



PROLONGED AND ARBITRARY ARREST AND DETENTION: AN ACCESS TO
JUSTICE DILEMMA FOR SOUTH SUDAN

Thesis presented for the Degree of
DOCTOR OF PHILOSOPHY
in the Department of Public Law
Faculty of Law
UNIVERSITY OF CAPE TOWN

By

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May 2021

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ABSTRACT

South Sudan gained independence on 9 June 2011 after a prolonged period of oppression and conflict which was fuelled by a combination of factors including race, religion, the denial of human rights and dignity for the people of the south. Independence from Sudan ushered in a hope that the conflict-affected population could have a homeland of their own to live in peace and dignity. However, since independence, the achievement of good governance and the protection of human rights have been considerable challenges for South Sudan. The outbreak of civil war barely two years into independence further heightened the woes of the country creating a protracted humanitarian situation, rolling back development gains and weakening the functionality of governance institutions including those relevant to justice and law enforcement.

Within this context of conflict, poverty and bad governance, an emerging concern is the prevalence of prolonged and arbitrary arrest and detention (PAD) in the criminal justice sector of South Sudan. While recognising that PAD occurs due to a combination of factors in any context, the thesis identifies three cardinal factors which have rendered PAD an inevitable component of the criminal justice sector in South Sudan. These include 1) the substantial geographic size and coverage of the country; 2) the limited financial and logistical resources available to justice and law enforcement institutions and; 3) limited human rights awareness and culture in South Sudan.

The thesis investigates the historical, socio-economic and political context of South Sudan and demonstrates how the intervening factors passively or actively contribute towards PAD in post-independent South Sudan. The thesis also investigates the definition and peculiarities of the various acts and omissions that constitute PAD and analyses how it contravenes national and international law and human rights principles and standards. The thesis also highlights the social, economic and cultural impact of PAD and determines that these cumulative factors render PAD an inevitable component of the criminal justice system in South Sudan.

The thesis relies on pre-existing theoretical and basic research for information and data relevant to the study. These materials include publications such as academic materials and human rights monitoring reports principally from three sources: Amnesty International, Human Rights Watch, and the United Nations Mission in South Sudan. The thesis also makes significant references to legislation, case laws, reports and statistical data from relevant institutions in South Sudan and other jurisdictions. Finally, international human rights treaties

and conventions (some of which South Sudan has acceded to) are also reviewed in explaining and determining the legality and applicability of human rights law, concepts and practices locally.

The thesis finds that the negative and harmful consequences of PAD occur at the individual, family, and national levels. Among others, the thesis identifies the right to access justice, including the rights to due process and liberty and security of persons as the main human rights violated by PAD. The thesis further notes that PAD significantly undermines the confidence and trust of the population in the justice and law enforcement institutions in South Sudan. Finally, the thesis also finds that unless the Government of South Sudan takes deliberate action to address the three cardinal factors, preventing and responding to PAD will be a difficult proposition.

The thesis makes several recommendations for preventing and responding to PAD in South Sudan. Recommendations include capacity building at the sectoral and institutional levels, including the development of sectoral strategic planning; effective coordination of justice and law enforcement institutions; promoting human rights awareness, making legal aid available and accessible to all; effective data and harnessing information, communication technology (ICT) for justice and law enforcement and promoting the full engagement and participation of the demand side in addressing PAD in South Sudan.

DEDICATION

I dedicate this work to my dear Admire for her love and enduring support and to Paulma, Brandy, Paul, Ruth and Elvis for the love and motivation they give me. You all hold a very special place in my heart and know I could not have completed this study without your support. I love you all!

ACKNOWLEDGEMENT

Let me start by thanking God for His infinite mercy and grace throughout this research. My human wisdom and strength were not enough to pull me through this challenge. I am eternally grateful for Your love and support in finalising this thesis.

I want to thank my loving wife Mrs Admire Turay for her unwavering support and encouragement over the period of this research. There are many times I found it difficult to blend my learning with the demands of professional work, and when I almost gave up, you were there to give me encouragement and reassurance. I am forever grateful to have you by my side as a friend, a partner and a wife and for the role, you played in spurring me on to complete this study. I also want to thank and appreciate my loving children Paulma, Brandy Paul, Ruth and Elvis who I count as the greatest blessings and motivation in my life. May God continue to bless you beautiful ones, and may you attain more than I could ever dream of in my lifetime.

I want to express profound appreciation to Professor Pamela J Schwikkard, who provided the best supervision I could have hoped for in completing my thesis. You opened my eyes to a lot of alternative ways of looking at the law and human rights and how it works and should be applied. Your feedback to my submissions was sometimes tough and frustrating, but I now recognise that they contained knowledge and learning. You showed great understanding and gave me the necessary encouragement to go on to the end. I am also grateful that you allowed me to use my views and perspectives in applying to this thesis the lessons and best practices I have amassed in my personal life and professional career. Your guidance in shaping my thoughts and your suggestions and advice on the presentation of my ideas are all greatly acknowledged and deeply appreciated. Thank you Professor for your support.

I also want to recognise the role of some other individuals who in various ways contributed to this study. First, I will start by recognising the huge contribution and support from a colleague and formal workmate Emmanuel Wani who was my main data and information person in South Sudan. Emmanuel was very helpful in keeping me up to speed with the evolving context in South Sudan both in terms of the peace process as well as the reformation of laws and other evolving developments. He was also very supportive in enabling access to data from various sources which would have otherwise been very difficult

to access outside South Sudan. Thanks, Wani for all the support you give me in finalising my thesis. I remain eternally grateful.

I also want to extend my thanks and appreciation to UNDP South Sudan for granting me access to their various reports and publications. These publications included the study on the codification of customary law; law reports and other knowledge products which have been developed on access to justice, rule of law, governance and peace building in South Sudan. I was also supported with a wide range of information and data on justice and law enforcement institutions including the quantity and locations of the courts, the police and the correctional institutions. The fast-changing situation in South Sudan required regular and quality documentation and analysis and UNDP was critical in this regard. For this, I am perpetually grateful to the organisation and colleagues in the Country Office for the support.

I want to recognise the role of Dr Roland Cole in providing me with guidance in better situating and delimiting the scope of this research. Through discussions and the provision reference materials, Dr Cole helped me to acquire a better understanding of the interactions of the various laws in South Sudan and the implications they have on human rights and access to justice for the population. I was therefore able to make an informed decision to focus my research on the criminal justice sector and not to veer into the realm of the civil law of South Sudan and the complications which arise from the myriad of tribal laws and practices. Thanks for the support and the invaluable contribution to this thesis.

Finally, I want to acknowledge the role of the Faculty, Department and the International Academic Programmes Office (IAPO) who were also instrumental in supporting and facilitating my admission, annual registration and participation in this course. You were always efficient in ensuring that I have all the relevant information needed to feel like a part of the university and always at hand to provide information and support when it was required.

TABLE OF ABBREVIATIONS

ABA	American Bar Association
ACHPR	African Charter on Human and People's Rights
ADRDM	American Declaration of the Rights and Duties of Man
AfriMAP	Africa Governance Monitoring and Advocacy Project
CFREU	Charter of the Fundamental Rights of the European Union
CPA	Comprehensive Peace Agreement
CPIA	Country Policy and Institutional Assessment
CSO	Civil society Organisations
DAC	Development Assistance Committee
DDR	Disarmament, Demobilisation and Reintegration
DFID	Department of International Development
ECtHR	European Court of Human Rights
GDP	Gross Domestic Product
HRD	Human Rights Department
IBC	Independent Boundaries Commission
ICC	International Criminal Court
ICSS	Interim Constitution of Southern Sudan 2005
ICCPR	International Convention on Civil and Political Rights
ICT	Information communications technology
IDP	Internally displaced persons
IEC	Information, Education and Communication
IFMIS	Integrated Financial Management Information System
IGAD	Intergovernmental Authority on Development
JLOS	Justice, Law and Order Sector
JSCO	Justice Sector Coordination Office
JSRSIP	Justice Sector Reform Strategy and Investment Plan
M&E	Monitoring and Evaluation
MDG	Millennium Development Goal
MID	Military Intelligence Directorate
MoFPED	Minister of Finance, Planning and Economic Development
MOU	Memorandum of Understanding
NGO	Non-Government Organisation

NPSSS	National Prison Service of South Sudan
NSS	National State Security
ODA	Official Development Assistance
OHCHR	Office of the High Commissioner for Human Rights
OSISA	Open Society Initiative for Southern Africa
OSIWA	Open Society Initiative for West African
PAD	Prolonged Arbitrary Arrest and Detention
PESTLE	Political, Economic, Socio-cultural, Technological, Legal and Environmental
SCOT	Strength challenge, opportunity and threat
SDG	Sustainable Development Goal
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SSNPS	South Sudan National Police Service
SSNSS	South Sudan National Secret Service
SSP	South Sudanese Pound
SSPS	Southern Sudan Police Service
TBC	Technical Boundaries Committee
TCSS	Transitional Constitution of South Sudan
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHS	United Nations Commission on Human Security
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNMISS	United Nations Mission in South Sudan
UNODC	United Nations Office on Drug and Crime
USA	United States of America
USAID	United States Agency for International Development

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Tanzania

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South Sudan

Advocate Act No 55 2013

Code of Criminal Procedure Act No 5 2008

Judicial Circular No 2 2011

Judiciary Service Act No 4 2008

Local Government Act 2009

Ministry of Legal Affairs and Constitutional Development Organisation Act No 8 2008

National Security Service Act 2015

Prisons Act 1994

Prisons Act 2003

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TABLE OF CONTENTS**Pages**

DECLARATION.....	ii
ABSTRACT.....	iii
DEDICATION.....	v
ACKNOWLEDGEMENTS.....	vi
TABLE OF ABBREVIATIONS.....	viii
TABLE OF STATUTES.....	x
TABLE OF CASES.....	xii

CHAPTER ONE: INTRODUCTION

1.1 Introduction.....	1
1.2 Objectives.....	1
1.3 Methodology.....	2
1.4.The South Sudanese context.....	3
1.5 Problem statement and opportunity	5
<i>1.5.1 PAD as a human rights concern.....</i>	<i>8</i>
<i>1.5.2 The three cardinal factors.....</i>	<i>10</i>
1.6 Structure of thesis.....	12

CHAPTER TWO: HISTORICAL, GEOPOLITICAL, SOCIOECONOMIC AND LEGAL CONTEXT OF SOUTH SUDAN

2.1 Introduction.....	14
2.2 Colonialism, Independence and Civil War.....	14
<i>2.2.1 The pre-independence civil wars and road to the independence of South Sudan.....</i>	<i>20</i>
<i>2.2.2 Post-independence civil war and peace efforts.....</i>	<i>23</i>
2.3 Geography, Population And Culture.....	26
2.4 The Development and Political Economic Context.....	29
2.5 The South Sudan Legal System.....	31
2.6 The Institutions Of Justice.....	34
<i>2.6.1 The Judiciary of South Sudan.....</i>	<i>35</i>
<i>2.6.2 The Directorate of Public Prosecution.....</i>	<i>37</i>

2.7 Security and Law Enforcement Institutions.....	38
2.7.1 <i>The Sudan People's Liberation Army (SPLA).....</i>	38
2.7.2 <i>The National Security Service.....</i>	40
2.7.3 <i>The South Sudan National Police Service (SSNPS).....</i>	41
2.7.4 <i>The National Prison Service of South Sudan (NPSSS).....</i>	42
2.8 Current Contextual Challenges.....	43
2.9 Conclusion.....	48

CHAPTER THREE: PROLONGED AND ARBITRARY ARREST AND DETENTION (PAD): A CONCEPTUAL AND CONTEXTUAL ANALYSIS

3.1 Introduction.....	50
3.2 Definition and Analysis of Key Concepts of PAD.....	50
3.2.1 <i>The right to the liberty and security of persons.....</i>	50
3.2.2 <i>Definition and characteristics of PAD</i>	56
3.2.3 <i>Understanding Arbitrariness.....</i>	59
3.3 Nature and Types of Arrest And Detention In South Sudan.....	63
3.3.1 <i>Arrest by warrant</i>	63
3.3.2 <i>Arrest without warrant.....</i>	64
3.3.3 <i>Arbitrary detention.....</i>	67
3.3.4 <i>The legal basis for detention in South Sudan.....</i>	69
3.4 Contestations of Human Rights as a Universal Standards.....	72
3.5 Prevalence of PAD in South Sudan.....	73
3.5.1 <i>UN Mission in South Sudan/Office of the High Commissioner for Human Rights.....</i>	78
3.5.2 <i>Amnesty International.....</i>	83
3.5.3 <i>Human Rights Watch</i>	85
3.5.4 <i>Other Statistics on PAD in South Sudan.....</i>	87
3.6 Conclusion.....	88

CHAPTER FOUR: THE CONCEPT OF ACCESS TO JUSTICE

4.1 Introduction.....	90
4.2 Definition of Access to Justice.....	90
4.3 Preconditions of Access to Justice.....	94
4.3.1 <i>Legal empowerment.....</i>	94

4.3.2	<i>Legal aid and its relevance</i>	99
4.3.2.1	<i>Types of legal aid</i>;	102
4.3.2.2	<i>Challenges and legal aid</i>	105
4.3.3	<i>Affordability of justice</i>	109
4.3.4	<i>Physical access</i>	112
4.3.5	<i>Timeliness of justice</i>	113
4.4	Access to justice in South Sudan	118
4.5	Conclusion	119

CHAPTER FIVE: FACTORS CONTRIBUTING TO PAD IN SOUTH SUDAN

5.1	Introduction	120
5.2	The Three Cardinal Factors	120
5.2.1	<i>The geographical size and infrastructural limitations in South Sudan</i>	120
5.2.2	<i>The limited budgetary allocation to the criminal justice sector</i>	123
5.2.3	<i>The limited human rights knowledge and capacity of the institutions of justice</i> ...	125
5.3	Other Factors Contributing to PAD in South Sudan	127
5.3.1	<i>Corruption in the justice sector</i>	127
5.3.2	<i>Extensive and unchecked powers of the security sector</i>	130
5.3.3	<i>Weak coordination of the justice and security sector</i>	133
5.3.4	<i>Limited data, engagement and political will</i>	136
5.4	Conclusion	137

CHAPTER SIX: THE INEVITABILITY AND IMPACT OF PAD IN SOUTH SUDAN

6.1	Introduction	139
6.2	PAD as a dilemma for the criminal justice system in South Sudan	139
6.3	PAD as an inevitable and undesirable component of the criminal justice system	141
6.3.1	<i>The inevitability of PAD in South Sudan</i>	142
6.4	The Impact of PAD	145
6.4.1	<i>The impact of PAD on the individual</i>	145
6.4.2	<i>Impact of PAD on the rights and dignity of the individual</i>	150
6.4.3	<i>Impact of PAD on the States and Communities</i>	150
6.5	Accountability for PAD	153

6.6 Conclusion.....	160
----------------------------	------------

CHAPTER SEVEN: PREVENTION AND RESPONSE TO PAD IN SOUTH SUDAN

7.1 Introduction.....	161
7.2 Prevention and Responsive Approach to Addressing PAD.....	161
7.3 Adapting the Human Rights-Based Approach.....	162
7.4 Proposed Measures in Addressing PAD in South Sudan.....	164
7.4.1 <i>Promoting a justice and security sector-wide approach to planning in South Sudan.....</i>	<i>164</i>
7.4.2 <i>Effective budgeting and finance management.....</i>	<i>167</i>
7.4.3 <i>Promoting coordination and inter-institutional collaboration in the justice sector.....</i>	<i>170</i>
7.4.4 <i>Strengthening the functional capacity and awareness of the justice sector actor.....</i>	<i>173</i>
7.4.5 <i>Increasing human rights awareness and practice among security and the administration of justice.....</i>	<i>177</i>
7.4.6 <i>Harnessing information technology for effective justice service deliver.....</i>	<i>180</i>
7.4.7 <i>The reform and implementation of laws and policies preventing PAD.....</i>	<i>185</i>
7.5 Engaging the Demand Side.....	187
7.6 Conclusion.....	190
BIBLIOGRAPHY.....	191

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

This introductory chapter provides a summary overview of the thesis in examining and discussing Prolonged and Arbitrary Arrest and Detention (PAD) as a human rights and justice challenge for South Sudan. The core thesis is that PAD is primarily a criminal justice challenge that is exacerbated by three dominant factors which has rendered it an inevitable component of the justice and law enforcement sector of South Sudan. The restriction of the scope of the study to the criminal justice sector is justified, and the methodology explained. The chapter begins with the presentation of the objectives and research methodology of the thesis. It then moves on to examine the South Sudan context, emphasising the contextual human rights concerns and concludes with an outline of the thesis.

1.2 OBJECTIVES

The thesis identifies three cardinal factors which have rendered PAD inevitable in the South Sudanese context and demonstrate how they collectively undermine human rights and the quality of service delivery in the justice and law enforcement sector of South Sudan. These three factors include: (1) a weak human rights awareness and culture, (2) the huge geographic coverage of the country and (3) the limited financial and logistical resources available to the justice and law enforcement sector in South Sudan. In pursuing this goal, the thesis considers:

- i. the historical, socio-economic and political context of South Sudan and how the intervening factors actively or passively contribute to PAD in post-independent South Sudan;
- ii. the definition and peculiarities of the various acts and omissions that constitute PAD;
- iii. how PAD contravenes national and international human rights law;
- iv. how the three cardinal factors render PAD an inevitable component of the criminal justice system in South Sudan; and,
- v. the health and socioeconomic impact of PAD on the human rights, dignity, access to justice situation of the people of South Sudan.

1.3 METHODOLOGY

This thesis relies on pre-existing theoretical and basic research as well as professional materials and data relevant to the study. These materials include publications such as scholarly books and articles, and research and monitoring reports and a wide assortment of web-based materials. Of critical importance to this thesis is the use of a combination of local and international sources in testing the research hypothesis. In this regard, relevant national and international legislation and case laws are cited and analysed to reinforce the central arguments made in the thesis. Sources include reports of the United Nations mission and agencies in South Sudan; research and development institutions; national and international human rights, humanitarian organisations and groups.

While data and information from these diverse sources are often not entirely scientific and are sometimes of questionable validity, the thesis will authenticate them by triangulation. In ensuring that the study can access reliable data on the prevalence of PAD in South Sudan, this research places emphasis on three principal sources: the United Nations Mission in South Sudan (UNMISS) in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), Amnesty International and Human Rights Watch. All these entities enjoy international recognition for their work in the human rights and governance sectors. Data on PAD shall also be sourced from official records of the justice and law enforcement institutions in South Sudan in ensuring that they reinforce those obtained from the three principal sources.

Unfortunately, materials based on academic field research on recent developments in South Sudan are limited. To address this limitation, the research relies on information and data accessed from reports, briefing notes and other similar studies and action research from government and non-government sources. Where available, the thesis relies on legislation, law reports and statistical data from the Government of South Sudan. International treaties and conventions to which South Sudan has acceded are reviewed in explaining and determining the legality and applicability of human rights law, concepts and practices locally.

Specific laws of South Sudan, which are central to this thesis and under which PAD operate include the Transitional Constitutions of South Sudan¹, the Codes of Criminal

¹ 2011.

Procedure Act², and the National Security Service Act among others.³ Relevant international and regional human rights principles and standards in assessing conformity and compliance with human rights are examined. UN Agencies such as the United Nations Development Programme (UNDP), the United Nations Office on Drug and Crime (UNODC) and the United Nations Children's Fund (UNICEF), are all strong points of reference for this research. Other sources include reports and documentation by the academic institutions, development and humanitarian non-governmental organisations active in South Sudan.

Although the thesis recognises instances of PAD in matters rooted in customary law, the primary focus is placed on PAD in the criminal justice system. Within this framework, institutions in South Sudan that are prioritised in this thesis include the Judiciary of South Sudan, the Ministry of Justice, Constitutional Legal Affairs, the South Sudan Prison Services, the South Sudan National Police Service (SSNPS), the National Security Service (NSS) as well as the Human Rights Commission. While recognition is given to the influence of other contributory factors, the thesis focuses on the three cardinal factors discussed above and delves into how the factors come about and result in PAD.

Previous and ongoing inquiries and documentation of PAD in South Sudan have focused mainly on the typology of the breach and the normative framework including the applicable laws as related to human rights and access to justice. The role of the Government of South Sudan in condoning the practice through its direct and indirect actions and omissions has also featured prominently in previous investigations and reports on PAD. Very limited attention has been given to how in the face of massive governance challenges, logistical inadequacy and limited infrastructure, PAD has become an undesirable but inevitable component of the criminal justice system in South Sudan. This research shall focus on exploring this uncharted area, and demonstrate the need for a more holistic approach to addressing PAD and other challenges that the justice and law enforcement sector is contending within South Sudan.

1.4 THE SOUTH SUDANESE CONTEXT

A more detailed description of the South Sudanese context is provided in chapter two. On 9

² 2011.

³ See analysis of laws related to PAD on page 52.

July 2011, South Sudan became an independent nation breaking free from Sudan in the north. At that time, there was a general sigh of relief and a sense of high expectations among the international community that at long last the conflict-affected population could now live dignified lives and direct their destiny.⁴ For South Sudanese, millions of whom were at the time of independence either displaced internally or seeking refuge in neighbouring countries, independence ushered in a new dawn of freedom, self-worth and high expectations for the realisation of their human rights and an improved standard of living. After independence, the people and Government of South Sudan set about the task of nation-building in fulfilment of the aspiration of its people. However, with continuing insecurity and political instability, heightened poverty and bad governance, nation-building has not turned out to be as easy as envisioned by many South Sudanese.

On 15 December 2013, a civil war broke out in South Sudan because of a power struggle between President Salva Kiir and the Vice President, Riek Machar.⁵ A few weeks after the fighting began, concerns were expressed by the United Nations (UN) and the wider humanitarian community that thousands of South Sudanese had suffered injuries and death because of the gruesome nature of the violence and fighting.⁶ To date, the South Sudan Humanitarian Response Plan 2020 informs that ‘1.5 million South Sudanese are internally displaced while 4.5 million are seeking refuge in neighbouring countries.’⁷ The civil war has had a disastrous effect on the young nation including the derailment of development efforts, impeding service delivery to large sections of the population, human rights violations and abuse, displacement of segments of the population and thousands of deaths.⁸

⁴ A Kumsa ‘South Sudan Struggle for Independence, And It’s Implications for Africa’ (2017) 17.4 *RUDN Journal of Sociology* 513 at 522. Kaumsa provides a detailed narrative on the history of South Sudan from its historic links to the north, to the two civil wars on to the referendum which lead to the independence. Also see H Verhoeven ‘Understanding the Implications of South Sudan’s Independence’ in *e-International Relations* (2012) 10. Verhoeven described the elation felt by South Sudanese for the independence of their country for their northern neighbours.

⁵ C Koos and T Gutschke ‘South Sudan’s Newest War: When Two Old Men Divide a Nation’ (2014) 2 *GIGA Focus* 2.

⁶ R Gerenge ‘South Sudan’s December 2013 conflict: Bolting state-building fault lines with social capital’ (2015) 15.3 *African Journal of Conflict Resolution* 95.

⁷ UN OCHA *South Sudan Humanitarian Response Plan* (2020) 8 – 10. The UN humanitarian agency reported that in addition to the thousands who lost their lives, the fighting also internally displaced an estimated 120 000 of South Sudanese.

⁸ The impact of the conflict in South Sudan has been evaluated to include a wide range of issues as including the extraction of ‘natural wealth resources and corruption at all levels of governance, ethnicity and tribalism, lack of justice and human rights violations, mismanagement of the economy, weak institutional capacity’ etc. See F A Afriyie, J Jisong and K Y Appiah ‘Comprehensive Analysis of South Sudan Conflict: Determinants and Repercussion’ (2020) *Journal of Liberty and International Affairs* 6:1 at 1.

Considering the level of destruction and human suffering occasioned by the conflict, the regional organisation, IGAD began efforts towards bringing the conflicting parties together in a peace process in January 2014. However, the journey towards the cessation of hostilities and an end to the civil war continue to meet many hurdles and has now led to the signing of peace deals in 2015, 2017 and 2019.⁹ At present, the neighbouring countries, and the international community have continued efforts towards securing an end to the conflict and ushering in sustainable peace in South Sudan.

In this context of conflict, poverty, extreme economic hardship and with the brutal civil war still an issue, a significant failing of the young nation is the limited demonstration of the will of the government to guarantee the realisation and protection of human rights for South Sudanese and others within their borders. While South Sudan has signed and ratified several human rights instruments and treaties¹⁰ and has promulgated a constitution which to a substantially high degree complies with principles and standards of international human rights, the conditions including funds and the enabling environment necessary to facilitate the protection, promotion and realisation of these human rights are either inadequate or mostly dysfunctional.¹¹ And, considering the level of vulnerability among the conflict-affected population, it will be an understatement to say that the people of South Sudan are seriously exposed to and adversely affected by various forms of violations and abuse of human rights.

1.5 PROBLEM STATEMENT AND OPPORTUNITY

The world over, human rights organisations, groups and activists are expressing concerns over the prevalence and frequency of PAD both as a human rights and justice challenge and a tool of political oppression.¹² Amnesty International reports that, at any one time, millions of people around the globe are deprived of their liberty through detention. Of this number, 3.2 million people in prison are unable to access and face trial in addressing their conflict with

⁹ M Birhanu and E Ahadu 'Evaluating the Challenges of IGAD-Led Peace Process of South Sudan' (2019) 78 *International Affairs and Global Strategy* 2. See also the IGAD-PLUS *Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access in South Sudan* (2018) 3 .

¹⁰ See OHCHR *Status of Ratification Interactive Dashboard* available at <https://indicators.ohchr.org/> accessed on 23 January 2021. OHCHR provides a list of international human rights instruments which have been signed and ratified by South Sudan.

¹¹ International Development Law Organization (IDLO) *Towards a People Centered Human Rights State in South Sudan: A collection of papers presented at the Symposium on Human Rights in South Sudan* (2016) 13.

¹² See Amnesty International *Permanent State of Exception: Abuses by the Supreme State Security Prosecution* 27 November 2019, available at <https://www.amnesty.org.uk/press-releases/egypt-state-prosecution-body-central-tool-repression-under-sisi-new-report>.

the law.¹³ Factors contributing to PAD are wide-ranging and include, inequality, lawlessness and abusive procedures, incompetent institutions and justice sector personnel and inadequate prison facilities.¹⁴ As awareness of the causes and impact of PAD continues to increase globally, there is a growing call for countries and their governments to work with their justice sector institutions and their citizens in preventing and responding to PAD. Despite this awareness and global concern, PAD continues to be a crucial criminal justice and human rights challenge that impacts the lives of people around the world.

Since independence, the achievement of good governance and service delivery to its vulnerable population has been a considerable challenge for South Sudan. Nonetheless, the country has become infamous for severe forms of human rights violations. Among the major human rights concerns in South Sudan are the high incidence of PAD in the criminal justice system and its use as a tool to suppress political dissent.¹⁵ However, statistics on the prevalence of PAD in South Sudan are difficult to come by, and the few that exist show the reality of PAD and its impact on the conflict-affected population. Evidence suggests that PAD can have severe implications at multiple levels including at the individual, family, community, institutional and national levels.¹⁶ Among others, PAD is noted to impact on the psychological and physical health and the financial and economic status of people it directly and indirectly affect. With the justice system of South Sudan continuing to demonstrate significant limitations and incapacity to address both the causal factors and the direct and indirect consequences of PAD, there is a strong likelihood that it will continue to be a basis for infringements on the rights and dignity of South Sudanese.

In South Sudan, PAD is noted to occur in all areas of the law, including both civil and criminal jurisdictions. A review of the South Sudanese legal system shows that some areas of customary law and traditional practices are enforceable by criminal law and backed by sanctions.¹⁷ Under the civil law of South Sudan, most instances of PAD occur in the

¹³ Amnesty International 'Detention and Imprisonment' available at <https://www.amnesty.org/en/what-we-do/detention/> accessed on 15th May 2019.

¹⁴ ALEF - Act for Human Rights *Guilty until proven guilty: Report on the cause of arbitrary arrest, lengthy pre-trial detention and long delays in trial* (2013) 19 - 20.

¹⁵ See chapter 3 where the thesis discusses at great length the use of PAD in suppressing political opposition and dissent.

¹⁶ See chapter six for an extensive discussion on the impact of PAD on the individual, family, community and state.

¹⁷ See the ruling in *Akok Deng Abiem Cr – App./198/2011* (unreported) where the accused was found guilty of adultery and required to pay damages in accordance with the customary law and practices of the aggrieved party.

application of customary and traditional practices and belief systems of the different tribes.¹⁸ For instance, PAD may occur in marriage negotiations through the ‘spearing of the leg’ of girls who refuse to marry suitors accepted by the parent until she agrees to concede to the decision of the father and the family.¹⁹ While as noted above there is clear evidence of PAD resulting from the practice of the civil and customary laws of particular tribes in South Sudan, it is clear from empirical evidence that the majority of instances of PAD occurs in the criminal justice sector. The thesis, therefore, focuses on the criminal justice sector in South Sudan.

In the criminal jurisdiction, PAD is likely to occur through the nature of the arrest and the duration, place and condition of detention of persons accused of or alleged to have committed a crime. The laws of South Sudan, inclusive of which are the Transitional Constitution²⁰ and the Code of Criminal Procedure Act,²¹ prescribes the standards, rules and procedures by which arrest and detention are to be carried out in a manner that is preserving and protective of the rights and dignity of the accused.

As mentioned above, the thesis prioritises three institutional and contextual challenges and limitations and argues that unless due action is taken to address them, PAD will continue to be an inevitable component of the justice and law enforcement system in South Sudan. These include: (1) the huge geographic coverage of the country, (2) the limited financial and logistical resources available to the justice and law enforcement sector, and (3) a weak human rights awareness and culture among the justice and law enforcement institutions.

Of course, the thesis acknowledges the contributions that other factors make to the incidence of PAD in South Sudan. These factors include among others unchecked powers of law enforcement institutions, the lack of political will, limited coordination and engagement between justice and law enforcement institutions. However, the emphasis is placed on the three factors because of the peculiarity in the South Sudanese context.

¹⁸ A classic example of such interaction is the criminalization of adultery by way of s 266 of the Penal Code of South Sudan 2008.

¹⁹ UNDP *In Search of a Working System of Justice for a New Nation* (2012) 75 – 76. Also see Human Rights Watch ‘“This Old Man Can Feed Us, You Will Marry Him”: Child and Forced Marriage in South Sudan’ available at <https://www.hrw.org/report/2013/03/07/old-man-can-feed-us-you-will-marry-him/child-and-forced-marriage-south-sudan> accessed on 3 June 2018.

²⁰ 2011.

²¹ 2011.

Some plausible actions are being taken by the Government of South Sudan and their development partners in addressing the challenges faced by the justice and security sector – specifically as related to PAD. The development partners include the UN, various diplomatic missions, Development Cooperations and donor agencies and others. These partners provide technical and financial assistance and support to the government in reinforcing the capacity of justice and law enforcement institutions for effective service delivery in South Sudan. Within this framework, some of the measures which have and are being undertaken include capacity building, various institutional strengthening measures, periodic monitoring and reporting, legal and policy reform and implementation.

Despite these plausible efforts, the need for further engagement in the justice and law enforcement sector of South Sudan remains high and ever more pressing. The prevention and response to PAD in South Sudan require a holistic and context-specific approach, wherein the Government of South Sudan plays a leadership role and is willing to allocate adequate human, technical, logistical and financial resources in addressing this human rights challenge.

1.5.1 PAD as a human rights concern

Among the numerous human rights concerns of South Sudan are the risks posed by acts and omissions that limits the right to liberty and security of persons which guarantees protection from PAD. Since the outbreak of the civil war, the UN Agencies and Mission, Amnesty International and other human rights institutions and actors have published several reports which raise concerns over the prevalence and frequency of PAD as a human rights and justice challenge in South Sudan. In 2017, a joint report by the UNMISS and the UN human rights agency, the OHCHR highlights several instances of PAD and called on the government to address current cases and prevent their further occurrence.²² While focusing on the actions of law enforcement and security forces, these reports highlight several instances where people have been arbitrarily arrested and detained in different locations of South Sudan for prolonged periods in contravention of domestic and international human rights laws. Unfortunately, data establishing the prevalence and the geographic spread of PAD is severely limited to non-academic literature, and there is evidence of high-security risks in pursuing

²² UN Security Council *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in The Context of The Fighting in Juba, South Sudan* (2016) 1 - 6.

scholarly work of this nature in locations in South Sudan.

Numerous academic and legal writings, as well as case law, have extensively covered the way and extent to which PAD violates the right to liberty and security of persons. This right finds its origins in several historical and legal documents around the world. These include, among others, the Magna Carta of 1215,²³ the Habeas Corpus Act of 1679²⁴ and later the Bill of Rights of 1689.²⁵ Other prominent and more recent legal frameworks worth mentioning here include the Universal Declaration of Human Rights (UDHR)²⁶ and international and regional human rights conventions including the International Covenant on Civil and Political Rights (ICCPR),²⁷ the African Charter on Human and People's Rights,²⁸ European Convention on Human Rights,²⁹ and other instruments like the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.³⁰ All these international legal instruments create a detailed and comprehensive framework for the promotion and protection of human rights globally and indeed in South Sudan. Today, most constitutions recognise and make provisions guaranteeing and protecting the right to liberty and the security of persons as a human right of all persons regardless of race colour and creed.

Under international law, PAD is prohibited by art 9 of UDHR³¹ which provides that

²³ The Magna Carta which means the Great Charter was a document signed by King in 1215 and is regarded as one of the earliest human rights instrument which notably recognised the right of all English subject to justice and fair trial. See V Stefanovska 'The Legacy of Magna Carta and the Rule of Law in the Republic of Macedonia' (2015) 11.1 *SEEU REVIEW, Special Edition, Magna Carta 800* 197 – 8.

²⁴ Habeas Corpus Act was enacted in 1679 provided for the writ of habeas corpus by which court were required to examine the lawfulness of detention in preventing PAD. See A L Tyler 'A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege' (2016) 19.5 *Notre Dame Law Review* 1949 at 51.

²⁵ The Bill of Rights is an Act of the Parliament of England which was passed on 16th December 1689 and which make provision for constitutional reforms and provides for the basic civil rights of the English people. The Bill of Rights is renowned for limiting the powers of the English monarchy and further provides among other free elections and the freedom of speech in Parliament and the criminalization of cruel and unusual punishment.

²⁶ 1948. A detailed discussion of the UDHR will be provided in Chapter 3 of the thesis.

²⁷ Adopted by the General Assembly of the United Nations on 19 December 1966.

²⁸ Adopted by the Organization of African Unity on 27 June 1981, Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

²⁹ Rome, 4.XI.1950 as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

³⁰ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) DOC/OS(XXX)247 as promulgated by the African Commission.

³¹ Adopted by the General Assembly of the United Nations on 19 December 1966. 'Article 9 provides that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' See Freedom Now Petition (2012) 14. Available at <https://www.freedom-now.org/wp-content/uploads/Petition-to-the-UN-Working-Group-on-Arbitrary-Detention-12-17-12.pdf> accessed on 12 November 2018.

‘no one shall be subjected to arbitrary arrest and detention.’ In a similar fashion, art 9 of the International Convention on Civil and Political Rights (ICCPR)³² provides that ‘no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ The spirit of these provisions of international law have also been factored into the Transitional Constitution of South Sudan³³ by prohibiting all ‘arrests, detention, and deprivations or restrictions on the liberty of persons except for specified reasons and in accordance with procedures prescribed by law’.³⁴ Several local statutes, including the Code of Criminal Procedure Act,³⁵ also includes provisions prohibiting PAD in the delivery of justice and law enforcement services.

1.5.2 The three cardinal factors

The thesis focuses on the three factors listed above, namely, (1) limited human rights awareness and culture; (2) the substantial geographic coverage of the country, and; (3) the limited financial and logistical resources to justice and security institutions in South Sudan.³⁶ However, it is recognised that other critical intervening factors contribute to PAD. Some of these factors include corruption, political interference, considerable and unchecked powers of security institutions, limitations in coordination and data collection and sharing. For purposes of this introduction, the three cardinal factors identified are discussed in demonstrating how they have rendered PAD an inevitable component of the criminal justice system.

Limited awareness and a weak human rights culture places a significant constraint on how the people of South Sudan can enjoy their human rights and how justice and law enforcement institutions could be made to account for the human rights implications of their work.³⁷ While UN agencies and other development and humanitarian partners have dedicated considerable time and resources to address this limitation, mainstreaming human rights principles and standards in the function of these institutions is still a critical challenge.³⁸ The

³² Adopted by the General Assembly of the United Nations on 19 December 1966.

³³ 2011.

³⁴ Article 59 ss 2 of the Transitional Constitution of South Sudan, 2011.

³⁵ 2008.

³⁶ The three cardinal factors are discussed extensively in Chapter 3.

³⁷ J Tanza ‘Sector Reforms Needed for South Sudan Police Service’ available at <https://www.voanews.com/africa/sector-reforms-needed-south-sudan-police-service> accessed on 12 April 2017.

³⁸ Several human rights and access to justice programmes and projects are being implemented at different levels and by different organisations and entities. Some of these include UNDP Access to Justice and Rule of Law (2014 – 2021); Search for Common Ground implemented Facilitating Access to Justice in South Sudan (2016 – 2018); European Union Enhancing Capacities for Human Rights (2013) etc.

significance of the limited enforcement of human rights is evident in the high number of infringements on the liberty and freedoms of ordinary people in South Sudan. And, given that there continue to be a limited institutional drive and political will in enforcing human rights as a critical component of the justice and law enforcement system in South Sudan, these human rights concerns including PAD will persist.³⁹

Second, the vast geographic size of South Sudan remains a principal factor impeding access to justice and questionable justice service delivery. The incapacity of the government to make justice – in particular – statutory justice and law enforcement services available and accessible across the country, especially to marginalised groups where it is most required, is recognised as a severe governance challenge. Police stations/posts and courts are very sparsely located and, in most locations, both institutions are not available in the same geographic area. This limitation means coordination between law enforcement and justice institutions are often affected and limited by distance and logistics. Within this context, the police are often forced to arrest and prolong the detention of persons accused and alleged to have committed an offence until they can transport them to court.⁴⁰ Such a scenario provides the ideal environment for PAD and other human rights violations to flourish.

Finally, constraints on the availability of essential logistics and other resources for justice and law enforcement institutions to effectively function impedes not only the efficient delivery of services but also impacts the human rights, safety and security of the people of South Sudan. These institutions are noted to operate on very meagre budgets and logistics and are often found to be without essential implements including paper, power, computers and radios. And, where there are official vehicles the availability of fuel and lubricants is often a problem.⁴¹ Even in the case of the functioning of the circuit courts, judges are often constrained from sitting court within their circuits because of challenges with mobility and other logistics.⁴² The results of these limitations are that justice and law enforcement officials are unable to carry out their duties and function effectively in the delivery of services. These challenges and limitation also mean that ordinary people often cover the cost of unavailable

³⁹ International Development Law Organization *Towards a People Centered Human Rights State in South Sudan: A collection of papers presented at the Symposium on Human Rights in South Sudan* (2016) 57.

⁴⁰ Human Rights Watch *“There is No Protection”: Insecurity and Human Rights in Southern Sudan* (2009) 33 – 39.

⁴¹ E LeBrun ‘Policing in South Sudan: Transformation Challenges and Priorities’ in *Human Security Baseline Assessment Issue Brief: Sudan and South Sudan* 26 (2017) 3.

⁴² UNDP *‘Institutional Support to the Judiciary of South Sudan’* (2006 – 2007) 3 – 7.

logistics or suffer the impact of the limited resources through the deprivation of their rights.

The thesis shall examine and analyse these three factors in greater details in chapter five and propose contextually appropriate interventions in both minimising their impact and ultimately addressing PAD in South Sudan.⁴³

1.6 STRUCTURE OF THESIS

There are seven chapters in this thesis. This chapter introduces the thesis and presents the objectives, the methodologies, the problem statement and concludes with the structure of this thesis. Chapter two provides an analysis of the context of South Sudan with a detailed narrative on the pre and post-independent geopolitical, political and socioeconomic context and how resultant factors limit and impede access to justice and contributing to PAD. The chapter is relevant to presenting the contextual limitations and challenges which at present define the South Sudan context.

Chapter three focuses on discussing the definitional and normative framework of PAD by examining the various concepts of law and human rights. Here the thesis compares competing theories underlying the study while highlighting the common and contrasting threads that hold them together. Chapter four examines the accessibility of justice at various levels in South Sudan. The section commences with a look at the definition and concept of access to justice. The nature and quality of access to justice are also explored in furthering the contextual analysis and testing the hypothesis. In this regard, the thesis will measure access to justice in South Sudan against the benchmarks of affordability, accessibility and timeliness of justice services. Finally, the chapter shall conclude with a look at how the barriers and limitations of access to justice contribute to and result in PAD in South Sudan.

Chapter five examines the factors precipitating PAD in South Sudan, in particular, the three cardinal factors of the vast geographic expanse of South Sudan; the limited infrastructural and logistical support to justice institutions and finally limitation in human rights knowledge and the capacity of justice and the law enforcement institutions in South Sudan. Some attention is also provided to other factors which contribute to PAD. Chapter Six considers how PAD is undesirable and an inevitable component of the criminal justice system

⁴³ Although the three cardinal factors have been presented as the main factors precipitating PAD in South Sudan, evidence suggests that the government has used PAD as a tool for the suppression of political dissent. See Chapter 3 pages 75 – 88 where point is extensively discussed.

in South Sudan. The impact of PAD on human rights and access to justice in South Sudan is examined, and the chapter includes an analysis of the PAD's socioeconomic and psychological effects on survivors and their social relations. Finally, chapter seven provides practical and contextual appropriate recommendations on how to prevent and respond to PAD in South Sudan.

CHAPTER TWO

HISTORICAL, GEOPOLITICAL, SOCIOECONOMIC AND LEGAL CONTEXT OF SOUTH SUDAN

2.1 INTRODUCTION

This chapter presents an account and analysis of the history, geopolitics, socio-economic and legal context of South Sudan. A narrative is provided of the historical events leading to the independence of South Sudan as well as a description of the people and the institutions and the geography of the country. The chapter also introduces the justice and law enforcement sector with an emphasis on the key institutions and their functionalities as well as how various socio-economic and political factors influence and limit their capacity to deliver justice and legal services in South Sudan. Finally, attention is given to the critical governance and development challenges and concerns of South Sudan, including the civil war and the ongoing peace process, corruption in governance, economic challenges, tribal and political tensions and humanitarian concerns. The chapter provides the contextual background against which PAD will be examined and highlights the challenges and limitations which facilitates its occurrence in South Sudan.

2.2 COLONIALISM, INDEPENDENCE AND CIVIL WAR

The political history of South Sudan can be traced as far back as the ninth and tenth century when the Nubian¹ kingdoms flourished in the fertile plains which are today occupied by the Republic of South Sudan.² These Nubian kingdoms located at the confluence of the Blue Nile, White Nile and River Atbara in what is today Sudan and South Sudan, are reported to have been quite prosperous by way of agriculture, the cattle trade and the strength of their

¹ Nubian is a Roman word referring to the territory beyond Egypt. Before the Romans, the region was referred to as Kush.

² D A Welsby *The Medieval Kingdoms of Nubia: Pagans, Christians and Muslims along the Middle Nile* (2002) 7. See also W Y Adams 'The First Colonial Empire: Egypt in Nubia, 3200-1200 B.C.' (1984) 26.1 *Comparative Studies in Society and History* (1984) 36. Adam writes that the Nubians were of a race completely distinct from the Egyptians and who spoke, as they do today, an indigenous African language. He also writes of trade and commerce between the Egyptians and the Nubians in what he referred to as the 'unholy trinity' of gold, ivory and slavery.

military power.³ However, most of these kingdoms were long in decline by the time of the Turkish-Egyptian invasion. The Turkish rule began with two military excursions into Sudan sanctioned by Mohamed Ali in 1820 to locate the source of the Nile and with a covert objective of acquiring precious items such as gold, gum, ostrich feathers, ivory and valuable kinds of wood as well as black slaves for conscripting into his army.⁴ After the military conquest of the region, Mohamed Ali realised that the enormous territorial expanse of Sudan would be a challenge to govern effectively and as such allowed the tribes in the south to enjoy a significant amount of autonomy.⁵

In 1881, a charismatic Islamic leader Muhammad Ahmad ibn Abd Allah proclaimed himself Al Mahdi al Muntazar with a mission to reform Islam and overthrow Turkish rule in Sudan and beyond.⁶ As his influence began to grow so did his followers among whom he began to recruit an army. At this point, the influence of the French and the British was starting to be exerted on an Egypt weakened by financial and economic maladministration. By the end of 1882, the Mahdi had brought large swaths of territories under his control, including Obeid, the second-largest city in Sudan.⁷ The rapid capture of one town after the other set alarm bells ringing in Khartoum and Cairo which then led to the dispatch of an army of 10,000 to confront the advancing armies of the Mahdi. The defending forces from Khartoum were defeated by the followers of the Mahdi in the battle of Shiekan further reinforcing the position of the Mahdi as a messenger of God and a conqueror for Islam.⁸ Slowly, the Mahdi began to tighten his grip around Khartoum the site of power in Sudan and put the city under siege. After a brief battle with a rescue force that was sent to relieve the city, the Mahdi captured Khartoum killing the British Governor-General Charles George Gordon.⁹

The Mahdi, however, passed away in 1885 five months after the capture of Khartoum

³ G Hatke *Aksum and Nubia Warfare, Commerce, and Political Fictions in Ancient Northeast Africa* (2013) 341. See also D A Welsby 'The Kingdom of Kush. Urban defences and military installations in N Crummy (ed) *Image, Craft and the Classical World. Essays in Honour of Donald Bailey and Catherine Johns* (2005) 39. Welsby writes that the Kush had flourished as a military power since the mid-8th century BC, even prior to Rome's growth and development.

⁴ D Deng & A Ruay *The Politics of Two Sudans: The South and the North, 1821-1969* (1994) 4 – 12.

⁵ P Holt & M Daly *A History of the Sudan: From the Coming of Islam to the Present Day* (1979) 50.

⁶ J Voll 'The Sudanese Mahdi: Frontier Fundamentalist' (1979) 10 *International Journal of Middle East Studies* 153.

⁷ H J Sharkey 'Jihads and Crusades in Sudan From 1881 to the Present' in SH Hashmi (ed), *Just wars, holy wars, and jihads: Christian, Jewish, and Muslim encounters and exchanges* (2012) 263.

⁸ *Ibid* at 263.

⁹ Constitutional Rights Foundation 'Sudan, Imperialism, and the Mahdi's Holy War' in *World History* (2014) 3.

and was succeeded by Khalifa Abdullah.¹⁰ A three-year famine and some high prized military expeditions against Ethiopia and Egypt greatly impacted the strength of the Caliphate. In 1896, the British finally decided to act in avenging the death of Gordon as well as in curbing the expansionist ambition of Khalifa Abdullah. An army under the command of General Kitchener was dispatched which clashed with the forces of the Mahdi outside Omdurman in 1898. The Mahdi fled, leaving 10,000 Sudanese dead and virtually marking the end of the Mahdiya in Sudan.¹¹

After the era of the Mahdiya, the Anglo-Egyptian Condominium was established, which restored Egyptian rule in Sudan.¹² The Condominium was a power-sharing arrangement that acknowledged the claim of sovereignty by Britain and Egypt over the territories of Sudan. During the Anglo-Egyptian Condominium, the northern and southern sections of Sudan were administered separately under the 'Southern Policy'.¹³ This policy granted high levels of autonomy to the native tribes in the south. While the principal reason which has been proffered by the British for the administrative separation of the north from the south was the prevention of the spread of Islam, it has been argued that the main reasons went beyond religion to preventing the Arab north from trading, and settling in the south of the country in curbing the threat of Arabisation.¹⁴

The separation of the north and south was reinforced by the creation of the Fault Line in 1922 which prohibited the people of the north from travelling southward 'over the 10th Parallel' and the south from travelling north 'over the 8th parallel.'¹⁵ Other measures were also put in place by the British to reinforce the separation including the passage of the Closed Districts Ordinances of 1920 which in turn led to the Passports and Permits Ordinance of 1922.¹⁶ The latter policy required travellers from both northern and southern Sudan travelling between the two territories to produce passports and permits in order to gain access across the

¹⁰ Ibid.

¹¹ P Holt *The Mahdist State in the Sudan, 1881-1898: a study of its origins, development and overthrow* (2009) 111 – 115.

¹² H C Metz *The Anglo-Egyptian Condominium, 199-1955* available at <http://countrystudies.us/sudan/15.htm> accessed on 25th September 2017.

¹³ O Albino *The Sudan: a Southern Viewpoint* (1970) 32. The Southern Policy was instituted by the British with an aim of building self-containment units of tribes in line with customs and traditional beliefs. See also A Kumsa op cit note 4 at 4 where Kumsa states that the 'Southern Policy' allowed for local tribes to continue using their system of government as long as they were in conformity with the western ideals of good governance and justice.

¹⁴ D N Mayo *The British Southern Policy in Sudan: An Inquiry into the Closed District Ordinances (1914-1946)* (1994) 165.

¹⁵ A Varma *The Creation of South Sudan: Prospects and Challenges* (2011) 3.

¹⁶ Ibid at 3.

parallel line. Subsequently, in 1925, the Permits and Trade Order was enacted requiring the people of the north to acquire permits to engage in trade in Southern Sudan.¹⁷ These were all laws and policies which demonstrated the intention of the British to keep Southern Sudan separated from the north.

Through a system of direct rule in the south, the British provided financial and moral support to education and the spread of Christianity by the establishment of churches, Christian missionary schools and social services.¹⁸ Beyond development and service provision, there is evidence that there was a genuine attempt by the British to protect and promote the culture of the southern inhabitants. Textbooks and other literal materials were published in local languages which were aimed at improving education and literacy while in the same vein preserving the language and culture of the people of the south.¹⁹ However, an apparent inconsistency that emerged from the Anglo-Egyptian rule of Sudan was the imbalance between the infrastructure and development projects that were undertaken in the north as opposed to the south.²⁰ In reflecting on the differences of the policy adopted by the British to the development in the northern and southern regions of colonial Sudan, Dr El Wathig Kameir writes that:

‘The most significant factor of concern in the separation of the South and the North – which continues to affect the relationships between the two peoples – was the colonial concentration of economic, political and administrative development in the North at the expense of the South, thereby creating socio-economic and political disparities between the two regions.’²¹

The elites of the Arab north were inflamed by the policy of separation of the north from the south and the separation has been regarded by many northern scholars as the

¹⁷ T Niblock *Class and Power in Sudan: The Dynamics of Sudanese Politics, 1898-1985* (1987) 154.

¹⁸ L Mawut *The Southern Sudan under British Rule 1898-1924: The Constraints Reassessed* (unpublished PhD thesis, Durham University, 1995) explains how as a result of a complete misunderstanding and underestimation of the government structures of the communities in the south, the British came to conclude that they could not hand over the government power and authority to the Southerners. In referencing historians, such as JFS Phillips Mawut explains how the British were very hasty in reaching the conclusion that the basis of power and authority among the Southern Sudanese was not based on a system of governance and politics but on witchcraft.

¹⁹ *Ibid* at 23.

²⁰ W Kameir *The Political Economy of South Sudan: A Scoping Analytical Study* (2011) 5.

²¹ *Ibid* at 5.

principal factor that drove a wedge between the two regions.²² In later years, the policy has been blamed by northern scholars and historians for the heightening of belligerence by the south towards the north. They argued that had the policies of separation not being in place, and the cultural and economic interaction between the north and south uncensored, there would have been a natural integration of the people of Sudan into a single nation.²³ Naturally, the southerners opposed the decision by the British to reverse the policy of separation of the north and the south. The southerners held fears that the relaxation of the policy would result in the revival of the slave trade and an influx and domination of the south by the north. In a very brief period after the reversal of the policy of separation, the southerners were confirmed in their fears as northerners overwhelmed the south and monopolised every facet of life from education, the civil service and most of all the aggressive spread of Islam and the Arabic language and culture.²⁴

After World War II, when the Separation Policy was relaxed, allowing interaction between the north and south, the British appointed eight hundred officials to govern the south. Of this number, only four officials were southerners.²⁵ However, with the start of political agitation for decolonisation and a growing call for the independence of Sudan, the British agreed, as an outcome of the Khartoum Administrative Conference of 1946²⁶ and the Cairo Agreement of 1953,²⁷ to cede independence to Sudan as a unified country. Sudan achieved independence from Britain on 1 January 1956 assuming what most South Sudanese considered a colonial mastership of the south. The decision to grant independence to Sudan and the control of the south had been communicated to the inhabitants of that region at the

²² T Y Ismael *The Sudanese Communist Party: Ideology and Party Politics* (2013) 7 – 8.

²³ Empirical evidence suggest that this line of thought was posited by the Arab north and not the south who were clearly pushing for separation from the north.

²⁴ For instance immediately after independence a decision was taken by the legislative Assembly in declaring Arabic as the language of education. See A A Balla 'A Review of Arabicization as a Controversial Issue of Language Planning in the Sudan' (2017) 7.2 *English Language and Literature Studies* 146.

²⁵ D Childress, *Omar al Bashir's Sudan* (2010) 33.

²⁶ The main resolution of the 1946 conference was the reversal of the policy of separate rule with a view that the success of the Sudanese nation depended on the unification of all its people. In his article 'British Southern Policy in Sudan: An Inquiry into the Closed District Ordinances (1914-1946)' republished as part of the Muse Project of Michigan State University, David Mayo reported that the British who had developed a measure of attachment to the south opposed the decision and argued that the decision would politically and economically disfavour the south because they were not consulted and did not participate in the conference. This notwithstanding, the British capitulated under the pressure from the Sudanese elite and agreed to the unification proposal. As a trade-off, the British however called for regionalization or federation as measures aimed at protecting the interest of the south in a unified Sudan.

²⁷ The Cairo Agreement of 1953 was designed and signed in Cairo on 12 February 1953 as an 'agreement Between the Government of The United Kingdom of Great Britain and Northern Ireland and the Egyptian Government concerning self-government and Self-Determination for the Sudan.' See F A Taha 'The Sudanese Factor in the 1952-53 Anglo-Egyptian Negotiations' (2008) *Middle Eastern Studies* 44:4.

Juba Conference of 1947.²⁸ The southerners who had come to consider themselves as being geographically, racially and culturally distinct from the north considered this move by the British a betrayal. In lamenting the decision of the British to hand over control to the Arab north, Riek Machar wrote that:

‘The betrayal of South Sudan by the British was finally concluded in the infamous Juba conference of 1947. [...] Nevertheless, the people of South Sudan regard themselves as “internally colonised people”. The deliberate handover of South Sudan to North Sudan by the British was one of the greatest blunders ever made in the diplomacy of British colonial history. If the British had felt that South Sudan was not yet ready to become an independent state by itself then, they should have either handed over its administration to an international body like the UN instead of North Sudan or should have left North Sudan to get independence separately as they did with North Rhodesia.’²⁹

With this heightened level of dissatisfaction and resentment articulated on both sides of the north-south spectrum, it was clear that an independent Sudan was bound to be an uneasy marriage between northern and southern Sudan. Upon independence, the dominant Arab north immediately set their eyes on achieving the Islamization and Arabisation of the south which they had been denied under British rule.³⁰ The people of the south took great exception to this overture from Khartoum and consequently sought political assurances that the aggressive policies of Islamization would be stopped and the autonomy of the south would be sustained through a federal system. As both sides took an uncompromising position, the stage became set for the political and civil strife which came to characterise the country for decades.

²⁸ This conference was the 559th meeting of the Governor General Council where the need for safeguarding the south was recognised after they expressed fear and suspicion of a return to the domination of the north of the south. See D D Akol Ruay op cit note 4 at 15.

²⁹ R Machar ‘South Sudan: A History of Political Domination - A Case of Self-Determination’ available at http://www.africa.upenn.edu/Hornet/sd_machar.html and accessed on 3 August 2018.

³⁰ H J Sharkey ‘Arab Identity and Ideology In Sudan: The Politics of Language, Ethnicity, and Race’ (2007) *African Affairs*, 107/426, 21.

2.2.1 *The pre-independence civil wars and road to the independence of South Sudan*

The Sudanese civil war has often been solely and simplistically attributed to the resistance by the Christian south to Islamisation by the predominantly Arab north. Historians have, however, contested this assertion as being a very narrow and simplistic interpretation of a complex web of political and socio-economic factors which came to fuel the civil conflict in Sudan.³¹ Sudanese nationalists have argued that the British made little effort in ensuring the participation of the south in all the consultative discussions on the independence of Sudan.³² Instead, the colonialist not wanting to be burdened by the enormous contextual challenges of the south, virtually thrust independence onto the dominant Arab north in disregard of the implications for the south.³³

On the issues of limited development in the south, a share of the blame must be apportioned to the British who despite their Separation Policy concentrated development projects including the construction of new highways, government offices and social facilities and services in the northern half of Sudan. At the independence of Sudan and long after that, the south remained a vast expanse of underdeveloped small pastoral and agrarian communities mainly characterised by thatched mud houses.³⁴ There was also the highly-contested claim of slavery and ill-treatment of people from the south in the north which primarily arose from a sense of racial superiority by the Arab north.³⁵ Politically, the call for greater autonomy which they had enjoyed under British rule was a principal demand of the

³¹ D H Johnson 'The Root Causes of the Sudan Civil Wars' in J Correy *Book Review* (2003) 147. See also the Berkley Center for Religion, Peace & World Affairs *Sudan: Race and Religion in Civil War* (2013) 4 where it is argued that '[w]hile religion was clearly a factor in both civil wars, it would be incorrect to say that the civil wars were fought strictly on the basis of religion. The southern Sudanese were concerned with other issues including anti-slavery and freedom, development in the south and economic opportunity. Religion only became an issues in the south when in 1983 Gaafar Nimeiry declared sharia law across the national – a situation which was exacerbated by the Islamist policies of Omar al-Bashir's.

³² C Collins 'Colonialism and Class Struggle in Sudan' (1976) 46 *MERIP Reports* 20. Collins writes that the south had no working class as most were herdsmen, fishermen and farmers and that southern politics were led by tribal chiefs who were a product of a strong anti-communist and anti-Islamic missionary education.

³³ *Ibid* at 5.

³⁴ R Ranganathan and C M Briceño-Garmendia 'South Sudan's Infrastructure A Continental Perspective' in *Africa Infrastructure Country Diagnostic (AICD) Country Report* (2011) 1. The authors observe that the infrastructure in South Sudan is in such state of neglect that it is impossible to identify what the most pressing infrastructural need is in the country. The authors paint a gloomy picture of the prospect and possibility of there being an improvement in the infrastructural of South Sudan and note that it would take more than a decade for the country to catch up with its neighbours.

³⁵ M Leopold 'Review: Slavery in Sudan, Past and Present' (2003) *African Affairs* 653 at 661. Leopold argues that historically, slavery has been a feature of ethnic rivalry in Sudan which was exacerbated by the civil war during which the practice was revived and increased the practice.

southerners. In all the consultations and discussions for independence, the northern elites completely waved aside the central demand by the south for a federation. They viewed all suggestions of a federation as impractical.³⁶ While the religious differences between the north and south were indeed a factor that reinforced the division between the two halves of the country, it was a combination of the above socio-economic and political factors that sparked the civil wars that lasted for decades.

The first Sudanese civil war began in 1955 spearheaded by the Anya Nya³⁷ separatist and ended in 1972. The civil conflict was sparked by a series of events that culminated into a full-scale insurgency against the excesses of Khartoum. As the independence of Sudan drew near, the shadow government in Khartoum set about taking steps to established supremacy of the south. Firstly, the government replaced the Southern Sudanese workers at the Nzara Cotton Scheme with workers from the north without providing any explanation. When the southerners protested, 20 of them were brutally killed.³⁸ This unfortunate incident was followed by reports that a military garrison in the south was to be moved to the north which led a group of military officers from the south to mutiny and shot Arab officials and killed dozens of their family members.³⁹

By 1969, the Anya Nya separatist movement controlled most of the territories of the south and in 1971 metamorphosed into the Sudan People's Liberation Army (SPLA), with the SPLM as its political wing.⁴⁰ The demands of the rebellion in those early days were not aimed at winning independence. Instead, the SPLM sought greater autonomy and religious freedom for the south in the continuance of the system inherited from the British. In 1972, the Addis Ababa peace agreement was signed which met the demands of the south by granting significant self-rule and autonomy and thereby bringing an end to the first civil war and ushering in a period of peace.⁴¹

³⁶ D H Johnson 'Federalism in the history of South Sudanese political thought' in *The Rift Valley Institute Research Paper* 1 (2014) 15 – 16.

³⁷ Anya Nya, meaning snake venom in the Madi tribal language, was the name adopted for the armed groups established to defend the Southern Sudan against the aggressive policy of Arabization by the north.

³⁸ D D Akyol Ruay op cit note 4 at 15. The Nzara Cotton Scheme was a large-scale colonial development project located in present day Western Equatoria State (WES) in South Sudan which was based around the growing and manufacturing of cotton.

³⁹ Ibid at 74.

⁴⁰ Enough Project *Sudan: Independence through Civil Wars, 1956-2005* (2011) available at <https://enoughproject.org/blog/sudan-brief-history-1956> accessed on 12 August 2017.

⁴¹ D H Shinn 'Addis Ababa Agreement: was it destined to fail and are there lessons for the Current Sudan Peace Process?' in *Annales d'Ethiopie*. Volume 20, année (2004) 239-259.

The second civil war which had a timeline of 1983 – 2005, was sparked by the decision of the government of Sudan to renege on the promises of autonomy and self-rule as well as religious freedom for the south which had been provided for under the Addis Ababa Agreement in 1972.⁴² However, the seeds of conflict were sown in 1978 when oil was discovered in Bentui and later more oil was discovered in 1979 in South Kordofan and Upper Nile; and 1980 in Unity, 1981 in Adar and 1982 in Heglig.⁴³ Soon after the discovery of oil, the military government in Khartoum decided to redefine the border of South Sudan and undertook the mass displacement of the inhabitants of the border region.⁴⁴

This provocation was compounded by the decision of the military regime in Khartoum to impose Islamic law on the whole country and to declare Sudan an Islamic state.⁴⁵ The declaration of an Islamic state provided the final impetus for the various factions of the SPLA in the south to galvanise around the course of religious freedoms and self-rule. The ensuing conflict is reported to have caused the death of approximately two million people and displaced an additional four million in Khartoum and the sub-region. The atrocious nature of the conflict and the terrible impact on human lives brought the prolonged conflict to the attention of the international community. A lengthy peace negotiation facilitated by the international community led to a peace deal signed on 9 January 2005. This peace agreement came to be called the Comprehensive Peace Agreement (CPA)⁴⁶. Among others, the CPA provided for six years of self-rule for the south at the end of which a successful referendum was held, resulting in a ‘yes’ vote in favour of a break away from Sudan. On 9th July 2011, South Sudan was recognised as an independent country among the community of nations.

The independence of South Sudan was cheered around the world as a triumph of the oppressed over tyranny. The colourful ceremony that marked the Independence Day celebration was a true testament to the diversity of the South Sudanese nation as well as the solemnity of the occasion. Notwithstanding the existence of indisputable evidence pointing to the enormity of the task of nation-building, there were high hopes that, at long last, the people

⁴² D H Johnson ‘The Root Causes of Sudan's Civil Wars’ (2003) 8:1 *African Association of Political Science* at 147 – 9.

⁴³ M Leben *Oil Development Induced Displacement in the Sudan* (2009) 2 – 3.

⁴⁴ Ibid at 3.

⁴⁵ L Mawut op cit note 18 at 17.

⁴⁶ See ‘Comprehensive Peace Agreement Between the Government of South Sudan and The Sudan’s People Liberation Movement/Sudan’s People Liberation Army’ (2005) <https://www.refworld.org/pdfid/5b44ac2b4.pdf>. and accessed on 3 March 2018.

of the south now had a country they could call home. In reporting on this solemn occasion, the New York Times reported that: '[m]any of those who turned out to celebrate, overcome with emotion, spoke of their fathers, mothers, sons and daughters killed in the long struggle to break free from the Arab-dominated north.'⁴⁷

2.2.2 *Post-independence civil war and peace efforts.*

Barely three years into independence, the new nation erupted into civil war on 15 December 2013. On the night in question, political tensions and power struggles that had been building up between the South Sudanese President Salva Kiir Mayardit and his Vice Riek Machar exploded into open hostility and fighting in Juba.⁴⁸ The conflict soon took on an ethnic-political characterisation between the Dinkas which was the tribe of the President and the Nuer, the tribe of the Vice President.⁴⁹ Apart from the power struggle, other factors leading to the conflict included the monopoly of power in the presidency, increased security and safety concerns, limited access to justice, and the mismanagement of the economy.⁵⁰

By 2013 when the civil war broke out, the South Sudanese state had all but collapsed under the weight of maladministration, cronyism and corruption. Knopf writes that:

'[a]fter nearly three years of civil war, South Sudan has ceased to perform even the minimal functions and responsibilities of a sovereign state. It exercises no monopoly over coercive power, and its ability to deliver public services, provide basic security, and the administration of justice is virtually non-existent.'⁵¹

The civil war was fought with such brutality that in the first few weeks of hostilities, reports emerged of the indiscriminate killings of thousands and displacing an estimated

⁴⁷ New York Times 'After Years of Struggle, South Sudan Becomes a New Nation' (2011) available at <http://www.nytimes.com/2011/07/10/world/africa/10sudan.html> accessed on 27th September 2017.

⁴⁸ The Guardian 'South Sudan: the state that fell apart in a week' (2011) available at <https://www.theguardian.com/world/2013/dec/23/south-sudan-state-that-fell-apart-in-a-week> accessed on 5 May 2020.

⁴⁹ J Pospisil *Civil War in South Sudan: Bloody Ethno-Politics and a Failed International Engagement* (2014) 2.

⁵⁰ M Muita, M Yitbarek & S Mnguni 'South Sudan Conflict Insight' in M Gebremichael (ed) *IPSS Peace & Security Report* August 2018 Vol. 2 (2018) 2.

⁵¹ K A Knopf *Ending South Sudan's Civil War* (2016) 3.

120,000 people.⁵² Human Rights Watch apportioned the blame for human rights atrocities and the indiscriminate killing of the unarmed and vulnerable population on all parties to the conflict.⁵³ The impact of the prolonged conflict on South Sudan is devastating, resulting in the heightening of vulnerability. To date, it is estimated that 7.5 million South Sudanese need humanitarian assistance while approximately 4 million have been displaced and 2.2 million are refugees mainly in Kenya and Uganda.⁵⁴ The impact of the civil war on the economy and other facets of life in South Sudan is discussed in sections 2.4 and 2.8 below.

Faced with a growing outcry of the human impact of the conflict and the looming threat of sanctions from the international community, the warring parties agreed to participate in a peace process which was spearheaded by IGAD and later IGAD-PLUS.⁵⁵ The model for the peace negotiations and deals was proposed by the former US Secretary of State, John Kerry, who suggested a framework for peace that would allow Riek Machar to continue in the role of First Vice President.⁵⁶ In August 2015, the first peace deal was brokered by the regional Heads of States and IGAD and mirrored the Kerry proposal.⁵⁷ Although widely celebrated at the time, the 2015 peace deal was destined to fail because the two parties refused to accept and comply with the key terms of the agreement.⁵⁸ This deal quickly fell apart by April 2016 when both sides of the conflict clashed again in Juba, leading to a

⁵² R Gerenge op cit note 6 at 5.

⁵³ Human Rights Watch 'South Sudan Event of 2018' (2018) available at <https://www.hrw.org/world-report/2019/country-chapters/south-sudan/> accessed on 27th September 2017.

⁵⁴ See Africa Center for Strategic 'Timeline of South Sudan Peace Agreements and Violence' (2019) 2. The Center writes that 'a steady level of fighting, averaging over 800 violent events per year since 2013, has persisted since the start of the war, resulting in an estimated 400,000 deaths ... Two-thirds of the population—7.5 million people—is in need of humanitarian assistance, up from 2.2 million in 2013. This includes an increase of 500,000 since the signing of the Revitalized Agreement on the Resolution of the Conflict in South Sudan (R-ARCSS) in 2018.'

⁵⁵ International Crisis Group *South Sudan: Keeping Faith with the IGAD Peace Process* (2015) 3. IGAD-PLUS was formally presented in March 2015 which happened after fifteen months of failed mediation efforts between the warring parties. The membership of IGAD-PLUS is much more expansive and comprises the African Union (AU), UN, European Union (EU), the Troika (U.S., UK and Norway), China and the IGAD Partners Forum (IPF).

⁵⁶ International Crisis Group 'Salvaging South Sudan's Fragile Peace Deal' (2019) 1.

⁵⁷ BBC 'South Sudan leader Salva Kiir 'to sign peace deal' 19 August 2015 available at <https://www.bbc.com/news/world-africa-33997700> accessed on 7 May 2020.

⁵⁸ V Baily & V Hoskins (ed) 'SOUTH SUDAN: Fragile Peace Agreement' (2015) 52.8 *African Research Bulletin* available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-825X.2015.06533.x> accessed 7th May 2020. President signed the Peace deal under considerable pressure from the US and the international community and expressed serious doubt as to whether the peace deal will be successful.

renewal of hostilities and an escalation of the conflict.⁵⁹ The ensuing carnage occasioned the spread of hostilities to new locations in the south and east of the country which had hitherto been untouched by the civil war. Also, the fighting saw an increase in targeted killings along tribal lines mainly between the Dinka and the Nuer tribe.⁶⁰

As the conflict intensified and took on an ethnic characterisation, there began to be defections across the lines of the conflict and the emergence of many other splintered groups aligning themselves to either the government's SPLA forces or to Machar's SPLA-IO.⁶¹ IGAD stepped up pressure on the belligerents in forcing their return to the negotiation table to resume the peace talks.⁶² However, the main challenge to the peace negotiation was having Riek Machar reinstated as First Vice President after he was replaced while away from Juba in 2016. He however continued to wield considerable influence over the SPLA/IO forces and could not be ignored or sidelined.⁶³ Negotiations dragged at a painfully slow pace for 15 months during which time, various towns and locations in South Sudan changed hands several times between the belligerents. Meanwhile, the humanitarian consequence of the fighting continued to be worrisome with a heavy toll on the civilian population.⁶⁴ However, after months of heated negotiations and efforts at the cessation of hostilities, a new power-sharing agreement was reached between Kiir and Machar on 7th July 2018. Through particular regional leaders, IGAD-PLUS was able to strong-arm both sides of the conflict to agree even though Kiir's government forces were in a stronger position than at the earlier stages of the civil war.⁶⁵

⁵⁹ 'As a result of indiscriminate attacks, including shooting and shelling, shells landed in camps for displaced people inside United Nations bases, and in other densely populated areas in the city, killing and wounding civilians. Human Rights Watch researchers visiting Juba in July after the clashes documented multiple crimes, most committed by government soldiers from the Sudan People's Liberation Army (SPLA)'. See Human Rights Watch 'South Sudan: Killings, Rapes, Looting in Juba' (2016) Available at <https://www.hrw.org/news/2016/08/15/south-sudan-killings-rapes-looting-juba> accessed on 7 May 2020.

⁶⁰ European Asylum Support Office *Country of Origin (COI) Query: South Sudan* (2020) 5 – 6 where the armed opposition group are noted to include the Sudan People's Liberation Movement-Army in Opposition (SPLM-IO); National Salvation Front (NAS); the SPLM-Leaders-Former Detainees (SPLM-FD); South Sudan Opposition Alliance (SSOA); South Sudan Liberation Movement (SSLM).

⁶¹ M J Blackings *The Case of South Sudan's Agreement on the Resolution of the Conflict in South Sudan* (2018) 13.

⁶² R Kane *Ritual Formation of Peaceful Publics: Sacrifice and Syncretism in South Sudan 1991-2005* (2014) 44.

⁶³ E R Gamboriko 'Peace Building and Peace Agreements in South Sudan: An Analysis of Recent Experiences' (2019) *The Zambakari Advisory: Special Issue* 27.

⁶⁴ Ibid 54 at 24.

⁶⁵ International Crisis Group 'South Sudan: Peace on Paper' 14 December 2018 available at <https://www.crisisgroup.org/africa/horn-africa/south-sudan/south-sudan-peace-paper> accessed on 22 January 2019.

On 12th September 2018, another peace agreement titled the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) was signed in Addis Ababa between the Government of South Sudan, the SPLM/A-IO and other opposition groups and political parties.⁶⁶ Components of the R-ARCSS included the creation of three additional Vice Presidents positions to that of the First Vice President, a position to be occupied by Riek Machar. Also, the R-ARCSS provided for the sharing of the positions of Ministers and Deputies among the parties to the agreement as well as establishing a Technical Boundaries Committee (TBC) to work with the Independent Boundaries Commission (IBC) in delineating the internal boundaries, composition and structure of the states of South Sudan.⁶⁷ A final provision of the R-ARCSS called for the reform of the Judiciary and the Judiciary Act⁶⁸. The R-ARCSS is thus far holding despite several alleged violations of the peace deal.

2.3 GEOGRAPHY, POPULATION AND CULTURE

The Republic of South Sudan is situated in East Africa within the north and eastern hemispheres with a geographic coordinate of 8 00 N, 30 00 E. South Sudan is a landlocked nation that covers a total land space of 619,745 square miles stretching from ‘Sudan in the north, Ethiopia in the northeast, Kenya and Uganda in the east and southeast and the Democratic Republic of Congo in the south and the Central African Republic in the West.’⁶⁹ The topography of South Sudan is a striking combination of mountains, plains, savanna and swamps that underscores the rich geography and great diversity of the young nation. In the north, the plains extend up to the highlands in the south and all the way to Uganda and Kenya.⁷⁰ The swampland, which is referred to as the Sudd (meaning the floating vegetation that hinders navigation) is more than 100,000 square kilometres. While South Sudan is reputed for its vast deposits of crude oil, the country is also endowed with other resources including gold, diamonds, timber, iron ore etc.

⁶⁶ J M Wuol ‘Prospects and Challenges of Peace making: The Case of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan’ (2019) *The Zambakari Advisory: Special Issue* 31.

⁶⁷ The issues of the 10 States will be discussed in detail in the next section.

⁶⁸ 2008.

⁶⁹ World Atlas South Sudan Geography April 7, 2017 available at <https://www.worldatlas.com/webimage/countrys/africa/southsudan/ssland.htm> accessed on 13 May 2020.

⁷⁰ FAO *Country profile – South Sudan* (2015) 1.

At independence, South Sudan was geopolitically divided into ten states. However, after the start of the civil war in 2013, the ten states were further broken down into twenty-eight smaller states and later expanded into thirty-two. The decision to further divide South Sudan into additional subdivisions was interpreted as politically motivated and intended to tighten the President's grip on power.⁷¹ A pro-development justification posited by the government for the new subdivisions has been the slow pace of development trickling down from state-level to local communities. The government contended that the enormous size of states made it harder for attention to be paid to the governance and developmental needs at the lower strata of the communities.⁷² However, as part of the R-ARCSS peace deal, the IBC and the TBC were established and mandated to review and make recommendations on the subdivision of the country and the boundaries. Following the completion of the assignment by the IBC and the TBC, the recommendation was made to the government for the country to revert to ten states. On 15 February 2020, the President of South Sudan gave a republican order reverting to ten states in addition to which three new administrative areas were created including Abyei, Greater Pibor and Ruweng Administrative Areas.⁷³

Whatever the rationale for the further division of the country into thirty-two states, large areas of the country remains underdeveloped with some communities reportedly lacking necessities including administrative buildings and offices for government functionaries. Most of the country continue to struggle to provide the necessary amenities for the indigent

⁷¹ The controversy that surrounded the decision to move from 10 to 28 and then to 32 states occurred at the height of the civil war. President Kiir reportedly handed the task of coming up with the division to the head of the Dinka Council of Elders whom proposed a 23-state plan and later increased the final number to 24 after consultation with the President's office. However, when the president finally announced the plan to the nation, he had raised the number to 28. A number of reasons have been posited for the increase in number including, (1) wanting to secure a balance of power in favor of the Dinka ethnic group which would strengthen his position; (2) to compensate and reinforce the culture of patronage; and (3) a more favourable argument is that the creation of the state was in response to pressure and demand for federalism and the decentralization of power. A final controversy is that after an initial move by President Kiir to use a presidential decree in implementing the 32-state plan, he was pressured into seeking a constitutional amendment from Parliament which required a two-thirds majority vote and which the Bill failed to achieve. It is reported that President Kiir and his supporters manipulated the results and claimed that the Bill had passed. On 24th December 2015, the 28-state plan was finally set into motion with the appointment of 28 governors. And later, an additional 4 states were added making for the current 32 states. See M Pritchard & A Verjee *US Institute of Peace South Sudan: From 10 States to 32 States and Back Again* March 1, 2021 available at <https://www.usip.org/publications/2021/03/south-sudan-10-states-32-states-and-back-again> accessed on April 2021.

⁷² M Schomerus and L Aalen (ed) *Considering the States Perspectives on South Sudan's Subdivision and Federalism Debate* (2016) 7.

⁷³ See A S K Njoroge *On the Status of Implementation of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan for the period 1st January to 31st March 2020* (2020) para 38 at 9.

population.⁷⁴ Travel and access to these communities are mostly by road networks which are in a terrible state mainly during the rainy season when heavy rains and perennial floods render the country impassable.⁷⁵ The appalling road conditions are a significant limitation to the access that local communities enjoy to essential services, including justice.⁷⁶

According to the World Bank, the population of South Sudan is approximately 11.5 million spreading across the different ethnic groups. These groups consist of the ‘Dinka, Nuer, Shilluk Murle, Mandari, Kakwa, Didinga, Azande, Kuku, Bari, Ndogo, Acholi, Baka, Anuak, Fertit, Dungotona, Bongo, Lndi, Lango, Bviri, tribes.’⁷⁷ Most of these tribes are further broken down linguistically and culturally, which also add to the diversity of South Sudan. Each tribe has its belief system and laws (distinct or shared) which prescribe various practices including the ownership and administration of property, marriage, divorce, family life and even funeral rites.⁷⁸ However, while the tribal distinctions further add to the rich diversity of South Sudan, there is no doubt that tribal differences and tribalism has also contributed to fueling conflict in South Sudan.⁷⁹

Regarding the tribal justice system in South Sudan, each tribe has in place a body of law, generally known as customary law. The customary laws of particular tribes have over time emerged from enduring practices; decisions of the customary courts that are ‘binding or persuasive’; belief systems arising from religious rules and principles of morality that are particular to the tribes.⁸⁰ It is worthy of note that customary law – as a body of law in South Sudan – has been significantly influenced by external forces especially the different colonial administrations who tried to dictate every facet of life in their colonies.

To fully understand the essence of the tribal customs and traditions in South Sudan,

⁷⁴ European Union Delegation in South Sudan *Rural Infrastructure Strategy in South Sudan* (2015) 9. See also African Development Bank (AfDB) Group South Sudan’ *An Infrastructure Action Plan A Program for Sustained Strong Economic Growth Summary Report* (2013) where the impact of the civil war is highlighted and analysed.

⁷⁵ C Quinn et al *South Sudan Climate Vulnerability Profile: Sector- and Location-Specific Climate Risks and Resilience Recommendations* (2019) 8 – 9.

⁷⁶ Since independence, South Sudan is categorised as one of the least developed countries in the world, with large sways of its territory underdeveloped and roughly 51 per cent of its people living in extreme poverty and largely dependent on subsistence farming and/or animal husbandry as their main sources of livelihood. See G Larson, P B Ajak, and L Pritchett *South Sudan’s Capability Trap: Building a State with Disruptive Innovation* (2013) 12 – 18.

⁷⁷ CIA ‘*World Fact Book, South Sudan*’ (2017) available at <https://www.cia.gov/library/publications/the-world-factbook/geos/od.html> accessed on 16 September 2017.

⁷⁸ A A Jok et al ‘*A Study of Customary Law in Contemporary Southern Sudan*’ (2004) 10 – 23.

⁷⁹ L P Blanchard *Conflict in South Sudan and the Challenges Ahead* (2016) 12.

⁸⁰ Sudan Tribune *Tribalism in South Sudan is an Infectious Disease* (November 2018) available at <https://www.sudantribune.com/spip.php?article66660> and accessed on 12 July 2019).

dispute resolution and access to justice mechanisms are of the highest consequence.⁸¹ As in other African contexts, most South Sudanese seek and access their justice remedies from the customary justice system which forms an integral part of the legal fabric of the young nation.⁸² A customary court in South Sudan is presided over by the chieftaincy in the different stratifications of local communities at the Payam and Boma levels.⁸³ As is the case elsewhere in Africa, justice delivered in the customary courts is informal and unwritten and provides a relatively timeous and reconciliatory option of justice in comparison to the statutory justice system.⁸⁴

2.4 THE DEVELOPMENT, POLITICAL AND ECONOMIC CONTEXT

At independence, South Sudan lagged far behind its northern neighbour Sudan and indeed other countries of the East Africa sub-region in terms of development and infrastructure. In discussing the status of the infrastructure, the Africa Growth Initiative at Brookings noted that:

‘[a]fter many years of brutal civil war, South Sudan emerged with extremely poor infrastructure and a population with limited human capital ... the country was born with weak institutions that were not suited to the delivery of sustainable economic growth and development.’⁸⁵

It was not only the infrastructure of South Sudan, which was neglected but also other sectors as well including education, health and justice which provide vital services to the population.⁸⁶ While there have been some improvements in the overall infrastructure of South Sudan since the early days of independence, progress has mainly been evident in Juba and very few other urban centres around the country.

⁸¹ The customary law of South Sudan shall be discussed in detail at a later stage of this chapter.

⁸² See s 5 (b) of the Transitional Constitution of South Sudan 2011.

⁸³ See L A Deng *The Power of Creative Reasoning: The Ideas and Vision of John Garang* (2013) 140 who notes that the Boma represents the lowest administrative strata of South Sudan and is equated to village, block or ward. He also notes that the Payam (a Kushite administrative concept) represents the fifth administrative subdivision of South Sudan after the national, state and county-level administration.

⁸⁴ Justice Africa *Justice and Reconciliation in South Sudan* (2014) 2.

⁸⁵ Africa Growth Initiative at Brookings *South Sudan: One Year After Independence: Opportunities and Obstacles for Africa's Newest Country* (2012) 1.

⁸⁶ Reuters Special Report ‘Southern Sudan: oil boom to bust-up?’ available at <http://www.reuters.com/article/us-sudan-south-idUSTRE6380V020100409?pageNumber=4> accessed on 17 October 2017.

The country does not fare any better in the health and educational sectors. On the eve of independence, and by 2012, a year after independence, the health situation was still desperate with millions of South Sudanese without access to quality and affordable health care.⁸⁷ Educational facilities were limited, and most of what existed were of questionable quality. The United Nations reports that South Sudan is ranked second to last on net enrolment in primary school and has over a million children who are unable to attend school.⁸⁸ Although a lot has been put into improving the education situation in South Sudan, the ongoing civil war has negatively impacted the educational figures with a report of 76% of girls of school-going age at present out of school.⁸⁹

At independence, the justice and law enforcement institutions in South Sudan were equally neglected making justice inaccessible and expensive for the indigent population. Even today, while the Supreme Court and Court of Appeal is housed in elegant and modern buildings in Juba which were built in the period after independence, the same cannot be said of lower and state-level courts. Most statutory courts, in particular, the High Court were and continue to be housed in poorly secured, ill-furnished and often unfinished or unkempt buildings. For instance, in 2011 the High Court in Kwajok, the capital of Warrap State was an unfinished building lacking all facilities other than an administrative office and a courtroom which also doubled as the chambers of the Senior Judge of the court.

The conditions of the customary courts were and are even more desperate. At independence, and currently, the local courts are housed in very primitive structures or none at all. Some high-ranking courts, mostly at the Payam level, are housed in buildings, but many local courts are held in the open and under trees.⁹⁰ While this state of affairs has been

⁸⁷ A year after independence, the health system of South Sudan continued to be fragile and unable to meet the health requirement of the people of the country who also now had to contend with several other challenges and drawbacks because of failing economy. Prolonged political instability and sanctions have only exacerbated the situation. See R Downie *The State of Public Health in South Sudan* (2012) 3.

⁸⁸ UNESCO and EFAGMR 'Building a better future: Education for an independent South Sudan' in *Global Monitoring Report Policy Paper 7* (2011) 6 - 12.

⁸⁹ See UNESCO 'Review of Education for All in South Sudan supported by UNESCO' available at <https://en.unesco.org/news/review-education-all-south-sudan-supported-unesco> accessed on 29 June 2020. Figures from UNESCO for 2015 indicates that '59.9% primary school teachers in South Sudan are untrained; 39.5% secondary school teachers are untrained; 49.6% Alternative Education System (AES) teachers are untrained; Gross Enrolment Rate (GER) for female students in primary school is 50.9% compared to 71.7% for male students; GER for female students in secondary school is 3.5% for female students compared to 6.4% for male students; 1.5% of secondary students have special needs.' See also Plan International 'South Sudan crisis forces girls out of school' (2017) available at <https://plan-international.org/news/2017-04-25-south-sudan-crisis-forces-girls-out-school#> accessed on 17th October 2017.

⁹⁰ International Commission for Justice *South Sudan: An Independent Judiciary in An Independent State?* (2013) 38.

pointed to as indicative of the informal nature of the local courts and accredited with the transparent dispensation of justice, the limited infrastructure and the lack of a protective environment for the local courts is a crucial impediment to fair trial in the customary justice system of South Sudan.⁹¹

Regarding law enforcement, it is estimated that, at the time of independence in 2011, the size of the police force was 33,000 (3,000 per state).⁹² The police force was initially mostly populated by officers from varied backgrounds including those who were professionally trained during the union with the north, community police which comprised community-level self-protection groups and various militia.⁹³ Most of the forces were former associates of the SPLA/M and even fought during the second civil war and had been reassigned to the police at the creation of the South Sudan Police Service. The vast geographical size of the country poses a significant challenge for law enforcement since the police are mostly present in state capitals and other urban centres where police stations had either been built during the union with Sudan or as part of post-independence stabilisation efforts.

To date, police presence at the grassroots level remains limited and grossly inadequate in meeting the safety and security needs of the population. The correctional services in South Sudan are faced with a similar fate as their police counterparts. Characterised by poorly equipped and ill-trained officials, the corrections facilities are often inhumane and overcrowded and in need of urgent attention. Given the retrogressive impact of the civil war in the country, the development and infrastructure situation has worsened and further weakened the fabric of the country.

2.5 THE SOUTH SUDAN LEGAL SYSTEM

South Sudan's legal system is built on a dualist approach which is akin to the pluralistic legal systems in most African jurisdictions in which statutory law co-exists with customary law. The dualism of the legal system finds legality in the Transitional Constitution of South Sudan

⁹¹ C Leanard 'The Politics of Customary Law Ascertainment in South Sudan' (2011) *The Journal of Legal Pluralism and Unofficial Law* 4.

⁹² OSAC *South Sudan 2020 Crime & Safety Report* (2020) where the figure of the Police officers today set at 40,000. Available at <https://www.osac.gov/Country/SouthSudan/Content/Detail/Report/375e9a73-fca0-48cb-81a6-18906cf51fe3> accessed on 29 June 2020.

⁹³ See chapter 2 at 40 – 2.

2011 which identifies the sources of law in South Sudan as including ‘the constitution, written law, customs and traditions of the people, the will of the people and any other relevant source.’⁹⁴ These sources of law can be divided into three categories. First, the constitution and other ‘written laws’ fall into the statutory law category. The second category falls under case law or the legal decisions of the courts in deciding cases. And the third source is customary law. Two definitions of customary law encountered during this research include first ‘the rules of law which by custom apply to particular communities,’⁹⁵ and second ‘custom, local usage, and belief of a particular community considered as binding on the people.’⁹⁶ Notable characteristics of customary law are its unwritten nature, the lack of predictability and the variation from one tribe to another.

To adequately understand the legal system of South Sudan, it is necessary to discuss how both systems of law co-exist, interact and complement each other. Arguments in favour of the dualist system emphasise the need to reinforce the true meaning, applicability and everyday usage of the law.⁹⁷ For the law to be embraced and to command compliance, it is argued, by Knight and others, that the law has to be engrained in the very lives and realities of the people concerned and within the scope of rules of behaviour and social construct which define people and to which they are accustomed.⁹⁸ In South Sudan, the customary law of particular tribes which prescribes most areas of the lives of people, mainly in the fields of family, property, inheritance, tort and contract appropriately fit this bill. The customary law of South Sudan follows this path and is firmly built on the different belief systems and customary practices that are particular to the tribes.

The interaction between the customary and statutory laws of South Sudan can best be described as mutually reinforcing and complementary. Both customary and statutory laws rely on the other for legitimacy and effectiveness. In demonstrating how the interaction of customary and statutory laws is relevant to reinforcing legitimacy, Tyler and Jackson state that:

⁹⁴ See s 5 (a, b, c, d & e) of the Transitional Constitution of South Sudan.

⁹⁵ Sec 170 (3) of the 1991 Constitution of Sierra Leone.

⁹⁶ M Kiye *The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon* (2015) 15.

⁹⁷ R S Knight *Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law Making and Implementation* (2010) 5. Also see L Fallers ‘Customary Law in the new African States’ (1962) 27 *Law and Contemporary Problems* (1962) 605.

⁹⁸ *Ibid* 5.

‘Early efforts to motivate compliance focused upon the threat or use of punishment through strategies of deterrence, but more recent studies have suggested that the public is also more willing to comply with the law when they view law and legal authorities as legitimate and hence feel an obligation to obey.’⁹⁹

The customary law of South Sudan bears all the limitations that characterise African customs and tradition, including its unwritten nature; gender biases and unpredictability. And yet, the positives of adapting the customary laws of tribes as part of the legal system in South Sudan should not be underestimated or ignored.

A primary weakness of statutory law in South Sudan is the limited accessibility by remote and hard-to-reach communities. Other flaws which characterise statutory law in the South Sudan contexts include unfamiliarity by the local population with laws, the punitive nature of laws and the tendency for delays and rigidity which define the processes and procedures for delivering justice.¹⁰⁰ Customary justice systems on the other hand present a speedy and flexible alternative that focuses on reconciliation rather than punishment. Both customary and statutory laws complement each other in addressing or making up for the limitations of the other. The unwritten nature, biases and diverse nature of the customary law are mitigated by statutes, policy regulations and oversight by statutory bodies or institutions. On the other hand, the deficiencies of the punitive and rigidity of statutory laws, the tendencies for delays, bureaucracy and limited coverage are mitigated by the flexibility, reconciliatory, informal and speedy nature of the customary justice system.¹⁰¹

The legal system of South Sudan is a mirror of its historical past which reflects all the different systems of laws the country encountered during its long journey to independence. The International Commission of Jurist reflecting on the nature of laws in South Sudan notes that:

⁹⁹ T R Tyler and J Jackson ‘Popular legitimacy and the exercise of legal authority: Motivating compliance, cooperation and engagement’ (2003) *Psychology Public Policy and Law* 3.

¹⁰⁰ K A Mingst ‘Judicial systems of sub-Saharan Africa: an analysis of neglect in Africa’ (1988) 31 *Studies Review* (1988) 114.

¹⁰¹ Some of the characteristics of customary law highlighted include legitimacy, flexibility, and adaptability ‘unwritten, informal, spontaneous, conservative, status based, and reliant upon its own enforcement procedures.’ See B Tobin *The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries* (2013) 24.

‘Different legal systems and concepts in South Sudan have merged to such an extent that it is sometimes impossible to distinguish which laws originate from pre-existing judicial culture and which have emerged through interaction with national laws and other legal cultures. Local and national laws and procedures percolate both up and down the judicial hierarchy: some chiefs sentence according to written laws, while some judges apply principles and procedures derived from local cultures. Therefore, the principle of legal certainty is undermined, as it becomes difficult to know what law will be applied in a given case in a given place.’¹⁰²

Contrary to most jurisdictions, South Sudan’s customary law plays a vital role in the maintenance of law and order and is a significant system of law in the adjudication of cases in both civil and criminal jurisdictions in South Sudan.¹⁰³ Laws regulating matrimony and alimony, property rights and inheritance, among others, rely heavily on the customary practices of particular tribes for their application and adjudication in court. The interaction of customary and statutory laws in South Sudan is complementary and mutually reinforcing. On this issue, the International Commission of Jurists further informs on the flexible nature of the customary law of South Sudan and how it has been going through an evolution and a process of growth and development with the continuous introduction of new statutes.¹⁰⁴ However, the merger of laws also comes with some disadvantages, including that the limitations of one law weaken the other.

In South Sudan, PAD is evident and perpetuated in both criminal and civil jurisdictions at all levels. PAD presents different dynamics and characterisations which shape the extent of its direct and indirect impact on people.

2.6 THE INSTITUTIONS OF JUSTICE

In South Sudan, the functionality of the following institutions’ has a bearing on the

¹⁰² The International Commission of Jurists ‘*South Sudan: An Independent Judiciary in An Independent State?*’ (2013) 14 – 15.

¹⁰³ Ibid at 15.

¹⁰⁴ Ibid at 13.

prevalence of PAD and access to justice for the people of South Sudan:

2.6.1 The Judiciary of South Sudan

The Judiciary of South Sudan, which is headed by the Chief Justice, comes into being by way of s 122 of the Transitional Constitution of South Sudan.¹⁰⁵ The Judiciary of South Sudan is charged with the exercise of the powers of the ‘courts in accordance with the customs, values, norms and aspirations of the people and conformity with this Constitution and the law’.¹⁰⁶ This constitutional provision is relevant to continuously highlight the appropriate place of custom and values in the justice system of South Sudan. Section 6 of the Judiciary Act¹⁰⁷ reinforces the independence of the Judiciary and provides that it shall enjoy independence from the legislative and executive branches of government.

In terms of functionality and powers of the Judiciary, the Constitution of South Sudan,¹⁰⁸ the Judiciary Act,¹⁰⁹ as well as other legislation,¹¹⁰ provide details that include the maintenance of professional standards and capacity building; the adjudication of disputes and rendering of judgements in conformity with the constitution and laws of South Sudan. These Acts provide the standards and principles that guide the delivery of justice services that include ensuring equality before the law and other tenets of fair trial. The Judiciary is required by legislation to be disposed towards ‘voluntary reconciliation’ between disputing parties and the administration of substantive justice without undue recognition of the technicalities of laws and procedures. These provisions of the law have the desired effect of ensuring a measure of flexibility and dynamism, which is required for the judiciary to function effectively and deliver quality and timely justice to the people of South Sudan.

The following are the courts that constitute the Judiciary of South Sudan:

- i. The Supreme Court: The Supreme Court is established under s 124 of the Transitional

¹⁰⁵ 2011.

¹⁰⁶ Section 122 (1) of the Transitional Constitution of South Sudan.

¹⁰⁷ 2008.

¹⁰⁸ 2011.

¹⁰⁹ 2008.

¹¹⁰ Other legislation making provision on the jurisdiction and functionality of the Judiciary of South Sudan includes the Code of Civil Procedure 2007; the Code of Criminal Procedure and the Local Government Act 2009.

Constitution of South Sudan¹¹¹ as the highest court of judicature. The Supreme Court is situated in the capital Juba and consists of nine Justices including the Chief Justice and a deputy both of who provides leadership to the judiciary. The Supreme Court is responsible for the ‘interpretation of the constitution; serving as the court of final judicial instance; exercising original jurisdiction in deciding disputes arising from the interpretation of the constitution; serving as a court of review and cassation in respect of any criminal, civil and administrative matters arising from the law; exercising criminal jurisdiction over the President and upholding and protecting human rights and fundamental freedoms.’¹¹² The Supreme Court has powers to form panels on constitutional, criminal and civil matters and make decisions, which can either be written or unwritten.¹¹³

- ii. The Courts of Appeal: The Court of Appeal is established according to s 129 of the Transitional Constitution¹¹⁴ and s 13 of the Judicial Act¹¹⁵ of South Sudan. The Court of Appeal, which is constituted by three justices at any given time, is situated in Juba, Rumbek and Malakal.¹¹⁶ The jurisdiction and the principal responsibility of the Court of Appeal include the exercise of jurisdictional powers in the hearing and review of cases on appeals from the High Court. All judgments of the Court of Appeal are determined by majority decision and can be appealed to the Supreme Court.
- iii. High Courts: The High Court represents the highest institution of the judiciary at the state level in South Sudan and is manned by a President and two other judges at each state level. The High Court comes into being by way of s 131(1) of the Transitional Constitution and s 14 of the Judicial Act of South Sudan. The jurisdiction of the High Court is specified in both the Civil and Criminal Procedure Acts.¹¹⁷ In each court, cases shall be tried by a lone judge except in criminal cases that may require to be composed of other actors such as those with customary implications for which assessors are required. The President of the court exercises both administrative and judicial duties and is

¹¹¹ 2011.

¹¹² See s 126 (1 – 6).

¹¹³ In the South Sudanese case of *Pagan Amum v Persident Salva Kiir* the Supreme Court discusses and clarifies its jurisdiction as provided for under s 126 of the Transitional Constitution.

¹¹⁴ 2011.

¹¹⁵ 2008.

¹¹⁶ The location of the Court of Appeal is divided in line with the regional division of South Sudan including Greater Equatoria, Greater Bahr-el-Ghazal and Greater Upper Nile regions with the locations mentioned being the regional headquarter towns.

¹¹⁷ See s 8 & 12 of the Code of Criminal Procedure Act 2008.

‘answerable to the Governor of the State in terms of performance and administration of the state judiciary.’¹¹⁸

- iv. County and Payam Courts are courts of original jurisdiction that are established by warrants produced by the Chief Justice and consist of first, second and third grade/class courts. Similar to the High Court, the power and jurisdiction of County and Payam Courts are specified in the Civil Procedure and Criminal Procedure Acts.¹¹⁹ Such responsibilities shall include hearing criminal and civil cases within the counties of the state.¹²⁰
- v. Customary Law Courts are established in accordance with s 97 of the Local Government Act.¹²¹ The Customary Law Courts are divided into Court C headed by the County Paramount Chief usually at the County level; Court B headed by the Head Chief located at the Payam levels, and Court A headed by the executive chief located at the Boma level.¹²² Finally, a Town Bench Court is established to administer the customary law in the urban centres including in the capitals of the states. These courts are responsible for the adjudication of cases of a customary nature in particular communities and ‘in accordance with customs, traditions, norms and ethics of the communities.’¹²³ Although Customary Law Courts do not have jurisdiction over criminal matters, the Local Government Act provides that where there is an interface between customary and statutory law, the statutory court can refer matters to a customary law court for adjudication.¹²⁴

2.6.2 *The Directorate of Public Prosecution*

The Directorate of Public Prosecution is established under s 8 of the Ministry of Legal Affairs and Constitutional Development Organisation Act¹²⁵ and provided for in Chapter III of the Code of Criminal Procedure Act.¹²⁶ The Directorate of Public Prosecution of South Sudan is administratively under the control of the Ministry of Justice and Constitutional

¹¹⁸ See s 15 (3) Judiciary Act 2008.

¹¹⁹ 2008.

¹²⁰ See s 13(2) Code of Criminal Procedure Act 2008.

¹²¹ 2009.

¹²² The division of the customary law courts into the indicated categories is for jurisdictional and appeal purposes.

¹²³ Section 98 Local Court Act 2009.

¹²⁴ Section 98 ss 2.

¹²⁵ 2008.

¹²⁶ 2008.

Affairs. The Directorate is headed by a Director who is answerable to the Minister and assumes the role of chief administrator with the responsibility of ensuring the effective functioning of the unit and the discharge of the functions for which it was established.¹²⁷ The Office of the Directorate of Public Prosecution is established in every state through which the unit can carry out its core functions.

The powers of the Directorate is derived from both the Ministry of Legal Affairs and Constitutional Development Organisation Act, and the Code of Criminal Procedure Act¹²⁸ to carry out functions relevant to the application of the law in instances where there is a breach requiring a criminal sanction.¹²⁹ Within this framework, the Directorate of Public Prosecution is empowered to provide advice to the institutions of government on criminal law and procedural matters at both national and sub-national levels.¹³⁰ Such advice should comply with the appropriate laws, and in guiding the investigations and prosecution of all criminal cases at the national and sub-national levels. Finally, the Directorate of Public Prosecution assumes responsibility for the preparation and analysis of crime statistics and the dissemination of such reports.¹³¹ However, as a directorate of the government, there are serious concerns over the capacity of the DPP to function independently without influence and interference from the government.¹³²

2.7 SECURITY AND LAW ENFORCEMENT INSTITUTIONS

The following institutions fall under the security and law enforcement sector and constitute institutions of the state which are charged with the provision of services relevant to defence, state security and law enforcement. These institutions include:

2.7.1 *The Sudan People's Liberation Army (SPLA)*

The SPLA is the military wing of the SPLM whose existence is mandated by s 3 of the SPLA

¹²⁷ See ss 8 (2) Ministry of Legal Affairs and Constitutional Development Organization Act 2008.

¹²⁸ 2008.

¹²⁹ The Council of Europe *The Role of Public Prosecution in the Criminal Justice System* (2000) 4.

¹³⁰ See ss 8 (2) (a) of the Ministry of Legal Affairs and Constitutional Development Organization Act 2008.

¹³¹ See ss 8 (2) (d) of the Code of Ministry of Legal Affairs and Constitutional Development Organisation Act 2008.

¹³² Amnesty International *"Do you think we will prosecute ourselves?" No Prospects for Accountability in South Sudan* (2019) 14.

Act of 2009.¹³³ According to the SPLM/A manifesto of 1983,¹³⁴ both the political and military wings were established to further the armed struggles. They were reignited following the collapse of the Addis Ababa Agreement. Almost a decade after independence, South Sudan continues to be highly militarised with the SPLA wielding significant power over the political life of the people. In 2009, the Sudan People's Liberation Army Act was enacted repealing the prior Acts of 1994 and 2003. The act provided for the establishment of the SPLA and how it would be administered, how discipline would be enforced and the key functions it would carry out. Considering that the 2009 law was passed during the implementation of the CPA, a core purpose of the Act was to protect the implementation of the treaty and the Interim Constitution of Southern Sudan 2005. Other functions of the SPLA include the maintenance of law and order; coordination and cooperation with defence forces in the region and participation in peacekeeping duties.¹³⁵

Since its formal establishment in 1983, the SPLA has snowballed in size which according to the Global Security website, was 2,500 in 1986 and by 1991 the number had reached a total of 50,000 – 60,000 with most of the forces lightly armed.¹³⁶ By the outbreak of the civil war in 2013, the number of SPLA troops had skyrocketed to figures ranging from 200,000 – 320,000 exceeding the sizes of the defence forces of most, if not all, countries in the sub-region.¹³⁷ This distended size of the SPLA was one of the critical factors leading to the launch of a two-phased Disarmament, Demobilisation and Reintegration (DDR) process in South Sudan in 2005 as mandated by the CPA.¹³⁸ However, the first phase of the DDR

¹³³ Section 3 of the Sudan People's Liberation Army Act (2009) provides that 'The purpose of this Act is to provide for the establishment, governance and discipline of the SPLA and for purposes connected therewith and incidental thereto.'

¹³⁴ Sudan People's Liberation Movement *The Manifesto of the Sudan People's Liberation Movement* (2008) 9. The manifesto highlights the pursuit of freedom, justice, dignity and human rights of the Southern Sudanese people in justifying the rebellion against the Sudanese.

¹³⁵ The Sudan People's Liberation Army Act is outdated and required an upgrade to speak to the current situation in South Sudan. This is particularly relevant as the legislation continually makes reference to Sudan and for instance indicates that the SPLA is one of the armed forces of the Sudan. On August 3, 2017, a conference chaired by President Kiir was held in Bilpam on "Restructuring for Effective Transformation" of the army into a more conventional force. Among the 70 resolutions of the conference, a change of name of the SPLA to South Sudan People's Défense Forces was agreed to. At the time of this study there is no evidence that the resolution for the name change of the SPLA has moved beyond the stage of a proposal.

¹³⁶ Global Security *Sudan People's Liberation Army (SPLA)/Sudan People's Liberation Movement (SPLM)* (2014) access at <https://www.globalsecurity.org/military/world/para/spla.htm> on 23 August 2017.

¹³⁷ Ibid para 8.

¹³⁸ G Haile and T Bara *Final Evaluation of Disarmament, Demobilization, and Reintegration Programme Individual Reintegration Project Component* (2009-2012) (2013). According to an evaluation report of the DDR process as prepared by the UN, the main goal of the DDR process was to facilitate the reintegration of 180,000 (i.e. 90,000 each in the North and South Sudan) ex-combatants and Special Needs Groups (SNGs) on both sides of the border.

process encountered various challenges, including limited political will, poor road infrastructure, limited access to target groups etc. These challenges led to the suspension of the DDR process in the periods preceding the start of the ongoing civil war. Given the current context of conflict in South Sudan, the role and influence of the SPLA are likely to continue to grow in South Sudan, and the culture of militarisation will be sustained in the foreseeable future.

2.7.2 *The National Security Service*

The National Security Service of South Sudan (NSS) is established by way of the National Security Service Act, which was passed in 2015. Section 7 of the NSS Act provides that a Minister who shall be answerable to the President shall provide oversight of the NSS. Regarding structure, the NSS is comprised of a Security Council as the highest security and intelligence body which includes the President and high-ranking South Sudanese government officials. Various sub-structures of the NSS constitute the General Intelligence Bureau and the Internal Security Bureau, which shall both be headed by a Director under the supervision of the Minister. The NSS is empowered by s 12 of the National Security Service Act¹³⁹ to carry out functions relevant to the protection of national security and intelligence including arrests and detentions, a search of private property with or without a warrant, interrogations and investigations.¹⁴⁰ The exercise of these sweeping powers has been considered by human rights activists to be unchecked and the exercise of which are in contravention of the human rights provisions of the Constitution of South Sudan.

Grave concerns have been expressed by national and international human rights organisations and groups on the exercise of sweeping powers by NSS which was accorded to it by the 2015 National Security Service Act.¹⁴¹ The uncensored exercise of the sweeping powers by the NSS undoubtedly provides an opportunity for abuse and arbitrariness. The NSS has developed a reputation and notoriety for despotism and acting outside the law – even in disregard of court orders – with minimal consequences.¹⁴² Of key concern to the human rights defenders and advocates is the extent to which the NSS has engaged in PAD in

¹³⁹ 2015.

¹⁴⁰ Section 11 NSS Act 2014.

¹⁴¹ More details provided in chapter four of the thesis.

¹⁴² Amnesty International *Denied Protection of the Law: National Security Service Detention in Juba, South Sudan* (2016) 1.

the exercise of its powers. There is evidence from Amnesty International and Human Rights Watch of the existence of many unofficial and clandestine detention facilities which have been used as locations for the arrest and torture of people who are accused of supporting or sympathising with the opposition.¹⁴³

2.7.3 *The South Sudan National Police Service (SSNPS)*

The SSNPS was established during the period of the six-month transition of the CPA.¹⁴⁴ Initially established as the Southern Sudan Police Service (SSPS) and later the SSNPS, the Police Service in South Sudan could be traced back to the period following the signing of the 1972 Addis Ababa Agreement when a police force was established for law enforcement in the south by the government in Khartoum. At the referendum for independence, the size of the police was estimated between 6,000 – 12,000 which though highly disputed, represented a modest figure in comparison to the numbers we have today. By the outbreak of the civil war in 2013, evidence suggests that the payroll of the SSNPS indicated a total of 50,000 officers in active police service.¹⁴⁵ Most of the officials of the police force who were graduates from the Police Academy in Khartoum would later join the rebellion against the Sudanese authorities at the start of the second civil war.¹⁴⁶ The switch of sides by police officers in the civil war from the authorities in the north to the rebellion leaders in the south, resulted in the newly established police force becoming dysfunctional and even non-existent. This left the SPLA to assume responsibility for enforcement of the law in the south. After the CPA came into being, the SSNPS was reconstituted with commanding positions given mostly to senior SPLA figures who had either been police officers before joining the war or others with no policing experience.

A milestone in the development of the police force in South Sudan came with the passage of the Southern Sudan Police Service Act.¹⁴⁷ This ground-breaking piece of legislation has been credited as the first piece of law to have brought the semblance of

¹⁴³ Concrete examples of these human rights concerns are discussed in chapter three below.

¹⁴⁴ See s 2 of the Comprehensive Peace Agreement ‘signed between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement (SPLM)/Sudan People’s Liberation Army (SPLA) on 13th December 2004.’

¹⁴⁵ This number was later reduced to 35,000 after an outcry against the uncontrollable size of the police and the eventual identification and removal of ghost workers from the payroll.

¹⁴⁶ LeBrun, E (ed) ‘Policing in South Sudan: Transformation Challenges and Priorities’ in Human Security Baseline Assessment (HSBA) Issues Brief (2017) 4.

¹⁴⁷ 2009.

professionalism to the police service in South Sudan outlining the mandate, structure, and authority of the SSNPS. The Act identifies the President as the supreme commander of the force while giving the administrative leadership role to the Interior Ministry. The position of Inspector General is established by the Act to provide overall command of the SSNPS and to direct the professional, financial, technical and administrative functions of the Police Service. However, the line between the police and the SPLA continues to be blurred by a provision in the Act that calls for the integration of the police with the SPLA.¹⁴⁸ Another controversy in the Act is that it permits ordinary citizens to support the police in the ‘performance of their duties’.¹⁴⁹ Besides further blurring the lines between the police, SPLA and militias, this provision has contributed to violence and instability. It has been used to justify the possession and use of firearms and the creation of a private army for self and communal protection.

In line with provisions of the Code of Criminal Procedure Act,¹⁵⁰ the functions of the Police include ‘pursuing and arresting offenders and undertaking criminal investigations under the directives of a Public Prosecution Attorney.’¹⁵¹ The police are also empowered by the Act to conduct surveillance, interrogation, searches and seizures and control firearms and other hazardous materials; grant bonds and bails; issue summons; request assistance from any member of the public in preventing crime; and including any other powers entrusted to the force by any other law.

2.7.4 *The National Prison Service of South Sudan (NPSSS)*

Before independence, most of the detention centres at the state level were controlled and run by state and tribal authorities. Most prisons consisted of elementary structures with holding cells where at night prisoners were locked in and in the daytime brought out in the courtyard often chained to trees or pieces of logs.¹⁵² The NPSSS came into being by way of the Prisons Act of 1994, which was later repealed by the Prisons Act of 2003. The Act provides for a Prison Force which consists of prison officers, non-commissioned officers and guards. The

¹⁴⁸ See s 14 (1 – 3) of the Southern Sudan Police Service Act 2009 provides that the President may order the SPLA force at any time to assist the Police Service in operations deemed as necessary for internal security. Also, in the case of a threat to the peace and unity of South Sudan the President is empowered by the Act to merge the police service into the SPLA. Finally, the Act provides that in the event of a merger of forces the SPLA shall take precedent.

¹⁴⁹ See s 15 Southern Sudan Police Service Act (2009).

¹⁵⁰ 2008.

¹⁵¹ See s 27 & 28 of the Code of Criminal Procedure Act.

¹⁵² Human Rights Watch *Prison Is Not For Me – Arbitrary Detention in South Sudan* (2012) 76.

Act further provides that the critical functions of the NPSSS include ‘the execution of Judicial Decrees and orders; administration of prisons, and maintenance of security therein; preservation of the safety of prisoners, their training, and qualification; and doing any other work in accordance with the provisions of the Act.’¹⁵³ Similar to the SSPS Act, the Prisons Act permits the merger of the Prison forces with the SPLA and the SSNPS at any time.

The situation of most prisons in South Sudan today can best be described as overcrowded, unsanitary and punitive. An assessment of the prison situation indicates that all the prisons are overpopulated by 70% or more.¹⁵⁴ At the end of 2017, prisons statistics showed that there were 6,027 prisoners and detainees held in various facilities in South Sudan.¹⁵⁵ Whereas there is generally evidence of detainees being held in separate cells according to their sex, there are repeated concerns that juveniles continue to be held in cells with adult detainees and in situations where female prisoners have infant children they are often held in detention with their mothers.¹⁵⁶ The sanitary conditions in prisons are a significant cause of concern and are characterised by the stench of human excrement, limited ventilation, high and soaring temperatures, and inadequate lighting. The prison facilities are characterised by insufficient medical supplies and inadequate food for the prisoners.¹⁵⁷

2.8 CURRENT CONTEXTUAL CHALLENGES

Since attaining independence in 2011, South Sudan has continued to face substantial socio-political and economic challenges which are negatively impacting its stability, economy and development. For many South Sudanese, independence from their northern neighbour was perceived as the fulfilment of their hopes and aspirations for a homeland in which they could live in freedom and dignity. However, a few years after being recognised as a country in its own right, the euphoria of independence that many South Sudanese held quickly dissipated into an ever-expanding sea of problems and complications. Poverty remains rife and rose

¹⁵³ Section 12 (a) &(b) of the Prison Act 2003.

¹⁵⁴ See UNDP South Sudan *Rapid Prisons Assessment Report reveals dire prison conditions* (2013) 12. See also, US Department of State *2020 Country Report on Human Rights Practice in South Sudan* (2021) 5. See also World Prison Brief *South Sudan* (2019) where at the end of December 2019 the entire prison population of South Sudan was reported to be 7,000.

¹⁵⁵ US State Department ‘*Human Rights Report South Sudan*’ (2016) 5 – 7.

¹⁵⁶ Ibid at 6.

¹⁵⁷ See South Sudan: Juba prison revolt underscores deep problems in justice system (2018) available at <https://www.amnesty.org/en/latest/news/2018/10/south-sudan-juba-prison-revolt-underscores-deep-problems-in-justice-system/> and accessed on 9 September 2019.

from 51% in 2009 to an astounding 66% in 2015.¹⁵⁸ The violence and conflict continue to have a destabilising effect on the country and its vulnerable population. Also, the growing economic hardship sparked by the rapid collapse of the South Sudanese Pound (SSP) continues to be a critical economic factor that has impeded the South Sudanese from enjoying a full measure of their human rights and the full benefit of nationhood.¹⁵⁹

The current efforts towards peace is indeed a welcome and critical step towards putting South Sudan back on its feet. However, the humanitarian, economic, and development impact of the civil war on the beleaguered nation is extensive and far-reaching. As of October 2019, the European Union reported that a total of 7 million South Sudanese are relying on some form of humanitarian support, of which 4.4 million have been reached with the help and support they require.¹⁶⁰

Notwithstanding the challenges associated with the accuracy of data on the death toll from the South Sudan civil war, casualty numbers have been projected in the hundreds of thousands since December 2013.¹⁶¹ This high mortality rate is not solely attributed to the fighting but also to other factors including acute malnutrition and disease with humanitarian and medical actors reporting that famine and malnutrition reached historic levels in South Sudan in 2019.¹⁶² Parties in the conflict have also been accused of sexual violence which has included the molestation and rape of women and young girls.¹⁶³ Sadly, experts continue to project that the numbers and type of human rights violations are going to increase further unless a peaceful resolution to the conflict is attained.

The political turbulence of the civil war affected every facet of life in South Sudan. While the civil war is not the sole reason for the worsening socio-economic and political situation of South Sudan, it is accurate to say that the war dramatically aggravated the

¹⁵⁸ The World Bank report in 2020 that ‘about 82% of the population in South Sudan is poor according to the most recent estimates, based on the \$1.90 2011 purchasing power parity poverty line.’ See World Bank in ‘South Sudan Poverty Profile’ available at <https://www.worldbank.org/en/country/southsudan/overview> accessed on 19 April 2019.

¹⁵⁹ See World Bank *Taming the Tides of High Inflation in South Sudan* (2017) available at <https://blogs.worldbank.org/africacan/taming-the-tides-of-high-inflation-in-south-sudan> and accessed on 18th October 2017.

¹⁶⁰ European Civil Protection and Humanitarian Aid Operations *Factsheet on South Sudan* (2019) 2.

¹⁶¹ The Global Conflict Tracker estimates that at least 50,000 people have been killed since December 15, 2013. See Council on Foreign Relation *Global Conflict Tracker* 21 May 2021 available at <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan> accessed on 29 May 2021.

¹⁶² UN News *South Sudanese facing famine in all but name, warns UN food agency* (2019) available at <https://news.un.org/en/story/2019/06/1040491> and accessed on 11 November 2017.

¹⁶³ Legal Action Worldwide (LAW), South Sudan Law Society (SSLS) and The Nuhanovic Foundation (NF) ‘Accountability for Sexual Violence Committed by Armed Men in South Sudan’ (2016) 8 – 11.

situation. The development and governance situation of the country was dire at the time of independence with global recognition of the enormity of the task of nation-building and addressing the developmental needs of the people of South Sudan.¹⁶⁴ Unfortunately, there is still a risk that fighting may resume and result in greater depth of vulnerability, poverty and political exclusion of sections of the population.

Apart from the civil war, other factors which are directly linked to the unfortunate governance situation in South Sudan are limited human resources and technical capacity; limited policy implementation; numerous dysfunctional state institutions and endemic and systematic corruption. Most government institutions have in the face of limited capacity and constrained resources been unable to deliver the types and quality of services required by the people of South Sudan.¹⁶⁵ This is particularly true in rural communities where very little has changed since independence. This deficiency is manifest in all sectors and government institutions, ranging from health and education to security and justice.¹⁶⁶

The dismal rating of South Sudan on the Country Policy and Institutional Assessment (CPIA) managed by the World Bank offers a clearer understanding of the underperformance of key institutions in the country.¹⁶⁷ This regression in performance is not solely symptomatic of under-performing institutions, but also of how the Government of South Sudan are implementing policies and programmes. In reporting on the limited performance in policy design and implementation, the Sudan Tribune notes that:

‘Most of the policies adopted by the Government of South Sudan are policies formulated by individuals in various ministries without any political guidance and direction. Even the current constitution of the country was not internalised within the structures of the SPLM before it was passed by the parliament. The SPLM as a ruling party seems to be focusing more on leadership than providing direction and right policies for the government to meet the

¹⁶⁴ Ibid at 26.

¹⁶⁵ African Development Bank Group *The Political Economy of South Sudan* (2108) 8 – 21.

¹⁶⁶ Ibid at 21.

¹⁶⁷ See 2018 CPIA Score: 1.5 2018; Change from Previous Year: No Change; SSA IDA Average: 3.1 2018; Highest Performing Cluster (Structural Policies): 2.0 2018, and Lowest Performing Cluster (Economic Management): 1.0 2018.

aspirations of the people of the South.’¹⁶⁸

South Sudan is ranked 175 out of 176 countries with a dismal score of 11 over 100 in 2016¹⁶⁹ and 179 of 180 countries and 12 over 100 on the Corruption Perception Index for 2020.¹⁷⁰ There is hardly any increase in the scores since 2016. According to the Business Anti-Corruption Portal, bribery and corruption are widespread and have infiltrated and undermined all facets of life in South Sudan.¹⁷¹

South Sudan has in place an Anti-Corruption Commission and anti-corruption legislation¹⁷² which is supplemented by the South Sudan Penal Code Act.¹⁷³ Despite the legislation making provisions against a wide range of corrupt practices, corruption remains rife with minimal effort on the part of government been directed towards the enforcement of law and curbing entrenched corrupt practices in South Sudan. The laws go as far as prohibiting gifts to officials, but challenges with enforcement in combination with other contextual limitations have rendered anti-corruption efforts futile. The incapacity to enforce anti-corruption regimes in South Sudan has unleashed and entrenched a culture that is now seemingly untameable. The extortion of money from motorists by the police, the evidence of political interests in private businesses, procurement of special favours in police stations and courts are all commonplace in South Sudan.¹⁷⁴

Economically, much has also changed since the euphoria of independence when the South Sudanese Pound (SSP) was introduced and was pegged to the US Dollar.¹⁷⁵ Over the last few years, the economic fortunes of South Sudan have witnessed a downward spiral which has resulted in a steep economic decline. Life in the oil-rich country has become very difficult with the price of goods and services multiplying way beyond the means of ordinary

¹⁶⁸ L B Deng ‘The quality of institutions and policies in South Sudan’ in *The Sudan Tribune* 5 December 2013 access at <http://www.sudantribune.com/spip.php?article49065> on 9 August 2017.

¹⁶⁹ Created in 1995, the Corruption Perception Index is a Transparency International ranking of countries based on how the corruption is perceived to exist in a given country. The ranking targets almost 200 countries on a scale of zero to 10.

¹⁷⁰ The World Bank ‘*South Sudan Economic Update: Taming the Tide of High of Inflation*’ (2017) 3.

¹⁷¹ Transparency International ‘Overview of Corruption and Anti-Corruption in South Sudan’ in *U4 Expert Answer* (2013) 4.

¹⁷² Southern Sudan Anti-Corruption Commission Act 2009.

¹⁷³ 2008.

¹⁷⁴ In discussing the levels of corruption in South Sudan, Magali Mores note that ‘... where legal instruments exist, lack of capacity, resources and political will often hamper effective implementation. M Mores ‘South Sudan’s anti-corruption framework is still in its infancy’ (2013) *U4 Anti-Corruption Resource Centre and Transparency International* 1.

¹⁷⁵ The South Sudanese Pounds began circulation on 18th July 2011.

South Sudanese. In 2014, the economic decline in the country had forced the government into the devaluation of the SSP, and by 2016 inflation was up by 379.85% – an increase regarded as among the highest in the world. The SSP depreciated precipitously from SSP 18.5 per dollar in August 2016 to SSP 172 a dollar by August 2017. The exchange rate of the SSP to the USD in May 2021 is set at SSP 130.26 to a dollar.¹⁷⁶

Despite the massive challenges facing the country at independence, South Sudan has a relatively small population. It is also blessed with an enormous reserve of crude oil that yielded considerable financial resources. This was the source of hope among international observers that with the right reform and management system, South Sudan would be able to pull through and become an economic success. To start with, South Sudan was free of all financial encumbrances and liabilities at independence which was critical to the development and rollout of a reform process aimed at accelerating economic growth. In the first few years before independence, the relative stability enabled the country to institute some economic reforms which had some promise.¹⁷⁷ Most of the country was accessible by road and air, which was critical to the movement of goods and services from one part of the country to another. Also, trade and commerce flourished with its neighbours as highly prized goods including foodstuffs, garments, spare parts and medicine flowed in from countries like Uganda, Kenya and Ethiopia. A sign of a thriving economy was also evident in the influx of migrant workers, mostly from neighbouring countries where jobs were scarce.

The economic woes of South Sudan have been primarily linked to its heavy dependence on its oil revenues and the ongoing conflict. The income from the sale of crude oil is the source of almost all South Sudan's exports, sixty per cent of gross domestic product (GDP) and 98 per cent of government revenue.¹⁷⁸ The conflict has also impacted the production of oil with yields plummeting from 300,000 to 165,000 barrels a day. This drastic reduction in the production of oil mainly comes about as a result of the concentration of the fighting in and around the oil-producing regions of Unity and Upper Nile. The industry has also been rocked by a dip in the oil price, which was at one point as low as \$30 per barrel

¹⁷⁶ See Currency Rate (undated) available at <https://usd.currencyrate.today/ssp> accessed on 25 July 2020.

¹⁷⁷ IOM South Sudan Crisis Response Plan 2020 – 2021 (2021) 6 – 9.

¹⁷⁸ The World Bank reports that the 'oil sector has continued to be the primary driver of growth, with estimated oil production of 62.1 million barrels in FY2019/20, representing a 26.5% increase on the 49.1 million barrels realized in FY2018/19. In the agricultural sector, cultivated area increased by 6% in 2020 compared to the previous year, but it is still far from reaching the pre-conflict levels.' World Bank *South Sudan Economic Update, December 2020: Socioeconomic Impact of COVID-19* (2020) available at <https://openknowledge.worldbank.org/handle/10986/35217> accessed on 6 March 2021.

from a high of \$100. Even though the price of oil has recovered in recent times to a respectable \$74.56 a barrel,¹⁷⁹ corruption, mismanagement of funds and the repayment of mounting debts to Sudan all continue to strangle the efforts by the Government in improving the economic situation of the country.¹⁸⁰

The sharp decline of the economy of South Sudan after 2013, has in the estimation of experts, put South Sudan on the brink of financial collapse.¹⁸¹ This has weakened the capacity of the government to adequately respond to the pressing needs and requirements of the South Sudanese population. It has also translated into a heavy dependence on international aid and humanitarian support for a substantial proportion of the people.¹⁸² As more and more South Sudanese continue to struggle with life either because of the war or the deepening economic hardship, confidence of the citizens and the international community is steadily dwindling in the ability of the country to recover from its political and economic decline. There is now more than ever an urgent need for political and economic reforms as well as fiscal discipline to gradually steer the country back to the path of recovery and development.

2.9 CONCLUSION

This chapter discussed the journey of South Sudan from the periods predating colonisation to its current independence as a nation-state. In doing so, the chapter highlighted a significant number of contextual challenges and limitations impacting the effective functioning and service delivery capacity of the government in the justice and law enforcement sector. The chapter identified the challenges as including the ongoing conflict, safety and security risks, the dysfunctional and ineffective justice and law enforcement institutions. These challenges limit the human rights and access to justice situation of the conflict-affected population and create the perfect conditions for PAD to flourish.

The chapter identifies the civil war as a principal deterrent to development and demonstrates the disastrous impact it is having on the vulnerable population and the effective functioning of the justice and law enforcement sector in South Sudan. Therefore, the most

¹⁷⁹ Figure as June 2021 courtesy of Oil Prize (undated) available www.oilprize.com. accessed on 6 March 2021.

¹⁸⁰ The African Development Bank *'The Political Economy of South Sudan'* (2018) 10 – 18.

¹⁸¹ Oxfam 'The Cost of Living and the Price of Peace: Economic Crisis and Reform in South Sudan' in *Oxfam Media Briefing* (2016) 3 – 4.

¹⁸² A Kaler & J R Parkins 'Food, Donors, and Dependency Syndrome in South Sudan' (2015) 1.3 *Sociology of Development* (2015) 416.

pressing issue at present for South Sudan is bringing an end to the civil war and ushering in stability and peace. Until peace is achieved in South Sudan, the country will continue to be held back and deterred from pursuing its governance and development agenda.

The ensuing chapter will consider PAD within this vulnerable, shifting and challenging context of conflict, and dysfunctional institutions in enabling an understanding of its definition and what it constitutes.

CHAPTER THREE

PROLONGED AND ARBITRARY ARREST AND DETENTION (PAD): THE HISTORICAL, CONCEPTUAL AND CONTEXTUAL ANALYSIS

3.1 INTRODUCTION

Chapter three of the thesis defines and examines PAD through a human rights framework in relation to the principles and standards of national, regional and international human rights laws. The chapter examines how PAD abrogates specific human rights including the rights to liberty and security of person and analyses the nature of PAD and its impact both globally and in the context of South Sudan. The chapter is divided into four main sections. The section that follows the introduction provides a detailed analysis of the definition and the concepts which constitute PAD. The third section examines various contestations of human rights as a universal standard and justifies why human rights are still relevant and applicable to the African context. Section four examines the factors which give rise to PAD in South Sudan with a focus on the three cardinal factors in relation to other contributory issues. The final section of the chapter examines the prevalence of PAD in South Sudan. This research utilises a rights-based approach in identifying and defining PAD and in determining the laws, policies and standards which are breached, the rights that are abrogated and the impact of this all on the dignity of the individual, the family and the nation at large.

3.2 DEFINITION AND ANALYSIS OF KEY CONCEPTS OF PAD

This section highlights and discusses the key concepts of PAD within the context of South Sudan.

3.2.1 The right to liberty and security of persons

The rights of an individual to be protected from the deprivation of liberty and the curtailment of their freedom constitutes a fundamental human right for all people irrespective of origin, race, sex and creed. This right is broadly encapsulated in the right to liberty and security of person which is guaranteed in international and regional human rights and legal frameworks

of many countries around the world, including South Sudan.¹ At the international level, the UDHR prohibits that any human being should be subject to any form of PAD.² In art 9, the UDHR utilises a prohibitive approach in terms of which the provision is constructed around the act which it negates and prevents rather than reinforcing the rights it promotes and protects. The ICCPR is more comprehensive in the provision it makes for the protection of the liberty and security of person. In utilising a rights framework, art 9 of the ICCPR commences with the establishment of the right to liberty and security of person and then moves on to highlight the prohibition of ‘arbitrary arrest or detention’.³ The provision is then aligned with the UDHR and concludes with the basis on which the right to liberty and security of person is curtailed. These two international instruments provide the critical parameter within which this core human right exists.

In consonance with the two core international instruments, principle 2 of the Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,⁴ provides that all forms of arrest and detention have to be effected in compliance with established law and by competent officials.⁵ The inclusion of a requirement of ‘competent officials’ in this provision introduces a high standard of accountability in situations where the right to the liberty and security of persons is curtailed. Article 6 of the African Charter on Human and Peoples’ Rights (ACHPR),⁶ as well as art 6 of the Charter of the Fundamental Rights of the European Union (CFREU)⁷ both makes similar provisions in reinforcing the right to liberty and security of person. Finally, reference is made to other regional human rights instruments that recognise and guarantee the right to the liberty and the security of person. This includes the American Declaration of the Rights and Duties of Man (ADRDM)⁸

¹ See Part II s 12 of the Transitional Constitutions of South Sudan 2011.

² See art 9 of the UDHR.

³ See art 9 of the ICCPR.

⁴ Adopted by General Assembly resolution 43/173 of 9 December 1988.

⁵ See United Nations The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Resolution 43/173 of 9 December 1988.

⁶ The African Charter on Human and Peoples Rights adopted by the Organization of African Unity (OAU) in Nairobi 27 June 1981 and entered into Force October 21, 1986. Article 6 of the Charter provides ‘Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.’

⁷ ‘The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties.’ See European Commission ‘Charter of Fundamental Rights of the European Union’ in *The Official Journal of the European Communities* 2000/C 364/01 (2000).

⁸ The ADRDM was the first international human rights instrument of the modern era, adopted before the UDHR in 1948 and laid the foundation for the subsequent human rights instruments to follow.

which takes a step further in providing for remedies in situations where a breach of this right occurs. Section XXV of the ADRDM provides:

‘No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for non-fulfilment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.’⁹

The right to a legal remedy enables victims and survivors of a breach of the right to liberty and security of person to approach a court of law in search of relief. These remedies can be used in enforcing a right as provided for by applicable laws and in preventing or bringing about relief for a breach.

At the national level, the Transitional Constitution of South Sudan conforms with international and regional human rights instruments in recognising and protecting the rights to liberty and security of person.¹⁰ Section 12 of the constitution expressly prohibits PAD and guarantees the rights to liberty and security of person except where provided for and justified by law. The constitutional provision does not only establishes the right but also highlights the prohibition and provides the means by which the right could be curtailed. However, the South Sudan constitutional provision stops short in making provision for remedies in the event of the curtailment or deprivation of the liberty and security of its citizens by way of PAD.

The above analysis highlights four essential elements of the rights to liberty and security of person. First, a right is established which is prescribed as accruing to all people as a fundamental human right on an unequivocal basis. Second, in reinforcing the rights which are established under the instruments, the prohibited action is identified as including arbitrary arrest and detention. Third, the instruments establish the precondition by which the rights to liberty and security of persons could be curtailed which requires that all breaches must be in

⁹ Section XXV of the ADRDM

¹⁰ See s 12 of the Transitional Constitution of South Sudan.

accordance with relevant procedures and the law.¹¹ The final essential element which arises from the above analysis is the availability of remedies in the event of a breach. The country would benefit from ensuring that these four elements of the rights to liberty and security are adequately captured and reflected in its law.

From the above analysis, no clear legal basis is provided for the joinder of the two rights, i.e. the rights to liberty and the right to security of person, other than their close association.¹² ‘Liberty’ and ‘security’ within the human rights framework has been defined in many legal writings and numerous cases. These shall now be considered as two different but closely related concepts.

The definition of liberty provided in the United States case of *Meyer v Nebraska*¹³ argues that liberty transcends freedom from restraint. The ruling provides that:

‘[Liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free men.’¹⁴

The definition in *Meyer v Nebraska* provides a very broad perspective of what liberty entails. However, in the context of South Sudan where financial and technical resources are limited, a wide definition of liberty which brings in additional requirements makes enforcement even more difficult. Within this context, the lack of enforcement will inevitably undermine the normative value of the right. However, where the resources are available and adequate, adapting this broad perspective and definition of liberty is critical to afford additional

¹¹ M Macovei ‘The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights’ (2002) *Human Rights Handbook* No. 5. The European Commission insists that the limitations on the right to liberty should be regarded as the exception to the rule; and should only be permissible in situations or circumstances where a legal justification exist.

¹² T Mana and H Haumaru ‘Life, Liberty and Security of Person in Human Rights in New Zealand’ (2010) 108.

¹³ 262 US 390 (1923).

¹⁴ Ibid at para 339.

protection to the people of South Sudan and will enable a reduction of incidence of PAD in furtherance of s 12 of the Transitional Constitution.

This ruling in this case is consistent with the views of Bentham and other like-minded thinkers who suggest that the principal challenge and limitation to the social freedom of an individual occurs where there is an external interference which intentionally or otherwise places a burden or barrier to the enjoyment of liberty.¹⁵ While accepting that liberty amounts to freedom from physical restraint, the European Guide on Article 5 of the Charter of Fundamental Rights of the European Union proffers that the right to liberty contemplates ‘the physical liberty of the person’¹⁶ which should not be merely limited to physical restrictions.’ This expanded interpretation may be applied in situations where although an individual is not physically restrained, psychological pressure is exerted, which prevents the making of personal choices related to life and wellbeing.

Further elucidation on the subject is provided in the European Union case of *Khlaifia and Others v Italy Application*¹⁷ a case related to two Tunisia nationals who crossed the Mediterranean on a make-shift boat and were arrested and detained in what amounted to unacceptable and inhumane conditions. The court ruled in favour of the complainants and found that the liberty of people could be curtailed in several forms which is ever expanding as laws, standards and procedures continue to be developed. The court admonished that the Convention should be understood and construed in light of the current and prevailing interpretation.¹⁸ This court ruling opens the door to the possibility of widening the scope of the concept of liberty.

In defining the right to security of persons, jurists have taken both traditional and non-traditional views of what the right encompasses. A more traditional and somewhat restrictive approach is that the right to security of persons should be interpreted within the context of physical liberty that is, the prevention of physical constraint which restricts

¹⁵ P Pettit ‘Liberty and Law’ in S Besson and J Luis Marti (eds) *Law and Republicanism* (2008) 41.

¹⁶ European Court of Human Rights ‘*Guide on Article 5 of the European Convention on Human Rights - Right to liberty and security*’ (2020) 8.

¹⁷ Application no. 16483/12.

¹⁸ Ibid. The Judge ruled that the ‘[d]eprivation of liberty may, however, take numerous other forms. Their variety is being increased by developments in legal standards and attitudes, and the Convention is to be interpreted in the light of the notions currently prevailing in democratic states.’ See also *Guzzardi v Italy* (1980) 3 EHRR 333 where the Court held that a specific contextual assessment can inform whether there is a deprivation of liberty and whilst individual factors taken in and of themselves may not constitute detention, the converse may be found when conditions are assessed cumulatively.

liberty.¹⁹ A more liberal approach to defining the right to security transcends protection of the physical integrity of the individual to include the necessities and prerequisite of life, including sustenance or healthcare, social security, and employment.²⁰

This broad definition is preferred in the Canadian case of *R v Morgentaler*²¹ which provides an expansive and liberal interpretation of the right to liberty and security of the person. Wilson J and Lamer J ruled that s 215 of the Criminal Code of Canada²² which restricted access by pregnant women to abortion is unconstitutional and a violation of s 7 of the Women's Charter²³ and the right to security of person. Both Judges concurred that in the context of the criminal law and jurisdiction it is a breach for the state to interfere with the bodily integrity of an accused person.²⁴ The Constitution of South Africa also adopts this broad definition of freedom and security of persons to include deciding one's reproduction.²⁵

An expansive view of what the right to security of persons constitutes aligns with the view of the United Nations Commission on Human Security (UNCHS) which draws a link between human rights and human security. In discussing this view, Bertrand Ramcharan²⁶ explains that all international and regional human rights instruments are intended to make people 'secure in freedom, in dignity, with equality, through the protection of their basic human rights'. He posits that security is 'a condition or feeling of safety, of being protected' and that 'security means protecting fundamental freedoms – freedoms that are the essence of life'.²⁷ While there have been efforts at distinguishing human security from human rights by proponents who argue that human security places 'an overwhelming emphasis in identifying and addressing widespread and cross-cutting challenges to the survival, livelihood and dignity of their people',²⁸ a useful link could nevertheless be explored between the two

¹⁹ Macovei op cit note 11 at 52.

²⁰ New Zealand Human Rights Commission *Life, Liberty and Security of Person* (2010).

²¹ 1 SCR 30, 63 OR (2d) 281, 37 CCC.

²² Criminal Code (Canada) RSC 1985, c C-46.

²³ See s 28 of the Canadian Charter of Rights and Freedoms which is a part of the Constitution of Canada.

²⁴ Ibid at 21 where the Judges noted that 'state interference with bodily integrity ... at least in the criminal law context, constitutes a breach of security of the person.'

²⁵ Section 12(2) of the Constitution of the Republic of South Africa states that '[e]veryone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.'

²⁶ Former Secretary General of the United National High Commission for Human Rights.

²⁷ B Ramcharan *Human Rights and Human Security in Strengthening Disarmament And Security* (2004) 40. Also see Commission on Human Report Security Human Security Now (2003) 5.

²⁸ United Nations Trust Fund on Human Security 'An integrated approach for the realization of the Sustainable Development Goals and the priority areas of the international community and the United Nations system' in *Human Security Handbook* (2016) 5 – 6.

concepts.²⁹

3.2.2 *Definition and characteristics of PAD*

Different approaches have been taken in ascertaining when an act or omission constitutes a restriction on the liberty and security of the individual. In some instances, the focus is placed on the arbitrariness and unlawfulness of arrest while others have emphasised the length of detention. However, the singular goal of the two approaches is to provide the legal basis for the right to liberty and security of person. For purposes of this thesis, the two approaches will be combined to emphasise their often-interconnected nature in dealing with their impact on access to justice and human rights in South Sudan.

In his book, *A Handbook of International Human Rights Terminology*, Condă defined arbitrariness of arrest as a situation ‘...when a person is taken into custody by the government authorities [...] without a proper, well-founded or lawful basis for doing so.’³⁰ The critical elements of this definition are the following. First, the definition commences with the individual being ‘taken into custody which signifies the deprivation of liberty (the prohibition). Second, the deprivation is deemed arbitrary because it occurs ‘without a proper, well-founded or lawful basis’. In a similar vein, arbitrary detention focuses on the deprivation of liberty in a manner that is inconsistent with the law and such that is deemed to be unfair and unjust.³¹ The Working Group on Arbitrary Detention in explaining when detention become arbitrary posits that a person is said to be arbitrarily detained if he or she is held in a way that is inconsistent with the international legal obligation of a given country.³²

In this thesis, PAD is defined as a situation wherein an arrest is carried out contrary to law and acceptable standards and procedure resulting in the loss of liberty and security of the person through the physical confinement or detention for an unlawful and prolonged period. This definition is divided into two segments: – the arrest and the detention. In respect of arrest, for PAD to occur, the ‘arrest’ should be carried out in a manner that is contrary to applicable law and acceptable procedures. Even where the detention may have resulted from

²⁹ See S A Dersso *Promotion of Human Security in Africa: The Role of African Human Rights Institutions* (2008) 5 where the Commission on Human Security demonstrates this link between human rights and human security.

³⁰ V Condă *A Handbook of International Human Rights Terminology* (2004) 17.

³¹ J Genser *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (2020) 4.

³² United Nations *Opinions Adopted by the Working Group on Arbitrary Detention* (2007) 26.

a lawful arrest, the protracted and unreasonable deprivation of liberty breaches the principles and standards of human rights. Therefore, the lawfulness of the arrest and the illegal prolongation of detention are the critical determinants of PAD.

This definition places human rights and in particular the infringement of the right to liberty and the security of persons at the centre of the concept of PAD. It supports the view that where this human right is to be limited and abrogated, it has to be in accordance with the law and with due consideration to the circumstances and human rights of the individual(s) concerned. An example of PAD is the South African case of *Mofokeng and Another v Minister of Police*³³ where the appellants brought an action against the respondent for unlawful arrest and detention for a forty-eight-hour period until their release by order of a Magistrate. The arrest was carried out without a warrant and took place at the workplace of the appellants. In the appeal which was against the quantum of damages offered by the Magistrates' Court, Spilg J³⁴ noted that:

‘... the right invaded by unlawful arrest and detention comprises “the invasion of a broad category of rights which may be distilled to include, the right to personal liberty, the right not to be arbitrarily arrested without lawful cause, the right to dignity and the right to one’s reputation which includes the right not to be defamed.”³⁵

This extract from Spilg J’s judgement builds on the foregone analysis and aligns with s 12 of the Transitional Constitution of South Sudan which provides that ‘[e]very person has the right to liberty and security of person; no person shall be subjected to arrest, detention, deprivation or restriction of his or her liberty except for specified reasons and in accordance with procedures prescribed by law.’³⁶ The judgement, however, provides a novel and

³³ (29678/2014) [2019] ZAGPPHC 566.

³⁴ At the time of Judgement, Judge Spilg was a Judge of the High Court of South Africa. Gauteng Local Division, Johannesburg South Africa.

³⁵ Ibid para 7.

³⁶ While several cases in the South African jurisdiction demonstrate a fairly liberal approach to interpreting the law, others such as the *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC) underscore the need for continued efforts towards improving the quality of justice and the realisation of the rights to liberty and security of persons at all levels.

expansive view of the rights to liberty and security of person and identifies new dimensions of human rights that are violated by PAD including ‘the right to one’s reputation which includes the right not to be defamed.’³⁷

This expansive definition of the rights to liberty and security of person which emerge from Spilg J’s judgment reflects the liberal and progressive nature of the South African legal system and as also the case in Canada and the EU.³⁸ The liberal and progressive or expansive approach espouses the principles of egalitarianism, the recognition and respect for human rights and justice and liberal democracy which are all fundamentals for an effective functioning justice system.³⁹ The legal system of South Sudan and the approach of the courts in interpreting the law, on the other hand, is conservative and inclined towards upholding customs and tradition which are conformist in approach.⁴⁰ South Sudan will do well to adopt a more liberal and progressive approach to the interpretation of the law⁴¹ including as related to the right to liberty and security of person in affording greater dignity and protection to its population. However, for such an approach to gain legitimacy and acceptance among the South Sudanese population, it has to be within the scope of the law and implemented through the appropriate systems and channels which will guarantee compliance of the South Sudanese public.

³⁷ Spilg J’s judgement is with specific reference to the South African Constitution and raises the issue of how to deal with comparative law. The rights infringed by PAD will differ from one context to the next depending on national law and the applicability of international instruments. It is important to note that Spilg J’s judgment might not be directly applicable to another jurisdiction. A critical consideration in the application of this judgement is whether the national legislation contains a limitations clause (e.g. Canada & South Africa), or whether national legislation specifies a remedy for breach.

³⁸ A straightforward and acceptable definition of what liberalism means, or what the liberal and progressive approach constitutes have been difficult to come by and is a subject of wide and ongoing discourse. See J Waldron *Theoretical Foundations of Liberalism* (1987) 127 – 131. Judith Shklar on the other hand, defines liberalism as ‘a political doctrine with only one overriding aim: to secure the political conditions that are necessary for the exercise of personal freedom.’ See J Shklar *The Liberalism of Fear* (1989) 21 – 37.

³⁹ D Bell ‘What is Liberalism?’ (2014) *Political Theory* Vol. 42:6 at 682.

⁴⁰ I am categorising and describing the South Sudan legal system as conservative because of the strong influence of the customs and tradition of particular tribes and the continued inclination of the Judiciary to rule on cases. *Akok Deng Abiem* supra note 17 at 6.

⁴¹ In the case of the liberal interpretation, the construction of the statute is done in such a way that it enlarges the meaning of the legislation to bring within its ambit situations or cases which are within the spirit of the statute, within the mischief the statute was meant to remedy. See B Sreya *Literal Interpretation versus Liberal Interpretation* (2013) 3.

3.2.3 The components of PAD

The three components of PAD require further scrutiny and will be considered in the following order: (i) arbitrariness; (ii) unlawful arrest, and; (iii) unlawful and prolonged detention.

3.2.3.1 Arbitrariness⁴²

The term arbitrary comes from the Latin word *arbitrarius* which implies dependence on the arbitrator's authority or will.⁴³ However, in the International Court of Justice (ICJ) case of *Ahmadou Sadio Diallo* (Republic of Guinea v. the Democratic Republic of the Congo),⁴⁴ Judge Trindade explains that with the progress of time the word took on a different meaning connoting an unrestrained exercise of will and control. He adds that arbitrariness is 'that which appears uncontrolled (arbitrary) in the exercise of will, amounting to capriciousness and despotism.'⁴⁵ The ruling in the UN Human Rights Committee case of *Mukong vs Cameroon*⁴⁶ goes a step further in providing a much broader definition of arbitrary as encompassing inappropriateness, injustice, unpredictability, and inconsistency with the law.

A definition of arbitrariness can be found in the widely referenced United States case of *Elettronica Sicala S.P.A. (ELSI)* (*United States of America V Republic of Italy*) also known as *ELSI's case*.⁴⁷ The International Court of Justice provided what has become a well-cited definition of the term "arbitrary". The Court noted that 'arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.'⁴⁸ This definition of arbitrariness has been selected because of its alignment with prior discussions in this thesis which highlight compliance with the law as a critical precondition for the curtailment of the right to liberty and security of person. By connoting that arbitrariness constitutes 'an act which shocks or at least surprises, a sense of judicial propriety,'⁴⁹ the definition further facilitates an understanding of the effect that non-

⁴² In this thesis, the term 'arbitrary' and 'arbitrariness' shall be used inter-changeably.

⁴³ Ibid at 27.

⁴⁴ ICJ GL No 103, [2012] ICJ Rep 324, ICGJ 435 (ICJ 2012), 19 June 2012.

⁴⁵ Ibid.

⁴⁶ *Womah Mukong v Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

⁴⁷ Judgment of 20 July 1989 in ICJ Reports (1989):15.

⁴⁸ Ibid.

⁴⁹ Asylum Judgement, ICJ Reports 1950 at 284.

compliance with the law has on the concept of the rule or the supremacy of law and the general sense of justice.

The second definition of arbitrariness to be considered in this thesis is found in the Italian case of *Azurix Corp. v. The Argentine Republic*⁵⁰ where the court notes that “‘arbitrary’ means ‘derived from mere opinion’, ‘capricious’, ‘unrestrained’, ‘despotic.’”⁵¹ Therefore ‘where arbitrary force prevails, the law is predictably absent.’⁵² In analysing the above definitions of arbitrariness, three critical signposts emerge from which there has to be ‘an action or a decision’ which has to be informed by or evaluated as emerging from a ‘personal will or discretion’ and which is taken in disregard of ‘rules and standards’. While further underscoring the issue of non-compliance with the law highlighted in the *ELSI’s case*, this definition deepens the understanding of the defining features of arbitrariness as including capricious, unrestrained and despotic. For this thesis, arbitrary action or arbitrariness connotes an action that is carried out unlawfully and outside the ambit of the law.

Examining or analysing arbitrariness in connection with the rule of law, opens another dimension to its impact on the rule of law, legal proceedings and due process. In simple terms, the definition of the rule of law emphasises the supremacy of the law requiring all man and institutions to be subject to the existing law.⁵³ Ban Ki-Moon, the formal Secretary-General of the United Nations provides a detailed insight into what the rule of law entails. He defined the rule of law as:

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

⁵⁰ *Azurix Corp. v The Argentine Republic* ICSID Case No. ARB/01/12.

⁵¹ Ibid 392. A quotation from the Oxford English Dictionary.

⁵² T I Cook ‘Law, Arbitrariness and Ethics’ (1941) *California Law Review* 30 at 151.

⁵³ A Valcke *The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)* (1 March 2012), available at <http://ssrn.com/abstract=2042336> accessed on 24 May 2019.

transparency.’⁵⁴

The Secretary-General highlights the ‘avoidance of arbitrariness’ as a core requirement for the practical application of the rule of law. Reference is also made to the impartial enforcement and applicability of the law as well as its adjudication within a framework which is immune to external influence. Finally, a call is made, for the rule of law to comply with human rights norms and standards which recognises the critical role of the law in facilitating the protection and realisation of human rights.

Emerging from the extract are two fundamental questions that need to be answered in deciphering how arbitrariness operates vis-à-vis the rule of law. The first question is, does arbitrariness negate the rule of law, and second, can arbitrariness be equated to unlawfulness or does it invoke a higher standard with which domestic law must comply to gain validity? It has been argued that arbitrariness negates the rule of law.⁵⁵ Ravi Kant explains that while the rule of law is built around upholding the law and establishing its uncontested supremacy, arbitrariness has been determined to work in complete disregard of the law and its principles and standards. For Kant, the law cannot exist in synch with arbitrariness as they both nullify the other. The definition of arbitrariness in *ELSI’s case* is also relevant as it considered arbitrariness to be ‘opposed to the rule of law.’⁵⁶ These two assertions by Kant and the International Court of Justice explicitly demonstrate how arbitrariness negates the rule of law and sets the two concepts as entirely different and opposing forces.

On the second question of whether within the framework of human rights and international law, arbitrariness can, in simple terms, be equated to unlawfulness, a dissenting view has been posited. Loranger Marcoux argues that if arbitrariness is equal to unlawfulness, then prohibitions such as those under art 9 of the ICCPR would not apply to actions by governments that are deemed to be lawful under their domestic legal framework.⁵⁷ He goes on to argue that:

⁵⁴ UN Security Council *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General* S/2004/616 (2004) para 7.

⁵⁵ R Kant ‘Arbitrary Actions of the State are in Conflict with article 14 (Right to Equality) of the Constitution of India’ available at <https://lawreports.wordpress.com/2009/06/12/arbitrary-actions-of-the-state-are-in-conflict-with-article-14-right-to-equality-of-the-constitution-of-india/> accessed on 16 January 2018.

⁵⁶ Supra note 46 at 58.

⁵⁷ L Marcoux ‘Protection from Arbitrary Arrest and Detention Under International Law’ (1982) *Boston College International & Comparative Law Review* Vol. 5.2 at 349.

‘If the word "arbitrary" simply means "unlawful," then the prohibition in Articles 9 and 9(1) would not apply to any lawful governmental action, regardless of how oppressive the action, if it conformed with domestic law. Such an approach would essentially allow each state, through its own domestic law, to determine the scope of an individual's right to freedom from arrest or detention.’⁵⁸

A state cannot be deemed to be acting unlawfully or illegitimately while acting in compliance and within the framework of domestic legislation or policy. This notwithstanding, actions of the state could be regarded as arbitrary when they contravene the obligations of that state under international law.⁵⁹

The South Sudan context, with all its challenges and limitations, presents an ideal environment for arbitrariness. In the first place, the rule of law can only be upheld in scenarios where the necessary apparatus of governance is in place and functional. Sadly, this is not the case in South Sudan, where the government continues to struggle with geographic coverage and control over its vast territories. With justice and security institutions sparsely located throughout South Sudan, services are limited and mostly inaccessible, which, in several instances,⁶⁰ facilitates the abuse of rights and arbitrariness in the delivery of justice and security services to the vulnerable population. Also, arbitrariness feeds on the destabilising consequences of the ongoing civil war, which has disrupted governance and service delivery in a significant section of the country. With millions of South Sudanese internally and externally displaced by the fighting and with the limitations on the part of the government to both accessing and asserting control over massive swathes of territory, law

⁵⁸ Ibid.

⁵⁹ The United Nations provides that ‘[b]y becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights.’ See United Nations *The Foundation of International Human Rights Law* (undated). Available at <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> accessed on 23 July 2017.

⁶⁰ See Amnesty International op cit note 113 at 80 where Amnesty International exposed the practice of arbitrary detention in the headquarters of the National Security Service in the Jebel neighbourhood of Juba, the capital of South Sudan. Also, Human Rights Watch provides harrowing accounts of violations and abuses committed by forces aligned with government. See Human Rights Watch *About Us* available at <https://www.hrw.org/about> accessed on 25th February 2018.

and order and access to justice are considerably challenged.⁶¹

Finally, the limited capacity at both the institutional and human resource levels in South Sudan has increased the likelihood of arbitrariness in the actions of the government actors. The challenge is not only with the capacity of the institutions regarding the available resources for active operations but also concerning their willingness, knowledge and application of human rights values and standards in the services they provide. An African Union case in point is *Zimbabwe Human Rights NGO Forum v Zimbabwe Decision*⁶², Communication 74/92 in which the African Commission held that governments have a duty to protect their citizens not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts ...⁶³

3.3 NATURE AND TYPES OF ARREST AND DETENTION IN SOUTH SUDAN

This section examines the types of arrest and conditions in which detention could be deemed as lawful and considers where the line may be drawn between a process of arrest and detention that is legal and that which is deemed to lead to PAD.

3.3.1 Arrest by warrant

An arrest by warrant occurs in a situation where an order permitting arrest emanates from a person authorised by law to make such an order, for example, a judge or magistrate. The order will empower a law enforcement officer to arrest and take into custody, a person alleged or suspected to have committed a crime. In South Sudan for an arrest to be deemed

⁶¹ One of the main impacts of the civil war in South Sudan is the division of the country into government and non-government-controlled areas. The non-government-controlled areas consist of areas that are loyal to or that have been captured in fighting by break-away factions of the Sudan People's Liberation Army in Opposition - SPLM (IO). Security and justice services in this locality are characterised by a concoction of traditional and militaristic systems which have been regarded by experts as harsh and unpredictable. See *Nyadera* op cit note 3 para 7.

⁶² (245/2002) (ACmHPR, May 15 2006)

⁶³ See also *Sudan Human Rights Organisation v. Sudan, Decision, Comm. 279/03; 296/05* (ACmHPR, May. 27, 2009) 'The Commission believes that the right to liberty complements the right to freedom of movement under Article 12. If [people] are not able to move freely to their homes, because of insecurity, or because their homes have been destroyed, then their liberty and freedom is proscribed.' For additional reference see *FLAG v. DRC, Decision, Comm. 25/89, 47/90, 56/91, 100/93* (ACmHPR, Oct. 11, 1995); *Mebara v. Cameroon, Decision, Comm. 416/12* (ACmHPR, Aug. 07, 2015); *Article 19 v. Eritrea, Decision, Comm. 275/2003* (ACmHPR, May. 30, 2007). From these cases, it is evident that the African Commission has adopted a progressive approach to the interpretation of art 6 of the ACHPR which has held governments accountable for the abrogation of the rights to liberty and security of persons.

lawful, a warrant of arrest needs to be issued by a Public Prosecution Attorney, Magistrate or Court. Section 73 (1) of the Code of Criminal Procedure Act provides the condition by which a warrant of arrest is issued.⁶⁴ Arrest by warrant is a procedure that is common and widely practised in both common law, and civil jurisdictions, and (where the prescribed law and standards are appropriately followed) provides a less complicated and humane means of carrying out an arrest. These provisions of the Code of Criminal Procedure Act of South Sudan⁶⁵ provide valuable instructions on how arrests should be executed with and through warrants.⁶⁶

3.3.2 *Arrest without warrant*

An arrest without a warrant is the more contentious of the two categories of arrests. It constitutes the procedure by which an arrest is carried out in the event of an offence in the presence of law enforcement officers, or where there is a reasonable belief that an offence has or is about to be committed. An extended list of scenarios for the use of arrest without warrant is provided in the South Sudan Code of Criminal Procedure Act.⁶⁷

Three provisions in relation to arrest without a warrant are included under s 76 (b) where the law empowers the police to carry out an arrest of a person who has been involved in an offence without a warrant. Section 91(1) provides the procedure by which persons other than those authorised by law can carry out an arrest without a warrant.’ The Act requires that ‘without unnecessary delay’ the arrested individual must be taken to the nearest police station or handed over to a policeman or policewoman. Section 96(1) provides the conditions to be met when arrests are made without a warrant. The section requires that the officer-in-charge

⁶⁴ See s 73 (1) of the Code of Criminal Procedure Act 2008 of South Sudan which provides that ‘[a] Public Prosecution Attorney, Magistrate or Court empowered by this Act to issue a summons for the appearance of any person may, after recording its, his or her reasons in writing, issue a warrant for arrest [...]’. The South African legal system also provides for arrest by warrant pursuant to s 39 (1) of the Criminal Procedure Act 51 of 1977.

⁶⁵ 2008.

⁶⁶ The Code of Criminal Procedure 2008 of South Sudan provides extensive information on the powers that emanate from a warrant of arrest as well as the nature and procedure of its execution. Sub-sections 73(1) & (2) provide details on situations in which a warrant can and should be issued including in addition or in place of a summons where there is evidence of abscondment and non-appearance. Sub-sections 78(1) & (2) provide for the form of a warrant which should ‘be in writing, signed or sealed by the Public Prosecution Attorney, Magistrate or Court’ and should remain in force until cancelled by the issuing official. Sub-sections 80(1)&(2) provide procedures by which the immediate execution of the warrant of arrest where necessary can be redirected to any individual in the instance where a police officer is not available and the Act provides for the redirection to more than one person.

⁶⁷ 2008.

of a police station to as soon as possible inform the prosecution and court of all the arrests that were made without warrant within the locations covered by the station.⁶⁸

Other legislation such as s 51 of the National Security Services Act⁶⁹ confers the power of arrest without a warrant. Serious concerns have been expressed about s 51's susceptibility to abuse. This apprehension is evidenced in the following extracts from an article published online before the passage of the National Security Services Bill into law:

‘The proposed law, an almost exact replica of Sudan’s security laws, would grant the already dreaded agency [National State Security] entirely unfettered power to spy on private communications, to search and seize property without a warrant, to arrest and detain innocent people without explanation, and to use physical force – in other words, torture.’⁷⁰

In a number of jurisdictions⁷¹, attention has been given to examine how the power of arrest has been used by law enforcement officers and how it curtails and infringes on the right to liberty and security of individuals. Several incidences and cases have demonstrated that where the execution of the power of arrest is not limited or subject to checks, it can be the source of egregious human rights abuse. The difference in approach between jurisdictions is rooted in whether a specific context has embraced and integrated the principles and standards of human rights in the criminal justice system and whether there are systems in place ensuring that institutions that are empowered by the law are held accountable for their actions in violating rights. The mainstreaming of human rights in the justice and law enforcement system is critical to determining whether an arrest is likely to be carried out with due consideration to the rights and dignity of the individuals concerned. Courts from different

⁶⁸ Code of Criminal Procedure Act of South Sudan 2008 s 77 (a – d). See also s 40(1) &(2) of the Criminal Procedure Act 51 of 1977 of South Africa.

⁶⁹ 2014.

⁷⁰ F McCrone *South Sudan’s National Security Service Under the Spotlight* available at <https://www.pambazuka.org/governance/south-sudan%E2%80%99s-national-security-service-under-spotlight> accessed on 9 February 2018.

⁷¹ See for instance New Zealand Police *Commission of Inquiry into Police Conduct* (2014 – 2017). Available at <https://www.police.govt.nz/about-us/investigations-and-reviews/commissions-inquiry/royal-commission-inquiry-historical-abuse> accessed on 18 April 2022. See also United States Department of Justice Civil Rights Division *Investigation of the Ferguson Police Department* (2015) available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf accessed on 18 April 2022.

jurisdictions have ruled that all forms of arrests and detentions must be in accordance with core principles and standards. A case in point is *Anaclet Paulo v United Republic of Tanzania*⁷² where the court also ruled that ‘any restriction of an individual’s liberty [...] must have a legitimate aim and must also serve a public or general interest.’

The key emerging principle in the ruling is that all exercise of public power (in this case as pertinent to the execution of an arrest) must conform with the core standards and principles enshrined in the Constitution. A similar principle is applicable in the legal system of South Sudan, where the exercise of all public power is derived from and should be in compliance with the Transitional Constitution.⁷³

One such principle is the recognition of the accused person as a bearer of rights and as such deserving of treatment which preserves these rights which accrue to him or her and which befit his or her humanity. Similarly, in the Namibian case of *Lena Sydney v Minister of Safety and Security*,⁷⁴ the appellant sued for damages for unlawful arrest and detention on charge of housebreaking with intent to steal and theft. The Magistrate identified no breach and therefore declared the arrest and detention lawfully resulting in his dismissal of the plaintiff’s claim with costs.

On appeal, Somyalo JP ruled that the Magistrate had failed to take cognizance of the fact that while the police are responsible for fighting crime, the law requires that this duty should be discharged within the limits of the law. The court confirmed that an arresting officer could ‘form a reasonable suspicion based on information at his or her disposal before she or he arrests a suspect with or without a warrant.’⁷⁵ The court held that a police ‘officer must exercise his or her discretion, and not act on the whim or instruction of another’. This ruling set a standard and the level of accountability on arresting officers which should be equally applicable in South Sudan. This would assist the criminal justice system of South Sudan in ensuring that all forms of arrests with or without a warrant are carried out within the confines of the law and in furtherance of justice and not as a tool to subjugate and oppress the public.

⁷² 2018 2 AfCLR 446 § 66

⁷³ See Part One s2 of the Transitional Constitution of South Sudan.

⁷⁴ (CA115/2009) [2010] ZAECGHC 14.

⁷⁵ Ibid.

3.3.3 *Arbitrary detention*

Detention is defined as ‘the deprivation of the liberty of a person charged with or convicted of a ... crime.’⁷⁶ In the Canadian case of *R v Therens*,⁷⁷ Dickson CJ noted that ‘[t]he word "detention" ... is directed to a restraint of liberty of varying duration’ and may involve ‘a case of deprivation of liberty by physical constraint.’ We can see from the above that the term detention is consistently used in association with actual physical restraint and involves ‘some form of coercion or compulsion by the state, which results in a deprivation of liberty.’⁷⁸

Other words that have been substituted for detention include custody, imprisonment, confinement, incarceration and internment. In also proffering a definition, the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Detention notes that ‘detention refers to the deprivation of liberty or confinement in a closed place which an [accused person] is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.’⁷⁹ A further definition of detention as provided by the UNODC is ‘the condition of being a detained person under investigation for having committed a criminal offence, or during the trial; under administrative detention; or for any other reason’.⁸⁰

For an act to be deemed as amounting to arbitrary detention, it has to be an abrogation of the applicable law or standards and principles which have been set to regulate detention and the curtailment of the right to liberty. These laws, standards and principles are encapsulated in the international human rights framework and national legislation, policies and guidelines. This means that as in other areas of law and governance, different jurisdictions have their legal systems and policy frameworks prescribing and regulating detention. It is this recognition of contextual differences in laws and systems relevant to detention that the UN has developed and disseminated guidelines, principles and standards in ensuring that countries operate within an acceptable framework. According to the UN, this is done with an intention to providing ‘flexible guidance for reform that accounts for the differences in legal traditions, systems and structures while providing a collective vision of

⁷⁶ Commission on Human Rights resolution 1997/50 para 15.

⁷⁷ 1985 1 S.C.R. 613.

⁷⁸ See *R v Prosper* [1994] 3 S.C.R. 236.

⁷⁹ UNHCR *Guidelines on Detention* (2012) para 5.

⁸⁰ UNODC *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (2016) 12.

how criminal justice systems should be structured.’⁸¹

The criteria set by the UN Working Group on Arbitrary Detention in determining whether detention is arbitrary include:

- ‘a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty;
- b) The deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the UDHR;
- c) The total or partial non-observance of the international norms relating to the right to a fair trial established in the UDHR and in the relevant international instruments is of such gravity as to give the deprivation of liberty an arbitrary character;
- d) Asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review of the remedy;
- e) The deprivation of liberty constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights.’⁸²

⁸¹ Ibid at 13.

⁸² Working Group on Arbitrary Arrest and Detention *Compilation of Deliberations* A/HRC/22/44 (2012) IV B.

Article 6 of the African Charter on Human and Peoples' Rights, provides permissible circumstances in which states parties may curtail the liberty of people. However, art 6 also provides that '[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.' The Charter provides that the prologation of detention should be informed by and compliant with existing law. Compliance with the law references adherence with standards, procedures and timeframe prescribed by the law.⁸³ In the African Union case of *Mebara v Cameroon Communications*⁸⁴ the Commission rule that the detention of the Complianant for an extended period of seven and a half years contrary to prescribed law while the prosecution investigated the case against him amounted to the prolongation of detention. See also the African Union case of *Kennedy Owino Onyachi v United Republic of Tanzania*⁸⁵ where the court ruled that 'any arrest and detention is arbitrary if it has no legal basis and has not been carried out in accordance with the law.'⁸⁶

As have been discussed, the lawful arrest will not always ensure lawful detention as the grounds justifying arrest and detention may be different. Also, while detention may be lawful from the onset, it is important to note that during detention, other factors including the conditions and length of detention can render detention arbitrary. Consequently, the full application of the law and compliance with the principles and standards of detention needs to be observed at all times in avoiding arbitrariness.

3.3.4 *The legal basis for detention in South Sudan*

In determining the legal basis for detention in South Sudan, reference will be made to s 12 of the Transitional Constitution of South Sudan which provides for the rights to liberty and security of persons and the legal basis by which this right can be curtailed.⁸⁷ This constitutional provision serves as the guiding principle and the legal basis for human rights

⁸³ R Gittleman 'The African Charter on African and Peoples Rights: A Legal Analysis' in *Verginia Journal of International Law* (1982) 692 – 695.

⁸⁴ *Mebara* supra note 63 at 63.

⁸⁵ 2017 2 AfCLR 65 § 132.

⁸⁶ See also South African case of *Minister of Justice and Constitutional Development and Another v Zealand* where the court held that 'The right to freedom is entrenched in the Constitution of the Republic of South Africa, 1996. When a person is arrested, and detained public power is being exercised by the executive administration of the State which may not exercise any power or perform any function beyond what is conferred by law. This is in accordance with the doctrine of constitutional legality, an incidence of the rule of law, which is a foundational value of the Constitution.'

⁸⁷ Section 12 Transitional Constitution of South Sudan 2011.

which come into play when people are faced with detention in South Sudan. Within the spirit of this constitutional provision, the Code of Criminal Procedure makes provision for detention during the pretrial, trial and post-trial stages of criminal proceedings.⁸⁸ These provisions shall now be examined:

- Pre-trial detention: Provision is made for a person having been arrested by the police in the course of an investigation to be detained ‘for a period up to but not exceeding 24 hours to facilitate investigations.’⁸⁹ The Act also provides that in situations where the investigation would not be completed in the space of 24 hours, a Public Prosecution Attorney, or a Magistrate could, in the interest of furthering the investigation, ‘renew the detention of the arrested person, for a period not exceeding one week.’⁹⁰ Provision is further made in s 64(3) for a Magistrate acting on the recommendation of a Public Prosecution Attorney to further extend the detention for a week with a requirement that the extension is recorded in the case diary. Finally, where the arrested suspect or accused individual is charged, s 64(4) gives the Magistrate the power to renew the detention continuously but not for a period exceeding three months from the start of the detention, except with the approval of the President of the Court of Appeal. While accepting that the limited capacity of the justice sector may warrant these continued extensions in facilitating investigations, these provisions leave considerable room for abuse. They could be viewed as encouraging unnecessary delays which is usually at the expense of the detainee. In the African Union case of *ACHPR v Libya*⁹¹ the court ruled that ‘every deprivation of liberty must meet a number of minimum guarantees commonly enshrined in international human rights instruments.’ In the same case the court further notes that ‘prolonged ... detention ... can lead to other violations such as torture, ill-treatment or interrogation without adequate protective measure.’
- Detention during trial: For detention during trial, the Act empowers a Magistrate or the Court to order the detention of an accused person and may renew and extend the detention on a weekly basis but not beyond a period of one month. The Act goes on to

⁸⁸ See also the Judicial Circular No 2/2011.

⁸⁹ Section 64 (1) of the Code of Criminal Procedure Act 2008.

⁹⁰ Section 64(2) Code of Criminal Procedure Act.

⁹¹ Application 002/2013 para 82.

make provision for the further extension of detention beyond the initial month of the detention up to but not beyond six months. All extensions of detentions beyond the allowable six months must be approved by the President of the Court of Appeal.⁹² Here again, the permissibility of extensions of detention potentially violates the right to liberty and security of persons as provided for by the Constitution in alignment with international human rights law. The courts have taken a firm stand on attempt to repeatedly extend detention for the purpose of investigation. For instance the African Union case of *Mebara v Cameroon Communications*⁹³ the court ruled that ‘the several separation and committal orders contributed to circumventing the requirement to observe the statutory maximum detention period of 18 months failing which the Complainant should be released unless there are other charges against him’ constituted a violation of art 6 of the ACHPR.

The provisions discussed above are meant to ensure that detention is legal and results solely from criminal proceedings. Compliance with the provisions of national laws and policies and conformity to the principles and standards of regional and international human rights provides the necessary safeguards and guarantees that detention is not carried out arbitrarily and that the liberty and security of people in contact with the law are protected and preserved.

A rather exciting provision in the Code of Criminal Procedure Act 2008 of South Sudan is s 102 which provides for the search of a person wrongfully detained. The Act provides that in an instance where a person is wrongfully detained or abducted and it has been determined that the confinement is an offence, the Public Prosecution Attorney, Magistrate or the Court may issue a search warrant authorising the person to be brought before the court for the determination of the matter.⁹⁴ This power is principally discretionary and not obligatory as the Public Prosecution Attorney, Magistrate or the Court are left to decide on the legality of the detention based on the merits of the case.

These provisions of the Code of Criminal Procedure Act⁹⁵ raise an interesting question on the issues of practicality in the face of other laws which grant far-reaching and

⁹² Section 100 Code of Criminal Procedure Act 2008.

⁹³ *Mebara* supra note 63 at 63.

⁹⁴ Section 102 Code of Criminal Procedure 2008.

⁹⁵ 2008.

blanket powers to the National Security Service and the Military Intelligence Directorate also to conduct arrest and detention. In the face of the considerable powers and influence which the National Security Service and the Military Intelligence Directorate exercise, there is a likelihood that the Public Prosecution Attorney, Magistrate or judge are unable to exercise the powers provided for in s 102 of the Code of Criminal Procedure Act or where efforts are made in this regard; they are simply met with non-compliance by the two institutions. As shall be demonstrated at later stages of this chapter, this disharmony between the provisions and non-conformity with laws are having a telling effect on the rights and dignity of the people of South Sudan.

3.4 CONTESTATIONS OF HUMAN RIGHTS AS UNIVERSAL STANDARDS

As is evident by now, the thesis emphasises the principles and standards of human rights as a yardstick in examining what PAD is and constitutes. The thesis proposes that actions and omissions amounting to PAD are to be reviewed and analysed through a human rights framework with specific reference to the provisions of national and international human rights law. However, it is essential to note that the universality and effectiveness of human rights as known today, especially given its western historic roots and perspectives have been called into question by some philosophers and thinkers as not only being foreign to Africa but also generally ineffective in meeting its objectives of protecting and preserving human rights and dignity. Bearing in mind that human rights are at the core of this thesis, three of such contrary views and contestations are examined in determining how the central reasoning of this thesis holds against these arguments and how human rights continue to be relevant in Africa and the South Sudan context.

A central part of the argument against human rights in the African context is that it is a western concept that was imposed by imperialists in their quest for territorial expansion and control. Proponents of this argument imply that human rights were imposed in disregard of the cultural identities and peculiarities of the African people and go on to highlight the incapacity of the current approach in achieving any meaningful impact. In discussing the impracticality of human rights in Africa, Mutua argues that western ideals of human rights cannot adequately cater to the contextual reality and needs of present post-colonial Africa.⁹⁶

⁹⁶ M Mutua *Human Rights: A Political and Cultural Critique* (2002) 71.

The core argument of this contestation is that for human rights to be effective and appropriate in a given context, it has to emerge from and be aligned to local norms, customs and belief systems and that the western philosophy of human rights fails in this regard.

Another contestation of human rights is in relation to human rights and cultural relativism. This perspective of human rights feeds off the work of prominent African philosophers such as Odera Oruka⁹⁷ and Pauline Hountondji⁹⁸ who propose a distinct African interpretation, approach and identity to religion, language and human rights. Proponents of this viewpoint including Oyowe argue that the conceptions of human nature through African philosophy provides an adequate departure point for understanding human rights in Africa. Oyowe undertakes an interesting debate on the relativity and universality of human rights in relation to the nature of humans and the impact and relevance of culture, especially in the African context. He concludes that the conception of human rights as being universal and inuring to the human being simply by virtue of her being human strips the human individual of the particularities of culture and only to be identified by the 'core peculiarities' that all human beings share.⁹⁹

Eric Posner's arguments transcend the historical and philosophical debate to positing a gloomy evaluation of the performance of the human rights regime against its central objective of preventing abuses and violations. In pushing for a transformation that is much more bottom-top than the opposite, Posner highlights the over-ambition, lack of dynamism and indeed the arrogance with which human rights and international human rights law has been propagated and implemented and how it has failed to learn from the lessons of international development. He aligns his argument with the positions of Mutua and others, in questioning the universality of human rights and refers to the belief that they could be forced on different context as in the case of international law as a misguided assumption from the onset.¹⁰⁰ Referencing current day instances where human rights have failed to yield the desired impact, Posner concludes that 'human rights law has failed to accomplish its objectives.'¹⁰¹

All these contestations and critiques of human rights make valid points in highlighting

⁹⁷ O Oruka 'Mythologies as African Philosophy' (1972) *East African Journal* 9 at 5.

⁹⁸ P Hountondji *African Philosophy: Myth and Reality* (1983).

⁹⁹ O A Oyowe *An African Conception of Human Rights? Comments on the Challenges of Relativism* (2014) 4.

¹⁰⁰ E Posner 'The Case Against Human Rights' *The Guardian* 4 December 2014 available at <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> accessed on 15 May 2020.

¹⁰¹ Ibid.

the weaknesses and limitations of human rights and the challenges to enforcement and compliance the world over. Recent world events including, for instance, the current global Black Lives Matter movement on racism and police brutality which was invigorated by the murder of George Floyd on 25th May 2020 in Minneapolis USA, raises a host of questions on the genuineness and authenticity of the western conception of human rights and the need to ensure that they are entitlements for all.¹⁰² The West, which was hitherto regarded as the bastion of human rights, can no longer claim the moral high ground in the global human rights discourse.

However, the thesis subscribes to the argument that the perception of human rights as a western concept was mainly relevant during colonial times when the socio-political customisation of African communities was being carried out by colonialists in complete disregard of existing cultural practices and belief systems.¹⁰³ During the colonial period, it was politically justified and indeed strategically right to shift the focus from the individual to the collective in reinforcing the call and campaign for independence. For to have done otherwise at that time and to have laid emphasis on individual human rights would have defeated the all-important goal of breaking the shackles of the imperialists and further weakening the drive towards independence.¹⁰⁴ It is, therefore, correct to say that in colonial Africa, the collective objective of self-rule in trouncing imperialism overshadowed the merits of embracing human rights.

Nonetheless, it is important to acknowledge the continued validity of the arguments that western concepts of human rights were imposed on Africa. Historical evidence informs that Africa was neither a part of the conceptualisation nor the final design of the UDHR, which was based mostly on a westernised conception of human rights.¹⁰⁵ However, this very valid argument is today overshadowed by the shifting priorities in Africa which in most cases have seen a downturn in the fortune of African states after independence.¹⁰⁶ All the countries in Africa are today independent and are now governed by local bureaucracies who hold the fate of their people in their hands. Unfortunately, many African governments today mirror

¹⁰² New York Times *Race and America* 25 May 2020 available at <https://www.nytimes.com/news-event/george-floyd-protests-minneapolis-new-york-los-angeles> accessed on 29 June 2020.

¹⁰³ M Hussein 'Human rights, a universal aspiration' (2019) *The UNESCO Courier* at 2.

¹⁰⁴ Ibid.

¹⁰⁵ Global Citizen's Commission *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (2016) 29.

¹⁰⁶ G Austin 'African Economic Development and Colonial Legacies' (2010) *Open Edition Journals* 1 at 11.

and, in some cases, surpass the repressive tactics of the colonialists and instead of focusing on policies and practices which contribute to development and economic prosperity, the emphasis has been on self-preservation and enrichment at the expense of all else.¹⁰⁷ In the face of heightened poverty and political suppression, brutal conflicts and civil wars, state-sponsored violations of human rights, mounting corruption and wastage of resources,¹⁰⁸ African states can no longer dwell on historic wrongs or play the blame game while neglecting its values and obligations to the welfare of their people.¹⁰⁹ The thesis posits that the focus of today's Africa and indeed South Sudan should be firmly directed at addressing the current challenges and limitations and in achieving regional and global aspirations including the African Union Agenda 2063¹¹⁰ and the Sustainable Development Goal (SDG).¹¹¹

Also worthy of note are the efforts which have been made towards the contextualisation of human rights in Africa. First, the coming into force of the ACHPR in 1979 was a positive step in ensuring that African values were not only reflected but embraced in the conceptualisation of human rights in Africa.¹¹² However, the African Charter, while widely proclaimed as a progressive development in the continued evolution of human rights on the continent, has faced several criticisms mainly because of its overemphasis on economic, social and cultural rights at the expense of civil and political rights.¹¹³ The Cairo

¹⁰⁷ See M Mbeki *Perpetuating Poverty in Sub-Saharan Africa: How African Political Elites Undermine Entrepreneurship and Economic Development* (2005) 3.

¹⁰⁸ E O John 'Colonialism in Africa and Matters Arising - Modern Interpretations, Implications and the Challenge for Socio-Political and Economic Development in Africa' (2014) *Research in Humanities and Social Science* 4. John argues that African states cannot continue to blame their current woes on the ills of colonialism as countries in Asia and elsewhere have been able to recover and thrive in spite of their historic past.

¹⁰⁹ The thesis acknowledges the adaptation of human rights principles and standards by most Africa countries. However, the thesis questions the sincerity of these developments and argues that the numerous cases in which human rights principles and standards have been compromised and disregarded for political gains are evidence of insincerity.

¹¹⁰ 'Agenda 2063 of the African Union, adopted in 2013, envisions an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena.' Agenda 2063: African Union *The Africa We Want* (undated) Available at <https://au.int/en/agenda2063/overview> accessed on 29 June 2019.

¹¹¹ See UN Transforming the World: The 2030 Agenda for Sustainable Development A/RES/70/1.

¹¹² Y Aiyedun *Fair Trial and Access to Justice In South Africa: How Traditional Tribunals Cater To The Needs Of Rural Female Litigants* (unpublish Doctoral thesis, University of Cape Town, 2013) 33. See also R T Nhlapo 'International Protection of Human Rights and the Family: African Variations on a Common Theme' (1989) *International Journal of Law, Policy and Family* 3.

¹¹³ C Annon 'The African Charter on Human and Peoples' Rights: How Effective is this Legal Instrument in Shaping a Continental Human Rights Culture in Africa?' in Le Petit Justice (2014). Available at <https://www.lepetitjuriste.fr/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/> accessed on 30 June 2020. Despite ongoing challenges and limitations associated with the ACHPR, the court has provided some excellent judgements in progressive and ground-breaking decisions and remedies in promoting the realisation of human rights. A typical

Declaration of Human Rights in Islam is another example of how human rights adaptation has been carried out in embracing values that are not western.¹¹⁴ Beyond the regional effort, individual nations also have had the opportunity to address the concerns over increased western influence on human rights by including provisions that are cognisance of African culture and values.¹¹⁵ What this demonstrates is that human rights need not be abandoned because of limitations and weaknesses. Rather, human rights should be flexible enough to be adapted to related contexts and embracing perspectives and values which are otherwise foreign and therefore absent from the current human rights framework.

In addition to the western versus African values component of the human rights debate, the contrast between developed and developing countries particularly in relation to the availability of services and funds is significant.¹¹⁶ With their economic prowess, developed countries (mostly located in the west) can take an expansive approach to both defining rights and ensuring that the relevant structures are in place and adequately functional in protecting the rights and dignity of their population. In contrast, most developing countries (a category within which most African countries fall) remain largely unable to address this vital need because of the unavailability and inadequacy of resources. Ironically, historical records indicate that the prosperous nations of the West acquired their wealth and resources from colonialism.¹¹⁷

The question, therefore, is not whether human rights are necessary and desirable in the African context, because we have sufficiently discussed evidence that countries on the continent have embraced the concepts. The real issue of concern is that developing countries like South Sudan and many other countries in Africa do not have the financial wherewithal to ensure that the realisation and protection of human rights are fully advanced. To achieve this, adequate logistical and financial resources are required by governance institutions including

example is the case brought by the Pan African Lawyers Union challenging the compatibility of vagrancy laws which many African Union countries retain on their laws. They argued that because the laws ‘criminalise poverty, homelessness or unemployment’ the vagrancy law were incompatible with African human rights standards. The court has called on states to review and amend or repeal such laws. See *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples’ Rights and other Human Rights Instruments Applicable in Africa* No. 001/2018 Advisory Opinion (2020).

¹¹⁴ Cairo Declaration on Human Rights in Islam as adopted at the Islamic Conference of Foreign Ministers in Cairo in 1990.

¹¹⁵ See the Part Two of the Transitional Constitution of South Sudan.

¹¹⁶ United Nations ‘Country Classification: Data sources, country classifications and aggregation methodology’ in *World Economic Situation and Prospects* (2014) 143 – 150.

¹¹⁷ J D Settles et al *The Impact of Colonialism on African Economic Development* (1994) 1 – 13.

those in the justice and law enforcement sector for the necessary conditions to be established and maintained at all levels.

Adequate financial and logistical support to the justice and law enforcement sector is essential, for instance, in determining and informing the approach to human rights which best suits the context, and which will also allow for innovations and progressive advancement. In contexts such as South Sudan where vulnerability to risk factors is high, the emphasis should be placed on the realisation of human rights because if the good it promises cannot be achieved and it is mere rhetoric, then human rights become a hollow vessel that does not garner support from the citizenry.

Furthermore, there is hardly any expressed assertion in any of these arguments or the historic reflection, which considers the concept of human rights as unnecessary and without merits. Nor has there been a call for non-compliance and non-adherence to human rights based on lack of complementarity. This was not the purpose of the critiques. Rather the alternative views of human rights protest the arrogance and weakness of the one-size-fits-all approach of the current and westernised approach to human rights and its implementation. Furthermore, the arguments call into question perceived assumptions and generalisations which omit to recognise and embrace individual, communal and cultural features which distinguishes one context from another. As have been stated, this approach to conceptualising and implementing human rights has not proved very successful and leaves a lot to be desired.

If on the basis of the above, human rights remain relevant as defining of and as a conduit to universal human dignity and the aspirations of happiness and peace,¹¹⁸ then the discourse here is shifted from the ‘why’ of human rights to the ‘how’ of its definition and implementation. The emerging question in this regard is, how then can human rights be interpreted and enforced in a manner that is in deference and cognisant of the peculiarities of differing contexts? And in the context of South Sudan, how do we ensure that human rights are not only relevant to the criminal justice system but also the numerous tribal customs and belief systems and can contribute to the development and peace of the nation?

As has been discussed in early chapters, South Sudan continues to grapple with considerable human rights issues, conflict and instability and governance challenges, which makes the response to these questions critical in ensuring that human rights are implemented

¹¹⁸ Hussein op cit note 92 at 72.

with due regard to the historical, tribal and the national identity of the country.

South Sudan, like most African countries, is still struggling to come to terms with and overcome its historic past and to weave together its diverse population into a nation. In this context, human rights are critical in ensuring that the development and governance system is not only effective and accountable but also inclusive and representative of the diversity of the country. The International Peace Institute notes that where accountability for human rights is not promoted and reinforced, evidence suggest that human rights violations could become a trigger and driver of conflict in destabilising countries.¹¹⁹ Embracing the positives that a human rights system has to offer is a crucial starting point in reinforcing the young nation's aspiration for development, peace and stability.

3.5 PREVALENCE OF PAD IN SOUTH SUDAN

The challenges facing the justice sector in South Sudan are extensive, and inclusive of deficiencies in infrastructure, human resources and necessary logistics. These challenges and limitations substantially constrain the delivery and quality of crucial services. In the face of these challenges and constraints in South Sudan, law enforcement, judicial and legal officials have had to make do with the limited resources and infrastructure in the delivery of justice-related services.

Within this context of limited capacity and constrained resources, the potential for the abrogation of human rights and the breach of the law cannot be overstated. Whereas the deficiencies in logistics and capacity present considerable governance challenges, the limitations in political oversight and control are leading to insufficient attention being given to breaches of human rights and the consequences of violations for the justice and law enforcement system. This has spurred on the continued use of PAD resulting in growing concerns over its nature and frequency in South Sudan.

However, in determining the prevalence of PAD in South Sudan, a critical challenge that exists is the limited access to verifiable information and data in determining prevalence. With limited access to officially certifiable data in the criminal justice sector coupled with the inclination of relevant government establishments to restrict access to various institutions, reliance must be placed on relevant research reports and data generated from a variety of

¹¹⁹ A Athie & Y Mahmoud *Human Rights and Sustaining Peace* (2017) 1.

sources.¹²⁰ Specifically, this study shall review and analyse human rights reports produced by three entities in demonstrating the prevalence of PAD in South Sudan. These shall include the following:

3.5.1 UN Mission in South Sudan (UNMISS)/Office of the High Commissioner for Human Rights (OHCHR)

Since the attainment of independence in July 2011, UNMISS in collaboration with OHCHR has played a leading role in efforts towards the protection of human rights and peacebuilding in South Sudan. The mandate of UNMISS includes the protection of civilians and the monitoring and reporting of human rights.¹²¹ Pursuant to this mandate, UNMISS/OHCHR is actively speaking out against human rights violations and abuses, and regularly calls for prompt action in addressing the weaknesses and loopholes in the systems and laws which allow for human rights violations and abuse. UNMISS/OHCHR produces various reports and advocacy initiatives and tools periodically in the form of mission updates and situational reports on events and occurrences relevant to human rights, security, justice and the rule of law.

The outbreak of fighting in December 2013 and the ensuing civil war brought about untold misery for the people of South Sudan. There were and continue to be frequent and widespread reports on the violations and abuses of human rights in contravention of the international human rights and humanitarian law commitments of South Sudan.¹²² Various

¹²⁰ See Chapter one at 2.

¹²¹ The mandate of UNMISS has evolved since 2011 when by way of resolution 1996 (2011) a mission was created for an initial period of one year to be renewed for further periods based on necessity. By way of a stakeholder's discussion on the way forward with the mission, Resolution 2304 (2016) was passed by the UN Security Council which provided UNMISS with the following mandates: '1) Protect civilians from physical violence; 2) Monitoring, investigating and report on human rights; 3) Create conducive conditions for the delivery of humanitarian assistance, 4) Support implementation of the CPA.' See United Nations *Adapting Resolution 2304 (2016) Security Council Extend Mission in South Sudan, Authorized Expanded Peacekeeping Force to Bolster Civilian Protection Efforts (12 August 2016)* Available at <https://www.un.org/press/en/2016/sc12475.doc.htm> accessed on 12 March 2021. Since then Resolutions 2392 (2017), 2406 (2018), 2459 (2019), 2514 (2020), 2567 (2021) has been passed in extending the mandate of UNMISS for a further year.

¹²² South Sudan is a State Party to the four international human rights treaty including two optional protocols in the form of the 'Convention on the Elimination of All Forms of Discrimination against Women 1981; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 2000; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987; the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2006, and; the Convention on the Rights of the Child 1990.' See OHCHR *UN Treaty Body Database (undated)* available at

reports by UNMISS provide an extensive list of alleged human rights violations which have occurred as a result of as well as external to the civil war. These alleged violations have included ‘extra-judicial killings, enforced disappearances, rape and other acts of sexual violence, arbitrary arrests and detention and violence aimed at spreading terror among the civilian population.’¹²³ The focus of this thesis are violations relating to the deprivation of liberty, which amounts to PAD.

In January 2017, UNMISS, in collaboration with OHCHR, published a joint report in furtherance of their mandate under Resolution 2304 (2016). The report titled *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan*¹²⁴ was prepared in furtherance of the mandate of UNMISS ‘to monitor, investigate, verify and report publicly and regularly on abuses and violations of human rights and violations of international humanitarian law’.¹²⁵ The report provides information on various forms of violations and abuse of human rights and breaches of international humanitarian law which occurred as a result of the clashes between the SPLA and the SPLM/A-IO in Juba from 8th – 12th July 2016.

Based on information gathered from monitoring in the aftermath of the fighting, the report notes that dozens of people were arrested and detained with a large proportion of the arrests and detention being politically motivated while others were on the grounds of ethnicity mainly directed against the Nuer tribe. For example, at least twenty-one (21) men, most of them Nuer, were arrested and detained without warrants during the said period in July 2016 in Juba alone. The arrests and detention were reportedly carried out by members of SPLA, SSNPS and NSS. The report concludes on the sad note that the whereabouts and situation of the twenty-one (21) remained unknown despite repeated inquiries into their location and the situation of their detention.¹²⁶

Another report published by UNMISS and OHCHR was on the human rights violations and abuses in Yei from July 2016 to January 2017.¹²⁷ After the July 2016 clashes

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN accessed on 28 September 2020.

¹²³ OHCHR and UNMISS *A Report on Violations and Abuses of International Human Rights Law and Violations of International Humanitarian Law in the Context of the Fighting in Juba, South Sudan* (2016) 3 – 30.

¹²⁴ Ibid.

¹²⁵ UN Resolution 2304 (2016).

¹²⁶ OHCHR and UNMISS *Human Rights Violations and Abuses in Yei July 2016 – January 2017* (2017).

¹²⁷ Ibid para 66.

in Juba, the SPLM/A-IO leader, Riek Machar, and a group of his supporters and bodyguards fled into the Democratic Republic of Congo by way of the Equatorias. As forces loyal to the government pursued Machar, the report states that there were several incidents of sporadic fighting along Machar's escape route. UNMISS and OHCHR found that these clashes ushered in a period of violence in the Equatorias as the security situation rapidly deteriorated and transformed into a localised conflict in Yei. This spate of violence slowly took an ethnic dimension, and with Yei being ethnically diverse, particular tribal groups considered to be against the current establishment experienced substantial curtailment of their rights and fundamental freedoms by the SPLA.

The Yei Report found that there were multiple incidences of civilians being regularly subjected to PAD and in several cases with some of the arrests resulting in deaths in the custody of the SPLA.¹²⁸ The report further indicates that most of the people were arrested and detained without charge and were held in inhumane conditions in military barracks. Reports also suggest that people were detained without contact and deprived them of accessing essential supports including medication, their families and legal counsel.¹²⁹ A particular worrisome element of the report points to information that 120 civilians were arrested by the SPLA and National State Security (NSS) and held without charge in Yei for extended and unspecified periods. Another instance of PAD includes the disappearance of an unnamed man who was stopped and arrested by SPLA officials in Yei River State. The report indicates that, after months of detention and despite repeated attempts by his family to locate him, the man is yet to be seen.¹³⁰

In other cases of PAD in South Sudan, UNMISS Human Rights Department (HRD) reported that two unnamed individuals were arbitrarily detained by the National Security Service in the town of Yambio because they were deemed to be connected with SPLA-IO.¹³¹ UNMISS HRD reported that despite repeated attempts by Human Rights Officers of the Mission and members of his family, they were not able to gain admittance to the detention facilities. There is still no information on the whereabouts of the two men.¹³² On 6 March 2019, UNMISS HRD made a passionate plea to the South Sudanese authority for the

¹²⁸ UNMISS/OHCHR *Human Rights Violations And Abuses In Yei* July 2016 –January 2017 (2017) para 45.

¹²⁹ Ibid at para 46.

¹³⁰ Ibid at para 47.

¹³¹ UNMIS and OHCHR *Violations and Abuses Against Civilians in Gbudue and Tambura States (Western Equatoria)* April-August 2018 (2018) para 57.

¹³² Ibid para 65.

immediate release of Peter Biar Ajak – a human rights defender who was arrested on 28 July 2018. Mr. Ajak was reportedly under investigation on allegations of treason and other national security-based offences. Since then, there have been no proceedings to determine his guilt or to enforce his rights to liberty and security. The UN condemned the prolonged and arbitrary detention of Mr. Ajak and called for his immediate release.¹³³ They noted with concern that the South Sudan authorities regularly use various counter-terrorism laws to infringe on and curtail the human rights and fundamental freedoms of people within their borders.¹³⁴

A more recent occurrence of PAD is the case of a civil society representative (unnamed) from Juba who wrote an article critical of an elected official and circulated it on social media in May 2020. He was summoned to the NSS Central Intelligence Division in Juba where he was accused and threatened by NSS Officers of attempting to mobilise young adults against the government. After been released with a warning, he was rearrested on the streets of Juba on 29 May 2020 by NSS personnel who assaulted and beat him with their pistols and he was once again detained.¹³⁵ The civil society representative described how he and other detainees suffered cruel, inhuman, and degrading treatment and forced to sleep on the floor in overcrowded cells with up to thirty inmates. The Commission reports that the inmates were not allowed to go outside, depriving them of recreation and fresh air and access by relatives and legal counsel. After being arbitrarily detained for nearly four months, he was forced to sign an undertaking not to campaign against the government and then released.¹³⁶

A final case of PAD reported by UNMISS/OHCHR in South Sudan occurred on 3 April 2020, when twenty-three (23) children were reportedly arrested and detained by police officers in Torit the capital of Eastern Equatoria State. Details of the arrest indicated that the children were said to have violated government orders prohibiting large gatherings of people as part of the COVID-19 social distancing measures. UNMISS/OHCHR was able to verify

¹³³ See OHCHR *South Sudan: UN experts strongly urge immediate release of human rights defender Peter Biar Ajak* (undated) available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24268&LangID=E> accessed on 23 May 2019.

¹³⁴ OHCHR *South Sudan: UN experts strongly urge immediate release of human rights defender Peter Biar Ajak* (2019) Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24268&LangID=E> accessed on 23 August 2020.

¹³⁵ Human Rights Council *Detailed findings of the Commission on Human Rights in South Sudan* in A/HRC/46/CRP.2 (2021) para 36.

¹³⁶ Ibid para 37.

that the children were harassed while in detention and that they were held for an unspecified number of days before they were released.¹³⁷

3.5.2 *Amnesty International*

Amnesty International is a globally recognised human rights protection and advocacy organisation whose activities in South Sudan predates independence when the country was part of the larger Sudan.¹³⁸ Amnesty International has played a frontline role in documenting and reporting on the human rights atrocities committed by warring parties involved in the South Sudan civil war. Through the publication of periodic reports, Amnesty International and similar organisations have brought the world's attention to and campaigned incessantly against rampant unlawful and arbitrary arrest and detention in South Sudan. The following are a sample of cases reported by Amnesty International on PAD in South Sudan.

In April 2016, the report titled 'South Sudan: Denied Protection of the Law: National Security Service Detention in Juba' was published by Amnesty International which focused on the NSS's use of PAD in suppressing perceived opposition support and opponents of government for extended periods.¹³⁹ The report finds that for the most part, the NSS uses unilateral powers in detaining people without presenting them before the courts to seek legal grounds for their continued detention. Specifically, the report notes the arrest of thirty-five men who were arbitrarily detained in the NSS headquarters in Juba. The report further states that of the thirty-five detainees, Amnesty International was only able to ascertain the specifics of their arrest and the apparent basis on which 16 of the men were detained. For the rest, the only confirmed information about their detention is their names. After a prolonged period of negotiation and pressure both internally and externally, the NSS released twenty-one detainees without charge. Evidence gathered indicates that most of the released men had been incarcerated for extended periods from between two and three years.

The report estimated that five other men remained detained on the allegation of communicating with or supporting the opposition. Among this number is James Gatdet, the former spokesperson of the SPLM/A-IO. He was charged with inciting violence, treason and

¹³⁷ Ibid para 18.

¹³⁸ Amnesty International *Who We Are* available at <https://www.amnesty.org/en/who-we-are/> accessed on 23 August 2018.

¹³⁹ Amnesty International op cit note 139 at 40.

the publication or transmission of false information prejudicial to South Sudan. A common feature of these detentions was that none of the thirty-five detainees had access to legal counsel or was charged or presented in court. Also, there is clear evidence that the NSS refused detainees contact with legal counsel and turned down requests of lawyers to meet with their clients. In demonstrating the extra-judicial nature of these detentions, the report states that in one instance, a lawyer was able to secure a court summons to have his client appear before the court. Nevertheless, the NSS simply declined to comply with the court order.

On 28 March 2017, a letter written by Salil Shetty, Secretary-General of Amnesty International to President Salva Kiir of South Sudan referenced and appreciated the commitment made by the President during the previous year's independent day celebrations to release members of the opposition as well as other political prisoners held in detention. Shetty expressed concerns over the extra-judicial activities of the NSS and the Military Intelligence Directorate in hundreds of instances of PAD as well as enforced disappearances of people alleged to be supporters of the opposition. The letter drew the President's attention to the continued detention of at least twenty-eight individuals by the NSS at its headquarters in Juba and further notes that although none have been charged with any offence, they continue to be held as political detainees, accused of communicating with or supporting the opposition. In addition to the above, Shetty presented a list of detainees who were confirmed to have died in the custody of the NSS and the Military Intelligence Directorate and concluded by urging the government to ensure the release of the detained individuals or, based on credible evidence, promptly charge and present them in court.

Evidence suggests that incidences of PAD have continued to be a challenge for South Sudan. Amnesty International's annual Human Rights in Africa Report for 2019 further chronicles several incidences of concern that amount to PAD.¹⁴⁰ The report on South Sudan states that the National Security Service and the Military Intelligence Directorate (MID) carried out the arrest and detention of people who were deemed to be opponents and critics of the government which aligns with the UNMIS/OHCHR reports. People who have suffered from this ordeal include journalists and members of civil society, businessmen and women and other ordinary people who have suffered detention for prolonged periods, in harsh and

¹⁴⁰ Amnesty International *Human Rights in Africa* (2019) 80 – 81.

inhuman conditions and without being informed of any charges against them.¹⁴¹ Amnesty International continues to lament that people who are held in detention are denied all access to legal representation and are in most cases subject to ill-treatment, including threats and torture.¹⁴² Detention facilities, including cells of police stations, are mostly overcrowded with minimal access to food medicine and water.¹⁴³

3.5.3 *Human Rights Watch*

Human Rights Watch is an international non-governmental organisation established in 1978 ‘with a mission to defend the rights of people worldwide.’¹⁴⁴ Human Rights Watch has attained global recognition for its accurate and impartial reporting and advocacy for the respect of human rights and fundamental freedoms. Human Rights Watch works with local human rights groups for effective monitoring, reporting and advocacy. During the civil war, Human Rights Watch documented and reported patterns of PAD by security forces, including the NSS in South Sudan. Several of these reports confirm the political suppression and incarceration of supposed opponents of the government, and journalists since South Sudan gained independence in 2011.¹⁴⁵

Human Rights Watch conducted research in 12 of 79 prisons in locations of high population density. As part of this research, Human Rights Watch was able to access over two hundred and fifty (250) inmates of justice and law enforcement institutions including correction, police, prosecutors, and traditional authorities. Human Rights Watch found that over 90% of the inmates were detained on a prolonged basis for offences such as rape, adultery and other sexual offences which in South Sudan are rooted in both statutory and customary law but which are contrary to human rights.¹⁴⁶ Other inmates, numbering over 200, were detained for long and extended periods because of their inability to meet the order of the customary court in relation to debts, fines, and compensation.¹⁴⁷ Human Rights Watch also found that a huge number of those held in detention were held without charge for any

¹⁴¹ Ibid at 80.

¹⁴² Ibid at 81.

¹⁴³ Ibid at 76.

¹⁴⁴ Human Rights Watch op cit note 51 at 60.

¹⁴⁵ Human Rights Watch *World Report* (2017) 549 – 553.

¹⁴⁶ African Criminal Justice Reform *Report Details Arbitrary Detention, Dire Conditions in South Sudan* (undated) Available at <https://acjr.org.za/resource-centre/report-details-arbitrary-detention-dire-conditions-in-south-sudan> accessed on 23 April 2021.

¹⁴⁷ Ibid.

offence. There is even evidence that some detainees were being held as proxies for relatives or friends who were suspected or accused of committing an offence.

About ninety (90) individuals were detained solely on the grounds of their mental disabilities.¹⁴⁸ Human Rights Watch reported that in situations where health facilities were either inadequate or unavailable, it is also commonplace for people suffering from mental illness to be detained in prison. In this regard, Human Rights Watch noted that

‘there were no special facilities for the persons with mental disabilities, and persons determined by a judge to be sufficiently dangerous ... following referral by family or the community, were incarcerated, medicated, and remained in detention until a medical evaluation determined they were no longer a threat and could be released.’¹⁴⁹

Since the start of the South Sudan’s civil war in December 2013, Human Rights Watch expressed concern over the means used by security forces to crack down on individuals perceived to be government opponents and subjecting them to PAD for as long as ten months without charges. Human Rights Watch reported having spoken to numerous detainees and their families. The cases of PAD were reported as probably representative of a minuscule proportion of the number of instances perpetuated by the NSS and the Military Intelligence Directorate. There are other reports of arrest and detention carried out by the military in the vicinity of Nimule in Eastern Equatoria involving 11 individuals. The report claims that the detainees were subjected to extended and prolonged periods of incarceration with harsh conditions of detention in the military barracks between 2014 and 2015. Although all of the 11 civilians were eventually released, none of them was ever charged for an offence.

Other incidents of PAD which are conflict-related and politically motivated include in November 2019, when the National Security Service summoned the Managing Editor of The Dawn newspaper, Emmanuel Monychol Akop, to their headquarters upon which he was arrested and detained. The arrest and detention of Akop have been alleged to be in relation to

¹⁴⁸ Ibid African Criminal Justice Reform at 83.

¹⁴⁹ US Department of State *2020 Country Reports on Human Rights Practices: South Sudan* (30 March 2021) Available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/south-sudan/> accessed on 13 April 2021.

a Facebook posting in which he is said to have made a disparaging comment about the clothing of the Foreign Affairs and International Cooperation Minister of South Sudan. Human Rights Watch monitored the arrest and detention of the Akop and noted that ‘ “Emmanuel Monychol’s detention is just the latest act of harassment by South Sudanese authorities in response to criticism or perceived dissent. Human Rights Watch called on ‘The authorities to immediately release him unless he has been charged with a recognisable offence.’¹⁵⁰

All these documented instances of PAD from UNMISS, Amnesty International and Human Rights Watch are clear demonstrations of the regular occurrence and widespread nature of PAD in South Sudan, especially since the outbreak of the civil war. These reports and statistics are reinforced and corroborated by others from multiple sources, including the Commission on Human Rights in South Sudan¹⁵¹ and the United States Department of State.¹⁵² The reports also highlight the audacious and unchecked manner by which PAD is practised and how likely it is for there to be impunity for these blatant breaches of national and international human rights law. A common feature among all the cases of PAD is the identity of the main perpetrators as being the NSS and the Military Intelligence Directorate. Another commonality in the cases is that individuals who are put through this ordeal are never charged in court despite being held for extended periods. These reports are extremely useful but do not reflect the extent of the problem as they are restricted to reported cases.

3.5.4 *Other Stats derived from the criminal justice*

Beyond the three sources discussed above, incidents of PAD obtained from the records of police stations and correctional facilities continue to demonstrate the prevalence of PAD as a criminal justice and human rights challenge in South Sudan. The records accessed for 2018 and 2019 highlights the annual statistics of arbitrary arrest and detention in Lake and Warrap States which follow the pattern and trend of the incidents of PAD discussed above.¹⁵³ In Lake State, police and prison records indicate that 181 incidents of arbitrary arrest and 15 incidents

¹⁵⁰ Human Rights Watch *South Sudan: Free Arbitrarily Detained Journalist* (2019) Available at <https://www.hrw.org/news/2019/11/28/south-sudan-free-arbitrarily-detained-journalist> accessed on 1 July 2020.

¹⁵¹ UN General Assembly *Report of the Commission on Human Rights in South Sudan A/HRC/37/71* (2019) para 44, 48 and 101.

¹⁵² US Department of State *South Sudan Human Rights Reports* (2019) 5 – 8.

¹⁵³ The records obtained from Lake and Warrap States are official records of the SSNPS and the NPSSS highlighting data of incidents of PAD on a monthly basis in 2018 and 2019.

of prolonged detention were recorded in 2018 and 194 incidents of arbitrary arrest and 74 incidents of prolonged detention were recorded in 2019. In Warrap State, 156 incidents of arbitrary arrest and 24 incidents of prolonged detention were recorded in 2018 while 172 and 22 incidents of prolonged detention were reported in 2019.¹⁵⁴

Without overemphasis, records obtained indicate that a total of 836 incidents of PAD were documented over a two-year period in the two states alone. The police and prison records from Lake and Warrap State further show that during the two years in question, cases of PAD that were resolved represent only 64% and 52% of the total cases recorded in the year for the two locations. From these figures, it could be safely concluded that over 30% of cases of arrest and detention in the two states in question are held arbitrarily and on a prolonged basis. While the above figures on the incidents of PAD are only representative of two out of the ten states and the three administrative areas, they are clearly consistent with the data presented above and reinforcing the conclusion that PAD represents a significant challenge in the criminal justice and human rights sector in South Sudan.

3.6 CONCLUSION

PAD represents a significant breach of the rights to liberty and security of person in South Sudan and directly impacts on the trust and confidence the public has in the justice system. A grounded understanding of PAD will ensure that the South Sudan population and indeed persons navigating the criminal justice system can determine when, where and how the rights to liberty and security of persons are violated and seek remedies for the violation of their rights. This knowledge is also crucial to informing advocacy for change by which the public, human rights actors and development partners can raise a voice against its continued occurrence in the criminal justice and law enforcement system and its use as a tool of political suppression and dissent in South Sudan.

In preventing PAD in South Sudan, the application of the law in the fullest measure is essential in ensuring that the rights of people are promoted and preserved. Fortunately, despite the numerous challenges and limitations identified in the South Sudan context, the relevant laws such as the constitution and the Code of Criminal Procedure are in place and make adequate provisions to prevent and respond to PAD. The main issues of concern are the

¹⁵⁴ Ibid.

implementation of the law and the quality of access to justice remedies the public enjoys. The implementation of the law and the protection and safeguards it provides will be of no essence if the population do not enjoy adequate and quality access to justice in addressing the offshoot of the criminal justice system in South Sudan. These shall be the issues that will be presented and addressed in the next chapter of the thesis.

CHAPTER FOUR

THE CONCEPT OF ACCESS TO JUSTICE

4.1 INTRODUCTION

This chapter discusses and examines access to justice in the framework of human rights and justice service delivery while drawing on pre-existing literature in determining the definition, nature and scope of the concept. The chapter is divided into five sections. Following the introduction, the meaning of access to justice is explored in section two, and section three discusses the preconditions of access to justice as including legal empowerment, the affordability of justice, physical access and the timeliness of justice. Finally, section four contextualises the discussion of access to justice in South Sudan with section five constituting a brief conclusion to the chapter.

4.2 DEFINITION OF ACCESS TO JUSTICE

To ensure a full understanding of access to justice, the concept is considered from different perspectives including through the lens of human rights, the courts, and as a responsibility of the state. A broad approach to defining access to justice enables a deeper and better understanding of the concept, demonstrates how it relates to and reinforces human rights and how it ensures that the law works for people in response to PAD.

In defining access to justice, Elvira Penido notes that for those working in the domain of justice and rule of law, access to justice represents the assertion of rights and emphasises the application and enforcement of these rights as the core objective of access to justice.¹ A similar human rights approach to defining access to justice is taken by Carboni who notes that the concept ‘refers to the right of an individual to seek (both substantially and procedurally) an unbiased remedy within the judicial system ... [and that] access to justice through courts is a much broader concept, which involves more than just access to the court.’² She argues that it relates to ‘the problem of allowing the claim-holders to be able to claim their rights in court

¹ M Pinedo ‘Access to Justice as Hope in the Dark in Search for a New Concept in European Law’ (2011) *International Journal of Humanities and Social Studies* 1.19 at 4.

² N Carboni ‘From Quality to Access to Justice: Improving the Functioning of European Judicial Systems’ (2014) *Journal of Civil Legal Sciences* 3.4 at 131.

and receive a judicial decision which is fair and of good quality, within a reasonable time and at a reasonable cost.’³ In relation to PAD, the significance of the human rights approach to defining access to justice means that the rights of people which are suffering PAD shall be at the forefront of efforts in seeking and obtaining justice remedies.

Palmer and Ellie agree with this broad viewpoint on access to justice and further reinforce the active link that the concept has with human rights. They posit that access to justice is the most basic human rights and requirement of an egalitarian society where the legal rights of all are guaranteed and protected.⁴ From the extract, we are reminded that access to justice is a precondition for any functioning society and the ascertainment of all other rights. Defining access to justice from a human rights perspective is also relevant to ensuring that PAD is viewed as a human rights and justice challenge in South Sudan.

A second perspective on access to justice to be considered is in relation to accessibility to the justice institutions. Cornford and others posit that for justice to be unencumbered, the unfettered access to the justice system is of the highest consequence and must be available to all. They translate accessibility as meaning the systems, rules and procedures which define how the legal system functions and how justice services are delivered to the indigent population.⁵ They further assert that such rules and procedures impact on how the poor and vulnerable population seek and access justice.⁶ Here the quality of ‘access’ is discussed and noted to transcend physical access to include the elimination of non-physical barriers that impede access to justice. Regarding PAD in South Sudan, this definition is critical to identifying the challenges and limitations which impede access by the conflict-affected population to justice and rule of law institutions and services.

The definition also refers to the target of access to justice as focussing on indigents as inclusive of the poor vulnerable and disadvantaged. This perspective of access to justice examined in relation to PAD, means that the quality of ‘access’ to the courts enjoyed by individuals whose liberty and security is compromised in the political and criminal justice system, is of the highest consequence in reinforcing their rights and protecting their

³ Ibid at 136.

⁴ T Cornford ‘The meaning of access to justice’ in E Palmer et al (ed) *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 8 - 12. Cornford note that ‘effective access to justice can thus be seen as the most basic requirement – the most basic "human right" of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.’

⁵ Ibid at 9.

⁶ Ibid at 9.

fundamental freedoms. Justice services should not only be limited to people who has the financial wherewithal to afford it, but should be accessible to all irrespective of their social status, geographic location and personal conviction. With the financial means of the people of South Sudan noted to be limited, the costs associated with access to justice should not be an impediment to the ability of people to seek and access this vital service.

Cappelletti and Garth also contribute to the discourse by positing that access to justice is not solely about the proclamation of the rights of an individual to seek and access justice.⁷ They argue that for justice to be accessible to all, there is a requirement that two essential preconditions of the legal system are in place. These preconditions include, first, that every man, irrespective of his race, colour, creed or sex is permitted and able to access the system. And, second that this endeavour in seeking justice should bring about outcomes that are deemed to be fair and just to individuals, groups and communities.⁸ In relation to PAD, it is essential that there is a strong guarantee in the justice system that the processes, rules and procedures prescribed by the legal system are enablers and not impediments to how people can seek and access their justice remedies and protect their right to liberty and security of person.⁹ In South Sudan, this can be achieved through determining whether processes, rules and procedures of the justice system pose barriers and challenges in impeding access to justice in general and in particular for people suffering from PAD.

Access to justice is considered a responsibility of the state. Francioni describes access to justice as a procedural guarantee that is inextricably linked to human rights which is protected by similar international human rights framework and the constitution.¹⁰ In agreeing with the nexus between access to justice and human rights as discussed by Penido, Caboni, Palmer and Ellie, Francioni further argues that under domestic law, access to justice is a human right and that states assume the primary responsibility for protecting and implementing those rights by ensuring that there is a system by which people can seek and access effective justice remedies within their jurisdiction.¹¹ What this implies in relation to PAD and in the context of South Sudan is that the state has the responsibility to ensure that the necessary conditions are in place and that the justice and law enforcement institutions are

⁷ M Cappelletti and B Garth 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) *Buffalo Law Review* 27 at 182.

⁸ Ibid at 183.

⁹ European Parliament 'Annual Activity Report: Directorate General for Internal Policies' (2018) 42.

¹⁰ F Francioni, (ed) 'Access to Justice as a Human Right' (2007) 32.

¹¹ Ibid at 42.

functioning effectively in preventing the abrogation of the rights to liberty and security of person and in enabling people to access justice when their rights are compromised.

From the above, it could be deduced that access to justice viewed and defined through multiple lenses is very pertinent to addressing PAD in South Sudan. First, access to justice has been identified and defined as a right – equal to other human rights – which accrues to all persons irrespective of their race, colour, creed, or social standing. PAD, as have been established, contravenes the rights to liberty and security of persons, and considering its use as a tool of political oppression in South Sudan, it is at odds with the principles and standards of human rights and access to justice.

The concept of access to justice is also regarded as a critical service to which all individuals and groups in every jurisdiction is entitled in reinforcing the realisation of justice remedies. With regards to PAD, access to justice is envisaged as an enabler for people to seek and access services and remedies from the justice system in ensuring that they are not subjected to arrest and detention on an arbitrary and prolonged basis.¹² Access to justice enables individuals including indigents whose liberty and security is compromised by PAD or who is rendered vulnerable and marginalised by their circumstances to seek and obtain legal support and assistance in furtherance of their human rights and dignity.¹³ Some of the services included within the access to justice framework include legal representation, legal drafting, legal information and counselling, etc.¹⁴ These services will be discussed in detail at a later point in this chapter.

As noted above, the concepts of access to justice goes beyond the human rights and service perspective to include processes and procedures which inform how justice services should be provided and accessed by all. As will be demonstrated in chapter five of this thesis, laws, policies, standards, and procedures are globally instituted to ensure that justice services are accessible and delivered in a timely and dignified manner. These mechanisms have worked well in more developed and resource-rich countries with results including justice services becoming affordable, accessible, and timely.¹⁵ However, many people, especially the poor, vulnerable and marginalised in South Sudan continue to suffer from PAD and enjoy limited access to justice. This is so because the key justice institutions are dysfunctional, and

¹² I Ramirez *A Practitioner's Toolkit on Women's Access to Justice Programming* (2018) 2.

¹³ R Robinson 'A Theory of Access to Justice' (2005) *The Journal of the Legal Profession* 29 at 142.

¹⁴ The types of access to justice services shall be discussed in later sections of this chapter.

¹⁵ See chapter three at 74 on the disparities between resource-rich countries and developing nations.

that conditions and systems are not in place to facilitate effective service delivery. Also, as evident in South Sudan, factors such as limited knowledge and awareness of laws, policies, standards, and procedures among the population serve as an impediment to people accessing quality justice services.¹⁶

It is, therefore, necessary to reexamine and emphasise the responsibility of the state in ensuring that the right conditions and services are in place in enabling effective access to justice for the population.¹⁷ The South Sudanese state has a duty emanating from its commitment to human rights as provided for in the Transitional Constitution of South Sudan and under international law in ensuring that justice and law enforcement institutions are in place and functional at an optimal level with adequate resources and qualified personnel to provide the services the people require. This is further discussed below in chapter five under the factors contributing to PAD in South Sudan.

4.3 PRECONDITIONS OF ACCESS TO JUSTICE

For justice to be deemed accessible there are a number of preconditions that have to be met in enabling people not only to access but equally to appreciate and have confidence in the justice system. In the context of South Sudan where endemic conflict and bad governance has rendered the population vulnerable to multiple risk factors, meeting these preconditions are of the highest consequence in reinforcing the ability of the population to seek and access justice and for the peace and stability of the country. The preconditions for access to justice include: (a) legal empowerment; (b) affordability of justice; (c) physical access and timeliness of justice. These are discussed below.

4.3.1 *Legal empowerment and access to justice*

A significant proportion of the world's population live in poverty and are deprived of the

¹⁶ Lack of education and awareness on the law impacts on the ability of people to firstly understand and utilise the law as a tool in enhancing their access to justice and reinforcing their human rights. See J Beqiraj & L McNamara 'International Access to Justice: Barriers and Solutions' (2014) *Bingham Centre for the Rule of Law Report* 17.

¹⁷ See Part C (c) African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2019) which reinforces the obligation of the state to access justice and ensure effective remedies are available to all. See also *OSJI v Cote d'Ivoire*, Decision, Comm. 318/06 (ACmHPR, Feb. 28, 2015) where the court finds the respondents to have violated s 6 of the ACHPR because the necessary conditions were not in place to guarantee protection to the Complainant.

opportunity to improve and transform their life situation because they lack sufficient access to justice and the protection of the law.¹⁸ Irrespective of gender, social standing and financial means, men, women and children around the world have been rendered vulnerable and marginalised by exclusion from the rule of law and the protection it offers to them.¹⁹ The extent and magnitude of legal needs and the corresponding demand for legal assistance globally are highlighted in the Measuring Justice Gap by the World Justice Project 2019 Task Force on Justice. The report states that:

‘An estimated 5.1 billion people have unmet justice needs globally, including people who cannot obtain justice for everyday problems, people who are excluded from the opportunity the law provides, and people who live in extreme conditions of injustice. This justice gap underscores the urgency of realizing justice for all and demonstrates unacceptable levels of exclusion from justice.’²⁰

In South Sudan, the forms of vulnerability and marginalisation are manifested in several ways and at multiple levels in the lives of people and may include among others a conflict with the law, lack of certification and identification of nationality, protection of assets, protection from all forms of violence and harm to their persons.²¹ Men, women and children in South Sudan who are not assured of protection under the law are exposed to human rights violations such as PAD and held back from achieving their full potential of living to the fullest as part of the human community.

Numerous theorists and expert practitioners in the justice sector have recommended that a practical comprehension of what the legal needs and experiences of people are is a critical entry point to understanding and analysing the concept of access to justice. Schetzer, Mullins and Buonamano define legal needs as a ‘limitation on the possibility of actions in securing or protecting the legal rights that are provided for in a given jurisdiction.’²² The

¹⁸ M Carmona ‘Access to Justice for Persons Living in Poverty: A Human Rights Approach’ (2014) *SSRN Electronic Journal* 6.

¹⁹ United Nations *Guidance Note of The Secretary General: UN Approach to Rule of Law Assistance* (2008) 2.

²⁰ World Justice Project *Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World* (2019) 5.

²¹ L Schetzer, J Mullins & R Buonamano ‘Access to Justice And Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in New South Wales’ (2003) 26.

²² *Ibid* at 7 – 12.

limitation mentioned in the definition is understood to affect a wide variety of issues and areas of life including the most common as it relates to issues of contract on employment, land, family, property etc.²³ The limitations and challenges of access to justice in South Sudan means that protection of the rights to liberty and security of person in preventing and responding to PAD also fall under the category of legal needs.

In South Sudan, evidence suggests that legal needs usually arise from a variety of factors and at multiple levels. At the institutional level, the limitations exhibited by justice institutions to adequately deliver legal and judicial services are well acknowledged and documented. Also, processes, policies and procedures are understood to contribute to impeding physical or non-physical access to justice. At the individual level, systemic and socio-economic factors which render people in South Sudan incapable of affording legal services are documented as an underlying cause of legal needs.

Other limitations at the individual level include the lack of awareness of rights and the law which has a direct bearing on the ability of people, especially the poor, vulnerable and marginalised to seek and access redress for violations they suffer and in claiming and reinforcing their human rights. All of these issues come into play when determining the factors which contribute to PAD in South Sudan.

To properly understand the true scope of what legal needs consist of, a critical presumption associated with the topic must initially be addressed. There is a presumption that generally people can determine when they have legal needs and in the same vein that they have what it takes to make decisions on what to do about the identified needs. This presumption could not be further from the truth. The 2013 UK Civil and Social Justice Panel Survey indicates that a minute 6% of people solve their legal problems with assistance from lawyers and that only 11% UK residence can correctly recognise legal problems as an when they arise.²⁴ The report further suggests that:

‘Legal capability was a key indicator for the effective use of legal services.

People with low levels of legal capability are more likely not to act, and less

²³ P Pleasance, N J Balmer & R L Sandefur *Paths to Justice: A Past, Present and Future Road Map* (2013) 28 – 32.

²⁴ L Wintersteiger *Legal Needs, Legal Capability and the Role of Public Legal Education Life: The Foundation for Public Legal Education* (2005) 3.

likely to sort things out alone. They are less able to successfully solve legal problems and are twice as likely to experience stress-related ill-health, damage to family relationships and loss of income.’²⁵

Making a comparison between statistics from the UK, a developed country – which has in place the required infrastructure and economic strength as well as a highly literate population, and South Sudan, which is characterised by weak or non-existent infrastructure, dysfunctional institutions and a low rate of literacy, indeed depicts a bleak picture. In South Sudan, there is, in general, a limited awareness of human rights and a heavy reliance on customary justice systems – factors upon which PAD has thrived. Awareness of the law and knowledge of procedures in seeking and accessing justice especially in response to PAD is considerably limited. Therefore, more needs to be done by the government and their development partners in ensuring that the people of South Sudan are aware of the law and are empowered to navigate the legal system in seeking their justice remedies and preventing PAD.²⁶

The capacity to determine whether a legal need exists often arises from and is determined by the level of legal empowerment that an individual or a group in question enjoys. Namati, an organisation focusing on legal empowerment, defines the concept as building the capacity of people to use the law as a tool in seeking and accessing legal remedies when their human rights are violated.²⁷ The Open Society Foundation similarly posits that legal empowerment involves:

‘... strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community. Legal empowerment is mainly about justice for ordinary people who are limited by their ability, awareness and their socioeconomic situation. It is about ensuring that the ‘law is not confined to books or courtrooms, but rather is available and meaningful to ordinary people.’²⁸

²⁵ Ibid at 3.

²⁶ See the recommendation on legal awareness and sensitization in chapter seven.

²⁷ L Goodwin & V Maru *What Do We Know About Legal Empowerment? Mapping the Evidence* (2014) 9.

²⁸ Open Society Initiative ‘Access to Justice’ available at <https://www.opensocietyfoundations.org/projects/legal-empowerment> accessed on 23 June 2019.

The United Nations Development Programme has categorised legal empowerment as including (a) the awareness of rights and the applicable law, (b) facilitating legal aid including justice support mechanisms and; (c) facilitating the legal identification of vulnerable and marginalised individuals and groups.²⁹ Although the categorisation above is essential in enabling an understanding of legal needs, it is not exhaustive. And, as the law continues to evolve and people become empowered, new areas of need will arise and be counted.

From the above, it could be deduced that legal empowerment favours an approach where laws are instituted and implemented in facilitating and enabling greater protection and the resolution of legal problems. While the relevant laws exist in South Sudan, implementation is weak and is a major factor which result in PAD. Legal empowerment also includes utilising the law to positively affect and transform the lives of people.³⁰ Once empowered by the law, the South Sudanese population would be able to positively engage and utilise the justice system in accessing their justice remedies and reinforcing their rights. Legal empowerment will also guarantee that they are able to act on a broad range of issues pertinent to the law. It is vital in helping the public develop the necessary consciousness of the legal culture and in further participating in the formulation of laws in South Sudan. Hassan describes legal awareness as including ‘self and social’ empowerment which enables marginalised and oppressed groups to raise a voice in claiming their rights. She sees this as a basis for redefining and reshaping the limitations and inadequacy of the law and practice.³¹

Finally and as relevant to preventing and responding to PAD, legal empowerment focuses on and targets the marginalised and vulnerable. As put succinctly by Scarman,

‘it is no longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other

²⁹ UNDP Kyrgyzstan *Widening Access to Justice for Legal Empowerment in the Kyrgyz Republic* (project document) 2014 – 2017 (2013) 10 - 15.

³⁰ K Bilz and J Nadler ‘Law, Moral Attitudes, and Behavioral Change’ (2014) *The Oxford Handbook of Behavioral Economic and the Law* 253.

³¹ F R Hasan *Limits and Possibilities of Law and Legal Literacy: Experience of Bangladesh Women* (1994) 70.

support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced'.³²

In South Sudan, where the law and the systems which facilitate its application and enforcement is not effective enough in assisting people to address their everyday legal needs, vulnerability and marginalisation will continue to be rife and PAD will persist as a justice and human rights challenge. The Government of South Sudan needs to pay more attention to empowering its population in ensuring that the law works for all and that legal challenges such as PAD are addressed.³³

4.3.2 Legal Aid and its relevance

The most common measure adopted by countries in ensuring legal empowerment and enhancing access to justice is making legal aid available and accessible to all.³⁴ The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) admonishes that

‘[l]egal aid should be defined as broadly as possible to include legal advice, assistance, representation, education, and mechanisms for alternative dispute resolution; and to include a wide range of stakeholders, such as non-governmental organisations, community-based organisations, religious and non-religious charitable organisations, professional bodies and associations, and academic institutions.’³⁵

The Lilongwe Declaration has come to be accepted globally as the standard and guide to the implementation of legal aid system. The United Nations Principles and Guidelines on

³² L Scarman ‘English Law – The New Dimensions’ (1974) 28 - 9. Also see, International Development Law Organization ‘*Global Legal Empowerment Working Papers*’ (2010) 11.

³³ See Recommendation in chapter seven at 184 – 185.

³⁴ Cappelletti and Garth op cit note 7 at 90.

³⁵ The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa of 2004.

Access to Justice in Criminal Justice Systems agree with the Lilongwe Declaration and define legal aid as including:

‘legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require.’³⁶

The focus of this definition is on legal aid within the context of the criminal justice system which is very pertinent to addressing legal needs in South Sudan and responding to PAD and its impact on the right to liberty and security of person. This definition also depicts the nature of legal support as focusing on indigents in conflict with the law which in the context of PAD are likely to be the poor. The Rwandan National Legal Aid Policy (2014) provides a similar definition and highlights the links between legal aid and access to justice.³⁷

Lord Denning also contributes to the discourse by defining legal aid as funding from the government for people who are unable to cover the cost of the necessary legal support and assistance they require.³⁸ He goes on to add that:

‘the greatest revolution in the law since the post-second World War has been the evolution of the mechanism of the system for legal aid. It means that in many cases the lawyers' fees and expenses are paid for by the state and not by the party concerned. It is a subject of such importance that I venture to look at the law about costs - as it was - as such it is and as it should be.’³⁹

Lord Denning emphasises the importance of the financial component of legal aid in a given context. This is also a crucial issues in a financially challenged context such as South Sudan.

³⁶ United Nations Development Programme *Access to Justice Practice Note* (2004) 12.

³⁷ Ministry of Justice Rwanda *National Legal Aid Policy* (2014) 2.

³⁸ A T Denning ‘What Next in the Law’ (1982) *Alberta Law Review* Vol XXII, No 2 at 318 – 19.

³⁹ *Ibid* at 381.

From the above definitions, it could be concluded that the key characteristics of legal aid are that it is provided without cost and that it is provided to people who because of their situation cannot afford legal services and therefore rely on the state or other agencies to provide them with the requisite legal support. Given the nature of vulnerability in South Sudan which is defined by resource limitation, covering the cost of legal aid is a critical step in preventing PAD and reinforcing the rights and dignity of the people of South Sudan.

Also from the definition, legal aid services consist of assistance and support which include the provision of legal representation before a court of law, legal information and awareness in promoting an understanding and appreciation of the law, legal counselling and advice in enabling informed decisions on the law and legal drafting and documentation as pertinent to contracts, certifications, national identities etc. In vulnerable context such as South Sudan, the range of these services are all critical to preventing and responding to PAD.

Globally, legal aid is considered a human right rooted in both international, regional and national legal and human rights frameworks. At the international level, the ICCPR provides for legal aid and specifies the service for assistance in the determination of criminal charges. The ICCPR guarantees that everyone which is charged with an offence should be provided with assistance with the law.⁴⁰ While specifically targeting persons facing criminal charges, this provision opens the door to an expansive interpretation which has resulted in free legal assistance in other areas of the law.⁴¹

Several provisions are made in the ACHPR which reinforce the right to legal aid, including art 3 on equality before the law; art 7 on the right to have one's cause heard, and; art 41 on the rights to a fair trial and legal aid in Africa.⁴² The ECHR provides for and guarantees the rights to fair and public hearing in the assertion of civil rights and obligations.⁴³ Not just the two regional human rights instruments mentioned above, but many

⁴⁰ Article 14 (3)(d) of the ICCPR.

⁴¹ See Human Rights Committee *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial* (2007) CCPR/C/GC/32. The Human Rights Committee provides an expanded interpretation of art 14 of the ICCPR and details specific actions which are to be taken to enable access to justice and in particular legal aid.

⁴² African Union *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2019) which builds upon the relevant provisions of the African Charter as pertinent to the right to a fair trial and legal aid. See Also *Wetshokonda Koso v DRC, Decision, Comm. 281/2003 (ACmHPR, Nov. 24, 2008)* para 89 where the Commission ruled that the 'verdict of the Military Court which consisted solely of Army Officers with no qualities of a Magistrate, did not offer the guarantees of independence, impartiality and equity and of constitute (sic) a violation of its Resolution No ACHPR/Res.41(XXVI)99 on the Right to a Fair Trial and Legal Aid in Africa.'

⁴³ Article 6 of the ECHR.

others recognise and make similar provisions in reinforcing the rights to legal aid as a fundamental human right for all.⁴⁴

Empirical evidence suggests that through inadequate access to legal aid, the poor and vulnerable become susceptible to the possibility of being excluded from the realisation of their rights and protections offered by the law.⁴⁵ In the context of PAD in South Sudan, persons lacking access to legal aid are more likely to be deprived of their liberty because they lack the rights information and technical guidance to do so. Beyond human rights considerations, the consequences of limited access to legal aid for persons whose rights and liberty is compromised by PAD includes the lack of confidence in the justice system. Enhancing access to vital legal aid services in the context of PAD is also critical to transforming their socioeconomic wellbeing.⁴⁶ Whatever the case, access to legal aid, in its varying forms, is a critical channel of support in ensuring that the law provides meaning and protection to vulnerable populations especially people who are suffering from PAD.

4.3.2.1 Types of legal aid

There are several types of legal aid services, all of which have been fashioned in accordance with the myriad of legal needs which exist among indigent, vulnerable and marginalised individuals and groups. The different types of legal services have been broadly categorised under general headings in accordance with the assistance they provide. For purposes of this research, emphasis shall be placed on the following three types of legal aid services: legal representation, legal advice and legal information and awareness.

In the context of legal aid, legal representation is understood to include the processes by which lawyers advocate and litigate on behalf of their clients before a court of law. Matthias Kilian describes legal representation as including the accompaniment, guidance, and representation of a party to a court proceeding by a certified legal practitioner.⁴⁷ Article 14(3)(d) of the ICCPR provides for the right to legal representation for the defence of a person facing criminal charges.⁴⁸ In conformity with the ICCPR, the Constitution of South

⁴⁴ See also art 8(2) of the American Convention on Human Rights and art 13 of the Arab Charter on Human Rights.

⁴⁵ See UNDP & UNODC '*Global Study on Legal Aid Global Report*' (2016) 5.

⁴⁶ L Schetzer, J Mullins and R Buonamano *op cit* note 20 at 93.

⁴⁷ M Kilian *Representation in Court Proceedings- Comparative Aspects and Empirical Findings* (2015) 1.

⁴⁸ Article 14(3)(d) of the ICCPR.

Sudan provides for a similar rights to self-defence through legal representation.⁴⁹ A similar provision is made in the South African Constitution in reaffirming and protecting the right to legal representation in a criminal trial.⁵⁰

There have been several debates as to what the right to legal representation consists of with the ratio decidendi in the South African case of *S v Mofokeng*⁵¹ providing that nothing else will suffice other than ‘effective legal representation’. Effective representation is simply defined as acting in the best interest of the client while still ensuring that his or her primary duty towards justice is maintained.⁵² It also means that defence attorneys are restricted from disclosing evidence in court, which is detrimental to their client. Other elements of effective representation include providing appropriate advice on the merit of the client’s case, arguing the client’s cases reasonably even if the attorney does not support or believe in the merit of the case, and not distancing oneself from the clients’ instruction.⁵³ Ensuring that people in conflict with the law are provided with adequate and quality representation is vital to guaranteeing access to justice and the protection of the rights of those affected by PAD.

Legal advice and counselling, on the other hand, has been defined as providing counsel on the application of the law in the form of statutes, case laws and legal standards and principles as may be pertinent to a particular situation or case. According to Redmount, legal advice includes the broad range of consultations lawyers can provide clients. He goes on to say:

‘This may be in a number of contexts (law offices, community boards, courtrooms) and may involve a variety of functions (planning, advice, legal action). In a narrower sense legal counselling is that group of particular attitudes,

⁴⁹ Section 19(7) of the Constitution of South Sudan 2011.

⁵⁰ See Section 35(b) & (c) of the Constitution of the Republic of South Africa, 1996. Also a similar provision on the rights to counsel is guaranteed by the 6th Amendment of the United States Constitution.

⁵¹ For representation to be said to be effective, the following conditions should be met including among others: 1) representation has to be in the best interest of the client; 2) defense counsel should not make submissions which are detrimental to the case of a client; 3) a prosecutor should present all evidence in court even if it damages the case of the prosecution, and; 4) defense counsel should completely understand their role and perform in a way that is appropriate. See *S v Mofokeng* 2004 (1) SACR 349 (W).

⁵² See Rule 6 of the American Bar Association Model Rules of Professional Conduct what is expected of a lawyer. Available at

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ accessed on 21 May 2019.

⁵³ Ibid at 99.

skills, and strategies that a lawyer utilizes mostly in his office to help individual clients to meet specific needs and resolve specific problems.’⁵⁴

Legal advice and counselling are not only provided by lawyers and advocates but also by paralegals, legal executives and ordinary people with sufficient knowledge and experience in the law. Considering the limitations in legal awareness among people confronted with PAD in South Sudan, legal advice and counsel are critical to providing valuable information and recommendations on various courses of action which are available and appropriate to the legal challenges and issues they face.⁵⁵ In this regard, legal advice and counselling may include, for instance in South Sudan context, providing essential information on the substance and merits of charges or providing information on the options which are available to victims of PAD. It may also include recommendations on choices to make in various cases and guidance on what to say in court.

Lessons learnt from the East Africa region indicate that legal information and advice have been very critical to informing the development, enactment and application of laws including those relevant to preventing and responding to PAD. The impact of legal information and advice ranges from the proper completion of forms⁵⁶ to empowering people to institute proceedings in court and seek compensation for damages for PAD. Legal theorists and practitioners have considered legal literacy as a relevant component of legal awareness.⁵⁷ In South Sudan, this knowledge and understanding of the law are essential in enabling people to make critical decisions and judgements about their everyday affairs in relation to the law, and how to use the legal system effectively in claiming and reinforcing their rights including the rights to liberty and security of person.⁵⁸

4.3.2.2 Challenges of legal aid

Many countries have established systems in ensuring that legal aid is available and accessible

⁵⁴ R S Redmount ‘An Inquiry into Legal Counseling’ (1976) *The Journal of the Legal Profession* 181.

⁵⁵ CPLEA *Legal Information vs. Legal Advice: What is the difference?* (2019) 1 – 2.

⁵⁶ Government of Tanzania and UNDP *National Legal Aid Baseline Assessment* (2018) 58.

⁵⁷ M E Manley-Casimir & W Cassidy *Legal Literacy: Towards a Working Definition a Report Submitted to the Canadian Law Information Council* (1989) 5. The authors define legal literacy as focusing on the ‘acquisition of knowledge, understanding and critical judgement about the substance of the law, legal process and legal resources, enabling and encouraging the utilisation of capacities in practice.’

⁵⁸ The American Bar Association *Commission on Public Understanding About the Law* (1989) 5.

to their population. This has been achieved through the enactment and implementation of laws and policies and the provision of adequate funds to relevant justice and non-governmental institutions through whom the services are made available. However, the provision of this vital service is continuously challenged by varying limitations that impede the effectiveness and efficiency of legal support and assistance to indigents including people who are suffering from PAD. The challenges which are faced in the establishment and managing of a functional legal aid system is broad-ranging from limited financial support to unavailability of adequate human and technical resources.

A common challenge associated with making a legal aid system functional and effective is the insufficiency of funds. In South Sudan, this challenge is particularly prevalent because of the limitations on available resources to meet competing demands for basic services.⁵⁹ Adequate financing is crucial in ensuring that services are, first, available and accessible to the people whose liberty and security is impacted by PAD and second, the available service is of sufficient quality to meet the standards set under international law. In South Sudan, the limitation in financial resources is visible in all sectors of governance including the justice and law enforcement where PAD is prevalent. While hoping for the best for South Sudan, there is every likelihood that this challenge will persist in the justice system while the country contends with the civil war and its current governance and economic challenges.

Nonetheless, the Government of South Sudan has, by way of its constitution, committed to ensuring that all South Sudanese including victims of PAD enjoy the full tenets of fair trial.⁶⁰ Furthermore, it should be borne in mind that certain aspects of legal aid are not only guaranteed by the constitution but mandated and reinforced by other laws including the Code of Criminal Procedure Act, the Ministry of Legal Affairs and Constitutional Development Organisation Act⁶¹ and the Advocate Act⁶². The South Sudanese state is required by law to ensure that persons accused of crime are provided with adequate and effective legal counsel and representation, except where they can afford to secure a lawyer of their choosing. The state should, therefore, endeavour to make available sufficient funds in both facilitating and ensuring that the legal aid scheme is indeed capable of discharging this

⁵⁹ See chapter three at 76 where the challenges associated with limited and unavailable funding in African and developing countries is discussed.

⁶⁰ Section 19 (7) Constitution of South Sudan.

⁶¹ Act No 8 2008.

⁶² Act No 55 2013.

obligation in conformity with the law and as a basis for preventing PAD.

Beyond the provision of state funding for legal aid, it is also important that government create the enabling environment for private and other non-governmental sources of funding for legal aid to flourish and supplement the efforts of the government. Private support to legal aid comes in the form of technical logistical and financial support provided to legal aid providers by international development cooperation, donor and funding agencies etc.

In most countries, the first step by the government in creating an enabling environment is the enactment of national legislation on legal aid which puts oversight and regulatory systems and mechanisms in place. In Tanzania for example, the Legal Aid Act 2017 provides for and has led to the establishment of a Legal Aid Board and the Office of the Registrar for Legal Aid in the Ministry of Constitution and Legal Affairs (MoCLA).⁶³ Examples from other countries may include the Sierra Leone Legal Aid Act 2012 and the Kenya Legal Aid Act of 2016. The Government of South Sudan will do well to emulate and draw on the examples from neighbouring countries in enacting and giving the force of law to the provision of legal aid in their country.

The responsibility of the government in ensuring that legal aid is available and accessible by its population cannot be delegated to non-governmental actors regardless of the good intentions and available means. Effective government oversight and coordination of the legal aid subsector ensures that the government is recognised as being primarily responsible for the provision of legal aid, that the quality of legal aid services is maintained, and that vulnerable and indigent populations are not preyed upon by scrupulous legal aid service providers. Finally, government oversight and coordination of a national legal aid scheme is necessary to ensure that the right to legal aid is recognised and protected by law.

Challenges to the delivery and quality of legal aid services in South Sudan arise at several levels. Primarily, challenges may arise from the insufficiency of human resources in the form of lawyers, advocates and paralegals to provide services that are equal to or meet the legal and justice demands of the public. This deficiency is mainly focused on the quantity and quality of justice sector workers and their availability to deliver valuable services to indigent populations in South Sudan. In the context of PAD, this challenge may manifest in several

⁶³ Section 4 – 7 of the Legal Aid Act, 2017 of Tanzania.

forms including in situations where detainees do not have access to counsel and have to navigate the criminal justice system on their own. As in most developing country, this is a critical challenge that South Sudan faces due to the inadequate number of legal practitioners especially in rural locations of the country.⁶⁴

A second challenge relates to instances where the requisite technical capacity and expertise are inadequate to sufficiently meet the demands for services in South Sudan.⁶⁵ Ensuring that a national legal aid scheme has the appropriate human and technical resources is also significant in ensuring the quality of services. In South Sudan, delays in the delivery of justice services which result in PAD do not only occur because of limited defence counsels, but also because of the shortage of justice and court officials. The effectiveness of legal services and indeed preventing and responding to PAD is highly dependent on the availability and willingness of well trained, experienced and dedicated justice and court officials.

Regarding the shortage of human resources for the delivery of justice services including in addressing PAD, other equally essential professionals could be empowered to play a critical role in this process and should be deemed as equally relevant. For example in a context where there is a dire shortage of lawyers and advocates, paralegals have proved to be viable alternatives in ensuring that legal aid services are available and accessible.⁶⁶ This is relevant particularly when it comes to addressing the human and technical resource gaps which perpetuate PAD in South Sudan where technical capacity continues to be a fundamental limitation of governance.⁶⁷

⁶⁴ See UNDP calls for a legislation in enabling the functioning of paralegals due in part to the shortage of legal practitioners in South Sudan. They estimate that there are about 400 practicing lawyers in South Sudan which is very limited in comparison to a population of about twelve million. See UNDP *Paralegals bring justice to women in South Sudan* (2012) Available at <https://www.ecoi.net/en/document/1277774.html> and accessed 24 July 2018.

⁶⁵ B A Chikwanha & L Hutton, *Institutions, Laws and Services: Exploring Justice Sector Reform in South Sudan* (2011) 6.

⁶⁶ The ABA ‘defines a paralegal as a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.’ See American Bar Association *Current ABA Definition of Paralegal* (2020) Available at https://www.americanbar.org/groups/paralegals/professioninformation/current_aba_definition_of_legal_assistant_paralegal/ accessed on 24 July 2018.

⁶⁷ In Tanzania, for instance, where the population is now in excess of sixty million, there are only about 4500 advocates over half of which are mostly based in urban locations. A baseline assessment conducted ‘by the Ministry of Constitutional and Legal Affairs and funded by the United Nations Development Programme’ in 2017 revealed the critical role of a well skilled and motivated human and technical resource to the effectiveness of a legal aid scheme. The assessment revealed a dire shortage of advocates and other legal practitioner including lawyers and paralegals for the provision of service to the people of Tanzania. The report indicates that there are 6,536 lawyers to a population of 55 million plus which means a ratio of 12,000 individuals to 1 lawyer.

Another challenge associated with legal aid the world over and indeed in South Sudan is ensuring that legal representation provided as part of legal aid is adequate and of good standard. In the context of PAD, legal representation needs to conform to a number of minimum standards as defined above.⁶⁸ However, because legal aid services and support is often provided on a *pro bono* or non-cost basis, it is commonplace for advocates not to provide competent representation by paying insufficient attention to the cases of victims of PAD. Ineffective representation does not only constitute an ethical challenge but by and large, it effectively defeats the purposes of the provision of legal aid to indigent people – which is ensuring that the indigents enjoy access to justice. Addressing this challenge in South Sudan is indeed crucial to ensuring that legal aid schemes continue to inspire and win the confidence of indigent populations and that they, in turn, are willing to continue seeking the services. The challenge of ineffective representation in South Sudan could be remedied by way of regular monitoring, client satisfaction surveys and through instituting systems that hold advocates responsible for their actions.⁶⁹

Other essential and commonplace challenges to the delivery of legal aid include limited information on where, when and how those who are indigents including victims of PAD can seek and access legal services in addressing their legal needs. These include various types of prejudices and discrimination based on gender, creed, national and social standing; the limited geographical spread of services wherein services are concentrated in urban areas to the virtual exclusion of rural communities etc. These are all challenges which administrators of legal aid are faced with and which impact the effective delivery of services. Until deliberate efforts are made towards addressing these issues, legal aid schemes in South Sudan will be incapable of achieving the desired impact.

The inadequacy of legal practitioners put a severe strain on the quality and sustainability of legal aid service delivery in Tanzania. The scarcity is not limited to advocates but also to paralegals who are recognized as playing a critical role in supporting access to justice and the human rights of indigent populations. While a national registry of paralegals is at present being established by the Office of the Registrar for Legal Aid, it is estimated that there are a total of 5,200 paralegals in Tanzania with the greater proportion of them concentrated in the urban communities. The critical shortage in the human and technical component of the Tanzanian Legal Aid Scheme is posing a serious challenge to people, especially in rural areas of Tanzania in accessing legal aid to address their justice needs. See Government of Tanzania and UNDP *National Legal Aid Baseline Assessment* (2018) 23 – 36.

⁶⁸ See chapter four at 100.

⁶⁹ See chapter six at 30 – 32.

4.3.3 *The affordability of justice*

Justice, as a public service, has an economic dimension which is a critical factor in facilitating the accessibility, quality and efficiency of the services of key institutions in the sector. These costs have implications on how people can seek and access justice especially where for instance they are impacted by PAD. In assessing the implications of the costs associated with seeking and accessing justice, the Centre for Innovative Justice notes that:

‘The law, and the system that is structured around it are designed to protect the interests of ordinary people. Yet the conventions and expense associated with this system mean that the majority of the population feel shut out from its redress – sandwiched between eligibility for public assistance and a realistic capacity to meet the costs of the private legal market.’⁷⁰

To fully comprehend the cost of justice, there is a need to initially examine it from the perspective of a public service which consists of ‘services provided by the government to people living within its jurisdiction, either directly (through the public sector) or by financing the private provision of services.’⁷¹ Law and justice form part of the services which the government provides to people living within the geographical boundaries of its country. The establishment and operationalisation of the justice system are, therefore, in recognition of this core function of government to its people for which financial resources are provided in enabling functionality and service delivery.

As is the case in most jurisdictions, institutions in the justice sector in South Sudan have been collectively constituted into a single unit which today consist of the following:

- i. The Judiciary including the court system established by statutes and other systems of law founded on the basis of culture, traditional belief systems, practices and religion.
- ii. The prosecution service, which is a subsection of the Ministry responsible for the

⁷⁰ Centre for Innovative Justice *Affordable Justice – A Pragmatic Path to Greater Flexibility and Access in the Private Legal Services Market* (2013) 4.

⁷¹ Science Daily ‘Public Services’ available at https://www.sciencedaily.com/terms/public_services.htm accessed on 29 December 2018.

administration of justice and is a critical part of the justice sector.

- iii. The police service, which promotes law and order by enforcing the law. The police carry out arrests in situations where the law is breached and in most cases conduct a preliminary investigation in determining the substance of the case.
- iv. The prison service, which is responsible for the incarceration and the reform of persons held on remand and those sentenced for offences committed.

All of these institutions within the justice and law enforcement sector of South Sudan operate as a chain relying on the effective functioning of the other for the delivery of justice services to the people. Within this framework, there is also the human resource component which includes judges, prosecutors, administrators, lawyers, arbitrators, mediators etc. These institutions which collectively constitute the justice and law enforcement sector, rely on the government to put systems, laws and procedures in place, to ensure that quality human resources are available, and to guarantee that the enabling environment exists for the justice system to function and deliver services effectively and efficiently.

In this regards, the functions of government include the payment of salaries and benefits of government functionaries, the development of policies and procedures, and the procurement of the relevant logistics and the necessary infrastructure for these institutions to function effectively. In South Sudan and other developing contexts, the efforts of the government in providing justice and law enforcement services are supported by development partners such as the UN, the World Bank, donor agencies and non-governmental organisations. However, all such efforts must be complementary to the priorities of the government, which is primarily responsible for the provision of justice and law enforcement services.

Regarding the demand side, millions of people around the world continue to face challenges in claiming and protecting their rights and contending with legal issues for which they require assistance. The challenges they face are wide-ranging, including matters related to contract, land, commerce, protection, etc., in other words, ‘the problems of everyday life’.⁷² However, empirical evidence suggests that 45% of all problems that people struggle with from day-to-day and for which they require legal assistance remain unattended and

⁷² M Gramatikov, M Barendrecht & J H Verdonchot ‘Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology’ in (2011) *Hague Journal of Rule Law* 3 at 11.

unresolved.⁷³ These grim statistics come about as a result of the cost of the provision of legal services. While a proportion of legal need end up being solved, there is evidence that for a substantial majority of the indigent population, pursuing justice is too costly and often beyond their means.⁷⁴ This challenge is very active in South Sudan where the justice system – especially statutory justice – is mainly available and active in urban communities and securing the services of laws are often way beyond the means of ordinary South Sudanese.

It is important to note that it is not only indigents that are prevented from seeking justice from the courts due to financial constraints. This was made evident in the Tanzanian case of *Julius Ishengoma Francis Ndyababo vs The Attorney General*.⁷⁵ This was an appeal from the High Court, which emerged from the October 2000 general elections in which the appellant was declared to have lost the race for a parliamentary seat in Nkenge Constituency. Aggrieved by the outcome of the elections, the appellant petitioned the High Court under ss 111 (1) of the Electoral Laws (Miscellaneous Amendments) Act 2001, questioning the validity of the results which granted victory to his opponent. However, the Registrar of the Court did not fix a date for the hearing in compliance with the provisions of the applicable law. The subsection of the Act impeding the process required a petitioner to pay a sum of five million Shillings without which the Registrar will not proceed to setting a date for the hearing of an election matter.⁷⁶

In agreeing with the applicant, Kimaro J, one of the judges who ruled on the matter in the High Court noted that:

‘By any standard, the provisions of ss 111 (2) & (3) have been made arbitrarily, and the limitations imposed in the law cannot be said to be reasonably necessary for achieving a legitimate objective. My views are that the amount being required to be deposited as security for costs being excessive, it is only a few people who can afford to pay. This means that the right to sue though given by the Constitution and the law concerned will be curtailed. Accessibility to justice will be open to only those who can afford to pay security

⁷³ P Pleasence, N J Balmer and R L Sandefur op cit note 22 at 92.

⁷⁴ P Talekar *Conceptualising Economics of Justice Delivery – Demand, Supply and Costs* - CCS Working Paper No. 250 (2011) 14.

⁷⁵ 2000 Civil Appeal No. 64 of 2001 presided over by Samatta CJ. Kisanga JA and Lugakingira JA. See also art 2 on the obligations of the state to ensure access to justice and art 14 of the ICCPR which guarantees procedural fairness.

⁷⁶ Ibid.

for costs.’

In affirming the judgement of Kimaro J, in favour of the appellant, the Court of Appeal observed that the critical issue in the case was about access to justice which is one of the fundamental and important human rights in a democratic society. The ruling declared that the provision of law requiring the payment of the sum of five million Tanzania Shillings to be arbitrary and that it imposed a limitation on the essential right of access to justice. This case demonstrates how laws and systems in different jurisdictions can impose various types of limitations and barriers on how people can seek and access justice. In the Julius Ishengoma Francis Ndyabo case, which did not involve an indigent, the limitation imposed was financial which the courts determined not just to be unconstitutional but also a violation of the rights to access justice.

4.3.4 *Physical access*

The World Bank notes that efforts towards enhancing access to justice would be rendered inefficient if the ‘population is unaware of their rights, or unable to access justice institutions due to physical, financial or intangible barriers.’⁷⁷ Access to justice is of both a physical and non-physical nature. Physical access to justice, in this instance, entails the capacity to gain bodily admittance to justice and law enforcement institutions or through virtual means. Physical access to justice institutions is mainly impaired by distance in context such as South Sudan where they are unavailable in particular localities or where deliberate measures (such as physical barriers, security checkpoints, administrative restrictions and limitations etc.) are instituted to impede people from directly accessing justice and law enforcement institutions such as the courts.⁷⁸

In such instances, the affected populations are required to travel long and often arduous distances to locations where these institutions are available to access the legal services they need. Where the challenge of distance is compounded by administrative restrictions in impeding access to justice, then poor and indigent populations are left partially or entirely marginalised and cut off from the essential protection and services that are offered

⁷⁷ The World Bank ‘Increasing Access to Justice for Women, the Poor, and Those Living in Remote Areas: An Indonesian Case Study’ in (2011) *Justice for the Poor Briefing Note* 6.I at 2.

⁷⁸ D A Larson ‘Access to Justice for Persons with Disability: An Emerging Strategy’ in *Laws* (2014) 220 – 238.

by the law.

In ensuring that their population have adequate access to justice, some jurisdictions embrace what information communications technology (ICT) has to offer in addressing the shortfalls of institutions and services in the justice sector. In most contexts, linking justice and law enforcement services with ICT has been referred to as ‘E-justice’. E-justice is the ‘use of information and communications technologies, and particularly the internet, as a tool to achieve better government’ and access to justice.⁷⁹ This experiment has mostly proven to be a success in more developed contexts where there are adequate human, financial and logistical resources. South Sudan does not have in place the necessary infrastructure nor the financial resources for the full adoption of the e-approach.⁸⁰ Therefore, it is essential to note that the successful adoption of e-justice by South Sudan would require significant investment and a strong commitment and dedication to reforming the justice and law enforcement sector.

Other barriers to the accessibility of justice which are of a non-physical nature include corruption both of a financial and procedural nature, official incompetence and incapacity, ineffectiveness and inefficiency in the delivery of services, outdated and impractical systems and procedure. Barriers include limited awareness of the laws and procedures as well as the incapacity to navigate the justice system. Most, if not all, of these barriers, are very active in the South Sudan context and do not only impact on the rights and ability of people to seek and access justice, but also on the peace, stability and prosperity of the nation.

4.3.5 *Timeliness of justice*

One of the critical determinants of access to justice is timeliness – a determination of whether justice was delivered in a timeframe which, in view of the intervening circumstances, could be deemed as reasonable and acceptable. The Honourable Wayne Martin AC Chief Justice of Western Australia defined delay in the delivery of justice in civil matters as ‘any avoidable

⁷⁹ G Lupo and J Bailey ‘Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples’ in *Laws* (2014) 354 - 356.

⁸⁰ For example, the United Republic of Tanzania is at present benefiting from a World Bank loan for the implementation of a project titled ‘Citizen-Centric Judicial Modernization and Justice Service Delivery Project for Tanzania which is aimed at improving ‘the efficiency and transparency of, and access to, selected citizen-centric justice services.’ There are three components to the project, the first component being governance, organization, and systems development. The component aims to improve court efficiency and modernize court administration through among others leveraging technology for the introduction of e-justice services and the production of statistics and information to citizens and businesses. See World Bank *Citizen-Centric Judicial Modernization and Justice Service Delivery* (2017) 12 – 19.

and unproductive lapse of time prior to the final disposition of a [...] dispute of the magnitude that contributed to the litigation reform industry.’⁸¹ The relevance of timeliness of justice is aptly captured in the legal maxim ‘justice delayed is justice denied’⁸² which has been interpreted as meaning the delay of justice is equivalent to no justice at all. Studies have indicated that the timeliness is critical in determining whether people appreciate the justice and law enforcement system as fair and impartial.⁸³ Delays and process inefficiencies are costly, and impact economically, emotionally and psychologically, not just on disputants, but also on the often-limited personnel and financial resources of courts and by extension, the government.

Interaction with the justice system from the demand side comes about at two levels: first, where such interaction is occasioned by the need to fulfil a legal necessity or requirement such as arrest, detention and trial; second, where there is a need or demand for legal or judicial remedies in the enforcement of a right. Legal and judicial remedies may include a wide range of recourses including the granting of relief such as an injunction, a restraining order, restitution etc. Where, there is an interruption or a failure of the justice and law enforcement system to deliver services relevant to meeting the requirement of the law or in fulfilment of a demand or expectation of a prompt legal remedy, then justice is deemed to have been denied.

In discussing the challenge of delays in the delivery of justice, Zeisel, Halven and Buchholz put it succinctly that:

‘Delay in the courts is unqualifiedly bad. It is bad because it deprives citizens of a basic public service, it is bad because the lapse of time frequently causes deterioration of evidence and makes it less likely that justice be done when the case is finally tried; it is bad because delay may cause severe hardship to some parties and may in general affect litigants differentially; and it is bad because it brings to the entire court system a loss of public confidence, respect and pride.’⁸⁴

⁸¹ W Martin *Timeliness in the Justice System: Ideas and Innovations* (2014) 8 – 9.

⁸² Attributed to William Edward Gladstone a former Prime Minister of England.

⁸³ B Ostrom & R Hanson *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts* (1999) 4 – 6.

⁸⁴ W A Falsgraf *Delay in the Court by Zeisel, Kalven and Buchholz* (1959) XXIII.

Delays in the justice system may occur at various stages of a criminal or civil proceeding to judgement, sentencing and detention as the case may be. In South Sudan, delays are more evident at the pretrial stage in criminal cases, where accused persons are known to suffer the indignity and anguish of languishing in jail – some for several months and even for years – before being granted an opportunity to determine their innocence before a court of law. In civil cases, aggrieved parties who approach the court in search of relief may be subjected to extended delays for the determination of their cases.

The impact of delays in the dispensation of justice in South Sudan, cannot be underestimated especially on how it impacts the daily lives and dignity of people and undermines the trust they have in the system. Because the statutory justice system in South Sudan has since independence, demonstrated an apparent inability to deliver justice fairly and expeditiously, people navigating the system face unnecessary burdens and often opt for alternatives such as the traditional courts which are noted to be expeditious and timely in the delivery of justice.⁸⁵ At the personal level, even where courts uphold the principles of ‘innocent until proven guilty’, delays can cause an accused person to suffer emotionally and psychologically and they are often left to deal with social stigma and economic impairment until innocence is established. As Rajan and Kahn correctly note:

'Even if he is guilty, delay shakes his confidence in the system of criminal justice and makes him cynical. The impact of this drama does not confine itself to the accused but extends to his dependents who may be subjected to undue suffering. Worse is the effect of delay on the complainant, victim to whose traumatic suffering the system appears and is heartless.'⁸⁶

Furthermore, delays in the delivery of justice services has been noted to have other consequences such as the degradation of evidence and the loss of witnesses. In determining the broader impact of delay on the judicial process, Judge Fremr notes that:

⁸⁵ Human Rights Watch ‘South Sudan: Stop Delays on Hybrid Court’ available at <https://www.hrw.org/news/2017/12/15/south-sudan-stop-delays-hybrid-court> accessed November 2019.

⁸⁶ N V Rajan and N Z Kahn *Delays in the Disposal of Criminal Cases in the Sessions and Lower Courts in Delhi* (1982) 10.

‘The delays can lead to the degradation of evidence. Victims and witnesses can die or become unavailable, time can damage their memories and they become uncertain. Delays also compromise the rights of the accused, particularly if they are detained.’⁸⁷

In the criminal justice system of South Sudan, delays in the delivery of justice are epitomised by the massive backlog in cases in the court systems as well as the resultant overcrowding of correctional facilities. For example, evidence suggests that the criminal justice system is overwhelmed by substantial backlogs in cases which is made worse by the ongoing civil war and the insecurity it has caused in different locations of the country. The overcrowding of state prisons and detention facilities in South Sudan is a further indication that the criminal justice system is severely constrained in terms of the human and technical resources and logistics necessary to addressing the backlog.

While this study was not able to access a definite number of backlog cases in South Sudan, the extent to which they impact on the lives of people whose liberty and security of persons have been curtailed by being held in remand because they are suspected or accused of offenses cannot be disputed. Over the last five years, evidence suggest that the United Nations has collaborated with the South Sudan Ministry of Justice in supporting mobile court proceedings which is aimed at reducing substantial backlogs in cases in different locations of the country including Lakes State and Juba the capital.⁸⁸ Cumulatively, these efforts were successful in clearing over 400 case backlogs and addressing PAD in South Sudan.

Timeliness is a critical feature of access to justice. It establishes how delays in the dispensation of justice can impact the institutions and individuals involved in both demanding and delivering justice. Legal systems around the world have made several efforts in ensuring that the justice system is sensitive to the timing of its service delivery. Some of these include ensuring efficiency in case flow and management systems, capacity building for judicial and

⁸⁷ J Fremr *How to Eliminate the Setbacks in the Proceedings before the International Criminal Tribunal* (2010).

⁸⁸ See Reliefweb *UNMISS Delivers Long-awaited Justice in Western Lakes* (2019) available at <https://reliefweb.int/report/south-sudan/mobile-court-delivers-long-awaited-justice-western-lakes> accessed on 23 July 2019. See also United Nations *UNMISS supports national efforts to resolve juvenile court cases amidst COVID-19* (2020) available at <https://peacekeeping.un.org/en/unmiss-supports-national-efforts-to-resolve-juvenile-court-cases-amidst-covid-19> 12 September 2020.

legal officials and case tracking. The efficiency of these remedial actions in addressing delays is highly dependent on the available infrastructure, the political will of the government and the available funding.

In South Sudan, it is important to recognise that efforts have been made by the governments to put in place systems, ensuring that justice services are available and accessible to their populations. However, these services are provided within the confines of available resources and capacity which in the case of South Sudan are limited or severely constrained. For justice services to be effectively delivered, it is imperative that such services are accessible, affordable and timely. These preconditions are not optional, but essential to access to justice. Also encapsulated within these broad preconditions are other minor but equally essential and requirements of access to justice, including equality of access, non-discrimination, and all other tenets of a fair trial. It is these conditions and determinants that are used to assess the quality of access to justice.

4.4 ACCESS TO JUSTICE IN SOUTH SUDAN

Since independence in 2011, significant progress has been made in revitalising the justice and law enforcement sector in South Sudan. However, systemic challenges and limitations continue to impede access to justice for the indigent population. The role of the Government of South Sudan in bringing about and implementing reforms in the justice and law enforcement sector has been substantially complemented by actors including the UN mission and agencies and other development partners such as diplomatic missions and national and international non-governmental organisations.⁸⁹

A notable challenge, however, is the slow pace of reforms and the questionable political will in ensuring the full implementation of legal reform at all levels in South Sudan. While evidence suggests that some progress has been made in the development of systems to address these deficiencies, progress has been very slow and a very limited impact is felt by the population. As in other areas of governance, implementation of reforms in the justice and law enforcement sectors is also limited by inadequate and quality human and technical

⁸⁹ See UNDP South Sudan's Rule of Law and Access to Justice Programme (2014 – 2018) which has continued to support government in enhancing the functionality and effectiveness of the justice sector (2014). Available at http://www.ss.undp.org/content/south_sudan/en/home/projects/access-to-justice-and-rule-of-law.html accessed on 4 January 2018.

resources, especially in rural communities where access is limited and there are significant challenges with the infrastructure. Because of the slow pace of implementation of the reforms and improvements in the justice and law enforcement sector, policies, action plans and strategies are in most cases only partially implemented with evidence of such reforms mainly visible in the urban areas.⁹⁰

Furthermore, the access to justice and law enforcement situation in South Sudan is severely impaired by the ongoing civil war which has gained notoriety around the world for the alarming numbers of injudicious killings, regular attacks and the massive displacement of large swaths of the South Sudan population.⁹¹ With war and conflict a regular feature of large portions of the nation, and the provision of services at all levels of South Sudan frequently halted because of the high level of risks, it does not come as a surprise that a significant proportion of the population is unable to access remedies to their legal and justice needs. Also within the framework of conflict and insecurity, is the susceptibility of the affected population to multiple layers of vulnerability which impact directly on their ability to enjoy their human rights, including seeking and accessing justice.⁹² Moreover, considering the destabilising effect of the conflict, justice and law enforcement institutions and officials in South Sudan cannot function effectively, and people do not feel safe and are fearful for their lives and wellbeing. Therefore, accessibility to justice is limited by the fear and likelihood of harm – a situation that is hardly ideal for the delivery of justice services.⁹³

The other barrier to access to justice in South Sudan is one associated with social, economic, geographic, structural, and institutional factors which translates into a complex web of challenges involving huge costs and undue delays in the population accessing justice services.⁹⁴ Beyond these, evidence has it that limited awareness of the functionality of the justice and law enforcement system among the population of South Sudan impacts the confidence and trust of the people.⁹⁵ Also, the limitation in awareness among the population

⁹⁰ See UNDP *Access To Justice and Rule of Law Project Mid-term Evaluation Report* (2015) 2 – 8; and *Search for Common Ground End-line Evaluation: Facilitating Access to Justice in South Sudan* (2018) 6 - 12.

⁹¹ See chapter 3 at 23.

⁹² See Reliefweb *South Sudan: Humanitarian Access Snapshot* (April 2018) available at <https://reliefweb.int/report/south-sudan/south-sudan-humanitarian-access-snapshot-april-2018> and accessed on 16 August 2018. UNDP writes that '[i]n Jonglei, fighting forced the suspension of non-food items distribution to over 13,000 people in Pieri and Motot. Health clinics, schools, and INGO compounds were also looted during the same fighting.'

⁹³ S Gates, H M Binningsbø and T G Lie *Post-Conflict Justice and Sustainable Peace* (2007) 2.

⁹⁴ See chapter 1 at 14.

⁹⁵ S Van de Walleb 'Confidence in The Criminal Justice System: Does Experience Count?' (2008) *British Journal of Criminology* (2008) 3.

of how the law works impacts how legal problems are interpreted and decisions made on what actions to take or what remedies are available.⁹⁶ Barriers of this nature are usually occasioned by factors associated with the dysfunctionality of the legal system; incapacity and ineffectiveness of institutions and limited application and enforcement of laws. All of these issues and challenges plague the legal system and the administration of justice in South Sudan as a result of which there is a huge mistrust and lack of confidence in the system.

4.5 CONCLUSION

At the core of access to justice are the right of all people to seek and access justice, the effective functioning of justice and law enforcement institutions, access to counsel, and the equal benefit and protection of the law. Access to justice can only exist if certain preconditions exist, including a level of awareness of human rights and the law, the availability of services and the enabling environment for people to enjoy such rights and access those institutions. The prerequisites for accessing justice in South Sudan are very limited, resulting in an environment that is conducive to PAD.

Consequently, more efforts need to be put into ensuring that the enabling environment exists for the population to claim and enjoy this essential human rights. The ongoing civil war in South Sudan presents perhaps the most pressing of the challenges limiting access to justice. The combination of all these factors poses significant challenges to the effective delivery of services and the realisation of the right to access justice. In the ensuing chapter, the focus shall be placed on the contextual limitations and factors which contribute to and give rise to PAD in South Sudan.

⁹⁶ OECD and Open Society Foundation *Leveraging the SDG for Inclusive Growth: Delivering Access to Justice for All* (2016) 2 – 3.

CHAPTER FIVE: FACTORS CONTRIBUTING TO PAD IN SOUTH SUDAN.

5.1 INTRODUCTION

As already highlighted in previous chapters, multiple issues come into play when examining the factors contributing to PAD in South Sudan. This chapter examines three cardinal factors critical to the occurrence of PAD in South Sudan as including: (a) the geographic size of South Sudan particularly given the infrastructural constraints; (b) the limited financial, logistical support to justice and security institutions, and; (c) the limitation in human rights knowledge and capacity of justice institutions in South Sudan. Other factors which contribute to PAD in South Sudan are also discussed and include: the widespread corruption and abuse of office in the criminal justice sector; broad and far-reaching powers of the law enforcement and security forces; weak coordination of the justice and security sector; limited access to data from prisons, police stations and places of detention.

5.2 THE THREE CARDINAL FACTORS

5.2.1 Geographical size and infrastructural limitations

The geographical size of South Sudan poses significant development, administrative and logistical challenges to the effective governance of the country. As detailed in chapter two, the young nation covers a total landmass of 619,745 square miles¹ and shares borders with ‘five countries including Ethiopia, Kenya, Uganda, the Democratic Republic of Congo and the Central African Republic.’² South Sudan is sub-divided into ten (10) states representing the administrative subdivisions with each state being further divided into counties, payams and bomas.³ Even more than the number of states is the number of tribes amounting to forty and their associated dialects which is over a hundred thereby making South Sudan one of the most diverse nations on the African continent. While in some other contexts diversity is a source of national strength and pride, in South Sudan, this factor has proven to be a divisive element that the government is having to contend with regularly in holding the country

¹ World Atlas op cit note 69 at 26

² Ibid.

³ See chapter two page 26 on the geopolitical sub-divisions of South Sudan.

together.⁴

South Sudan continues to struggle in asserting full control over its territories, mainly due to underdevelopment and conflict. A significant portion of the territory of South Sudan remains underdeveloped with inadequate infrastructure required for effective governance and the provision of services.⁵ While evidence suggests some significant improvements in the infrastructure since independence, a large section of the rural communities in South Sudan continue to exist mostly in deprived conditions with limited access to the most basic services.⁶ Nowhere in South Sudan is more symptomatic of this infrastructural neglect than the contested locations where the civil war is most active. The roads linking communities are in terrible shape, especially in the rainy season, and is a crucial factor limiting access to basic goods and services for the rural population. In some locations, the infrastructure is so rudimentary that there are hardly adequate buildings for offices for state-level governance, including courthouses and police stations.⁷ The prolonged period of conflict in South Sudan and its impact on the functioning of institutions is a significant contributing factor to the severe neglect of the infrastructure in South Sudan.⁸

In reflecting on the weak state of the infrastructure and human resource capacity of South Sudan, the African Development Bank notes that: ‘... institutional capacity and infrastructure remain underdeveloped. Public authorities lack the qualified staff needed to implement regulations ... [including], ... specialised legal professionals to handle ... cases.’⁹ The situation of South Sudan’s infrastructure impacts the institutions of justice and law enforcement across the country. The thesis has demonstrated that it is in situations where conflict persist and infrastructure is weak that PAD flourishes.

In all, there are one hundred and fifty-three (153) police posts and stations across the country with Juba, the capital, having the highest number of thirteen (13) police stations and posts.¹⁰ With this limited number of police stations and posts in South Sudan, most areas

⁴ See M Jok ‘Diversity, Unity, and Nation Building in South Sudan’ in *Special Report United States Institute of Peace* (2011) where Jok recognizes the challenges which the young nation faces in ensuring that South Sudan’s linguistic and cultural diversity is harnessed to the advantage of the country and its people and not allowed to pose as an impediment to good governance, peace and prosperity.

⁵ See detailed presentation on the geography of South Sudan in chapter two page 26.

⁶ W House ‘Population, Poverty, and Underdevelopment in the Southern Sudan’ (1998) *The Journal of Modern African Studies* 27.2 at 20.

⁷ African Development Bank *South Sudan: An Infrastructure Action Plan A Program for Sustained Strong Economic Growth* (2013) 14.

⁸ Ibid at 13 – 17.

⁹ Ibid at 13.

¹⁰ The data on the number of courts is courtesy of Access to Justice and Rule of Law Programme of UNDP South Sudan.

especially rural communities lack the presence of law enforcement officers and rely on deployments to nearby communities for their security needs. In such scenarios, when a crime occurs and an arrest is effected, the suspect is held often for an extended period until the logistics are available and situation is right to facilitate the conveyance of the suspect or accused to a police station. This situation therefore renders PAD inevitable and an everyday challenge in these locations.

The infrastructure of the courts are also grossly inadequate in addressing the justice needs of the population of South Sudan. With the Supreme Court located in Juba and the branches of the Court of Appeal also located in Juba and the towns of Rumbek and Malakal,¹¹ all appeals are heard in one of these three locations. The High Courts are mainly located and accessible in the capitals of the ten (10) states. Below the High Courts, are subordinate courts known as the County Courts which, by law, are supposed to be established in each county but which is yet to occur. The incapacity of the judiciary to be fully functional in all the administrative divisions and sub-divisions of South Sudan impacts negatively on access to justice, the credibility of the court and the extent to which they can contribute to the occurrence of PAD in South Sudan.¹²

The limited presence of these vital justice and law enforcement institutions in most locations of the country has a direct impact on the prevalence of PAD in South Sudan. Within this framework, PAD is likely to occur at the pre-trial stage of criminal justice proceedings when for instance, people are arrested for a misdemeanour or felonious offence, in communities where there is no police presence, and have to be transported to the nearest post or station for processing. Evidence from South Sudan indicates that when people are detained away from their communities and homes, it does not only deprive them of necessary psychological support but also impedes their ability to seek and access bail.¹³ Once a person is arrested and detained on the suspicion and an allegation of an offence, the South Sudanese law provides that the prosecutorial process should commence with the presentation of the accused before a competent court for their arraignment. However, because the police posts and stations in South Sudan are often in locations far away from the courts and are often lacking in necessary logistics such as functional vehicles, fuel, lubricants and means of

¹¹ International Commission of Jurist 'South Sudan: Court Structure' (2014) Available at <https://www.icj.org/cijl/countryprofiles/south-sudan/south-sudan-introduction/south-sudan-court-structure/> accessed 12 January 2019.

¹² Ibid at 6.

¹³ H Alvin and Jr. Goldstein 'Selected Problems in the Administration of Criminal Justice' (1970) 1.

communication, accessing the court is a massive challenge.¹⁴ Many people held in detention in South Sudan are often left to bear the brunt of this situation with very few alternatives open to them.

5.2.2 *Limited budgetary and logistical support to the criminal justice and law enforcement sector*

This factor has already been alluded to in the previous section as contributing to the incapacity of institutions to deliver services in an effective and timely manner to the indigent population. In South Sudan as is the case in most developing countries, constraints in public financing and thus the availability of relevant logistics is a debilitating factor limiting the effective functioning of the justice and law enforcement institutions and impeding service delivery. For these institutions such as the police, prisons and the courts to function efficiently and prevent the occurrence of PAD in South Sudan, they need to be provided with the necessary funding to cover the cost of their operational requirements including the provision of basic logistics, equipment and resources.

For example, the budget allocated to the justice sector in 2018/2019 and 2019/2020 is indicative of the limitation in funding which has plagued the sector and the Government of South Sudan in general. For the 2018/2019 budget, a total of SSP 3,799,862,752 was allocated to the justice sector in South Sudan, which is equivalent to US\$ 29,229,713¹⁵ in today's exchange rate. While this allocation remains inadequate due to the magnitude of South Sudan's numerous challenges, proper management of the allocated funds would go a long way to improving service delivery. A review of the overall approved budget vis-à-vis the allocations made to justice and law enforcement institutions indicates that the priorities of the Government of South Sudan lie with the military.¹⁶ The table below provides the budgetary allocations to specific justice and law enforcement institutions for 2018/2019 and 2019/2020 in South Sudan:

¹⁴ R A Portada III, J H Riley and M D Gambone 'Security Sector Reform In South Sudan: Identifying Roles For Private Military And Security Companies' (2014) *Journal of Third World Studies* 31.2151 at 178.

¹⁵ Exchange rate as of 23 August 2020 is SSP 130 to US\$1.

¹⁶ The budget allocation for the Ministry of Defence & Veteran Affairs in 2018/2019 and 2019/20 are both three times more than the allocations to justice and rule of law institutions.

Figure 1: Allocations to justice and law enforcement institutions 2018/2019¹⁷

Institutions	Wages and Salaries	Use of Goods and Services	Capital Expenditure	Transfers and Grants	Interest, grants, loans & donations	Grand Total
MoJCA ¹⁸	47,321,138	78,032,125				125,353,263
Police	1,036,768,527	304,854,414	95,000,000	1,054,412,684		2,491,035,626
Prisons	83,839,551	69,795,216	47,500,000	739,045,201		940,179,968
JoSS ¹⁹	133,065,628	110,228,267				243,293,895
Total						3,799,862,752

Figure 2: Allocations to justice and law enforcement institutions 2019/2020²⁰

Institutions	Wages and Salaries	Use of Goods and Services	Capital Expenditure	Transfers and Grants	Interest, grants, loans & donation	Grand Total
MoJCA	47,321,138	130,113,516				177,434,654
Police	1,545,270,583	296,831,292		1,099,250,542		2,941,352,417
Prisons	161,309,764	95,564,833		806,045,400		1,062,919,997
JoSS	133,065,628	97,944,025				231,009,654
Total						4,412,716,722

While the budget allocation is by no means minimal by continental standard,²¹ it is a review of the figures in comparison to the magnitude of the challenges associated with the justice and law enforcement sector in South Sudan that raises concern. Moreover, the limitations in capacity of the justice and law enforcement sector both in terms of human resources, logistics and infrastructure in South Sudan means that the allocations have, for the most part, been grossly inadequate. Furthermore, the limitations in the infrastructural and functional capacity are coupled with other factors including mismanagement, misappropriation of funds, corruption and the large geographic size of South Sudan which all contribute to the justice and law enforcement sector being underfinanced.

With limited financial and logistical support to the justice and law enforcement sector in South Sudan, the operational and functional capacity of the key institutions is significantly

¹⁷ Table courtesy of the Ministry of Finance and Planning Republic of South Sudan Approved Budget Tables Fiscal Year 2018/19 (2018) 4. Available at www.mofep-grss.org › 2017/11 › book-final-1718-1, accessed on 12 January 2018.

¹⁸ Ministry of Justice & Constitutional Affairs.

¹⁹ Judiciary of South Sudan.

²⁰ Table courtesy of the Ministry of Finance and Planning Republic of South Sudan Approved Budget Tables Fiscal Year 2019/20 (2019) 2.

²¹ Uganda for instance allocated Ush 1,296 billion or US\$ 352,433 to the Justice/Law & Order sector in 2018/2019.

diminished. Within the context of limited financing and constrained resources, PAD has become a commonplace occurrence in South Sudan. In these instances, justice and law enforcement officials are made to function within the scope of available means and deliver services that are often of questionable quality.

Most police stations and posts in South Sudan are very poorly equipped and often require people approaching the institutions for services to procure implements including pens and paper and other necessities for their cases to be processed.²² Only a minimal number of police stations are provided with the requisite amount of vehicles to facilitate mobility and access to the communities they serve. Even where vehicles are available, the necessary provision for fuel and lubricants are not adequate.²³ Therefore, the police are not always able to facilitate the appearance of persons suspected or accused of committing offences in court, resulting in PAD and the infringement on the rights and dignity of people in detention.

Similarly, the Judiciary at the state level in South Sudan has demonstrated significant limitations in the sitting of circuit courts because of financial and logistical challenges. The requirements for circuit courts, among others include transportation, fuel, daily subsistence allowances and stationaries. The inadequacy and frequent unavailability of these logistics in the justice and law enforcement sector are significantly contributing to delays of cases, the congestion of the police cells, prisons and court system, the huge backlog in cases and the perpetuation of PAD.

As highlighted in the previous chapter, the United Nations had to provide support to the Ministry of Justice for mobile courts to sit and address the backlog in cases and reduce overcrowding in places of detention.²⁴ Until adequate resources are made available, their incapacity to deliver timely and quality services shall continue to be a core limitation in the prevention and response to PAD in South Sudan.

5.2.3 *Limited human rights knowledge and capacity of justice and law enforcement institutions.*

As noted in chapter three (3), an extensive range of rights covering civil, political, economic and social rights is provided for and guaranteed by the Bill of Rights in the Transitional Constitution of South Sudan.²⁵ This is in harmony with South Sudan's human rights

²² E LeBrun op cit note 41 at 11.

²³ A S Lokuji, A S Abatneh and C K Wani *Police Reform in Southern Sudan* (2009) 17.

²⁴ *Mid-Term Evaluation Report – UNDP Access to Justice and Rule of Law Project (2012 – 2017)* (2014) 36.

²⁵ See chapter three 47 – 55.

commitments as a signatory to several international human rights conventions.²⁶ In a demonstration of the political will to accord these rights, various institutions and mechanisms, including the South Sudan Human Rights Commission have been established to reinforce and uphold human rights.²⁷ However, translating national commitments into actions that impact the lives and wellbeing of people has been a major challenge. There have been limited efforts towards legislating complementary laws in furthering and facilitating the implementation on the constitutional provision for human rights.²⁸ The limited harmonisation between customary and statutory laws as well as the extensive lack of awareness present further challenges to human rights in South Sudan.²⁹

A key challenge in the promotion and protection of human rights in this context is the inadequate capacity of government officials, civil society and the general public to put systems and procedures in place for the effective implementation of the principles and standards of human rights.³⁰ There is a general limitation of knowledge and awareness of human rights, which is further aggravated by a general emphasis on customary law and belief systems. Evidence suggests that these customary laws and belief systems, as well as other forms of informal justice mechanisms, are in some cases incongruent with international human rights principles and standards.³¹ This situation is even more precarious given the nature of the South Sudan National Police Services which is made up of former fighters of the SPLA who before independence were mainly trained in guerrilla warfare.³² Against this backdrop, the propensity for rights violations including the use of PAD remains high among justice and law enforcement officers.

It is therefore no surprise that PAD continues to be practiced without consideration to its implications on the rights, dignity and wellbeing of the people it affect in South Sudan. A grounded knowledge and awareness of human rights among justice and law enforcement

²⁶ See chapter 3 note 102.

²⁷ See s 7 (1) of the South Sudan Human Rights Commission Act, 2009 which highlights the roles and mandate for the South Sudan Human Rights Commission. See also arts 9(4), 10, 145-6 of the Transitional Constitution of South Sudan 2011.

²⁸ UNDP *Paralegals Bring Justice to Women in South Sudan*. Available at <https://www.undp.org/content/undp/en/home/ourwork/ourstories/paralegals-bring-justice-to-women-in-south-sudan.html> and access on 30 March 2020.

²⁹ See chapter two at 21 – 24.

³⁰ IDLO *Towards a People Centered Human Rights State in South Sudan* (2016) 8 – 12.

³¹ M Kiye op cit note 96 at 32. For example, customary and traditional belief and practices such as male dominance early and forced marriage which are widely practices among the tribes of South Sudan disadvantage women and they are contrary to the spirit of the Transitional Constitutions and principles and standards of international human rights law.

³² See chapter 2 at 31.

officials will ensure that rights violations including PAD is identified in a timely manner and addressed before it becomes an endemic problem as it is today.

5.3 OTHER FACTORS CONTRIBUTING TO PAD IN SOUTH SUDAN

This study recognises that several other factors also play a significant role in contributing to PAD in South Sudan. The other factors discussed below are by no means less important than the three cardinal factors discussed above. However, the three cardinal factors are set aside to emphasise specific contextual limitations and challenges in South Sudan. The additional factors identified below are not peculiar to South Sudan. These include corruption, unchecked powers of law enforcement institutions, weak coordination, limited access to information, limited engagement and political will.

5.3.1 *Corruption in the justice and law enforcement sector*

A key governance challenge in South Sudan is the rampant and widespread nature of corruption, which includes bribery, extortion, political interference and nepotism.³³ These corrupt acts impact directly on the effective functioning and the quality of services within the broader governance framework, including the justice and law enforcement institutions. Corruption is so prevalent that South Sudan is ranked last out of 178 countries in its corruption index.³⁴ Anti-corruption measures undertaken by the government are viewed as a smokescreen as the country is yet to demonstrate a true commitment to the fight against corruption.³⁵ Key governance institutions continue to perform poorly in the delivery of services with the bulk of the blame directed at corruption and mismanagement.³⁶ The justice and law enforcement sector is no exception in this regard as one report after another raises the

³³ See sec 5 on interpretation of the South Sudan Anti-Corruption Commission Act 2009 where the act defines what constitute corruption in South Sudan.

³⁴ Transparency International 'Corruption Perceptions Index' (2019). Available at <https://www.transparency.org/en/cpi/2018/index/dnk> and accessed on 26 November 2019.

³⁵ S Deng Dut 'Criminal Justice Response to Corruption in South Sudan in Resource Material Series' (2017) 145. On 22 February 2015, South Sudan ratified the United Nations Convention Against Corruption However, South Sudan is yet to put in place requisite systems in ensuring effective compliance obligations arising from the convention.

³⁶ 'US Department of State reports that government officials frequently engage in corrupt practices, with total impunity, as officials suspected of corruption are only rarely investigated. Poorly paid and trained administrative staff, inefficient government bureaucracy, lax record keeping combined with a general lack of transparency and oversight provide both opportunities and incentives for corruption and rent-seeking behaviour.' See Transparency International *Corruption and Anti-Corruption in Sudan* (2012) Available at https://www.transparency.org/files/content/corruptionqas/342_Corruption_and_anti-corruption_in_Sudan.pdf accessed on 26 November 2019.

alarm on how this malaise is impacting the sector.³⁷ The Judiciary, the Directorate of Public Prosecution, the National Police of South Sudan, and the Corrections Services are all struggling to demonstrate the capacity to serve the purpose for which they were established. In reflecting on the challenge of corruption in South Sudan, the GAN Business Anti-Corruption Portal states that:

‘Corruption undermines the courts in South Sudan, which are also perceived as ineffective and overburdened (HRR 2015, ICS 2016). Almost two-thirds of citizens find the courts to be corrupt (GCB 2013). The South Sudanese constitution guarantees the judiciary’s independence; however, in practice, it is influenced by the executive (BTI 2016). Officials found guilty of corruption in South Sudan are unlikely to face sanctions as they are often protected by personal networks (BTI 2016).’³⁸

A classic example of how this results in PAD and impacts on liberty and security of South Sudanese is the commonplace situations where police officers arrest motorists on propped up charges in extorting money and soliciting bribes. Those who refuse to pay bribes are arrested and only released after the payment is made.³⁹

It is not just the judiciary; rather there is a generalised and widespread public perception of the police as also being corrupt and ineffective, which results in human rights violations such as PAD, limited public confidence in the capacity of the institution to enforce law and order and keeping the peace.⁴⁰ The reputation of the police has been significantly dented by frequent reports of police brutality and heavy-handedness and for rampant bribery, corruption, and impunity at all levels.⁴¹ It therefore comes as no surprise that PAD is a derivative of this system where accountability and performance is not prioritised.

The primary concern for governance and anti-corruption experts in South Sudan is that

³⁷ See reports such as the South Sudan Country Report (BTI 2018), *Fueled by Corruption, South Sudan War Enters Third Year* (IRIN 2018), *Weapons of Mass Corruption* (The Enough Project) which bemoans the rampant nature of corruption and the impact it was having on the development, the ongoing civil war and the peace and stability of the nation. Bertelsmann Stiftung *BTI 2018 Country Report* (2018).

³⁸ GAN Business Anti-Corruption Portal ‘*South Sudan Corruption Report*’ (2020) available at <https://www.business-anti-corruption.com/country-profiles/south-sudan/> accessed on 30 March 2019.

³⁹ Eye Radio *Traffic Police Officers Return to ‘Terrorize’ Juba Motorists* (22 January 2021) available at <https://eyeradio.org/traffic-police-officers-return-to-terrorize-juba-motorists/> accessed on 18 May 2021.

⁴⁰ United States Department of State, Bureau of Democracy, Human Rights and Labor *Country Reports on Human Rights Practices for 2015* (2016) 4.

⁴¹ Transparency International op cit 168 at 45.

corruption is allowed to flourish unabated despite the apparent impact on the quality of governance and service delivery and the general outcry from the public.⁴² There is an assumption that the lack of action by the government in curtailing the increased level of corruption, especially among law enforcement is due to rampant cronyism, as a significant number of the police officers today were former SPLA fighters who continue to be revered nationally and protected by the government.⁴³

Another form of corruption plaguing South Sudan which is contributing to PAD is the vast and visible political influence on the justice system and the judiciary in particular. Evidence suggests that the executive, SPLM and the military exert significant influence on the judiciary and other justice institutions. Consequently, the judiciary is not able to fully exercise the influence it should have on the governance system and process of South Sudan.⁴⁴ The interference by elements of the executive constitutes a clear and distinct breach of the Constitution of South Sudan, which calls for the separation of powers.⁴⁵ The interference by the executive in the judiciary came to a head in November 2017 when Kukurlopita Marino Pitia, a Judge of the Supreme Court of South Sudan, resigned over what he called a lack of independence of the judiciary. The Honorable Judge lamented that '[t]he judiciary lacks institutional independence, and the independence of judges and justices in performing their judicial function is interfered with and hence the guarantee of the independence of the judiciary by the Constitution and the law is a fallacy'.⁴⁶

Apart from the impact of corruption on good governance and service delivery, the high incidence of interference by the executive has resulted in a significant dent in the confidence of the public in the justice system in South Sudan.⁴⁷ With this heightened level of corruption in the justice sector and the resultant impact on human rights and ineffectiveness in the delivery of justice services, it is not surprising that this malaise has become a national concern and is posing as a significant deterrent to the development, peace and stability of

⁴² A S Lokuji et al op cit note 23 at 123.

⁴³ See chapter 2 at 31.

⁴⁴ Bertelsmann Stiftung's Transformation Index BTI '2018 Country Report South Sudan' (2018) 11.

⁴⁵ Section 122(2) of the Constitution of South Sudan.

⁴⁶ Reuters *South Sudan Supreme Court judge quits citing lack of independence* available at <https://www.reuters.com/article/us-southsudan-judiciary/south-sudan-supreme-court-judge-quits-citing-lack-of-independence-idUSKBN1DE20D> accessed on 23 March 2019.

⁴⁷ See International Commission of Jurist 'South Sudan: Independence and impartiality; Judicial integrity and accountability (2014) Available at <https://www.icj.org/cijlcountryprofiles/south-sudan/south-sudan-judges/south-sudan-independence-and-impartiality-judicial-integrity-and-accountability/> accessed on 30 March 2019.

South Sudan. In this contexts of rampant and unchecked corruption, PAD has flourished impacting on the rights and liberty of people.⁴⁸ The Open Society Justice Initiative notes that:

‘Corruption flourishes in the pretrial phase because it receives less scrutiny and is subject to more discretion than subsequent stages of the justice process, and often involves the lower paid and most junior actors in the system. Unhindered by scrutiny or accountability, police, prosecutors, and judges are able to arrest, detain, and release individuals based on their ability to pay bribes. Those caught at the nexus of pretrial detention and corruption suffer, and society as a whole also pays a high price.’⁴⁹

5.3.2 *Extensive and unchecked powers of the security sector*

Another factor contributing to PAD in South Sudan is the extensive and unchecked powers of the security sector. These institutions include the Police, the Prisons Service, National Secret Service and the South Sudan Strategic Intelligence Service and other auxiliary groups established by the government to undertake various types of security duties.⁵⁰ It can be presumed that South Sudan established its security apparatus to defend, preserve and protect an acceptable ‘way of life,’ and the protection of fundamental freedoms and local values.⁵¹ However, while the intentions of the Government of South Sudan in establishing a security apparatus and in establishing a system for national security could be assumed to be in good faith, how these institutions were constituted and now function raises many questions regarding their ability to effectively deliver the protection and services required of them. To understand how the security sector has been able to amass a tremendous amount of power in South Sudan, it is essential to comprehend the way in which some of these institutions came into being, are constituted and how they function.

The South Sudan Transitional Constitution established the SSNPS with a mandate of enforcing the law and explicitly prohibits other security apparatus from having any internal

⁴⁸ The Opening Society Justice Initiative’s ‘*Global Campaign for Pretrial Detention: Pretrial Detention and Corruption*’ (2017).

⁴⁹ Ibid.

⁵⁰ See chapter two at 28 – 33 on the security sector institutions.

⁵¹ L Lazarus and B J Goold ‘Security and Human Rights’ (2007) 1. They open their article by stating that, ‘[t]he attainment of security and the protection of human rights are not necessarily antithetical, either as a matter of fact or principle.’

law and order mandate.⁵² Article 55(2) (3), (b) and 85(1) of the Transitional Constitution also provides for the enactment of legislation for the establishment of the National Secret Service but goes on to make provision for explicit checks and balances on its powers and mandate. However, in disregard of the constitutional provision, the National Security Service Act⁵³ when enacted did not place the required constitutional limitations on the NSS and granted the institution extensive and far-reaching powers.

In providing for arrests and detention without a clear stipulation of the limits within which these powers are to be exercised, the National Security Service Act 2014 opens a door that allows for the abrogation of human rights and the perpetuation of PAD contrary to the provisions of national and international law.⁵⁴ With no reference to or mandate to comply with the safeguards provided by the constitution for the protection of human rights and fundamental freedoms including the right to a fair trial, liberty and security of persons and the presumption of innocence,⁵⁵ the likelihood of PAD is significantly increased and is the basis of concern among human rights campaigners and activists.

The Act provides that '[a]ny legislation governing the subject of this Act is hereby repealed, provided that any orders and proceedings taken or made under the repealed legislation, except to the extent cancelled by or otherwise inconsistent with this Act, shall remain in full force and effect.'⁵⁶ This provision of the National Security Service Act has been interpreted by the agency as superseding the constitutional provisions which place a check on the mandate of the NSS and its excesses.⁵⁷

Section 3 of the Transitional Constitution of South Sudan provides that:

⁵² Section 155 (1 & 2) South Sudan Transitional Constitution provides 'there shall be a police service to be known as the National Police Service which shall be a decentralized professional service. The mission of the Police Service shall be to: a) prevent, combat and investigate crime, maintain law and public order, protect the people and their properties; and b) uphold and enforce this Constitution and the law.'

⁵³ 2014.

⁵⁴ Section 13 of the National Security Service Act empowers the NSS to 'Arrest and detain suspects in accordance with the provisions of this Act in crimes related to National Security as provided for under s 7 of this Act.' Section 7 makes provision for acts that constitute crimes against the state.

⁵⁵ Section 19 of the Constitution of South Sudan provides that '[a]n accused person is presumed to be innocent until his or her guilt is proved according to the law.'

⁵⁶ Section 2 National Security Service Act 2014.

⁵⁷ Nuhavonic Foundation *National Security Service Bill of South Sudan* (2014) available at <http://www.nuhanovicfoundation.org/en/legal-instruments-6/national-security-services-bill-of-south-sudan/> accessed on 22nd April 2019.

- ‘(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 effect of the unchecked powers of arrest and detentions accorded to the NSS is a derogation of the constitution and allows the NSS to regularly exercise powers in contravention of the grand norm of South Sudan by arbitrarily arresting and detaining people they perceive as a ‘threat to national security’.⁵⁸

Another security institution that gained notoriety during the civil war for its use of oppressive tactics of PAD is what has come to be called South Sudan Strategic Intelligence Service (also known as Military Intelligence) which constitutes the intelligence wing of the SPLA. There are several reports of instances of arrest and detention which occurred as part of military operations which have not complied with established rules and procedures and which exceeds the mandate of the Military Intelligence.⁵⁹ As a result of the grant of these extensive powers of arrest and detention to these institutions, protection of the population from PAD remains inadequate and the rights to liberty and security of persons are significantly compromised.

South Sudan needs to use the various checks and balances in place to prevent and respond to the continued use of PAD by the law enforcement and security forces and in ensuring the protection of the rights and dignity of their citizens. While there is evidence that attempts have been made in using the courts to prevent the arbitrariness of these institutions,⁶⁰ the criminal justice system is powerless in the face of such sweeping powers

⁵⁸ See chapter 4 where reference is made to reports by UNMISS, Amnesty International and Human Rights Watch on the spate of prolonged and arbitrary arrest and detention which has not become a political priority as a human rights concern in South Sudan. As stated above there are incidences of arrest and detention carried out by the NSS which have amounted to political prosecution of South Sudanese who are considered to be supporters of political dissidents or others who are considered opponents of the government.

⁵⁹ See chapter 3 where reports by UNMISS, Amnesty International and Human Rights Watch highlights the role of the Military Intelligence in the use of PAD as a weapon of war.

⁶⁰ Human Rights Watch notes with concern that efforts by the Judiciary to limit the powers and arbitrariness NSS officials have been largely of little effect. Although the Transitional Constitutions and other laws provide for checks and balance on the use of such sweeping powers, they have in practical terms provided to be of very little effect in protecting people from abuse. See Human Rights Watch “*What Crime Was I Paying For?*” (14 December 2020) Available at <https://www.hrw.org/report/2020/12/14/what-crime-was-i-paying/abuses-south-sudans-national-security-service>

exercised by the NSS and South Sudan Strategic Intelligence Service and an apparent lack of political will to promote accountability.

5.3.3 *Weak coordination of the justice and security sector*

Another factor that contributes to PAD is the limited coordination between the various justice and law enforcement institutions in South Sudan. Coordination is a widely used sectoral management strategy that ‘... helps to create efficiency in the administration of justice, ensures inter and intra-sectoral harmony, addresses and resolves problems arising in the justice system and ensures that all agencies and institutions working in the administration of justice are working effectively.’⁶¹

The justice sector, especially with regards to criminal justice, is usually considered a chain comprising of multiple institutions established with diverse mandates and which gives rise to strong interdependence among the institutions for the effective functioning of the system.⁶² As such, the justice and law enforcement sector as a whole relies on an effective supply chain management system through which continued consultations, engagements and collaboration at different levels is required in ensuring that quality services are provided to the public.⁶³ The use of the supply chain management model in the justice and law enforcement sector is relevant to supporting the various institutions in integrating and coordinating the processes that take place across the institutional boundaries for efficiency and effectiveness.⁶⁴

Effective coordination of the justice sector is challenging, especially in a fragile and developing context such as South Sudan. A review of literature on the justice sector in South Sudan indicates that justice institutions mostly prefer a silo approach to the execution of their mandate. This is identified in a project baseline study conducted by Search for Common Ground⁶⁵ in South Sudan, which highlights limited coordination in the justice sector as a

⁶¹ J Otteh *Need for Justice Sector Coordination: Role of Stakeholders* (2017) 1. Available at https://nji.gov.ng/images/Workshop_Papers/2017/Refresher_Judges_and_Kadis/s3d.pdf accessed on 3 May 2019.

⁶² A Hondeghem, X Rousseaux and F Schoenaers (eds) *Modernisation of the Criminal Justice Chain and the Judicial System* (2016) 115.

⁶³ F Iannacci, A Seepma and S de Blok *Coordinating criminal justice: A Qualitative Comparative Analysis of Inter-Organisational Information Sharing of Four EU Member States* (2015) 1.

⁶⁴ *Ibid* at 1.

⁶⁵ ‘Search for Common Ground is an international non-profit organization operating in 36 countries whose mission is to transform the way the world deals with conflict away from adversarial approaches toward cooperative solutions.’ See Search for Common Ground *About Us* (undated) available at <https://www.sfcg.org/about-us/> accessed on 7 April 2019.

critical challenge that directly impacts the quality of service delivery. Search for Common Ground notes that:

‘With divergent strategies and goals, coordination across Ministries and institutions, especially in the criminal justice sector, is considered very weak mainly due to the lack of inter-agency cooperation or single agency leadership with the guidance of a multi-stakeholder steering committee.’⁶⁶

The study goes on to highlight the wastage of time and resources as a significant consequence of the lack of an integrated approach to justice service delivery in South Sudan.⁶⁷ In the previous chapter, the thesis demonstrates how such wastages of time and resources directly contribute to PAD and the infringement of the rights and liberty of the South Sudanese population.⁶⁸

The UN also recognises the lack of coordination as a critical challenge to the effective functioning of the justice system in South Sudan. UNDP notes that:

‘[m]ultiple development actors provide infrastructure, policy and capacity development in the rule of law sector at various levels of government. Without coordination, however, the aggregate benefit to sector reform and improvement of services is difficult to ascertain. There is a risk of poor development results where support is not coordinated to ensure sustainable results.’⁶⁹

Justice sector coordination mechanisms can be an effective remedy in reducing the burden of accessing services by citizens who are forced to navigate red tapes and barriers. UNDP also notes that the justice system, particularly at the statutory level remains overwhelmed with a considerable backlog in cases that results in accused persons, especially in rural areas, being held arbitrarily or detained on a prolonged basis in overcrowded detention facilities.⁷⁰

⁶⁶ Search for Common Ground ‘*Baseline Evaluation of the “Facilitating Access to Justice in South Sudan” Project*’ (2017) 10.

⁶⁷ Ibid at 27.

⁶⁸ See page 125 on corruption in the justice and law enforcement sector.

⁶⁹ UNDP ‘*Support to Access to Justice and Rule of Law Programme*’ (2013) 6.

⁷⁰ Ibid at 3.

In South Sudan, criminal justice institutions worked in silos thereby limiting information flow, accountability of institutions and resulting in undue delays in the delivery of justice services including addressing the backlog in cases. To address this challenge in South Sudan, UNDP supported the establishment of state and national level Rule of Law Forums which meet monthly in strengthening information dissemination, promoting coordination and engagement between the demand and supply sides, and reinforcing accountability in the criminal justice system. Key successes of the forums in the different states include up-to-date statistics on crimes and detention, collective decisions on responding to backlog in cases such as through circuit and mobile courts, regular court monitoring and reduction in incidents of PAD.⁷¹

There is also a considerable likelihood of duplication of interventions and wastage of resources where interagency collaboration and action are limited or non-existent. And finally, there are also the challenges of delay in the trial process, congestion of court dockets, the lack of prosecution of suspects for crimes committed, and perhaps, of most concern is that suspects spend an extended period awaiting trial – some for years.⁷²

In the African context, several models have been developed and interventions instituted, including the development of infrastructure, policy and capacity in reinforcing coordination.⁷³ These interventions have been designed to identify and address needs in the justice system, and the models are defined according to the political and legal culture. Without coordination, however, the aggregate benefit to sector reform and improvement of services is difficult to ascertain. A cohesive multi-disciplinary cross-agency approach to responding to justice sector coordination is essential to preventing and responding to PAD. Coordination of the justice systems can have a significant impact on the quality and

⁷¹ See chapter five at 123.

⁷² F J Donald Jr, P K Nora and R Michael Rempel *Collaborative Justice in Conventional Courts – Stakeholder Perspective in California* (2005) 9 – 11.

⁷³ In Sierra Leone for instance the ‘Justice Sector Coordination Office was established in June 2007 by the Government of Sierra Leone (GoSL) to serve as the main agent for the coordination of reforms in the justice sector.’ Its formation is steeped in a post-war reconstruction agenda, in which the need for a coordinated approach to reform of justice delivery institutions was among others prioritized as the main means of ensuring that the gains of political stability after the civil war are complemented by institutional reforms that seek to strengthen democratic good governance. See JSCO <https://jsco.gov.sl/about-jsco/what-we-do/>. A different model has been used in Tanzania where a National Criminal Justice Forum has been established in accordance with s 27(1) of NPSA which provides for the establishment of a forum ‘to create an opportunity for actors in the criminal justice sector to meet and discuss strategic issues involved in the administration of criminal justice’. While it is true to say that both models are not without challenges, putting such structures in place at least demonstrates an intent and have provided a basis for increased coordination and joint action in supporting the effective functioning of the justice sector. S E. Mchome ‘*The Civilianisation and Streamlining of the Prosecution System in Tanzania*’ (2015) 6 – 8.

timeliness of justice service delivery, as well as ensuring greater efficiencies and an effective channelling of resources.⁷⁴

5.3.4 *Limited information, engagement and political will.*

The limited availability and access to quality data from justice and law enforcement institutions including prisons, police stations and other detention facilities is a further challenge to justice and law enforcement and the occurrence of PAD.⁷⁵ This deprives the Government of South Sudan of an essential tool for adequately detecting and recognising that PAD is a problem requiring action.⁷⁶ Furthermore, the shortage or unavailability of data means that the capacity of the government to make informed decisions including the introduction of corrective measures and effectively channelling resources in addressing the root causes of PAD is significantly diminished.

Another factor contributing to PAD is the limited engagement between the justice and law enforcement institutions and the citizenry.⁷⁷ Engagements and interactions between the institutions which are established to provide justice and law enforcement services to the people they serve are a critical requirement of good governance. This engagement is recognised as an accountability mechanism that enables service providers to receive feedback in the form of appreciation or concerns from the public and end-users over the services they provide. This level of engagement is minimal in South Sudan's justice and law enforcement sector thereby weakening accountability mechanisms and in holding the government accountable for PAD. The UNDP-facilitated and led Rule of Law Forum is an example of how effective engagement between the demand and supply sides of the justice and law enforcement sector can provide effective prevention and response to PAD. UNDP notes that:

‘The monthly Rule of Law forum serves as one of the few open venues for citizens to talk and interact directly with law enforcement agencies, and for law enforcement agencies to transparently share their data with local communities. Representatives from the police and prisons service share specific figures at each

⁷⁴ UNDP op cit. 68 at 132. See example of how improved coordination through the Rule of Law Forums impacted on the quality of justice services and reduced PAD.

⁷⁵ R Harmon ‘Why Do We (Still) Lack Data On Policing?’ (2013) *Marquette Law Review* 96:1119 at 1125.

⁷⁶ OSCDC ‘Data Challenges’ in *Global Studies on Homicide* (2015) 90 – 107.

⁷⁷ P Talekar op cit note 69 at 109.

meeting on prisoner and case counts, and candidly talk about logistical challenges they are facing.’⁷⁸

This relates directly to another factor contributing to PAD, namely, a limited political will to prevent and respond to the issue. Concerns over the high prevalence of PAD as a specific human rights violation and abuse have been expressed by the UN and other human rights and humanitarian organisations in South Sudan. There have been several appeals to governments for action to be taken in ensuring that this blatant abuse of the rights and dignity of people are curtailed.⁷⁹ This call highlights the need for the government to be the leading campaigner for human rights and in the case of PAD to be seen as holding institutions accountable for the way they treat individuals who are suspected or accused of crimes. However, the approach taken by the government in addressing PAD has either been one of open indifference, very inadequate or nonexistent response.⁸⁰ Until the government is willing to demonstrate an interest in preventing and responding to PAD and taking concrete steps in ensuring that the institutions and individuals accused of the gross violation of human rights are made to account for their actions, PAD will continue to be an ever-present reality in South Sudan.

5.4 CONCLUSION

The factors identified in this chapter collectively pose significant limitations on efforts towards promoting and protecting the rights to liberty and security of persons as provided for under international law and the Transitional Constitution of South Sudan. Furthermore, the impact of these factors on the current drive towards peace and stability in South Sudan cannot be overstated. A good understanding of how PAD impacts the rights and dignity of the people in South Sudan is an absolute imperative in determining and deciding on mitigating measures and solutions in preventing and responding to PAD. In the following chapter, the thesis shall

⁷⁸ UNDP *Community Embraces Collective Responsibility for Rule of Law in Torit* (2018) available at https://www.ss.undp.org/content/south_sudan/en/home/presscenter/articles/2018/community-embraces-collective-responsibility-for-rule-of-law-in-.html accessed on 22 April 2020.

⁷⁹ The OSCE stresses that political will is a critical element in addressing all human rights abuses especially in protecting human rights defender. OSCE *‘Political will the key to ensuring the protection of human rights defenders, say participants at OSCE conference in Bern.’* Available at <https://www.osce.org/cio/119655> accessed on 12 May 2019.

⁸⁰ See the Open letter to Salva Kiir on the ratification of the African regional human rights instruments by Amnesty International South Sudan. Available at <https://www.amnesty.org/en/documents/afr65/1435/2015/en/> accessed on 12 May 2019.

draw on the information and analysis from this chapter in determining the impact of PAD. A determination will be made on appropriate systems to be put in place in furtherance of accountability mechanisms at all levels in the justice and law enforcement sector in preventing and responding to PAD in South Sudan.

CHAPTER SIX:

THE INEVITABILITY AND IMPACT OF PAD IN SOUTH SUDAN

6.1 INTRODUCTION

This chapter examines the hypothesis of PAD as an inevitable component of the justice and law enforcement system and how it impacts the delivery of justice services in South Sudan. The chapter firstly reviews how PAD has become a dilemma for the criminal justice system torn between the need for the provision of criminal justice services while recognising that the provision of such services has the potential to lead to the violations of human rights. The chapter moves on to identifying, evaluating and analysing the impact of PAD at three primary levels including the individual, communal and state levels, respectively. The chapter concludes with the identification of various mechanisms in the South Sudanese context in promoting accountability for PAD and provides an analysis of the issues and challenges impeding the effective adaption and implementation in South Sudan.

6.2 PAD A DILEMMA FOR THE CRIMINAL JUSTICE SYSTEM IN SOUTH SUDAN

In all jurisdictions, including that of South Sudan, the criminal justice system is established as the state machinery for the prevention and response to crime. The criminal justice system investigates and demands accountability for acts and omissions which amount to a crime and for ensuring and reinforcing the safety and security of individuals, groups and communities.¹ In furthering the discussion on the purpose of the criminal justice system, the British House of Commons Committee on Public Accounts notes ‘that the criminal justice system [...] investigates, tries, punishes and rehabilitates people who are convicted or suspected of committing a crime ... [and that] a functioning criminal justice system is at the core of a functioning civil society.’²

According to the United Nations Office on Drugs and Crime (UNODC), the prevention and response to crime ‘comprise strategies and measures that seek to reduce the risk of crimes occurring, and their potentially harmful effects on individuals and society,

¹ P Sallmann and J Willis *Criminal justice in Australia* (1984) 6.

² See Commission on Human Rights in South Sudan *Human Rights Council Report* (2020) s V para 25.

including fear of crime, by intervening to influence their multiple causes.’³ Without this essential service by the state through its criminal justice system, there would be disorder and chaos in human communities globally.⁴ The prevention and response to crime is, therefore, an imperative in the modern human community and more particularly in a context such as South Sudan which is characterised by volatility and instability partly arising from the civil war.

As is the case in other contexts, the justice and law enforcement system of South Sudan is made up of several institutions, including law enforcement, prosecution, defence counsels, courts, and corrections.⁵ These institutions need to be in place and fully functional in ensuring that they can make a collective contribution to identifying, investigating and demanding accountability for crimes and that this process is effectively coordinated and harmonised.⁶ However, as noted in earlier chapters,⁷ the provision of this essential service in preventing and responding to crime is significantly impacted by various contextual and institutional challenges and limitations. In chapter five it is noted that these factors have contributed to the diminished quality of services, limited trust in the justice system and undermining of the rights and dignity of people.⁸

South Sudan finds itself in a difficult conundrum where law and order must be preserved through the prevention and response to crime while also being mindful that the provision of this vital service has the potential to result in violations of the human rights of people if not carried out effectively. However, in such a volatile context as South Sudan where the rate of crime remains high and instability continues to be a challenge, it is neither suggested nor advised that efforts towards the prevention and response to crime should be abandoned or minimised. Nor at any point would it be acceptable that the rights and dignity of the people of South Sudan should be sacrificed to crime prevention and response. Instead, the provision of crime prevention services should be conceived of as complementary and reinforcing of human rights.⁹ Where this mutually reinforcing relationship exists between crime prevention and human rights, the effective performance of one reinforces the other and

³ UNODC *Guidelines for the Prevention of Crime* ECOSOC Resolution 2002/13 (2003) para 4.

⁴ G Walters *Crime and Chaos: Applying Nonlinear Dynamic Principles to Problems in Criminology* (1999) 12.

⁵ See ss V and VI of chapter two 33.

⁶ House of Commons Committee of Public Accounts *Efficiency in the Criminal Justice System – First Report of Session 2016–17* (2016) 4.

⁷ See s II of chapter four on the three cardinal factors contributing to PAD.

⁸ See chapter five 108.

⁹ M C Bassiouni ‘Human Rights in The Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’ (1993) *Duke Journal of Comparative & International Law* 3:235 241.

the neglect of one diminishes the other.

Crime prevention and human rights interact at multiple levels. In the first place, human rights law provides one of the standards by which crime prevention and response are generally evaluated. The UNODC reinforces this discourse by stating that ‘[t]he rule of law and those human rights which are recognised in international instruments to which the Member States are parties must be respected in all aspects of crime prevention. A culture of lawfulness should be actively promoted in crime prevention.’¹⁰ Any response to crime should be carried out with due cognisance to the basic principles and standards of human rights as provided for under national and international law. Therefore, at no point in the criminal justice chain should PAD be allowed or justified in the name of justice service delivery.

This requires the Government of South Sudan to publicise and promote the human rights responsibilities of justice and law enforcement institutions through capacity building of officials in the sector. Promoting the human rights responsibilities of justice and law enforcement institutions will be discussed at greater length as part of recommendations in the following chapter. Being cognisance of human rights in the provision of justice and law enforcement services collectively provides a safeguard in ensuring that the criminal justice process including the prevention and response to PAD is free from prejudices and biases, which impact the quality of justice and the satisfaction it brings. Prof. Bassiouni reflecting on the relevance of human rights in the criminal justice process notes that ‘[t]hese safeguards are important protections against abuses of power which affect the life, liberty, and physical integrity of individuals.’ He concludes by admonishing that without these rights ‘the potential abusive exercise of power by states, democracy could not exist.’¹¹

6.3 PAD AS AN INEVITABLE AND UNDESIRABLE COMPONENT OF THE CRIMINAL JUSTICE SYSTEM

As already noted PAD is a significant threat to the justice system and the peace and stability of South Sudan. Earlier chapters focused on how PAD is occasioned by various factors and the limiting effect it can have on the operations and functional effectiveness of the justice and law enforcement institutions. This section will examine the question of whether PAD has

¹⁰ UNODC *United Nations Standards and Norms in Crime Prevention At your fingertips* (2012) para 12.

¹¹ *Ibid* at 135.

become an inevitable component of the criminal justice system in South Sudan.

6.3.1 *The inevitability of PAD in South Sudan*

In determining the question of the inevitability of PAD in South Sudan, the following definition of inevitable is adopted: namely, the inability to avoid or circumvent the occurrence of an event.¹² The question that arises is whether, in the current context of South Sudan, PAD has become an inevitability arising from the enforcement of the law and the administration of justice. Global experiences show that human right violations and abuses including PAD are more likely to occur where issues of corruption, instability, insecurity and bad governance are evident.¹³ In such contexts, justice and law enforcement institutions, like other governance institutions, find it extremely difficult to meet the demands for services from the populations they serve.

In reflecting on the impact of conflict and instability on service delivery, the World Bank notes in its World Development Report 2011 that:

‘Access to good quality basic services is essential to improve the daily living conditions of the poor, and to realise their full potential to participate in the economy and contribute to the country’s development. Service delivery is especially important in FCA¹⁴ states, where progress towards the MDGs¹⁵ is well off track. [...] And security is essential for people to get on with their lives in relative peace and safety. Yet much of the basic infrastructure to deliver services is often damaged or destroyed, with severe shortages of trained personnel and supplies. Furthermore, the breakdown of social order through conflict often translates into the systematic exclusion of certain groups along ethnic, religious, political and gender lines. If not addressed, these

¹² See the Black Law Dictionary available at <https://thelawdictionary.org/inevitable/> accessed on 2 September 2019

¹³ See S Rose-Ackerman *The Challenge of Poor Governance and Corruption* (2004) 7. See also USIP *Governance, Corruption, And Conflict: A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors* (2010) 16.

¹⁴ Fragile and Conflict Affected.

¹⁵ Millennium Development Goals.

inequities can quickly lead to further violence and disorder.’¹⁶

Issues of corruption, instability, insecurity and bad governance, all have a telling effect on the nature, types and quality of service delivery at all levels. One of the services which is significantly impacted by the above-listed situation and challenges is justice and law enforcement. The prevalence of corruption, instability, insecurity in South Sudan has rendered justice and law enforcement institutions dysfunctional and incapable of providing the quality of services required by the population. And we have seen from earlier chapters how this situation ultimately result in PAD and the abrogation of the right to liberty and security of person in South Sudan.

Conflict and insecurity in South Sudan are also recognised as critical impediments to justice and law enforcement service delivery and factors which render PAD inevitable. In recognising the impact of conflict on the effective functioning of justice and law enforcement institutions, UNDP notes that ‘[t]he breakdown of the rule of law is the most significant indicator of an escalating conflict, and thus critical to conflict prevention. In the aftermath of a conflict, the rule of law is paramount in creating a safe and secure environment in which recovery can take place.’¹⁷ The above extract from the World Bank also discuss how conflict and insecurity exacerbates the exclusion of people from services based on ethnicity, religion, political persuasion and gender – issues which are also contentious in the South Sudan context. Reports of the arbitrary arrest of people deemed to be sympathisers and operatives of the opposition or on the basis of tribe abounds in the press and details of how they suffer arbitrarily, and prolonged periods of detention is a constant cause of concern in South Sudan.¹⁸

The erosion of the rights of the liberty and security of person in South Sudan is further exacerbated by the incapacity of justice and law enforcement institutions to function effectively in an instable and unsafe context. Active conflict and the high level of instability in the context of South Sudan impedes deployments and results in the complete absence of

¹⁶ M Baird *Report Service Delivery in Fragile and Conflict Affected States* (2010) para 4 at 6.

¹⁷ UNDP *Strengthening the Rule of Law in Conflict-and Post-Conflict Situations – A Global UNDP Programme for Justice and Security 2008-2011* (2007) 5.

¹⁸ Human Rights Council *Report of the Commission on Human Rights in South Sudan* A/HRC/40/69 (2019) 6 para 27.

justice and law enforcement officials.¹⁹ Justice and law enforcement institutions in South Sudan ‘... suffer from a dearth of personnel, many of whom may have fled during the conflict ...’.²⁰ Other impact of conflict and instability in South Sudan includes displacement, longer and unsafe distances to the locations of justice and law enforcement institutions, vulnerability to violations and abuse and limited access to legal aid.²¹ All of these factors render PAD inevitable in South Sudan.

With the safety and security of the local population as well as government officials a constant concern, and physical access to justice and law enforcement institutions almost impossible, the prospect of justice institutions functioning effectively in South Sudan is highly improbable as it is in these conditions that PAD is more likely to occur and flourish. The direct and practical correlation between conflict and the resultant instability, insecurity as well as the negative impact on the functionality of justice and law enforcement institutions lends credence to the hypothesis on the inevitability of PAD in South Sudan.

The links between conflict and dysfunctional institutions are particularly evident in Unity and Jonglei States in South Sudan which has been significantly impacted by the conflict.²² In these locations, conflict and instability has rendered communities inaccessible and governance institutions including the justice and law enforcement sector completely dysfunctional and unable to deliver quality services to the South Sudanese population.²³ For example, in 2017, the United States Agency for International Development (USAID) estimates that only a total of 120 judges were deployed in South Sudan the majority of whom were in locations not affected by the conflict.²⁴ In the face of challenges ranging from concerns over safety and security, limited deployments and inaccessibility of justice and law enforcement and institutions, PAD is more likely to occur and flourish.

¹⁹ UNODC *Criminal justice reform in post-conflict States A guide for practitioners* (2011) 9.

²⁰ Ibid. The USAID recognizes the impact of the conflict and instability in South Sudan as partly contributing to the limited number of deployments of justice and law enforcement officials, which in 2017 was estimated at only 120 nationwide. Other factors that limit access to justice include poverty, language barriers, long distances to courts for rural residents, illiteracy, lack of understanding of legal rights, gender bias, ongoing conflict, and a lack of access to legal representation

²¹ United States Agency for International Development *Democracy, Human Rights, and Governance Assessments Task Order South Sudan* (2020) 14.

²² Office of the Deputy Humanitarian Coordinator for South Sudan *Crisis Impacts on Households in Unity State, South Sudan, 2014-2015* (2016) 23 – 25.

²³ REACH ‘*Situation Overview: Unity State, South Sudan*’ (2018) 1 – 8.

²⁴ USAID op cit. 17 at 156.

Other issues to be considered in the determination of the hypothesis on the inevitability of PAD include the geography, underdevelopment and logistical challenges and limitations of the South Sudan context. Because of the geography of the country, the inevitability of PAD arises from the limited coverage of justice and law enforcement, which directly results in the inadequate access of the populations to justice institutions and remedies. In chapter two the limitation in development, especially in relation to the infrastructure of the rural regions of South Sudan is emphasised.²⁵ Underdevelopment and limited infrastructure directly impacts on the effective functioning of justice and security institutions and the accessibility of justice.²⁶ This factor has been discussed and acknowledged to contribute in no small way to PAD in South Sudan.

In concluding, it is safe to say that as long as the conditions discussed above including conflict and instability, the limitation in infrastructure and logistics, limited human rights awareness and capacity continue to exist, PAD will without doubt be an inevitable component of the criminal justice system in South Sudan.

6.4 THE IMPACT OF PAD

In this section, the impact of PAD on the South Sudan context is examined at the individual, family, communal and state levels.

6.4.1 *The impact of PAD on the individual and the family*

Professional and academic research on the effects of detention demonstrates that PAD can severely affect the mental and socio-economic situation of individuals.²⁷ Research also shows that the impact of PAD can have a ripple effect on family members of those who are experiencing or have survived the ordeal. In South Sudan, empirical evidence suggests that detention disrupts the social support structure that individuals enjoy from their immediate and close relatives. Such support structure includes the provision of food and other essentials

²⁵ See chapter 2 at 2.

²⁶ The Institute of Security Studies in a comparative analysis of the access to justice in Sierra Leone, Tanzania and Zambia notes that ‘provision of adequate infrastructure and resources (human and financial) would go a long way in reducing case backlogs and ensuring that the poor have access to justice - providing such resources reach their intended targets.’ See R Bowd *Access to Justice in Africa Comparisons between Sierra Leone, Tanzania, and Zambia* (2009) 4.

²⁷ European Court of Human Rights ‘Factsheet – Detention and Mental Health’ (2019) 1.

including soap, medication and clothing etc. The International Committee for Red Cross (ICRC) notes that due to prolonged detention in South Sudan, more of such demands is placed on the families resulting in psychological and financial pressures and where detention occurs in locations outside communities of residence, the detainee is cut off from this vital source of support.²⁸

Empirical evidence suggests that prisons and other detention facilities are detrimental to the mental health of inmates due to the prevailing unhealthy and unsafe conditions which are further exacerbated by the ongoing conflict and its traumatic impact on the population.²⁹ The situation in many prisons and places of detention in South Sudan are likely to aggravate the mental health conditions of people experiencing and having survived detention. These factors include overcrowding, acts of violence, solitary confinement and insufficient health care services in prisons. Consequent to these factors, the risks to the detainees including mental health and suicide associated with depression caused by the cumulative effects of conditions of prisons and other places of detention is likely to occur.³⁰ Mental health is acknowledged as a critical health challenge in most detention facilities in South Sudan. For instance, in the absence or as a result of the inadequacy of specialised facilities in the country, people suffering from mental illness are held in prisons as a safeguard in preventing harm to themselves and others.³¹

Several cases have reflected on the causal link between detention and mental health. Most of these cases focus on the impact of detention on the individual concerned and how, as a result of the conditions of their arrest and detention, they suffer varying forms of mental health deterioration. One of such cases is African Commission case of *Egyptian Initiative for Personal Rights, et al. v Egypt*³² where the Egyptian authorities arrested, detained, interrogated, tried and sentenced three individuals to death on the allegation of their involvement in bomb attacks. The victims argued that were subjected to torture and cruel,

²⁸ International Committee of the Red Cross *South Sudan: Detainees lose vital support as families flee violence and food insecurity* available at <https://www.refworld.org/topic,50ffbbe582,50ffbbe5ee,59c3c3494,0,,COUNTRYNEWS,SSD.html> accessed 10th October 2019.

²⁹ See the House of Commons Committee of Public Accounts 'Mental Health in Prisons' Eighth Report of Session 2017–19. Available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/400/400.pdf> accessed on 24 January 2019.

³⁰ WHO and ICRC *Mental Health And Prisons – Information Sheet*. Available at 2019.

³¹ Amnesty International *Our Hearts Have Gone Dark* (2016) 26.

³² Communication 334/06

inhuman or degrading treatment among others, contrary to art 5, 7 and 26 of the ACHPR. The Commission rule that the victims' rights under Article 5 ACHPR on the freedom from torture and cruel, inhuman or degrading treatment were violated through the physical harm they suffered and the resultant mental health deterioration while in detention. The Commission also highlighted the failure of the Egyptian authorities to provide medical services to the victims.³³ The situation of detention in South Sudan is even more dire than those highlighted in the *Egyptian Initiative for Personal Rights, et al. v Egypt* and is having the same impact on the mental health of people suffering PAD.

Regarding children, there is ample evidence that the effects of separation from parents can be harmful to their wellbeing and development.³⁴ The fundamental rights and welfare of children may also go unattended when parents are arrested and detained. Evidence suggests that children become highly vulnerable and are exposed to multiple risk factors when the parents and caregivers are held in detention.³⁵ The World Health Organization (WHO) associates the high number of street and unaccompanied children in South Sudan to the absence of parent and competent caregivers.³⁶ And in South Sudan the absence of parents and caregivers is mainly due to separation resulting from death, the conflict and insecurity and detention.³⁷

PAD may result in multiple traumas in children which in some situations are triggered by the forcible arrest and removal of the parent or caregivers. The trauma often arises from the unexpectedness and abruptness with which they lose their caregiver, and subsequently, the removal from a familiar home environment.³⁸ In her book 'The Burden of Deportation on Children in Mexican Immigrant Families, Joanna Derby notes that:

³³ See also *Romanov v Russia* 63993/00 [2005] ECHR 933 European Court of Human Rights 24 February 2005 where the ECHR ruled that the conditions of detention amounted to inhuman and degrading treatment. See also *Rupa v Romania* (2008) Application No. 58478/00 where the court ruled that due consideration should have been given to the vulnerability of the applicant and that the conditions of detention coupled by the lack of care had led to the worsening of his mental health situation. See J Cleveland, C Rousseau *Psychiatric Symptoms Associated With Brief Detention of Adult Asylum Seekers in Canada* (2013) *CanJPsychiatry* 58:7.

³⁴ A Mooney, C Oliver and M Smith *Impact of Family Breakdown on Children's Well-Being Evidence Review* (2009) 7 – 9.

³⁵ American Orthopsychiatry Association 'The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families - A Report for the Inter-American Human Rights Court' in (2014) *American Journal of Orthopsychiatry* 5 at 5.

³⁶ World Health Organization *Working with Street Children: Module 1 Profile of Street Children* (undated). Available at https://www.unodc.org/pdf/youthnet/who_street_children_module1.PDF accessed on 18 June 2021.

³⁷ *Ibid.*

³⁸ J Mcleigh *Young Adults in Conflict: Confident but Struggling, Networked but Disconnected* (2014) 9 - 17.

‘Chronic separation from a caregiver can be extremely overwhelming to a child. Depending on the circumstances and their significance, the child can experience these separations as traumatic. They may be sudden, unexpected, and prolonged, and can be accompanied by additional cumulative stressful events.’³⁹

In May 2020, the Judiciary of South Sudan in collaboration with UNICEF and UNMISS facilitated the release of eighty-five (85) children in detention as part of the COVID prevention and response measures in South Sudan. Concerns were expressed over the conditions under which the children were detained which were noted to expose them to risk of infection and compromising their general wellbeing. Both UN agencies were also apprehensive over the incapacity of the criminal justice system to cater for the special needs of children in conflict with the law.⁴⁰

On the socioeconomic impact of PAD, several studies have shown how it affects people and their families and acknowledged its harm on their individual and collective developments, mainly as related to the poor and vulnerable.⁴¹ The socioeconomic effects of PAD can be felt at all levels of the human community where it is acknowledged to exacerbate poverty.⁴² The socioeconomic impact of PAD goes beyond the prisoners and other detainees to impact directly and indirectly on the extended relations of persons in detention.⁴³ People who lack economic empowerment are vulnerable to most social challenges and more likely to come into conflict with the law or find themselves entangled in the unforgiving web of the criminal justice system.⁴⁴ The lack of access to essential resources means poor people run a

³⁹ National Child Trauma Stress Network *Children with Traumatic Separation: Information for Professionals*. Available at www.NCTSN.org accessed on 29 September 2019.

⁴⁰ UNICEF *UNICEF Welcomes Release of 85 Children from detention in South Sudan* (2020) available at <https://www.unicef.org/press-releases/unicef-welcomes-release-85-children-detention-south-sudan> accessed on 18 June 2021.

⁴¹ C Patler *The Economic Impacts of Long-Term Immigration Detention in Southern California* (2013) 1 - 6.

⁴² Open Society Justice Initiative and UNDP *The Socioeconomic Impact of Pretrial Detention* (2010) 21.

⁴³ K Brabeck *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families: A Report for the Inter-American Human Rights Court* (2014) 4 – 8.

⁴⁴ R M Gisselquist ‘Legal Empowerment and Group-Based Inequality’ in (2019) *The Journal of Development Studies* 337.

far higher risk of PAD when they come into contact with the law and while awaiting trial because they are unable to meet the bail conditions.⁴⁵

Furthermore, people who are limited by access to and ownership of resources are unable to cope with the socio-economic trauma of detention. Evidence suggests that such people are more likely to become trapped in the fight to address issues such as homelessness and nutrition.⁴⁶ Experts in the criminal justice system and prison reform note that PAD is also associated with the loss of employment and income during and after detention.⁴⁷ PAD places tremendous stress on the family unit, which has a diminishing effect on the socioeconomic stability of detainees and their families. In assessing the impact of pre-trial PAD in Kenya, Mozambique and Zambia, the Open Society Initiative for Southern Africa (OSISA) stated that:

‘The majority of detainees are of prime income-earning age, have basic education, and live with their families. Their families are not wealthy and have incomes which are highly reliant on the income and non-monetary support formerly generated by the detainees ... Many detainees were responsible for the entire household income: among men, more than two-thirds contributed the entire household income, while among women more than 40% contributed the entire household income. The continued incarceration of the detainee, in the majority of instances, more than halves the family’s income, and places additional economic and social strain on the family, including the cost and burden of visiting the detainee over extended periods.’⁴⁸

While the thesis was unable to access specific case studies on the manifestations of the socioeconomic impact of PAD on survivors and their relations, the lessons derived from other contexts could be applied in South Sudan. The socioeconomic impact of PAD on survivors and their families is manifested through a variety of factors and forms including the loss of employment and a reduction in disposable income, diminished social standing and

⁴⁵ Open Society Justice Initiative *Pretrial Detention* (2008) 2.

⁴⁶ *Ibid* at 339.

⁴⁷ T Thornberry *RACE, Socioeconomic Status and Sentencing in the Juvenile* 1973) .

⁴⁸ Open Society Initiative for Southern Africa (OSISA) *The Socio-Economic Impact of Pre-Trial Detention in Kenya, Mozambique and Zambia* (2016) 2 – 3.

protection from the community and in some case exclusion from services. The impact of PAD is even more severe in rural, and conflict affected communities in South Sudan where the capacity of the state is limited in providing financial assistance and support to individuals and families.

6.4.2 Impact of PAD on the rights of the individual

The human rights implications of PAD on the individual and the state has been discussed above and will only be presented as a summary in this section. PAD is a violation of the right of the individual to be protected from the deprivation of liberty and the security of persons. The curtailment of the fundamental freedom, liberty and security of people constitutes a human right's violation for all irrespective of origin, race, sex and creed particularly where they interact with the criminal justice system. The right to liberty is recognised in the national laws of South Sudan. It is acknowledged as a fundamental right in the Bill of Rights forming part of the Constitution.⁴⁹ The arbitrary arrest of people and prolongation of detention is in contravention of law in South Sudan.

6.4.3 Impact of PAD on states and communities

In addition to the impact of PAD highlighted above, PAD can have a severe effect on the broader community and state contributing to entrenching a 'disadvantaged characteristic' of that community and country at large.⁵⁰ Evidence suggests that the negative impact of PAD on communities and countries is mostly evidenced in poor, marginalised and underdeveloped contexts where issues of arbitrary arrest and detention, pretrial and prolonged detention are likely to occur. In South Sudan, where protection mechanisms are weak or non-existent and where services including justice are unavailable, the discriminatory nature of the justice system and the conservative approach to the interpretation and enforcement of the law is evident.⁵¹ In reflecting on the responsibility of the state to mitigate the impact of

⁴⁹ Section 12 of the Transitional Constitution of South Sudan 2011.

⁵⁰ Ibid at 16.

⁵¹ Discrimination is alleged because of the gender biases and insensitivities which characterises the interpretation and application of customary law and traditional practices. For example, practices intended to enforce marriage arrangements are mainly targeted at women and girls.

discriminatory laws and the biased and inequitable approach to the application of the law, Human Rights Watch notes that:

‘States have a clear obligation to end discrimination under the law and to enact effective laws against both direct and indirect discrimination by both government and private actors, including access to development assistance. Failure to do so may lead to unequal outcomes of development and poverty alleviation programs. Maintenance of state-sponsored discrimination can undermine development activities for specific sectors of the population, even if overall a country is meeting its goals and indicators.’⁵²

The use of PAD in impoverished and marginalised communities can have a detrimental effect not only on individuals who are held in detention but also on the community as a whole. This is to the extent that the community as a unit is deprived of vital human resources in the form of parents and caregivers, family heads, community leaders and political authorities.⁵³ The impact of the excessive use of PAD on the community results in the furtherance of the exclusion and marginalisation of individuals and groups, and decreases their political involvement and power. For example, research among poor and marginalised communities in Chile indicates that criminal justice and political actors have used PAD to limit the influence of individuals and leaders within the communities.⁵⁴ In South Sudan, PAD has been used to a similar effect by which individuals who are deemed as opponents of the government and others who raise dissenting voices are incarcerated for prolonged periods in conditions that are deemed inhuman.⁵⁵

The impact of PAD on the state is felt mostly by way of the high and unaffordable costs arising from the responsibility to care for people held in detention. Correctional institutions are not prioritised by the Government of South Sudan for adequate financial resources and are therefore unable to provide all the necessities of inmates in their custody.⁵⁶

⁵² Human Rights Watch *Discrimination, Inequality, and Poverty—A Human Rights Perspective* (2012) 20.

⁵³ *Ibid* at 22.

⁵⁴ Open Society Justice Initiative *The Socioeconomic Impact of Pretrial Detention* (2010) 34. The report notes that ‘in Chile ... members of the Mapuche indigenous group claim that racially-motivated, disproportionate pretrial detention is used against them to weaken their community politically and take their land.’

⁵⁵ See chapter 3 at 145.

⁵⁶ See chapter four pages ... on the allocations made to justice and law enforcement institutions.

The inability of the state to meet the obligation to care for people in custody has rendered prisons and other places of detention dangerous on the grounds of crime and the infestation of diseases.⁵⁷

The ICRC notes that because of the limited logistics and financial support to correctional institutions and other places of detention in South Sudan, most detainees depend on their families for basic provisions and essentials like food, clothing and sanitation.⁵⁸ Because of the geographic locations of detention facilities in South Sudan, most detainees are usually held in facilities outside the reach of the family and community which deprives detainees of these lifesaving supports. With the civil war, access by family and community members to detainees is impeded and the isolation further reinforced.

The prolongation of detention is, not solely a question of financing but also of security. On prison conditions and safety, Nelson Mandela stated that ‘[i]t is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.’⁵⁹ PAD is a critical factor in exacerbating the challenges the state faces in ensuring that people in detention are safe and provided with adequate care and humane treatment. The safety issues arise mainly from overcrowding and its resultant effect on security, health and nutrition.⁶⁰

Finally, a fundamental budgeting flaw that is associated with the administration of justice which leads to under-budgeting and high unanticipated costs is the belief that prisons are not built primarily to accommodate pre-trial detainees. However, statistics from prisons around the world indicate that pretrial detainees account for a sizeable proportion of the prison population.⁶¹ Not to adequately cater to the needs of people awaiting trial in South

⁵⁷ Human Rights Watch ‘Prison is not for me’ (2012) 76 – 91.

⁵⁸ Ibid at 141.

⁵⁹ A quote by Nelson Mandela published on the UN website on the Nelson Mandela Rule. Available on https://www.un.org/en/events/mandeladay/mandela_rules.shtml accessed on 10th October 2019.

⁶⁰ The Rt. Hon Elizabeth Truss, Lord Chancellor and Secretary of State for Justice in a proposal presented to the British Parliament on the reform of the British Prison system notes that ‘[Britain] will never be able to address the issue of re-offending if we do not address the current level of violence and safety issues in our prisons.’ Available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565014/cm-9350-prison-safety-and-reform-_web_.pdf accessed on 23 February 2020.

⁶¹ UNODC notes that ‘the proportion of pre-trial detainees is highest, on average, for countries at the lower end of income levels and lowest for countries at higher income levels, suggesting that high levels of pre-trial detention may point to shortcomings in criminal justice systems. In post conflict and low-income states seven out of ten prisoners may be awaiting trial.’ UNODC *Why Promote Prison Reform* (undated) available at <https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html> accessed on 23 February 2020.

Sudan is, therefore, a significant weakness in the prison system – one which renders the justice system incapable of preventing and responding to PAD and its resultant issues.

6.5 ACCOUNTABILITY FOR PAD

South Sudan is faced with a difficult challenge in ensuring the effective delivery of criminal justice services in a manner that respects, preserves and protects the rights and dignity of its citizens and other people living within its borders. With the prevalence of PAD in the criminal justice system and its continued use as a tool of oppression, the call for accountability from the South Sudanese public, human rights activists, development partners and the international community is growing even louder.⁶² The question that South Sudan is faced with at this point is how to enforce accountability for PAD and the reinforcement of human rights in accordance with the provisions of national and international law. In responding to this question, two issues are addressed. The first requires a reflection on the current global trends and the push for greater accountability among nations including South Sudan on justice, human rights and the broader issues of governance. And the second calls for the examination and enforcement of South Sudan's human rights commitments and obligations both under international and national laws. These two issues provide the primary basis for the identification of gaps and limitations on accountability for PAD in South Sudan.

The OHCHR definition of accountability and its different elements is used as a starting point for the identification and analysis of various accountability mechanisms for PAD in South Sudan. According to OHCHR, 'accountability refers to the obligation of those in authority to take responsibility for their actions, to answer for them to those affected, and to be subject to some form of enforceable sanction if their conduct or explanation is found wanting.'⁶³ Reference to 'responsibility' in this definition means that people in authority are to be assessed transparently and objectively by a higher 'duty and performance standards'.⁶⁴ Reinforcing the need for accountability for state-led or orchestrated violations of human rights falls into place with prevailing jurisprudence around the world which mainly targets

⁶² Open Society Initiative 'Why We Need a Global Campaign for Pretrial Justice' available at <https://rm.coe.int/justice-fact-sheet-why-we-need-a-global-campaign-for-pretrial-justice/1680790b3b> accessed on 7 April 2020.

⁶³ OHCHR 'Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda' (2015) 4.

⁶⁴ Ibid at 4.

persons bearing the greatest responsibility for actions and omissions resulting in violations and abuse of human rights.⁶⁵

An analysis of the mechanisms which reinforce accountability for PAD in South Sudan reveals a highly politicised system which has largely been unsuccessful in curtailing the practice. At the core of accountability mechanisms are the institutions, which in South Sudan include the Judiciary, Ministry of Justice and Constitutional Affairs, the South Sudan Police Service, and the South Sudan Prison Service. As discussed in chapter two, the functional capacity of these institutions is limited by challenges including infrastructural, technical, and logistical capacity limiting their delivery of services. Constrained by these limitations and challenges, there is very little to celebrate in terms of performance in reinforcing accountability not just in response to PAD but in general terms.⁶⁶

At the political level in South Sudan, there is sufficient evidence that PAD is used as a tool to suppress political dissent. In chapter three of the thesis, an overwhelming number of cases of how PAD is used as a tool of political oppression has been presented and discussed. This essentially means that the requisite political will to address PAD is limited. It therefore comes as no surprise that there has been little or no effort by the Government of South Sudan in demanding accountability from perpetrators of PAD.⁶⁷ A case in point is in relation to concerns expressed by the South Sudan's Commission for Human Rights over what it termed 'delays and obstruction' in establishing the Hybrid Court – a mechanism for accountability and transitional justice decided on as part of the commitment made by the government in the peace agreement of 2015.⁶⁸ The Commission has called on the Government of South Sudan to keep to its commitment in facilitating a timely establishment of the Hybrid Court which will be crucial to addressing PAD.

Notwithstanding the above, several mechanisms are in place in reinforcing accountability for PAD in South Sudan. The first of these accountability mechanisms to be considered here is the growing use and influence of social media and citizen's journalism globally and indeed in South Sudan. A combination of factors including the growing

⁶⁵ See Statute of the Special Court for Sierra Leone arts 2-5, 2178 U.N.T.S.145, 16 January 2002.

⁶⁶ D K Deng *Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan* (2013) 37.

⁶⁷ C du Plessis *UN human Rights Report: Accountability Long Overdue in South Sudan* (2020) Available at <https://www.africaportal.org/features/un-human-rights-report-accountability-long-overdue-south-sudan/> accessed on 24 April 2021.

⁶⁸ Ibid

awareness of human rights, the unprecedented level of globalisation, access, and connectivity to the internet, use of social media, information speed and linkages between nations and people globally are significantly contributing to reinforcing accountability for PAD. With South Sudan benefiting from the positives that these factors of globalisation has to offer, incidents of PAD can no longer be cloaked in secrecy and covered up. The widespread access and use of social media platforms as well as the growth and development of the phenomena of citizen journalism means that, unlike the past, information on PAD in written, oral and pictural formats can easily and swiftly be documented and disseminated within and outside South Sudan.⁶⁹

Social media and citizen's journalism were at play in South Sudan between 2013 – 2018 as PAD and other human rights incidents perpetuated by the military and other warring parties in Juba, Yie and Bentui. These incidents were promptly published on social media platforms and communicated to the South Sudanese public and the international community. As is the case now globally, social media provided the platforms in enabling the people of South Sudan to communicate their concerns and objections and push for accountability for human rights violations including PAD which occurred during the civil war. While the need for the meticulous verification of information on social media cannot be overemphasised because of the high tendency and risk of misinformation, citizen's journalism and social media platforms have been a main source of information on PAD and other human rights violations in South Sudan.

Another accountability mechanism for PAD in South Sudan is the monitoring, documentation, and reporting on human rights. UN and other human rights and humanitarian actors in South Sudan regularly monitor, document, and report on human rights as a reminder to the government and people of South Sudan that impunity for the violations and abuse of human rights is unacceptable and will not be tolerated. These reports are periodically published highlighting data and statistics on the nature and types of PAD and other human rights violations in South Sudan. The International Community uses these reports to provide clear objections to the violations and abuse facilitated and cause by the Government of South

⁶⁹ Citizen's journalism is also referred to as participatory, democratic, guerilla or street journalism which focusses on the role and participation of citizens in the collection, analysis, reporting and dissemination of information and news. See A C Apeh 'Implications of Citizen Journalism on the Main Stream Journalism' (2017) *International Journal of Academic Research in Business and Social Sciences* 7:12 at 1349

Sudan and other warring parties and demand a high standard of accountability in compliance with the country's international human rights commitments.⁷⁰

However, as has been noted in chapter three, human rights systems have struggled with enforcement especially when it comes to dealing with violations that are orchestrated by rich and powerful nations including Russia, China, America and Israel to name but a few. Also, it is recognised that sometimes regional geopolitics has been known to get in the way of enforcement of human rights.⁷¹ Notwithstanding the challenges to enforcement, the existence of mechanisms such as the United Nations General Assembly and Security Council as well as other regional bodies like the African Union and international institutions provide platforms from which the global community of nations can call out and hold each other accountable for human rights violations including PAD.⁷²

Also applicable in the South Sudanese context are several mechanisms and measures which have been established in ensuring that governments are held to account for actions and omissions which impact the rights and wellbeing of people within their borders. Some of these accountability mechanisms include the obligations emerging from the commitment to human rights and international law, sanctions regimes and the role of the International Criminal Court. The obligations of states to international human rights law come about through the signing and ratification of international conventions and treaties which becomes binding and demand compliance and adherence by signatories. South Sudan has signed and ratified several of these international instruments and even domesticated some into their laws and statutes. However, even where countries are not signatories to the conventions and treaties, the global community has recognised them as universal values and standards and required adherence to them.⁷³

⁷⁰ United Nations 'The Establishing Effective Accountability Mechanisms for Human Rights Violations.' available at <https://www.un.org/en/chronicle/article/establishing-effective-accountability-mechanisms-human-rights-violations> accessed on 27 October 2019. See also David P. Forsythe (ed) *'Human Rights and Comparative Foreign Policy: Foundations of Peace'* (2000) Available at <https://www.corteidh.or.cr/tablas/27531.pdf>, accessed on 22 January 2020 where a contrary argument is presented and discussed as being defined and influenced by the national interests or the worlds powerful and prosperous nations such as America, England, Japan and Russia.

⁷¹ R Falk 'The power of rights and the rights of power: what future for human rights?' in *Ethics & Global Politics* (2008) 81 – 93. Available at <https://www.tandfonline.com/doi/pdf/10.3402/egp.v1i1.1815> accessed 24 December 2019.

⁷² These views on human rights have been contested on the basis of history, socioeconomic situation and limited effectiveness. See chapter three on the contestations of human rights 73.

⁷³ J K Cogan 'Noncompliance and the International Rule of Law' in (2006) *The Yale Journal Of International Law* 31:189 at 2. Cogan states 'that though it is said that compliance with international law is high, the international system contains few legislative, judicial, or executive processes analogous to those of States, and,

The UN defines universal values as consisting of ‘peace, freedom, social progress, equal rights, human dignity.’⁷⁴ In stressing the importance of adherence to these values and standards, the former President of the United States, Barak Obama notes that ‘adherence to international standards strengthens those who do and weakens and isolates those who do not.’⁷⁵ South Sudan as a member of the international community cannot, therefore, continue using and allowing PAD to flourish in the name of crime prevention and maintenance of law and order without a blight on its image and the ramifications from the international community.

Another mechanism that has been successfully used by nations in promoting accountability for PAD and other human rights violations is the imposition of sanctions and the reduction or withholding of development and humanitarian aid. International aid also called foreign assistance consists of financial, logistical and human resource assistance usually provided ‘to countries and territories on the list of the Development Assistance Committee (DAC) of Official Development Assistance (ODA).’⁷⁶ International aid or development assistance is provided to promote the development and respect for human rights in these countries.⁷⁷ Foreign aid and development assistance can be withheld in applying the necessary pressure on states to push for compliance with international human rights including PAD.

Therefore, countries that practice PAD and violate and trample on the human rights of their citizens are treated as pariahs and made to suffer various sanctions regimes imposed collectively by the international and regional organisations or individually by other

consequently, the system's ability to self-correct and self-enforce is much more limited, creating gaps between aspiration and authority, procedures and policy.’

⁷⁴ The United Nations has defined universal values as consisting of peace, freedom, social progress, equal rights, human dignity. Kofi Anan ‘*Do we still have universal values*’ 12 December 2003 speech delivered by UN Secretary General in Germany delivered at the Tübingen University. Available at <https://www.un.org/press/en/2003/sgsm9076.doc.htm> accessed on 3 August 2019.

⁷⁵ See speech by President Barak Obama ‘A Just and Lasting Peace’ December 2009 available at <https://www.nobelprize.org/prizes/peace/2009/obama/26183-nobel-lecture-2009/> accessed on 3 August 2019.

⁷⁶ See OECD ‘DAC List of ODA Recipients’ (undated). Available at <http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/daclist.htm> accessed 23 December 2019.

The DAC List of ODA Recipients is made up of all the countries and territories which qualify to receive development assistance. These are mostly low- and middle-income countries rated as such because of their low gross national income (GNI) per capita.

⁷⁷ M Lawson and E Morganstern *Foreign Aid: An Introduction to U.S. Programs and Policy* (2019) Reflecting on the objectives of aid, the article notes that international aid and foreign assistance includes the ‘promotion of economic growth and reduction of poverty.’

countries.⁷⁸ In like manner, more powerful states withhold foreign aid and development assistance in forcing compliance with international standards.⁷⁹ At present, the Government of South Sudan is facing a sanctions regime, including an arms embargo because of the continued concerns over the human rights violations in the ongoing civil war.⁸⁰ The sanctions are being used to ensure that South Sudan complies with its commitment and obligations under international human rights and humanitarian law in preserving the rights and dignity of people within its borders.

The International Criminal Court (ICC) is another accountability mechanism.⁸¹ The UN resolved to establish the court on 5 July 1998 after the successful experimentation in the former Yugoslavia and Rwanda. As per the Rome Statute of the International Criminal Court, the ICC is mandated to ‘investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community [including for] genocide, war crimes, crimes against humanity and the crime of aggression.’⁸² The ICC is not only established to enforce accountability for the above-listed acts but also to serve as a deterrent to aggression and other actions that may result in war crimes, crimes against humanity and genocide.⁸³ So far, despite the criticisms of possible bias against small and less powerful nations – especially those in Africa, the ICC has and continue to register some impressive results in reinforcing accountability for human rights, international law and peace.⁸⁴

⁷⁸ North Korea is a classic example of countries which are subject to international action and pressure because their appalling human rights record. See North Korea *Events of 2018* available on <https://www.hrw.org/world-report/2019/country-chapters/north-korea> accessed on 25 June 2020.

⁷⁹ R A Nielsen ‘Rewarding Human Rights? Selective Aid Sanctions against Repressive States’ (2013) *International Studies Quarterly* 791–803.

⁸⁰ Security Council Resolution 2471 (2019) imposing sanctions against South Sudan. Available at <https://www.un.org/press/en/2019/sc13827.doc.htm> accessed on 6 October 2019. See also B Bimbetova ‘The Impact of International Sanctions on National Economic Regime of Target States’ (2019) *Academy of Strategic Management Journal* Volume 18:4 at 9 and J Gutmann, M Neuenkirch and F Neumeier *Sanctioned to Death? The Impact of Economic Sanctions on Life Expectancy and its Gender Gap* (2017) where the negative impact of sanctions is discussed as including the unintended population being hit the hardest.

⁸¹ While South Sudan has not signed the Rome Statute, this section of the thesis refers to mechanisms which are available and are being used internationally to address crimes which fall under the ICC jurisdiction.

⁸² See Rome Statute of the International Criminal Court of 1998.

⁸³ See OHCHR (Information Note 2) Democratic Republic of The Congo 1993-2003. Available at https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf accessed on 6th October 2019.

⁸⁴ L Hart ‘The International Criminal Court: biased or simply misunderstood?’ in *The Colour Line* (2018) Available at <https://www.una.org.uk/magazine/2018-1/international-criminal-court-biased-or-simply-misunderstood> accessed on 20 August 2019. Hart discusses and assesses the merits in the criticism of the Court as being a tool of the west for the continued enslavement of Africa. Also see A Allo *The ICC’s problem is not overt racism, it is Eurocentricism: European imperial values laid the foundation of the ICC and have caused its many problems* in Aljazeera on 28 July 2018. Available at <https://www.aljazeera.com/opinions/2018/7/28/the-iccs-problem-is-not-overt-racism-it-is-eurocentricism> accessed 12 June 2019 where the author notes that ‘The

South Sudan emerged from a turbulent past defined by civil war and racial discrimination which led to the isolation of their neighbour Sudan and the ultimate achievement of independence. One would have expected that the independence of a previously oppressed people would present an opportunity for ensuring an end to their pre-independence ordeal and that human rights would be used as the standard in defining the nation. And yet, the euphoria of independence and vast expectations for an improved and dignified life is yet to materialise. Beyond the socio-economic and political challenges, the country has gained an undesirable reputation for the practice of PAD and other human rights violations and abuses including as arising from issues of tribalism, instability, and corruption.

Despite the current context of underdevelopment, conflict and insecurity in South Sudan, there is a demonstration of will for the protection and respect for human rights at least as evident in the laws that govern the country. As previously noted, the Constitution of South Sudan provides for a long list of human rights, including those relevant to the right to liberty and security of persons.⁸⁵ These rights are positive development but not an end in themselves. This is so because the mere existence of these laws providing for human rights do not in themselves necessarily result in their application and enforcement. The Government of South Sudan should reinforce efforts towards fulfilling its obligation in protecting and preserving the rights and dignity of its citizens and people within its borders. Such actions could include the adoption and implementation of policies and action plans aimed at empowering the citizen to speak out against PAD and other violations of human rights. In South Sudan, these plans and strategies shall be central to ensuring that, PAD shall be identified and curtailed before they occur.

Furthermore, the Government of South Sudan needs to take an active step in strengthening accountability mechanisms for PAD and other human rights violations. This may include through enhancing justice and the protection of the law and further enhance their capacity by way of appropriate information, awareness, and training on their rights to make adequate demands for such services. Finally, all these efforts would be fruitless if the very people for whom the action is taken are not involved in the processes of planning and executing the above-suggested actions. Therefore, consultations and the involvement of the

ICC's problem is not overt racism, it is Eurocentricism: European imperial values laid the foundation of the ICC and have caused its many problems.'

⁸⁵ See Part II s 9 – 34 of the Transitional Constitution titled, the Bill of Rights.

South Sudanese population are critical to both developing and implementing long and short-term actions in reinforcing accountability for PAD as well as addressing other concerns on human rights in South Sudan.⁸⁶

6.6 CONCLUSION

Beyond the above-discussed impacts of PAD, there are others including undermining the rule of law and fuelling conflicts that makes PAD undesirable. South Sudan should learn from its past that the use of PAD as a tool of oppression and violence can only breed malcontent and ultimately conflict. Furthermore, a country such as South Sudan which faces significant challenges in accessing the necessary human resource required for effective functioning and in meeting their development goals, cannot afford to continue in the perpetuation of PAD. This will in no doubt weaken the country and its capacity to be productive and provide for its population. Having suffered years of instability and civil war, the emphasis should be placed on ensuring that PAD do not further weaken the fabric of the nation.

Finally, the continued use and practice of PAD is incongruent with the aspirations of the government and people of South Sudan to be a respected member of the international community. The Government of South Sudan bears the responsibility in ensuring that its citizens and people within its borders are protected from the harm that comes with PAD and that the national interest is not compromised. To achieve this, more efforts need to be put into developing and updating the law, policies and systems in contributing to both the prevention and response to PAD in all of its forms and at all levels. This shall be the focus of the ensuing chapter.

⁸⁶ The World Bank Group 'Consultation Guidelines' (2013) 6. Available at <https://pubdocs.worldbank.org/en/248301574182372360/World-Bank-consultations-guidelines.pdf> and accessed on 23 April 2020.

CHAPTER SEVEN: PREVENTION AND RESPONSE TO PAD IN SOUTH SUDAN

7.1 INTRODUCTION

This chapter proposes a set of measures aimed at preventing the occurrence of PAD, as well as, ensuring that relevant systems are in place in providing an appropriate response when it occurs. The chapter is divided into three sections: the first discusses the relevance of the prevention and response approach, and then move on to explaining how the rights-based approach is essential in reinforcing human rights, participation, inclusiveness and accountability in efforts at addressing PAD. The second section proposes practical measures which could be used in preventing and responding to PAD in a fragile and unstable context such as South Sudan. The chapter concludes with an examination of the needs for legal empowerment of the demand side as a critical requirement in addressing PAD in South Sudan.

7.2 PREVENTION AND RESPONSE APPROACH TO ADDRESSING PAD

The thesis proposes a prevention¹ and response approach to addressing PAD and its effects on the justice system and the people of South Sudan. The dual approach also means that when and where PAD occurs, there are adequate procedures, safeguards, capacity, logistics and appetite among justice and law enforcement sector actors in mitigating the impact of PAD before it becomes an insurmountable problem.

In the criminal justice domain of South Sudan, the responsibility for prevention of PAD rests with the government. A preventive approach could enable the Government of South Sudan to carry out a proper assessment of the sector in identifying underlying needs and instituting measures such as reforming laws and policies and introducing innovations that reduce the likelihood of PAD. As previously highlighted in chapter five, the government

¹ M E O'Connell, T Boat, and K E Warner (eds) *Preventing Mental, Emotional, and Behavioral Disorders Among Young People* (2009) . The term 'preventive approach' (also called the 'proactive approach') is used to describe a means by which precautionary measures are put in place to avert or reduce the likelihood of a future occurrence or need. In terms of service provision, it constitutes an approach by which services are offered ... with the expectation that the likelihood of a future need will be reduced.'

carries out this function through the institutions which constitute the criminal justice chain in South Sudan.

The response or reactive approach on the other hand reacts to an incidence which has gone wrong with the aim of cutting short its further occurrence, minimising the damage, and setting a new course in the rectification of the initial action.² The response approach is more appropriate in dealing with challenges and limitations which emerge from processes. This approach is noted to be efficient in its ability to ensure that systems are restored quickly, and derailed processes are put back on track irrespective of the fact that these resources are human or mechanised. Finally, the response or reactive approach remedies performance where systems and procedures are found to be weak and inadequate in preventing maladministration.³

Responding to the occurrence and the harmful effect of PAD in South Sudan is of equal importance as efforts towards its prevention. With PAD already recognised as a significant justice and human rights challenge, addressing the harmful effects of PAD ensures that subsequent prevention efforts are not hampered or limited by the offshoots of the current fragility of the justice and law enforcement system in South Sudan. With the response or reactive approach, the leadership of the criminal justice system should be able to quickly identify, evaluate and institute measures that ensure that PAD is curtailed, and that the criminal justice sector is able to deliver quality services. The thesis suggests that ‘there are circumstances under which each is useful, and that processes which combine the two approaches may capture benefits of both approaches to yield maximum ... benefits’ to efforts at addressing PAD in South Sudan.⁴ An adaptation of both approaches will assist the criminal justice system in South Sudan to harness these advantages.

7.3 ADAPTING THE HUMAN RIGHTS-BASED APPROACH

Another critical point in addressing PAD in South Sudan is the adoption of the rights-based approach to identifying and addressing essential challenges of justice and law enforcement

² G Champlin ‘Proactive & Reactive Strategies’ (1991) *Wyomissing Behavior Analysts* 1 – 2.

³ K Motlhabane ‘Reactive versus proactive management system: Reconstruction and Development Programme (RDP) housing delivery’s unintended consequences’ in (2015) *The Journal of Public and Municipal Finance* 46.

⁴ M K Arora, K Singh & S Devra A Comprehensive Review of Reactive and Proactive Congestion Control Methodologies (2018) *International Journal of Computer Applications* Volume 179:17 at 5.

institutions. This recommendation is made with due cognisance to the issue discussed in chapter three on the contestation of human rights and the ongoing challenge with its enforcement. Therefore, in proposing the human rights-based approach, the thesis pays credence to viable arguments, contestations and alternative views which have emerged on the history, nature and relevance of human rights in South Sudan and the world over.⁵

By adapting the rights-based approach the Government of South Sudan should utilise a holistic rights framework which should augment programmes and operations in critical areas of interventions in addressing PAD in the justice and law enforcement sector.⁶ The rights-based approach should reinforce the government's prevention and response efforts by creating an enabling environment for inclusive development which will allow people to participate in the reform process.⁷ In this regard, the Government of South Sudan should be able to tackle issues of marginalisation and vulnerability arising from the limitations of the justice and law enforcement sector by allowing them to communicate their views and participate in processes relevant to addressing PAD and the protection of their rights and dignity.

Through this approach the Government of South Sudan shall ensure that people are not regarded as objects of the reform process, rather their needs should be regarded as human rights concerns while also recognising them as the subjects of the reform process.⁸ In the context of South Sudan, where oversight of government institutions (including the justice sector) is severely constrained by limited capacity, resources and corruption, the rights-based approach may be critical in reinforcing accountability through the identification of and awareness of the people of the responsibilities and obligations of the state (as duty bearers) in preventing and responding to PAD. Also, the approach promotes the empowerment of the people of South Sudan (as rights holders) in making effective demand for services.

Finally, the rights-based approach shall enable the government to focus on the people of South Sudan who are marginalised and vulnerable within the context of development. In the context of PAD, these are the category of people who suffer because of the multiple risk

⁵ See chapter three page 72.

⁶ UNFPA *A Human Rights-Based Approach to Programming - Practical Implementation Manual and Training Materials* (2015) 73.

⁷ Ibid at 74 .

⁸ O De Schutter *International Human Rights Law: Cases, Materials, Commentary* (2014) 220.

factors they are exposed to as well as the limitation of their awareness, and susceptibility to abuse.

7.4 PROPOSED MEASURES IN ADDRESSING PAD IN SOUTH SUDAN

In this section, specific interventions and measures which could be undertaken or put in place in preventing and responding to PAD globally but specifically in South Sudan are discussed. Reference is made to actions that have been successfully applied in post-conflict and fragile contexts and these interventions have been contextualised and adapted to fit the South Sudan context.

7.4.1 *Promoting a justice and security sector-wide approach to planning in South Sudan*

Set against the backdrop of constrained resources and limited capacity, the relevance and impact of effective and collective planning⁹ in the justice and law enforcement sector in preventing and responding to PAD in South Sudan needs not be overstated. The need for effective and collective planning is relevant to addressing the tendency of criminal justice institutions in South Sudan to pursue separate mandates in the delivery of specific justice services¹⁰ and how this *modus operandi* results in institutions working in silos without an eye on the bigger picture.

The development of a sector-specific plan is critical to addressing one of the cardinal factors precipitating PAD in South Sudan including the limited financial and logistical resources to justice and law enforcement institutions in the country. This challenge has been discussed extensively in chapter five of this thesis as resulting in duplication and wastage of resources.¹¹ Effective and collective planning by justice and law enforcement institutions in

⁹ Planning is a management action aimed at addressing the challenges which arise from organisational changes by increasing the efficiency, reducing the risks involved and facilitating the proper effective coordination within organisations and entities. Planning reinforces and supports the mobilisation of all resources available to an organisation towards the achievement of its mandate and mission. See S Alipour 'Importance of Planning and Control of Managers' (2013) *Arabian Journal of Business and Management Review* 2:9 12. The World Bank states that effective planning assures 'that an organisation remains relevant and responsive to the needs of its community and contributes to organisational stability and growth. It provides a basis for monitoring progress, and for assessing results and impact. It facilitates new programme development. It enables an organisation to look into the future in an orderly and systematic way.' N Hanna 'Strategic planning and management a review of recent experience' in *World Bank Staff Working Papers* No. 751 (1985) 2 – 5.

¹⁰ See chapter five on the weak coordination of the justice and security sector.

¹¹ See chapter five at 122.

South Sudan shall facilitate and reinforce a singularity of purpose and clarity of direction in defining and communicating critical areas of needs in efforts towards addressing PAD. This shall be very essential in facilitating a clear, compelling, and consistent message on prioritised interventions and as pertinent to addressing PAD. Effective and collective planning shall be critical in the pooling, deployment, and usage of technical, financial, and logistical resources. This approach shall prevent the wastage and ensure that resources are directed where the need is most evident in supporting performance and optimising results in preventing PAD.

A specific planning methodology proposed for justice and law enforcement institutions in South Sudan is strategic planning which enhances operational effectiveness of service delivery.¹² The strategic planning approach utilised by the justice sector and other government entities are slightly different from those of corporate entities and NGO sectors. This is so because while the companies or NGOs may change their mandate ‘the core mandates of the agencies in the justice sector are rather codified in the laws and thus not flexible’ unless through a reform process prescribed by law.¹³

Two examples of countries where effective strategic planning has yielded positive results in improving justice service delivery and addressing PAD is Sierra Leone and Uganda. After the civil war in Sierra Leone, technical and financial support was provided to the Government by the British Department of International Development (DFID) for an in-depth reform of the justice sector.¹⁴ The support provided includes the preparation and implementation of a Justice Sector Reform Strategy and Investment Plan (JSRSIP) first from 2005 – 2010 as JSRSIP I and later in (2011 – 2014) as JSRSIP II. As an example, the four goals of the JSRSIP II included: (1) promoting the safety of communities; (2) enhancing access to justice for all; (3) strengthening the capacity and functionality of the rule of law; and (4) improving justice service delivery at all levels. An evaluation conducted by the Africa Governance Monitoring and Advocacy Project (AfriMAP) and Open Society Initiative for West Africa (OSIWA) notes that key areas of improvements realised from the implementation of the JSRSIP I & II included increased capacity and coordination among justice sector institutions through regular sectoral meeting and information sharing, the

¹² Examples of justice sector strategic planning is provided below

¹³ UNDP *Strategic Planning of the Justice Sector Institutions - A Handbook for Planner* (2014) 5 – 7.

¹⁴ AfriMAP and OSIWA *Sierra Leone – Justice Sector and the Rule of Law* (2014) 7.

effectiveness of data management and quality reporting which was evident at all levels of the justice system.¹⁵

Another example of strategic planning is the Justice, Law and Order Sector (JLOS II) Strategic Investment Plan (2006 – 2011) of Uganda.¹⁶ This plan follows an earlier JLOS I which was implemented from 2001 – 2005 and undertook specific actions which included among others the review of rules and procedures in minimising delays in the justice system, capacity building of officials on rules of procedures including for instance bail; promoting effective record management; clearing backlogged cases etc. With specific reference to PAD, these interventions yielded quick dividends including among others the reduction in the duration of remand from twenty-four to less than fifteen months for a felony; the reduction in persons held on remand from 39% to 1% and 23% to 10% for both felonies and misdemeanours; and the integration of regulatory best practices in policy formulation and preparation.

To adapt lessons learnt and best practices from other contexts and in deciding on a model for sectoral planning, the Government of South Sudan should be informed and guided by the local context with due consideration to the current and active personnel, technical, financial, logistical and technological needs in the justice and law enforcement sector.

There are foreseeable challenges when it comes to accessing local expertise to provide the technical leadership of a sector-wide strategic planning process that might not be readily available in-country. However, the Government of South Sudan could access the relevant technical expertise by outsourcing from non-governmental sources such as development organisations, academic institutions and individual consultants. Also, where the funds are available international experts could be recruited to provide the necessary technical expertise and leadership of the process.

A final issue for consideration by the Government of South Sudan is the need for the establishment of a monitoring and evaluation (M&E) system in tracking and determining the progress in implementing the plan and the changes resulting from the interventions. In establishing an effective M&E system for the justice and law enforcement sector, the Government of South Sudan has to come up with clear impact (long term), outcomes (short to

¹⁵ Ibid.

¹⁶ See the JLOS website at <https://www.jlos.go.ug/> for detailed information on the institutional framework, its ongoing interventions and future plans.

medium term) and outputs (short term) result areas that the sector will aspire to achieve.¹⁷ For each result area, specific indicators of success must be developed which will be critical to tracking progress towards results.

Furthermore, the government will need to pay keen attention to the cost implications of M&E and ensure that adequate funding is made available and mobilised. The cost requirements for M&E include among other staff recruitment and time, the collection and analysis of data, procurement of office equipment and other logistics.¹⁸ All the requirements will in no doubt need considerable resources which may not be readily available in South Sudan. However, given the concerns over corruption and mismanagement of resources,¹⁹ an effective M&E system will be critical to demonstrating results and justifying the expenditure incurred in the reform process of the justice and law enforcement institutions. South Sudan could also solicit support from development partners including the UN, donor agencies and diplomatic missions both in terms of funding for the process as well as the technical expertise required to undertake a successful M&E as part of the strategic planning process.

7.4.2 Effective budgeting and finance management

The need for adequate logistical and financial resources for institutions in the justice and law enforcement sectors in South Sudan is of the highest consequence in ensuring effective functionality and relevance in addressing PAD. The civil war and its destabilising impact on the institutions of governance, and the heightened vulnerability among the population, reinforces the need for adequate support in ensuring that justice services are provided effectively in preventing PAD. As has been discussed in previous chapters of this thesis, justice and law enforcement institutions are considerably under-resourced and therefore constrained not just in their capacity to effectively deliver services but are also rendered ineffectual in ensuring sufficient deployment, coverage, and functionality.²⁰

To address this challenge, a full understanding of the justice system and its constituent parts is required. In South Sudan as in most other contexts, the justice and law enforcement systems can be simplistically divided into two components: first, there is the institutional

¹⁷ USAID *Performance Monitoring & Evaluation Tips: Building A Results Framework* (2010) 5 – 7.

¹⁸ S Sedrakian *Financing Monitoring & Evaluation a Self-Study Toolkit* (2016) 2.

¹⁹ See chapter two at 124.

²⁰ See chapter five pages 118 – 121 on the limited budgetary and logistical support to criminal justice sector.

component which includes the critical human resources, the procedural rules they must comply with, and the funding they receive as determined and provided by the state.²¹ The second concerns the delivery of services including law enforcement, adjudication, prosecutorial and correctional services as laid out in chapter two. Having a holistic understanding of these two components of the justice and law enforcement institutions in South Sudan is important in comprehending their financial and logistical needs, devising modalities to address them adequately and ensuring effective functionality in addressing PAD.

The Government of South Sudan needs to be apolitical in ensuring effective decision-making on the type, amount, and frequency of resources to be allocated to justice and law enforcement institutions in preventing and responding to PAD.²² With corruption noted as a critical challenge to South Sudan, the need for strengthening accountability and transparency in the judicious use of funds and logistics provided by the Government of South Sudan to justice and law enforcement institutions is a critical need. The African Development Bank reports serious shortcomings in the budgetary process and practices by governance institutions including ‘discrepancies between the programmed and executed resources due to extra-budgetary expenditures.’²³ Specific examples of these discrepancies include for instance in the 2018 - 19 fiscal year, an average of 24% of budget resources were unutilized and the manual preparation and execution of the budget outside the Integrated Financial Management Information System (IFMIS).²⁴

To curb the underlying challenges of corruption, misappropriation and mismanagement and its impact on PAD in the justice and law enforcement sector in South Sudan, a holistic prevention and response approach in reinforcing compliance with policies and procedures on the judicious use of resources in the justice and law enforcement sector is recommended. In the 2019/2020 Budget Speech of the Government of South Sudan, the

²¹ T Kirat *Performance-Based Budgeting and Management of Judicial Court in France: An Assessment* (2010) 1.

²² M Walecki ‘*Challenging the Norms and Standards of Election Administration: Political Finance*’ (2007) 75 – 93. Dr. Walecki quotes James Kerr Pollock on the relation between money and politics as being ‘one of the great problems of democratic government. Healthy political life is not possible as long as the use of money is unrestrained. Money provides access to the basic tools of a modern democracy - for example, advertising, running political parties, selecting candidates, mobilizing voters and polling - and for this reason, political finance affects almost every aspect of democratic politics in both developing and consolidated democracies.’

²³ F A Soares da Gama ‘Budget And Resource Management: Addressing Fiscal Imbalances’ in *South Sudan-Policy Advisory Note* (2020) 1 – 2.

²⁴ Government of South Sudan *2019/20 state Budget Speech* (2020) 7 – 9.

Minister of Finance, Planning and Economic Development (MoFPED) lists some of the compliance measures as including but are not limited to:

‘(i) efficient use of an Integrated Financial Management Information System (IFMIS) to ensure alignment between expenditures and revenues (available cash); (ii) limiting non-priority operating expenditures; (iii) establishment of a cash management committee; and (iv) establishment of an arrears management committee.’²⁵

South Sudan will do well in implementing these recommendations in addressing the weaknesses and loopholes in the justice and law enforcement sector which enable corruption, misappropriation and mismanagement of funds and results in PAD.

The Government of South Sudan must set priorities in response to needs and other requirements identified across the justice and law enforcement sector and ensure that the allocated resources are utilised in accordance with the political agenda and the public interest.²⁶ In the context of PAD in South Sudan, this shall include putting in place systems and procedures and in reinforcing transparency and accountability as well as the tracking and recording of results emerging from the use of these resources.

Also, in reinforcing compliance and the astute use of resources by the justice and law enforcement sector in preventing and responding to PAD in South Sudan, it is recommended that the demand side comprising civil society organisations, trade unions, religious and other interest groups are duly allowed to play a watchdog role in monitoring the processes of utilising the funds in line with prescribed policies and procedures.²⁷ Their involvement will ensure that needs in addressing PAD are correctly identified, resources are appropriately channelled, and oversight mechanisms are effective. However, given the limited political

²⁵ Ibid.

²⁶ ‘A government's decision on the allocation of resources between the private and public sectors of the economy and the pattern of distribution within them will be influenced by political, social and economic considerations.’ See D I Trotman-Dickenson *Economics of the Public Sector* (1996) 60.

²⁷ Steinberg notes that ‘Demand side reform should be seen as the missing component of an integrated access to justice agenda, and not as a substitute for existing efforts. The implementation of demand side reform would boost supply side efforts to expand lawyering services for the poor, rather than compete with such efforts, and would combine with the supply side initiatives to create a holistic access to justice agenda.’ See J Steinberg ‘Demand Side Reform in the Poor People’s Court’ in (2015) *The Connecticut Law Review* 47 at 802.

tolerance and the constricted space for civic engagement in South Sudan,²⁸ the likelihood of the demand side being accorded the opportunity to engage in the manner discussed above is a difficult proposition.

7.4.3 *Promoting coordination and inter-institutional collaboration in the justice sector*

The nature and demands of justice and law enforcement services and the broad scope and interlinked nature of the criminal justice chain in South Sudan require a change of mindset and strategy in addressing PAD.²⁹ For justice and law enforcement institutions to function effectively, it is recommended that a coordinated approach be adopted in promoting the ‘integration of tasks and the merger of objectives’ in achieving desirable results.³⁰ Coordination and inter-institutional collaboration should be directly reinforcing of the recommendation on strategic planning for the justice and law enforcement sector. Effective coordination demands a departure from institutions working in silos and focusing exclusively on their mandates. For coordination to be effective in South Sudan, it is essential for all the institutions in the criminal justice sector to appreciate the necessity to align their mandates and proportionally reconciling specific interventions and activities and collectively adopting measures to achieve the broader objectives including addressing PAD.³¹

In relation to PAD, a particular challenge to be addressed by inter-institutional coordination and collaboration is in addressing the backlog in cases at pretrial and trial stages in South Sudan. Unfortunately, this study has not been able to access data in determining the exact number of backlog cases in South Sudan due to challenges with the case management and record keeping system especially at the lower levels of the Judiciary of South Sudan. However, data pieced together from various sources provides an estimate of 1,500 cases

²⁸ The Human Rights Council states that ‘[a]midst increasing repression by the National Security Service (NSS) and other intelligence arms of the Government, civic space for debate and dissent has continued to shrink, which has given rise to myriad human rights violations including activists and journalists being deprived of their fundamental freedoms.’ Human Rights Council *Transitional Justice and Accountability: a Roadmap for Sustainable Peace in South Sudan* (2020) para 3, 22 and 65.

²⁹ J Král ‘Introduction to Coordination Concept’ in M Blašková *International Scientific Journal Human Resources Management and Ergonomics* (2007) 2.

³⁰ R Vanagas and J Stankevic *Impact of Coordination for Organization Process* (2014) 116. Coordination is defined as an ‘integrating or linking together different parts of an organisation to accomplish a collective set of tasks.’

³¹ *Ibid* at 134.

backlog in the statutory justice system alone.³² And it is of no surprise that a significant proportion of the estimated cases have resulted to PAD in South Sudan.

Enhancing coordination and collaboration across the criminal justice chain in South Sudan would require a multidimensional and nation-wide approach among all the institutions, including the demand side, comprising non-governmental and civil society organisations (CSO) and the local population. Sectoral coordination should not be perceived as a one-off event or a unique experiment after which institutions are allowed to slip back into their individualistic and traditional way of work. Rather in relation to addressing PAD in South Sudan, coordination should constitute a sustained and deliberate effort in the justice and law enforcement sector.³³

In pushing for coordination and cooperation among justice and law enforcement actors, different countries have adopted differing models which are often informed by contextual and institutional factors as well as the goal that is sought after. An example of justice sector coordination could be drawn from Sierra Leone, where the government with support from development partners has established the Justice Sector Coordination Office (JSCO) as a justice institution in its own right. The JSCO is mandated to undertake strategic policy development in the justice sector; facilitate the coordination of donor support and engage in resource mobilisation for the justice sector, provide monitoring and evaluation of ongoing reform priorities and finally to facilitate the coordination and support of the implementation of justice sector priorities.³⁴

The Ugandan model is a slightly different model called the JLOS which has already being encountered in this thesis. The JLOS utilises ‘a sector-wide approach adopted by government bringing together institutions with closely linked mandates of administering justice and maintaining law and order and human rights, into developing a common vision, policy framework, unified on objectives and plan over the medium term.’³⁵ The emerging lesson from these two examples of justice sector coordination in Sierra Leone and Uganda is

³² Unpublished data received from UNDP South Sudan Court Statistics for the year 2020.

³³ C Osifo *Organization and Coordination: An Intra-and Inter Performance Perspective* (2012) 2.

³⁴ See the JSCO website <https://jsco.gov.sl/> to learn more about the mandate, ongoing work and future plans of this coordination mechanism in Sierra Leone.

³⁵ JLOS *Our History* available at <https://www.jlos.go.ug/index.php/about-jlos/our-history> accessed on 16 October 2019.

that a one-size-fits-all approach does not work with the establishment of a coordination mechanism.

The Government of South Sudan will have to decide on the model that fits their situation and context in addressing the challenges limiting the effectiveness of the justice and law enforcement sector in preventing and responding to PAD. Fortunately, some form of coordination in the sector is already in place in South Sudan. The Rule of Law Forums supported by UNDP and the Government of South Sudan in the periods after independence have already been discussed in previous chapters.³⁶ These Forums were established at the national and state levels as a coordination model which facilitate engagement and dialogue in the justice and law enforcement sector and between service providers and the community to address immediate access to justice and human right needs.³⁷ Some of the issues addressed by the forums at the state level include issues like the treatment of female and juvenile offenders, arbitrary arrest and prolonged detention and the overall quality of justice services. The Rule of Law Forums have demonstrated effectiveness in ‘generating attention towards localised justice and security problems’ and in promoting collective action in solving emerging challenges.³⁸

Regarding PAD, a coordinated approach shall ensure that justice and law enforcement institutions effectively harness and bring to bear their mandates and comparative advantages in devising effective preventive and response mechanisms in South Sudan. Specifically, a coordinated approach shall ensure that justice and law enforcement institutions in South Sudan meet regularly for purposes of information sharing, updates as well as proffering solutions to emerging challenges with PAD. A coordinated approach shall also ensure that data and statistics in relation to PAD in South Sudan are effectively collected and managed. A coordinated approach shall facilitate mutual accountability for PAD and create the urge for action among the justice and law enforcement institutions in South Sudan. Finally, to create the necessary urge for coordination among the justice and law enforcement institutions in

³⁶ UNDP *Support to Access to Justice and Rule of Law Programme 2013-2017* (2013) 16.

³⁷ Ibid at 134.

³⁸ See UNDP South Sudan *Empowering Lives, Resilient Nation - Annual Report* (2012) where, for example, in Western Equatoria State arbitrary detention of juveniles was reduced by 70%, from 37 to 11 inmates, based on the recommendations made during a Forum. A specific intervention included regularly monitoring and tracking the record of correction facilities and the identification of cases of PAD and timeously addressing them. In 2015, in Western Bahr el Ghazal, the RoL forum facilitated the release of 11 remanded juvenile cases whilst in Northern Bahr el Ghazal, they facilitated the release of 129 inmates who were being arbitrarily detained and/or were imprisoned because they could not pay fines or civil debts. In Eastern Equatoria, prison authorities relocated 70 prisoners (all male) from Torit to Riwoto Prison to address overcrowding.

South Sudan, it is recommended that the call for coordination is backed by law or policy (with some form of sanction) in promoting compliance.

7.4.4 *Strengthening the functional capacity and awareness of the justice sector actors*

A further recommendation in preventing and responding to PAD in South Sudan is through enhancing the technical capacity and awareness of justice and law enforcement actors for the effective delivery of services. This recommendation shall be critical to addressing the limited technical expertise and knowledge among justice and law enforcement sector officials required to address PAD in South Sudan.³⁹ Whether the focus is on the capability of the police and law enforcement actors to investigate and carry out arrests or as pertinent to the technical capacity of prosecutors and state counsel to effectively apply the law, enhancing the technical capacity and awareness of actors in the justice and law enforcement institutions is critical in reinforcing the quality of services including addressing PAD in South Sudan.⁴⁰

Capacity building in the justice and law enforcement sector to prevent and respond to PAD in South Sudan should commence with the conduct of capacity needs assessments in determining and highlighting the existing capacity, gaps in knowledge, expertise and skills that are required for the justice and law enforcement institutions to function and deliver services in preventing and responding to PAD.⁴¹ The outcome of the proposed capacity needs assessment shall also provide baselines which are important in determining the point of departure for various capacity building interventions and in monitoring and evaluating the progress made towards optimising the functionality and efficiency of justice and law enforcement institutions. The needs assessment shall also be important in determining the sustainability of such results in relation to preventing and responding to PAD in South Sudan.

Given the contextual challenges and limitations associated with the justice and law enforcement institutions of South Sudan, it is recommended that the needs assessment

³⁹ See chapter two at 41.

⁴⁰ Capacity building has been defined in many ways depending on the context and organisational type. The US Department of Education ‘defines capacity building as a process for strengthening the management and governance of an organisation so that it can effectively achieve its objectives and fulfil its mission.’ United States Department of Education *Conceptualizing Capacity Building* (2015) 1. See also UNDP *Capacity Building: A UNDP Primer* (2015) 13 - 15. This definition perceives capacity building as a means to an end – a means by which organisations and institutions can enhance management and organisational performance in achieving their goals and mandates. UNDP takes a similar view to capacity building and adds that: ‘capacity development is about transformations that empower individuals, leaders, organisations and societies.’

⁴¹ UNDP *Capacity Assessment Methodology: User’s Guide* (2008) 5.

considered the inclusion of a Political, Economic, Socio-cultural, Technological, Legal and Environmental (PESTLE) analysis which provides a ‘framework to analyse the key factors ... influencing an organisation from the outside.’⁴² The PESTLE assessment will ensure that justice and law enforcement institutions in South Sudan can prioritise specific areas of capacity building in better positioning themselves for effective response to PAD.

The thesis further recommends that capacity building interventions should occur at multiple levels including at the environmental, institutional, and individual levels.⁴³ At the environmental level, the Government of South Sudan will set the overall scope of capacity building by developing supportive legal and policy frameworks which authorise and mandate capacity building for justice and law enforcement institutions as pertinent to addressing PAD. This will address the challenge and likelihood of justice and law enforcement institutions treating capacity building as optional. The proposed legal and policy frameworks should include the clarification of the roles and responsibilities of key institutions and actors thereby allowing and facilitating the smooth and continuous implementation of capacity building of justice and law enforcement institutions to provide adequate prevention and response measure to PAD in South Sudan.

The next level of intervention in enhancing the capacity of justice and law enforcement institutions in South Sudan in addressing PAD is at the institutional level. The focus here is on the collective technical and functional capacity of the justice and law enforcement institutions in reinforcing the overall functional capacity and enhancing and making available specific skills and expertise related to everyday service delivery. Capacity building interventions at this level shall be focused on ensuring that the human resources (staffing) have the necessary skills, expertise, and tools to effectively function in the sector. For example, a notable challenges faced by the police in South Sudan is charging suspect with the wrong offences which often result in undue delays and the dismissal of criminal cases in court. In this regard, specific capacity building interventions proposed to address this challenge would be ensuring that police officers are trained in criminal law and penal code or

⁴² Chartered Institute of Personnel and Development ‘PESTLE Analysis’ available at <https://www.cipd.co.uk/knowledge/strategy/organisational-development/pestle-analysis-factsheet#gref> accessed on 15 June 2020.

⁴³ UNDP identifies these three levels as the points at which capacity is nurtured and grown. It states that ‘these three levels influence each other in a fluid way – the strength of each depends on, and determines, the strength of the others.’ UNDP op cit note 5 at 5.

better still, provided with access to adequate legal advice in reviewing and certifying files before they are forwarded to the court.

Capacity building of justice and law enforcement officer can be achieved through training sessions and workshops on different thematic areas and coaching and mentoring in increasing performance in addressing PAD. The training of justice and law enforcement officials in South Sudan should occur through one-on-one or group workshops and sessions including face-to-face in person or (as is now common during the COVID-19 global epidemic) through virtual means online. Training workshops and sessions shall be effective in increasing the knowledge and skills of justice and law enforcement officials in different thematic areas. Training workshops shall also enable officials in the sector to receive and become familiar with new tools they require in preventing and responding to PAD in South Sudan.⁴⁴

Regarding mentoring and coaching, the Government of South Sudan should avail the opportunity for more experienced experts in the justice and law enforcement sector to provides ‘intensive, personalized guidance and skills transfer to emerging and promising officers in the sector’.⁴⁵ For example, police officers often omit to follow the legal procedures in extending the detention of suspects when the lawful period of pretrial detention expires. A challenge in this regard is in relation to the know-how to complete the necessary forms in making an application to the judge for an extension of the detention. In this instance, the mentoring and coaching model of capacity building will be effective in ensuring that less experienced police officers can benefit from the day-to-day guidance and support provided by their more experienced colleagues in reinforcing the compliance with rules and procedures and promoting professionalism relevant to addressing PAD in South Sudan.

Another action which could be carried out in ensuring that justice and law enforcement institutions in South Sudan have the necessary capacity to prevent and respond to PAD include the recruiting and retention of the right calibre of staff or volunteers with the appropriate knowledge and skill set. This recommendation speaks not just to the limitation in knowledge and awareness which is evident in the justice and law enforcement sector, but also

⁴⁴ B O Martin ‘Training Methods: A Review and Analysis’ (2013) *Human Resource Development Review* 13:1 at 25. See also M A Manore *Visualization education and training: Learning the New Tools - and New Tools for Learning* (2007) 12 – 18.

⁴⁵ K Guccione and St Hutchinson ‘The reputation of coaching and mentoring’ in Marian Mahat (ed) *Coaching and Mentoring for Academic Development* (2021) 193-200.

to the cardinal challenges of limited resources plaguing the criminal justice system in South Sudan. Having the right human resource in place shall enable justice and law enforcement institutions to function effectively, conveyed the rights knowledge and expertise across the institution and promote professionalism and effectiveness in the sector.⁴⁶

Furthermore, the formation and nurturing of networks and partnerships among justice and law enforcement institutions shall promote synergy and complementarity in preventing and responding to PAD in South Sudan. For instance, at the state-level, limited networking and engagements between the judges and prosecutors often limits the impacts of courts circuit in reducing backlog cases in South Sudan. The silo approach to the conduct of court circuit at the state level invariably means that planning and funding for the circuit court is inadequate and largely borne by the Judiciary resulting in adequate funding and ineffectiveness.⁴⁷ Tools and mechanisms which may be of help here include the development of plans of action, terms of references (TOR) for courts circuit, memorandums of understanding (MOU) in fostering collaboration and engagements at all levels as well as guidelines and standard operating procedures (SOP) which detail how the institutions in the justice and law enforcement institutions in South Sudan could harness the advantages of other organisations.

For capacity building to be thorough and effective in the justice and law enforcement sector of South Sudan, emphasis should be placed on managing and facilitating transformation for improvements in service delivery in the sector. In the context of South Sudan, capacity building should focus on long term results and not as a one-off intervention.⁴⁸ The emphasis on long term goals does not, of course, rule out short-term results which are also very critical in measuring the long term gains of capacity building.

Since the attainment of independence, substantial government resources supplemented by funds from the donor community have been put into reinforcing the technical and functional capacity of the governance and indeed justice and law enforcement

⁴⁶ PAHO and WHO 'How to organize and preserve the institutional memory' in *Methodologies for Information Sharing and Knowledge Management in Health* (2015) 7 – 9.

⁴⁷ G Musila *The Rule of Law and the Role of Customary Courts in Stabilizing South Sudan* (2018) Available at <https://reliefweb.int/report/south-sudan/rule-law-and-role-customary-courts-stabilizing-south-sudan> accessed on 15 October 2020.

⁴⁸ The UNDP Practice Note explains that capacity development 'is not a one-off intervention but a long-term process. Because of its long-running system of working through Country Offices, UNDP is able to stay engaged for the duration of a programme and beyond so that it can engage continually and then track and measure the results of its capacity development efforts.' See UNDP *Practice Note: Capacity Development* (2008) 24.

institutions in South Sudan. Such support which includes interventions at the human resource, infrastructural and logistical level of the government, need to be sustained and regularly examined and evaluated for any real impact to be realised especially in addressing PAD in South Sudan.

7.4.5 Increasing human rights awareness and practice among law enforcement and the administration of justice

As have been discussed in previous chapters, human rights and the administration of justice are mutually reinforcing.⁴⁹ When the rights of people are violated or abused, they turn to the justice system within their communities in seeking remedies and in ensuring that their rights are protected and reinforced. In the administration of justice, the principles and standards of human rights are critical ingredients that make justice desirable and more satisfying.⁵⁰

In the context of South Sudan, a critical challenge and limitation which this thesis has identified as associated with the delivery of justice service is the inadequate awareness of the law and political will in promoting and protecting human rights.⁵¹ Most of the law enforcement institutions are staffed by officials who have had little or no formal training, exposure to and experience with the principles and standards of human rights and its relevance to the work they do and the services they provide.⁵² There is evidence that they lack the very basic technical know-how in translating the principles and standards of human rights into their everyday work.

The occurrence of PAD therefore comes as no surprise as officers have very limited awareness how it impacts the dignity and wellbeing of people. This lack of awareness of the human rights implications of PAD means the provision of justice and law enforcement services is completely divorced from the protection and promotion of human rights in South Sudan. As a result, access to justice is not viewed as a human rights intervention nor are the

⁴⁹ See chapter seven at 137.

⁵⁰ C Wellman 'Social justice and human rights' in *An Approach to Rights, Law and Philosophy Library* Vol 29 (1997) 187.

⁵¹ The following is noted as critical limitations of human rights: '1) Lack of accountability for serious crimes is a longstanding problem in South Sudan, e.g. no arrests have been made yet in the wake of allegations that the S.P.L.A was involved in the killing of more than 800 people, destruction of hundreds of homes, and displacing thousands, in Jonglei state in December 2011 and January 2012. 2) Security forces continue to arrest, harass, and detain journalists because of what they wrote or said.' See A Bandone *South Sudan: Enhancing Capacities for Human Rights* (2013) 9.

⁵² See chapter two at 40.

justice institutions considered as avenues through which the rights of people are promoted, preserved, and protected.

A critical intervention in reinforcing human rights awareness among justice and law enforcement officials and in addressing PAD, is to promote their understanding and appreciation of the principles and standards of human rights as related to the South Sudanese context. This can be achieved as part of a sustained and deliberate process of training and other forms of capacity building as discussed above.⁵³ Conducting training and capacity building sessions on the principles and standards of human rights shall enable justice and law enforcement officials to perceive their roles and functions as reinforcing of human rights in South Sudan.

A strategic and institutional approach which enhances local ownership of the process, and which is driven by the various institutions is required. Within this framework, the following are specific interventions proposed in enhancing awareness on issues of human rights among justice and law enforcement institutions in addressing PAD in South Sudan:

- Policy, strategy and procedures development and implementation: The development and implementation of policies could provide the ideal platform for the promotion of the principles and standards of human rights in the justice and law enforcement sector in South Sudan. Policies and strategies are relevant in prescribing how justice and law enforcement officials should comport themselves in their official and non-official capacity in preventing PAD.⁵⁴ This approach ensures that the promotion and protection of human rights are mandated and sanctioned at the highest level of justice and law enforcement institutions and that the institutions equally supports the enforcement and implementation.
- Orientation and information sessions: This shall take the form of workshops and meetings where officials shall be provided with basic orientation on international human rights principles and standards relevant to the work of justice and law enforcement institutions

⁵³ See chapter seven at 164.

⁵⁴ Within this framework, human rights issues are treated at place at the core of the action plan and in the case of violations and other infringements. 'Instead, human rights would always be at the heart of how decisions are made with full appraisal of their likely human rights consequences, and with the full participation and inclusion of citizens whose rights would be affected in the decision-making process.' See D S Olawuyi 'Mainstreaming Human Rights Under National And International Law: Legal And Epistemic Question' (2013) *Indonesia Law Review* 3:3 221.

in South Sudan.⁵⁵ Such sessions shall also be relevant to empowering officials to acquire knowledge and develop expertise on the formulation and application of policies and practices which reinforce and protect human rights both in the institutional environment and in the services they provide. This approach will be effective in sensitising officials of justice and law enforcement institutions in their role and responsibility in protecting and promoting human rights and in affecting human rights in their day-to-day functions.

- **Developing and disseminating information, education and communication (IEC) messages:** The development of communication messages through the use of various IEC supplements requires the combination of strategies, approaches and methods which enable officials of the justice and law enforcement institutions to access human rights materials in an easily comprehensible and user-friendly format. The use of IEC shall facilitate learning which empowers justice and law enforcement institutions in South Sudan to acquire knowledge in making informed decisions, modifying behaviours and transforming social conditions to promote and protect human rights. A list of the types of IEC materials and supplements including, ‘printed materials; mass media; giveaways; community awareness events, and innovative ideas.’⁵⁶
- **Making human rights a requirement in performance management processes:** Including human rights in the performance management of justice and law enforcement officials in South Sudan shall be relevant to ensuring that due attention is paid to the human rights responsibilities and implications of the work that they do and that the environment or setting is created where these officials are enabled to perform their human right functions to the best of their abilities.⁵⁷

The interventions discussed above are inexhaustive and constitute a sample of possible actions which could be undertaken in increasing awareness and an application of human rights in the delivery of services and addressing concerns over PAD in South Sudan. More innovative approaches should be adopted in ensuring and facilitating a growing

⁵⁵ OHCHR *Professional Training Series No. 9 Human Rights in The Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 25. In this training manual, OHCHR emphasises the need for orientation and training of officials of justice and law enforcement institutions because of their central role they play in the delivery of justice services to targeted population.

⁵⁶ L Bruce *Developing Behavior Change Communication Interventions for Population, Health and Environment Projects: Facilitator Guide* (2013) 69 – 76.

⁵⁷ See J Martanto & H Efendy ‘Implementation of Performance Management in Inspectorate General of the Ministry of Law and Human Rights’ (2017) *International Journal of Human Resource Studies* 8:1 137.

consciousness of human rights among justice and law enforcement institutions and officials in South Sudan. This shall ensure that they are able and willing to examine every aspect of their day-to-day work through a human rights lens and that the principles and standards of human rights are applied and upheld.

Three principal challenges which might impede the successful human rights awareness raising among justice and law enforcement officials include: first, the cost factor in conducted extensive training as is being proposed here may pose significant challenges given the resource limitation of South Sudan.⁵⁸ Second, the willingness of the Government of South Sudan to prioritise compliance with its human rights obligations and responsibilities under international law may also be a difficult proposition. Third, the influence of customs and tradition some of which are incongruent with national and international human rights standards may also provide to be a challenge.

In ensuring that these challenges do not impede progress in promoting human rights and addressing PAD in South Sudan, human rights should be contextualised to ensure that it is not pitted as competing with or an alternative to customs and tradition. Rather, human rights should be understood as reinforcing of customs and tradition and as supportive of the work of the justice and law enforcement officials in South Sudan.⁵⁹ For example, human rights could be infused as an antidote to addressing issues of male dominance, masculinity and other practices and belief systems which perpetuate vulnerability among women in South Sudan.

Also, the Government of South Sudan is encouraged to view and appreciate human rights as their responsibility or obligation arising from international law and not as a tool for the opposition. This will enable the adequate apportionment of both human and financial resources and ensuring the prioritisation that human rights require to thrive among justice and law enforcement institutions in South Sudan.

7.4.6 Harnessing information technology for effective justice service delivery

⁵⁸ See chapter two 31 – 4.

⁵⁹ S Obatusin ‘Customary Law Principles as a Tool for Human Rights Advocacy: Innovating Nigerian Customary Practices Using Lessons from Ugandan and South African Courts’ (2018) *Columbia Journal of Transnational Law* 26.

As have been acknowledged in this thesis, a critical challenge in addressing PAD in South Sudan is the limitation in the infrastructural capacities of justice and law enforcement institutions.⁶⁰ The infrastructural limitation translates into fewer and inadequate courts, police stations and posts and correctional facilities in enabling physical access to justice and law enforcement services to the public. A critical infrastructural challenge of justice and law enforcement institutions is the heavy reliance on manual paper-based systems which restricts efficiency gains in the sector.⁶¹ Performance in the justice and law enforcement sector in South Sudan is limited by the accuracy of data, delays in the dissemination of information across institutions in the sector which in turn result in undue delays in service delivery and PAD.⁶²

Information Communication Technology (ICT) platforms offer the Government of South Sudan a viable, accountable, and transparent alternative to preventing and responding to PAD, enhancing access to justice, and increasing the overall effectiveness and quality of justice and law enforcement services in South Sudan.⁶³ Most industries and sectors are today adopting new and innovative ICT products and services in making service provision more responsive and effective. The justice and law enforcement institutions in South Sudan would do well to upgrade their systems from manual paper-based to the highly effective and efficient digital and ICT- based systems and models of operations.⁶⁴ Given the context of South Sudan with all the challenges and limitations, an effective sectoral response to PAD would need to be timely to delivery within the appropriate schedule, accurate in terms of data and reporting, and cost-effective in ensuring sustainability of the systems. ICT- based systems and models will ensure effective information and case flow between the different justice institution as well as provide an effective system for tracking performance of officials in meeting set objectives.

⁶⁰ See chapter two 29 – 31 on the capacity limitations and challenges impeding the functionality of the justice and law enforcement institutions.

⁶¹ H Ayatollahi, P A Bath and S Goodacre 'Paper-based versus computer-based records in the emergency department: Staff preferences, expectations, and concerns' (2009) *Health Informatics Journal* 15:3 207.

⁶² See chapter 5 at 131.

⁶³ N Netten et al 'Legal Logistics: A Framework to Unify Data Centric Services for Smart and Open Justice' (2018) *International Journal of E-Planning Research* 51.

⁶⁴ M Bexci and R Subramani 'Towards Effective use of Information and Communication Technology (ICT) Application in the Healthcare Management: A Descriptive Study of Online Appointment System Services of Hospitals in India' (2013) *International Journal for Management Science And Technology* Volume 1:7 Paper- 3 at 19.

Given the ubiquitous concerns over corruption and the wastage of public funds, the Government of South Sudan will also benefit from the legitimacy which ICT offers by enhancing transparency and accountability in the utilisation and reporting on public and development funds.⁶⁵ There are several advantages to be had from adapting datacentric processes including through mining and utilising Big Data⁶⁶ in identifying root causes and proffering solutions to preventing and responding to PAD in South Sudan. ICT- based systems and models shall contribute to reinforcing relevance, responsibility and answerability for government resources and the various funding support they receive in the justice and law enforcement sector.

Utilising ICT-based systems for effective data and case management and analytics should enable the Government of South Sudan to uncover previously unseen patterns and trends in criminality and service delivery in South Sudan.⁶⁷ Furthermore, promoting data analytics through the adaption of ICT in the law enforcement institutions is critical to the adaption of the approach known as “predictive policing,” which involves the use of data and statistical models to anticipate increased risks of crime, followed by interventions to prevent those crimes from happening.⁶⁸ Other advantages which may be offered by ICT-based platform in South Sudan include effective information sharing across institutions, the addressing of huge backlogs and blockages in case flow management and efficiency of coordination across the criminal justice system.

In this regards, the justice and law enforcement sector in South Sudan should consider the adaption and deployment of criminal justice case management systems in improving case flow management and reducing delays in case processing and adjudications which result in PAD. A case management system is an ICT based platform which facilitates the tracking and management of data and other information set in a centralised and security environment and

⁶⁵ P Chinedu, Y Hussaini ‘ICT Deployment in Governance: A Potent Enabler of Accountability, Reliability and Transparency (ART) of Government Business’ (2018) *Engineering Mathematics* 2(2):68-78 78. The authors note that most developed and developing countries are adopting ICT ‘as a cost-effective and convenient means to promote accountability, reliability and transparency, and to reduce corruption.’

⁶⁶ See K Taylor-Sakyi *Big Data: Understanding Big Data* (2016) 2 where the author ‘defines Big Data as referring to large sets of complex data, both structured and unstructured which traditional processing techniques and/or algorithms are unable to operate on. It aims to reveal hidden patterns and has led to an evolution from a model-driven science paradigm into a data-driven science paradigm.’ Available at <https://www.researchgate.net/publication/291229189> and accessed on 29 May 2020.

⁶⁷ See B Pearsall ‘Predictive Policing: The Future of Law Enforcement?’ in *National Institute of Justice Journal* (2010) 1 – 4.

⁶⁸ Ibid.

collaboration and communication on cases and share information in a secure environment.⁶⁹ The criminal justice case management systems will also facilitate the payment of fees and fines, and most importantly making judicial services available and accessible to the South Sudanese public.⁷⁰ A case management system shall enable justice and law enforcement institutions in South Sudan to better access and manage data on PAD and allow for improved interaction with the public.

At present, the ICT capacity of South Sudan remains significantly low and, in some locations, non-existent. However, the Government of South Sudan has demonstrated a willingness for the adoption and use of ICT in improving effectiveness and efficiency in service delivery. Examples of the adoption and use of ICT by the Government of South Sudan are the Financial Management Information System (IFMIS)⁷¹ and the Health Management Information System (HMIS)⁷² which are at present being used in the finance and health sectors respectively. The Government of South Sudan can draw on the lessons learnt from the above examples of ICT programmes in implementing the proposed criminal justice case management systems. At the individual level, the influence of ICT among the population is palpable through the availability and wide use of devices such as computers, smartphones, and mobile apps which are all an integral part of the daily lives of people in South Sudan.

Without a doubt, the adoption and implementation of ICT-based programmes across justice and law enforcement institutions in South Sudan will recognisably be a challenging and ambitious undertaking. This will require commitment, adequate resources, and the cooperation of all the institutions involved. This is so because of the huge logistical, infrastructural, capacity and monitoring requirements of ICT-based platforms such as the proposed criminal justice case management systems. Fortunately, the foregone examples of the adoption of ICT-based platform in South Sudan demonstrates the willingness of the

⁶⁹ H P Gramckow and V Nussenblat *Caseflow Management: Key Principles and the Systems to Support Them* (2013) 2.

⁷⁰ M Velicogna 'Justice Systems and ICT What can be learned from Europe?' (2007) *the Utrecht Law Review* 12.

⁷¹ See World Bank *IFMIS Current Status, Challenges and Future Development* (2013) 3 where the World Bank defines the Financial Management Information System (FMIS) 'as a set of automation solutions that enable governments to plan, execute and monitor the budget.'

⁷² R Muhindo1, E N Joloba and D Nakanjako 'Health Management Information System (HMIS); Whose Data is it Anyway? Contextual Challenges' (2016) *Review of Public Administration Management* where HMIS is defined as 'a database system in which "raw data" are stored and transformed into information, as a system is said to be composed of interrelating components that can be grouped into two entities.'

government and also highlights advantages and efficiency gains that ICT offers. The justice and law enforcement sector has the opportunity in building on the lessons learned and best practices from the finance and health sectors in adapting ICT-based programmes to prevent and respond to PAD in South Sudan.⁷³

Countries like Kenya and Namibia have successfully adopted and deployed case management systems in their justice sectors. In Kenya, the Chief Justice reports that the case management system has been successful in integrating ICT into proceedings of the judiciary and facilitating ‘an efficient electronic filing and service of documents in the judiciary.’⁷⁴ Namibia has successfully developed and rollout the e-Justice system which ‘is a web-based platform that leverages on content management systems and dynamic electronic form (e-form) technology ... [and] ... offers law firms and Court users a single access point for commencement and active management of case files throughout the litigation process.’⁷⁵ Both of these countries are reporting excellent results of their ICT platforms in support of the delivery of justice services

The adaption of the proposed integrated data and case management system for criminal justice in South Sudan is in itself not enough. The adaption of the system has to be followed by a series of actions that both prepare and enable South Sudan to adequately address PAD as well as other challenges associated with the criminal justice system. The first course of action and a critical requirement of getting the system up and running is the deployment to the institutions for which it was designed. The deployment of the system shall include installation and the procurement and setup of all equipment necessary to get the system functional. Another important course of action is the development and rollout of guidelines that detail the functionality and use of the proposed system. A further step in the process shall include providing orientations and training targeting the officials who shall be involved in the implementation of the proposed system.

⁷³ Two examples of ICT-based platforms which are at present in use in South Sudan is the 1) the District Health Information Software 2 (DHIS2) is an open source, web-based health management information system (HMIS) platform adapted by the South Sudan Ministry of Health, and; 2) the UN Organizations for the Coordination of Humanitarian Assistance (OCHA) Humanitarian Data Exchange (HDX) which ‘is an open platform for sharing data across crises and organisations with a goal of making humanitarian data easy to find and use for analysis.’ See National Association for Court Management *Court Technology Solutions Award: Nomination Form* (2018) 1.

⁷⁴ Gazette Notice No. 2357 of 2020.

⁷⁵ Namibia has also adopted an eJustice platform in providing various ‘functionalities and related services that streamline the litigation process and helping to improve efficiency and enhance access to justice. It will also enable legal practitioners to handle greater caseloads more effectively and rapidly.’ Ibid at 73.

Once the institutions have been effectively trained in the use of the system, the public also needs to be targeted with effective messaging and a sensitisation campaign in getting them aware of the existence, advantages and use of the proposed system. Finally, persistent time, effort and resources are required in ensuring coordination between the different institutions and the documentation of lessons learnt and best practices on the functioning and use of the criminal justice case management systems. Furthermore, the sector will have to follow up on upgrading the proposed system to meeting the unfolding demands and new requirements in addressing PAD and for the delivery of justice services.

7.4.7 The reform and implementation of laws and policies to preventing and respond to PAD

In South Sudan, two critical challenges exist in relation to the law with a significant impact on the perpetuation of PAD. First, other than the Constitution which makes express provision for the protection of human rights and in particular the rights to liberty and security of persons, most other laws are silent on issues of human rights. Second, where laws that reinforce human rights exist, the capacity and resources required for the implementation of these laws are either inadequate or outrightly unavailable. These two challenges render the law ineffective in preventing and responding to the incidents of PAD in South Sudan.

For the legal system of South Sudan to be deemed effective in preventing and responding to PAD, the country needs to confront these two challenges in ensuring that it has a comprehensive system of laws and have effectively functioning institutions to enforce and implement the laws in a manner that is consistent with the principles of human rights, justice, and good governance.⁷⁶ While having laws in place is important, South Sudan needs to recognise that the capacity to implement such laws is also of equal significance. The implementation of laws must involve the development of strategies and action plans which enable their application as well as facilitate the commitment of personnel, financial and logistical resources.

However, where the effectiveness of the law is found to be with the construct of the law itself, then there is a need for the reform and modernisation of such laws. Factors that

⁷⁶ The International Institute for Democracy and Electoral Assistance *Rule of Law and Constitution Building: The Role of Regional Organizations* (2014) 1.

necessitate the reform and modernisation of laws include among others, sections of laws that become ineffective or outdated due to the passage of time, harshness, and non-compliance with international standards. An example of provisions of laws that need to be reformed and modernised in preventing and responding to PAD in South Sudan include the Code of Criminal Procedure Act and the National Security Service Act. The Code of Criminal Procedure Act makes provisions under section 64 ss 3 and 4 allows for a continuous extension of the detention of a suspect with the approval of a Judge for up to three months in allowing for the proper investigation of the case. The National Security Service Act, on the other hand, has been placed within this category because of its draconian provisions which allow for PAD. As discussed in chapter 5, the National Security Service is using the act as an instrument of suppression of political opposition and dissenting voices in South Sudan.⁷⁷

The reform and modernisation of laws involve identifying gaps, omissions and weaknesses in the law and an alignment with standards and principles or improving it to meet the changing time including the technological trends, and rationalising and simplifying it in enabling compliance and enforcement. The SDG Accountability Handbook offers four critical processes of reforming the law which is all applicable in the South Sudan context. These include (a) repeal: which involved the complete removal or reversal of existing and outdated laws, (b) the creation of new laws, (c) consolidation which consists of the combination of several laws into one and (d) codification by which compilation and arrangement of laws are carried out according to a given plan.⁷⁸

Undertaking a reform of the laws of South Sudan is an absolute imperative in ensuring the effectiveness of the law in addressing concerns over PAD and more broadly in promoting law and order and the protection of human rights. Given the ongoing effort towards ending the civil war and entrenching peace in South Sudan, reform of the law is even more pressing. Provision of laws that opens the door to violations and abuse of rights and the perpetuation of PAD needs to be expunged from the laws of South Sudan. Once these laws have been identified as requiring reform, a thorough review process has to be conducted to determine which laws should be repealed entirely or others that should be updated and

⁷⁷ See chapter 5 at 128.

⁷⁸ TAP Network ‘Pursuing Law Reforms, Strategic Litigation and Legal Empowerment’ (2020) *SDG Accountability Handbook* 1.

modernised in response to the current justice and human rights needs in the context of South Sudan.

Notwithstanding the usefulness and impact of reforms and the modernisation of laws, if implementation and enforcement are not undertaken with the same level of efficiency, the law will continue to be of little or no consequence and PAD shall continue to thrive in South Sudan. The implementation of laws in South Sudan requires all actions and interventions by governmental and non-governmental actors and institutions in operationalising and meeting the requirements of laws. These include the development of policies, rules and procedures, regulations and guidelines which inform the implementation process and the establishment of institutions, and platforms for effective coordination, oversight, and reporting on the process of implementation.⁷⁹

7.5 ENGAGING THE DEMAND SIDE

In addressing PAD in South Sudan, engagement should not only be limited to the justice and law enforcement institutions and actors but should also be inclusive of the South Sudanese population. In examining the role of the demand side in the justice and law enforcement sector, the Search from Common Ground notes that public engagement increases the sustainability of programs.⁸⁰ The justice and law enforcement sector can benefit from the social linkages which the public has established, and; over the long term, this engagement can increase the level of confidence and trust which the public has in the justice sector.⁸¹ This approach is consistent with a transitional justice approach, which places the people at the centre of processes and ensures that their voices are heard, and their concerns are taken into consideration.⁸²

Public engagement in processes aimed at addressing PAD shall include awareness-raising and legal education initiatives. Empowering the public through awareness and education is extensively discussed in chapter four and noted to include increasing knowledge and use of the law to address legal challenges and access justice remedies.⁸³ This goal is

⁷⁹ See Lexis Nexus Stage 9: The Law is Implemented and Enforced Regulatory Activity (2007)' available at http://www.lexisnexis.com/help/cu/the_legislative_process/Stage_9.htm accessed on 26th April 2021.

⁸⁰ Search for Common Ground 'Civic Engagement' available <https://www.sfcg.org/civic-engagement/> accessed on 12 August 2020.

⁸¹ Search for Common Ground *Edline Evaluation: Facilitating Access to Justice in South Sudan* (2018) 6.

⁸² A Ngari and J Kolok *Citizens' Perceptions on Transitional Justice Processes in South Sudan* (2019) 12.

⁸³ World Health Organization *Information, Education and Communication* (2008) 3.

achieved through the use of a wide range of information, education and communication and capacity building methodologies. Other examples of how legal awareness and education have been promoted include transcribing and simplifying laws, policies and strategies in audio format for radio broadcasts; radio discussions and phone-in programmes; development of brochures, leaflets and pamphlets providing information on laws; development of billboards and posters and banners on specific themes etc. IEC materials will be particularly effective in targeting sections of the population in South Sudan who are illiterate in the language of the law, unable to access copies of the law and most importantly ensure that all segments of the country can understand and therefore utilise the law to protect themselves from PAD. These processes will enable them to become familiar with the action by the government in addressing PAD and will be fully informed on how they can play a watchdog role in ensuring that the process is fully implemented.

Empowering the people of South Sudan to participate in the preventions and response to PAD effectively also requires ensuring that they have unlimited access to legal aid support and services. The issue of legal aid has also been discussed extensively in chapter four on access to justice. It is, however, important to note that the provision of legal aids is difficult and constrained even in developed and resource-rich countries like the United Kingdom.⁸⁴ Notwithstanding this recognition, South Sudan is encouraged to put in place systems and procedures for legal aid to thrive starting with the enactment of legislation on legal aid followed by a policy and action plan which will facilitate the availability and accessibility of this critical service to the people.

A final element of legal aid to be discussed is the use of paralegals in making up for the shortage of lawyers and its impact on PAD in South Sudan. With an approximate population of 11.1 million, there are only an estimated 1457 lawyers in South Sudan of which 223 are female and less than 500 are actually practicing the law.⁸⁵ This figure roughly translates into 7,618 South Sudanese to a lawyer.⁸⁶ The need to address the deficiency of lawyers by augmenting the training of more lawyers therefore cannot be overstated. An ideal action in addressing the deficiency of legal practitioners including judges and lawyers is through the establishment of law schools in multiple locations and removing undue

⁸⁴ Ministry of Justice *User Guide to Legal Aid Statistics, England and Wales* (2021) 51.

⁸⁵ Courtesy of the South Sudan Bar Association.

⁸⁶ UNDP *Paralegals bring justice to women in South Sudan* available at <https://www.undp.org/content/undp/en/home/ourwork/ourstories/paralegals-bring-justice-to-women-in-south-sudan.html> access on 30 March 2020.

restrictions and limitations in the practice of law in South Sudan.

Fortunately, there is a precedent that the Government of South Sudan can draw on in the construction of a Law School. In 2015, UNDP completed the construction and handover of the College of Law in the University of Juba with an aim of addressing the acute shortage of lawyers and enhancing local capacity for legal and justice service delivery in South Sudan.⁸⁷ However, given the contextual limitations and challenges both in terms of the financing and the human resource requirements for such an intervention, the government would have to demonstrate a genuine commitment in making available the requisite resources or working with development partners in seeing it through.

Another way of addressing this challenge, which is gaining popularity around the world is the training, deployment and use of paralegals, especially in contexts that are far away from urban centres where lawyers are mostly unavailable.⁸⁸ Utilising paralegals in supporting access to justice and addressing issues of PAD can be a gamechanger, not only because of the low or sometimes no-cost factor but because of their knowledge of local conditions and issues and the level of trust that they enjoy from communities and individuals. While there is, at present, no law providing for the existence and the work of paralegals in South Sudan, it is recognised that they can provide a viable alternative and an effective channel through which legal aid services could effectively reach vulnerable and marginalised population.⁸⁹

South Sudan needs to do more in providing the legislative framework to recognise and mandating the existence and functioning of paralegals and fully harnessing the positives they bring to the legal system. And fortunately, there are several good examples of legislations in the subregion to learn from in drafting such a law.⁹⁰ While a decision is waiting to be made in this regard, the need for legal services continues to be critical at all

⁸⁷ Juba College of Law inaugurated, customary laws of 14 communities made part of curriculum (2015) Available at https://www.ss.undp.org/content/south_sudan/en/home/presscenter/articles/2015/05/15/juba-college-of-law-inaugurated-customary-laws-of-14-communities-made-part-of-curriculum.html accessed at 23 May 2019.

⁸⁸ There is no presumption that paralegals can or should be a replacement for lawyers, rather, it is acknowledged that there is an dire need for more lawyers to be produced and deployed for the justice system to function effectively and in ensuring that justice is affordable and accessible to all South Sudanese.

⁸⁹ Ibid at 105.

⁹⁰ The law governing legal aid and paralegals in both Kenya and Tanzania are quite progressive and forwards looking. While the legislation in both countries are clearly defined with different aims, South Sudan could tap into the emerging lessons on legal aid in these two contexts and come up with a more effective law in response to their needs and to suit their context. Some of the emerging lessons that could be emulated by South Sudan include effective coordination and oversight.

levels of the country.

7.6 CONCLUSION

This chapter has recommended a wide variety of interventions that can be undertaken in preventing and responding to PAD in the context of South Sudan. It is acknowledged that the list of recommended action discussed in this chapter is by no means exhaustive. One emerging lesson from all the foregone discussion is that in addressing PAD, innovation and ingenuity is required at the national, institutional, and individual levels in identifying and responding to the challenges and limitations which impede the effective functioning of the criminal justice system and the prevention and response to PAD. We have also discussed how crucial it is to use a coordinated approach by which all institutions in the criminal justice sector can collaborate and engage in the achievement of a single goal. In most post-conflict and fragile contexts, this coordinated approach has been achieved through the creation of platforms which mandate and reinforce interactions and collaborative action.⁹¹

The thesis recognizes that the successful implementation of all these recommendations is contingent on the need for the requisite political will and the local leadership and ownership of all the proposed interventions. Also, implementation of the recommendations are also contingent on the availability of the necessary human and financial resources. However, the thesis has established that these resources are not readily available in South Sudan and even where they are the justice and law enforcement sector is not prioritised for the receipt of these resources. The Government of South Sudan therefore needs to examine these issues and come up with innovative solutions in ensuring that they do not impede progress toward addressing PAD and other justice and human right challenges in South Sudan. It is also important to acknowledge that the conflict will continue to limit the functionality and effectiveness of justice and law enforcement institutions in South Sudan. However, the impact of the conflict and its debilitating effect of justice service delivery has not been adequately covered in this study and could be the topic of future research.

⁹¹ See Geneva Centre for Good Governance ‘Security Sector Reform’ available at <https://securitysectorintegrity.com/security-sector-governance/security-sector-reform/> accessed on 23 June 2020.

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