment for the state to rebuild.

3 MINUSCA and the Special Criminal Court

3.1 The mission's rule of law activities and the 'urgent temporary measures'

MINUSCA has undertaken an extensive rule of law mandate over the course of its deployment ranging from the rebuilding of institutions, the provision of training, and perhaps most importantly assisting with the creation of the SCC. The mission's first mandate in April 2014 stressed the need to end impunity for violations of international law either within the national legal system or before the International Criminal Court (ICC).³⁵ To assist the transitional authorities in that endeavour, MINUSCA was to monitor and report on violations of humanitarian law and human rights and to work on preventing future violations by utilising human rights observers.³⁶ Furthermore, ending impunity would be particularly difficult where the armed groups who deposed President Bozizé, the ex-Séléka, were in control of government functions. From the mission's inception there was an understanding that the rule of law needed to be re-established for an effective state with MINUSCA mandated to build the capacity of the judicial system and reinstate the criminal justice system 'within the framework of the United Nations global focal point on rule of law.'³⁷

The mission sought to provide a secure environment for the criminal justice system to establish itself and work towards ending impunity.³⁸ This formed part of an overarching strategy for MINUSCA where it was believed a) international forces would be more effective if the penal system was re-established and b) there must be development and respect of human rights and the rule of law if the Central African Republic (CAR) is to have peace.³⁹ MINUSCA has also assisted with the refurbishment of courts and in less than one year

²⁷ Lahoud (n 17) 128.

²⁸ Sannerholm (n 18) 66.

²⁹ Bryn Hughes and Charles Hunt, 'The Rule of Law in Peace and Capacity Building Operations: Moving beyond a Conventional State-Centred Imagination' (2009) 13 *Journal of International Peacekeeping* 267, 268–269.

³⁰ Scott N Carlson, 'Legal and judicial rule of law work in multi-dimensional peacekeeping operations: Lessons-learned study' (2008) 12 *Journal of International Peacekeeping* 111, 111–113.

³¹ Sannerholm (n 18) 68.

³² Larry May, *After War Ends* (Cambridge University Press 2012) 118.

³³ Sannerholm (n 18) 68.

³⁴ Tolbert and Solomon (n 19) p.33; UN General Assembly, 'High Level Panel on Threats, Challenges and Change' (2 December 2004) A/59/565 para 229.

³⁵ UN Security Council, Resolution 2149 (10 April 2014) S/RES/2149, para 12.

³⁶ *ibid*, para 30(e)(i).

³⁷ *ibid*, para 30(f)(ii), 30(f)(iii).

³⁸ UN Security Council, 'Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolution 2127 (2013)' (3 March 2014) S/2014/142, para 81; UN Security Council, Resolution 2387 (15 November 2017) S/RES/2387 para 43(e)(vi).

³⁹ Alexander Gilder, 'Human Security and the Stabilization Mandate of MINUSCA' (2021) 28 *International Peacekeeping* 200, 209; UN Security Council, 7206th Meeting (24 June 2014) S/PV.7206, 3 as per Mr. Gaye; S/2014/142 (n 38) para 10.

from the mission's deployment courts in Bangui resumed their functions and magistrates were deployed to 12 out of 28 courts in other areas of the CAR.⁴⁰ By 2017, civil cases were being adjudicated by mobile courts supported by MINUSCA and the UN Development Programme (UNDP) and criminal cases were being heard in Bangui.⁴¹ Prisons were reopened and MINUSCA was granted a number of corrections officers as part of its troop ceiling to assist with the training of CAR prison officers and improving the standards of the prisons.⁴²

However, the justice system in the CAR is plagued by distrust where people believe trials are won by the person who can pay a magistrate more.⁴³ The UN too has described the CAR justice system as 'dysfunctional' with a severe lack of resources.⁴⁴ Religious issues also dominate the country with the predominantly Muslim ex-Séléka and Christian anti-Balaka in conflict. Lenneke Sprik notes the religious conflict creates a perception that justice is less accessible to the Muslim population.⁴⁵

To counter the evident dysfunction and to support the ending of impunity, the UN Security Council decided from the mission's deployment,

...that MINUSCA may, within the limits of its capacities and areas of deployment, at the formal request of the Transitional Authorities and in areas where national security forces are not present or operational, adopt *urgent temporary measures* on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations, which are limited in scope, time bound and consistent with the objectives set forth in paragraphs 30 (a) and 30 (f) above, *to maintain basic law and order and fight impunity* and requests the Secretary-General to report to the Security Council any measures that may be adopted on this basis.⁴⁶

The urgent temporary measures go further than the normal law enforcement capabilities of peace operations, but it is not entirely clear what crimes MINUSCA may arrest persons for. Sprik has highlighted a discrepancy with the urgent temporary measures where the UN website states the mission provides support for detaining and prosecuting 'individuals for war crimes, *rebellion and other offences*' while the Security Council refers in particular to violations of international humanitarian law and international human rights law.⁴⁷ However, in 2019 it was reported that the temporary measures were used to apprehend 54 persons on suspicion of crimes such as murder, kidnap, armed robbery and torture, which shows MINUSCA has been arresting persons for crimes under national law that do not necessarily fall under international criminal law.⁴⁸

3.2 Transitional justice in the CAR and the Special Criminal Court

The second area in which MINUSCA seeks to contribute to the rule of law is through transitional justice mechanisms such as, the hybrid Special Criminal Court.⁴⁹ Transitional justice combines judicial and non-judicial institutions and approaches 'to achieve justice by providing a just social response to past abuses of human rights and through social transformation.'⁵⁰ National courts may have limited legitimacy or may be limited in their functioning due to damage to infrastructure.⁵¹ As has been described above, MINUSCA specifically targeted its rule of law activities at rebuilding the infrastructure of the justice system to ensure courts and correctional services could be functional.⁵² Alongside these initiatives MINUSCA has assisted

⁴⁰ UN Security Council, 'Report of the Secretary-General on the situation in the Central African Republic' (1 April 2015) S/2015/227 para 47.

⁴¹ UN Security Council, 'Report of the Secretary-General on the situation in the Central African Republic' (1 February 2017) S/2017/94 para 48.

⁴² UN Security Council, Resolution 2212 (26 March 2015) S/RES/2212.

⁴³ Louisa Lombard and Enrica Picco, 'Distributive Justice at War: Displacement and Its Afterlives in the Central African Republic' (2019) *Journal of Refugee Studies* 1, 17.

⁴⁴ UN Security Council, 'Letter dated 19 December 2014 from the Secretary-General addressed to the President of the Security Council' (22 December 2014) S/2014/928 para 56.

⁴⁵ Lenneke Sprik, 'UN Peacekeeping and Local Rule of Law Initiatives in the Central African Republic' (2019) 13 *European Society of International Law Conference Paper Series* 1, 4.

⁴⁶ S/RES/2149 (n 2) para 40 (emphasis added).

⁴⁷ Sprik (n 45) 18; <<https://peacekeeping.un.org/en/justice>> accessed 11 August 2020, and UN Security Council, Resolution 2217 (28 April 2015) S/RES/2217 para 33(a)(iii).

⁴⁸ UN Security Council, 'Central African Republic' (15 February 2019) S/2019/147 para 46.

⁴⁹ First included in MINUSCA's mandate as a new priority task in 2015. S/RES/2217 (n 47) para 32(g).

⁵⁰ Robert Muharremi, 'Hybrid Courts and Transitional Justice' in *The Palgrave Encyclopedia of Peace and Conflict Studies* (Palgrave 2019), 1–2.

⁵¹ *ibid.*, 2, 4.

⁵² I have covered the rule of law and rights-based activities of MINUSCA from a human security angle in Gilder (n 39).

with the creation of a hybrid court. Hybrid courts are hybrid in nature because of a mixing of national and international elements.⁵³ Hybrid courts can take many forms with different legal foundations, sources of funding, rules of procedure, UN and other international involvement that ultimately create a unique body with unique relationships to other national and international courts.⁵⁴ The purpose of hybrid courts has been said to be the implementation of international criminal law, to allow norm penetration, address issues surrounding the legitimacy of national courts, and contribute to the capacity building and improvement of domestic systems.⁵⁵ However, concerns have been raised that hybrid courts can fail due to a lack of political commitment and insufficient resources.⁵⁶ Since 2012, hybrid courts have become more popular and in 2019 the Dakar Guidelines on the Establishment of Hybrid Courts aimed to outline key aspects for consideration when setting up a hybrid mechanism.⁵⁷

The CAR has three institutions which can hold persons accountable for violations of international criminal law: (1) the national courts, (2) the International Criminal Court and (3) the hybrid Special Criminal Court.⁵⁸ However, the Court of Appeal in Bangui has only charged international crimes twice with the first conviction coming in February 2020.⁵⁹ Similarly, the ICC has had limited success in the CAR in the past. Its first investigation, CAR I, led to a major case against Jean-Pierre Bemba in relation to crimes committed in the early 2000s but Bemba was acquitted in 2018.⁶⁰ The ICC has a current investigation, CAR II, focusing on crimes committed during the most recent civil war underway since 2012.⁶¹ As a result of CAR II, the ICC are currently pursuing joined cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and more recently Mahamat Said Abdel Kani was surrendered to the ICC in January 2021.⁶²

It is under this light that we turn to discuss the long road to the establishment and opening of the SCC. In 2014, MINUSCA first deployed a team of investigation and prosecution experts to assist with investigations of serious violations of international law.⁶³ It was thought that at a later date, international prosecutors, judges and national magistrates would try the alleged perpetrators of violations.⁶⁴ During the same year, the UN and Central African transitional authorities signed a Memorandum of Understanding on the establishment of a 'Special Criminal Court.'⁶⁵ The agreed SCC was to be crafted by both the transitional authorities and international actors to ultimately try 'serious crimes, including serious violations of human rights and international humanitarian law, including conflict-related sexual violence as well as grave violations of the rights of the child, that constitute a threat to peace, stability or security.'⁶⁶

⁵³ See e.g., Sarah Nouwen, 'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Courts' (2006) 2 *Utrecht Law Review* 190.

⁵⁴ *ibid.*, 213; Kirsten Ainley and Mark Kersten, 'Resilience and the impacts of hybrid courts' (2020) 33 *Leiden Journal of International Law* 969, 969.

⁵⁵ Laura A Dickson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295, 296; Muharremi (n 50) 4.

⁵⁶ Valérie Arnould, 'The uncertain promise of hybrid justice in the Central African Republic' (Egmont Institute, Africa Policy Brief No.14, September 2015) 2.

⁵⁷ Mark Kersten, 'As the Pendulum Swings – The Revival of the Hybrid Tribunal' in Mikkel Jarle Christensen and Ron Levi (eds), *International Practices of Criminal Justice* (Routledge 2017) 251–273; Kirsten Ainley, Mark Kersten, 'Dakar Guidelines on the Establishment of Hybrid Courts' (LSE Institute of Global Affairs and Wayamo Foundation, July 2019) <<https://hybridjustice.files.wordpress.com/2019/07/dakar-guidelines-final.pdf>> accessed 10 June 2021.

⁵⁸ Patryk I Labuda, 'Institutional Design and Non-Complementarity: Regulating Relations between Hybrid Tribunals and other Judicial and Non-Judicial Institutions' forthcoming in Kirsten Ainley and Mark Kersten (eds), *Hybrid Justice: Innovation and Impact in the Prosecution of Atrocity Crimes* (Oxford University Press 2020) 13; There is also a new Truth, Justice, Reconciliation and Reparations Commission (TJRRC) which Labuda reports may be given investigatory powers. See e.g. <<https://www.justiceinfo.net/en/truth-commissions/42348-central-africans-discretely-consulted-on-truth-commission.html>> accessed 10 June 2021.

⁵⁹ *ibid.*, 14.

⁶⁰ See, *The Prosecutor v. Jean-Pierre Bemba Gombo* (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute') (9 June 2018) ICC-01/05-01/08 A.

⁶¹ For details see <<https://www.icc-cpi.int/carII>> accessed 10 June 2021.

⁶² International Criminal Court, 'ICC Pre-Trial Chamber II joins Yekatom and Ngaïssona cases' (Press Release, 20 February 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=PR1439>> accessed 10 June 2021; International Criminal Court, 'Situation in Central African Republic II: Mahamat Said Abdel Kani surrendered to the ICC for crimes against humanity and war crimes' (Press Release, 24 January 2021) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1559>> accessed 10 June 2021.

⁶³ UN Security Council, 'Report of the Secretary-General on the situation in the Central African Republic' (1 August 2014) S/2014/562 para 53.

⁶⁴ *ibid.*, para 54.

⁶⁵ UN Security Council, 'Statement by the President of the Security Council' (18 December 2014) S/PRST/2014/28 p.4; S/2014/928 (n 44) para 63.

⁶⁶ UN Security Council, 7246th Meeting (19 August 2014) S/PV.7246, 3 as per Mr. Gaye; S/2014/928 (n 44) para 63; It is not made explicitly clear whether by 'serious crimes violations of human rights' the UN and CAR intend to pursue crimes under national law or crimes against humanity under international criminal law.

In April 2015, the Central African Transitional Parliament adopted the Organic law creating the SCC which was later promulgated by the President, Catherine Samba-Panza, on 3 June 2015.⁶⁷ Patryk Labuda has undertaken an extensive study on the Organic law specifically focusing on its relationship with the ICC through the principle of complementarity.⁶⁸ A few important features are worth noting. First, the SCC has been created as a court under the Central African judicial system.⁶⁹ Second, the SCC may apply international norms and procedures where Central African legislation does not deal with the issue.⁷⁰ Labuda notes that the primacy of national legislation in the Organic law sets the SCC apart from other hybrid tribunals.⁷¹ Third, the SCC is composed of four bodies, the Court (which includes four chambers), the Registry, the Office of the Prosecutor, and the Special Unit of Judicial Police.⁷² Fourth, the judges are to be a minority of international appointees and a majority of Central African nationals.⁷³ Fifth, the Special Prosecutor is an international appointee while the Deputy is a Central African.⁷⁴ Labuda highlights that Central African nationals have a numerical advantage under the Organic law but international staff 'have the final word'.⁷⁵ Sixth, the SCC has been given jurisdiction over violations of human rights and humanitarian law since 1 January 2003 under the Central African Penal Code and by virtue of the CAR's international obligations.⁷⁶ Lastly, under Article 37, with regards to complementarity with the ICC, the SCC has primacy over investigations unless the ICC Prosecutor exercises jurisdiction over a specific case.⁷⁷ Labuda has argued in depth how this is incompatible with international law because Article 37 flips the principle of complementarity where national courts typically have primacy.⁷⁸ Sprik has also noted that the complementarity issue may 'signal to the CAR population that international justice may prevail over local justice'.⁷⁹ The issue of complementarity and the impact of the SCC on the rule of law at the local level will be returned to in Section 5.

The organic law provides for MINUSCA to play a key role in supporting the functioning of the SCC. Article 7 provides for a SCC judge to be supported by a legal adviser recruited with the support of MINUSCA.⁸⁰ Under Article 9, the decision-making bodies of the SCC, with the exception of the Secretariat of the Special Prosecutor and the Special Judicial Police Unit, will include at least one international member proposed by MINUSCA.⁸¹ International judges for the SCC are also proposed by MINUSCA and confirmed by the President of the Superior Council of the Magistracy.⁸² MINUSCA is also empowered to provide information to the Special Prosecutor where necessary to 'establish the commission of a serious crime'.⁸³ Lastly, MINUSCA may provide police officers to assist the judges or Special Prosecutor's office but this 'does not in any way remove the police officers of MINUSCA from their internal chain of command'.⁸⁴

MINUSCA's involvement in the SCC has been described as unprecedented and the relationship with the UN is deeper with a report from the UN Office of the Commissioner for Human Rights serving as the basis for the Court's prosecutorial strategy.⁸⁵ Following the introduction of the Organic law, MINUSCA's mandate included an extensive provision on the support to be given to the SCC:

⁶⁷ Patryk I Labuda, 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?' (2017) 15 *Journal of International Criminal Justice* 175, 177; Organic law No. 15-003 on the creation, organisation and functioning of the Special Criminal Court, 2015 (In French: Loi organique No. 15-003 portant création, organisation et fonctionnement de la Cour Pénale Spéciale, 2015), Article 1. <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=92C4EC76991F04C4C1257ECB004E25D5&action=openDocument&xp_countrySelected=CF&xp_topicSelected=GVAL-992BU6&from=state> accessed 10 June 2021.

⁶⁸ Labuda (n 67).

⁶⁹ Organic law Article 1.

⁷⁰ Organic law Article 3.

⁷¹ Labuda (n 67) 182.

⁷² See Organic law Articles 6-10.

⁷³ Labuda (n 67) 184.

⁷⁴ Organic law Article 18.

⁷⁵ Labuda (n 67) 184.

⁷⁶ Organic law Article 3.

⁷⁷ Organic law Article 37.

⁷⁸ Labuda (n 67) 192-3.

⁷⁹ Sprik (n 45) 7.

⁸⁰ Organic law Article 7.

⁸¹ Organic law Article 9.

⁸² Organic law Article 24.

⁸³ Organic law Article 28 (author's translation).

⁸⁴ Organic law Article 32 (author's translation).

⁸⁵ Beth van Schaack, 'The Building Blocks of Hybrid Justice' (2016) 44 *Denv J Int'l L & Pol'y* 169, 195; Labuda (n 58) 4.

(i) To assist the Transitional Authorities and subsequent elected authorities and facilitate other bilateral and multilateral support to the Transitional Authorities and subsequent elected authorities in the establishment of the national Special Criminal Court (SCC) consistent with CAR laws and jurisdiction and in line with the CAR's international humanitarian law and international human rights law obligations with the aim of supporting the extension of State authority;

(ii) To provide technical assistance and capacity building for the CAR authorities, in order to facilitate the functioning of the SCC, in particular in the areas of investigations, arrests, detention, criminal and forensic analysis, evidence collection and storage, recruitment and selection of personnel, and the establishment of a legal aid system, as appropriate, as well as, within existing resources, to provide security for magistrates, and take measures to enhance the security of victims and witnesses as conditions allow, in line with the CAR's international human rights obligations, including with respect to fair trials, and due process.⁸⁶

A similar provision remains in the most recent iterations of MINSUCA's mandate.⁸⁷ This may indicate a continued reliance on the UN and that the SCC is incapable of, for instance, protecting victims and witnesses without international assistance.

The SCC is now operational with active investigations. However, the SCC has been criticised by the Russian UN delegation as having potential for extreme costs and inefficiency.⁸⁸ This is because despite the promulgation of the Organic law in 2015 it was not until June 2017 that a Special Prosecutor and five judges were sworn in and until May 2018 for rules of procedure and evidence for the Court to be adopted.⁸⁹ The Court's first session was held in October 2018 and the first investigations supported by MINUSCA were launched in 2019.⁹⁰ By October 2019 the Court had identified 22 priority cases and MINUSCA had created a 'special legal corps' to 'protect the rights of the accused.'⁹¹ Section 5 will discuss various issues with the transitional arrangements in the CAR focusing on how there is little space for local involvement in rebuilding the rule of law. But first, the next section will outline the very different situation of South Sudan and UNMISS' protection of civilian sites.

4 UNMISS and the rule of law

4.1 UNMISS's mandate and rule of law-based activities

In 2011, UNMISS was mandated to build the capacity of the government to 'provide security, to establish rule of law, and to strengthen the security and justice sectors.'⁹² Creating legitimate rule of law institutions formed a major priority for UNMISS and ties in more recent findings that civil society believes there 'cannot be peace in South Sudan without justice.'⁹³ Early activities included the provision of technical and logistical support for justice and prison institutions and supported initiatives to end arbitrary detention.⁹⁴ One unique aspect of UNMISS is that South Sudan had not yet acceded to any international human rights treaties. The Security Council implored the South Sudanese government to ratify human rights treaties and offered UNMISS' support in the ratification process and the harmonisation of the national legal system with international standards.⁹⁵ South Sudan has since joined several major international human rights treaties.⁹⁶

⁸⁶ S/RES/2217 (n 47) para 32(g).

⁸⁷ UN Security Council, Resolution 2499 (15 November 2019) S/RES/2499 paras 32(e)(iv)–(v); UN Security Council, Resolution 2552 (12 November 2020) S/RES/2552 para 32(e)(iv).

⁸⁸ UN Security Council, 7901st Meeting (16 March 2017) S/PV.7901, 11 as per Mr. Iliichev.

⁸⁹ Human Rights Watch, 'Central African Republic: Parliament Adopts Special Criminal Court Rules' (4 June 2018) <<https://www.hrw.org/news/2018/06/04/central-african-republic-parliament-adopts-special-criminal-court-rules>> accessed 10 June 2021.

⁹⁰ UN Security Council, 'Central African Republic' (17 June 2019) S/2019/498 para 59; Note that the SCC was only established for an initial 5-year term and delays will ultimately affect the success and renewal of the Court.

⁹¹ UN Security Council, 'Central African Republic' (15 October 2019) S/2019/822 para 57.

⁹² UN Security Council, Resolution 1996 (8 July 2011) S/RES/1996 para (3)(c).

⁹³ UN Security Council, 'Report of the Secretary-General on South Sudan' (2 November 2011) S/2011/678 para 60; Kirsten Lavery, 'South Sudanese Perceptions of Justice: The Terrain Trial' (2020) 18 *Journal of International Criminal Justice* 271, 288.

⁹⁴ UN Security Council, 'Report of the Secretary-General on South Sudan' (26 June 2012) S/2012/486 para 64; UN Security Council, 'Report of the Secretary-General on South Sudan' (7 March 2012) S/2012/140 para 60.

⁹⁵ S/RES/1996 (n 92) para 11; S/2011/678 (n 93) para 67; S/2012/140 (n 94) para 64; UN Security Council, 'Special report of the Secretary-General on the review of the mandate of the United Nations Mission in South Sudan' (23 November 2015) S/2015/899 para 50.

⁹⁶ A full list is available here, UN General Assembly, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: South Sudan' (23 August 2016) A/HRC/WG.6/26/SSD/1 paras 16–7.

However, it was reported in 2014 that '[r]espect for international human rights standards in the administration of justice showed no improvement' despite a number of treaties being ratified the year before.⁹⁷

The outbreak of civil war in December 2013 led to a major shift in focus for the mission. Due to grave human rights violations being committed by South Sudanese forces (SPLA) the UN ended any capacity building support 'that may enhance their capacity to engage in conflict, commit human rights violations and abuses and undermine the Addis Ababa negotiations process' but continued support in States where fighting had not taken place.⁹⁸ Following this, Resolution 2155 removed parts of UNMISS' mandate that allowed for improving the capacity of the government to provide security and establish the rule of law.⁹⁹ During the civil war the administration of justice was problematic with less than 200 judges and in one State only 2 prosecutors.¹⁰⁰ It wasn't until 2018 that technical assistance to the South Sudan National Police Service (SSNPS) and other government institutions was again provided.¹⁰¹ Since 2018, UNMISS has been working with the South Sudanese government to create mobile courts to allow prosecutions where permanent courts are not yet in operation.¹⁰² Kirsten Lavery has found that the mobile courts have been perceived as effective at delivering justice in rural areas but limited public information means many people see the courts as expensive and unsustainable.¹⁰³

As a consequence of the civil war and the ineffectiveness of the national justice system a Hybrid Court was proposed in 2015.¹⁰⁴ The Hybrid Court was intended to focus its efforts on high-level perpetrators while the South Sudanese national courts would have the primary responsibility for the prosecution of conflict-related crimes.¹⁰⁵ Naturally, an internationally influenced Hybrid Court is controversial for the South Sudanese government whose forces are responsible for many atrocities. As a result, the Hybrid Court has not come to fruition with the South Sudanese government not likely to sign a memorandum of understanding with the African Union (AU) on the court's creation.¹⁰⁶ The South Sudanese government has gone as far as using a US lobbying firm to assist them in blocking the Court's creation.¹⁰⁷ The government spread the rhetoric that a Hybrid Court is a form of foreign intervention with the purpose of bringing regime change.¹⁰⁸

4.2 The protection of civilian sites and the rule of law

One key change in the course of UNMISS' deployment was the creation of PoC sites. By the end of 2013 around 45,000 people were seeking protection within UN compounds and in late 2020 the number stood at approximately 170,000.¹⁰⁹ PoC sites are inviolable under international law as attacks on UN personnel *and facilities* constitute violations of international law.¹¹⁰ The UN has described the PoC sites as 'uncharted territory' as the UN seeks to provide protection from outside threats as well as threats from within the sites.¹¹¹ UN forces provide perimeter security but long-term internal security on these large PoC sites is something the UN had not prepared for or had previous experience of.¹¹² The UN is essentially governing large cities which it is not prepared for in terms of powers under the mandate or the policies in place.¹¹³

⁹⁷ UN Security Council, 'Report of the Secretary-General on South Sudan' (30 September 2014) S/2014/708 para 51.

⁹⁸ UN Security Council, 'Report of the Secretary-General on South Sudan' (6 March 2014) S/2014/158 para 69.

⁹⁹ UN Security Council, Resolution 2155 (27 May 2014) S/RES/2155.

¹⁰⁰ UN Security Council, 7392th Meeting (24 February 2015) S/PV.7392, 4 as per Mr. Šimonović; UN Security Council, 'Report of the Secretary-General on South Sudan' (15 June 2017) S/2017/505 para 38; UN Security Council, 'Report of the Secretary-General on South Sudan' (1 December 2017) S/2017/1011 para 43.

¹⁰¹ UN Security Council, 'Report of the Secretary-General on South Sudan' (11 September 2018) S/2018/831 paras 39, 46.

¹⁰² UN Security Council, 'Report of the Secretary-General on South Sudan (covering the period from 1 December to 26 February 2019)' (28 February 2019) S/2019/191 para 39; UN Security Council, 'Situation in South Sudan' (14 June 2019) S/2019/491 para 45.

¹⁰³ Lavery (n 93) 289.

¹⁰⁴ UN Security Council, Resolution 2252 (15 December 2015) S/RES/2252 para 27; UN Security Council, 7628th Meeting (19 February 2016) S/PV.7628, 7 as per Mr. Šimonović; UN Security Council, 8030th Meeting (24 August 2017) S/PV.8030, 3 as per Mr. Wane.

¹⁰⁵ UNMISS Rule of Law Advisory Section, UNMISS Human Rights Division and UNDP, 'Preliminary Viability Study on National Mechanisms to Promote Accountability for Serious Conflict-Related Crimes in South Sudan' (2017). Quoted by Labuda (n 58) 17.

¹⁰⁶ Labuda (n 58) 16.

¹⁰⁷ S/2019/491 (n 102) para 56.

¹⁰⁸ Lavery (n 93) 278.

¹⁰⁹ UN Security Council, 7091st Meeting (23 December 2013) S/PV.7091 p.2 as per the Secretary-General; S/2020/890 (n 5) para 45.

¹¹⁰ United Nations, 'Security Council Press Statement on Cessation of Hostilities Agreement in South Sudan' (23 January 2014) SC/11261-AM/2802.

¹¹¹ S/2014/158 (n 98) para 49.

¹¹² Lisa Sharland and Aditi Gorur, 'Revising the UN Peacekeeping Mandate in South Sudan: Maintaining Focus on the Protection of Civilians' (Stimson Center, December 2015) <<https://www.stimson.org/sites/default/files/file-attachments/CIC-December-2015-FINAL-web-003.pdf>> accessed 10 June 2021, 14; Emily Paddon Rhoads and Rebecca Sutton, 'The (Self) Protection of Civilians in South Sudan: Popular and Community Justice Practices' (2020) 119/476 *African Affairs* 370, 384.

¹¹³ Rachel Ibreck and Naomi Pendle, 'Customary Protection? Chiefs' Courts as Public Authority in United Nations Protection of Civilian Sites, South Sudan' (Justice and Security Research Programme, JSRP Paper 34, September 2016), 3.

Criminality on the sites is rampant and poses a major security threat.¹¹⁴ People have brought contraband such as weapons and alcohol into the sites and residents have complained of gang violence.¹¹⁵ There have been murders, rapes, communal violence, thefts, and much more inside the sites.¹¹⁶ Recently, it was reported that community leaders mobilised youths to disrupt humanitarian activities within the sites.¹¹⁷ Criminality is not the only issue with poor sanitation, intercommunal tension, and former combatants seeking refuge further complicating matters.¹¹⁸ What is particularly concerning is that gender-based violence is prevalent making the risks on the PoC sites acute for women and girls, alongside the risk to men and boys.¹¹⁹

A core issue is that UNMISS does not have an executive mandate similar to that of UNMIK giving the mission executive, legislative or judicial powers. The mission also does not have urgent temporary measures to maintain basic law and order as we saw in MINUSCA. MINUSCA's powers were agreed with the Central African transitional authorities and there is little hope that the powers could be replicated for UNMISS with the less cooperative South Sudanese government.¹²⁰ The Status-of-Forces Agreement sets out the limitations placed on UNMISS with regards to its law enforcement capabilities. First, UNMISS' premises remain the territory of South Sudan, and therefore South Sudanese law is applicable, but the premises are 'inviolable and subject to the exclusive control and authority of the United Nations.'¹²¹ The mission has the power to arrest its own military personnel but where the mission 'takes into custody any other person on the premises of UNMISS' the person shall be handed over to the South Sudanese authorities.¹²² The mission has lamented its insufficient powers despite regular patrols by UNPOL to seize prohibited items and the use of holding facilities.¹²³

The SOFA does not grant the mission any judicial authority to prosecute residents of the PoC sites which leaves the UN with three options: (1) expulsion of the person from the site (2) the transfer of the person to the South Sudanese authorities or (3) detention under the mission's PoC mandate to protect others in the site.¹²⁴ Expulsion may not be preferable because the suspected offender could be harmed by forces outside the PoC site. Transfer is also fraught with complications as the UN cannot hand over suspects where the South Sudanese authorities may violate the person's human rights.¹²⁵ The mission has established a 'handover risk assessment committee' to decide, in cooperation with community leaders and the suspected offender, if the person's human rights would be violated by the authorities, such as by imposing the death penalty.¹²⁶ The final option of detention is also problematic because indefinite detention also infringes on the person's right to due process and a fair trial.¹²⁷

To address criminality UNMISS has needed to develop and support alternative mechanisms. Community watch groups (CWGs) are made up of volunteers selected by communities and report to UNPOL. UNPOL has assisted the groups with developing codes of conduct and given training on topics such as dispute resolution, local justice, gender, and child protection.¹²⁸ The CWGs operate under customary authority and hold their own hearings or refer cases to customary courts.¹²⁹ However, the CWGs have been involved in criminal activity with reports of CWG members torturing and beating up women.¹³⁰ Another mechanism

¹¹⁴ Jana Krause, 'Stabilization and Local Conflicts: Communal and Civil War in South Sudan' (2019) 18 *Ethnopolitics* 478, 485.

¹¹⁵ Sharland and Gorur (n 112) 16.

¹¹⁶ See e.g., Ibreck and Pendle 2016 (n 113); Sharland and Gorur (n 112) 16.

¹¹⁷ S/2018/831 (n 101) para 26.

¹¹⁸ S/2014/158 (n 98) paras 16, 26, 49; UN Security Council, 'Report of the Secretary-General on South Sudan' (18 November 2014) S/2014/821 para 15.

¹¹⁹ Rhoads and Sutton (n 112) 385.

¹²⁰ Jenna Stern, 'Establishing Safety and Security at Protection of Civilians Sites: Lessons from the United Nations Peacekeeping Mission in South Sudan' (Stimson Center, Civilians in Conflict Brief No. 2, September 2015) <<http://www.stimson.org/books-reports/establishing-safety-and-security-at-protection-of-civilians-sites/>> accessed 10 June 2021, 11.

¹²¹ United Nations, 'Status of Forces Agreement Between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan ("SOFA")' <https://unmiss.unmissions.org/sites/default/files/unmiss_sofa_-_english_version_0.pdf> accessed 10 June 2021, para 16.

¹²² *ibid*, para 44.

¹²³ S/2014/708 (n 97) para 41; UN Security Council, 'Report of the Secretary-General on South Sudan' (17 February 2015) S/2015/118 para 32.

¹²⁴ UN Security Council, 'Future planning for the protection of civilian sites in South Sudan' (12 September 2019) S/2019/741 paras 14, 20; See Rhoads and Sutton (n 112).

¹²⁵ Stern (n 120) 11.

¹²⁶ *ibid*, 11.

¹²⁷ *ibid*, 14.

¹²⁸ Rhoads and Sutton (n 112) 389; Stern (n 120) 16.

¹²⁹ Ibreck and Pendle (n 113) 10.

¹³⁰ Rhoads and Sutton (n 112) 389.

is the Informal Mediation and Dispute Resolution Mechanism (IMDRM) designed to mitigate dispute and prevent escalation without issuing fines or giving out punishments.¹³¹ The IMDRM has been confused with customary courts which are the main dispute settlement mechanism for communities on the sites and a mechanism the UN does not directly engage with.¹³²

Customary courts take many forms in the PoC sites such as chiefs' courts, hearings held by the CWG and other committees but are rooted in the same traditions.¹³³ Due to the lack of formal courts on the PoC sites, research has shown that traditional authorities were heavily relied upon as the most common first step in the Bentiu PoC site following murder or sexual assault.¹³⁴ Customary courts are found across South Sudan where chiefs mediate disputes under local customary laws and are the 'quintessential justice providers' for much of the population.¹³⁵ Traditional authorities which hold customary courts are part of the South Sudanese legal system after being incorporated into the Local Government Act 2009.¹³⁶ Ibreck and Pendle outline how the '[c]hiefs narrate customary laws as if they were a fixed set of principles that constitute Nuer tradition. In this manner, the courts conjure an imagined shared morality, law and moral community, contrasting with the realities of historical experience across the Nuerlands.'¹³⁷ Customary courts are commonly held under a tree with up to sixteen chiefs.¹³⁸ Community members will be in attendance and the courts collect fees, and issues fines and punishments. Under the 2009 Act customary courts do not have jurisdiction under criminal matters unless there is a 'customary interface' which is not defined in the Act.¹³⁹ Nevertheless, the customary courts do hear criminal cases and issue fines and punishments for criminal acts.¹⁴⁰

UNMISS has made it clear that serious cases of murder or rape should be dealt with by UNPOL but otherwise does not monitor or regulate the customary courts.¹⁴¹ Ibreck and Pendle have documented numerous examples of cases heard by customary courts in the PoC sites. There have been instances where the customary courts have limited their own jurisdiction and referred to human rights. For example, a chief was advised not to use physical punishment in his court after the punishment was reported to UNPOL and in another case a court referred to the Universal Declaration of Human Rights in relation to a woman's right to divorce.¹⁴² However the courts have acted beyond their remit and adjudicated serious cases such as rape due to delays in UNPOL's processing of cases and poor communication with the community.¹⁴³ Rhoads and Sutton note the customary courts have led to strengthened social cohesion but it must be noted that traditional authorities can uphold patriarchal norms and adopt exclusionary and discriminatory practices.¹⁴⁴ The next section will discuss these issues in greater depth and suggest paths forward for incorporating bottom-up empowerment into rule of law activities and local justice.

5 Local justice and empowering communities to have ownership of the rule of law process

MINSUCA and UNMISS have had very different experiences of rebuilding the rule of law. MINUSCA has cooperated closely with the host state, seen the establishment of a hybrid court, and operated with unique temporary measures for maintaining law and order whereas UNMISS has faced unprecedented challenges on its PoC sites in a 'jurisdictional vacuum'.¹⁴⁵ This section makes normative suggestions for the increased

¹³¹ Rachel Ibreck and Naomi Pendle, 'Community Security and Justice under United Nations Governance: Lessons from Chiefs' Courts in South Sudan's Protection of Civilians Sites' (2017) 6(1) *Stability: International Journal of Security and Development* 1, 7.

¹³² *ibid.*, 7; Ibreck and Pendle (n 113) 10.

¹³³ Ibreck and Pendle (n 113) 26.

¹³⁴ Rens Willems and David K Deng, 'Access to Justice: Perceptions of and Experiences with Violent Crime in South Sudan' (University for Peace, September 2016) <[http://www.upeace.nl/cp/uploads/downloadsprojecten/Access-to-Justice-in-South-Sudan--Final-Report\(1\).pdf](http://www.upeace.nl/cp/uploads/downloadsprojecten/Access-to-Justice-in-South-Sudan--Final-Report(1).pdf)>, 16–7.

¹³⁵ *ibid.*, 35; Van Vollenhoven Institute, 'Policy Brief South Sudan Working with local institutions to improve the provision of justice' (October 2016) 2.

¹³⁶ Van Vollenhoven Institute (n 135) 2.

¹³⁷ Ibreck and Pendle (n 113) 9–10.

¹³⁸ *ibid.*, 8.

¹³⁹ Willems and Deng (n 134) 13.

¹⁴⁰ Van Vollenhoven Institute (n 135) 2.

¹⁴¹ Ibreck and Pendle (n 113) 10.

¹⁴² *ibid.*, 32, 45.

¹⁴³ *ibid.*, 37–8.

¹⁴⁴ Rhoads and Sutton (n 112) 388, 392; Naomi Pendle, 'The Future of Protection of Civilian Sites: Protecting displaced people after South Sudan's peace deal' (Conflict Research Programme, LSE, February 2019), 3.

¹⁴⁵ Rhoads and Sutton (n 112) 386.

involvement of the local in rebuilding the rule of law in light of 'the local turn' which promotes the engagement and empowerment of the local in decision-making processes.

What the local turn does is bring to the forefront local perceptions of peace and how local people believe sustainable peace can be brought about in their communities.¹⁴⁶ The local are a primary focus for peace-builders because there exists a wealth of detailed knowledge at the sub-national level which can be tapped into by external actors.¹⁴⁷ Local agency and empowerment is critical and a UN peace operation should engage the local to determine the full range of local needs and expectations.¹⁴⁸ Ownership of the peace process, and consequently the rule of law, cannot be achieved without building local capacities by engaging and empowering the local.¹⁴⁹

It has been a priority since the early 2000s that the UN would engage with local actors in regards to the rule of law.¹⁵⁰ By involving local actors, the UN can 'bring much needed legitimacy to the project' and '[f]ailure to do so can limit the effectiveness of reform.'¹⁵¹ Top-down approaches of the past have been described as 'inherently hegemonic and out-of-touch with local realities' and studies have shown that success at the national level does not necessarily mean there will be success at the local level.¹⁵² Top-down approaches can miss the nuances of a conflict, worsen conditions, and marginalise communities.¹⁵³ To avoid the negatives of top-down approaches the UN needs to navigate a complex environment ensuring both engagement at the local level and the wider national reconciliation. The HIPPO Report recognizes the need for local engagement when it observed,

[b]y shifting from merely consulting with local people to actively including them in their work, missions are able to monitor and respond to how local people experience the impact of peace operations.¹⁵⁴

Other studies have demonstrated the UN does provide space for local engagement and empowerment emphasising the need to address local priorities, promote national reconciliation, and ultimately build a sustainable peace.¹⁵⁵ But what role do the local play in the (re)building the rule of law?

5.1 The local and hybrid justice

Intrinsically linked are the perceptions of justice by local communities and the legitimacy of hybrid justice mechanisms and other rule of law programming. Therefore, importance is attached to the inclusion of local staff and expertise in hybrid courts, a method of engagement and empowerment.¹⁵⁶ The issue though runs deeper. While some populations, such as in the CAR, may appreciate a need for an international entity of some kind to bring about justice there can be disconnects between international/national discourses and local needs.¹⁵⁷ Aaron Fichtelberg argues a key advantage of hybrid courts is that they can 'frame justice discourses in a fashion that will resonate with the local population.'¹⁵⁸ Where the public 'own' the court due

¹⁴⁶ Isabell Schierenbeck, 'Beyond the local turn divide: lessons learnt, relearnt and unlearnt' (2015) 36 *Third World Quarterly* 1023, 1027. See also, Roger Mac Ginty and Oliver P Richmond, 'The Local Turn in Peacebuilding: a critical agenda for peace' (2013) 43 *Third World Quarterly* 763; Roger Mac Ginty, 'Everyday peace: Bottom-up and local agency in conflict-affected societies' (2014) 45 *Security Dialogue* 548.

¹⁴⁷ Gilder (n 7) 231.

¹⁴⁸ Vesna Bojicic-Dzelilovic and Mary Martin, 'Wholly local? ownership as philosophy and practice in peacebuilding interventions' (2018) 6 *Peacebuilding* 218, 218; Oliver Richmond, 'Beyond Local Ownership in the Architecture of International Peacebuilding' (2012) 11 *Ethnopolitics* 354, 363.

¹⁴⁹ Hanna Leonardsson and Gustav Rudd, 'The 'local turn' in peacebuilding: a literature review of effective and emancipatory local peacebuilding' (2015) 36 *Third World Quarterly* 825, 830.

¹⁵⁰ Lahoud (n 17) 142.

¹⁵¹ Jenny H Peterson, "'Rule of Law' initiatives and the liberal peace: the impact of politicised reform in post-conflict states' (2010) *Disasters* 34(S1) S15–S39, S23–4.

¹⁵² Elisa Randazzo, 'The paradoxes of the "everyday": scrutinising the local turn in peace building' (2016) *Third World Quarterly* 37(8) 1351, 1353; Séverine Autesserre, 'International Peacebuilding and Local Success: Assumptions and Effectiveness' (2017) 19 *International Studies Review* 114, 118.

¹⁵³ Randazzo (n 152) 1352.

¹⁵⁴ HIPPO Report (n 24) 14.

¹⁵⁵ Gilder (n 7).

¹⁵⁶ Sprik (n 45) 5.

¹⁵⁷ Lombard and Picco (n 43) 17.

¹⁵⁸ Aaron Fichtelberg, 'Identity politics and hybrid tribunals' (2020) 33 *Leiden Journal of International Law* 993, 994.

to a domestic tie to the community it will have greater success.¹⁵⁹ One way in which hybrid courts pursue community involvement is through outreach programmes that can 'create better possibilities for ownership' and 'shape public perceptions.'¹⁶⁰

However, in the CAR the focus was on technicalities such as developing the rules and procedures for the SCC but local issues in the aftermath of displacement were ignored.¹⁶¹ That being said, the UN itself does recognise the need for political settlements that include the rule of law and accountability to address local conflicts or there will be limited long-term impact.¹⁶² MINUSCA has undertaken mediation activities at the local level and at the national level the Bangui Forum, a national conference held in 2015, called for increased participation of citizens to bridge the capital and other areas of the country.¹⁶³ But where are the participatory, community programmes to promote ownerships of the SCC?

When designing hybrid mechanisms international actors, such as the UN and its partners must consider local needs and practices by engaging the local and empowering local partners to participate in decision-making. Where this is not the case hybrid courts can have a destabilising effect where 'court proceedings will fuel internal political conflicts.'¹⁶⁴ Muharremi notes resentment and resistance from the local can compromise national reconciliation and undercut the core objectives of transitional justice.¹⁶⁵ The SCC follows the French inquisitorial model which Labuda says gives victims space to influence investigations but can result in a flood of claims.¹⁶⁶ Because of this victims are encouraged to contact the Special Prosecutor and discouraged from making individual petitions to the investigative judges.¹⁶⁷ This presents the risk that if the Special Prosecutor does not deal with petitions in a timely manner or if petitions are dismissed with poor communication then individuals, and their communities, could become disconnected from transitional justice process. This leads to the worry that the court may not prosecute the crimes that of chief concern to victims and affected communities.¹⁶⁸ As was seen in UNMISS' PoC sites, where complaints are not handled promptly people can become angry and turn to traditional authorities for settlement.

Communication and the inclusion of voices from the bottom-up is vital for a hybrid mechanism where international actors are working with the government and other national bodies to create complex laws and procedures. International actors must go further than simply disseminating information that explains the functioning of the court. Instead there must be a strategy that allows local voices to truly influence the construction and operation of such mechanisms through meaningful engagement and empowerment. Such a strategy would require a hybrid court to use national staff to build a network of stakeholders, not only national elites, and include a broad range of voices in meaningful discussions that shape the image and procedures of the hybrid court. Not all stakeholders will be able to debate finer points on criminal procedure and prosecutorial practices, but by bringing together many different groups national staff can work to provide ownership of the court to communities and attempt to pacify sceptics. At the same time, information collected can assist the court in understanding complex communal differences and sources of conflict that will likely have coloured the preceding conflict and continue to lead to divisive politics that may undermine the functioning of the court.

Similarly key for local buy-in is delicate treatment of internalising international laws and norms alongside local laws and customs. Sprik identifies a need for empowerment when she discusses how it is important for local communities to be able to implement rules and practices of their own rather than seeing changes as impositions by international actors.¹⁶⁹ There have been critiques that rebuilding the rule of law

¹⁵⁹ *ibid*, 994, 1003.

¹⁶⁰ *ibid*, 1010.

¹⁶¹ Lombard and Picco (n 43) 18.

¹⁶² United Nations Departments of Peacekeeping Operations and Field Support Policy, 'The Role of United Nations Peacekeeping Operations in Addressing Local Conflicts' (2017) <https://peacekeeping.un.org/sites/default/files/20171003_local_conflict_web_0.pdf> accessed 10 June 2021, 35.

¹⁶³ Marie-Joelle Zahar and Delphine Mechoulan 'Peace by Pieces? Local Mediation and Sustainable Peace in the Central African Republic' (International Peace Institute November 2017), 3, 33.

¹⁶⁴ Muharremi (n 50) 7.

¹⁶⁵ *ibid*, 7.

¹⁶⁶ Patryk I Labuda, "'Open for Business": The Special Criminal Court Launches Investigations in the Central African Republic' (EJIL Talk!, 8 February 2019) <<https://www.ejiltalk.org/open-for-business-the-special-criminal-court-launches-investigations-in-the-central-african-republic/>> accessed 10 June 2021.

¹⁶⁷ *ibid*.

¹⁶⁸ Arnould (n 56) 8.

¹⁶⁹ Sprik (n 45) 17.

is a form of liberal peacebuilding where Western values are imposed on other states.¹⁷⁰ Following this critique, law is seen as an exercise of power and the UN is simply utilising a concept seen as objective and fair to both stabilise states and exert Western power.¹⁷¹ The export of legal institutions, norms, and rules from one state to another is the norm when statebuilding in the global South.¹⁷² By enforcing a Western ideal of the rule of law the conflict-ridden country is left stable but in a way which is comparable with the liberal, law-abiding societies of the West. Robert Blair has highlighted how the UN currently has a focus on rule of law education to socialise state actors to 'align their behavior with rule-of-law (and other) principles.'¹⁷³ Importantly though education must allow the local to synthesise and establish their own practices to realise rule of law principles.

The prosecutorial strategy of the SCC places its focus on genocide, crimes against humanity, and war crimes.¹⁷⁴ A focus on established international crimes is important from a complementarity standpoint where the ICC, hybrid court, and national courts work together on rooting out impunity for those crimes. However, Mohamed Sesay explains there is a preoccupation with the 'processes of cascade, compliance, and localisation of global justice norms.'¹⁷⁵ An inherent focus on established international crimes is useful to avoid disputes over the jurisdiction of a hybrid court, but Sesay explains there can then be less attention paid to local concerns creating 'a governance vacuum in local settings where the state lacks sufficient capacity to maintain social order countrywide or where state legitimacy remains contested.'¹⁷⁶

Legal pluralists have worked to address concerns where international criminal law lacks legitimacy in particular communities due to being vague or foreign.¹⁷⁷ For instance, Julie Fraser argues that Islamic and international law are plural systems and that the former can be referred to by the ICC in order to improve legitimacy amongst Muslim communities.¹⁷⁸ On the one hand, legal pluralism may be promoted by hybrid courts that apply both domestic and international laws, requiring judges to find commonalities in the legal systems for consistency of approach. On the other hand, where an international court is given primacy over a hybrid tribunal, as is the case with the SCC, there may be less space for pluralism. Paul Schiff Berman suggests that complementarity means there are competing jurisdictions where one actor agrees not to assert their jurisdiction and therefore 'one community does not hierarchically impose a solution on the other.'¹⁷⁹ However, the SCC does allow for the ICC to impose itself which may instead perpetuate international norms instead of allowing international crimes to be implemented by the hybrid court that can account for different cultural views. The UN is in a unique position in the CAR. The mission is directly included in the Organic law and able to influence and support the SCC, but the mission is not solely working on ending impunity through hybrid justice. As has been explained, MINUSCA also has other rule of law activities across the country which presents the opportunity to influence local justice. Currently the UN does not report on whether local perceptions of justice and the rule of law are incorporated into these activities. Sprik has concluded that MINUSCA's contributions to the SCC may be insufficient to provide justice in the eyes of local communities.¹⁸⁰ Blair has suggested that the police and civilian components of peace operations should be expanded to as those personnel are directly responsible for rule of law reform.¹⁸¹ But going further what is needed is bottom-up empowerment of the local to ultimately lead to ownership of justice practices. Similar conclusions have been reached by David Curran and Charles Hunt where they have concluded there is a 'strong normative position that effective peacebuilding processes need to be locally driven and owned.'¹⁸² In

¹⁷⁰ See e.g., Peterson (n 151) S18.

¹⁷¹ *ibid*, S19.

¹⁷² Mohamed Sesay, 'Hijacking the rule of law in postconflict environments' (2019) 4 *European Journal of International Security* 41, 41.

¹⁷³ Robert A Blair, 'UN Peacekeeping and the Rule of Law' (2021) 115 *American Political Science Review* 51, 53.

¹⁷⁴ Labuda (n 166).

¹⁷⁵ Sesay (n 172) 47.

¹⁷⁶ *ibid*, 47.

¹⁷⁷ See e.g., Alexander K.A. Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 *Indiana Law Journal* 1063; Elies van Sliedregt, 'Pluralism in International Criminal Law' (2012) 25 *Leiden Journal of International Law* 847.

¹⁷⁸ Julie Fraser, 'Exploring legal compatibilities and pursuing cultural legitimacy: Islamic law and the ICC' in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar 2020) 378, 393–395.

¹⁷⁹ Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155, 1215.

¹⁸⁰ Sprik (n 45) 22.

¹⁸¹ Blair (n 173) 58.

¹⁸² David Curran and Charles T Hunt, 'Stabilization at the Expense of Peacebuilding in UN Peacekeeping Operations' (2020) *Global Governance* 1–23, 7.

post-conflict situations social cohesion at the local level is important and tension and mistrust can continue even after the end of conflict.¹⁸³

To diffuse tension and rebuild community trust, the rule of law is vital. Examples of empowerment are numerous with missions supporting peace conferences to facilitate dialogue, local peace committees, community-based workshops to teach conflict management, the promotion of women's organisations and mandates to support the inclusion of civil society, women's organisations, and youth groups in the implementation of peace agreements.¹⁸⁴ There appears to be an implicit understanding within the UN, and consequently the mission, that the peace process needs to involve bottom-up empowerment to allow individuals to 'make better choices' and avoid conflict in the future. However, it is not clear how the UN empowers local people to be involved in and be given ownership of justice practices and activities for rebuilding the rule of law.

5.2 Empowerment and cooperation with international actors on formal and informal justice mechanisms

UNMISS' PoC sites show how communities can come together, be empowered, and take ownership of local justice. In the absence of a hybrid mechanism, weak state institutions, and the jurisdictional vacuum of the PoC sites, communities have responded by using customary courts as a method of 'self-protection'.¹⁸⁵ The catch-22, however, is that while customary methods of justice can improve social cohesion and fill the gaps left by poor formal institutions, the customary methods can be discriminatory, patriarchal, and ultimately undermine or directly contravene international human rights law. The UN must then choose the level of support it offers to traditional authorities. The UN recognises traditional mechanisms of justice can be a more legitimate method of resolving disputes at the local level, but formal institutions are prioritised.¹⁸⁶ Traditional mechanisms may also be necessary where 'internationally supported efforts have inhibited access to justice for those historically excluded from the formal state system'.¹⁸⁷

That being said, the UN has not engaged with the customary courts on UNMISS' PoC sites and instead acquiesces to their practices. One reason for this is because engagement with the customary courts may antagonise the government since the UN would be supporting justice mechanisms that undermine government authority.¹⁸⁸ But, at least in the situation of South Sudan, customary courts are recognised by the formal justice system. The UN must appreciate that non-engagement allows existing inequalities to be exacerbated and vulnerable members of the community put at risk.¹⁸⁹ On the one hand the UN cannot support practices which contradict international human rights law, but on the other hand the UN cannot expect local communities to adapt their practices and understandings of justice overnight. The further development of customary mechanisms could be promoted to find pluralism and ultimately a sense of justice for communities. For instance, with regards to the CAR, the Justice and Security Diagnostic of Bangui has shown '[t]here is a need to build bridges and address the sectarian dynamics influencing social cohesion'.¹⁹⁰ The UN will need to address this disconnect in its rule of law activities if its missions are to support a lasting peace.

Focusing only on hybrid mechanisms or other international efforts dominated by elites while not engaging with customary mechanisms does little for empowering and building the capacity of local people to resolve disputes peacefully and promote pluralism. For example, the empowerment of women has been a key focus of UNMISS. Resolution 1996 mandated UNMISS to support popular participation in political processes and particularly focused on the participation of women.¹⁹¹ In 2014 the mandate was altered to

¹⁸³ Giulia Piccolino, 'Local Peacebuilding in a Victor's Peace. Why Local Peace Fails Without National Reconciliation' (2019) 26 *International Peacekeeping* 354, 370.

¹⁸⁴ UN Security Council, 'Report of the Secretary-General on South Sudan' (8 November 2013) S/2013/651 para 39; S/2015/118 (n 123) para 29; UN Security Council, 'Report of the Secretary-General on South Sudan' (21 August 2015) S/2015/655 para 35; UN Security Council, Resolution 2100 (25 April 2013) S/RES/2100 paras 16(b)(iii), 25 UN Security Council, Resolution 2295 (29 June 2016) S/RES/2295 para 26; UN Security Council, Resolution 2227 (19 June 2015) S/RES/2227 para 14(c).

¹⁸⁵ Rhoads and Sutton (n 112) 380.

¹⁸⁶ UNDPKO (n 162) 25.

¹⁸⁷ Sesay (n 172) 60.

¹⁸⁸ Rhoads and Sutton (n 112) 392.

¹⁸⁹ *ibid.*, 392; As was demonstrated in one of Ibreck and Pendle's case examples where CWG members beat two female suspects. See Ibreck and Pendle (n 113) 31.

¹⁹⁰ Patrick Vinck, Phuong N Pham, Catherine L Kelly and Timothy P Meyer, 'Justice and Security Diagnostic - Bangui Central African Republic' (Harvard Humanitarian Initiative & American Bar Association Rule of Law Initiative, 2017) <<https://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-rol-i-car-bangui-diagnostic-report-0917.pdf>> accessed 10 June 2021, 8.

¹⁹¹ S/RES/1996 (n 92) para 3(a)(ii).

include the facilitation of intercommunal reconciliation 'as an essential part of long-term State-building activity'.¹⁹² UNMISS regularly conducts community dialogue workshops to promote women, youth and traditional leaders in the peacebuilding process.¹⁹³ Some progress has been made with a delegation of women attending the Intergovernmental Authority on Development (IGAD)-led peace talks as observers and women's peace forums have been held across the country.¹⁹⁴ However, the UN needs to work with traditional chiefs and (female) community leaders to understand the relationships between its activities that seek to empower women and customary justice practices that can undermine women's rights. The PoC sites have in fact brought together chiefs and customary laws from different regions across the country leading to legal plurality.¹⁹⁵ The PoC sites presented the UN with a unique opportunity develop an understanding of unique local justice practices, engage in equal discussions on how to promote and rebuild the rule of law, and promote legal pluralism.

6 Conclusion

The rule of law is experienced in a variety of different ways depending on the (post)conflict situation present. The UN has pursued (re)building the rule of law in very different ways in the CAR and South Sudan. The study above has shown how the rule of law is certainly a critical concern for the UN in its current peace operations. MINUSCA has pursued an extensive rule of law mandate with unique powers to maintain basic law and order. This has been possible due to cooperation with the host state government culminating in the establishment of the SCC. MINUSCA is deeply ingrained in supporting the SCC by assisting with investigations and protecting the rights of the accused. UNMISS has been a very different experience. In 2011 the UN foresaw a grand state building project where UNMISS would assist the fledgling South Sudanese government improving its justice systems and entrenching international norms. However, civil war meant state building activities ceased and a difficult situation presented itself on the mission's PoC sites. Both missions have to consider local justice as they go forward with further rule of law activities. The most effective method of ensuring that local justice is pursued is by engaging and empowering local communities to ultimately have ownership of the process. For MINUSCA this means ensuring support for the SCC and its other activities seek to promote social cohesion with meaningful dialogue taking place at the local level. For UNMISS the approach of non-engagement with customary courts is untenable. The PoC sites brought together many communities and were a prime opportunity for the UN to learn how to build local justice and understand community relationships and customary practices.

Acknowledgements

Thank you to the organisers at SIM and the Montaigne Centre for their useful feedback both during and after the Rule of Law from Below conference that has led to this special issue.

Competing Interests

The author has no competing interests to declare.

¹⁹² S/RES/2155 (n 99) para 4(a)(v).

¹⁹³ S/2019/191 (n 102) para 38, 41; S/2019/491 (n 102) para 41.

¹⁹⁴ S/2014/821 (n 118) para 2; UN Security Council, 'Report of the Secretary-General on South Sudan' (20 June 2016) S/2016/552 para 47.

¹⁹⁵ Ibreck and Pendle (n 113) 46.

How to cite this article: Alexander Gilder, 'UN Peace Operations and the Role of the Local in (Re)Building the Rule of Law' (2021) 17(2) Utrecht Law Review pp. 70–86. DOI: <https://doi.org/10.36633/ulr.649>

Published: 07 October 2021

Copyright: © 2021 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.



Utrecht Law Review is a peer-reviewed open access journal published by Utrecht University School of Law.

OPEN ACCESS