

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

THE ROLE OF TRANSITIONAL JUSTICE IN RESOLVING THE SOMALI AND SOUTH  
SUDAN CONFLICTS

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R50/81067/2015

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A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE DEGREE OF  
MASTER OF ARTS IN INTERNATIONAL STUDIES

AUGUST 2017

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**DECLARATION**

I, SAMANTHA ARGWINGS-KODHEK hereby declare that this thesis is my original work and where it is indebted to the work of others, due acknowledgement has been made. Furthermore, it has not been presented in any other University or learning institution for an academic award.

Signed.......... Date.....*4th December 2017*.....

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This thesis has been submitted for examination with my approval as University Supervisor at the University of Nairobi.

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## **ABSTRACT**

In order to achieve accountability for past injustice, provide redress for victims and move from conflict to peace, the concept of transitional justice has become indispensable in global post-conflict states, and perhaps more importantly in Africa. In recent times, transitional justice has paved the way from repression to democracy. However, there has been some criticism emerging as to the ability and effectiveness of the transitional justice instruments previously applied in Africa and whether these mechanisms are able to offer justice, peace and lasting reconciliation. The common thread running through the criticisms has been that despite the use of transitional justice, the mechanisms applied to African states have not been able to either completely address past injustices or foster complete reconciliation leading to an inability to truly move past the conflict. This study provides an assessment of some of the criticism directed at transitional justice mechanisms previously applied in Africa, for instance for their disregard of some elements of tradition given the push by international actors. As a result, it aims to provide an understanding of where critics have stated that the mechanisms have failed. By so doing, it aims at providing a better understanding of how transitional justice can be applied in Somalia and South Sudan – two of Africa’s most recent and notorious post-conflict states.

## **ACRONYMS**

<b>ANC</b>	<b>:</b>	<b>African National Congress</b>
<b>ARCSS</b>	<b>:</b>	<b>Agreement on the Resolution of Conflict in the Republic of South Sudan</b>
<b>ARPCT</b>	<b>:</b>	<b>Alliance for the Restoration of Peace and Counter-Terrorism</b>
<b>AU</b>	<b>:</b>	<b>African Union</b>
<b>CRA</b>	<b>:</b>	<b>Compensation and Reparation Authority</b>
<b>HCSS</b>	<b>:</b>	<b>Hybrid Court for South Sudan</b>
<b>ICU</b>	<b>:</b>	<b>Islamic Courts Union</b>
<b>SPLM</b>	<b>:</b>	<b>Sudan People's Liberation Movement</b>
<b>SPLM-IO</b>	<b>:</b>	<b>Sudan People's Liberation Movement – In Opposition</b>
<b>TRHC</b>	<b>:</b>	<b>Truth, Reconciliation and Healing Commission</b>
<b>TFG</b>	<b>:</b>	<b>The Transitional Federal Government</b>
<b>TNG</b>	<b>:</b>	<b>The Transitional National Government</b>
<b>SNPC</b>	<b>:</b>	<b>Somalia National Peace Conference</b>
<b>SPLM</b>	<b>:</b>	<b>Sudan People's Liberation Movement</b>
<b>SPLM-IO</b>	<b>:</b>	<b>Sudan People's Liberation Movement-in-Opposition</b>
<b>UN</b>	<b>:</b>	<b>United Nations</b>
<b>UNMISS</b>	<b>:</b>	<b>United Nations Mission in South Sudan</b>

**UnoSoM I : United Nations Operation in Somalia I**

**UnoSoM II : United Nations Operation in Somalia II**

## **ACKNOWLEDGMENTS**

First and foremost, I am eternally grateful to God for good health, wisdom, wellbeing and the resources that were necessary to complete this study.

Secondly, I will be eternally grateful to my supervisor Dr. Winnie Wairimu for the continuous support, patience, guidance and continuous encouragement. Her guidance aided me during the duration of my writing of this thesis, she never lost sight of the end goal and continuously reminded me of the same.

However, of great importance I would also like to thank my eternal cheerleader, my mother Carole Argwings-Kodhek for her effortless support during this period and always being a mentor and role-model. Without her support and involvement every time I was ready to quit, this study would never have been achieved. This study was possible due to her continued support and encouragement.

To the trail-blazer, Chiedo More Gem Argwings-Kodhek!

Finally, to everyone who I may not have mentioned, thank you for the impact you have had towards this study. I do not take it for granted. I cannot begin to express my gratitude and appreciation for your friendship.

Thank you all.

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## **CHAPTER ONE**

### **1.0 INTRODUCTION**

Subsequent to gaining independence, African countries have faced a myriad of governance related problems. Characterized by attempted coups, uprisings and in some cases all-out timely and costly war – resulting in gross violations of human rights, the conflicts have had one simple underlying effect, delaying the prosperity of Africa. Most African States have been authoritarian and undemocratic which is characterised with human rights violations and oppressive behaviour. However, this repressive and authoritarian manner of leadership is gradually giving way to democracy with some countries having been able to release the shackles of conflict and become entrants into the international community.

Somalia and the new born South Sudan are two states that have borne the brunt of post-independence civil strife as a result of failures in leadership which has in turn resulted in conflict. The resultant power vacuum has been exploited by the rise of military groups such as Al-shabaab in Somalia and the rise of ethnic leaders in the case of Sudan which, once again, leads to the stagnation of the Country. However, the situation seems to be shifting in favour of a democratic system of governance.

Despite the Somali elections held in 2017 which saw the shift from a divided clan-based system of power towards a more democratic system, the over thirty year struggle in Somalia needs to be substantively handled for the country to begin anew. Similarly, South Sudan became an independent state and despite setbacks such as being ranked among one of the top fragile states and the breakout of civil war in 2013, the state has constantly shown a strong desire to embrace peace.

During the 1980's and 1990's several attempts at a third wave of democratisation in Africa were despots who tried to cling to power begun to give into certain tenets of democracy, while continuing as the Heads of State. This wave gave a rise to the never ending question that faced the leaders and indeed the international community "how to address past atrocities while ensuring peace, justice and prosperity?" It is on the basis of this resistance, that the concept of transitional justice was hinged; the compromise that comes with the move from conflict to peace which oils the wheels of movement and transition has often failed to satisfy the demands for reckoning and justice. Moreover, the constant mounting pressure from the international community to avoid future conflict and dispose of the shackles of the past – by international standards – has led to the emergence of the need for transitional justice to work for African states.

Transitional justice largely defined as the processes associated with an attempt by a society deal with and overcome previous atrocities or conflict scenarios, it involves reconciliation and accountability to assist the country move past the period of.<sup>i</sup> Differently put, transitional justice is an approach to massive human rights violations that provides both redress to victims and creates opportunities for the transformation the root causes and trigger conditions that led to the abuses.<sup>ii</sup> Its objectives are to re-establish trust among the society, to end impunity and to prevent future abuses. Transitional justice aims at dealing with any trauma of the past without threatening the future peace and security.

The concept of transitional justice has its roots in the Nuremburg trials<sup>iii</sup> of the 1940's. To date it has gained recognition as pioneering the transitional justice movement in modern society and emphasizing due the need for society to look back in order to democratically consolidate its future prospects – ensuring there is societal "buy-in". This is achieved mainly through judicial and non-judicial measures which range from judicial prosecution to commissions and public forums,

to ensuring reparations for the victims and reintegration of past combatants. The most common approach is where the four strategies are combined. It is worth noting that out of 55 African states, 18 in one way or another have established a truth commission or reconciliatory mechanism to assist it move forward.

Looking at Somalia and South Sudan, justice, reconciliation and lasting peace are central factors to be taken in consideration when planning for these states' futures and by proxy the future of the African continent in an increasing globalised world. However, to be able to achieve this, transitional justice mechanisms are necessary. Notably though, considering the criticism aimed at transitional justice in Africa, this study aims at assessing past failures, in a bid to understand where the past mechanisms have failed, and therefore put forward the best practice applicable in Somalia and South Sudan.

It is worth noting that it has been argued that transitional justice is only as good as the political will thereon and is ineluctably political. This is evidenced by the Rwandan *Gacaca* trials that created a record of the crimes but excluded any Tutsi crimes or in South Africa where the African National Congress (ANC) apartheid regime agreed to amnesty for those who confessed. When transitional justice takes such approaches it defeats the purpose as it delivers justice to some, but denies it to others.

## **1.1 BACKGROUND**

There has been great international attention on Somalia and South Sudan because of frequent and prolonged armed conflicts and the need for reformist post-conflict strategies. Due to the prolonged conflict, the area has been coined one of the “hottest geographical spaces of internal dissidence and interstate effects.”<sup>iv</sup> The fall of the Somali Said Barre regime in 1991 and attempted coup d'état in South Sudan in December 2013, have resulted in the displacement of millions of

people, countless fatalities and regional implications as the continuous fighting for power intensifies. These conflicts have had far reaching consequences, but the stagnation of development in the areas has had the deepest effect of the conflicts in the areas. The effects of these conflicts on the economies, security and populations in the two states and the regional fallout cannot be underestimated, and until the situations are remedied, the region will continue to suffer.

African countries that have been lauded for using transitional justice include South Africa, Sierra Leone, Rwanda, Nigeria, Liberia and Ghana as the strategies attempted to not only seek accountability for the conflict, but attempted to seek accountability for the victims.<sup>v</sup> However, “what happens when we ignore ugly truths about the past – when families bury their dark secrets and nations try to forget their sins?”<sup>vi</sup> The answer is simple, regression and the inability for the society to move past the tragedy, thus underscoring the need for transitional justice. Societies coming from massive human rights abuses, state repression and dictatorships have a small chance of stability as the destabilising nature of war is that the community is destabilised and those have lasting effects on further generations.

### **1.1.1 Somalia**

Some scholars have stated that violence and clannism was prevalent in Somalia before the fall of the Said Barre regime in 1991, but the 1990’s marked the era when the state began to retaliate against its own people and rebel groups opposed to the Barre regime specifically between 1988 and 1990. The protracted engagements led to the fall of the regime in 1991. However, the power vacuum that was left perpetuated the turmoil in Somalia including protracted warfare, famine and disease as the warring clan lords, Ali Mahdi Mohamed and Mohamed Farah Aideed, continued to joust for power.



In Somalia unlike other countries where the state has assumed responsibility for overseeing transitional justice, there has been a complete state collapse followed by a protracted civil war that continues in various forms to the present day. The country has been affected by the selfish needs of various factions to assume and retain power, further dividing the nation and the absence of a central government to lead has gained it the unfortunate title of a “failed state” up until the establishment of the Federal Government of Somalia was established and Somalia’s title downgraded to a “fragile state” in 2012.

It is worth noting that all the effort put in in resolving the conflict so far has not borne fruit and in Somalia to date almost 90% of the gross human rights violations are yet to be adequately addressed. The conflict still continues unabated due in part to the lack of an effective mechanism through which the different warring factions can sit and reconcile their differences.

### **1.1.2 South Sudan**

In 2011 the youngest nation in the world, South Sudan, was born out of the conflict that plagued Sudan's 60 years independence. The South's' need for independence was formed as a result of the people of the South, who are largely Christian, having been marginalised and essentially oppressed by North Sudan. Following the North-South peace deal which gave the southerners the right to self-determination, the South exercised that right and opted to become an independent state. The peace deal was signed following the end of the 1983-2005 civil war. In 2013, the country born of such hope disintegrated into civil war that rages on to date when as a result of the sacking of the Vice President, Riek Machar and the entire Cabinet in June 2013, on suspicion of conspiracy to oust the current president in a coup d'état.<sup>vii</sup> This continuous fighting and suspicion presents a discouraging environment for the institution and promotion of transitional justice.

South Sudan presents with a myriad of problems which coexist in the young state. The matters range from inter-clan over natural resources, to more politically driven power struggles among the military and political ruling class. Unfortunately, senior figures on both factions have been implicated in one way or another in abuses and even if the warring sides can muster the goodwill to fight impunity and rebuild South Sudan, the infrastructural and logistical difficulties would provide several obstacles.<sup>viii</sup>

Bringing justice to countries which are still embroiled in fighting is extremely challenging as the fragile and indeed brittle nature of the status quo could descend rather rapidly into deadly conflict. Analysis of the conditions, consequences, and risks is required because any transitional justice programme might imply since any ill-founded programme may do more harm than good.

Transitional justice programmes must contribute to realising peace in the course of a conflict, as well as ensuring that justice serves both retributive and restorative goals.

## **1.2 PROBLEM STATEMENT**

From the studies conducted, it seems that transitional justice in African countries has been widely criticized as having fallen short of bringing about lasting peace and/or creating reconciliation amongst the society. The main reasons given have been incompetence and lack of neutrality as well as the resources required to ensure social justice. In addition, many citizens distrust their respective country's judicial institutions and so a transitional justice programme spearheaded by the same institutions is often highly scrutinized. On the other hand however, some of the citizens are against international assistance as they feel that this would amount to interference.

As such, it is incumbent upon the proponents of transitional justice to find a balance within which all members of the society feel comfortable enough to participate. Therefore, this study aims at assessing the attempts at transitional justice in post-independence Somalia and South Sudan. The study considers whether these transitional justice mechanisms have been effective or not. It also considers the role of the regional and international community in achieving transitional justice and identify policy issues that can be addressed for transitional justice to work. In so doing, this study seeks to answer the question; has and can transitional justice work in post-conflict South Sudan and Somalia?

## **1.3 OBJECTIVES**

### **1.3.1 Main Objective:**

The purpose of this study is to comprehensively assess the role/contribution of transitional justice in resolving the Somali and South Sudanese conflicts.

### **1.3.2 Specific Objectives:**

- 1. To identify specific attempts at transitional justice in the conflict areas and assess their effectiveness.**
- 2. To assess the critical role of the regional and international community in these transitional justice mechanisms and initiatives.**
- 3. To formulate tailor-made transitional justice ideas that would be more suited to the Counties/ to identify what policy issues that needs to be strengthened or re-oriented for these mechanisms to work.**

### **1.4 RESEARCH QUESTIONS**

- 1. Why have attempts at transitional justice failed in post-independence Somalia and South Sudan?**
- 2. What role do regional and international actors have to play in assisting Somalia and South Sudan towards achieving justice, reconciliation and lasting peace?**
- 3. How does understanding the root causes of conflict in African societies affect development of transitional justice programmes?**
- 4. Is a transitional justice programme that has elements of both African and Western culture the key to lasting peace and reconciliation in post-conflict Somalia and South Sudan?**

## **1.5 JUSTIFICATION**

Socio-economic rights, and more importantly their restoration and observance, are central to transitional justice in post-conflict States as it is these very rights that are at the core of the conflicts they aim at resolving. In post-conflict scenarios, the study of transitional justice is of importance if the lingering effects of such conflict are to be addressed and by so doing, lasting peace and reconciliation is to be achieved; moreover, the State is enabled to move past any atrocities with “buy-in” by the citizenry. This study aims at assessing the best transitional justice mechanism that will ensure the trigger points and manifestations of the conflict in Somalia and South Sudan are uncovered, conveyed, discussed and reconciled.

Some transitional justice mechanisms have been criticised for bringing about “victor’s justice”<sup>ix</sup> from the Nuremburg trials to date. The consequence of this is not only a perception of failed justice, but also an increased possibility of recurrence of conflict. More often than not, where one side feels invincible to transitional justice mechanisms, the possibility of impunity arises, and with it the threat of violence increases. Proportionately, where one side feels humiliated and condemned while feeling the other side has not been punished, resentment and hostility arise which opens up the possibility of violence.

All sides must be held accountable, regardless of political standing, wealth or stature. To do so requires the willing participation of the entire citizenry. However, as neither Somalia nor South Sudan are completely free from war or the underlying triggers, there is need to study how best to achieve willing participation in transitional justice which hopefully will work towards resolving the disputes in their entirety. As such, this study is of importance as it will assess instances where citizen participation has both been embraced and not and the effects of each choice.

Additionally, by providing an assessment into the past criticism directed at transitional justice, it is envisaged that the lessons learnt will aid the two states in formulation of policies that foster justice, peace and lasting reconciliation. The study will provide insight into best practices which will be invaluable to academic progression of the study area as well as being put to practical use in policy formulation and implementation.

## **1.6 LITERATURE REVIEW**

### **1.6.1 Transitional justice**

Transitional justice is gaining more significance as the term used to describe the approach taken by post conflict societies to deal with the aftermath of conflict in a manner that leads to sustainable peace, justice and reconciliation. The term has increasingly been used to describe an ever expanding range of mechanisms and non-judicial measures to recompense any human rights abuses. These mechanisms and non-judicial measures include tribunals, truth commissions and reparations which are applied in a bid to bring redress for past wrongs. In addition, it envelopes an ever expanding scope not limited to vindicating the dignity and recognition of the victims and provide justice in times of transition but also bringing about and maintaining peace once conflict abates.

Notably, the definition of transitional justice differs from one scholar to the next, although the vast majority describe it in terms of the mechanisms and institutions that bring about justice. As such, these definitions are quite expansive as they include trials, truth commissions, reforms and, where possible, reparations\* with each either working on its own or in a combination. In fact, one definition of transitional justice gives it as eight “separate but interrelated processes, of which some, if not all, are necessary to account for past wrongs: official acknowledgement of harms done; official apologies and other gestures; the promotion of public fact-finding or truth-telling

fora; justice in the form of trials; the establishment of rule of law; public gestures of commemoration like the creation of monuments, memorials, and holidays; institutional reform; and public deliberation”.<sup>xi</sup>

However, recently the definition gaining more ground is that by the United Nations Security Council which defined transitional justice as, “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice, and achieve reconciliation. These may include judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”.<sup>xii</sup> This definition is the foundation upon which this study is based and that which will be relied on when discussing whether transitional justice can work in Somalia and South Sudan.

### **1.6.2 Does transitional justice work?**

As transitional justice is gaining more relevance in post conflict scenarios, scholars have noted that transitional justice also lays a strong foundation for lasting and improved democracy in the post-conflict state, and perhaps more importantly a great increase in the observance of human rights. This has been recorded at the Transitional Justice Data Base.<sup>xiii</sup> Several studies have been carried out with some seeking to explore whether or not transitional justice improves democracy and human rights, and others looking into whether one or more mechanisms do so better than other mechanisms. As a result of the findings derived from previous studies regarding the achievements of transitional justice, some assumptions as to how transitional justice contributes towards improving democracy and human rights have been confirmed while others have been dispelled.

In order to achieve repaired democracy and improved observance of human rights, transitional justice must contain unique mechanisms including, trials and amnesties as well as truth commissions. Findings have shown that a justice based mechanisms, where the approach generally advances a respect of human rights, promotes accountability and stability and overall provide3s a positive condition for democracy to grow, are best placed. However, other findings illustrate that truth commissions, when relied upon alone, have a negative impact on advancing democracy and respect for human rights, but contribute positively when combined with trials of perpetrators and amnesty where appropriate.<sup>xiv</sup>

The assumption as to the ability of single mechanisms to achieve improvement of human rights and democracy has been challenged and an assertion made that a combination of multiple mechanisms has a better success rate. In exploring the limitations of trials that assign accountability for mass atrocities to individual leaders, some authors offer a model to understand the contribution of these trials to social reconstruction. These authors state that there has been a shift from calling out for individual leaders responsible for mass terror, towards a press for states to initiate proceedings against both the leaders and their followers.<sup>xv</sup> However, other studies still hold that the ultimate responsibility for mass atrocities should be borne by the leaders in totality as it is they who call upon the masses to take up arms.

In Rwanda for example, the *Gacaca* has been criticised for targeting the larger Rwandese citizenry. The *Gacaca* trails are said to have largely failed to deliver on its stated goals of justice, truth, reparations, and reconciliation. Instead it fostered a culture of accusatory practices by unleashing accusations against millions of suspects instead of dealing with the 120,000 it was intended to. Secondly, due to the large numbers of suspects, the quality of hearings was



compromised for quantity which in turn produced unfair trials and so undermined truth-telling, justice, and civic trust. Thirdly, the *Gacaca* was poised on voluntary participation, but it was reported that large numbers were coerced to attend and consequently those numbers kept silent which resulted in a negative impact on truth-telling and trust<sup>xvi</sup>.

One interesting study used practical experience lessons and transitional justice theories to develop a model christened “transformative justice”. Transformative justice supports maintainable peace building by shifting the focus on transitional justice as being an interim process, but instead thinking about it as being transformational process. The study proposes a focus on inclusive participation in the transitional justice mechanism to be implemented. Furthermore, the author proposes long-term, sustainable processes which adopt psychosocial, political, economic and legal perspectives on justice be embedded in society. It is envisaged that with the adoption of this model, the result will be a reconciliation of restorative and retributive justice – key elements in contributing to sustainable peace.<sup>xvii</sup>

### **1.6.3 What makes transitional justice unique?**

Bringing an end to conflict is hard. The hatred running between the sides embroiled in conflict runs deep, the fighting often spills over from battlefields and tempers often flare which only surmounts the problem faced when peace is mentioned. To achieve reconciliation, the approach taken must be capable of handling a multifaceted approach. Each of the warring factions has to feel they are gaining from the approach. This is where transitional justice prevails.

By applying a combination of mechanisms, transitional justice is able to bring about peace while addressing injustice. It is able to bring enemies to a negotiating table and cause citizens to feel injustices meted against them by a dictatorial regime have been addressed. The most successful transitional justice approaches applied in post conflict scenarios are those that are

cognisant of the impact that violent atrocities in societies and that seek to foster contributory, socio-emotional and distributive forms of 'social learning' among former enemies.<sup>xviii</sup>

Furthermore, delivery of justice to victims of conflict is easier to achieve through collaboration of transitional justice mechanisms and especially with harmonization of restorative and retributive justice in criminal trials. This is further enhanced where trials are conducted within a 'rights paradigm', understood against different procedural traditions and practices in various jurisdictions.<sup>xix</sup> In conflict, sometimes the afflicted are averse to 'western' methods of conflict resolution. As such, it is important to include some 'traditional' aspects of conflict resolution in the transitional justice mechanism applied. The entire society must understand their roles and be involved in maintaining peace for reconciliation to be achieved.

Through comparative studies of civil war and international conflict and the impact of reconciliation thereafter lends a view to why reconciliation restores social order. Successful reconciliation has been pegged on national forgiveness rather than a negotiated peace settlement between warring factions. In the history of transitional justice, all reconciliation mechanisms have been pegged on a four pronged approach of public truth telling, justice, redefinition of former belligerents, and a call for a new relationship.<sup>xx</sup>

The strength behind a successful transitional justice mechanism is in the application of a multiplicity of approaches with a similar goal. A successful transitional justice mechanism must therefore have inclusive, meaningful, participation by the entire society. It cannot succeed if the citizens feel left out either because of the approach taken or for failure to be heard. Similarly, it cannot succeed if one of the parties to a conflict feels short-changed or overlooked. Each party to the conflict must feel that they are valued and that their contributions are taken into account.

Taking cognisance of the criticism directed towards transitional justice, it is clear that failure to do so will most likely lead to – at best – a partial failure of transitional justice.

#### **1.6.4 The Somali conflict**

The origins of Somalia's conflicts can be traced to the 1800's when Britain, Italy and France were all fighting for pieces of the Horn of Africa, each of these national signed a series of treaties with the five kingdoms of Somalia.<sup>xxi</sup> Resultantly, parts of the North of Somalia were managed by the British and the South governed by Italy.<sup>xxii</sup>

In 1960 Somalia gained independence under President Aden Abdullah Osman Daar, but independence was granted to a very fragile country whose grasp of economic and political intelligence and independence was lacking. These inabilities can be traced back to the fact that there were stark difference between how Italy and Britain administered their respective protectorates. Italy had developed an economic and political plan whereas Britain was largely accused of neglecting its territory and resultantly stagnating it both economically and politically. The different modes of control begun to ingratiate regional traditions and clannism and this in turn would later would lead to the difficulties to merge and integrate the two territories, and at the end of colonialism which attempted to unify Somalia, competition between the two was predictable.<sup>xxiii</sup> The lines which had divided them previously would become fault lines for conflict, and this has been compared with other post-colonial African states which deteriorated into violence following the colonial era.

In 1967, President Daar lost the election to Prime Minister Abdirashid Ali Shermarke<sup>xxiv</sup> and barely 9 years into independence, President Shermake was assassinated and a on

21 October 1969 the Somali Army seized power by a military coup. At the helm of the insurrection was Major General Mohamed Siad Barre, who subsequently took power which he held until 1991. It is worth noting that despite Barre outlawing “clan loyalties” he did support clan elders to maintain control of rural areas<sup>xxv</sup> furthering, though unknowingly, the clan divide in Somalia.

The Somali people were overall disillusioned with the Barre regime, the starvation crisis had not changed since independence and the military rule, essentially a communist dictatorship, was making the government increasingly unpopular which bred. The regime attempted to create a centrally governed state on a Somali civil society who as a result of colonialism, had never formed a single cohesive, centralised nation.

*“This unstable political form—maintained only through violence—would prove to be a pressure cooker for conflict”<sup>xxvi</sup>*

It is worth noting that due to its increasing communist views Somalia during the Cold War<sup>xxvii</sup> was a strategic importance to both the USSR and United States, However, upon the easing of the Cold War tensions, Somalia’s importance and global support was waning which allowed for resistance movements supported by Ethiopia (who was essentially retaliating for its loss of the Ogaden territory.)<sup>xxviii</sup> President Barre took retaliatory measures against those he deemed as supporting the rebellion by summarily executing rebels and bombing cities allied to the rebellion forces (United Somali Congress). The United National Development Programme, “Human Development Report 2001-Somalia”<sup>xxix</sup> termed the *“the 21-year regime of Siyad (Siad) Barre had one of the worst human rights records in Africa.”* The report outlines systematic Human Rights and Political abuses carried out by the Barre regime, ultimately leading to the coup in 1991. Nonetheless, by 1988, full scale civil unrest had gripped Somalia forcing Barre to withdraw into his own clan essentially rendering him a warlord like most other groups now baying for power.

By 1991, Barres regime collapsed with a coup forcing Barre into exile; the fall of the regime resulted in the Somali forces splintering and become regional or clan based forces. The 1991 coup was different from the 1969 take over, because no single person or party was agreed upon to take leadership. The fall of the regime led to the apparent fragmentation of the state and a localisation of political authority to regional, district and clan levels without a cohesive structure of governance. <sup>XXXX</sup>

The period that followed lasting up to 1995 witnessed a methodical devastation of infrastructure, collapse of economic entities and structures, tribal cleansing, stealing and looting of assets by the fifteen warring factions and militia groups. It was during this time that the UN Security Council Resolution 733 and UN Security Council Resolution 974 were passed in favour of the creation of United Nations Operation in Somalia (UNISOM) I and II respectively for security of humanitarian missions, peacekeeping and stabilisation of the deteriorating country. Ultimately on 3<sup>rd</sup> March 1995, the UN ultimately withdraws from Somalia.

The first tangible moves towards peace and a consolidated government somewhat recognised both internationally and locally, was the Transitional National Government (TNG) formed in August 2000 following the Somalia National Peace Conference in Arta, Djibouti. However, the Government was plagued with poor infrastructure, the inability to collect taxes, lack of territorial control over Somalia, and perhaps most importantly, the inability to provide social services.

Due to the above pitfalls, TNG was succeeded by the 14<sup>th</sup> attempt at a cohesive government, the Transitional Federal Government (TFG) in 2004 under duly elected President Abdullahi Yusuf Ahmed which was the first internationally recognised government in Somalia since its collapse in 1991. However, in March 2005, the parliamentarians of TFG split and the

militia group Alliance for the Restoration of Peace and Counter-Terrorism (ARPCT) seeing the weakness in the government, decided to confront the Islamic Courts Union (ICU- rival administration to TFG which was based in Mogadishu) in an attempt to seize Mogadishu, but the ARPCT were defeated. However, following Ethiopia's support for the TFG, they assisted in defeating the ICU in December 2006 and recapturing the capital, Mogadishu.

ICU in turn fragmented into several splinter groups, one of which is the infamous Al-Shabaab<sup>xxxii</sup> which once again turned Somalia into a battle ground between 2006 and 2009, most notably when they managed to secure the retreat of the Ethiopia in January 2009. The retreat of Ethiopia left only the AU forces who were grossly understaffed and the ongoing arms-embargo led to the inability to adequately constitute a national force. December 29, 2008, Abdullahi Yusuf Ahmed once again left Somalia lacking a central authority, retreating to its default setting, clannism.<sup>xxxiii</sup>

Further peace talks were held in 2009 led to the establishment of the coalition government under President Sheikh Sharif Sheikh Ahmed, within months of his ascend to power, he seceded more land in Somalia's conflict zones to militia groups, again the central government lacked territorial control over its county. Since 2009, Somalia's main adversaries have been Al-Shabaab militia prolonging the fighting and spreading the same regionally with several terrorist attacks across the border. This led to the intervention known as Operation "Linda Inchi"<sup>xxxiii</sup> where in October 2011 the Kenyan Government entered Somalia to secure its porous border. Notably, in August 2012 Somalia elected its first formal parliament who elected Hassan Sheikh Mohamud in September 2012 President ending an eight year transition period.

Since the 1991 coup, a lot has been done by the international community to re-establish state structures and gain territorial control, but it still has a difficult road of reform ahead of it. In

terms of governance reform, Somalia still must still re-establish its internal boundaries, decide on the powers of Somalia's constitutive states and hold free and credible elections. The ever worsening humanitarian crisis<sup>xxxiv</sup> continues in Somalia and socially the government must deal with infrastructure, literacy, immigration, tax collection and a host of other issues in order to become a functional government.

Most importantly, in order to fully move forward all the issues from independence, the Barre regime and human rights violations thereon, and the over twenty six years of fighting ought to be addressed.

### **1.6.5 The South Sudan Conflict**

The current South Sudan and Sudan were under colonial Egypt until they gained independence in 1956 where it inherited its boundaries from Anglo-Egyptian Sudan. Since Once again, we see that Britain neglected its territory by instituting a "divide-and-rule" strategy which separated the North from the South. They heavily invested in the Arab North, but essentially neglected the south which consequently slowed down their economic and social development.<sup>xxxv</sup>

Moreover the "indirect rule" divided the south into hundreds of informal units where tribal leaders were given the authority to rule over their clans, this was contained in the British Southern Policy in Sudan.<sup>xxxvi</sup> Though the policy was revoked in 1946, the same had irrevocably differentiated the Country without separating them politically. This laid the ground work that upon independence where the South were not even invited to the pre-independence negotiations and, therefore, the stronger more educated, economically favoured and socially aware North would attempt by force to assimilate the underdeveloped South by force.

The First Sudanese War<sup>xxxvii</sup> was fought from 1955 to 1972, where the Southern insurgents fought for greater autonomy from the North. The conflict was triggered when a southern member

of the nationally assembly was wrongfully prosecuted for treason, causing a mutiny by the Sudan Defence Force Equatorial Corps which developed into pockets of insurgency. The rebels had their own internal problems including internal ethnic divides. The war was described as:

*“period from 1955 to 1963 was simply one of guerilla survival, scarcely removed from banditry, and that it was successful due to a score or so of former southern army officers and warrant officers, and a small number of non-commissioned officers.”<sup>xxviii</sup>*

The war, however, did lead to several change of governments over the 17 year conflict. In 1958 and 1964 a coalition and interim government were formed respectively both of whom were unable to deal with the guerrilla warfare. This lead to several Islamic administrations between 1966 and 1969 who were unable to deal with the multifaceted problems of the war. This inability led to two military coups in May 1969 and July 1971, however, military style government led to further protests and rebellion as its domineering martial nature was unpopular.

However, the 1971 coup under Joseph Lagu managed to unify the insurgents under the Southern Sudan Liberation Movement (SSLM), and for the first time was lauded making a cohesive attempt to secede and form an independent South Sudan. This unified administration leadership was able to then negotiate the end of the war under the Addis Ababa Agreement in May 1972.<sup>xxix</sup>

The Second Sudanese War which lasted over twenty two years from 1983 to 2005 is one of the longest civil wars in history, which essentially picked up from where the First Civil War had ended. This was precipitated by several violations of the Addis Ababa agreement including the attempt by the President Gaafar Nimeiry to seize the oil fields in South and was fuelled by Islamic fundamentalists in the North who were dissatisfied with the apparent autonomy of the South. The war which had several horrific outcomes, ended with the signing of a Comprehensive



Peace Agreement<sup>xi</sup> on 9 January 2005 in Nairobi. Most notable was the formation of the Autonomous Government of South Sudan who would, within six years, hold a referendum, a right which was exercised.

South Sudan stands out on the global arena for being the youngest state having seceded from the greater Sudan. <sup>xli</sup> The novelty was short lived when scuffles within the country commenced after the sacking of the Vice President, Riek Machar and the entire Cabinet in June 2013, on suspicion of conspiracy to oust the current president in a coup d'état. <sup>xlii</sup> It has been argued however, that the alleged coup was fictional, but one thing that is definite is that a political disagreement has escalated into ethnic violence. President Salva Kiir's preferential treatment of his fellow Dinka citizens that has been anything but subtle, as he has been accused of excluding all other ethnic groups from vital state functions and stripped them of any civic or military positions that they held<sup>xliii</sup>. Moreover, the now military-capable opposition comprised of the Nuer mostly could not stand the ousting of their fellow clans man, Machar, from his position of Vice President.

In January 2014, despite a ceasefire being signed, fighting continued between the SPLM and the SPLM-IO, the government and rebel forces allied to Machar forces respectively, continued prompting the Deputy President to flee the Country. The Compromise Peace Agreement<sup>xliv</sup> signed in 2015 allowed him to return to the country where he was re-appointed Deputy President. Unfortunately, this did not last long as fighting broke out again, and the Deputy had to flee, prompting the President to replace him.

As usual, the armed conflict had overwhelming effects on civilians and continues to threaten to become a full scale ethnic war. Apart from mass killings, just under 2 million civilians have been internally displaced and the number continues to rise. The IDPs are hoarded into camos that are already past their capacity which further puts a strain on social amenities within the camps.

Apart from those internally displaced, it has been noted that over 1.1 million civilians have sought shelters as refugees in neighbouring countries.<sup>xlv</sup> Moreover, as South Sudan is an oil rich country where over 95% of its revenue come from oil export, its production continued to be threatened by the same.

## 1.7 THEORETICAL FRAMEWORK

Theoretically the conflicts can be characterised by the “greed-grievance theory” which states that most conflict can be attributed to combatants need for enrichment i.e. favourable opportunities which make rebellion attractive.<sup>xlvi</sup> Moreover, the rewards of joining a rebellion far outweigh the costs associated with the same. Secondly, is the “using conflict theory” propounded by Karl Marx, where parties with different goals are aware of different goals and are frustrated as a result of competition for resources.

This research paper will be based on the social-learning theory of transitional justice espoused by Nevin T. Aiken in his book *“Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies.”*<sup>xlvii</sup> In it, the author advises that the synergy between transitional justice and reconciliation in divided societies is of critical importance. He goes on to state that transitional justice interventions will only be successful if they take into account “social learning” to transform formerly aggressive that divided the societies. Therefore, transitional justice will only be successful if they promote dialogue between former adversaries with a view to addressing any perceived inequalities.<sup>xlviii</sup>

The countries that form the basis of this study have both been ravaged by long standing civil unrest that has caused division along ethnic, political and religious lines. As such, for any

transitional justice interventions to be attained there is need to fully investigate and understand both the obvious and underlying causes of the conflict.

Reconciliation can be defined as “transforming the relations between rival sides from hostility and resentment to friendly and harmonious relations”, a long-term endeavour that requires former antagonists to “form new relations of peaceful coexistence based on mutual trust and acceptance, cooperation, and consideration of each other’s needs”.<sup>xlix</sup> Reconciliatory social learning involves social and psychological processes that engage former adversaries in challenging and redefining the conflicting belief systems that motivated past violence and which can replace these with more positive relationships and understandings.<sup>l</sup>

The post-conflict period presents a unique opportunity for reconciliation in divided societies and offer former enemies a chance to redefine their opposing identifications and relationships.<sup>li</sup> Transitional justice interventions are suited to serve as enablers of collective erudition in such opportune moments as they provide the first venue in which warring factions are brought together in the post-conflict environment to healthy speak about the past and reconsider their relationships going forward.<sup>lii</sup>

Therefore, the social learning that occurs during transitional justice assists in altering opposing perceptions, which in turn creates the conditions required for reconciliation and sustainable peace. However, learning about and ultimately altering the causes of conflict on its own is not sufficient to bring about peace. For victims of human rights abuse during periods of conflict, justice may be either redress or coming to terms with reality and forging ahead. As such, this study will also rely on the transformative theory of transitional justice.

Wendy Lambourne<sup>liii</sup> suggests that an approach that uses transitional justice as a tool towards peace is more suited as it considers the needs and wants of affected who may still want to

deal with past acts before moving forward to peace and reconciliation for the future. Lambourne reiterates that the affected society's expectations ought to be taken into account as, essentially, they are the actors and catalysts towards reconciliation and peace building.

The countries under study previously engaged in transitional justice programmes which failed due to a failure to include the entire society in the process. Whereas the reasons for this are varied, there is need for broad consultation in the process so as to ensure the opinions, needs and wants of all stakeholders are heard and factored in. This ensures that the society owns up to the process and any outcomes to be implemented are owned as opposed to being imposed.

Lambourne suggests a model of transformative justice that requires a shift from a "transitional" and hence interim process of linking the past to the future, towards a "transformational" and more long-term sustainable process, embedded in the society.<sup>liv</sup> As such, for transitional justice to be successful, it requires to encompass accountability, socio-economic factors, political factors and psychosocial needs. Taken together, these are the conditions necessary for reconciliation and sustainable peace.

## **1.8 HYPOTHESIS**

In conducting the study, the research has the following hypothesis:

1. Transitional justice can only be achieved where there is active participation by the community and the leaders at conflict.
2. The only way a transitional justice mechanism that can be successful is for it to incorporate elements of local conflict resolution as well as "western" transitional justice ideals.

## **1.9 METHODOLOGY**

This study is aimed at assessing attempts at transitional justice in post-conflict Somalia and South Sudan. The study considers whether these transitional justice mechanisms have been effective, state the role of the regional and international community in achieving transitional justice and identify policy issues that can be addressed for transitional justice to work. Therefore, qualitative approaches of data collection and analysis have been used. The data was collected from previous publications on transitional justice, its effectiveness and past attempts at it in Somalia and South Sudan. In addition, in depth interviews of experts in conflict and in transitional justice, as well as urban refugees were done. To analyse the data, content analysis was applied where the data was coded and indexed in order to illustrate similarities and differences. To analyse the responses collected during interviews, narrative analysis was applied with the responses being systematically gathered, analysed and represented with focus on the content thereof.

#### **1.10 THESIS OUTLINE**

Chapter one introduces the study by giving a background of transitional justice and stating the problem sought to be answered as whether transitional justice can work in post-conflict Somalia and South Sudan. Furthermore, it sets out the objective which is to assess the role of transitional justice as a solution in the Somali and South Sudanese conflicts. It also contains a literature review which looks at the concepts of transitional justice, highlighting the term as the approach taken by post conflict societies to deal with the aftermath of conflict in a manner that leads to sustainable peace, justice and reconciliation. Other topics covered in this section include the research questions to be solved, a justification of the study and the hypothesis on which the study is based. Furthermore, the section gives the theoretical framework as the social learning

theory of transitional justice. In the methodology section, it is noted that the main method of data collection is qualitative.

Chapter two is a study of transitional justice in Somalia. It will look at previous attempts at transitional justice in Somalia, if and why they failed, the previous mechanisms that were applied and if these mechanisms were best suited. It will also contain an examination of the traditional systems of justice in Somalia, look at their effectiveness, principles and aspects. Finally, it will examine the role played by international actors in previous attempts at transitional justice.

Chapter three is a study of transitional justice in South Sudan. It will look at previous attempts at transitional justice, if and why they failed, the previous mechanisms applied and whether they were best suited. Additionally, it will contain a study of traditional transitional justice mechanisms in South Sudan, their effectiveness, principles and aspects. Finally, it will examine the role played by international actors in previous attempts at transitional justice.

Chapter four presents an analysis of both Somalia and South Sudan in terms of what is required for transitional justice to work. It will be based on the study of previous attempts, and the success or failures thereof in the preceding two chapters. Furthermore, it will examine the role of international actors in future attempts at transitional justice. Finally, it will look at the aspects and effectiveness of traditional mechanisms of transitional justice, as well as their applicability in the modern day – either on their own or in tandem with modern approaches.

Chapter five will present conclusions and recommendations based on the objective of the study, and offer considerations that must be taken for any attempts at transitional justice in Somalia and South Sudan to succeed.

## **CHAPTER TWO**

### **TRANSITIONAL JUSTICE IN POST CONFLICT SOMALIA**

This chapter provides a study of transitional justice in Somalia. It contains an analysis of traditional systems of transitional justice in Somalia by analysing their principles, aspects and more importantly their effectiveness. It also looks at previous attempts at transitional justice in Somalia, their effectiveness and suitability. Finally it examines the role played by international actors in the previous attempts.

#### **2.0 HISTORY OF THE SOMALI CONFLICT: CAUSES, EFFECTS AND CURRENT DAY STATUS.**

The earliest forms of conflict in Somalia resulted from a combination of internal and external factors. Internal disagreements as to who wielded greater power between the centralized state authority and the kinship clan system. Externally there were the lingering effects of colonialism that had essentially divided the Somali people, the impact of the Cold War towards relations with other states, and the effect of wars with neighbouring states. The ongoing conflict has had multiple and complex causes including but not limited to competition for power and resources, repression, the colonial legacy, a highly politicised coterie identity, large numbers of unemployed youth and their access to weapons, and certain aspects of the Somali culture that sanction the use of violence.<sup>lv</sup> In addition, the scope has been widespread, between various groups fighting along religious lines, clan lines, and also between rebels against the government.

During the entire period of conflict, several transitional justice interventions have been attempted. A series of reconciliation attempts under the auspices of the United Nations (UN), African Union (AU), Arab League and the Inter-Governmental Authority on Development (IGAD)

include: the 1997 National Salvation Council in Sodere, Ethiopia; the 1997 Cairo Peace Conference/Cairo Declaration; the 2000 Somalia National Peace Conference in Arta, Djibouti<sup>lvi</sup>; the 2002 Somali Reconciliation Conference in Eldoret, Kenya; the 2003 National Reconciliation Conference in Nairobi, Kenya<sup>lvii</sup>; the 2004 Nairobi Conference; and the 2007 National Reconciliation Conference in Mogadishu<sup>lviii</sup>.

## **2.1 TRADITIONAL TRANSITIONAL SYSTEMS OF CONFLICT RESOLUTION IN SOMALIA: PRINCIPLES AND EFFECTIVENESS.**

Somalia has in the past two decades been categorized as a “failed state”, yet despite going through a period of statelessness and conflict, the Somali people have maintained a certain amount of order largely thanks to their traditional dispute resolution systems. The main forms of dispute resolution have been modelled in line with Religion (*Sharia*) and Customary Law (*Xeer*), and while each is distinct in form and usage, they are applicable in consonance to achieve the overriding objective of peace and dispute resolution.

### **2.1.1 *Xeer***

*Xeer* is a form of customary law, comprised of both civil and criminal law. It is administered by clan elders and focuses on restoration and reconciliation *vis à vis* punishment of the perpetrators of crime. While retribution, also plays a role, the focus lies less on punishment and more on restoration, aimed at reintegrating the perpetrator into society through reconciliation with the victim<sup>lix</sup> – an essential aspect of transitional justice.

In case of disputes, Somalis have traditionally reverted to *Xeer* to solve their problems. There are three levels of dispute resolution available: first, direct negotiation between the disputing parties; second, negotiation with help of a third-party mediator; and third, arbitration by a tribunal of clan elders chosen by the conflicting parties. The negotiations of the first two instances aim at



voluntarily reaching an agreement between both parties. If this cannot be achieved, the parties will establish a tribunal of elders who will act as arbitrators. Where the conflict is between two different clans, the *Xeer* court will comprise of elders from both clans. The parties involved commit themselves to complying with the decisions of the arbitrators, and the decision can also be enforced.<sup>lx</sup>

With regard to enforcement, the *Xeer* system is collective in character. As such, the immediate victim of a crime, his family and even sub-clan are entitled to any compensation to be sought from a perpetrator. In the same vein, the perpetrator, his family and even sub-clan are liable to pay any fine imposed. It is this collective responsibility which helps to enforce the judgments of the *Xeer* courts and serves as an incentive for families and clans to prevent crimes in the first place by exerting social pressure upon their members.<sup>lxi</sup>

One major problem of the *Xeer* courts is the lack of an independent, third-party militia that could back up the decisions of the elders with (the threat of) legitimate force.<sup>lxii</sup> Reliance is placed on its collective nature since that acts as an incentive for families and clans to prevent crimes from occurring in the first place. In addition, in *Xeer* courts, customary law is interpreted by the clan elders, and so another means to influence the behaviour of individuals and groups is the modification of the *diya*<sup>lxiii</sup> (blood money) to be paid as reparation for crimes and offences committed<sup>lxiv</sup>. On the other hand, individuals can also change their affiliation to sub-clans and chose new elders if they are discontent with their judgments, an option that is often used in Somalia.<sup>lxv</sup>

### **2.1.2 Sharia**

*Sharia* is the highest form of Islamic law, based on teaching from the Quran, the *Sunnah* which are principally the codified teachings, deeds and sayings of the Islamic prophet Muhammad, and the supreme law that must be followed by all Muslims.<sup>lxvi</sup> In contrast to *Xeer*, *Sharia* exists in a universal, codified form that cannot be changed. It is a punitive law code focused on individual responsibility. It has capital punishment for severe crimes, yet also incorporates compensation payments for certain crimes.<sup>lxvii</sup> Forgiveness also plays an important part in *Sharia*, leaving room for instance to forego capital punishment for a murder and opting for *Diya* instead. Thus, while codified, *Sharia* can be interpreted differently, ranging from liberal interpretations (where it concerns mostly family law) to radical ones (where it pertains to every aspect of law and morality).<sup>lxviii</sup>

### **2.1.3 The collective use of *Xeer* and *Sharia* in conflict resolution**

Somalis have used a combination of *Xeer* and *Sharia* to deal with disputes and crimes. Traditionally, *Xeer* has been used for the majority of conflicts, including major disputes like homicide, theft, or conflicts over ownership and access to land and water wells, whereas *Sharia* has covered mostly issues pertaining to family law like marriage and inheritance. Notably, the latter enjoyed greater popularity in urban areas, where Muslim clerics are more readily available, than in rural ones.

With both *Sharia* and *Xeer* at their disposal, victims could either apply the punishments under *Sharia* or in line with *Sharia's* principle of forgiveness, opt for a negotiated settlement under *Xeer*. Similarly, *Sharia* could be used to assess the amount of *Diya* to be paid, or in cases where

the dispute in question was not covered under *Xeer*, *Sharia* could come in to assist. Furthermore, *Sharia* could be applied in cases where dispute resolution under *Xeer* failed – as a last resort.

The collapse of the Somalia was characterised by a rise of the Islamic courts where *Sharia* increased in popularity, especially in the urban areas that had Islamic courts, because these courts applied stricter rules and had militias capable of effectively enforcing their decisions, subsequently increasing public safety.<sup>lxi</sup> While the initial Islamic courts were based on *Xeer* and decisions were made in consultation with elders, its radicalisation during the rise of Islamist courts led to a reduction of its role, as the interpretation of *Sharia* became more fundamentalist.<sup>lxx</sup>

## **2.2 AN OVERVIEW OF PREVIOUS ATTEMPTS AT TRANSITIONAL JUSTICE IN SOMALIA, ITS SUCCESSES AND FAILURES**

Traditional systems were embraced at the local levels as essentially that as all the “law and order” available to the citizenry which would resolve the conflicts and effect an element of normalcy. Conversely, ending the national level has failed to embrace ending the conflict. A series of reconciliation attempts under the auspices of the United Nations (UN), African Union (AU), Arab League and the Inter-Governmental Authority on Development (IGAD) include: the 1997 National Salvation Council; the 1997 Cairo Peace Conference; the 2000 Somali National Peace Conference<sup>lxxi</sup>; the 2002 Somali Reconciliation Conference; the 2003 National Reconciliation Conference; the 2004 Nairobi Conference<sup>lxxii</sup>; and the 2007 National Reconciliation Conference in Mogadishu<sup>lxxiii</sup>.

### **2.2.1 The 1997 National Salvation Council in Sodere, Ethiopia**

By 1996, despite the fact it failed to garner international recognition, a self-declared Republic of Somaliland, led by Muhammad Ibrahim Egal, was functioning. In the rest of the

country, there were other factions loosely grouped into alliances including: the Somali Salvation Alliance (SSA), headed by Ali Mahdi Muhammad; the Somali National Alliance (SNA), first formed by General Mohammed Aideed, who died in 1996, and in 1997 led by his son Hussein Aideed; and a third alliance led by the Aideed's former financier, Osman Hassan Ali ("Ato"), th. Both the SSA and SNA alliances claimed to head governments and their leaders used the title "president."

In October 1996, 26 Somali leaders affiliated with SSA factions, met in Kenya with the aim of establishing a government to rule over the entire state of Somalia. The aim of the meeting – which was met, as per a subsequent statement issued – was to culminate in commitments to *inter alia*, a cessation of hostilities, removal of all regional roadblocks to allow free movement, and a commitment to continue dialogue towards a lasting peace. Consequently, the IGAD, organised a meeting in Sodere, Ethiopia, on the 3<sup>rd</sup> day of January, 1997, which was attended by the leaders affiliated with SSA, but boycotted by those affiliated with SNA and the Republic of Somaliland.

The meeting, known as the 1997 National Salvation Council, aimed at buttressing the commitments set out in the previous meeting – held in October 1996 – in a bid to establish a single functional government for the Somali state. In a Declaration of National Pledges and Commitments,<sup>lxxiv</sup> the leaders in attendance agreed to the establishment of the National Salvation Conference (NSC) and a National Executive Committee in preparation to the eventual establishment of a Transitional Central Authority or Provisional Central Government of Somalia. The declaration provided that the NSC would be composed of 41 members selected from the 26 political movements with an 11-member national executive committee led by five co-chairmen. The declaration called for the pursuit of a five-point program to:

- Work towards the restoration of peace, stability, law and order;
- Help reconcile the differences among the clans in conflict zones;
- Draft a Transitional National Charter for the Transitional Central Authority;
- Cooperate and facilitate the provision of emergency relief and rehabilitation programmes and other social services; and
- Act as the counterpart to the international community in efforts to assist the reconciliation and rehabilitation process.

In addition to this program, the United Nations Security Council (UNSC) also called for a cease all hostilities and cooperation with regional and international efforts towards peace and national reconciliation. The Council reiterated that the responsibility for achieving national reconciliation and restoring peace rested with the Somali people. Furthermore, it restated its call upon all States to fulfil their commitments under the arms embargo imposed by Resolution 733<sup>lxxv</sup> and called upon them to refrain from any actions which might exacerbate the situation in Somalia.<sup>lxxvi</sup>

However, in spite of the pledges and commitments made, the five point program proposed was not implemented due to various reasons. The main reason being the non -inclusion of the factions allied to SNA and the Republic of Somaliland. Both Hussein Aideed (representing SNA) and Mohammed Egal (representing the Republic of Somaliland) claimed to have been elected by their respective people and both rejected the formation of the NSC, with each laying claim to the leadership of the entire state of Somalia.

In addition, despite a call from the UNSC, none of the faction leaders agreed to disarmament and so fighting in several areas continued almost unabated. For instance in Mogadishu, there were

clashes between the militias of Osman Hassan Ali (Ato), and Ali Mahdi while in the south Somali plain, the local Rahanweyn clans contested Hussein's control causing the southeast conflict to continue.

Moreover, another factor leading to the stagnation of the peace efforts was the rise of Islamist militia groups, such as the Sudan-backed Al-Ittihad. The groups carried out several attacks in Ethiopia leading to repeated methodical cross-border attacks by Ethiopian troops where the militias were cleared from their bases. Unfortunately, these skirmishes only underlined the 1997 meeting's failure to achieve lasting peace.

### **2.2.2 The 1997 Cairo Peace Conference**

In December 1997, a meeting known as the Cairo Peace Conference was held in Cairo, Egypt. It was co-chaired by Hussein Aideed and Ali Mahdi, and had representatives from 25 Somali clans. The aim of the meeting, just as the one held earlier in the year in Sodere Ethiopia, was to establish a single functional government over the entire Somali state. However, just as Hussein Aideed had refused to attend the meeting held in Sodere, there was non-inclusivity of all the faction leaders at the Cairo Conference.

Abdullahi Yusuf Ahmed and Adan Abdullahi Nur Gabeeyow who were both co-chairmen of the NSC, left the Cairo negotiations in protest against the selection of Aideed-held Baidoa as the venue for the reconciliation conference.<sup>lxxvii</sup> Additionally, the faction leaders with close ties to Ethiopia, such as Abdullahi Yussuf, withdrew from the talks which they termed as hostile towards Ethiopia.<sup>lxxviii</sup> The non-inclusivity notwithstanding, the conference proceeded and resulted in the signing of the Cairo Declaration.

The Declaration contained a decision to adopt regional autonomy by a federal system and an agreement to form a transitional government of national unity. Moreover, an agreement was made proposing another inclusive conference of reconciliation in Baidoa, Somalia, through which a presidential council and a prime minister would be elected. Furthermore, the leaders present agreed on the creation of an elected constituent assembly, the establishment of an independent judiciary and the preparation of a transitional charter. With 28 signatories, the conference saw a greater participation than the previous one held in Sodere, Ethiopia earlier in the year. This indicated positive momentum and significant progress in the drive towards reconciliation.

Building on this, the UNSC called upon Somali leaders to build on that momentum, include the widest possible participation in the reconciliatory efforts and in particular observe a ceasefire and end all hostilities. Furthermore, the Council reiterated its call upon all States to implement the arms embargo imposed by Security Council Resolution 733<sup>lxxxix</sup> on delivery of weapons and military equipment to Somalia and to refrain from any actions which might exacerbate the situation there. The UNSC also encouraged the Secretary-General to continue his consultations with the Somali parties, and all interested to support all peace and reconciliation efforts.<sup>lxxx</sup> It requested the Secretary-General to keep it regularly informed and to submit a report about those consultations and developments in the situation in due course<sup>lxxxi</sup>.

Following the Cairo Declaration, Hussein Aideed, Ali Mahdi and Ali Ato, agreed to the re-opening of Mogadishu's air and sea ports and to the elimination of the "green lines" which had divided Somalia since 1991. The meeting also agreed to the demobilization of clan militia into designated camps and the establishment of a collective security force for Mogadishu which would essentially work for the whole of Somalia.

However, problems began when agreements made during the conference began to be broken. On 14<sup>th</sup> February 1998 Ali Mahdi and Hussein Aideed announced that the Baidoa conference was cancelled citing technical difficulties. The conference was rescheduled to 31<sup>st</sup> March 1998, however, the announcement cast aspersions as to the future of the Cairo peace process. Aideed had not yet withdrawn his forces from Baidoa, as required under the Declaration. On 30<sup>th</sup> March 1998 the Baidoa Conference was again postponed, and was never held. Further opposition to the Declaration also emerged from the Ethiopians, who feared that an Arab-backed regime in Mogadishu would ferment Islamic fundamentalism.<sup>lxxxii</sup> As a result, despite the UNSC's lauding of the Declaration's efforts, the end result was a country without a national leader, with leaders such as Ali Ato openly stating that the Cairo Peace Process was dead<sup>lxxxiii</sup>.

### **2.2.3 The Somali National Peace Conference**

From 20<sup>th</sup> April to 5<sup>th</sup> May 2000 a series of meetings were held in Arta, Djibouti which cumulatively were known as the Somali National Peace Conference (SNPC). The conference was, once again, aimed at getting representatives of the combatant Somali factions to discuss peace initiatives to end protracted the civil war. The expectation of the conference was to once again re-establish Somalia as a sovereign state and map out the necessary steps towards establishing a democratically elected government.

The conference had official backing from the UN Secretary-General, the Arab League, the Organisation of African Unity (OAU) and IGAD. Attendance included civic and religious leaders, representatives of the business community and heads of main and sub-clans. A few of the less powerful warlords took part, but the more notorious Mogadishu warlords did not, and nor did Abdullahi Yusuf<sup>lxxxiv</sup> who objected to the lack of a federal structure.



It was structured in committees working on various aspects, which aimed at ultimately electing a Transitional National Council, a President and a Prime Minister. On 16<sup>th</sup> July 2000 the conference passed a provisional charter which provided for the appointment of an interim parliament consisting of 245 MPs 13<sup>th</sup> August 2000, elect a Parliamentary speaker and three deputies on 20<sup>th</sup> August 2000, elect an interim President on 25<sup>th</sup> August 2000 and appoint a Prime Minister on 8<sup>th</sup> October 2000, the Transitional National Government (TNG). The resolutions were wholly endorsed by bordering countries as a regional initiative of the IGAD. The international community also recognised the government enabling Somalia to reclaim its position and seat as a sovereign nation at regional bodies and the UN.

As in every previous meeting, the matter regarding fair participation presented challenges as the selection process of the clan elders was challenging especially since there was no one to confirm their legitimacy as an elder. A proposal for a geographical based power sharing model lacked consensus on that model as some leaders came from regions overrun by militia; women groups, religious groups, and civil society at large did not have either an agreed formula for representation and participation, or a unified common agenda for resolving the crisis causing them to revert to clan loyalty; and failure to engage some armed groups turned them into spoilers.

In spite of the noble outcomes and sound basis for the same, the expectations and outcomes of the Conference were never implemented. By condensing the time required to achieve peace in Somalia, the Conference befell a similar fate as that of the previous attempts. The sound basis that shifting from a centralised state to factional leaders was essentially to ensure participation of the people, and bringing power closer to the citizens. The UN, OAU, IGAD, Arab League, and the

Organisation of Islamic Conference all welcomed that approach. However, despite all the support, the same was reserved and reverted to a central authority.

Rebuilding a country such as Somalia after a long conflict was not just about making the implementation of a president or cabinet, it is at its core about restoration of trust and relations. It has long been advised that the way to rebuild trust, is a down-up approach starting with the grassroots so there is local ownership of the processes. This required time. A better approach to would been taken to implement the process in phases, where each different clan would develop its own unique institutions according to its local needs, but under an umbrella of a federal Somali state. This would be a long process, requiring much more time than the conference allowed.<sup>lxxxv</sup>

Additionally, as Ethiopia supported Abdullahi Yusuf, the international community failed to adequately support or assist the TNG. This resulted in a meeting between Yusuf and 17 other Somali political groups and alliances in Awasa, Ethiopia in March 2001. In that meeting the Somalia Reconciliation and Restoration Council (SRRC) was formed to oppose the Arta process and the TNG. The two sides had to be brought together if any progress in the peace process was to be made. In this regard, IGAD launched a national reconciliation process which eventually morphed into a set of meeting known as the Somali National reconciliation Conferences.

#### **2.2.4 Somali National Reconciliation Conferences**

From October 2002 to late 2004, the Somali National Reconciliation Conferences were hosted by Kenya and were geared at brokering peace in Somalia by runiting the TNG and the opposition SRRC. Unlike most of the past conferences, they were designed to address the source of the conflict issues rather than focusing exclusively on power-sharing deals. The conferences were to be spearheaded by a technical committee which recommended the containment of the

influence by armed actors, through signing of an agreement on the termination of hostilities and creation of room for engagement of unarmed leadership.

Representation was more inclusive than ever before, but as we have seen previously there was a dispute relating to representation and selection of delegates. There was also representation from transitional leaders as well as political leaders, the latter were given main focus and the former side-lined which aggravated the already fragile talks. The facilitators – a technical committee comprising of Ethiopia, Djibouti and Kenya – legitimised key the political leaders by forming a ‘Leaders’ Committee’, which led to a feeling that the process was effectively monopolized by these factional/political leaders. As a result, the talks focused heavily on power sharing rather than on peace building and root causes of the conflict.<sup>lxxxvi</sup>

However, representation issues notwithstanding, the meetings concluded in the in the ratification of a Transitional Federal Charter and consequently the establishment of the Transitional Federal Government (TFG). The governments mandate was for five years and was mainly pegged on transitional tasks including writing a constitution and stabilising the security within Somali.

Despite having received support from Ethiopia, the TFG lacked local broad-based support and therefore unable to establish itself in Mogadishu. The failure to establish as a legitimate authority saw the ascendant Islamic Courts Union (ICU) taking over much of south-central Somalia. Ethiopian and TFG forces defeated the ICU in early 2007 but the same led to a humanitarian emergency<sup>lxxxvii</sup> and the perpetual “winner takes all” approach. In addition, international engagement was based on a containment policy that now gripped the international community regarding the Somali crisis.

In the wake of the Conference, it was established that a proper power sharing formula based on representation, although necessary, was insufficient to guarantee the broad representation of all key stakeholders. A power sharing agreement had to be so broad based that faction leaders, business people, civil society and even traditional leaders all had to feature, for there to be grass root buy-in. In addition resolution of key conflict issues required dedicated attention as opposed to power sharing agreements. Moreover, competing regional agendas had to be addressed prior to attempting reconciliation and the establishment of a government.

Elected with 189 votes, Abdullahi Yusuf Ahmed was declared the president of the internationally recognised Somali Transitional Federal Government (TFG). As part of continuous peace building, the 25 candidates swore on the Quran that they would support the duly elected president and demilitarise, however, this did not happen. Despite being Somalia's central authority from April 2004 to August 2012, it was superseded by the current Somali Federal Government (SFG).

### **2.3 THE INTERVENTION OF INTERNATIONAL ACTORS IN TRANSITIONAL JUSTICE IN SOMALIA**

Through a protracted civil war in the 1980's which birthed a period of state collapse, warlordism in the 1990's, up to a conflict of ideologies in the early 2000's, the conflict in Somalia has constantly mutated through time. During the same period, the international community has also morphed from the cold war period to a war on terror – which has ultimately had a bearing on conflict resolution in Somalia and international responses to it.

In the wake of the 1991 Somali civil strife, international response to Somalia was belated because the wars in the Gulf and the Balkans had already commanded major international

attention. The Djibouti Government unsuccessfully tried to broker a deal in June and July 1991<sup>lxxxviii</sup> and it was only until 1992 when through a United Nations' diplomatic engagement that a ceasefire was negotiated between two major belligerents in Mogadishu. However, the United Nations Operation in Somalia (UNOSOM) was unable to curb the widespread violence or extensive famine that ravaged through the country.

In 1995, UNISOM and the US troops departed from Somalia instigating the role of IGAD in initiating and sponsoring the Somali peace process. Consequently, IGAD has made the continued fighting in Somalia as a priority agenda and has convened a number of peace talks aimed at establishing a central authority in Somalia.<sup>lxxxix</sup> This was furthered by a 2002 resolution by Heads of State meeting in Khartoum to bring peace to Somalia. They agreed to sponsor the Somali Peace and Reconciliation Conferences in which representatives of the Somali people would participate in establishing their own national government, a first in Somali history. An agreement signed during one of the conferences<sup>xc</sup> stipulated that all parties were to abstain from using violence as a means of resolving conflict. After two years of negotiations, the conferences, led to the establishment of the TFG as a legitimate government of the Somali people.

Despite these efforts, the TFG suffered from the problem of legitimacy<sup>xcii</sup> as there continued to be disagreements within the government and the ever present deterioration of the security within the Country. This instructively meant that there would need to be a restructuring of the TFG. In 2008 The UN mediated and IGAD facilitated Djibouti Peace Agreement<sup>xciii</sup> was signed between the old TFG and an ICU faction known as Alliance for Re-liberation of Somalia (ARS).<sup>xciii</sup> The agreement demanded a cessation of hostilities and the immediate withdrawal of Ethiopian troops and the deployment of an African Union peace keeping force – African Union Mission in Somalia

AMISOM. This was also passed at the UN UNSC Resolution 1725 of December 2006 also authorized the deployment of AMISOM. <sup>xciv</sup>

To this end, the AU Peace and Security Council (PSC) mandated AMISOM to support dialogue and reconciliation in Somalia, provide protection to the Transitional Federal Institutions, and provide support to all the disarmament and stabilization efforts.<sup>xcv</sup>

Interestingly, the continued Somali conflict had IGAD expanding its mandate to include the establishment of East Africa Standby Brigade (EASBRIG) which is essentially mandated to intervene in the internal affairs regarding governance and social rights including genocide or mass human rights violations, but most importantly the unconstitutional removal or change of government.<sup>xcvi</sup>

## **2.4 THE NEED FOR TRANSITIONAL JUSTICE IN SOMALIA, AND THE UNIQUENESS THE SOMALI CONFLICT PRESENTS IN TRANSITIONAL JUSTICE.**

Post-conflict reconciliation involves restoring the confidence in governance structures and the rule of law, but most importantly providing tangible hope for the future.. However, this requires capacity building of state organs while enhancing peace between the people – potentially contradictory processes as the former requires consolidation of authority, while the latter involves moderation through compromise and agreement. This delicate balance grants transitional justice a platform to thrive and is essentially what is required to end the conflict in Somalia once and for all. With the Somali conflict, neither processes will be successful without involving the Somali people.

With no consensus as to why transitional justice efforts have borne no fruit, the ineffectiveness can largely be attributed to several factors including: domestic spoilers such as warlords non-committed to peace and/or a central government; external impediments by neighbouring states that proffering their own interests; missed opportunities by external actors; and even a misdiagnosis of the causes of conflict and prescription of techniques required to solve it. However, despite lack of consensus as to why transitional justice has failed, the lessons learnt from the Somali conflict are of great importance to future attempts.

Notably, attempting transitional justice in a state categorized as “failed” negates the usual framework actors are accustomed to. Due to disputed representation, the reconciliation efforts absolutely have to be coupled with reviving collapsed state structures. In addition, the Somali people have buttressed the fact that where the people do not own the process, then the success thereof is likely to be minimal if any.<sup>xcvii</sup> Furthermore, representation plays a key role. The Somali experience enunciates the fact that if transitional justice processes are to be successful, then the involvement of all authorities is important – whether elders, intellectuals, business men or religious leaders, they must all be involved.

In addition, managing spoilers has to be a central consideration. The interests of these spoilers must be considered and their perceptions re-shaped for them to own any strategies. The Somali experience has shown that they can promote informal systems of law but consistently undermine the need for a central state. This necessitates the need to devise a strategy that reduces the threat posed by a centralized system of government. Once this is done, then reconciliation and justice may be successful.

Security and safety also require strategic attention since any Somali peace process model based on the notion of a central military force has constantly and consistently been unequivocally rejected. However, the same is a major concern in attaining sustainable peace and reconciliation. In this regard, a consensus-based approach calls for a joint command and responsibility for the security apparatus which is the only tangible approach to Somalia's security management.

There is also a need to identify a non-partisan party to lead the transitional justice talks. The Somali perceive many of the countries offering to take up the role as being partisan. Similarly too the UN, IGAD and the Arab League have lost favour. An entirely different entity requires to be considered – and backed by the previous ones – if it is to stand a chance at winning the confidence of all the Somali people.

Finally, there is need to rethink the stance taken by the conferences which have led to transitional governments. Most of these conferences have preferred to broker a power-sharing agreement over actual conflict resolution. The result has been transitional governments lacking unity. The Somali context has proved that the two are inseparable, and support for a state-building process must be accompanied by reconciliation efforts – no matter how bitter a pill to swallow.

## **2.5 CONCLUSION**

Somalia is “at the forefront of a poorly understood trend – the rise of informal systems of adaptation, security, and governance in response to the prolonged absence of a central government.”<sup>xviii</sup> However, it can be argued that the traditional systems of conflict resolution – *Xeer* and *Sharia* – can be the tools required to enable transitional justice work in Somalia. While historically, they have at times been an obstacle, the main reason was not necessarily due to their nature, but rather due to in the nature and circumstances of their use. With proper utilization,



coupled with inclusion of stakeholders, and backed with international support these mechanisms can be tailor made to suit the Somali people's current need.

The concept of a mediated state, once successfully implemented might be the most viable solution to the dilemma of Somalia's extended period of statelessness. If reconciliation is firmly entrenched within state building, Somalia may have a chance of lasting peace. In order to attain this, there's need for the various international actors to throw their weight and support behind one neutral mediator. By so doing, spoilers such as competing agendas, perceived "Western policies" and lack of legitimacy and ownership will be catered for.

To achieve a unified Somalia, a reconstruction agenda built around an integrated transitional justice framework ought to be set out. Such a framework must be constituted with caution, given that the effects of the Somali condition are so vast that an orthodox transitional justice approach would be inadequate. What ought to be pursued, is a framework capable of reaching out and tapping into the strength and heritage of Somali social institutions. The formulation of an integrated model based on traditional and modern practices could offer a valuable template for Somalia.

## **CHAPTER THREE**

### **TRANSITIONAL JUSTICE IN POST CONFLICT SOUTH SUDAN**

This chapter provides a study of transitional justice in South Sudan. It contains an analysis of traditional systems of transitional justice in South Sudan, looks at their effectiveness, principles and aspects. It also looks at previous attempts at transitional justice in South Sudan, their effectiveness and suitability. Finally it examines the role played by international actors in the previous attempts.

#### **3.0 HISTORY OF THE SOUTH SUDANESE CONFLICT: CAUSES, EFFECTS AND CURRENT DAY STATUS.**

The conflict in South Sudan began as a result of fighting between the Government of South Sudan forces and opposition forces. The conflict which essentially began before South Sudan gained independence, and has been characterized by several cease fires and disarmament campaigns, but nonetheless continues unabated as none of these have been able to achieve lasting peace.

Considering that South Sudan was a new national, the fighting added credence to the fragility of the fledgling state. It is yet to be determined whether the causes and triggers of these conflicts are local, national, political, economic, and social or a combination of all. What is clear however, is that the violence remains a volatile mix of local, inter and intra ethnic, conflict pervaded with political intrigues on a national level.<sup>xcix</sup>

In 2013, following an attempted coup, then President Salva Kiir, begun a restructuring of his Government, including a dismissal of then Vice President, Riek Machar. This led to tension between the two leaders. By December 2013, the two leaders who hail from different ethnic

communities<sup>c</sup>, but both members of the Sudan People's Liberation Movement (SPLM), were seemingly geared towards a collision course. Two opposing groups emerged in the SPLM – the group in the Government and the one outside government made up of dismissed ministers and governors – which was referred to as Sudan People's Liberation Movement – in Opposition (SPLM-IO). The SPLM-IO, in a press conference, stated the main differences between themselves and SPLM and called on the SPLM Chairman – Salva Kiir – to convene the Political Bureau in order to set an agenda for the anticipated National Liberation Council (NLC) meeting.

Machar announced a public rally to be held on the 14<sup>th</sup> day of December, but Kiir on the other hand announced the NLC meeting would be held on the same day. Local and church leaders appealed to both sides to postpone both the rally and the meeting so as to give dialogue a chance in order to reach an agreement on antagonistic issues. Machar agreed to the postponement, Kiir did not and the NLC meeting was held. On the 15<sup>th</sup> day of December as the meeting came to an end, Kiir ordered one of his generals to return to his headquarters and disarm the troops. General Marial implemented Kiir's orders. However, once he was done, he ordered the Dinka soldiers be rearmed which essentially was a clear beginning to the intra-ethnic tensions and obviously this did not sit well with his deputy – an ethnic Nuer. A brief scuffle ensued during which Nuer soldiers broke into the armory and rearmed themselves <sup>ci</sup> and subsequently taking control of the military headquarters, which triggered fighting in Juba between Marial's troops who were government battalions and those who were not. The next morning, Kiir called a press conference, and declared the fighting as a coup<sup>cii</sup>.

At the same time, the military headquarters near Juba University were attacked, heavy gunfire was reported and UNMISS announced that hundreds of civilians sought refuge inside its

buildings.<sup>ciii</sup> This was confirmed by the UN who also reported that people had gathered outside its compound seeking refuge from the fighting, unfortunately, this also led to government troops demanding that the UN surrender Nuer civilians seeking shelter there.<sup>civ</sup> Juba International Airport was closed indefinitely, a dusk to dawn curfew was imposed as state-owned SSTV (South Sudan Television) went off air for several hours.<sup>cv</sup> As an ally of the government, Uganda also joined the fighting under the guise of assisting to secure the airports to evacuate Ugandan civilians,<sup>cvi</sup> however, Machar stated that the Ugandan foray was more than an evacuation missions as they had allegedly bombed their positions in Bor<sup>cvi</sup>.

There was also fighting in Malakal, the administrative centre of the Upper Nile region, a state which at the time supplied all of South Sudan's crude oil. UNMISS also reported heavy fighting, with both the government and rebel forces claiming control over the town.<sup>cviii</sup> In the town of Bentiu, the capital of Unity State, military troops split along ethnic lines and subsequently clashed. Military commander James Koang, who swore allegiance to Machar, declared an “interim government” in Bentiu which forced the then governor to flee. However, a combined force of troops loyal to the government and rebel South Sudan Liberation Movement (SSLM) forces took back the town in January 2014.<sup>cix</sup>

In December 2015, Salva Kiir capriciously increased the number of states within South Sudan from 10 to 28 and subsequently appointed and swore in new governors he considered loyal to him or from his tribe. In this increase, Kiir's ethnic clan, the Dinka's, had a majority in strategic locations and increased Dinka control over land conventionally held by other tribes or factions. This move was also viewed as the governments bid to hold on to the peace deal so as to maintain international aid. This led to some disgruntled ethnic groups such as the Shilluk and Lotuko

forming rebel groups. These groups clashed with the Dinka Sudan People's Liberation Army (SPLA) troops in February 2016 at the Protection of Civilians (PPOC) site, which was housing nearly 48,000 people fleeing the civil war.

In July 2016, Kiir and Machar were holding a meeting in Juba and violence broke out outside the meeting place and spread through the city like wildfire.<sup>cx</sup> A spokesman for the SPLM-IO stated that South Sudan was "back to war" and that the fighting was an attack on opposition forces based in areas of Juba.<sup>cxii</sup> Kiir and Machar ordered a ceasefire after days of intense violence<sup>cxiii</sup> before Machar fled Juba. Kiir ordered Machar to return and continue with the peace talks, giving him a 48 hour ultimatum which Machar refused to honour. Unfortunately, this all culminated in a call for armed struggle by Machar against Kiir's government<sup>cxiiii</sup> and that the SPLM-IO would not participate in a workshop organized by the Joint Monitoring and Evaluation (JMEC), until the peace agreement was revised.

Despite the fact that South Sudan fought long and hard for their independence from Sudan, this has not stopped the incessant fighting which have far reaching implications including regionally and globally. The civil war in South Sudan is of concern to a whole region that had hoped to gain from the proximity the new state. The most notable regional impact of the war is the humanitarian crisis and growing monetary cost of the war. The various countries have let in numerous refugees from South Sudan regardless of the security, economic and political implications of handling such large numbers of psychologically-tortured and possibly politically volatile refugees.

The report titled **South Sudan: The cost of war**,<sup>cxiv</sup> clearly researched the economic effects of the war. It noted that continued conflict over five years would cost South Sudan's neighbours

including Kenya, Ethiopia, Sudan, Tanzania and Uganda up to \$53 billion, not to mention the increasing numbers of refugees and security concerns from the continued clashes. Plus due to the approximately near location to South Sudan each neighbouring state would eventually be forced either implicitly or explicitly to shoulder the political and socioeconomic consequences of the conflict.

Uganda being affected in this regard as members of the Lord's Resistance Army (LRA) having found refuge and comrades in the South Sudan uprising. Further, Uganda and Kenya face the ever growing financial impact of the war is crippling to their economies having established and invested in South Sudan extensively; Kenya's plan to offer South Sudan an alternative route for transport of its oil was also thwarted with the conflict. The fact that Kenya has also been dealing with Somalia as a failed state increases its interest not to see another regional partner descend into endless conflict and resultant militarised terrorist groups.

Ethiopia faces a serious security threat of spill over of the civil war across its borders that have prompted its government to spearhead, as well as host, most mediation talks. This is due to the fact that Ethiopia's federal system puts value and allocation in numbers, therefore, the Nuer refugee flow influx around Gambela region raises a significant problem as power is allocated in direct proportion to the population of the cultural communities.

Further, it was estimated that the international community as a whole would spend up to \$30 billion on peacekeeping and humanitarian assistance between one to five years in conflict. It has been estimated that over 700,000 have fled the South Sudan into neighbouring states which consists of a huge burden on these states, but still around 2.1 million are still displaced internally. The civil war has continued to also cripple food harvesting as the war raging has led to poor

agricultural conditions which in turn has led to the skyrocketing of food prices, and now areas of South Sudan are facing famine which consequently leads to an increase in the need of food aid. As of August 2017, a conservative estimate was made that stated 1.7 million people are on the edge of famine and 6.1 million face extreme hunger in South Sudan due to constant disruptions of planting and even the distribution of food aid. Moreover, 4.6 million are in need of general humanitarian assistance with over 88% being women and children who are most often hardest affect by any conflict.

Internally, South Sudan would suffer as the economy would not grow and indeed would contract, forfeiting between \$28 billion dollars in economic prosperity; the effects of the conflict on hunger and labour alone would cater for a drop in \$6 billion loss. The country's heavy dependence on oil as an income earner, over 70% of the GPD in the country's 2014-2015 budget, which has fallen dramatically due to the escalating conflict which in turn has led to the fall in provision of basic amenities. Additionally, the government borrowed over 1 billion from its central bank to finance war which resulted into huge debt for the government. Prior to the war, the debt to the Bank of South Sudan stood at 3.9 million, but the advent of the war saw that amount skyrocket to 8.1 billion by the end of 2014.

Unfortunately, the cost of war has far reaching implication as South Sudan's growth after the conflict will be constrained due to fragility, wanting governance and policy direction and general instability and regional tensions.

### **3.1 TRADITIONAL TRANSITIONAL SYSTEMS OF CONFLICT RESOLUTION IN SOUTH SUDAN: PRINCIPLES AND EFFECTIVENESS.**

The African continent has its own distinct systems of conflict resolution deeply engrained in its customs and traditions<sup>cxv</sup> which have been handed down through the generations and are inherently institutions with the African cultural set up. Traditional conflict resolution is a well-organised, socially engrained and a proven social instrument.<sup>cxvi</sup> Despite the fact that these cultural norms are engrained in society, the influx of modernisation, and global norms and standards, and the contemporary state still exerts influence on these institutions.

These traditions are unique as they are deploy not as revenge justice, but rather geared at catering for reconciliation and maintenance of social relationships and collective actions for achieving mutually beneficial ends.<sup>cxvii</sup> As such, in the African setting, conflict resolution focuses on reconciliation rather than justice based on the rules of law as is the case in the western concept of adjudication.<sup>cxviii</sup>

The traditional conflict resolution mechanisms are considered African if they are characterized by certain basic features. These include, first, being engrained in the African cultural milieu that values social harmony and unity.<sup>cxix</sup> Second, they are relatively informal<sup>cxx</sup> and third, they focus on the principles of human nature, cooperation and sharing.<sup>cxxi</sup> Fourth, they are all-inclusive and community based as they peg the whole community as parties to a dispute.<sup>cxxii</sup>

As the Dinka and Nuer tribes represent the major Nilotic ethnic group which is by itself the major ethnic group in South Sudan. In addition, the key features of conflict resolution adopted by these two tribes are replicated among the entirety of South Sudan. Finally, due to the availability of research resources relating to them, these two tribes will form the basis upon which this section



will be based. Moreover, considering the crux of the fighting regards these two groups, it would be prudent to focus on their forms of conflict resolution despite there being other tribes and groupings such as the Luo (such as the Shilluk, Jur Chol, the Anyuak, the Pāri, Lokoro and the Acholi) and Non-Nilotics such as the Azande who inhabit the Western Equatorial State in Southern Sudan

### **3.1.1 MAIN CAUSES OF CONFLICT IN SOUTH SUDAN (PRE-2013)**

Although there are still many small groupings of families and clans which are not yet accepted as being referred to as tribes, the ethnic groups found in South Sudan are the Nilotes, the Bantus and some Sudanese ethnic groups. Each of these ethnic groups has several tribes within but the Nilotes are by and large the largest with the Dinka, Nuer and Shilluk tribes present therein.

In assessing inter-communal conflict, the main traditional cause of conflict in South Sudan related to resources. The Nilotic tribes are cattle herders and fishermen, and their livelihood was – and indeed still is – largely dependent on these resources. During the dry season and as a result of seasonal movement in search of pasture and water, the tribes often clashed over the scarce resources available. In addition, due to drought, the herders often migrated towards the Nile River to water their animals, which in turned caused tension amongst them and the tribes who predominantly depended on fishing for survival.<sup>cxxiii</sup>

Another source of conflict in South Sudan arises out of the authority vested in traditional elders. Due to displacement of people as a result of war, coupled with their exposure to human right violations and awareness of their social rights, communities have become increasingly fragmented and mixed leading inevitably to a fusion of cultures, traditions and beliefs. Consequently, there has been a corresponding increase in contradictions as to which law to abide

by, and who the authority in the community is, since each of the community members hold divergent views.

Conflicts associated with land are also common. In this regard, conflict occurs where communities claim ancestral land from persons displaced as a result of war, others arise as between herders and farmers, or even as a result of disputes relating to ownership of land in urban or semi-urban areas. The latter is especially gaining notoriety as the conflict between the Government and the opposition forces seems to be slowly mellowing.

Other causes of conflict include: blood feuds which may emerge from criminal acts (especially murder) within or with outside communities, which could escalate beyond the parties involved to the entire baying for revenge; family disputes such as in cases of divorce, elopement or adultery, and especially in communities where bride price is paid in the form of cattle; and also where returning IDP's may find their spouses re-married, yet customs recognize the first marriages as the legitimate one<sup>cxix</sup>.

### **3.1.2 TRADITIONAL MECHANISMS OF CONFLICT RESOLUTION**

In South Sudan, due to the fragility of the state, many conflicts arise due to what parties think may happen, rather than an actual occurrence. The conflicts are triggered by socio-political inequalities exacerbated by underlying stress factors and the general unease following the 2013 clashes. Although the conflicts vary according to culture, security or season, their causative factors depend on geographical, socio-economic and political differences.

The Dinka and Nuer both have a traditional system of authority to enforce decisions as does most cultures in Africa. These authorities were known as the *Bany Bith* in the Dinka community and the *Kuar Kwac* in the Nuer community. As in most traditional mechanisms or

negotiations, the *Bany Bith* and *Kuar Kwac* did not have any political or executive authority, but rather the respect and moral force to ensure parties comply with the decisions made thereon. They performed sacrifices, oaths and mediated in all types of conflict. Their residences were sacred and any offender who sought refuge in their residences was spared by the offended.<sup>cxxv</sup>

Another important actor in conflict resolution was the *Bany Alath* who was a chief appointed by the Government. The *Bany Alath* is a member of the customary court, which made its first appearance by the virtue of the local courts legislation. The *Bany Alath* decided cases in customary law courts in consultation with the respective traditional authorities and as a result, the roles of these traditional leaders did not contradict. A key factor to mention is that mediation by the *Bany Bith* or *Kuar Kwac* required the consent of the parties to the dispute in order for the dispute to be settled. In addition, compensation was applicable in both civil and criminal cases, and different offences attached different forms and amounts of compensation payable to the victim or his family.<sup>cxxvi</sup>

Since the break out of hostilities, both conventional and traditional laws have been operational in South Sudan. From 1983–1994 in Sudan, the army being the head of the state resolved civil suits, however, in 1994 a convention was passed which gave civil authority to the judiciary. Although functional, the judiciary was not properly able to fully carry out its functions which was essentially a legacy of the military state. As such, the hierarchy of courts in place prior to the Comprehensive Peace Agreement included Regional and Executive Chief's Courts at the third tier; High Courts, County Courts and Payam (township/district) Courts at the second tier; and the Court of Appeal at the first tier. However, the Chairman of the SPLM sat at the apex of the entire judicial structure.<sup>cxxvii</sup>

The most palpable variance between the two courts was that State Courts (Court of Appeal, high Court, County Courts and Payam Courts) applied statutory laws while local courts (Regional Courts and Executive Chief's Courts) applied customary laws. Statutory laws were codified definitions of criminal conduct and types of punishment for such an act. However, customary laws were non-codified laws that have been transferred from generation to generation orally.

Secondly, was the differences in the proceedings of the Court. The legal proceedings in statutory courts followed the universal procedure of reporting, investigation and trial of the accused. The decision whether or not one appears at a trial was given to the police. However, civil suits could either be instituted by the Police or the plaintiff and the defendant would receive summons and appear before the court.

The purpose of settling disputes in the courts was more retributive aimed at punishment through imprisonment and fines or requiring payment of compensation to the victim, or both as in the case of murder trials. However, the local courts were geared towards reconciliatory justice between the disputants. Procedurally, the court tried to ascertain innocence or guilt through cross-examination and evidence. If found guilty, the perpetrator paid compensation to the victim, then both parties performed certain cultural or mystical rituals so that the cause of the conflict could be "detached".<sup>cxxviii</sup>

### **3.1.3 A CONTEXTUALIZATION OF TRADITIONAL TRANSITIONAL CONFLICT RESOLUTION IN SOUTH SUDAN**

Traditional conflict resolution systems in so far as they relate to mediation, compensation and reconciliation are similar amongst tribes in South Sudan, but the application between tribes may be different. Overall, these traditional mechanisms lead to violations of human rights, and are

more often than not, in contravention of the rights enshrined in the CPA, Interim National Constitution and international instruments of human rights.

Traditional conflict resolution is however still very relevant in South Sudan because since the escalation of hostilities, a vacuum in the system of justice appeared in the rural areas. There is need to maintain the existing traditional system while rebuilding alternatives such as a functional judiciary which would steadily address weaknesses in the traditional system. There is also need to establish, in the event an institutional collapse occurs, a transitional criminal justice system with the capacity to address conflict at all levels of society in South Sudan without the need of an institutional basis.

To do so, traditional conflict resolution mechanisms need to be looked at and coordinated to match modern constitutional legal provisions that safeguard constitutional rights. This then requires dialogue between established local authorities, the civil society, community-based organizations and traditional leaders. Furthermore, it is imperative that confidence is built and maintained as between these partners, institutions and stakeholders.

However, we must note that war of any kind has a grave impact on traditions and culture in general and this has a spill over effect to traditional justice mechanisms and South Sudan is no exception. War has the effect of destabilising spheres of influence and traditional leaders lost influence and reverence from their subjects. Parallel leaderships were established by parties who were engaging in the wider war, moreover, Chiefs and leaders were forced to arm themselves and undergo military training to ensure swift and unforgiving execution of orders from whichever side they supported in the war. Refugees and IDPs also undermine the governance structures in the

areas they flee to, as discussed above, it leads of a fusion of cultures and conflict resolution mechanisms.

## **3.2 AN OVERVIEW OF PREVIOUS ATTEMPTS AT TRANSITIONAL JUSTICE IN SOUTH SUDAN: SUCCESSES AND FAILURES**

### **3.2.1 INITIAL ROUND OF TALKS (LATE 2013 – EARLY 2014).**

In the wake of the eruption of civil war in December 2013, the United States sent an envoy to engage the two leaders in peace talks geared towards ending the conflict as at the time, South Sudan was the world's youngest nation. In his statement to reporters in December 2013, the US envoy to South Sudan, Donald Booth stated that President Salva Kiir had agreed to begin talks with opposition leader, Riek Machar without any pre-conditions as soon as Machar was willing to begin. Machar on the other hand, said that although he was ready for dialogue, Kiir had to first release and evacuate to Ethiopia of his political allies<sup>cxix</sup> including former Ministers who were arrested for treason for their role in the attempted coup. However, Government Minister for information said that that demand would not be met.<sup>cxx</sup>

In the meantime, conflict raged on with intensified fighting occurring in several major cities. The involvement of Ugandan troops which came in to assist troops loyal to the South Sudan Government resulted in a stronger force, which was able to fight against the rebel forces on several different fronts, and inflict heavy losses against the rebel forces. This fighting which had left massive casualties and deaths was condemned by several countries, and through sustained effort, negotiations between the Government and the opposition were mediated upon by IGAD as well as the African Union (AU), United Nations (UN), China, European Union (EU), US, UK and Norway.<sup>cxxi</sup>

As a result of the efforts by these countries as well as the envoys sent to assist in mediation, a meeting was held in neighbouring Ethiopia. On 23<sup>rd</sup> January 2014, representatives from the Government and opposition negotiated a ceasefire agreement and permitting the immediate dispatch of humanitarian aid to be dispatched and any aid supply routes to be opened with immediate effect.<sup>cxvii</sup> The pact stipulated that 11 officials allied to Machar be released<sup>cxviii</sup> and that the warring parties "*redeploy and/or progressively withdraw armed groups and allied forces invited by either side from the theatre of operation*". It was also noted that a cessation of hostilities was only a temporary measure short of a formal and comprehensive peace agreement.

Furthermore, the parties also agreed to refrain from rape, sexual abuse and torture and to desist from attacking civilians. A group of unarmed monitors was also set up with membership drawn from surrounding East African nations and representatives from both the rebels and the government. UNIMISS was tasked with monitoring the truce and IGAD was to put in place a monitoring and evaluation mechanism to ensure the truce was long lived.<sup>cxix</sup> However, it is worth noting that most observers were of the opinion that "*The ceasefire agreement is only a temporary solution; any of the two sides could break the deal any day soon as they have other issues*"<sup>cx</sup>

However, despite the provisions of the agreement, South Sudanese Government troops in a bid to continue asserting their position continued taking over opposition held towns. When they took over Leer, the opposition accused the Government of attempting to sabotage the second round of talks – which were scheduled to be held in February. Moreover, the opposition stated that the second round of talks would not take place until the four remaining senior political figures were released by government who include Pagan Amum Okiech the former SPLM Secretary General, Majak D. Agoot the former Deputy Defence Minister, Lol Gatkuoth former Southern Sudan envoy

to the US and Oyei Deng Ajack the Chief of Staff for SPLM and Security Minister who are being held after being accused of treason in regards to the coup and the withdrawal of Ugandan troops. This led to a delay in the second round of talks, and renewed outbreak of fighting in the towns of Malakal and Bentiu.<sup>cxxxvi</sup>

### **3.2.2 SECOND AND THIRD ROUND OF TALKS (EARLY 2014 – EARLY 2015).**

Following sustained pressure from IGAD as well as a host of Western envoys, the second round of talks was held in Addis Ababa, Ethiopia in May 2014. This was the first meeting in person between Kiir and Machar, since the fighting had begun five months earlier. On 9<sup>th</sup> May 2014, the leaders signed a one-page agreement which essentially recommitted to the first ceasefire<sup>cxxxvii</sup> but was known as the second ceasefire. The deal agreed to an end to hostilities within 24 hours while a permanent ceasefire was worked on, with the two leaders agreeing to set up a transitional government and hold fresh elections. They further promised to open humanitarian corridors and allow thirty days of tranquillity so farmers could sow crops and prevent famine. However, a few hours after the ceasefire was to be in effect, both sides accused the other of violating the deal.<sup>cxxxviii</sup>

On 11<sup>th</sup> June 2014, both the Kiir and Machar were to head groups to talks on the formation of a transitional government and a third ceasefire, however, the talks were boycotted by both sides<sup>cxxxix</sup> and by 16<sup>th</sup> June, the ceasefire was violated. Fighting continued, with the Government advancing on rebel held towns. In August 2014, Kiir and leaders of South Sudan's neighbouring states (the regional IGAD Bloc) signed the Protocol on Agreed Principles on Transitional Arrangements towards Resolution on the Crisis in South Sudan. The protocol stated that Kiir remains president until the elections which were to be held in two and a half years, moreover, it gave both Kiir and Machar 45 days to reach a peace agreement. The protocol also formed the basis



of a transitional government and essentially the foundation to have parties come to the negotiating table towards sustainable peace. However, Machar refused to sign it, accusing IGAD leaders of tilting the process in favour of Kiir<sup>cxl</sup> and that it failed to address the root causes of the conflict but rather insisted on a transitional government.

IGAD were however successful in bringing Machar to the mediation table, and after months of talks, it was reported that a transitional phase had been agreed upon. Most notable was the agreement on how to share executive powers and the command of two armies. In November 2014, the two parties renewed the broken ceasefire<sup>cxli</sup> and IGAD mediators gave the parties fifteen days to reach a power-sharing deal.

The third ceasefire was also short-lived after fighting was reported in the oil rich north just shy of 24 hours after the ceasefire was signed.<sup>cxlii</sup> However, IGAD were un-relenting, and by use of sustained pressure as well as threatening sanctions against both sides, they were able to return to the talks. This time, Kiir and Machar signed a document on "Areas of Agreement on the Establishment of the Transitional Government of National Unity in the Republic of South Sudan" in Addis Ababa, in February 2015. The Areas of Agreement include the establishments and mandate of a Transitional Government of National Unity which should be established by June 2015, the establishment of transitional justice institutions which would be known as the Commission for Truth, Reconciliation and Healing as well as an oversight and monitoring of these institutions. Perhaps more importantly the agreement also highlights a power sharing ration in part II of the agreement which states that the appointments would be shared on a percentage ratio. The Agreement also gave parties till 5<sup>th</sup> March 2015 to agree on a comprehensive peace agreement.

However, despite their recommitment to the ceasefire, they failed to agree on power sharing.<sup>cxliii</sup>

Unsurprisingly, the talks collapsed and fighting broke out in March.<sup>cxliv</sup>

### **3.2.3 THE AGREEMENT ON THE RESOLUTION OF CONFLICT IN THE REPUBLIC OF SOUTH SUDAN (ARCSS) (LATE 2015 – EARLY 2017).**

Following months of intensive talks between the two warring parties, IGAD through sustained pressure, mediation and threats of sanctions, was able to have an agreement signed by both Kiir and Machar. The ARCSS was signed on 17<sup>th</sup> August 2015 at Addis Ababa. The agreement contained provisions for inter alia a Transitional Government of National Unity (TGoNU). Much like the “Areas of Agreement,” ARCSS covers the basics that parties have been trying to have the warring factions agree upon including permanent ceasefire as well as transitional justice, accountability, reconciliation and national healing. Regarding the TGoNU, ARCSS proposes that the transitional government be set up within 90 days of the signing of the agreement and its core mandates are to be the overseer of the implementation of the documents and is to have democratic elections and by proxy establish democratically elected government. In the interim before the elected government is put in place, the TGoNU is essentially the government in place and will, therefore, to oversee a process of national reconciliation, oversee the return of refugees and IDPs, work with stakeholders and reform public financial management. Majority of the document also speaks to the composition and procedure of appointment to offices with the government especially since the same has been a contentious issue in most negotiations. Interestingly, the agreement would make Machar the vice-president again,<sup>cxlv</sup> in addition to establishing a body tasked with overseeing and implementation of the document know as Joint Monitoring and Evaluation Commission (JMEC).<sup>cxlvi</sup>

Chapter two of the agreement handles a permanent ceasefire and transitional security arrangements which have always been contentious issues between the two sides. Perhaps most poignant is the declaration of a ceasefire within 72 hours of signing the agreement, disarming and eventual unification of the forces. Chapter V is also relevant provision as it speaks to transitional justice, reconciliation and accountability, by establishing the following:

- Truth, reconciliation and Healing Commission
- Compensation and Reparation Authority
  - and
- Hybrid Court of South Sudan

Amid alleged pressure from the UN Security Council, both leaders half-heartedly signed the agreement with reservations. UN Security Council had “created a system to impose sanctions” on those engaging in “actions or policies that have the purpose or effect of expanding or extending the conflict in South Sudan or obstructing reconciliation or peace talks or processes, including breaches of Hostilities Agreement.”<sup>cxlvii</sup>

Though he signed the same, Salva Kiir made 16 reservations to the agreement which included: the scope and provisions relating to the permanent ceasefire and transitional security arrangements; functions and mandate of the Joint Monitoring and Evaluation Commission (JMEC); amendment procedures for the ARCSS; powers and status of the vice presidents and the executive in the TGoNU; the structure and composition of state governorships; resource, economic and financial management; and timelines for the reconstitution of the Constituent Assembly within the parameters of drafting the permanent Constitution.<sup>cxlviii</sup> These factors were in his opinion were drafted to attack the sovereignty of South Sudan and some provisions were just not practical to

implement. One of the main reservations included the redeployment of troops to a 25km radius outside Juba, this Kiir disliked as it was the work of the government to protect the people as they did during the failed coup in December 2013.

A second major reservation regarded the monitoring and verification mechanism which was drafted as a reporting mechanism on the ceasefire. As the mechanism already existed from previous peace arrangement, Kiir was of the opinion the same was ineffective and on several occasions had reported unofficial information which was often exaggerated or manipulated towards sectional interests. The role of JMEC, which is meant to oversee the implementation of the agreement, was also brought into question in the reservations as the “overseeing” function undermined the sovereignty of the government and as they had to report to several bodies including UN Security Council and the AU Peace and Security Council that JMEC was essentially the government as they were conducting a stately role. JMEC, together with Council of Ministers, was also given the role of being allowed to vote whether ARCSS could be amended which Kiir termed as “neo-colonialism.” The sovereignty of the government was once again called into question as ARCSS proposed that South Sudan have two vice-presidents with different status’ which Kiir did not agree with; he wanted the vice-presidents to share equal status, as he famously stated that having two vice-presidents would be a “reward for rebellion”.

A further “impractical” provision was the Compensation and Reparation Authority whose role was to manage the funds for compensation and repatriation. Kiir contended that this was prone to abuse and instead the funds should be aimed at rebuilding infrastructure and investing in the livelihoods of communities.

During the signing ceremony he quipped “with all those reservations that we have, we will sign this [ARCSS] document... some features of the document are not in the interest of just and lasting peace. We had only one of the two options, the option of an imposed peace or the option of a continued war.”Machar on the other hand stated that just as his faction had dropped their reservations in favour of peace, so too should Kiir. Furthermore, he stated that Kiir should have kept his reservations to himself, just as they had done.<sup>cxlix</sup>

However, despite these reservations, the agreement was approved by the South Sudan National Legislative Assembly on 10<sup>th</sup> September 2015. In accordance with the agreement, on 20<sup>th</sup> October 2015, Uganda announced the voluntarily withdrawal of its soldiers from South Sudan.<sup>ci</sup> In April 2016, as per the agreement, Machar subsequently returned to Juba with those loyal to the opposition and was sworn in as vice-president.<sup>cii</sup> However, despite the formation of the TGoNU, fighting still continued in some areas of South Sudan between government and opposition forces. Regional and international actors noted the slow implementation of the agreement, but despite the same violence erupted in the 7<sup>th</sup> of July 2016 after an attack outside of where Kiir and Machar were meeting. The confrontations are often violent and result in massive destruction of property, loss of lives and displacement of people.<sup>cii</sup>

In September 2016, Machar called for an armed struggle to oust Kiir<sup>ciii</sup>. Meanwhile, the African Union backed plans for the deployment of troops from regional nations<sup>civ</sup> – plans that were authorised by the UNSC in August 2016<sup>civ</sup>. Fighting has since then spread throughout the country, and continues unabated despite Kiir’s unilateral ceasefire in May 2017.

### **3.3 THE INTERVENTION OF INTERNATIONAL ACTORS IN TRANSITIONAL JUSTICE IN SOUTH SUDAN**

Since the independence of South Sudan, there continues to be a heavy presence of foreign and international actors in South Sudan. These include, Non-Government Organisations (NGO's), diplomatic missions and relief agencies. However, the largest and most visible international presence is the United Nations and its various missions and programs. The most notable being the United Nations Mission in South Sudan (UNMISS) which portrays the UN's major attempt at maintaining peace as set out in the Agreement on Resolution of Conflict in the Republic of South Sudan – signed on 26<sup>th</sup> August 2015 (ARCSS). The agreement also includes the role and functions of these international actors and perhaps rightly so. It assigns three primary functions to the international actors: first is the provision of funds for the implementation of the agreement and various reluctant projects; second underscores the need for technical expertise in the areas that South Sudan needs advise including oil production and management, and boundary demarcation; finally is the verification of the implementation of the agreement through peaceful operations.<sup>clvi</sup> This emphasises the need for any transitional country to rely on the international community's experience.

The mandate of the UNMISS is reflective of a dilemma underlying many post-conflict peace operations. Drawing from experience, in South Sudan and indeed to world any peace agreement made due to pressure from other actors is likely to stall a process rather than progress it. They also create new political expectations of realities by privileging certain actors over others, legitimizing some armed movements over others thus promoting the former to internationally recognized partner status, while demoting the latter to little less than terrorist organizations.<sup>clvii</sup>

However, in addition to the UN, other international actors that have assisted in the road towards peace in South Sudan cannot be overlooked. As aforementioned financial and technical expertise has been lent from regional and western states such as those that constituted the IGAD+<sup>clviii</sup>, as well as others who have sent envoys, held peace talks between the warring functions, provided venues for peace mediations to be held, provided personnel or even put up funding for all these interventions. Other partners have also assisted by way of sanctions, or threats thereof, which have at times yielded positive results were softer means have been unable to.

The US for instance, which heavily invested in South Sudan's struggle for independence and the consequent push for peace after the current conflict begun, in response to the violence in July 2016, drafted a resolution to the UN Security Council to increase the UNMISS troops by 4000 soldiers – as part of a Regional Protection Force. The Regional Protection Force which is mandated to protect civilians from the atrocities rests on several key assumptions: including that the current peace process is salvageable, Juba must be stabilised and that the leaders of the two sides can enforce a negotiation settlement.<sup>clix</sup>

IGAD has similarly consistently held mediation talks between Salva Kiir and Riek Machar from 2013 to 2017. These talks have culminated in small wins over the years, which led to the major ARCSS agreement signed in late 2015. It is as a result of this agreement that South Sudan saw an almost year long period of relative peace. In collaboration with and supported by the African Union, IGAD remains committed to bringing about lasting peace in South Sudan. Additionally, by drawing membership and support from regional states, it has been able to secure a large number of the peace keeping troops supporting its work in South Sudan.



If the peace process is to move forward, IGAD in collaboration with regional and international stakeholders must find a substitute method towards establishment of the transitional government laid out in ARCSS. The Regional Protection Force should concurrently continue working towards securing and stabilizing South Sudan, while at the same time deterring mass atrocities against the people of South Sudan. However, as the Force is unlikely to have sufficient capacity and political backing to achieve these aims, even if the Force manages to fulfil immediate goal of maintaining order, it does not seem to have an immediate and durable political solution. In this context, the many dilemmas facing the Force and indeed the international community begs for a tailor-made approach to sustainable peace.<sup>clx</sup>

### **3.5 CONCLUSION**

South Sudan presents a unique challenge in transitional justice as it is a young state which has seen some of the worst fighting and atrocities in the past four years. Moreover, a hybrid of Traditional and formal conflict resolution is still very relevant in Southern Sudan because there is a vacuum in the justice system especially at the grassroots. African value systems remain relevant and viable in resolving conflict.

South Sudan is also unique because unlike most countries that have experience conflict, South Sudan has signed several “road maps” and agreements to peace, but in particular the August 2015 Agreement on the Resolution of the Conflict in the Republic of South Sudan, which has been the cornerstone to stabilise South Sudan. The agreement outlines in detail, the structure of a transitional government, humanitarian assistance, details of a ceasefire and culpability for human rights violations.

Chapter V of the agreement contains several provisions on transitional justice including the formation of Commission for Truth, Reconciliation and Healing, Hybrid Court for South Sudan and the Compensation and Reparation Authority all aimed at rebuilding and indeed healing the County to enable it move forward and become an active member in international relations.

The current state of the agreement leaves much to be desired, especially where President Kiir famously signed the ARCSS “with reservations” as he alleged he was forced to sign the same. Some scholars have argued that the “reservations” by the President have rendered ARCSS inoperable. However, that does not take away from that fact that ARCSS must be hailed as the blueprint for peace as evidenced in the National Dialogue initiative inaugurated by Salva Kiir which essentially began the “healing” and conciliation at the grassroots level. With the exception of question of elections, all of the other issues in the National Dialogue Initiative were defined in the ARCSS.

## **CHAPTER FOUR**

### **WHAT WILL MAKE TRANSITIONAL JUSTICE WORK IN SOMALIA AND SOUTH SUDAN**

#### **4.0 INTRODUCTION**

Achieving transitional justice during a period of conflict is extremely difficult as hatred continues to run deep. Moreover, fighting often spills over from battlefields to peace talks which only surmounts the already uphill task of bringing about peace and reconciliation. For successful implementation of transitional justice the approach taken must be multifaceted, specifically tailor-made to the country or conflict and each of the warring parties must feel they have made more gains than sacrifices. The UN has on several occasions eschewed a “one size fits all” policy on transitional justice without a thorough analysis of the nation’s needs and wants during the time of conflict. The most successful transitional justice strategies applied in promoting post conflict reconciliation are those that take account of the collective impact of violence in conflict societies and that seek to promote and implement instrumental, socio-emotional and distributive forms of ‘social learning’ among former enemies.<sup>clxi</sup>

For transitional justice to work, it is imperative that there is a harmonization of restorative and retributive justice. Retributive justice focuses on punishment for offenders, while restorative justice focuses on the relationship between the offender and the victim with a view to correcting the same. This is further enhanced where transitional justice mechanisms are conducted in tandem with applicable traditions and practices.<sup>clxii</sup> This is especially necessary as it enhances buy-in for the process by importing cultural techniques which is vital to its success. Where the society is averse to “western” practices, more often than not spoilers arise who render the entire process

nugatory through any means necessary. It is important for societies to understand, accept and be involved in the process for it to be successful.

In addition, the successful transitional justice mechanisms ensure the process does not amount to mere negotiations of settlement. Successful implementation of these mechanisms entail establishment of truth, justice short of revenge, redefinition of the identities of former belligerents, and establishment of new relationships<sup>clxiii</sup>. In order to achieve this, one approach is insufficient. It calls for a multiplicity of players, working in tandem, with clearly defined goals towards a common end.

Finally, innovation and flexibility are crucial in ensuring the successful implementation of transitional justice mechanisms. Socio-political and legal conditions vary and this dictates what kinds of approaches can be taken in each attempt. It is important to ensure that what is done responds to the conditions in the country. Notably, despite the fact that a multifaceted approach is required, the fragility associated with countries in transition may necessitate a step by step approach designed to balance implementation with resistance. What is of importance is despite the time and resources put into any approach taken, that the result is success – whether immediate or long term. The Secretary Generals guidance note published in March 2010 on transitional justice implies that it must conform to international norms, standards and law regarding international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, transnational justice must be guided by right to justice, the right to truth, the right to reparations, and the guarantees of non-recurrence of violations (duty of prevention).<sup>clxiv</sup>

#### **4.1 TRANSITIONAL JUSTICE IN SOMALIA**

First, we must acknowledge that accountability and justice are key towards realising a sustainable peace in Somalia. Establishing “law and order” will essentially provide confidence and a resultant following of the institutions that will be the foundation of sustainable peace. It has been argued that the most critical institution in this regard is the security system, and once even a minimum level of security is attained, then only can any mechanisms be attempted. More than two decades after the ousting of Said Barre’s regime and amidst subsequent emergence of armed conflict in Somalia, all efforts to restore peace and normalcy have faced a plethora of challenges. However, these challenges notwithstanding, the efforts have resulted in a number of peace processes, agreements and transitional government arrangements. These include:

- 1993 Conference on National Reconciliation in Addis Ababa
- 1997 Conference on National Reconciliation in Sodere, Ethiopia, which saw the creation of the 41 member National Salvation Council (NSC), responsible for organising a transitional government
- 1997 Cairo Peace Conference, which led to the ‘Cairo Declaration’ providing for a 13 person Council of Presidents
- 2000 Djibouti Conference.

However, it is at the Djibouti Conference that a marked improvement was seen in the manner in which the negotiation for peace was done. At that conference, the Arta Declaration was signed which provided for the Transitional National Government (TNG), the Transitional National Charter (TNC) and the Transitional National Assembly (TNA). However, due to opposition mainly from the Somali Reconciliation and Restoration Council (SSRC), the TNG was unable to achieve its mandate. This necessitated another conference known as the Mbagathi/Eldoret Peace Process

held in 2002 – 2004. The Mbagathi conference resulted in the Transitional Federal Charter (TFC), the Transitional Federal Government (TFG) and the Transitional Federal Government (TFG).

The mandate of the TFG was to fundamentally oversee key milestones relating to disarmament, drafting of a new constitution, elimination of tribalism and organization of national elections. However, there was very minimal progress on these issues. Instead, the security situation in the country worsened as a result of the activities of Al-Shabaab – the youth wing of the Union of Islamic Courts (UIC) – which gained notoriety following the UIC's ousting in 2006. This necessitated an extension of the TFG's mandate in 2009 for two years, and again (under the Kampala Accord) in 2011 for a further year.<sup>cixv</sup>

The final result from these conferences was the successful nomination of 135 traditional leaders who in turn nominated 825 members of the National Constituent Assembly – responsible for the nominations of 275 Members of Parliament (MP's) and the provisional adoption of the Constitution. The nominated MP's consequently elected a Speaker of Parliament and two deputies as well as a President. The President later appointed a Prime Minister, who formed a cabinet to make up the new government.

However, the culmination of this process was not without challenges. These include abuse of office and renewed/continuous fighting. However, the main ones were the existence of vested self-interests, bribery and corruption.

#### **4.1.1 Existence of vested self-interests**

As we have seen previously, upon the deterioration of the Somali situation, the country reverted to clan bases allegiances. Moreover, it has been argued that these factional allegiances and coalitions can be shifted at any time to further ones interests. According to Article II of a Presidential pronouncement that provided for an end to the transition and a Protocol establishing

the Technical Selection Committee (TSC), which was primarily mandated to document and publicize the list of 135 recognized traditional leaders. The political intrigues surrounding the work of the TSC posed a major challenge because the TSC membership refused to be influenced into accepting/rejecting names sent to them. The situation became so dire that at one juncture, the President sought to disband the TSC but he was unsuccessful.

In addition at the TSC level itself, there existed vested interests as to the names proposed from different clans. This led to a general lack of cohesion as some clan's quickly passed the proposed names and other names for another clan were scrutinized.<sup>clxvi</sup> Furthermore, there arose issues as to the lack of representation by the requisite number of women.

#### **4.1.2 Bribery and corruption**

In relation to the challenges facing the TSC regarding the selection of leaders, there also arose a major challenge regarding bribery. In this regard, the TSC as well as the traditional leaders were approached with offers of either bribery or threats of violence against them, so as to influence their selection choices. The level of intimidation and bribery was so pronounced that a source within the UN indicated having been approached by certain individuals desperate for their names to be considered for nomination into parliament. While the UN staff had no means to help, the experience suggested the gravity of desperation of some actors to get nominated to parliament. The fact that the persons were bold enough to approach UN officials indicates how far they may have gone to influence the traditional leaders to have their names nominated.<sup>clxvii</sup>

#### **4.2 ROLE OF ACTORS IN FUTURE ATTEMPTS AT TRANSITIONAL JUSTICE**

Neighbouring states have always been interested in restoring peace to Somalia simply because of the cross boundary effects of the conflict and protection of their own interests. Globally. The ever increasing threat of terrorism and the refugee crisis continues to affect countries on other

continents. However, since the advent of the conflict all attempts by the international community have been wanting and generally have failed. It has been argued that the internal community has failed to understand clan complexities and treated the era as post conflict by providing aid and restoration instead of addressing the underlying causes of the conflict having been concentrated on state building and not peace building.

Moreover, the attempts also created regional authorities in Somalia instead of working with the already established devolved clan units. Any programme towards transitional justice must be “home-grown” and benefit the indigenous people. However, the international community is pivotal for stabilisation until a government is put in place that can manage its own affairs.

Notwithstanding these challenges, the transitional justice mechanisms have been able to achieve a measure of success due to the varying factors. Among these was a clear understanding of the various roles to be undertaken by different actors. Each of the actors involved in the processes before the establishment of the transitional bodies was tasked with different aspects to which they were expected to deliver upon. Through working in tandem, they were able to prioritise tasks, meet vital deadlines and take the necessary steps towards establishment of these bodies. Similarly, each of these actors still has a role to play moving forward.

For international actors, facilitation of the process is essential to sustaining it. Part of the reason transitional justice achieved a level of success was because the UN has persistently maintained its presence and support to Somalia throughout the length of the conflict. In addition, it has provided resources towards maintaining peace, holding talks and establishing governance structures. International actors must continue to lend support to the federal states to boost their



activities. In addition, international actors continue to play a vital role in provide expertise and technical assistance where they can.

Regional actors have also played a vital role in the transitional period. Especially through the constitution and assistance lent by the AMISOM force. However, the African Union, IGAD and other regional actors must now look towards assisting the federal states bolster their own security arrangements, and begin to plan an exit strategy for AMISOM. In addition, the regional actors are well placed to guide national and local reconciliation processes and assist in reconciliation of federal states. Furthermore, they can assist in promoting inclusive local governance through capacity building at the grassroots levels.

Nationally, the elected leadership has to work towards legitimising the electoral process. A lack of accountability and transparency can greatly undermine the perceived legitimacy of the election process, and by extension the elected leadership. Allegations of favouritism in financing of candidates by foreign states need to be immediately addressed. Similarly, there's a need to look into gender balance so as to meet the set quotas. Another major concern is the disputes arising between federal member states and the need for a mechanism through which to solve these disputes. Finally, the security situation requires to be strengthened so as to effectively deal with the threat posed by insurgents such as the Al-Shabaab.<sup>clxviii</sup>

#### **4.3 INTEGRATING TRADITIONAL JUSTICE SYSTEMS IN MODERN DAY TRANSITIONAL JUSTICE: A CASE FOR SOMALIA**

The Somali people still largely rely on traditional justice systems, especially at the local level, due to the overall lack of trust and perceived ineffectiveness of the secular justice system. Moreover, given that after the collapse in 1991, the state reverted to the centrality and to this day have legitimate traditional structures, their importance cannot be underrated. The clan elders have

solidified their role as mediators, enforcers and regulators of day to day life in Somalia. The involvement of clan elders in day to day conflict resolution and management is a sure sign of their legitimacy. Considering the evolving and generally unstable governance and security structures, since 1991 a constant feature is customary law, and therefore the latter could be used as a stabilising mechanism for the former and in time amalgamate. In the Fourth Issue of the International Peace Support Training Centre Report 2013, they stated that women in Somalia also play a definitive role in conflict prevention, and therefore are key in strategy development and implementation.

The dominant traditional system applicable is the *Xeer* which governs interpersonal relations and cases of criminal activities. Its persistence all through the Somali conflict is attributable to its centrality which has further buttressed its legitimacy in the provision of justice. Its importance and legitimacy though indisputable has come under scrutiny for its incompatibility with modern day human right based standards.

Somalia's development of security and governance structures is attributable to the re-emergence of justice systems. A combination of modern, traditional and religious systems have enhanced social order, reduced impunity and increased trust in the possibility of a Somali state.<sup>clxix</sup> Transitional justice mechanisms are therefore more likely to succeed if they are intended to take into account the needs of the affected communities. In other words, transitional justice is more likely to succeed if a bottom-up approach is taken, where the needs of the communities are considered and resolved, before moving on to regional and national levels.

Somalia still has a long way to go if it has to be seen as a state that upholds justice and the rule of law. To achieve this, it is necessary that the transitional justice mechanisms implemented in Somalia integrate the use of traditional mechanisms of dispute resolution so as to achieve long-

term success, are more inclusive and address the root of the conflicts that have continued to spring up repeatedly all through the course of the conflict.

Due to its inclusivity the bottom up approach has been effective in resolving some instances of past conflicts in Somalia. The methodology applied has been characterised by three major factors necessary for transitional justice to be successful. If implemented, these factors as applied traditionally can be combined with modern methods to great success. These factors are as discussed below:

#### **4.3.1 Ceasefires**

When the Siad Barre government was ousted, clan elders were instrumental in maintaining some semblance of peace. At the time, some clans were in support of the fallen regime while others were against it. This caused inter-clan tension and threatened to break peace. The elders for both clans called for a ceasefire. Furthermore, they encouraged the clans supporting the dissidents to Siad Barre's government not to retaliate against those who had lost. So influential was the elders' influence that the clansmen ceded to the request, not only maintaining peace, but also strengthening relations. The elders thus became in addition to the central societal leadership, political leaders too.<sup>chxx</sup>

The elders, by virtue of their position in society, command respect from members of the community. They are influential decision makers and are often final decision makers in dispute resolution. This is a position of trust which holds great potential for transitional justice. By tapping into this resource, these traditional leaders can be facilitated to understand modern day tenets of transitional justice and their applicability in line with traditional justice systems. This knowledge can then be applied in cases of conflict. The respect accorded to them should ensure this application

is accepted by the communities, which then means that at the same time these communities embrace transitional justice.

#### **4.3.2 Negotiation conferences**

Negotiation meetings within and between Somali clans are easy to initiate because it is inherent in their culture. As a result, the onus is on the elders to initiate these meetings whenever need arises. In instances of conflict, the elders would, subsequent to calling for ceasefires, initiate such meetings with a view to understanding causes of conflicts, and solutions to them so as to ensure peace. They were able to successfully do so with reference to the traditional systems of *Xeer* and *Sharia* which mandated them, gave them the scope of their role and prescribed punishments or otherwise for varying crimes.

Arguably, the reason these systems had such success was because they presented home grown solutions to home grown problems. As such, there was no feeling of an imposed solution to conflict resolution – which is what occurs whenever external actors impose solutions. Such imposition may negatively affect the outcome of conflict resolution process because the people may perceive the solutions offered as furthering the agendas or interests of the external actor.

Additionally, the negotiation process is more inclusive when driven by the elders because it is held at community level meaning the community is able to attend the hearings and give their input. However, when the reconciliatory meetings are led by other actors, they are often at a higher level than the community, and usually characterised by membership drawn from regional leaders. This takes away the chance for the people to participate in the talks, which in turn affects the effectiveness of these meetings.

### **4.3.3 Reparations**

The outcomes of negotiation conferences included declarations of permanent cessation of hostilities, institution of reconciliation processes and provisions for reparations for victims of conflicts/crimes. With regard to reparations for victims of inter-community conflicts, the elders of the warring communities would agree amongst themselves of the reparations to be given based on the various clan/tribe customs. As such they were representatives for the victims or perpetrators – as the case was. These reparations were largely accepted as the process leading up to the discussions was inclusive, with the elders acting as a representative of the will of the community. Once again, these traditional leaders provide an easier way into acceptance of transitional justice mechanisms than by failing to utilise their position.

In a nutshell, the advantages of incorporating traditional justice in modern day transitional justice mechanisms cannot be overlooked. If traditional elders are incorporated in transitional justice mechanisms, they would be able to ascertain the underlying causes of the conflicts and address them from that level. In addition, the transitional justice process would take a bottom-up approach which would increase inclusivity and by extension acceptance of outcomes, legitimacy and lasting peace. In so doing, the conflicts will cease to recur, and Somalia can begin to experience lasting peace. Finally, as every conflict arises in varying contexts, it would be prudent to ensure that the problems are solved in those contexts. As such, if the main conflict begun at community level, then the traditional systems of conflict resolution should be attempted to bring about reconciliation and peace before imposed ones are attempted. At the very least, if not implemented as the lone dispute resolution mechanism, the traditional system should be incorporated as a part of the proposed means of transitional justice.

#### **4.4 TRANSITIONAL JUSTICE IN SOUTH SUDAN**

Despite hope for a better future upon gaining independence in 2011, South Sudan has been embroiled in civil war since late 2013. A war arising out of political tension has taken on an ethnical as well as political dimension and has been catastrophic to the country. Tens of thousands have either died or been displaced, with an even greater population fleeing the country to seek refuge in neighbouring states. The humanitarian crisis is as bad as can be expected, and despite the efforts taken to bring about lasting peace, it is proving elusive. Transitional justice efforts seem to have been unable to resolve the conflict.

Since the onset of conflict, several transitional justice mechanisms have been attempted. The foremost attempt by an envoy from the US, followed by three rounds of talks mediated upon by IGAD+ were largely unsuccessful because even though they led to ceasefire agreements being signed, these were immediately broken and the fighting persisted. However, IGAD did not give up, and through sustained pressure, were able to finally have an agreement<sup>elxxi</sup> signed by the two warring factions. This represented South Sudan's most notable attempt at implementing transitional justice.

This agreement came about after intensive talks the results of which were proposals relating to power sharing, a permanent ceasefire, transitional justice, accountability and national healing. To enable transitional justice, it contained provisions which would assist in transitional justice including a Commission for Truth, Reconciliation and Healing (CTRH), a Hybrid Court for South Sudan (HCSS) and a Compensation and Reparations Authority (CRA). However, the provisions of the agreement were implemented extremely slowly, and political tensions once again resulted in renewed fighting which caused a halt in the implementation process.

The reasons why transitional justice has failed in South Sudan are varied. However, the main reason has been a perception of lack of goodwill from the leadership. This is closely followed by the general lack of citizen awareness as to the provisions of Chapter 5 of the ARCSS – which deal with transitional justice. Other lesser reasons include the overlap of conflicts within the main one pitting the President Salva Kiir and his previous deputy Riek Machar; Lack of grass root co-ordination of efforts geared towards application of transitional justice mechanisms; and the presence of individuals who act as spoilers – essentially working against implementation of any transitional justice mechanism so as to continue benefiting from war.

#### **4.4.1 Lack of political goodwill**

Transitional justice must not only heal wounds, but must rebuild trust; the trust between the two principals leaves a lot to be desired; furthermore, both the instigator and a lot of the continued problem in South Sudan has been the lack of trust. Ever since the adoption of the agreement, the warring parties have been reluctant to honour its provisions. Notably, both warring factors signed the agreement with reservations, and it can be argued that this is the reason why there has been lack of goodwill in its implementation. South Sudan's government has since then gone ahead to implement these reservations without international support.<sup>clxxii</sup> As a direct result, the agreement has been rendered effectively inoperable.

Central to the feasibility of the agreement is the National Dialogue Initiative launched in 2017 by President Kiir. The objectives of the initiative, with the exception of the issue of elections, seem to run counter to the provisions of the ARCSS, and are perceived as being proposed as a replacement to the agreement. Moreover, despite direction from the UNSC on basic minimums to be met to ensure credibility of the dialogue, the GoSS has failed to meet them. As such, it is difficult to see how the initiative will result in an end to the conflict.<sup>clxxiii</sup>

#### **4.4.2 Lack of awareness**

In a survey undertaken three months after the ARCSS was signed, notwithstanding that a vast majority of the population knew that the agreement was in place, some respondents did not know of its existence.<sup>cixxiv</sup> This indicates that the agreement despite relating to peace affecting the entire country, was negotiated among leaders, but with little or no input from the citizens. This resulted in lack of local buy in and a perception that the agreement was likely to be politicised.

Furthermore, the agreement was perceived as being obligatory on the people of South Sudan by foreign powers. Both warring factions signed the agreement with reservations as a result of fear of possible sanctions from IGAD and other western countries. As such, the government in particular was not particularly eager to disseminate information pertinent to the agreement. This suppressed effort also led to lack of awareness among the people of South Sudan.<sup>clxxv</sup>

In addition, with regards to the specific provisions that relate to transitional justice, the levels of awareness dropped even further. A large percentage of the population were unaware of the institutions under chapter 5 of the agreement. Those that did know of the existence of these institutions demonstrated a lack of faith in their effectiveness, reasoning that bias against the persons to be prosecuted – especially those who were in positions of power – would negatively impact the effectiveness of the institutions.<sup>clxxvi</sup>

#### **4.5 ROLE OF ACTORS IN FUTURE ATTEMPTS AT TRANSITIONAL JUSTICE**

To ensure accountability for past atrocities that have occurred throughout the course of conflict in South Sudan, the ARCSS, like most of the peace agreements, proposed three transitional justice mechanisms, the CTRH, the HCSS and the CRA. However, to date the transitional justice provisions have yet to be implemented. It has also been argued that not one, but all entities aimed at transitional justice must be implemented to both tackled restorative and retributive justice, this



will need the involvement of several actors as for example the hybrid court is meant to be established by the AU and the country's Transitional Government of National Unity. The entities must coordinate and sequence their activities to avoid overlap and adequate use of resources. To implement these mechanisms, the Government of South Sudan (GoSS) requires assistance from International, Regional and local actors and if indeed these actors are serious about South Sudan's healing, they will focus on all the factors of transitional justice.

Firstly. The lack of political will as seen above, needs to be changed through lobbying of the international community and in a small way they must act as mediators between the warring sides.

From the international actors, the GoSS requires financial and technical assistance. It is important that the three mechanisms are implemented and facilitated to work simultaneously. To be able to do this, they require adequate funding. The GoSS – already in deep debt – cannot on its own manage to do so. Of equal importance is the creation of a fund to cater for reparations to victims. It is envisaged that during the course of transitional justice talks, the issue of reparations will come up and failure to plan for it could cause the entire process to fail.

The regional actors are mandated under the agreement to provide technical support to South Sudan. This is necessary to enable the establishment of the three proposed bodies, since the agreement provides for a mixed membership drawn from South Sudanese nationals as well nationals from other African states. In addition to providing the experts to constitute these bodies, the regional actors will assist in adoption and implementation of the African transitional Justice Policy Framework to supplement the efforts made under the provisions of the agreement.

Local actors including civil society groups and NGO's must actively advocate for an transitional justice approach centred on the victims. In addition, they must be at the forefront in

insisting on a lasting ceasefire, so as to ensure increased victim participation. Finally, they should co-ordinate the implementation of specific customary mechanisms regarding reparations if these fit the context. These will foster greater reconciliation than monetary reparation. To do so however, requires a deep understanding of these customary mechanism and so it is difficult to inculcate them without inclusion of local leaders/elders.

Transitional elections are at the utmost importance towards the stabilisation of a country. It builds rifts between former warring factions and brings them together under one legitimate government. ARCSS calls for elections, which is essentially a much needed reprieve for South Sudan. In this regard, a National Elections Commission (NEC) to conduct “free and fair elections,”<sup>clxxvii</sup> and organise the elections for the President, National Assembly, State Governors and State Assemblies. The mere nature of ARCSS is that regional and international actors play a supportive role, and therefore, would have to lend the same role in the elections. South Sudan could also benefit from capacity building on how to run a successful election cycle where international actors could offer information about the administrative and legal processes behind a successful election.

There has been a call from stakeholders that the international and regional community ought to be appointed to the Commission to add credence to it and to ensure delivery of a credible, free and fair election or at the very least the community will provide supervision to the body. The international community will also be agitators for the elections and observers, if and when they take place as they are all pushing towards the formation of a legitimate government. Nonetheless, international aid organisations have also taken a pivotal role in dissemination of the content of ARCSS to all citizenry to help them support the implementation process.

#### **4.6 INTEGRATING TRADITIONAL JUSTICE SYSTEMS IN MODERN DAY TRANSITIONAL JUSTICE: A CASE FOR SOUTH SUDAN**

Despite gaining independence from greater Sudan in 2011, conflict broke out in 2013 which was initially seen as a struggle over the presidency, but consequently but quickly took on an ethnic dimension. Over the course of the conflict, gross human right atrocities have been witnessed yet there has been no justice for the victims. In 2015, a peace agreement,<sup>clxxxviii</sup> signed provided for a Transitional Government of National Unity (TGoNU), mandated to bring about transitional justice to South Sudan. The main organ responsible for this was a proposed Hybrid Court of South Sudan (HCSS) which was to be established as per the agreement.

However, the HCSS, mandated to investigate and arraign individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, is yet to be established. In line with the Agreement, the HCSS was expected to be in place within one year from the date that the TGoNU was sworn in.<sup>clxxxix</sup> However, this is yet to happen due to factors such as renewed fighting and unwillingness by the Government of South Sudan (GoSS).

As conflict rages on, the victim list continues to rise and the need for a rigid rule of law system continues to grow. However, the people of South Sudan have little to no access to formal justice mechanisms. Formal courts in the country are few and far between, highlighting the crucial role played by local, traditional courts.<sup>clxxx</sup> In a research carried out into traditional dispute resolution, village courts presided over by elders play an important role in transitional justice in South Sudan. It is worth noting that the international community has taken cognisance of the need for the development of state institutions, and though it takes time and in the interim the formal institutions are lacking. Moreover, state building efforts do not always translate to access to justice.

The Transitional Constitution of South Sudan (TCSS) entered into force in 2011 is the supreme law in South Sudan. All other laws – both customary and statutory – have to conform to the provisions of the Constitution. In Article 3, it states that:

*“(1) This Constitution derives its authority from the will of the people and shall be the supreme law of the land. It shall have a binding force on all persons, institutions, organs and agencies of government throughout the Country.”*

*“(2) The authority of government at all levels shall derive from this Constitution and the law.”*

*“(3) The states’ constitutions and all laws shall conform to this Constitution”*

The TCSS also explicitly recognizes the importance of customary law and as a source of legislation. In Article 5 it states:

*“The sources of legislation in South Sudan shall be:*

*(a) this Constitution;*

*(b) written law;*

*(c) customs and traditions of the people; ...”*

Furthermore, in Article 33 it states that:

*“Rights of Ethnic and Cultural Communities*

*Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law.”*

The Local Government Board (LGB) and the Ministry of Justice and Constitutional Affairs (MoJCA) of the Republic of South Sudan held an Annual Rule of Law Forum for Traditional Leaders in December 2016. The forum provided a platform for traditional leaders to have discussions on the potential of harnessing traditional justice mechanisms to address legacies of conflict in South Sudan and promote reconciliation and sustainable peace.<sup>clxxxii</sup> The forum offered an opportunity for traditional leaders and judges to talk about harmonizing customary norms and statutory laws, and encouraged traditional leaders to discuss their role in conflict resolution and promoting peace and reconciliation among communities.

As with all legal systems that recognize constitutional supremacy, the provisions of statutes as well as customary laws require regular determination by the courts as to their constitutionality. Thus, consideration has to be paid to the importance of customs and traditions when determining whether legislation or written law supersedes it. As the TCSS did not adopt a stance which made customary law the applicable law, in so far as it did not conflict with statutory law and the Constitution,<sup>clxxxiii</sup> this forum was useful to provide a forum through which meaningful discussions could be had as to the applicability of traditional justice mechanisms with modern day ones.

In order to do so, the discussions held point to the fact that it is necessary to facilitate an increase in knowledge for the systems already in place. For instance, traditional leaders should be educated on the laws applicable in the South Sudan state courts (Court of Appeal, High Court, County Courts and Payam Courts) while judicial officers are *vice versa* enlightened on customary laws applicable in local courts (Regional Courts and Executive Chief's Courts). This will ensure that the judicial structure begins to take a common thread in dispensation of justice – enhancing legitimacy in the Judiciary's ability to dispense justice to all the people of South Sudan. Traditional

leaders should be educated on basic tenets of the law, and judicial officers educated on basic traditional justice mechanisms.

In addition, traditional law being non-codified is difficult to consistently apply. There is need to have traditions reduced into writing and where possible harmonised. This will ease the applicability of traditional justice mechanisms in this modern age. In relation, documentation pertaining to evidence and sentences should be properly stored and where possible made available to enhance legal knowledge. By enlightening the community, this will serve as a deterrent to repeated cases of conflict and ultimately enhance permanent peace.

Even as the actors involved in transitional justice in South Sudan continue to push for the establishment of the HCSS, for transitional justice to be effective, the activities undertaken towards this success must be coordinated and sequential. The HCSS may not have the capacity to deal with all the crimes that took place during the course of the conflict. Yet, central to the success of transitional justice, is the victim. A victim centred approach necessitates the establishment of truth from the victims themselves who are at the community level. Therefore, justice needs to be done at that level. To do so, a complementary system is necessary, and this is achievable only through integration of the already present system of traditional leadership.

#### **4.7 CONCLUSION**

The need for transitional justice in these two nations cannot be emphasised enough. Local capacity within the African set up is consistently gaining notoriety in conflict prevention and resolution, this is due to the fact that culture and traditional are essentially cornerstones to any African society. As in any conflict it is important to identify and utilise any peacemaker, and in Africa the African culture is based on “elders” and long identified traditional conflict resolution figures. However,

there is also a need to harmonise traditional mechanisms in line with modern and acceptable legal and administrative structures. This will establish both international and local confidence between partners, institutions and stakeholders in the process. Moreover, this ensures that traditional approaches that disregard key human rights are no longer permitted within the transitional justice set up.

South Sudan and Somalia now stand at the forefront to essentially test and prove the above hypothesis. At the core of transitional justice, is the rebuilding of trust and relationships amongst the civilian population, therefore, it is only logical to maintain lifelong traditions while building sustainable judicial systems which in turn would address any weaknesses of the traditional systems. Essentially, international and regional support is key to continue to push the “reform agenda” but more importantly ensuring the election process does not become a “flash point” for instigation of conflict.

## **CHAPTER FIVE**

### **SUMMARY, CONCLUSIONS AND RECOMMENDATIONS**

#### **5.0 INTRODUCTION**

This chapter presents a summary of the findings, a discussion based on the objectives sought to be achieved, concluding remarks and recommendations. The study aimed at assessing the contribution of transitional justice in Somalia and South Sudan. Specifically, the study aimed at identifying specific attempts at and effectiveness of previous transitional justice attempts as well as assessing the role of regional and international actors in those attempts.

Post conflict societies are often characterised by legacies of power vacuums, lack of democracy and unresolved violations of human rights. This leads to exploitation by power hungry despots who take advantage of the situation and plunge these societies right back into conflict. Thus, there arises a need to address these past atrocities while ensuring peace, justice and reconciliation are upheld, and it is on this basis that the concept of transitional justice is hinged.

Defined as an approach to massive human rights violations that provides both redress to victims and creates opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses, transitional justice aims at re-establishing trust among the society, bringing an end to impunity and preventing future abuses. The objectives of this study were hinged upon these aims, and they were discussed in detail for each of the two states in question.

In addressing the effectiveness of previous specific attempts at transitional justice attempts in both Somalia and South Sudan, this study followed a chronology of events from the outset of the countries' post-conflict era, detailing instances where transitional justice was attempted and discussing why the attempts failed. Thereafter, an assessment of the role of regional and



international actors in those attempts was undertaken, with a view to establishing the importance and roles of these actors in transitional justice.

The first chapter one introduced the study by giving a definition, background and general discussion around transitional justice. Thereafter, the problem sought to be answered was set out as being whether transitional justice can work in post-conflict Somalia and South Sudan. The objectives of the study which were an valuation of the role of transitional justice as a solution in the Somali and South Sudanese conflicts followed. It also contained a literature review which looked at transitional justice as well as the Somali and South Sudan conflicts broadly. Other areas of focus covered in the chapter included an insight on the research questions to be solved, a justification of the study and the hypothesis on which the study was based.

The second chapter was a study of transitional justice in Somalia. It contained an introduction to and analysis of the Somali conflict. Thereafter, it looked at the previous attempts at transitional justice in Somalia, their relative levels of success and shortcomings, as well as their suitability in bringing about transitional justice. It also contained an analysis of traditional systems of transitional justice in Somalia, their effectiveness, principles and aspects. Finally, it introduced an examination of the role played by international actors in the previous attempts at transitional justice.

The third chapter, like the second, was a study of transitional justice, but this time in South Sudan. It contained an introduction to and analysis of the conflict in South Sudan. Thereafter, it looked at the previous attempts at transitional justice in South Sudan, their levels of success and shortcomings, as well as their suitability in bringing about transitional justice. It also contained an analysis of traditional systems of transitional justice in South Sudan, their effectiveness, principles

and aspects. Finally, it introduced an examination of the role played by international actors in the previous attempts at transitional justice.

The fourth chapter gave an analysis of what is required for transitional justice to work. Building on the findings of the two preceding chapters, it looked at the role of actors and stakeholders in future attempts at transitional justice. The findings highlighted the importance of each actor working in tandem with the others towards the grand goal being bringing about transitional justice. In addition, the chapter looked at the place and import of traditional justice, as well as its applicability in line with modern day attempts at transitional justice. It found that inclusion of traditional justice mechanisms is not only of importance, but also absolutely necessary, if the transitional justice mechanism is to be inclusive, effective and for it to achieve the overarching objective – being to bring about lasting peace.

The fifth and concluding chapter presents concluding remarks, as well as recommendations. It ties the objectives of the study introduced in the first chapter and discussed in the next three, with the analysis and considerations of what has to be done if attempts at transitional justice in Somalia and South Sudan to succeed. It also presents conclusions derived from the analysis of the research questions set out in the first chapter and discussed thereafter. In addition, this chapter contains an analysis of the hypothesis upon which the study was based, drawing findings from the discussions contained in the previous chapters.

## **5.1 KEY FINDINGS**

From the foregoing, various findings were drawn. These are discussed hereunder, in relation to the objectives of the study:

### **5.1.1 Objective I: To identify specific attempts at transitional justice in the conflict areas and assess their effectiveness.**

This objective aimed at highlighting the previous attempts at transitional justice in post conflict Somalia and South Sudan. The study recognised the fact that prior to its commencement, there had been previous attempts made at transitional justice, and these would form a spring board from which this study would commence. The essence was to place this study in context, allowing that transitional justice is a living concept that is growing in stature and usage. By so doing, this study recognises the importance attributed to transitional justice in bringing about lasting peace in post-conflict societies.

The study looked at the chronology of events in both states from the outset of the respective conflicts, and assessed each attempt made to end the conflicts. This assessment provided insight as to what measures were undertaken during each attempt and their level of effectiveness. It was established that in the two states, transitional justice was unable to initially have an impact due to a variety of reasons. These included renewed fighting between belligerents, presence of spoilers who undermined the progress made during the process and lack of government support in implementation of some measures.

The sum result was that these created a roadblock for progress, stretching out the period of conflict in both states. Renewed fighting had the effect of rendering the talks inoperable since the warring parties often accused each other of instigating violence against the other. As such, tensions

often ran high and these had to be quelled before the thought of another round of talks could be harboured. However, these renewed conflicts were sometimes instigated by persons who had no interests in the cessation of conflict. Termed as spoilers, such persons thrived in times of conflict by commanding large armies of looters or providing business such as sales of arms and ammunition. As such, these spoilers caused a delay in the process whenever they could for personal gain.

Said delays notwithstanding, the talks would eventually be held, culminating in resolutions ranging from ceasefires, power sharing agreements and in some cases proposed institutional changes. However, a major cause of ineffectiveness for transitional justice lay in the inability or lack of support from the respective states' governments. The state being the central organ of authority was best placed to implement any agreements made during peace talks. However, where the government did not want to support the resolutions, then there was little or no implementation carried out calling into further question the effectiveness of the transitional justice attempts in those states.

However, on the upside, regional and international actors continuously piled pressure on the belligerents to cease-fire, sit down and talk. Eventually, backed by threats of sanctions, the pressure paid off and where there had been stalling, the talks were held, and similarly where implementation had been wanting, the pressure helped push along the process to some extent.

### **5.1.2 Objective II: To assess the critical role of the regional and international community in these transitional justice mechanisms and initiatives.**

The importance of regional and international actors in the transitional justice attempts made in Somalia and South Sudan cannot be overlooked. The presence of a variance of actors working towards the common goal of bringing transitional justice to these states ensured a number of different activities were simultaneously undertaken, which in turn increased the scope of activities under the transitional justice mechanism. Notably, each of the actors had a clear understanding of their roles, and worked in tandem towards their achievement.

Overall, international actors were the major financiers of the transitional justice mechanisms attempted in Somalia and South Sudan. Funding from the UN and affiliate agencies, as well as developed countries enabled the organisation and holding of peace talks throughout the transitional justice period. It is at these talks that significant progress towards lasting peace was achieved. In addition, the international actors also brought on board technical expertise and advice. Finally, in some cases, they exerted pressure on the leaders who refused to co-operate in the process which achieved a measure of success. They continue to do so even at the implementation despite the government's laxity, in the hope that this pressure will finally bear fruit.

Regional actors were instrumental in guiding national and local reconciliation processes. Being well seized of the regional affairs, they are best placed to offer neutral grounds for negotiation during peace talks, and during these opportunities, they were able to influence the belligerents towards negotiation of cease-fires and ultimately peace deals. In addition, regional states contributed to the maintenance of security in the states by providing military personnel and support. Likewise, they too provided technical expertise where possible.

### **5.1.3 Objective III: To formulate tailor-made transitional justice ideas that would be more suited to the countries.**

The study considered previous attempts at transitional justice in both the Somali and South Sudan conflict, addressing the limitations these attempts had and looking into their relative levels of success. The findings highlighted the importance of community buy in and a bottom –up more inclusive approach to the implementation of transitional justice. To this end, the analysis of previous attempts highlighted shortcomings in the approaches taken. They found that these attempts amounted to power sharing amongst belligerents, while failing to include the people. As a result, the people did not get a feeling of justice, but instead were easily drawn back to fighting whenever the disputants fell back on their agreements.

Building on the experiences reported around these previous attempts, the study suggests the incorporation of traditional systems in future attempts. The flexibility and dynamism of traditional justice highlights its importance. Traditional justice mechanisms are able to rope in the people enhancing local buy-in into the transitional justice mechanism, the result of which is enhanced inclusivity, the ability to understand the underlying causes of the conflict and as a result, enhanced probability of lasting peace. Essentially, as the overarching goal of traditional justice is reconciliation, which is also a major objective for transitional justice, a combination of the two systems is better suited to bring about transitional justice in post-conflict Somalia and South Sudan.

## **5.2 TESTING THE HYPOTHESIS**

At the onset, this study was based on two hypotheses which were put to the test, and from which conclusions arose. This section contains a summary of the conclusions derived from those hypotheses.

### **5.2.1 Hypothesis I: Transitional justice can only be achieved where there is active participation by the community and the leaders at conflict.**

In order to achieve a successful transitional justice programme, a bottom-up approach is best suited. In this regard, the implementation of the mechanisms chosen should be centred on the people most affected – the community. In so doing, the mechanism chosen should ensure the active participation of the community so as to get to understand and resolve their needs. If this approach is not taken, then the root causes of conflict often remain unresolved which results in re-emergence of conflict.

In both Somalia and South Sudan, the communities relied heavily on traditional systems of justice whenever conflict arose and state systems were rendered inoperable. Where there was lack of a central system of governance, the people reverted to traditional systems, which they had trust in. These systems were effective in maintaining social order, due to their acceptance and buy in by the community. In addition, these systems were more appealing as they brought about a greater sense of justice to the community than the modern systems that were perceived as being imposed. Furthermore, as the communities were more familiar with the traditional systems, it was faster and more convenient to incorporate their use into modern day transitional justice, than to attempt implementation of the latter from scratch.

Somalia, classified as a fragile state, has been criticised for being too focused on post-conflict relations as opposed to the detailed mechanics of reconciling the Somali people. In addition, the key to bringing Somalia out of that crisis lies with the Somali traditional leaders. However, they cannot do so alone; they require help from local, regional and international actors<sup>clxxxiv</sup>. Similarly, in order to successfully implement the transitional justice mechanisms proposed in South Sudan there has to be co-operation between the various actors and the local

communities through their leadership. Drawing from previous experiences and lessons within South Sudan, the people of South Sudan may not necessarily feel justice has been served where modern justice is applied as compensation for lost life, property or injury. The community believe in material reimbursement, short of which feelings of vengeance will persist<sup>clxxxv</sup>.

**5.2.2 Hypothesis II: The only way a transitional justice mechanism that can be successful is for it to incorporate elements of local conflict resolution as well as “western” transitional justice ideals.**

Of importance to note, is the argument that the traditional systems also have limitations, the most common of which is their non-alignment with human rights approaches. Arguments have been raised pointing to the fact that some ethnic or gender based practices could limit the effectiveness of these traditional systems, leading to inequality in their use. Another limitation is that the sustained attempt to replace traditional systems with statutory ones has weakened them. In addition, traditional systems lack the capability to enforce decisions against militant groups. Finally, they may not be well equipped to handle the scale of atrocities that occurred during the conflicts in Somalia or South Sudan.

However, in both Somalia and South Sudan, the common practice was that the people referred to traditional leaders whenever they experienced injustice – notwithstanding the fact that sometimes the injustice suffered fell outside the ambit of traditional justice mechanisms. Therefore, this necessitates the argument for incorporation of traditional justice mechanisms in western methods.

Incorporation of traditional systems in modern day ones helps alleviate the shortfalls in each of the approaches. For the traditional mechanisms, where they are non-aligned with human rights, the specific provisions thereof can garner support from modern methods to enhance their



capability to deliver equal and fair access to justice. Similarly, with incorporation of systems, the traditional ones can work together with administrative units so as to enhance the enforceability of their decisions, which in turn broadens their scope and jurisdiction.

Conversely, as the members of the communities prefer reference to traditional systems, the incorporation of these traditional systems will enhance community buy-in. As a result, there will be increased participation in the process, which is necessary for the success of the entire process. This also results in a deeper understanding of the conflict, and as such, the root causes are easier identified and dealt with. In a nutshell, the success of transitional justice can only be guaranteed where the traditional and modern methods are integrated into the mechanisms applied.

### **5.3 CONCLUSION**

The period of conflict experienced in Somalia and South Sudan has been characterised by death, destruction of property and gross violation of human rights. This necessitates the intervention of actors with the aim of bringing about lasting peace and reconciliation. Transitional justice mechanisms have emerged as the preferred means to bring about that peace and reconciliation. However, previous attempts at transitional justice in both Somalia and South Sudan have come short, with renewed fighting experienced throughout the countries. This necessitated an analysis of these previous mechanisms, with a view to understanding their shortfalls, and proposing a better approach.

This study has shown that during periods of transitional justice, there exist certain factors that impede the proper implementation of the transitional justice mechanisms. These limiting factors include domestic spoilers such as warlords non-committed to peace; external impediments by neighbouring states that proffer their own interests; misdiagnosis of the causes of conflict and prescription of techniques required to solve it; and lack of support from a central government.

However, these limitations notwithstanding, the transitional justice mechanisms implemented thus far have achieved a measure of success. The level of conflict in the two states has reduced, with talks between the warring factions enabling some temporary periods of peace and subsequent agreements on sharing of power. This has also allowed actor's space within which to address some human right atrocities, as well as put in place steps geared towards public participation. Although, these have achieved relative peace in the two states, the aim of transitional justice is fundamentally to cultivate lasting peace and reconciliation. This then necessitates an improvement of the mechanisms.

This study argues that based on the traditional justice systems present in the two states, the range of mechanisms available for use under those systems may well bring about the improvement sought. It goes without saying that traditional systems were by and large democratic. The central tenets of these systems was reconciliation. However, with the advent of colonialism, the application of these systems was gradually infiltrated and eroded that they no longer held as much clout as they used to.

Admittedly, even though some of the western values that came with colonialisation have brought an improvement to standards of living, the possibility remains that traditional justice systems could still bring about a means by which post-conflict African states may restore peace and reconciliation as well as link traditional justice to modern day democracy. This then necessitates an integration of these systems with modern day transitional justice mechanisms, where the two systems work in tandem, with each building the others capacity.

This dynamic system has much to offer the two states by proffering a system which emphasises on distributive roles to various actors, a victim-centred approach and the centrality of

reconciliation. This assists the post-conflict states achieve sustainable lasting peace and reconciliation, necessary for them to rebuild in a progressive humane manner.

#### **5.4 RECOMMENDATIONS**

At the onset of this research paper, the author identified a gap relating to the legal sector institutions that govern the administration of justice mechanisms surrounding transitional justice. There had been widespread criticism about the inability of transitional justice to bring about lasting peace and reconciliation in post conflict Somalia and South Sudan. The reasons set forth include renewed conflict during times of transition, presence of spoilers and lack of government support. Based on these, the findings of the foregoing chapters have brought to the fore that indeed the transitional justice approaches applied in Somalia and South Sudan have yet to bear lasting fruits.

Increased interest in transitional justice continues to underscore the need for an intense study on the subject. Conflicts continue to arise all over the world, and with modern day examples in the form of the two subject countries, further investigation on the subject matter should be able to yield results able to influence legislative reform. The findings in this study have occasioned the need for a more critical look at the transitional justice mechanisms applied in these post-conflict societies, a discussion as to their shortfalls and a discussion as to the recommended means by which these shortfalls can be mitigated. This section explains some of the recommendations drawn based on the findings of this study.

##### **5.4.1 Government support**

Lack of government support has cost both Somalia and South Sudan as they attempted to implement transitional justice. In both cases, the lack of support from a system of government has meant that there was little or no support in the process which in turn affected the success of the project. Government support cannot be overlooked because the government is central in the

transitional justice process. In that regard, the government is tasked with the investigation and/or prosecution of perpetrators, support to victims through enforcement of sentences and the implementation of the proposed activities under the mechanism applied.

In addition, the government represents the will of the people. As such, if the government is lethargic in its mandate, this casts aspersions as to the will of the people in implementation of the transitional justice mechanisms. This in turn may have adverse effects on support from other actors. Funding for projects may reduce in light of such lethargy which would have a corresponding negative ripple effect on the entire transitional justice mechanism.

#### **5.4.2 Adoption of a bottom-up approach**

Despite the transitional justice mechanism chosen, the importance of inclusivity in the process cannot be overstated. The basic nature of conflict is that it is perpetrated among people on the ground. As such, so as to properly address the root causes of conflict, the transitional justice mechanism chosen has to take into account the concerns of the people. This can only be achieved by speaking to the people and giving them a chance to air their grievances and tell their stories. To do so, the transitional justice mechanism must therefore adopt a bottom-up approach as opposed to a top-down one.

#### **5.4.3 Incorporation of traditional mechanisms**

In relation to the foregoing, in order to implement a bottom-up approach, the mechanism chosen has to be appealing to the people. Traditional systems of justice have a strong foothold in post-conflict communities because where governments fail or are ousted, it is these traditional systems that maintain law and order. Thus the people are often more receptive to use of these systems. Therefore these traditional systems can be implemented to help enhance participatory levels.

In addition, the wealth of knowledge held by traditional leaders can be relied upon as and when applicable. Justice, being abstract as it is, may not always be seen to be done in all scenarios where a black and white interpretation of the law is done. There are cases where there has to be slight deviations which are unforeseen beforehand. In some of these cases, traditional systems of justice could offer solutions.

#### **5.4.4 Adoption of a broad based approach**

Post-conflict societies are often characterised by a system of failed state systems. Thus, the transitional justice period is characterised by a several overarching activities including rebuilding of state systems, reconciliation of warring parties and maintenance of peace. It is necessary to have these activities done in tandem. As such, there is need to adopt a variety of mechanisms. However, it is important to ensure that the mechanisms complement each other which then necessitates cooperation between actors with the common goal being the overall success of achieving transitional justice.

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<sup>i</sup> United Nations' Security Council, "*The rule of law and transitional justice in conflict and post-conflict societies*" of 23<sup>rd</sup> August 2004, S/2004/616, available at: <http://www.refworld.org/docid/45069c434.html> [accessed on 14<sup>th</sup> March 2017].

<sup>ii</sup> United Nations' Peace Building Commission, Working Group on Lessons Learnt "*Background Note – Justice in Times of Transition*" of 26<sup>th</sup> February 2008, available at [http://www.un.org/en/peacebuilding/pdf/doc\\_wgll/justice\\_times\\_transition/26\\_02\\_2008\\_background\\_note.pdf](http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf) [accessed on 14<sup>th</sup> March, 2017].

<sup>iii</sup> The Nuremberg trials (National Military Tribunal at Nuremberg) were a series of military tribunals, held by the Allied forces after World War II, which were most notable for the prosecution of prominent members of the political, military, judicial and economic leadership of Nazi Germany who planned, carried out, or otherwise participated in the Holocaust and other war crimes. The trials were held in the city of Nuremberg, Germany, and their decisions marked a turning point between classical international law and contemporary international law. Wikipedia, *Nuremberg Trials*, available at [https://en.wikipedia.org/wiki/Nuremberg\\_trials](https://en.wikipedia.org/wiki/Nuremberg_trials) [accessed on 24<sup>th</sup> March, 2017]

<sup>iv</sup> Gumbi S.K., "The effect of Somali Armed Conflict on the East African Sub-Region", *African Journal of Political Science and International Relations*, Vol. 9 (4) (2015) pp. 115-119

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<sup>vi</sup> Leslie Vinjamuri, *Lessons From Africa's Efforts at Transitional Justice*, available at <http://www.nytimes.com/roomfordebate/2014/01/06/turning-away-from-painful-chapters/lessons-from-africas-efforts-at-transitional-justice> [accessed on 16<sup>th</sup> March 2017].

<sup>vii</sup> Ploch, L. (2016). Conflict in South Sudan and the Challenges Ahead. Congressional Research Service. In *Library of Congress*.

<sup>viii</sup> According to a UN Panel of Experts that was formed to assess the possibility of imposing targeted individual sanctions in South Sudan: "clear and convincing evidence that most of the acts of violence committed during the war ... have been directed by or undertaken with the knowledge of senior individuals at the highest levels of the Government and within the opposition." Letter dated 22<sup>nd</sup> January 2016 from the Panel of Experts on South Sudan established pursuant to Security Council resolution 2206 (2015) addressed to the President of the Security Council - Final report (S/2016/70)

<sup>ix</sup> The term "victor's justice" is a situation in which an entity participates in carrying out "justice" on its own basis of applying different rules to judge what is right or wrong for their own forces and for those of the (former) enemy. Wikipedia, *Victor's Justice*, available at [https://en.wikipedia.org/wiki/Victor%27s\\_justice](https://en.wikipedia.org/wiki/Victor%27s_justice) [accessed on 26<sup>th</sup> March, 2017].

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<sup>xi</sup> Crocker D., "Reckoning with past wrongs: A normative framework" *Ethics and International Affairs*, Vol. 13, (1999) pp 39 – 63.

<sup>xii</sup> Supra note 1

<sup>xiii</sup> The Transitional Justice Data Base Project began at the University of Wisconsin in 2005 and is led by three political scientists: Leigh A. Payne, Tricia D. Olsen, and Andrew G. Reiter. The team created a global database of over 900 mechanisms (trials, truth commissions, amnesties, reparations, and lustration policies) used from 1970-2007. The main task of the project was to better understand how the mechanisms are used and whether they work, with the ultimate goal of improving policy.

<sup>xiv</sup> Olsen, T. D., Payne L. A., and Reiter A. G., "The justice balance: When transitional justice improves human rights and democracy." *Human Rights Quarterly* Vol. 32.4 (2010) pp 980-1007.

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<sup>xvi</sup> Waldorf, L., "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice", *Temple Law Review*, Vol. 79 (2006), pp. 1.

<sup>xvii</sup> Lambourne, W. "Transitional Justice and Peace Building after Mass Violence", *International Journal of Transitional Justice*, Vol. 3 (1) (2009), pp. 28–48.

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<sup>xix</sup> Findlay, M. and Henham, R., *Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process*, (London: Willan Publishing, 2005).

<sup>xx</sup> Long, W.J. and Brecke, P., *War and Reconciliation: Reason and Emotion in Conflict Resolution*, (London: MIT Press 2003).

<sup>xxi</sup> Ajuran Sultanate, the Adal Sultanate, the Warsangali Sultanate, the Sultanate of the Geledi and the Majeerteen Sultanate.

<sup>xxii</sup> Ismail I. Ahmed and Reginald Herbold Green, *Third World Quarterly*, 1999 "The heritage of war and state collapse in Somalia and Somaliland: local-level effects, external interventions and reconstruction" [PDF]. Accessed on 18<sup>th</sup> April 2017

<sup>xxiii</sup> Besteman, Catherine *Unraveling Somalia: Race, Violence, and the Legacy of Slavery*. Philadelphia, PA: University of Pennsylvania Press, 1999.

<sup>xxiv</sup> Shermarke was Prime Minister of Somalia from July 12, 1960 to June 14, 1964, and President of Somalia from June 10, 1967 until his assassination on October 15, 1969

<sup>xxv</sup> Zapata, Mollie "Somalia: Colonialism to Independence to Dictatorship, 1840-1976" Posted by on Jan 31, 2012- <http://www.enoughproject.org/blogs/somalia-colonialism-independence-dictatorship-1840-1976> Accessed on 18th April 2017

<sup>xxvi</sup> . Helen Chapin Metz, ed. *Somalia: A Country Study* Washington: GPO for the Library of Congress, 1992, accessed August 10, 2009. Accessed on 18<sup>th</sup> April 2017

<sup>xxvii</sup> The Cold War circa 1947-1991 was a state of geo-political tension after World War II between powers in the Eastern Bloc and the powers in the Western Bloc ( the Soviet Union and its allies and the United States and its allies.) these tensions were brought about by increasingly different political and economic ideologies between the two axis' and was fought through proxy wars, increasingly hostile foreign policies and nuclear military preparation for war.

xxviii The Ogaden war July 1977 to 1978 was a military offensive by Presidents Barres regime to reclaim the Ogaden Region from Ethiopia where by Treaty, it was seceded by the British in 1987 to Emperor Menelik.

xxix UNDP, *Human Development Report 2001-Somalia*, (New York: 2001), p. 42

xxx UNDP, *Human Development Report 2001-Somalia*, (New York: 2001), p.34

xxxi The Harakat Shabaab al-Mujahidin- ("Mujahideen Youth Movement" or "Movement of Striving Youth") - the militant wing of the Somali Council of Islamic Courts.

xxxii The period 2008 to 2009 has been noted to have reversed a lot of the gains made in the 1990s with over 1.3 million displaced, 3.6 million in need of food aid and a record number of over 50,000 fleeing over the borders due the growing humanitarian crisis.

xxxiii Operation Linda Inchi- Operation Protect the country was an effort launched on 16<sup>th</sup> October 2011 between the Kenyan ad Somali Armed Forces who entered Somalia's conflict zones in a bid to capture al-Shabaab militia.

xxxiv "A USIP Fact Sheet "The Current Situation in Somalia" United states Institute of Peace Fact Sheet Monday, January 30, 2017- <https://www.usip.org/publications/2017/01/current-situation-somalia> accessed on 18th April 2017

xxxv "Roots of Sudanese conflict are in the British colonial policies" 13 January 2008- <http://www.sudantribune.com/Roots-of-Sudanese-conflict-are-in,25558> Accessed n 19<sup>th</sup> April 2017

xxxvi "The policy of the Government in the southern Sudan is to Build up a series of self-contained racial or tribal units with structures and organization based, to whatever extent the requirements of equity and good government permit, upon indigenous customs, traditional usage and beliefs. (Beshir, 1968, p.115; and Henderson,1965,p.165)"

xxxvii Known as the Anyanya Rebellion or Anyanya I, after the name of the rebels which means 'snake venom. LeRiche & Arnold "*South Sudan: from revolution to independence*" 2012. Columbia University Press. New York. p. 16

xxxviii O'balance, Edgar, "*The Secret War in the Sudan: 1955-1972*" Faber and Faber, 1977, pg 57

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- <sup>xlvii</sup> Aiken, N.T., *Identity, Reconciliation and Transitional Justice*, (New York, NY: Routledge, 2013).
- <sup>xlviii</sup> Ibid.
- <sup>lix</sup> Bar-Siman-Tov, Y. ‘Dialectics between Stable Peace and Reconciliation’, in Bar-Siman-Tov, Y. (ed.) *From Conflict Resolution to Reconciliation*, (Oxford: Oxford University Press 2004).
- <sup>i</sup> Lederach, J.P. *Building Peace: Sustainable Reconciliation in Divided Societies*, (Washington, DC: United States Institute of Peace Press, 1997).
- <sup>ii</sup> Coleman, P.T. *Polarized Collective Identities: A Review and Synthesis of the Literature*, (New York, NY: Columbia University, 2002)
- <sup>iii</sup> Aiken, N.T. ‘The (Re) Construction of a Culture of Human Rights: Transitional Justice and Human Security’, *Human Security Journal*, Vol. 8, (2009), pp. 10–18.
- <sup>iiii</sup> Supra note 17
- <sup>liv</sup> Ibid
- <sup>lv</sup> Elmi, A. A., & Barise, A., “The Somali Conflict: Root Causes, Obstacles and Peace-Building Strategies”, *African Security Review*, Vol 15 No. 1, (2006) pp. 32-54.
- <sup>lvi</sup> Under the newly established Transitional National Government (TNG)
- <sup>lvii</sup> When the Transitional Federal Government (TFG) was established and the Transitional Federal Charter was adopted.
- <sup>lviii</sup> Available at <http://amisom-au.org/about-somalia/somali-peace-process/> accessed on 7.6.2017 at 5:48 a.m.
- <sup>lix</sup> Abdile, M., “Customary Dispute Resolution in Somalia”. *African Conflict & Peace Building Review* Vol 2, No. 1, (2012), pp 95.
- <sup>lx</sup> Ibid at pp 105.
- <sup>lxi</sup> Maru, M. T., “The Future of Somalia's Legal System and its Contribution to Peace and Development.” *Journal of Peace Building & Development*, Vol. 4, No. 1, (2012), pp. 1 – 15.
- <sup>lxii</sup> Mwangi, O. G., “The Union of Islamic Courts and security governance in Somalia.” *African Security Review* Vol. 19, No. 1, (2010), pp 105.
- <sup>lxiii</sup> *Diya* in Islamic law is the financial compensation paid to the victim or heirs of a victim in the cases of murder, bodily harm or property damage. In Arabic, the word means both blood money and ransom. Available at [https://en.wikipedia.org/wiki/Diya\\_\(Islam\)](https://en.wikipedia.org/wiki/Diya_(Islam)) accessed on 12/6/2017 at 10:52 a.m.
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- <sup>lxvi</sup> Supra note 10 at pp 259.
- <sup>lxvii</sup> Bakonyi, J., “Authority and Administration beyond the State: Local Governance in Southern Somalia, 1995–2006.” *Journal of Eastern African Studies* Vol. 7, No. 2, (2013), pp. 272 – 290.
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- <sup>lxix</sup> Menkhaus, K., “Governance without Government in Somalia – Spoilers, State Building, and the Politics of Coping.” *International Security* Vol. 31, No. 3, (2007) pp. 89.
- <sup>lxx</sup> Supra note 8, at pp. 91 – 92.
- <sup>lxxi</sup> Which led to the establishment of the Transitional National Government (TNG)



<sup>lxxii</sup> When the Transitional Federal Government (TFG) was established and the Transitional Federal Charter was adopted.

<sup>lxxiii</sup> Available at <http://amisom-au.org/about-somalia/somali-peace-process/> accessed on 7.6.2017 at 5:48 a.m.

<sup>lxxiv</sup> Appendix III of document S/1997/17 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/003/93/PDF/N9700393.pdf?OpenElement> accessed on 7.6.2017 at 6:30 a.m.

<sup>lxxv</sup> Available at <http://unscr.com/en/resolutions/733> accessed on 7.6.2017 at 11:25 a.m.

<sup>lxxvi</sup> Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/053/43/PDF/N9705343.pdf?OpenElement> accessed on 7.6.2017 at 11:20 a.m.

<sup>lxxvii</sup> Accessed from <http://www.refworld.org/pdfid/486a53410.pdf> on 28.8.2017 at 1:30 p.m.

<sup>lxxviii</sup> Accessed from <http://www.c-r.org/downloads/accord%201997%20Somali%20peace%20agreements%202010%20ENG.pdf> on 28.8.2017 at 2:00 p.m.

<sup>lxxix</sup> Supra note 21

<sup>lxxx</sup> Available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/1997/135](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1997/135) accessed on 7.6.2017 at 12:20 p.m.

<sup>lxxxi</sup> Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/378/28/PDF/N9737828.pdf?OpenElement> accessed on 7.6.2017 at 12:30 p.m.

<sup>lxxxii</sup> Supra note 23

<sup>lxxxiii</sup> Horn of Africa, Monthly Review, January – June 1998. Available at

[http://www.africa.upenn.edu/eue\\_web/hoa0198.htm](http://www.africa.upenn.edu/eue_web/hoa0198.htm) ,

[http://www.africa.upenn.edu/eue\\_web/hoa0298.htm](http://www.africa.upenn.edu/eue_web/hoa0298.htm) ,

[http://www.africa.upenn.edu/eue\\_web/hoa0398.htm](http://www.africa.upenn.edu/eue_web/hoa0398.htm) ,

[http://www.africa.upenn.edu/eue\\_web/hoa0498.htm](http://www.africa.upenn.edu/eue_web/hoa0498.htm) ,

[http://www.africa.upenn.edu/eue\\_web/hoa0598.htm](http://www.africa.upenn.edu/eue_web/hoa0598.htm) accessed on 29.8.2017 at 10:45 p.m.

<sup>lxxxiv</sup> Yusuf was a Somali politician and former Colonel in the Somali National Army. He was one of the founders of the Somali Salvation Democratic Front, as well as the Puntland State of Somalia, where he served as the autonomous region's first President. In 2004, he also helped establish the Transitional Federal Government, which he led as President from 2004 until 2008.

<sup>lxxxv</sup> “*Somali Peace Concerns and Arta Outcome*” available at <https://www.scribd.com/document/13250437/Somali-Peace-Concerns-and-Arta-Outcome>

accessed on 29.8.2017 at 10:00 p.m.

<sup>lxxxvi</sup> Menkhaus K et al., “*A history of mediation in Somalia since 1988*”, Inter-peace and Centre for Research and Dialogue (2009), pg 52.

<sup>lxxxvii</sup> Ibid.

<sup>lxxxviii</sup> Available at [http://www.interpeace.org/wp-content/uploads/2009/05/2009\\_Som\\_Interpeace\\_A\\_History\\_Of\\_Mediation\\_In\\_Somalila\\_Since\\_1988\\_EN.pdf](http://www.interpeace.org/wp-content/uploads/2009/05/2009_Som_Interpeace_A_History_Of_Mediation_In_Somalila_Since_1988_EN.pdf) accessed on 7.6.2017 at 6:00 a.m.

<sup>lxxxix</sup> Farah N., “To Whom Does Somalia Belong? A Novelist’s Account of the Somali Conflict” In *Somalia: A Nation Without a State*. (2007), (Life and Peace Institute: Sweden).

<sup>xc</sup> The Declaration on Cessation of Hostilities and the Structure and Principle of the Somalia National Reconciliation Process

<sup>xc</sup>i International Crisis Group (ICG), “Somalia: To Move Beyond the Failed State”, African Report No. 147, (2008) (Nairobi/Brussels: International Crisis Group)

<sup>xcii</sup> Medhane T., “Somali: Bailing Out the TFG” *Inter Africa Group*, (2009), Addis Ababa.

<sup>xciii</sup> Keck T., “Somalia: Any Chance For Peace?” Policy Brief for the Friends Committee on National Legislation, (2009) (Washington DC)

<sup>xciv</sup> Available from <https://www.un.org/sc/suborg/en/s/res/1725-%282006%29> accessed on 23.6.2017 at 5:51 p.m

<sup>xcv</sup> 69<sup>th</sup> PSC meeting held on 19<sup>th</sup> January 2007. Available at <http://www.peaceau.org/en/article/communique-of-the-peace-and-security-council-somalia-7> accessed on 23.6.2017 at 5:34 p.m.

<sup>xcvi</sup> Alemayehu F., “A Nascent Peace and Security Architecture in the Horn of Africa”, *The Horn of Africa Bulletin*, Vol. 22 No. 3, (2010), pp. 1 – 5.

<sup>xcvii</sup> The Borama Peace Talks in Somaliland are a good example of this. Available from Walls, M., Mohammed, K., & Ali, M. O. *Peace in Somaliland: an indigenous approach to state-building* (2008) at <http://apd-somaliland.org/wp-content/uploads/2014/11/Interpeace-APD-Statebuilding-EN.pdf> accessed on 21.6.2017 at 8:36 p.m.

<sup>xcviii</sup> Supra note 15, pp 74

<sup>xcix</sup> Wilson J, “*Local peace processes in Sudan and South Sudan*”, *Peaceworks*, Vol. 97, (2014) pp 5

<sup>c</sup> Salva Kiir was an ethnic Dinka, while Riek Machar was an ethnic Nuer – two tribes with a history of conflict.

<sup>ci</sup> Nyaba P A, “*It wasn't a coup – Salva Kiir shot himself in the foot*”, South Sudan Nation. Available at <http://www.southsudannation.com/it-wasnt-a-coup-salva-kiir-shot-himself-in-the-foot/> accessed on 4.9.2017 at 8:40 a.m.

<sup>cii</sup> Al Jazeera News, “*South Sudan President says coup attempt foiled*”, 17<sup>th</sup> December, 2013. Available at <http://www.aljazeera.com/news/africa/2013/12/s-sudan-president-says-coup-attempt-foiled-2013121613417331572.html> accessed on 4.9.2017 at 9:13 a.m.

<sup>ciii</sup> Ibid

<sup>civ</sup> Al Jazeera, “*UN says base in South Sudan stormed*” 20<sup>th</sup> December 2013. Available at <http://www.aljazeera.com/video/africa/2013/12/un-says-base-south-sudan-stormed-20131219174151171239.html> accessed on 4.9.2017 at 5:15 p.m.

<sup>cv</sup> BBC Africa, “*South Sudan crushes coup attempt, says President Kiir*”, 16<sup>th</sup> December 2013. Available at <http://www.bbc.com/news/world-africa-25396853> accessed on 4.9.2017 at 9:27 a.m.

<sup>cvi</sup> The Daily Star, “*Ugandan troops deployed in South Sudan capital: report*” 20<sup>th</sup> December, 2013. Available at <http://www.dailystar.com.lb/News/Middle-East/2013/Dec-20/241787-ugandan-troops-deployed-in-south-sudan-capital-report.ashx#ixzz2o2AHW7aI> accessed on 4.9.2017 at 5:27 p.m.

<sup>cvi</sup> Sudan Tribune, “*Machar says Ugandan jet bombed S.Sudan rebel positions*” 28<sup>th</sup> December, 2013. Available at <http://www.sudantribune.com/spip.php?article49356> accessed on 4.9.2017 at 5:46 p.m.

<sup>cvi</sup> The Daily Star, “*S.Sudan's Kiir gets regional backing, army says wins back oil town*” 28<sup>th</sup> December, 2013. Available at <http://www.dailystar.com.lb/News/Middle-East/2013/Dec-28/242493-s-sudans-kiir-gets-regional-backing-army-says-wins-back-oil-town.ashx#axzz2oNa3sbT8> accessed on 4.9.2017 at 6:00 p.m.

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- <sup>cxix</sup> Small Arms Survey Sudan, “*The Conflict in Unity State*” Human Security Baseline Assessment for Sudan and South Sudan (HSBA), 2014, pp 1 – 4.
- <sup>cx</sup> Al Jazeera, “*S Sudan: More than 100 dead on independence anniversary*”, 10<sup>th</sup> July 2016. Available at <http://www.aljazeera.com/amp/news/2016/07/south-sudan-scores-dead-independence-anniversary-160709090438275.html> accessed on 6.9.2017 at 10:30 p.m.
- <sup>cxii</sup> BBC Africa, “*South Sudan ‘back to war’, says VP Riek Machar’s spokesman*”, 10<sup>th</sup> July, 2016. Available at <http://www.bbc.com/news/world-africa-36758013> accessed on 6.9.2017 at 11:00 p.m.
- <sup>cxiii</sup> BBC Africa, “*South Sudan clashes: Salva Kiir and Riek Machar order ceasefire*”, 11<sup>th</sup> July, 2016. Available at <http://www.bbc.com/news/world-africa-36763076> accessed on 7.9.2017 at 5:26 a.m.
- <sup>cxiiii</sup> James Butty, “*South Sudan’s Riek Machar calls for armed struggle*”, 26<sup>th</sup> September, 2016. Available at <https://www.voanews.com/a/south-sudan-riek-machar-calls-for-armed-struggle/3525045.html> accessed on 7.9.2016 at 6:00 a.m.
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- <sup>cxvi</sup> Choudree RBG, “Traditions of Conflict Resolution in South Africa”, *African Journal on Conflict Resolution*, Vol. 1, (1999), pp 9-27.
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- <sup>cx</sup> Ibid
- <sup>cxxi</sup> Supra note 18
- <sup>cxii</sup> Murithi T, Practical Peace Making Wisdom from Africa: Reflections on Ubuntu, *The Journal of Pan African Studies*, Vol 1, (2006), pp 25 – 34.
- <sup>cxiii</sup> Supra note 20
- <sup>cxiiii</sup> Wassara, S. S., Traditional mechanisms of conflict resolution in Southern Sudan, *Berghof Foundation for Peace Support*, (2007), pp 4
- <sup>cxv</sup> Ibid
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- <sup>cxvii</sup> Ibid
- <sup>cxviii</sup> Tefera B. K., “Conflicts, Conflict Resolution Practices and Impacts of the War in South Sudan”, *International Journal of School and Cognitive Psychology*, Vol. 2(13), (2015), pp 6.
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- <sup>cx</sup> Al Jazeera, “*US envoy says S Sudan President open to talks*”, 24<sup>th</sup> December 2013. Available at

<https://web.archive.org/web/20131225065123/http://www.aljazeera.com/news/africa/2013/12/us-envoy-says-s-sudan-president-open-talks-20131223193635972873.html> accessed on 5.9.2017 at 8:19 p.m.

<sup>cxxx</sup> Odera C & Nichols M, "U.N. chief seeks to urgently double the size of the U.N. peacekeeping force in the country to protect civilians in a deepening conflict that has killed hundreds", Thomas Reuters Foundation News, 23<sup>rd</sup> December, 2013. Available at <http://news.trust.org/item/20131223195244-2j16n/> accessed on 11.10.2017 at 4:30 p.m.

<sup>cxxxi</sup> Collectively known as IGAD+

<sup>cxxxii</sup> Available at

[http://www.sudantribune.com/IMG/pdf/signed\\_agreement\\_cessation\\_of\\_hostilities\\_.pdf](http://www.sudantribune.com/IMG/pdf/signed_agreement_cessation_of_hostilities_.pdf) accessed on 13.10.2017 at 9:00 a.m.

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<sup>cxxxiv</sup> Jason Hanna & Sussana capeluoto, CNN, "South Sudan, rebels reach cease-fire after weeks of fighting", 24<sup>th</sup> January, 2014. Available at <http://edition.cnn.com/2014/01/23/world/africa/south-sudan-ceasefire/> accessed on 5.9.2017 at 8:25 p.m.

<sup>cxxxv</sup> According to regional political analyst Messay Kindaya.

<sup>cxxxvi</sup> The 2014 Bentiu massacre occurred on 15<sup>th</sup> April in Bentiu when more than 400 civilians, all said to have been Dinkas, were massacred by Nuer rebels.

<sup>cxxxvii</sup> BBC Africa, "South Sudan Rivals Kiir and Machar agree peace deal" 10<sup>th</sup> May, 2014. Available at <http://www.bbc.com/news/world-africa-27352902#> accessed on 5.9.2017 at 8:50

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<sup>cxxxix</sup> Al Jazeera, "S Sudan's warring sides boycott peace talks", 17<sup>th</sup> June, 2014. Available from <http://www.aljazeera.com/news/africa/2014/06/s-sudan-warring-sides-boycott-peace-talks-201461701426722700.html> accessed on 6.9.2017 at 5:23 a.m.

<sup>cxl</sup> Irin News, "Is South Sudan's latest peace accord the real deal?", 26<sup>th</sup> August 2015. Available at <http://www.irinnews.org/news/2015/08/26/south-sudan%E2%80%99s-latest-peace-accord-real-deal> accessed on 6.9.2017 at 5:40 a.m.

<sup>cxli</sup> This was the third round of talks aimed at reaching a ceasefire.

<sup>cxlii</sup> Supra note 41.

<sup>cxliii</sup> Supra note 41.

<sup>cxliv</sup> Al Jazeera, "South Sudan peace talks suspended indefinitely", 7<sup>th</sup> March 2015. Available at <http://www.aljazeera.com/news/2015/03/south-sudan-peace-talks-suspended-indefinitely-150306124303011.html> accessed on 6.9.2015 at 12:15 p.m.

<sup>cxlv</sup> Supra note 41

<sup>cxlvi</sup> The full text of this agreement is available at [https://unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf) accessed on 20.10.2017 at 10:30 a.m.

<sup>cxlvii</sup> UNSC Resolution 2206, available at [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2206.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2206.pdf) accessed on 20.10.2017 at 10:00 a.m.

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cl Peter Clotey, “*Uganda begins troop withdrawal from South Sudan*”, VOA News, 22<sup>nd</sup> October, 2015. Available at <https://www.voanews.com/a/uganda-begins-troop-withdrawal-from-south-sudan/3018884.html> accessed on 6.9.2017 at 5:35 p.m.

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clv UNSC Resolution 2304 of 2016, available at <http://www.bbc.com/news/world-africa-36833875> accessed on 20.10.2017 at 2:30 p.m.

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clviii Supra note 33

clix Supra note 58

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clxiv Examples within international conventions: Universal Declaration of Human Rights, article 8, International Covenant on Civil and Political Rights, article 2, International Convention on the Elimination of All Forms of Racial Discrimination, article 6, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 6, International Convention for the

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Protection of All Persons from Enforced Disappearance, article 24, the Convention on the Rights of the Child, article 39. S

<sup>clxv</sup> In a meeting held between then President Sheikh Sharif Sheikh Ahmed and Speaker of Parliament Sheikh Sherif Sheikh Hassan, organized on 9<sup>th</sup> June 2011 under the auspices of President Yoweri Museveni in Kampala, Uganda. The meeting was facilitated by the Special Representative of the Secretary-General (SRSG), Ambassador Augustine Mahiga, Available at [https://unpos.unmissions.org/sites/default/files/old\\_dnn/110609%20-%20Kampala%20Accord%20\(signed\).pdf](https://unpos.unmissions.org/sites/default/files/old_dnn/110609%20-%20Kampala%20Accord%20(signed).pdf) accessed on 25.10.2017 at 9:00 p.m.

<sup>clxvi</sup> Asamoah A A, "*Long walk to restoration: Lessons from Somalia's transition process*", Institute for Security Studies, Situation Report, (2013), pp 4.

<sup>clxvii</sup> Ibid at p 5

<sup>cixviii</sup> International Crisis Group, "*Somalia: New Leadership, Persistent Problems*", Commentary on Africa, 28<sup>th</sup> February 2016, available at <https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-new-leadership-persistent-problems> accessed on 30.10.2017 at 4.50 a.m.

<sup>clxix</sup> Leite N, "*Reinvigoration of the Somali Traditional Justice through Inclusive Conflict Resolution Approaches*", ReliefWeb International, (2017) pg 2.

<sup>clxx</sup> War-Torn Societies Project International, "*A Self-Portrait of Somaliland: Rebuilding from Ruins*", War-Torn Project, pp 22

<sup>clxxi</sup> The Agreement on the Resolution of Conflict in South Sudan (ARCSS), available at [https://unmiss.unmissions.org/sites/default/files/final\\_proposed\\_compromise\\_agreement\\_for\\_south\\_sudan\\_conflict.pdf](https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf) accessed on 27.10.2017 at 10:30 a.m

<sup>clxxii</sup> Knopf K A, "*A path to justice in South Sudan*", Relief Web, 1.7.2017, available at <https://reliefweb.int/report/south-sudan/path-justice-south-sudan> accessed on 26.7.2017 at 11:58

a.m.

<sup>clxxiii</sup> Ibid

<sup>clxxiv</sup> Willems R & Deng D, "*Perceptions of Transitional Justice in South Sudan*", University for Peace, UPEACE Centre, South Sudan Law Society & PAX, 2016 available at <https://www.paxforpeace.nl/publications/all-publications/perceptions-of-transitional-justice-in-south-sudan> accessed on 27.10.2017 at 11:04 a.m.

<sup>clxxv</sup> Ibid

<sup>clxxvi</sup> Supra note 11 at page 28

<sup>clxxvii</sup> ARCSS- Section 2.1.12. pg. 6.

<sup>clxxviii</sup> ARCSS

<sup>clxxix</sup> Appendix 6 of the Agreement

<sup>clxxx</sup> Van Drumpt F, "*The Importance of Traditional Courts*", Cordaid, (2015), available at <https://www.cordaid.org/en/news/justice-chicken-shack/> accessed on 4.11.2017 at 6.11 a.m.

<sup>clxxxi</sup> Ibid

<sup>clxxxii</sup> Relief Web, "*Traditional leaders resolve to set up committee for traditional justice as a vehicle for peace and reconciliation in South Sudan*", UNDP Report, (2016), available at [http://www.ss.undp.org/content/south\\_sudan/en/home/presscenter/pressreleases/2016/12/12/traditional-leaders-resolve-to-set-up-committee-for-traditional-justice-as-a-vehicle-for-peace-and-reconciliation-in-south-sudan.html](http://www.ss.undp.org/content/south_sudan/en/home/presscenter/pressreleases/2016/12/12/traditional-leaders-resolve-to-set-up-committee-for-traditional-justice-as-a-vehicle-for-peace-and-reconciliation-in-south-sudan.html) accessed on 4.11.2017 at 6:39 a.m.

<sup>clxxxiii</sup> Other Constitutions such as the South African an Kenyan one expressly state as such.

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<sup>clxxxiv</sup> Farah I, “*Somalia: Let us get it right this time*”, Horn of Africa Bulletin ,(May – June, 2012), pg 4

<sup>clxxxv</sup> Tiitmamer N, “*Transitional Justice for stabilizing South Sudan: Lessons from Global and Local contexts*”, The Sudd Institute Policy Brief, (2016).