THE EFFICACY OF ALTERNATIVE DISPUTE RESOLUTION IN RESOLVING DISPUTES
A CASE STUDY OF SOUTH SUDAN

BY
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DECLARATION

I, hereby declare that this is my original own work at the best of my knowledge and belief. It has never been produced by anyone or institution for any academic award in and outside Kampala International University or diploma of the university or other institute of higher learning, except where due acknowledgment has been made in the text.

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APPROVAL BY SUPERVISOR

I certify that I have supervised and read this study and that my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelor of Laws of Kampala International University.

Signature: .....

Esther Christine Kisubi (ms)

Date : 11/11/2016

DEDICATION

To my lovely Aunt Mrs. Mugisha Janet and my uncle Mr. Machiika Mugisha Patrick (Advocate) who have been there for in everything. I can't proceed without mentioning my dear Grandmother, Mrs. Machiika Margaret because there is nothing as good as a Grand/mother's love.

My brothers Bwesigye Enock (Advocate), Cousin brother Amos Arinaitwe (Advocate), Cousin Sister Christine Naturinda (Advocate), to all my course mates and lectures during the entire period of my study at the university and the family and friends at large.

I will remain indebted to you all forever.

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LIST OF ABBREVIATIONS

AACC	:	All Africa Conference of Churches
ADR	:	Alternative Dispute Resolution
ARCSS	:	Agreement on the Resolution of the Conflict in the Republic of South Sudan
AU	:	African Union
CCMA	:	Commission for Conciliation, Mediation and Arbitration
CPA	:	Comprehensive Peace Agreement
GoS	:	Government of Sudan
IBMA	:	Integrated Boarder Management Approach
ICSID	:	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IGAD	:	Intergovernmental Authority on Development
JPSM	:	Joint Political and Security Mechanism
SDBZ	:	Safe Demilitarized Boarder zone
SPLM/A	:	Sudan People's Liberation Movement/ Army
SPLM/A-IG	:	Sudan People's Liberation Movement/ Army-In Government
SPLM/A-IO	:	Sudan People's Liberation Movement/ Army-In Opposition
TGoNU	:	Transitional Government of National Unity
UN	:	United Nations
WCC	:	World Council of Churches

ABSTRACT.

The research is about the efficacy of ADR as a dispute settlement mechanism in South Sudan given the different methods of dispute resolution, this research examines ADR development and evolution in Uganda including the traditional means of settling that have led to the present ADR, its effectiveness, benefits and hindrances. It also goes ahead to look at the different types of ADR that can be used by parties.

Further the research also examined the law relating to ADR and how is implemented and applied.

CHAPTER ONE

1.0 Introduction of the Study

Alternative dispute resolution (ADR) known in some countries, such as Australia,[1] as **external dispute resolution**) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.

Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). Additionally, parties to merger and acquisition transactions are increasingly turning to ADR to resolve post-acquisition disputes.[2]

The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favour of this (ADR) use of mediation to settle disputes.

The management of dispute using peaceful, non-violent methods through diplomatic means has been around for a long time in the oil producing area in south Sudan. In nearly all African societies and the world at large, there is a preference for the peaceful settlement of dispute along the lines prescribed by the institutions and values of the community. Violence and youth restiveness is normally frowned at in the oil producing communities in south Sudan. In a few instances where it may be tolerated, the community rather than the individual has to be the sanctioning authority which has to follow the due process.

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[1]Http://en. Wikipedia/wiki/Alternative dispute resolution cite note -1
[2]Http://en. Wikipedia/wiki/Alternative dispute resolution cite note-2

A wide range of non-violent methods of managing conflicts are available in the conflict transformation world. These methods are available at the individual, family, group, community, and international levels. The peaceful methods can be classified into two broad categories. The first is the proactive category, which entails methods that aim to prevent the occurrence of the dispute in the first instance. These include undocumented community-based trust and confidence building measures, communication, good governance, and inter-party collaboration.

Conflict resolution in Sudan has taken centre stage in the last decade with efforts geared towards developing alternative and acceptable mechanisms for dealing with the country's numerous conflicts. One of such mechanisms that has been given prominence is the alternative dispute resolution mechanism. This research was therefore set out to add its voice to this advocacy by investigating the effectiveness of the alternative dispute resolution in South Sudan. The aim of the research was to ascertain reasons for the use of alternative disputes resolution in this protracted conflict case and also examine the strengths and weaknesses of the method. The research relied on interviews as a data collection instrument.

In all, eight (8) interviews were conducted among members of the various committees as well as members and leaders from the two communities. The research revealed that the method of alternative disputes resolution was preferred by the people of the two communities compared to traditional method of litigation owing to the delays and judgemental posture of these traditional methods. Again, the research revealed that the use of alternative dispute resolution operated under a three pronged structure; the mediation committee, the consultative committee and the community pacesetters. All these structures worked under different remits to culminate in the desired result of peace for the two communities. The research equally revealed a large involvement of the people from the two communities in the peace process. The research therefore recommends that there should be more vigorous education on the relevance of alternative disputes resolution in South Sudan as well as a creation of alternative dispute resolution units in all district and regional capitals.

Africa has the uncanny reputation of being the world's leading theatre of conflict, war, poverty, disease, and instability. Therefore, it is not surprising that scholars of ethnicity and conflict management regard it as a major laboratory for experimentation and theory building. During the post-Cold War period, Africa experienced persistent violent and seemingly

intractable conflicts.[3] Some of these conflicts which include the notorious genocide and ethnic cleansing in Rwanda and to some extent, Burundi, civil wars in Liberia, Sierra

Leone, the Democratic Republic of Congo, Sudan, Co^te d'Ivoire and Somalia, minority uprisings in Nigeria, and separatist agitation in Cameroon and Senegal, represent reference points of the conflicts in the African continent.[4] The causes and destructive consequences of conflicts imply that pragmatic steps must be employed to resolve these conflicts. Therefore, greater emphasis must be placed on securing and maintaining peace processes which are durable and embody a holistic view of all contending parities. Peace processes need to be able to draw on a wider spectrum of arrangements for all parties involved to provide the conditions in which a stable peace, which addresses the fundamental causes of conflict, can be established.[5]

If we examine conflicting situations, it will be seen that wherever they exist, and whatever their causes, there have always been attempts to resolve them. Finding solutions requires the involvement of other people, who strive to negotiate acceptable terms and conditions between the conflicting parties. Although some of the notable and fairly successful cases have been highlighted, the South African ''miracle'', Ethiopia's ethnic federalism, Botswana's democratic stability, sub regional approaches to conflict resolutions via the Economic Community of West African States (ECOWAS), Inter- governmental Authority on Development (IGAD), Southern African Development Community (SADC), and more recently, the African Union (AU), have all involved various mechanisms aimed at tackling conflicts in a durable and pragmatic manner.[6]

The researcher is therefore of the opinion that more innovative (that is, methods of conflict resolution that are originated within the people themselves and fit the circumstances of the conflict) and traditional approaches (methods of conflict resolution that takes care of the core values and traditions as well as customs of the people) to conflict resolution is the sure panacea to Africa and particularly South Sudan's numerous conflicts situations. The problem, however, is that the management of conflict literature does not adequately reflect or acknowledge the efforts of many available mechanisms of solving conflicts. Even though

[3] Eghosa and Robinson, 2005·
[4] Zartman, 2000
[5] Shinta, 2009
[6] Clapham, 2001

international agencies, governments, and private organizations have entered the 'business' of conflict resolution in ever increasing numbers, it is clear that most interventions in African conflicts have done little to prevent the continent from taking the debilitating course it has traversed over the last decade.[7] The failure of these attempts further demonstrates the need for more creative approaches to conflict resolution.

The renewed interest in traditional techniques for settling conflicts can be seen in this light. Alternative disputes resolution programs can play a positive role in resolving the conflicts in Africa and particularly South Sudan. Alternative disputes resolution refers to a range of methods and techniques for resolving disputes, including unassisted negotiation, non-binding third-party intervention (conciliation or mediation), and binding arbitration.[8] Alternative dispute resolution (ADR) is a collection of processes used for the purpose of resolving conflicts or disputes informally and confidentially.[9] Alternative dispute resolution (ADR) provides alternatives to traditional processes, such as grievances and complaints; however, it does not displace those traditional processes. The purpose of this research is therefore to access the effectiveness of alternative dispute resolution in the South Sudan conflict in the Volta region of South Sudan. This method was adopted for the purpose of the long standing conflict between the Dinka and Nuer who lived side by side each other not in peace but in perpetual conflicts since the 19th century. In 2006, peace building efforts were started using an alternative dispute resolution mechanism.

Therefore, the main purpose and aim of this research was to access the effectiveness of the alternative dispute resolution mechanism in bringing peace to these two communities and whether this method is best suited for the African and South Sudanese situation. Again, the research will equally access the strengths of this method and also find out whether peace through this method is sustainable and durable.

1.1.1 The salient features of each type of Alternative dispute resolution are as follows:

1. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. (NB – a third party like a chaplain or organizational ombudsperson or social worker or a skilled friend may be coaching one

[7] Clapham, 2001
[8] Chigas and David, 2000
[9] CDC/ATSDR policy on alternative dispute resolution, 2006

or both of the parties behind the scene, a process called "Helping People Help Themselves" [10]

2. In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties. In some countries[11], ADR is synonymous with what is generally referred to as mediation in other countries.
3. In collaborative law or collaborative divorce, each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.

In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration. This is known as a 'Scott Avery Clause'. In recent years, the enforceability of arbitration clauses, particularly in the context of consumer agreements[12], has drawn scrutiny from courts. Although parties may appeal arbitration outcomes to courts, such appeals face an exacting standard of review

1.1.2 Global/ International dispute resolution.

Alternative and commercial disputes resolved through creative problem solving Resolving disputes between nations and parties or between parties residing in or doing business in different countries can be highly complex. The legal procedures of each country differ, and international laws such as the Foreign Sovereign Immunities Act, which provides the primary means to sue foreign sovereigns in the United States, often offer only a partial solution, if any.

At the Law Offices of Charles H. Camp, P.C., attorney Charles Camp has been resolving legal disputes for more than 30 years. Mr. Camp is a highly knowledgeable and experienced international attorney who has assisted foreign sovereigns, major corporations including foreign and domestic banks and commercial companies and individuals and dynastic families

[10] See Helping people help themselves in Negotiations Journal July 1990 pp 239-248
[11] Eg United Kingdom.
[12] E.g credit card agreement

worldwide. The firm offers clients comprehensive international dispute resolution services with a special emphasis on recovering debts internationally, including assets owed to satisfy judgments and arbitral awards.

1.1.3 Regional Customary Justice

The U.N charter states that **"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations[13]"**

Abstract Interest in informal legal systems has grown in recent years with greater emphasis being placed on local ownership as an effective means of development. Non-state justice systems, including indigenous, customary, and religious legal orders; alternative dispute resolution mechanisms; and popular justice for are often the only avenues through which the masses can access justice. Customary justice systems (CJS) provide access to justice for marginalized or impoverished communities that may otherwise have no other options for redress. The essential nature of CJS systems to many communities emphasizes the need for their recognition for successful rule of law promotion. However, customary and religious systems are not without deep flaws. They often discriminate against women and minorities, and are inconsistent with established criminal justice standards and human rights norms. Furthermore, informal dispute resolution mechanisms are often captured by local elites or religious leaders, and women, the poor, and ethnic minorities are unlikely to get equal access or fair treatment. At the UN level, a great deal of attention has been given to the empowerment of people to use the law and legal processes, as well as to interventions aimed to strengthen the capacity of local communities, to guarantee access to justice on a fair and non-discriminatory basis.

1.2 Background of the study

In 1821 the Sennar Sultanate to the north collapsed in the face of an invasion by Egypt under the Muhammad Ali Dynasty. After consolidating their control over northern Sudan, the Egyptian forces began to foray south. In 1827 Ali Khurshid Pasha led a force through the Dinka lands and in 1830 led an expedition to the junction of the White Nile and the Sobat.

[13]Article 52(1) of the Charter of United Nations.

The most successful missions were led by Admiral Salim Qabudan who between 1839 and 1842 sailed the White Nile, reaching as far south as modern Juba.

The Egyptian forces attempted to set up forts and garrisons in the region, but disease and defection forced their quick abandonment. While claimed by the Khedives of Egypt, they had no real authority over the region. In 1851, under pressure from foreign powers, the government of Egypt opened the region to European merchants and missionaries.

The Europeans found a large supply of ivory, but found the local Bari had little interest in anything they were selling. As a result, the merchants often turned to force, seizing the ivory, even this proved not to be economical and the merchant ventures had little success. Christian missionaries also established posts in the region, with the Catholic Apostolic Vicariate of Central Africa, covering the region. The missionaries also had little impact on the region in the early 19th century.

The lack of formal authority was filled in the 1850s by a set of powerful merchant princes. In the east Muhammad Ahmad al-Aqqad controlled much land, but the most powerful was Al-ZubayrRahma Mansur who came to control the Bahr el Ghazal and other parts of South Sudan. Al-Zubayr was a merchant from Khartoum, who hired his own private army and marched south.

He set up a network of trading forts known as *zaribas* through the region, and from these forts controlled local trade. The most valuable commodity was ivory. In previous centuries Sudanese merchants had not placed a high price on ivory, but the period of Egyptian rule coincided with a great increase in global demand as middle class Americans and Europeans began to purchase pianos and billiard balls.

To manage the trade al-Zubayr needed labour, and thus also began to capture a significant number of slaves. To his mercenary force, he also conscripted a large slave army. Due to trade disputes with the Sultanate of Darfur al-Zubayr went to war against that kingdom and in 1874 defeated their forces and killed Ibrahim, the last Fur Sultan.

1.2.1 Republic of Sudan

The region has been negatively affected by two civil wars since before Sudanese independence, resulting in serious neglect, lack of infrastructural development, and major

destruction and displacement. More than 2.5 million people have been killed, and more than five million have become externally displaced while others have been internally displaced, becoming refugees as a result of the civil war and war-related impacts.

1.2.2 First civil war

In 1955, one year before Sudan achieved independence, the First Sudanese Civil War started, with aims of achieving representation and more regional autonomy. For seventeen years, the Sudanese government fought the Anyanya rebel army. In 1971, former army Lt. Joseph Lagu gathered all the guerilla bands under his South Sudan Liberation Movement (SSLM). This was the first time in the history of the war that the separatist movement had a unified command structure to fulfill the objectives of secession and the formation of an independent state in South Sudan.

It was also the first organization that could claim to speak for, and negotiate on behalf of, the entire south. Mediation between the World Council of Churches (WCC) and the All Africa Conference of Churches (AACC) eventually led to the signing of the Addis Ababa Agreement in 1972, which established the Southern Sudan Autonomous Region.

1.2.3 Second civil war

John Garang founded and led the Sudan People's Liberation Army/Movement through the Second Sudanese Civil War.

In 1983, President of Sudan Gaafar Nimeiry declared all Sudan an Islamic state under Shari'a law, including the non-Islamic majority southern region. The Southern Sudan Autonomous Region was abolished on 5 June 1983, ending the Addis Ababa Agreement[14]. In direct response to this, the Sudan People's Liberation Army/Movement (SPLA/M) was formed under the leadership of John Garang, and the Second Sudanese Civil War erupted. Several factions split from the SPLA often along ethnic lines and were funded and armed by Khartoum, with the most notable being the SPLA-Nasir in 1991 led by RiekMachar.[15]

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[14]Peter Robertshaw "Prehistory in the Upper Nile Basin" The journal of African History (1987)28:177- 189 Cambridge University Press.

[15] Patricia Meyers "Shilluk" Trade and Politics from the Mid 17th Century to 1861 "The journal of African Histor 1971 page 410 of 407-426

As a result of the infighting, more southerners died at each other's hands than were killed by northerners during the war[16]. In the Bor massacre in 1991, an estimated 2000 civilians were killed by SPLA-Nasir and armed Nuer civilians and another estimated 25,000 died from the resulting famine in the following years[17]. This war lasted for twenty-two years (until 2005), becoming the longest civil war in Africa.

In 2005, Comprehensive Peace Agreement, mediated by the Intergovernmental Authority on Development (IGAD), as well as IGAD-Partners, a consortium of donor countries, was signed in Nairobi and autonomous Government of Southern Sudan was formed. This agreement lasted until 2011, when South Sudan declared independence.

1.3 Statement of the problem

The choice of good alternative dispute resolution strategy is a difficult task, because a lot of physical and mental energy is required. The management of dispute using non-violent, peaceful methods has been around for a long time in oil producing areas in south Sudan. Violence and youth restiveness is normally frowned at in the oil producing in Nigeria by the government. In south Sudan, there is a preference of peaceful settlement of dispute along the line prescribed by the institutions and values of the community (David, 2006).

It is apparent that the success of a functional alternative dispute resolution strategy depends on good application using appropriate method which can subsequently motivate parties in dispute in their various communities. Lack of good alternative dispute resolution strategy by a trained individual in our community and institution can lead to inappropriate behaviour and frustration on the part of youth and students and this can cause dispute and conflict in oil producing areas. Methods that can enhance youth co-existence in their community are usually applied at different levels by mediators and negotiators to achieve positive results in schools and communities of south Sudan. In making choice of alternative dispute resolution strategies communities are faced with the challenges of selecting the method suitable for achieving nonviolent and peaceful co-existence in the oil producing areas.

At the moment, it appears that some factors contributing to poor achievement of peaceful and non-violent strategies include ineffectiveness of the use of alternative dispute resolution strategies. Other researchers attribute the ineffectiveness and failure of strategies to misunderstanding of both parties and behaviour of youth in the communities. The African

[16]ShillukEncyclopedia of the peoples of Africa and the Middle East, volume 1 infobase Publishing ,2009
[17]Nagendra Kr Singh "International Encyclopedia of Islamic dynasties Anmol Public actions PVT.LTD 2002 page 659.

alternative dispute resolution commonly adopted by the communities and parties in conflict situations in different areas of the oil producing sector of the economy appears ineffective for the achievement of non-violent and peace initiative in our host communities(Elladan, 2011). Hence, it is desirable to investigate two major techniques that can help in dispute resolution in oil producing communities in south Sudan. The two methods are mediation and negotiation techniques.

ADR has become an important facet in the disposal of disputes in courts all over the world today and has offered many advantages than the adversarial litigation based system; however South Sudan has since its attainment of independence way back in 2012 been in endless conflicts with North Sudan as well as those ones within post independent South Sudan and a number of ADR methods have been adopted by the states themselves, international bodies such as IGAD, UN, AU among others. Despite all that, the conflicts continue. The main study of this research is thus to examine the efficacy of ADR in resolving the above dispute(s) and make relevant findings and recommendations applicable to it.

1.4 Purpose

The study is aimed at identifying the alternative dispute resolution method that can bring the mentioned objectives of peace and non-violence to reality and to ascertain the perception of the respondents on these methods. Specifically, the study is meant to:

Identify the alternative dispute resolution methods appropriate for dispute resolution.

Determine alternative dispute resolution methods for the achievement of peace in the community.

Ascertain respondents' perception of these methods, which can enhance non-violence and peace with the community.

1.5 objectives

The specific objectives of the study are:-

1. To examine the reasons for Alternative dispute resolution in conflict management in Africa.
2. To examine the efficacy of ADR in resolving disputes between South Sudan and North Sudan.
3. To establish the challenges of Alternative dispute resolution in Africa particularly South-Sudan.

1.6 Scope of the Study

The study looked at the various ongoing peace efforts including the mediation and negotiation process that aimed at securing the success of the Comprehensive Peace Agreement in Sudan (CPA). It also focused on various successes that had so far been achieved through the negotiation and mediation efforts, as well as the challenges that had been encountered throughout the process. The various parties involved in the negotiation and mediation process were also focused on during the study.

1.6.1 Methodology

The study draws much of its information from already documented sources and written literature for instance published books and unpublished works, journals, articles, conference papers and other publications to be found in various libraries, material from internet is also used to prove foundation upon which the hypothesis is verified.

The resultant findings together with the discoveries in the body of literature was relied on the laws and regulations which was examined to provide ample ground for incisive conclusion, upon which practical recommendations on use of ADR was framed.

1.7 Significance of the study

Many techniques and methods exist in the area of conflict resolutions in Africa and South Sudan to be specific. However, the methods that best fit a particular conflict situation are culture specific. Dispute resolution is a part of every society's culture, and in each society, some methods are favoured over others. Each culture in the world may be unique, but underlying each culture is its own specific though usually tacit agreement or system that determines how to resolve disputes. Therefore, the case of using alternative dispute resolution in the South Sudan conflict resolution is aimed at enriching the process and highlighting the suitability of this method to the specific situation of South Sudan.

Again, this research is significant as it equally expose the use of non-violent means in the resolution of conflicts in South Sudan

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

There are existing literature about ADR on both the south and Northern Sudan. These studies are based on the assessment of various scholars and researchers who have studied this problem before and analyzed the accuracy of their findings as well as the applicability of their recommendations. However the present research adds to the existing literature by analyzing the peace efforts currently on ground, the achievements and challenges encountered in the application of ADR.

The researcher therefore examined different existing literature works in regard to some research topics for purposes of reviewing, identification of gaps in such works and how the present work which addresses those gaps.

Many authors have researched on topics relating to this one but due to time changes, there is a lot which were left out. Mr. Omar Dawood Kalinge Nnyago who is an electoral engineer by first training. He has done graduate structure in distance and open hearing this special interest is in the learning. He is a private consultant and has been a columnist for the nation media group daily monitor of Uganda and regularly comment on political and social attains in local and international media. He is the author of the active since 1996; he is the deputy secretary general and national coordination, justice forum, a registered political party with representation in parliament. He now serves as head of research, analysis and capacity building at the-inter party cooperation secretariat. He participated in the development of IPC's 2011 manifesto.

Nuredin Netabay in his paper "The Dafur Peace Process": understanding the obstacles to the success (May 2009), this paper set out to uncover the factors that have contributed to the breakdown of the Darfur peace process. The paper referred to important peace research which offered a theoretical framework for the failure and success of peace processes considered the factors that undermined the Darfur Peace Process. In his paper he considered the weaknesses of the mediation process. External pressure was one of his findings that failed mediation. Lack of mediation experience and impartiality by the Chadian mediators, ill equipments and language barrier were some of the problems he analyzed. In spite the fact that his work had an aspect of mediation, it was egocentric on Darfur. My research is basically on the efficacy of ADR in resolving disputes in The South Sudan.

John Prendergast in his policy essay for two New Sudans (August 2011) while discussing on securing peace in Sudan, he emphasized focusing on the root causes, promoting democratic reform, creating a new peace initiative that unifies currently desperate efforts, demanding transparency and supporting accountability. On ADR, he emphasized that the existing ADR modal should be wrecked and rebuilt to focus on and feed into national process of constitutional reform and power sharing. Acknowledging his efforts, his essay was too wide, covering the whole Sudan problems. However this research zeros to ADR to accomplish resolving disputes in south Sudan.

JosteinTellness (2015) the unexpected deal: oil and the IGAD process; in his study, he reveals that Sudan's oil reserves are a major catalyst for the outbreak and prolongation of the north-south war in Sudan. A high percentage of the country's oil resources are located in Southern Sudan, for which the Sudan People's Liberation Movement/ Army (SPLM/A) began demanding self-determination in the early 1980s. In 1999 when the Government of Sudan (GoS) started to export oil, it strengthened its financial base and gained new international allies. Under these conditions there seemed to be few reasons to expect any peace process between the Sudan government and the southern resistance movements to succeed. It was expected that oil would prove a difficult issue to resolve in the Intergovernmental Authority on Development (IGAD) peace process, yet a combination of mediation strategies, International pressure, progress in security talks and the motivations of the parties to reap the benefit of Sudan's oil resources led to the GoS and SPLM/A signing the agreement on Wealth Sharing during the Pre-Interim and Interim Period in January 2004, a year before the final Comprehensive Peace Agreement (CPA) was signed. However he never gave any recommendations that help to implement the Comprehensive Peace Agreement (CPA). This is the basis also my research will focus on.

The Sudan's Comprehensive Peace Agreement; the long road ahead, African Report no 106-31 March 2006, considered Abyei problems as a threat to peace. He discussed in detail the referendum perception. He discussed the economic perceptions surrounding the oil reserves in Abyei. However his decisions were mostly political rather than socially geared at creating peace in the area. He also recognized the International community particularly the IGAD and quarterly of the US, UK, Norway and Italy during the Navisha talks. However the report never streamlined the way forward aimed at meeting the resolutions of CPA, neither

did the international community's efforts examined to meet the needs of CPA yet my research intends to examine the efforts of ADR to meet the needs of CPA.

Yasin Olum associate professor in the department of political science and public administration, faulty of social science, Makerere University. He obtained his PHD in public administration by research funded by the common wealth from the University of New Castle upon River- tyre in the United Kingdom (1998).
He is full bright scholars and a consultant research for a number of local and international organizations. He also served as a board member of Butabika hospital and some local NGOs has keen inters in matter of politics and governance generally where he has severally published.

Ojijo O.M.P Al Amin Furthermore still; in order to come up with a concrete research I met my friend Ojijo O.M.P Al Amin who is a lawyer with vats experience in Alternative dispute resolution and human right advocacy in Sudan and a career consultant in legal research, and writing and trainer in financial literacy he is also executive member of the citizen's coalition for electoral democracy in Uganda **CCEDU** and a partner in Sudan youth Network.

Thomas L. Ted Ford a celebrated philosopher on civil liberties Stuart Mills one remarked that "**if all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power would be justified in silencing mankind**", this was so in the book called **Freedom of Speech in the United States by Thomas L. Ted Ford, third edition, strata published inc. state Pennsylvania.**

2.1 African Traditional Dispute Resolution

Africa is represented by a diversity of cultural and religious practices. This diversity affects the approaches to dispute and conflict resolution in the traditional setting. The approaches tend to differ from the western alternative dispute resolution in several respects. In Africa itself, the approach may also differ from one culture to another. Global religions like Christianity and Islam have also impacted on the culture of the people.

The approaches also differ as one move from one level of conflict with another. There are variations in conflicts involving property, land, family, marriage, communities as well as those between Muslim parties on the one hand, and then Muslim and non-Muslim parties on the other. In some African societies, the universal religions have nearly completely displaced the traditional methods of dispute resolution. According to Ekuerhare (2007) the doctrines of Islam and Christianity religions have affected parts of the tradition, redefined and reshaped others and left some intact.

Pre-Colonial Africans may be classified as the segmental system otherwise called egalitarian political system in that: The setting for dispute resolutions in the segmental system would normally be a neutral ground as the village square, market square or an open hut. Where a boundary dispute between individuals, families, clans or villages is the issues, the boundary in contention could be the venue of the meeting; the venue must be accepted for conflict resolution by the parties.

The shrine is a sacred ground and women are kept out of African alternative dispute resolution (ADR) would normally, but depending on the sensitivities and the peculiarities of each community, be adult males. There is always bias in decisions taken at the shrine, a decision is meant to include, and affect, woman and children most cases, the best awards and decisions are always in favour of adult males.

The preparation involves consultation, invitations sent to the appropriate persons, the gathering of materials for rituals such as sacrificial animals, local brew for libation for others to consume thereafter, selection of a date that does not clash with events like market days or farming. Silence is a representation of the sanctity and dignity of the people, the community, leadership and the process itself.

There is invocation of pledges or references to ancestors and ancestral spirits, the pouring of libation, sacrifice of a live animal. Disputants may thereafter swear to oaths and state their cases, to the hearing of the elders. Other members of the community present also listen to the stating of the cases by disputants. At the end of the listening, the elders have the duty to give their verdict. The focus is to pass a verdict that promotes community solidarity, but with emphasis on non-violence. At the end of the process, there could be other activities that follow.

If the event is at a shrine, the sacrificial lamp or chicken (black or white) will either be cooked or roasted, and eaten by the most senior men. Similarly, the men will drink the wine or local alcohol that accompanies the process and such drink will be brewed by women. The peace deals are then assumed to be completed and sealed.

African ADR is conducted in the open also, as a means of ensuring that subsequent generations in the community learn the process and value system of ADR. It is the socialization of the younger ones. This is why younger persons do more of listening and observing of the senior than participate or contribute.

2.2 The use of Alternative Dispute Resolution

The idea of Alternative Dispute Resolution (ADR) is about the search for and application of "nonconventional" peaceful means of settling disputes and resolving conflict situations using the least expensive methods, and in ways that satisfy the parties, as well as ways that preserve relationship diplomatically after a settlement might have been reached by the two parties (Hornby, 2006). ADR is specially meant to serve as an alternative to the official or conventional means of settling disputes, mainly through litigation and the courts, but with a preference for non-violence.

The conflict resolution and transformation spectrum consist of a range of options employable for non-violent management of conflict. These can be classified into two, namely: the voluntary processes and the involuntary processes. The voluntary processes are those in which parties have some control over the outcome. They include fact, finding, in-depth research and case studies, facilitation, negotiation, conciliation, mediation and breakage. The involuntary processes on the other hands are more often than not, outside the control of the parties to the conflict. Even though they may be non-violent, the third parties who are part of the process may sometimes have down outcomes, which the parties have to accept either in principles or in law. These options include arbitration, adjudication and law enforcement using the coercive apparatus of the state.[18]

[18] *Sacha Journal of Policy and Strategic Studies, Volume 1 Number 2 (2011), pp. 64-73 ISSN 2045-8509 (Online) 2045-8495 (Print) ©Sacha International Academic Journals, London, England, UK.*

2.3 The ADR Track Record in Africa

The notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation. Pioneering ADR projects in Ghana, Ethiopia, and Nigeria have generated positive results and illustrate the suitability of ADR in African contexts.[19] Under these arrangements, ADR was used as the default resolution method. Formal court litigation, or instances where the judge actually *judges*, are reserved for cases of constitutional or legal interpretation, where there is a need to set precedence, in cases with major public policy implications, or as a last resort after ADR has been tried.

As part of a project on judicial reform, for example, Ghana held its first mediation week in 2003 in which about 300 cases pending in select courts in Accra were mediated over 5 days. The effort was a major success, with 90 percent of surveyed disputants expressing satisfaction with the mediation process and stating that they would recommend it to others. The achievements of this initiative led to a follow up ADR round in 2007 where 155 commercial and family cases from 10 district courts in Accra were mediated over 4 days. Almost 100 cases were fully mediated or concluded in settlement agreements. Eighteen cases reached partial agreement and were adjourned for a later mediation attempt. A total of 37 cases were returned to court. The 2007 program was expanded through 2008, and over 2,500 cases in seven district courts in Accra were mediated, with over 50 percent of the cases completely settled. This demonstrated both the scale and potential reduction in backlog that ADR can generate. More than 40 district courts in Ghana have since initiated court-connected ADR programs. In the ADR Center in the town of Ashaiman, for example, a group of five mediators settled 476 of 493 cases considered between January and June 2011. By 2013, all district, circuit, and high courts in Ghana will have functioning mediation programs, with a projection of 10,000 case mediations annually—significantly reducing the pressure on Ghana's court system.[20]

Ghana's positive experience with ADR greatly influenced the creation of the country's landmark ADR legislation in 2010—finalized after nearly 10 years of consultations, consensus-building, bill drafting, and multiple changes in government leadership and in the

[19] The ADR projects in Ghana and Ethiopia were implemented between 2003 and 2008 with funding from the U.S. Department of State with Ernest Uwazie as the Principal Investigator/Project Director. The Nigeria project was implemented from 2008-2009 and was funded by the World Bank with Ernest E. Uwazie as the social scientist consultant and trainer. References to the ADR experiences in these countries are drawn from these projects.

[20] "Strategic Plan for Judicial Service ADR Programme 2008–2013," The Judicial Service of Ghana, available at <http://www.judicial.gov.gh/>.

judiciary. ADR Act 798 is the most comprehensive ADR legislation in Africa. Under Section 82 of the law, mediation agreements are recognized as binding and enforceable as court judgments. The Ghana experience provides potentially useful lessons for other African countries contemplating ADR, especially regarding the importance of gaining official support and funding, establishing relationships between mediators and traditional chiefs to maximize the complementarily of their efforts, and instituting the enforceability of out-of-court settlements or mediation agreements.

During an initial ADR project in Ethiopia in August 2008, 31 cases from the civil and family court dockets from the Ethiopian Women Lawyers Association (EWLA) in Addis Ababa were referred for mediation. During the 3 days of the pilot, all cases or complaints were handled by newly trained mediators, 17 of them resulting in full settlements, 6 in partial agreement or adjournment, and 8 returned to court or the EWLA. As in Ghana, over 90 percent of disputant survey respondents expressed satisfaction with the mediation process, an intention to use it in the future, and a willingness to recommend it to others.

Since the creation of the pioneering Lagos Multi door Courthouse and its ADR Center in 2002, disputing parties now have the option of choosing among court-connected alternative methods to resolve their disputes, including the Lagos State Ministry of Justice's Citizen Mediation Centers (CMC). Similar multi door courts and CMCs either currently exist or are emerging in a dozen other locations in Nigeria, with an average of approximately 200 cases mediated monthly and resolution or settlement rates ranging from 60 to 85 percent. This represents a significant portion of caseloads in Nigeria where it is not unusual for judges to add up to 50 new cases to their docket each day.[21]

In November 2009, in an effort to elevate and expand the use of ADR as well as generate publicity and educate the legal profession, Lagos State held its first mediation week. About 100 medium-scale commercial disputes were selected from the Lagos Island High Court docket with the consent of disputants, lawyers, and judges and scheduled for mediation over 5 days. Using lessons learned from earlier experiences, nearly 60 percent of the mediations resulted in agreement. Over 98 percent of disputants surveyed expressed satisfaction with the process, and nearly 70 percent said they preferred mediation to court litigation. Most of the

[21] Abdulwahab Abdulah and Tosin Adejuwon, "ADR Will Decongest the Courts—Fashola," *The Vanguard* (Lagos, Nigeria), November 3, 2009.

participating lawyers also found the process satisfactory and indicated that they would recommend it to their clients.

2.4 The Future Of ADR In Africa

ADR can contribute to building an effective dispute settlement system and bridge the gap between the formal legal system and traditional modes of African justice. The institutionalization of ADR in African legal systems should also bolster security and development. While some conflict is inevitable in any society, its effective resolution directly hinges on the availability of trusted processes and skilled personnel. ADR is a practical tool to foster peace building and conflict resolution at both the interpersonal and community levels. By reducing disaffection with the lack of access to justice—and the perceived need for disputants to take justice into their own hands—the potential for violence and rebellion is reduced.

ADR is also a potentially valuable mechanism for stabilization and state building efforts. From land disputes in Liberia, to reconciliation in Côte d'Ivoire, and competition for resources aggravated by widespread displacement in Africa's Great Lakes region, ADR can deliver quick (though not immediate) relief to some recurrent conflict triggers in fragile contexts, while more complex and long-term judicial sector restructuring and capacity-building unfolds. In the newly emerging state of South Sudan, for instance, studies of inter-communal disputes found that conflicting parties sought an "organic mechanism for the court members to advise one another and improve their capacity to handle changing and interethnic cases, rather than necessarily to produce binding agreements or fixed definitions of law."[22] With a view to meeting this need while fostering longer term judicial development, one of the first public acts of South Sudan's first Chief Justice of the Supreme Court, Chan Reec Madut, was to call for wide use of ADR mechanisms in the still inchoate judicial system.[23]

Notwithstanding these benefits, ADR programs in Africa face key challenges, including inadequate political support, human resources, legal foundations, and sustainable financing. Many governments are slow to understand or recognize the need for ADR, hence ADR programs are often donor initiated. The lack of national or local government support constrains institution-building that will in turn spur the development of personnel and create

[22] Cherry Leonardi et al., *Local Justice in Southern Sudan* (Washington, DC: United States Institute of Peace, October 2010), 82.
[23] Ngor Arol Garan, "Chief Justice Calls for Speedy Dispute Resolution," *Sudan Tribune*, September 13, 2011.

an enabling legal framework. Furthermore, some lawyers view ADR as a threat to their income, especially among those without any ADR exposure. Some judges may also resist ADR for fear of losing "control" over non-litigation processes of resolution or out-of-court settlements.

Any effective ADR system must have a flexible design structure that is rooted in satisfying the interests of the parties in dispute and professionally administers fair justice in a dynamic yet culturally appropriate manner. To integrate ADR as a popular and effective tool in building a stronger culture of justice in Africa, several steps by governments and donors are required:

Enact robust ADR legislation. While most African court rules or policies permit the judge to encourage parties to settle out of court, enacting legislation would elevate the status of ADR before a skeptical disputant, build public confidence, and further increase ADR utilization. Legislation would also provide a framework for reference, review, and reform as well as institutionalize much needed education and professional training.

Invest in broad capacity-building. National and local governments and international partners should invest in training and infrastructural support for ADR networks comprised of mediators and advocates who can continually advance best practices. In addition to legal professionals, capacity-building efforts should include training of local and religious leaders, traditional authorities, election officials, police and security personnel, human rights organizations, public complaints bureaus or offices of ombudsmen, and women and youth leaders. This would increase the country's conflict mitigation and prevention capacity as well as reduce the number of cases that burden court dockets. Particular emphasis should be given to supporting ADR networks in Africa's conflict-prone and post conflict countries and communities. Given the high levels of community participation and legitimacy achieved in ADR experiences thus far, ADR could also play a vital healing and trust-building role in transitional justice contexts.

Create appropriate incentives for stakeholders. To develop and broaden adoption of ADR mechanisms, their benefits and contributions to legal professionals must be clear. For lawyers, strategic use or inclusion of ADR should offer an additional tool to enhance the efficiency of their practice, potentially increase revenue, and achieve greater satisfaction for

both the lawyer and client. Awards and recognitions by the legal profession, including reviews for senior advocates and national merit honors, would also elevate the support and use of ADR among members of the bar and bench.

Measure progress. To maximize the efficiencies and complementarities of ADR with the official judicial process, a systematic monitoring process should be established. This includes measuring key qualitative and quantitative data that would then lead to adjustments in the scope and focus of ADR efforts. Indicators include ADR usage, percentage of cases filed and processed through ADR vs. court litigation, the average time spent on a case, the number of successful ADR settlements with agreements reached, the number of qualified ADR practitioners and trainers, the number of ADR institutions and services in the country, community acceptance, and level of service satisfaction by disputants and practitioners. The ultimate test of an ADR system will be how much it affects a country's conflict vulnerability and mitigation capability.

Target youth early. With nearly 70 percent of the African population 30 years old or younger, a substantial rate of youth restiveness is inevitable and poses a major challenge to the already strained criminal justice systems that cannot afford excessive incarceration. The ADR technique of victim-offender mediation for low-level offenses, such as fights, vandalism, and petty theft, could serve as a more effective alternative to more costly and punitive approaches. Likewise, ADR techniques to address youth unrest and violence based on peace education and restorative justice principles should be integrated into school programs. One pilot project in the Niger Delta region of Nigeria in which schools launched peer mediation programs demonstrated reductions in acts of school indiscipline (fights, drug use, bullying, cheating) and gender biases, an increase in school attendance and critical skills (communication, problem-solving, leadership), and popularity among teachers, principals, students, and participating communities.[24]

[24] The author was project director of the initiative, which was funded by the JAMS Foundation.

CHAPTER THREE

LEGAL FRAMEWORKS RELATING TO ALTERNATIVE DISPUTE RESOLUTION

3.0 Introduction

This chapter examines the law on ADR both on the international and national level. The purpose of this research is to discuss the efficacy of ADR in South Sudan and as such therefore the focus is on various laws governing ADR.

There are various laws that govern ADR on the international scene for which South Sudan is a signatory too as discussed below.

The Legal System of South Sudan

The South Sudanese legal system is built on the combination of statutory and customary laws. South Sudan has enacted dozens of laws since 2005, but their use in legal disputes and courts is limited[25]. Poor dissemination of laws, little experience with the new statutory provisions, the difficulty of many legal staff in understanding English[26] and lack of access to statutory courts limit the relevance of the new laws.

The Transitional Constitution structures the government according to the principle of separation of powers between the executive, legislature and the judiciary. South Sudan is divided into ten states, which are to manage affairs according to a principle of "**decentralized government**" and "**devolution of powers**[27]."The highest state-level executive authority is the Governor. State legislative assemblies pass legislation in accordance with and subject to the supremacy of national laws, in case of conflict[28]. The states do not have their own judiciaries, but each state contains a high court.

The government's judiciary is centralized in administration, and all appointments are made by national government officials[29]. South Sudan's pluralist legal system grants customary courts concurrent jurisdiction, and they often operate alongside statutory courts.

3.1.1 Interim Constitution of Southern Sudan 2005

The Interim Constitution of Southern Sudan was mandated by the CPA and entered into force in 2005, concurrently with an Interim National Constitution. It set out the government's

[25]Among the laws used mostly are the penal code Act 2008. the code of criminal procedure Act 2008 and the Land Act 2009.
[26]Many of southsudan's judges were trained in Arabic when studying in Sudan, since English is the official language of southsudan, the ministry of justice Laws are not translated into Arabic.
[27]Transitutional Constitution Article 47-49.
[28]Ibid schedule E
[29]Judiciary Act 2008 section 20-27

organizational structure. The differences between the Interim Constitution and the Transitional Constitution reflect ongoing internal negotiations about the "right model" for South Sudan.

3.1.2 Constitutional Model

South Sudan's constitutional model is Presidential, in so far as the President is elected directly and forms the head of the executive. Functional analysis confirms the President's broad power. The relationship between the national government in Juba and the state governments of the ten states is unclear. Given that the states have their own constitution and independent elections of Governor and state legislative assemblies, the structure appears federal. However, functional analysis and empiric study shows that the national government's income and resources are much stronger than those of states, and that states often effectively lack the capacity to enact their own laws. The states receive their revenue largely from the central government and all subterranean natural resources belong to the central government[30]. Until early 2012 oil, was the source of over 95% of government income[31].

The National Constitutional Review Commission (NCRC) is given the task to draft the final constitution, which will then be presented to parliament and enacted into law[32]. As of August 2012, the NCRC was still in the process of passing its Rules of Procedure and deciding on a Plan of Action. It is unclear whether the constitutional deadline of January 2013, for it to present a draft text will be respected. At the highest level of government, disagreement about the constitutional model to be chosen is evident. On the one hand, there is a push for real decentralization of powers and devolution of law making authority to the state level[33]. Once a final draft of the constitution is presented to the President, he can call for the Constitutional Conference to meet and approve the draft text. In a last step, the National Legislature has to adopt the draft text of the constitution for it to become effective law. [34]

3.1.2 The Bill of Rights

The Transitional Constitution includes a Bill of Rights, which forms "the cornerstone of social justice, equality and democracy[35]." The Bill is powerful as it is justifiable between the people and the state as well as between private individuals[36]. The constitution further makes

[30]Interview with Deputy Governor Eastern Equatorial state. Jerome Gama surur. july 2012.
[31]National bearue of statistics, south sudan statistical Yearbook 2011.
[32]A constitutional Review conference held in different parts of the country provides opportunity for civil society and interested citizens to get involved .
[33]South sudan vice president Dr.RiekMacharTeny discussion.
[34]Transitional constitution Act 203.
[35]Ibid Article 9-34
[36]Ibid Article 9(1)

reference to international human rights treaties, the ones adopted by South Sudan becoming "an integral part" of the Bill of Rights[37], and creates a Human Rights Commission to ensure the respect of these fundamental rights[38].

3.1.3 The Executive Power

The head of the executive is the President of the Republic of South Sudan. The President is also the commander-in-chief of the SPLA[39]. Election of the President is direct and the term of office is five years.

The President is given a strong institutional position, due to a long list of functions, which grant oversight and influence over the legislature (by way of convening parliament and submitting bills to be enacted), and the judiciary (by way of unchecked appointment powers)[40]. The President can also unilaterally declare a state of emergency to be approved by the legislature within thirty (30) days[41]. The Transitional Constitution also explicitly provides for the legislature to delegate creation of rules and regulations to the executive branch. At this writing, a lot of law is still made through executive orders from the president and the ministries[42].

Generally, it can be said that limited capacity in the legislature leads to the executive power being extensive and without a meaningful counterweight.

3.1.4 The Legislative Power

The National Legislature of the Republic of South Sudan consists of the National Legislative Assembly and the Council of States. The National Legislative Assembly is elected in a national general election from the constituencies as defined by the National Election Law. In elections, there is a separate women's-list to fulfill the constitutional requirement of having at least twenty-five percent (25%) female members of parliament (this also applies to state elections).

The Council of States is comprised of representatives from their respective state legislative assemblies. The exact number of representatives is to be determined by the National Election Law.

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[37]Ibid Article 9(3)
[38]Ibid Art 145-146
[39]Ibid Art 97(3)
[40]Ibid Art 101(c) (f) and (g)
[41]Ibid Art 189-191
[42]Ibid Art 92

The function of the National Legislature is primarily law making. Additionally, it serves a supervisory function with respect to the executive. Individually, the National Legislative Assembly and the Council of States are given specific functions. The Council of States is a body comprising representatives from state assemblies and is to initiate legislation in the interest of states and the principle of decentralization.

3.1.5 The Judiciary

The Judiciary in South Sudan is a complex structure consisting of constitutionally established government courts, which base their adjudication on statutes, and customary courts, which are presided over by traditional authorities and rule according to the customary laws of their respective ethnic groups. Given that a customary court's decisions can be appealed to a statutory court, two different legal systems may be applied to a single dispute. The effects of this duality on practice are still unclear and vary. In most instances, appealed customary cases are reviewed *de novo* and no deference is given to the customary court, nor are the cases remanded when faced with an incomplete factual record.

The main legal texts establishing the judiciary and defining its jurisdiction and procedures are the Transitional Constitution of 2011, the Judiciary Act of 2008, the Code of Civil Procedure Act of 2007, the Code of Criminal Procedure Act of 2008, and the Local Government Act of 2009.

3.2 Statutory Courts

3.2.1 The Supreme Court (National)

The Supreme Court, located in Juba, is the highest organ of the judiciary. It consists of seven judges (called Justices), one of whom is the Chief Justice of the Supreme Court and one the Deputy President. The Court can form three different panels: the Constitutional Panel, the Criminal Panel and the Civil Panel. The first consists of all justices, the latter of three justices. Decisions are majoritarian. Most of the time the Supreme Court decides cases on the record but it can call litigants for oral argument if needed.

The Supreme Court is the highest appellate court in the country and takes appeals from the Court of Appeals. For matters of constitutional law, the court is given original jurisdiction for capital offenses, where executions are carried out by hanging. The original jurisdiction for capital offenses involving a death penalty charge is given to the High Courts.

3.2.2 The Court of Appeals (Regional)

The three regional Courts of Appeals (based in Juba, Rumbek and Malakal, for the Greater Equatorial, Greater Bahr-el-Ghazal and Greater Upper Nile regions, respectively) are intermediary appellate courts that hear cases from the states' high courts. They further fulfill an administrative (and possibly harmonizing CHECK) function over the High Courts in their jurisdiction. Three judges sit on the bench, with one judge being the President as appointed by the Chief Justice of the Supreme Court.

3.2.3 High Court (State)

Ten High Courts (one in each state capital) are the highest courts in South Sudan with original jurisdiction. Their jurisdiction, in some cases exclusive, is determined by the Civil Procedure Act 2007, and Criminal Procedure Act 2008. The High Court hears appeals from all the lower courts. There is no internal appellate hierarchy among the lower courts.

3.2.4 First Class Magistrate Court (County)

The First Class Magistrate Courts are courts of original jurisdiction that are responsible for a specific county within a state. In criminal cases, they can pass prison sentences up to seven years and fines up to 5000 SSP.

It should be noted that these lower levels of statutory courts are not fully in place, due in part to a lack of sufficient judges. To compensate for this shortcoming, the judiciary plans to deploy mobile courts.

3.2.5 Second Class Magistrate Court (County / Payam)

The Second Class Magistrate Court is similar to the First Class Magistrate Court, but is more limited in its authority to pass prison sentences (maximum of three years) and fines (maximum of 2500 SSP).

3.2.6 Third Class / Payam Court

The Third Class or Payam Court is the lowest government court. They are not allowed to pass fines over 300 SSP. These courts, even though provided for in the Judiciary Act, have not yet been established in reality.

3.2.7 Customary Courts

The Local Government Act of 2009 codifies the recognition of customary law courts in South Sudan. These courts are to decide cases within their jurisdiction based on "the customs,

traditions, norms and ethics of the communities." The Act prescribes principles for decision making in these courts, including general principles like non-discrimination, non-delay, compensation, possible mediation, and a focus on substantive justice.

Statutory courts are inaccessible for many people, because of their prohibitive cost, their unfamiliar procedures, and their use of languages that people do not know. As a consequence, customary courts are the preferred option, and an estimated 90% of disputes in South Sudan are handled by them.

Customary law courts do not have jurisdiction to hear criminal cases unless they have a "customary interface" and have been referred to the customary law court by a statutory court. Given that many cases in South Sudan involve familial disputes and sexual transgressions, and some suggest that the "customary interface" requirement is often met. In practice, it is often unclear whether the dispute qualifies as customary, and chiefs often adjudicate matters that are clearly outside their jurisdiction, such as homicide or theft.

The customary court structure in South Sudan was put in place during the colonial period, as part of the British method of "indirect rule". The courts were a cheap and undisruptive way for gradual change, which was to be achieved through installing "more enlightened local administrators" that could change the substance of customary law. The basic tenant of this approach, reform through existing institutions, is still visible today. Chiefs are a "hybrid" actor between state and community, receiving salaries from the government but having their authority based in the community's acceptance.

Procedures among customary courts vary. In urban areas, an adaptation to formalistic proceedings of statutory courts is discernible. The educational level of the chief and, if available, court clerk also determine formalization of procedure.

The laws used for adjudication in customary courts are a mix of traditional practice, the discretion of the chief, statutory provisions known to the chief and negotiation between the parties.

Traditional practice is mostly passed down orally, but principles of binding precedent (like *stare decisis*in a common law system) do not generally apply. The personal disposition of the

chief[43]. Moreover, the inclusion of characteristics that would be regarded irrelevant or inadmissible in European or U.S. courts[44]. As a consequence, the principle to "treat like cases a like" would be likely to find less application in South Sudan and the realm of binding precedent would shrink. Some customary courts refer to statutory provisions, especially of the Penal Code, to make their decision. Customary courts often serve as a forum for negotiation and arbitration as much as adjudication.

The customary courts are generally organized in two levels, where the lower level B court exists in every Payam and only has jurisdiction up to a maximum penalty whereas the higher level C court is for each county. Some Bomas have A courts and more urban areas often have town bench courts.

The following sections deal with the individual courts and their relationships as laid out in the law. Practice varies widely across South Sudan, and much of the discrepancies depend on whether a particular area was controlled by the Khartoum government or by SPLM/A during the civil war.

3.2.8 C Court: county paramount chief (County)

According to the Local Government Act, the C courts take criminal cases referred to them by the statutory government courts and often also hear cases involving intercultural disputes. The head chiefs from the county's payams are members. The court is supervised by the county commissioner.

Furthermore, the C courts are the highest appellate body among the customary courts. The decision of the C court can be appealed to the statutory Magistrate courts.

3.2.9 B (regional) court: head chief (Payam)

The B courts have original jurisdiction over suits that involve large fines and prison sentences and are presided over by the payam's head chief. They are supervised by the county's paramount chief.

Furthermore, the B courts hear appeals from the A court. The decision of the B court can be appealed to the C court.

[43] I.e. Conception of the court proceeding as educational, restorative or punitive can influence the verdict.
[44] I.e. the punishment demanded by family members,leads to casesbeingdistiguishables.

3.2.10 Chief court: executive chief (Boma)

The A courts have original jurisdiction over family and marriage cases, minor disputes and local administrative cases. The courts are supervised by the payam's head chief.

3.3 Legal Research in South Sudan

As of June 2012, South Sudan did not yet have a functioning gazette collecting and updating the valid laws of the country. The mandate for this sits with the Ministry of Justice. To obtain the latest laws, the author requested a complete set of laws from the Directorate of Legislation at the Ministry of Justice.

As of June 2012, there was no system publishing the decisions of the statutory courts. In some instances, it was possible to get hold of an opinion by contacting the court directly.

3.3.1 Laws of South Sudan as of November 2012

This section provides links to the official texts of Acts passed by the government of South Sudan. This list does not claim to be exhaustive and some of the Acts might have been amended. The authors will do their best to keep the list up to date.

Even though the Geneva Convention and Refugee legislation are only termed provisional orders in the provided documents, the authors are confident that they have since been passed with the exact language and are now Acts.

The authors also know that the legislature passed the following additional acts in its session that ended in September 2012. Unfortunately, no original copies of the legislation are in the authors' possession. These acts are: The Appropriation Act, the Taxation (Amendment) Act, the Refugee Act, the Geneva Convention Act, the Legal Training Institute Act, the National Communication Act, the Anti-Money Laundering and Counter-Terrorist Financing Act, the Banking Act, the Foreign Exchange Business Act, the Peace and Reconciliation Commission Act and the General Education Act.

Links to official texts of the Acts of the Republic of South Sudan.

3.3.2 Secession of the South

The path to this political divorce was anything but peaceful. The Government of Sudan could not accept that the campaign for independence by South Sudanese reflected the will of the people. Seeking scapegoats, the officials in Khartoum implied that the secession resulted from Western interference and the Zionist lobby. In a conference called the "**Fateful Issues Conference**," the representatives from the Sudanese government eventually agreed on self-

determination for South Sudan. The Machakos Protocol of July 20, 2002 subsequently reinforced the decision for the right to self-determination for the South Sudanese.

The independence of South Sudan was enabled by the terms of **the Comprehensive Peace Agreement (CPA) of January 9, 2005**, which sought to end 22 years of civil war between the North and the South. The agreement calls for national elections and a referendum for secession of the South in 2010. An extraordinary achievement in the history of Sudanese politics, the CPA addresses a wide range of controversies and challenges surrounding religious and cultural diversity, rural marginalization, power-sharing, and a transformation toward democratic governance. When the citizens of South Sudan went to the polls to vote on the referendum for independence, the outcome seemed inevitable; the referendum for secession passed by more than 98% of the vote. Secession from the Republic of Sudan was the South Sudanese people's response to a long history of acrimony, mistrust, and war. On July 9, 2011, when South Sudan declared its independence, all 192 member States of the United Nations offered their endorsement.

The secession of South Sudan from Sudan had major economic, political, and social implications. The expansive border between the two countries spans 2135 kilometers more than the borders collectively around South Sudan with Ethiopia, Kenya, Uganda, Central Africa, and the Democratic Republic of the Congo. Border areas between Sudan and South Sudan are inhabited by 81 pastoral tribes, representing 20% of the population in both countries. On one side of the border, Sudan has five states: East Darfur, South Kordofan, White Nile, Blue Nile, and Sennar. On the other side of the border, South Sudan has the three states of Upper Nile, Unity, and Northern Bahr el Ghazal. Again, the general euphoria that came with independence quickly turned to bitterness, with threats and counter-threats emerging from both Khartoum and Juba regarding control of the border areas.

After secession, both countries began levying accusations of military intervention threatening internal security. The Republic of South Sudan and its ruling party the SPLM accused Khartoum of supporting militia groups and political movements seeking to overthrow the nascent government in Juba. For their part, the Government of Sudan charged the SPLM with fostering close military and political ties with an umbrella movement called the **Sudan Revolutionary Front (SRF)**, a group working toward the forceful overthrow of the government in Khartoum.

3.3.3 Oil, Arms, and Economics in Sudan.

As acrimony and threats intensified in the wake of the referendum, violence erupted in certain border regions. The reasons for the conflicts often center on disputes over the control of land, economic competition, and conflicting interpretations of the boundary divisions between the two countries.

Two border regions that are currently sites of extensive hostility, resulting in extensive casualties and large-scale displacement, are the Nuba Mountains and the Blue Nile. For the conflicts in both regions the protagonists are the Government of Sudan and Sudan People's Liberation Movement-North (SPLM/N)[45]. SPLM-N receives military support from SPLM from South Sudan. One major source of the hostility centers on the mis-interpretation and incorrect implementation of the CPA. While the agreement calls for disarmament by the government of Sudan of SPLM-North in 2012, the government sought to impose this measure prematurely in 2011. Yet, the Government of Sudan has political control of both regions.

Two other border conflicts are known as KafaiaKingi in South Darfur and "14 Mile" in East Darfur. In both cases, the Sudan Armed Forces clashed with SPLM/N. Currently, the Kafaia Kingi region is controlled by the government of Sudan; "14. Mile" is controlled by the Government of South Sudan.

These struggles over boundary divisions, however, mask a deeper set of disputes over a vital natural resource: oil. The contestation of oil, its access, control, and economics — erupted into violence in four regions: North Kordofan, the Blue Nile, Abyei, and the Heglig Oilfield. The collective impact of the violence in these regions resulted in thousands of fatalities, massive displacement of civilians, and gross human rights violations committed by both sides (Brosché 2011). A region of intense conflict, Abyei is the richest oilfield for both countries, with an area of 10,460 square kilometers. Before the 2011 referendum, it had "special administrative status" within the CPA, due to a protocol of 2004 the Abyei protocol on the Resolution of the Abyei Conflict[46]. After negotiations over control of this disputed area stalled, the major parties reached out to the International Court at The Hague for arbitration. The Court rendered its binding decision on July 22, 2009 regarding the boundaries for Abyei. The court ruled that neither country will have political control over Abyei and that the region would be governed by the Presidential Commission that was formed in 2005 as part of the CPA.

[45]Before seccession of south sudan, SPLM-N was re united with SPLM. As an independent armed movement SPLM is currently active primarily in the Blue Nile and South Kordofan against the martial forces of the government of Sudan

[46]According to the NCP, 5 represent SPLA, 3 represent the intergovernmental Authority on development and one each represent the United States and the United Kingdom.

In the spring of 2011, when the South was building momentum for its anticipated succession, the Government of Sudan launched a large-scale military assault to take control of the oil-rich border area of Abyei. Despite this violent provocation, the South refused to engage in the violence, mindful of its own military weakness and political fragility. By May 21, 2011, the Sudanese Armed Forces had for three days maintained an occupation in Abyei that proved to be devastating to civilians, causing extensive casualties, displacement, and looting of property. Ultimately a settlement was reached with Sudan agreeing to withdraw from the area and replace the military with Ethiopian peacekeepers[47].

Another border region experiencing conflict is the Heglig oilfield, currently under the political control of the Government of Sudan. On Friday, January 20, 2012, South Sudan fully suspended its oil production, following disputes over transit fees for the passage of oil through Sudan to the Port of Sudan, a vital route for export of oil from both countries. The Minister of Information in South Sudan[48], accused Khartoum of misappropriation of funds and of imposing unreasonable transit fees. In response, the Government of Sudan declared that South Sudan was overdue in its payment of tolls, and appropriated South Sudanese oil. South Sudan considered this action an act of piracy and a flagrant violation of international law. Sudan demanded a passage fee of 26 Sudanese dollars per barrel, while South Sudan maintained a proposal of 70 cents per barrel. On Tuesday, April 10, 2012, The SPLM/A expelled the Sudanese Armed Forces from this region and shut down the Heglig oilfield. Sudanese President Omar Al-Bashir retaliated by suspending trade with South Sudan and declaring a state of emergency in three border states: South Kordofan, White Nile, and Sennar. Additionally, the Sudanese parliament declared Southern Sudan an enemy of Sudan.

The decision to shut down oil production had serious consequences for both countries. Oil production represents 98% of treasury revenue for South Sudan[49].The loss of this revenue resulted in rampant inflation and severe limits on access to essential material resources for the population. Sudan experienced similar hardships, as runaway inflation and a thriving black market eroded their economy. For Sudan, this oilfield was the source of approximately 60 thousand barrels of oil per day more than 50% of the nation's oil production.

[47]Brosche and Rothbart 2013, chapter 9

[48]Barnabas Martial Benjamin.

[49]Foreign aid has increased since independence, although donors are wary of long term investment because of allegations about corruption, instability and tribal fighting.

3.3.4 Sudanese economic war

The Sudanese government responded to these losses by launching an economic war against its neighbor, with results that were counter-productive at best. Officials imposed carrier fees to use the pipeline, which limited trade, and the frequent border closures imposed by Sudan reduced the flow of goods between the two countries. To tackle its budget deficit, Sudan's government cut fuel subsidies in June, which reduced by three-quarters the country's oil output, causing high inflation. Opposition protests erupted in parts of Sudan after the spending cuts, including calls for regime change, but subsided after a security crackdown during the holy month of Ramadan. The Sudanese Minister of Finance, Ali Mahmoud, said that the conflict with the Republic of South Sudan caused a fiscal deficit of 6.5 billion Sudanese dollars ($2.4 billion).

3.3.5 A Fragile Peace in Sudan

On May 2, 2012, the United Nations Security Council adopted resolution 2045, calling for an immediate halt to fighting between Sudan and South Sudan. With this resolution, the Council gave both countries an ultimatum either resolve the conflict or face sanctions until August 2, 2012. Despite the fact that the conflict continued beyond this date, the UN did not impose these sanctions, believing at the time that such measures might hamper ongoing negotiations. And in fact, as one step towards peace, Sudan and South Sudan agreed on September 27, 2012 to establish a demilitarized zone on the border and to resume oil exports from the South through the territory of Sudan. Yet, long-standing disputes between the countries remained unresolved.

One of these disputes concerns the issue of nationality of citizens of the South after its independence.

The Sudan government rejected the principle of dual citizenship, despite the Constitution of Sudan providing the ability for Sudanese citizens to acquire the nationality of another country. A second dispute centres on the right to residency of Southern citizens living in the North. A decree by the government of Sudan declared that all southerners living in the North must return 'to their ancestral homeland.' Yet, in fact, hundreds of thousands of Southerners living in the North were actually born and raised in the North, and many who have returned to the South did not participate in the referendum for the self-determination of South Sudan. Some sought to unify the North and South. Others are students still studying in different levels of education or were leaders in the ruling regime. Alongside the fallout from these

decisions about nationality and repatriation, there are some issues that directly affected Southern citizens, such as suspension of trade with South Sudan, which rendered staple goods unaffordable for most people.

So, the sources of these various border disputes centre on economic competition, a history of acrimony and distrust among ethnic groups, and political disputes overland access and control. And the regions are rife for continued hostility.

Both North Sudan and South Sudan claim the area. Controlled by Sudan after taking the area in May 2011.

3.4 United Nations Charter

The Charter[50] provides that members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered, the 1970 Declaration on principles of International Law concerning friend relationship and cooperation among states[51] develops this principle and note that "states shall, accordingly seek early and just settlement of the international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements other peaceful means of their choice".

The same methods of dispute settlement are stipulated in the Charter[52] although in the context of disputes the continuance of which is likely to endanger international peace and security. States are therefore free to choose the methods they want to use and there are no specific methods required for any situation. Parties also have a duty to continue to seek a settlement by other peaceful means agreed by them, in the failure of one particular method.

Under Article 33(1) provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall first of all seek a resolution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or arrangements or other peaceful means of their choice.

Under Article 37(1), should parties to a dispute fail to settle it by means stated in Article 33, they shall refer it to the Security Council.

[50]UN Charter Article 2(3).
[51] UN General Assembly Resolution 2625(xxv).
[52]UN Charter Article 33(1).

Article 52 (1) of Chapter Seven (vii) provides that nothing in the chapter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the purposes of the UN.

Article 5(2) stipulates that members of the UN entering into such arrangements or agencies are to make every effort to settle local disputes peacefully through such regional arrangements or by such regional agencies by referring them to Security Council.

Although reference where appropriate to regional arrangements should take place, this does not affect the comprehensive role of the UN through the Security Council or General Assembly in dealing in various ways with disputes between states. It was noted[53] that state parties to regional arrangements shall make every effort to settle disputes through such mechanisms but that this does not preclude states from bringing any dispute to the attention of the Security Council in accordance with the UN Charter.

The idea behind opting for ADR is to settle disputes in an amicable manner and stay at peace with the adversary. At the international level, the UN as the main instrument provides for it and since South Sudan is a signatory that is the more reason why it should be emphasized.

3.5 The New York convention award on the enforcement of foreign arbitration award 1958

International arbitration is an increasingly popular means of ADR for cross-border commercial transactions. The primary advantage of international arbitration over court litigation is enforceability: an international arbitration award is enforceable in most countries in the World. Other advantages of international arbitration include the ability to select a neutral forum to resolve disputes that arbitration awards are final and not ordinary subject to appeal, the ability to choose flexible procedures for the arbitration and confidentiality. Countries which have adopted the New York Convention have agreed to recognize and enforce international arbitration awards.[54]

[53] Section 1 Para 6 of the manila declaration on the pacific settlement of the international dispute adopted in Geneva assembly resolution 37/10/1982.

[54] http//wiki convention on the recognized enforcement of foreign arbitral awards. Last checked on November 4, 2016

The convention entered into force on 7th June, 1959 and it seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic "appears to embrace awards which although made in the state of enforcement, are treated as foreign under its law because of some foreign element in the proceedings, e.g. another state's procedural laws are applied[55].

The convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[56]

The convention is open to accession by any member state of the United Nations, any other state which is a member of any specialized agency of the United Nations, or is a party to the statute of the International Court of Justice (Articles VII and IX).

Article I of the convention applies to the recognition and enforcement of arbitral awards made in the territory of the state other than the state where the recognition and enforcement of such awards are sought and arising out of the difference between the persons; whether it's physical or legal. It also applies to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought. Part iii of the Arbitration and Conciliation Act stipulates under section 39(1) that a "New York Convention award" means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a state (other than South Sudan) which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Under Section 41, any New York convention Award which would be enforceable under this part will be binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defense, set off or otherwise in any legal proceedings in south Sudan. This award shall be recognized and enforced.

[55]http//www.uncitral/ny convention.Last checked 4th/November/2016.
[56] Ibid.

3.6 The United Nations convention on international trade law (UNICTRAL)

The UNICITAL MODEL Arbitration law[57] provides for an arbitration agreement and the form of an arbitration clause in a contract or in the form of a separate agreement which shall be in writing. With a written arbitration agreement, there's evidence that the parties intend to refer their dispute to arbitration.

Also parties are free to determine the number of arbitrators they want, however if they fail, there shall be one arbitrator who shall not be precluded on grounds of their nationality unless it's agreed between the parties: An arbitrator who has been chosen is free to reject this position if he or she feels that there will be a possibility of not being independent and impartial; the parties may also challenge any arbitrators credibility.

The arbitrators are to make their award in writing and it should be signed by the arbitrator or by the arbitrators and the award is binding upon the parties.

3.7 Conventions on the settlement of investment disputes between states and nationals of other states. (ICSID)

This convention consists of a framework within which conciliation and arbitration takes place and provides an autonomous system free from municipal law in which states and non-state investors (from member states) may settle disputes. State parties to the convention undertake to recognize awards by arbitration tribunals acting under the auspices of the center as final and binding in their territories and to enforce them as though they were final judgments of national courts.

An "ICSID convention award" means an arbitral award rendered pursuant to the Convention on Settlement of Investment Disputes between States and Nationals of other States (the "ICSID convention") which was opened for signature on 18th March, 1965.

A ICSID Convention award shall include any decisions interpreting, revising or annulling an award, being pursuant to the ICSID convention, and any decision as to costs which under the convention are to form part of the award; and an award shall be deemed to have been rendered pursuant to the ICSID convention dispatched to the parties.

3.8 ADR at the continental level (Africa)

African parties involved in especially commercial arbitration disputes have several options at their disposal depending on the region of the continent. Though these regional institutions are fairly new and have some organizational and legitimacy concerns, they are a step forward in

[57] UN Resolution No.40/72 11th December 1985.

the right direction of providing alternative venues and rules for solving such commercial disputes.

The *Asian-African Legal Consultative Organization* ("AALCO") is an international organization with members from 47 States in Africa and Asia. In 1978, AALCO proposed the establishment of Regional Centres for International Commercial Arbitration[58]. Currently there are four Regional Centers: The Regional Centre for Arbitration, Kuala Lumpur, and the Cairo Regional Centre for International Commercial Arbitration, the Lagos Regional Centre for International Commercial Arbitration, and the Tehran Regional Arbitration Centre. All centers use the UNCITRAL arbitration rules and aim to provide arbitration facilities of a widely acceptable international standard. All host starts of the Regional Centres are parties of the New York Convention and as such its provision awards may be enforced against a disputing party in other signatory State. Focusing exclusively on the Lagos Regional Centre in Lagos, Nigeria, the center promotes and administers international commercial arbitration. It offers advice and assistance in relation to arbitration, provides other options for settlement of disputes, such as negotiation, mediation, and conciliation. Within the center, the dispute must be of an international character; however the parties in the suit may be individuals, corporate bodies or governments[59]. It case load typically involves disputes arising from the oil industry, but is currently working on diversifying to the solid mineral sector and intellectual property. As such therefore South Sudan needs to borrow a leaf from such countries and endeavor to be a member which would have avoided conflicts such as that of the Abyei region with the North.

East African Court of Justice which was established by the East African Community ("EAC"). The East African Community is a regional intergovernmental organization comprising the Governments of Burundi, Kenya, Rwanda, Tanzania, Uganda and now South Sudan with the aim of establishing the East African economic, social, cultural and political integration. Historically these countries have established several trade and customs unions in the region and the treaty in which the EAC is a result solidified the concerted effort of cooperation in the region. The community operates through several organs and institutions established under Article 9 of the treaty, the East African Court of Justice is one these

[58]For a discussion of the history and purposes of AALCO see its website www.aalco.int.
[59]T.Sutherland, and G. Sezneck, "Alternative Dispute Resolution Services in West Africa: A Guide for Investors" A guide sponsored by the Commercial Law Development Program US Department of Commerce. (2003).

institutions. Established in November 2001, the court operates on an ad hoc basis. It has 10 judges with 2 judges being appointed by each partner state[60].

The Court has jurisdiction over the interpretation and application of the treaty. It also has arbitral jurisdiction on matters arising from a) an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or c) arising from an arbitration clause contained in a commercial contract or agreement which the parties have conferred jurisdiction on the Court[61]. This court has the potential of becoming a power house in the region in resolving cross border commercial disputes. It has promulgated its own set of arbitration rules and procedures which vary from other international and regional rules and standards[62]. Currently, the member states as well as people within the region are not taking the potential role of the court seriously. As such, the jury is still out on whether the court will rise to its true potential of being a regional mechanism of dispute resolution. Since 2010, there has been a concerted effort by the members and community to enhance the structure of the court and solidify its presence in the region, this includes working with national legal systems of the member states to prevent the fragmenting of community jurisprudence, allowing East African citizens access to the services of the regional court, better organization within the structure of the court itself, raising visibility of the Court, extending its jurisdiction, and mitigating inadequate human and financial resources[63].

3.9 Customary Law

A close look at ADR would suggest that it is not new as it sounds. In African culture the use of a third party neutral in resolution of disputes is still very common today. The neutral person is normally appointed because of his/her stature and respect within society. Decisions reached with the intervention of the third party are implemented in good faith and are normally widely supported in the community. Societies world-wide have long used non judicial indigenous methods to resolve disputes. As Anthony Gross so rightly puts it; "it is indeed ironic that we have all but lost sight of the good attributes of our customary law and

[60]Establishment and Composition of the East African Court of Justice, http://www.eac.int/eacj.html (2012).
[61] East African Court of Justice, "Strategic Plan: 2010-2015", (April, 2010).
[62]East African Court of Justice," Arbitration Rules of the East African Court of Justice," http://www.eacj.org/docs/EACJ_Arbitration_Rules.pdf, Arusha, Tanzania, (2004).
[63]Brenda Brainch, ADR in the world: an African perspective on community mediation (2007).

traditional courts of elders, the rural system of quick fix practical remedies at little cost, which was as much concerned with preserving village relationships as it was about determining the winner of any dispute. Now we must try and rediscover the virtues of principled dispute resolution in the more formal and complex setting of our highly paced society of commerce, complex relationships and property ownership[64].

3.10 Conclusion

Alternative dispute resolution and arbitration is gaining increasing importance within the continent of Africa. Various countries have begun establishing through their Chambers of Commerce commercial related mediation, conciliation, and arbitration services. Though sometimes lacking in organization and financial resources, these efforts by countries to incorporate non adversarial dispute resolution methods in the country is imperative to increasing foreign and domestic investment. The biggest challenge to the process is finding legitimacy within the current judicial framework especially in countries that have a pluralistic government, incorporating portions of civil, common and customary law. The usage of international arbitration rules such as UNICTRAL and the New York Convention may help heed the fears of enforcement by investors. However it is imperative that the judiciary system within a country are part of the process in order to ensure the success of enforcement and smooth transitions between arbitration, conciliation, mediation and actual enforcement. Only time will tell of how influential and successful ADR methods will be in resolving commercial disputes.

The process of application of ADR process by South Sudan Judicial system has not been around for a very long time, it is therefore vital for the Judiciary to ensure that proper applications of these ADR laws are considered.

The government also needs to adopt laws, treaties and conventions that are applicable to South Sudan conditions and economic status and can be easily implemented.

[64] Anthony Gross: the role of legal ethics and jurisprudence in nation building: a paper given at the occasion of a conference at Strathmore university on 29th.10.2004.

CHAPTER FOUR

4.0 The Efficacy of Mediation and Negotiation Methods for Dispute Resolution

MEDIATION METHOD

Mediation is a popular process of conflict management. It is quite productive and helpful in settling conflicts that would have otherwise escalated easily. The voluntary, informal, non-binding process undertaken by an external party that fosters the settlement of differences or demands between directly invested parties. Mediation as used in law is a form of alternative dispute resolution, a way of resolving disputes between two or more parties (Shedrack, 2006. Thus mediation is assistance provided by a mediator called the third party. A third party, the mediator assists the parties to negotiate their own settlement. The third party normally provides assistance where the parties to a conflict admit that they have a problem which they are both committed to solve but in which the mediator manages a negotiation process, but does not impose a solution on the parties.

When two friends have a disagreement, for instance, and the line of communication is broken, common friend could be a mediator in the relationship. The objective of mediation is to help parties to a conflict, within an environment of controlled communication, to reach solutions to their problem the role of a mediator is to create the enabling environment for the parties to carry out dialogue sessions leading to the resolution of a pending conflict. The mediator works on communication between parties pollinates by working on common themes and drawing attention to neglected points and is a confident to the parties, as well as a reconciler.

The mediator helps parties to identify and arrive at common grounds with a view to overcoming their fears and satisfying their real needs. The mediator needs to enjoy the confidence of the parties to the conflict. In addition, there is need to be objective, neutral, balanced, supportive, and non-judgmental and astute in questioning, and to try to drive the parties towards win-win as opposed a view on what might be a fair a reasonable settlement, generally where all parties agree that the mediator may do so. Mediation has a structure, timetable and dynamics. The presence of a mediator is the key distinguishing feature of the process. There may be no obligation to go to mediation, but in some cases, any settlement agreement signed by the parties to a dispute will be binding on them.

The findings of the research question 1 revealed that the mediation method was appropriate as perceived by the participants. Their responses indicated that the mediation method can serve as the best method of alternative dispute resolution. This is as a result of the sensitive nature of dispute that can lead to the destruction of life and properties. The respondents as indicated in Appendix 1 perceived mediation method as effective because it is a practical – oriented method which accommodated different practical activities like flexibility in dialogue, confidentiality, privacy, neutrality, and reality test approach in dispute resolution. Ezeji (1993) highlighted the point that (mediators) utterances, actions, teaching methods, alternative dispute resolution strategies, leadership styles, knowledge of subject and skills in dispute resolution are considered as important factors having implication for nonviolent method of conflict resolution. On the other hand, participants tend to look at the mediation method as the most effective methods of dispute resolution.

There is a significant difference between the mean responses of participants' perception of the use of negotiation and mediation methods. This indicated that they would stand a better chance of settling a dispute using the mediation method because it involves the parties and a third party in mediation. The mediation methods are important to clear doubts in that, the mediator encourages the two parties to come to a compromise through effective dialogue.

4.1 Negotiation Method

Negotiation is a key approach to the peaceful resolution of dispute and conflicts that may arise between the parties. It is also within the reach and control of parties like communication and collaboration because there are no third parties involved. Thus, negotiation is a direct process of dialogue and discussion taking place between at least two parties who are faced with a conflict situation or dispute. Both parties come to the realization that they have a problem, and both are aware that by talking to each other, they can find a solution to the problem. The benefits of compromised solution, it is believed to outweigh the losses arising from refusal to negotiate. In negotiation, there must be communication between two or more people intended to gain understanding, to produce agreement, to bargain between individual involved in a conflict or dispute.

Negotiation typically takes place during the early stages of conflict when communication between parties is cordial and good or at the de-escalation point when communication has been restored (Chikwe, 2011). There are two types of negotiation. We have the positional

negotiation and the collaborative negotiation. The first type of negotiation is based on the aggressive pursuit of interest by parties, and is typically adversarial and competitive. Parties make demands that are inconsiderate of the interest and needs of others, and this makes it difficult for this interest to be met. Parties may also perceive themselves to be in competition. The desire will be to win, instead of working towards a mutually beneficial instead of working towards a mutually beneficial outcome. Thus, the demands of one party can be met only to the detriment of the other. Parties tend to stubbornly adhere to their positions and one side seems to dominate the negotiation. It can break down easily.

Collaborative or constructive negotiation, on the other hand, is a process where parties try to educate each other about their needs and solve their problems in ways that the interests and fears of both or all parties are met. The process is collaborative in principle and the emphasis is on mutual understanding and feeling, all aimed at building a sustainable relationship. Negotiation seems to have universal application as a principle of conflict management based on dialogue. It is apparent that the success of functional (Chikwe, 2011).

The findings of the research questions revealed that the negotiation method was not appropriate as perceived by the participants selected from different institutions. Their responses indicated that they did not find the negotiation method practically convenient for conflict or dispute resolution in the oil producing areas. The respondents disqualified the negotiation method because participants perceived it is being conventional between two parties in dispute, which is counterproductive for delivering the needed objectives of dispute resolution.

There is proper training for negotiators to gain advantage over the other party in negotiations, since the aim is to gain advantage over your opponent during negotiation. Olaitan (1983) indicated that for effective process (dispute resolution) to be effective, knowledge of subject matter as well as skill in negotiation is essential during the section. There is a need, therefore for a programme designed to train would be participants in the methodology and principles of dispute resolution. The programme designed for the participants should be planned to include the methods of using acquired skills during the training/workshop (Umunadi, 2008).

Consequently, the participants will be able to acquire the needed skills and knowledge during the workshop/training for effective negotiation for dispute resolution in their host community when the need arises. The participants' responses showed that the negotiation method is not a better option when adopted in dispute resolution.

4.2 Development of ADR in South Sudan

The Development of Arbitration in South Sudan should be traced from the 21st Century Abyei arbitration which also traces its history back to negotiations led under the auspices of the Intergovernmental Authority on Development (IGAD) in September of 1994[65].

The IGAD-led peace talks had little momentum until 1998 because Northern Sudan refused to accept the IGAD's Declaration of Principles. During the four years of stalling, relations between Northern and Southern Sudan seriously deteriorated. Nevertheless, IGAD persisted with its mediation efforts and after stalling twice, they finally gained momentum in 2002.

The third round of IGAD-led negotiation and mediation lasted for approximately two years[66].The United States, United Kingdom, and Norway all provided mediation services; Sudan's neighboring states, including Kenya and Ethiopia, and various European states actively encouraged the process.

In January of 2005, IGAD's mediation efforts culminated in the signing of the Comprehensive Peace Agreement (CPA), which officially ended Sudan's second civil war.

Importantly, the CPA provided that Sudan: (1) establish a democratic system of governance by elections in 2009 (but these elections were ultimately delayed until April 2010), (2) work to find a comprehensive solution to the country's economic and social woes, (3) find a peaceful solution emphasizing social and economic justice, fundamental freedoms, and human rights, (4) develop are construction and development plan for areas affected by war, and (5) make the unity of Sudan an attractive option. In addition to the above provisions, the CPA established a process for creating a semi-autonomous government in the South (GOSS) and provided for a 2011 referendum for the South to separate from the North if unity was ultimately not an attractive option.

Finally, the CPA created a process for determining the borders between Northern and Southern Sudan, including the Abyei region[67].

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[65] Simon J. A. Mason, Sudan, North-South Comprehensive Peace Agreement, in UNPACKING THE MYSTERY IN MEDIATION IN AFRICAN PEACE PROCESSES.

[66] Human Rights Watch, Sudan: Peace Accord in the South, but Atrocities in Darfur (2004).

[67] The Comprehensive Peace Agreement Between The Government of the Republic of the Sudan and The Sudan People's Liberation Movement/Sudan's People's Liberation Army (CPA) (2005).

4.3 Effectiveness of ADR in resolving disputes between South Sudan

Northern and Southern Sudan have been embroiled in civil war practically since the day Sudan first gained its independence from Britain and Egypt in 1956[68].

On July 9, 2011, after years of fighting and failed peace initiatives led by the international community, Southern Sudan officially gained its independence and seceded from the North creating the Republic of South Sudan[69]. Ninety-nine percent of Southerners voted in favor of independence. Despite the secession, the border separating Sudan from South Sudan is unclear[70]. To this day, the centrally-located, resource-rich, and hotly contested Abyei region remains caught in the middle of a border dispute.

Prior to the secession, international organizations and various nation-states made numerous attempts to broker a peace agreement between Northern and Southern Sudan and end the violence devastating the country and its people. Border disputes, including ascertaining ownership of the Abyei region, formed a central part of the negotiations[71]. Ultimately, the various peace talks and accords failed to ascertain ownership of Abyei; eventually, both Northern and Southern Sudan agreed to bring the issue before the Permanent Court of Arbitration (PCA) at The Hague. While one of the Abyei arbitrators, Judge Awn Al Khasawneh, predicted that the arbitration award would "in all likelihood, have a profound impact on the future of the Sudan as a State and the peace and well-being of all its long suffering citizens regardless of their ethnicity or creed," arbitration actually did little to resolve the Abyei issue or stem fighting between Northern and Southern Sudan[72].

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[68] Sudan: Recent Developments, N.Y. TIMES, July 14, 2011, available at http://topics.nytimes.com/top/news/international/countriesandterritories/sudan/index.html.
The first Sudanese civil war took place between Northern and Southern Sudan from 1955-1972 and the second from 1983-2003. both wars had a devastating effect on Sudan and the Sudanese people. The violence between the North and South only escalated in 1989 when Omar Hassan al-Bashir, backed by the National Islamist Front (NIF) came to power in a bloodless coup. Once in power, the NIF and President al-Bashir instituted Islamic law and forcibly converted Sudan's Christian and Animist populations—both of which are located primarily in the South. After the coup, fighting continued to rage between Northern and Southern Sudan and thus far an estimated two million people have died and another four million people displaced. Indicative of how the war was fought, in 2010, the International Criminal Court indicted President Bashir, charging him with inciting war and abusing human rights. See The Secretary-General, Report of the Secretary-General on the Sudan, delivered to the Security Council, U.N. Doc. S/2005/57 (Jan. 31, 2005); Lucien Dhooge, Condemning Khartoum: The Illinois Divestment Act and Foreign Relations, 43 AM. BUS. L.J. 245, 249-50 (2006); Boswell.

[69] Supra note 44.

[70] Alan Boswell, As Sudan Prepares to Split, Tensions Rise in Abyei, TIME, Jan. 9, 2011, available at http://www.time.com/time/world/article/0,8599,2041445,00.html.

[71] John Young, Sudan Igad Peace Process: An Evaluation, SUDAN TRIBUNE, Jan. 8, 2008, available at http://www.sudantribune.com/Weaknesses-of-IGAD-mediation-in,25725. Abyei's natural resources surely contributed to its value. Prior to 2009 Abyei Arbitration, the Abyei-area contained numerous oil reserves and contributed a quarter of Sudan's total crude oil output in 2003. See Rebecca Hamilton, Oil Rich Abyei: Time to Update the Shorthand?, CHRISTIAN SCIENCE MONITOR, Nov. 3, 2010, via Pulitzer Center on Crisis Reporting, available at http://pulitzercenter.org/articles/oil-rich-abyei-sudan-accuracy-label.

[72] Judge Awn Shawkat Al-Khasawneh, Dissenting Opinion, July 22, 2009 at 1; Jeffery Gettleman& Josh Kron, U.N. Warns of Ethnic Cleansing in Sudan Town, N.Y. TIMES, May 25, 2011.

Therefore, the failure of arbitration to bring lasting resolution to the Abyei border dispute highlights a larger problem, the inadequacy of international arbitration to resolve border disputes in South Sudan. Alternative Dispute Resolution (ADR) processes, as realized in South Sudan, are criticized for being "ad hoc, uncoordinated, poorly planned, and largely ineffective," as the Abyei arbitration was no exception.

4.4 The various peace agreements that have arose in South Sudan to try and instill peace.

4.4.1 The Agreement on Security Arrangements

This Agreement reaffirms the commitment of the two States to renounce war and to implement all the security agreements and arrangements reached in previous negotiations. These include Agreements relating to the immediate withdrawal of any forces to the side of the border. Specifically, the two States agreed to operationalize immediately the Safe Demilitarized Border Zone (SDBZ) in accordance with the administrative and security map presented to them by the AUHIP in November 2011. The Agreement made provision for special arrangements for the "14 Mile Area", which involved the complete demilitarization of the Area overseen by the Joint Political and Security Mechanism (JPSM) and supported by the mechanisms under the JPSM. The Parties agreed to maintain the status quo of the joint tribal mechanisms for the resolution of disputes. The Parties agreed immediately to open the ten (10) agreed border-crossing corridors linking the two States. As such, this peace agreement was at least maintained by the South and Northern Sudan.

4.4.2 The Framework Agreement on the Status of Nationals of the Other State

This Agreement was first initialed on 13 March 2012. It provided principles and mechanisms for the treatment by each State of the nationals of the other State. The key principle was the Four Freedoms: residence, movement, economic activity, and the right to acquire and dispose of property, which each State to assure for the nationals of the other State.

The Agreement established a Joint High Level Committee to oversee the range of issues relating to nationals of the other State. The Parties agreed to elaborate the four freedoms in order to facilitate their full implementation within the two States. This agreement was seen as a shun since none of the parties abided by it as this was evidenced from the vast wars that always escalated between the two Sudans.

4.4.3 The Agreement on Border Issues (including demarcation)

The Agreement on border issues was a consolidation of a range of issues relating to the overall management of the border (the area either side of the boundary between the two States). The Agreement adopted two key principles: a "soft border" and an "integrated border management approach" (IBMA). A soft border was to ensure a peaceful, safe and secure border between which the flow of people, trade and livestock would remain unhindered. The Agreement made special arrangements for transhumance (seasonal movement of livestock for pasture) and guaranteed the continuance of nomadic livelihoods.

The principles of the IBMA would foster the better coordination and management of various activities along the border, under the oversight of the Joint Border Commission, and with the participation of all key actors, including the border communities.

The Agreement recommitted the two States to establish institutions for completing the demarcation of the boundary within specified period[73]. The agreement like many other peace agreements in Sudan was not respected as this saw the Abyei dispute arising just shortly after this peace agreement was formed.

4.4.4 Agreement on the Resolution of the Conflict in the Republic of South Sudan Addis Ababa, Ethiopia 17th August 2015.

This agreement was to restore peace, security and stability in the country; Expedite the relief, protection, voluntary and dignified repatriation, rehabilitation and resettlement of IDPs and returnees; Facilitate and oversee a process of national reconciliation and healing through an independent mechanism in accordance with this Agreement including budgetary provisions for compensation and reparations. Currently to date this is the agreed that still stands in South Sudan and the only challenge that it faces is implementation of this Agreement is undoubtedly compromised and partially derailed.

There are almost daily violations of the ceasefire, perpetrated by uniformed armed forces of SPLA-IG and SPLA-IO and other armed groups. This hostility has the potentially to trigged an uncontrolled escalation of violence motivated by retribution. Which has resulted into the violation of the Peace agreement in south Sudan.

Conflicts in Africa have much in common, and striking parallels can be drawn between them at all levels. Dynamics affecting the most complex war time conflicts, civil unrest and other macro disputes are in play, even in the smallest community conflicts. The converse is also

[73] Sudan-south-Sudan agreements. (African Union High level Panel for Sudan Implementation and South Sudan).

true: lessons learned through community mediation, for example in South Africa, are applicable to the most complex and largest conflicts to be found on the continent.

Just as conflict dynamics are comparable between African conflicts, whether large or small, local or international, so are mediation processes. Effective approaches to resolving large-scale conflicts and civil wars are effective at the community level, and ineffectual techniques at the community level are just as likely to be counter-productive in mediating international disputes. While there may be some differences in mediating macro- and micro-conflicts (such as the time required, the need for negotiation teams, and the complexities of agenda development or renegotiations), as far as the mediation process is concerned, the differences are more like variations on a theme than real substantive dissimilarities.

As African conflict dynamics and mediation processes can be seen as analogous, on levels ranging from the community to the international arena, so too are many of the issues and interests affecting countries, political parties, ethnic groups, interest groups, and communities and civil societies. Often these interests are very basic: survival and safety. At other times, they occur on a higher level of interest, such as self-determination and/or securing human rights, but they are of equal importance at all levels.

A major premise of ADR or peace education is that lessons learned from conflict resolution in larger regional or national conflicts are applicable to community mediation, and vice-versa. Approaches that were successful in the Democratic Republic of the Congo may hold keys to resolving the south Sudan conflict. As civil wars (or any war) affect large cross sections of countries and communities, so do environmental crises.

4.5 Challenges that have been faced by ADR mechanisms in resolving disputes in South Sudan.

4.5.1 The involvement of immediate regional actors in peace talks is a double-edged sword.

From the outset, the engagement of IGAD's frontline states-Uganda, Kenya, Ethiopia, and Sudan was critical to the parties' calculations and approach to negotiations. The sometimes conflicting interests of these states-some of which subsequently became overt or covert participants in the conflict-likewise influenced their approach to the process, particularly during IGAD summits where senior regional leaders participated directly in mediation. This

was sometimes critical in advancing the process, and other times complicated progress, by fundamentally altering the direction of negotiation. In the eyes of some, this compromised the neutrality of the mediation.

4.5.2 Poor economic governance and devastating corruption in the war torn Sudan.

These issues are at the heart of South Sudan's conflict. Complicated by the war, the diversion of state resources to the conflict, the mortgaging of the country's resources, we now face the near-collapse of the economy. Recent years have seen growing attention to how competition for control of resources, corruption, and economic patronage can drive conflict. In South Sudan, access to oil revenues and corruption schemes make political positions lucrative, further reinforced by the established expectations of familial and ethnic patronage networks. Power, particularly the power to control access to South Sudan's wealth, was a principal driver of conflict.

4.5.3 Identity and the Intersections of Identity

The identities have a powerful effect on the way we react to disputes, the choices people make about how to handle them, and the chances of resolving them fairly and in accommodation of the needs. What do people mean by identity? Everyone has an identity - for example, people all have a gender, a race, a sexuality. People are urban dwellers or country people. People are old or young, able bodied or people have a disability. Aspects of the identities may be apparent to most (gender); to some (sexuality) or to no-one (some sorts of disability). How does the identity affect us as disputants?

Suppose a citizen is detrimentally and, they believe, unfairly affected by a decision of a government department. If they are an articulate, middle class, professional person they may employ various strategies to deal with the injustice. They may access professional networks to find useful information about the way in which such government decisions are taken. They may protest at a higher level in the department. They may attempt to negotiate a change of the decision. If this fails, they may take legal advice, perhaps take legal action and even commence court proceedings.

However, if the citizen is a recent immigrant to Australia, for whom English is a second language and who originated from a country in which state bureaucracies are intransigent except to those who are well connected, there may be many obstacles to their having the unfair decision reviewed. Such a citizen may well decide to "lump it", and accept the

decision without protest, believing (perhaps falsely) that their chances of having it reviewed are negligible. For a range of reasons stemming from experiences in their country of origin, and their experiences as immigrants in this country, they may decide that to attempt to have the decision reviewed would be a fruitless exercise. Even if they do decide to take action, they may find negotiating a change difficult because of the challenges of language and an unfamiliar culture. They are also likely to find accessing legal advice more challenging, and be less willing to commence litigation.

Both of these citizens could, by one route or another, find themselves trying to resolve their dispute in ADR, for example, in mediation. Their identities are also likely to affect their participation in mediation. There are likely to be differences in their capacity to understand the mediation process, articulate their position and needs and assert their interests. Their sense of their own entitlement - that their views count for something and that they deserve a fair and unbiased process – is also likely to be significantly different and may lead the less powerful to bargain for less and to settle for less.

Of course, the articulate middle class disputant will not always have the advantage in the resolution of a dispute. The advantage depends on the situation. Transported to a newly acquired hobby farm and in dispute with a neighbour about burning off paddocks, the city professional may find him or herself considerably disempowered.

Identity and ADR dispute resolvers

If ADR is to provide a fair process and fair outcomes, it is important that dispute resolvers understand the impact of identity on the dispute resolution process, and that they take it into account when making decisions. For example, when deciding if a dispute is suitable for ADR or how to compensate for power imbalance between participants in ADR, issues of identity may be of great importance. Responding appropriately to the identity of disputants does not, of course, mean that ADR practitioners should respond on the basis of stereotypes about particular groups. Dispute resolvers must pay careful attention to the needs of the individuals with whom they work, rather than responding on the basis of assumptions about the characteristics of members of groups to which disputants belong.

Intersections of Identity

Responding appropriately also means taking into account the intersections of identity. A range of aspects of identity go to make up who people are. People cannot be separated out into the components of the identity and have each aspect dealt with separately. Some Aboriginal women, for example, have taken issue with white feminists' emphasis on gender, pointing out that, for them, race is the most powerful determinant of their daily experiences.

To give another example of intersections of identity, in 1986 the High Court heard the case of two Vietnamese women who alleged that they had been discriminated against by the Postal Commission.[74] The women wanted permanent employment with the Commission and to get it they had to have a medical test. They both failed the test, because it applied height and weight requirements that they could not meet. They could not comply because those height and weight charts were constructed on the model of Caucasian males and they were Vietnamese females. The two women complained of discrimination. Because of various problems with the legislation they could only complain of discrimination on the ground of their gender. Their height and weight was a function of both their gender and their race but the law could only take account of their gender.

Men who have disabilities report that they are often seen differently to men who are able bodied. Able bodied males are assumed to need to have emotional and sexual relationships. Men with disabilities say that they are often perceived as 'sexless'. People with disabilities who live in rural or remote areas often face additional difficulties to those who live in urban areas. They may also face problems of comparative poverty.

Fairness and justice in procedure and outcome

Some people have argued that the term 'justice' should not be used in relation to ADR. They feel that 'justice' should be used only to refer to the procedures and outcomes of the formal justice system. ADR may involve a departure from justice in the sense that what is agreed in an ADR procedure may differ - sometimes quite substantially - from what would have been decided by a court. Indeed, the accommodation of non-legal principles is a prime advantage of ADR.

[74] *Dao v Australian Postal Commission* (1987) EOC 92-193

What is procedural fairness?

Not surprisingly, given that ADR in its present form is new and must justify its place, much time has been taken up in elaborating the procedural advantages of ADR over those of litigation. Examples of such advantages are the control over procedures by the participants and their ability to be 'heard' and to participate in developing the outcome. In litigation, control is likely to be given over to lawyers. Lawyers are experts - but their clients may feel that the expert takes over. Clients may feel that the dispute is out of their hands, and is being taken in directions they may not endorse. They may be asked to choose betpeopleen directions all of which they find unsuitable or which do not suit their needs. ADR is seen as having the advantage that the participants can make their own decisions about how they deal with their dispute, can do it at their own pace and according to their own understandings of what the dispute is about. Even if the alternative process involves a third party decision maker (as arbitration does for example4), the participants can choose the identity of the arbitrator, decide if they want legal representatives to present arguments to the arbitrator, or decide which issues to submit to arbitration.

Procedural issues may be fairly described as the preoccupation of ADR providers and they have directed much attention to what is a fair process. Some of the factors that they might emphasise in defining a fair process are:· The participants make a free and informed choice to enter. This means, amongst other things, that the participants understand the nature of the process and what will be required of them when they participate. It means that there is no threat, compulsion or coercion to enter or stay in the process.

· All parties have the capacity to participate effectively.

· The parties are able to raise all of the issues which are important to them, and to put their point of view fully.

· The parties hear the other side and can question and challenge what the other participant says if they need to do so.

· A balance of popeopler betpeopleen the parties.

· Access to all relevant information.

· Access to the support and advice needed by the parties.

· Any third party who is involved in the process is unbiased, and that lack of bias is apparent.

· A fair outcome, that is, an outcome determined by the participants.

· Referral to other resources if the process cannot provide a fair or just outcome or does not in fact do so.

There is no neat separation between fairness and justice of procedure and fairness and justice of outcome. An unfair procedure is highly unlikely to produce a fair outcome. Good, effective procedural rules and practices are there to ensure that a fair outcome is achieved. For example, there are procedures in litigation and ADR which are designed to ensure that decisions are taken on the basis of all the relevant information. A decision taken without relevant information may be unfair. For example, if property is shared between the parties to a marriage or business partners, and assets have been concealed by one of the parties, the result will not be fair.

Fair and just outcomes

It is necessary that there be fairness in relation both to process and outcome. One is not enough. For example, where mediation or conciliation was first used between Aboriginal and non-Aboriginal peoples it was praised because it provided the Aboriginal people with the opportunity to speak out to people who previously had not been prepared to listen. However, important though this opportunity may be, it is surely not enough if the opportunity to speak and be listened to is all that ADR provides. If the issues in dispute were not resolved fairly and justly - if the Nwel people were not truly heard and their reasonable complaints responded to appropriately - then the dispute resolution mechanisms can reasonably be said to have failed.

The fulfilment of three levels of interest has usefully been said to be necessary to the achievement of a fair and just outcome.[75] They are:· Substantive interest: the tangible requirements such as money and time which are a major focus of the ADR negotiating process;

· Procedural interest: the *way* the participants discuss their interests and the *manner* in which the bargaining outcome is implemented;

· Psychological interest: the emotional and relationship needs that a disputant has both during and as a result of the negotiations. For example, disputants want to be respected and not degraded by the other party during the negotiations.

[75] Christopher W Moore, The Mediation Process - Practical Strategies for Resolving Conflict, Jossey - Bass Publishers, 1991, page 37.

For the participants, their view of their substantive interests may be shaped by many factors, including:

· The likely outcome under the law;

· The view of the majority of the community (hopeoplever that view is to be ascertained);

· The view of various groups or minorities in the community (although there may not be homogeneity within a group);

· Their shared values and beliefs; and · Their individual values and beliefs.

In the context of the formal justice system the law decides what is just and appropriate. Not everyone shares the values which are embodied in the law.

However, it provides an objective standard with regard to rights, entitlements and obligations which most people accept, for a variety of reasons.

In contrast, as noted, using ADR allows the participants to depart from the law's idea of fairness and justice, and to agree according to their own needs, values and wishes. For example: A woman after separation may wish to maintain a good relationship between the children who reside with her and their father. She may wish to accede to her ex-husband's request to accept less property than she could get if she negotiated hard or litigated. She may do this freely after full legal advice because there is sufficient property, she has the earning capacity to allow her a comfortable lifestyle and she has no wish to engage in conflict with her ex-partner because she fears it will affect the relationship between the father and the children. However, the differences are not startling, and the results probably do not depart markedly from community ideas of fairness. Many people would be likely to find these agreements fair.

There will, no doubt, be other situations however, where departure from community standards in an agreement is unfair or unjust. What if the wife in the example above, (who wishes to agree to less property than she may otherwise be entitled) has not had legal advice, does not have enough money to maintain herself and the children in a comfortable lifestyle, and her anticipation of a good relationship between the children and their father are based on her irrational hopes of reform of a self centred sociopath?

If ADR processes produce an unfair result, a disputant may subsequently go to litigation. Then the parties and the taxpayer must pay for both the ADR and the litigation. However, their willingness or capacity to litigate may be limited by a number of factors. They may not have the emotional or financial resources to do so; they may not have access to information and advice which would let them know that the result was unfair or unjust; they may feel (rightly or wrongly) that their chances in the formal justice system would not be good; they may know that the formal justice system will not provide them with what they need.

Involvement of Dispute Resolver in Achieving Fairness of Outcome

Opinions are not unanimous as to when, and to what extent a dispute resolver should step in to avoid what most people would regard as a patently unfair outcome. The generally accepted view is that, beyond assisting a fair outcome by ensuring the procedural fairness of the process, the role of the dispute resolver is limited.

According to this view, the dispute resolver's responsibility is to ensure that the participants: *'... understand their choice and to explore with them their enlightened self interest, but not to impose ... values upon them.'6*

On the other hand, however, the *'Standards of Practice for Lawyer Mediators in Family Disputes'* adopted by the American Bar Association in 1984 provide that a mediator: *'... should be concerned with fairness ... (and) has an obligation to avoid an unreasonable result'.*

Similarly, Queensland Community Justice Program Guidelines stipulate that the mediator has a responsibility to the participants to reach a fair and equitable settlement. In disputes involving issues of public as well as private interest, it has also been said that dispute resolvers have a broader responsibility.[76] In environmental disputes, for example, it has been suggested that dispute resolvers have a responsibility towards the general public and future users for the preservation of their dwindling resources.

[76] Judith L Maute, 'Mediator Accountability: Responding to Fairness Concerns', (1990) 2 Journal of Dispute Resolution, quoting from Patton, 'A Brief Outline of the Mediation Process', (Jan 14, 1982), (unpublished paper held by the author), page 347.

The effect of this wider view of the responsibility of dispute resolvers is, of course, to shift the focus of interest from the parties themselves to the dispute resolver. Arguably, this may seriously undermine general concepts of ADR as an empowering process for the participants to a dispute in which they themselves assume the primary responsibility for reaching an agreement. It would also seem to undermine principles of third party neutrality 8 requiring that the dispute resolver be more sensitive to community standards and needs than the participants themselves, and that they can recognise what most people would regard as a patently unfair agreement. This may not always be the case.

Public Accountability

In some situations, where the law is inadequate or where people wish to depart from legal constraints, the flexibility of ADR may be an advantage to individual disputants. On the other hand, where agreements are entered into which are unfair or exploiting of members of minorities, it may be a serious problem.

Matters are dealt with behind closed doors and society as a whole is not afforded the opportunity to respond. Legal precedents are not allowed to evolve. Increasingly, ADR is being prescribed by Government as a means of resolving a range of disputes, many of which, for example, discrimination, may raise issues of public concern and interest.

In contrast, litigation has a number of advantages where issues of public concern and interest are involved as a result of its public nature as a method of resolving disputes. Disputes are resolved in a forum which is open and accessible to the public and courts carefully consider making decisions to exclude the public or to restrict the publication of information arising from court proceedings. Decisions of courts are reported where they contain important issues of law. Decisions are recorded and are appealable. The law is developed in important respects through precedent.

It is argued that some disputes are of such public importance that they should be dealt with openly and subject to public comment and that ADR is inappropriate in such circumstances. Disputes which reveal that there is a systemic problem may be concealed from public attention and others may suffer harm because they are not alerted to the problem. It is necessary to remember, however, that this difficulty is present in litigation also. Even where

court proceedings are commenced, disputes are frequently settled. Where terms of settlement preclude publicity, issues may be effectively privatised.

Although one solution for ADR might be to refuse to accept disputes involving issues of public importance, it might not always be possible for people to turn to the formal justice system. This might mean, effectively, that they would be denied any form of recourse in their dispute. Moreover, this would only solve half the problem. In many cases, it is not the individual case, but the trend reflected in a series of cases, that is a matter of public concern.

Another solution might be to consider ways in which the ADR movement can be made more accountable. It has been said in this regard that:
'More annual reports are needed where agencies analyse outcomes, and the measures could be usefully compared with results from courts and other systems. More research is also needed to monitor success rates, costs, outcomes and satisfaction levels of parties. Private does not have to mean secret or lacking accountability. More independent research would go a long way to dealing with some of the concerns that some commentators have in this area. In addition, ADR practitioners could consider how they evaluate their work and if it can be submitted to independent scrutiny.'[77]

Within the limits of confidentiality, agencies could produce information about the amount and nature of their work and the issues raised by that work. Perhaps, each dispute resolution agency could also establish a register of matters resolved by way of ADR, similar to that used by the courts. This would provide a resource for dispute resolution providers and would encourage a feeling for precedent. Additionally, in disputes involving public interest issues, some central record keeping body could be informed. This could be reported upon annually to the Commonwealth Attorney-General, Commonwealth and State Law Reform Commissions or Social welfare bodies.

South Sudan has struggled with inter and intra communal violence for decades over access to water and grazing land betpeopleen pastoralist communities. Easy access to peopleapons and ammunition is responsible for much of the violence. State secùrity has not had capacity to provide protection to civilians or control the illicit flow of these armaments.

[77] Francis Reagan, 'Dilemmas of Dispute Resolution Policy', (1997) vol 8(1) Australian Dispute Resolution Journal, page 5 at page 15.

4.5.4 Persistent tensions with Sudan over the sharing of oil revenues and the status of the contested Abyei region also presents an ongoing challenge to peace and security.

The GoS has provided southern rebels with funds, peopleapons, and ammunition-intentionally stoking tensions within South Sudan. Most recently, rebel leader David Yau Yau accepted the amnesty deal, creating a new administrative area for the Murle ethnic homeland called the Greater Pibor Administrative Area. Historically, Yau Yau has benefited the Khartoum's support. While this new deal has created peace betpeopleen the Murle and the Government of South Sudan, it may also incentivize other rebel commanders to seek political and economic gains through violent means[78].

4.5.5 Failure to provide Justice and accountability.

Mass killings, sexual violence, and other war crimes have been widely documented by jthenalists and human rights groups in South Sudan. Children have been pulled out of school and the UN estimates there are at least 9,000 child soldiers that have been recruited into the current conflict on both sides[79].

For many, there cannot be peace without justice. So far, the presidential commission appointed by president Kiir has failed to hold the government forces accountable for atrocities and obstruction of humanitarian aid. For their part, the armed opposition investigated a dramatic massacre in Bentiu and announced that one man with a machine gun was responsible for all the killing.

4.6 Has ADR yielded results in post South Sudan violence

The hope for peace and stability in South Sudan was restored when a peace pact – the Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) – was signed betpeopleen the Sudan People's Liberation Movement and Army in Government (SPLM/A-IG) and SPLM/A in Opposition (SPLM/A-IO), as represented by President SalvaKiir Mayardit and First Vice President Riek Machar Teny Dhurgon respectively. The agreement, which was signed on 17 August 2015 in Addis Ababa, Ethiopia, and on 26 August 2015 in Juba, South Sudan, was ratified by the South Sudan National Legislative Assembly on 10 September 2015. The agreement sought to end the deadly civil war that had broken out in South Sudan in December 2013, following popeopler struggles betpeopleen Kiir and Machar and the allegations of an attempted coup made by the former against the latter.

[78] www.enoughproject.org/conflicts/sudans/conflict-south-sudan.
[79] www.enoughproject.org/conflicts/sudans/conflict-south-sudan.

ARCSS culminated in the formation of a Transitional Government of National Unity (TGoNU) on 29 April 2016 with the return of Machar, who had fled Juba following the outbreak of the civil war. Hopeoplever, events on the night of 7 July 2016, less than 48 hthes before the celebration of the country's fifth anniversary of independence, peoplere characterized by violent confrontations in Juba betpeopleen the SPLM/A-IG and SPLM/A-IO and spread to many parts of the city, resulting in the deaths of many soldiers and civilians as peoplell as the destruction of property and displacement of people. This quick return to violence provoked analysts of conflict and peace studies to rethink and reflect on the processes leading to the signing of the ARCSS. This article analyses the events leading to the conclusion of the ARCSS and the extent to which they undermine the ownership, buy-in and commitment of stakeholders in the South Sudan peace process. As such therefore, ADR has not yielded any positive results i.e. securing peace in Southern Sudan.

CHAPTER FIVE

CONCLUSION AND RECOMENDATION

5.1 Conclusion and Recommendations

From the foregoing discussion, it is obvious that participants have different perceptions regarding preferred alternative dispute resolution methods and there is a difference in these opinions among participants. It is a settled fact to know that the kind of conflict or dispute will determine the choices of method for dispute resolution either mediation or negotiation methods, which is a key to national development and peaceful co-existence in different parts of Jiongolei State.

It is hoped that even those who are seen practicing the selection of methods in the institutions are equipped with dispute resolution skills through exposure to functional education. Mediation is a popular process in conflict management as perceived by a majority of the participants in Jio State. It is seen as voluntary, informal, non-binding process undertaken by an external party that fosters the settlement of differences or demands between directly invested parties while negotiation is a key approach to the peaceful resolution of dispute and conflicts that may arise among parties.

The findings of the research question revealed that negotiation method was not appropriate as perceived by the participants from the different institution. It was revealed as clearly that mediation method was appropriate as perceived by the participants. Their responses indicated that the mediation method can serve as the best method of alternative disputes resolution in Jiongolei State. There is a significant difference between the mean responses of participants' perception of the use of negotiation and mediation method of settling disputes. It is used by mediators most often and it encourages the two parties to come to a compromise through effective dialogue. The following recommendations are therefore vital:

- The government should provide funding for the training and re-training of mediators and experts to improve on the alternative dispute resolution strategies.
- The government should organize training/workshop for more participants from different institution to include unskilled personal and youths in the different oil producing community
- Participants should combine both negotiation and mediation methods as the situation demands to make dispute resolution effective and at the same time maximize communication and efficiency in conflict resolution.

Since South Sudan seceded from the Sudan, much has been anticipated in relation to alternative dispute resolution. Traditional conflict resolution based on customary law plays a considerable part in dispute and conflict resolution in South Sudan. Much of this covers family law and crime. Offences such as adultery, slander and defamation are compensated traditionally, e.g. by paying the aggrieved party in cattle, sheep or goats or by simply giving an apology. On the other hand, crimes as serious as murder could be settled through payment of *dia*or replacement of a human victim by another human being from the aggressor.

Recommendation

South Sudan has no sound foundational institutions of governance to build on, unlike other African countries that inherited such institutions and simply re-engineered or reconfigured them to suit their new normal. South Sudan is building from an almost clean slate. The institutional infrastructure is peopleak and its governance culture is new and fragile as such government needs to involve its self in teaching the citizens the motion of peace in consideration of Alternative dispute resolution.

5.2 Alternative Dispute Resolution (ADR) Training and sensitization:

The government of South Sudan should sensitize its nationals, judicial officers and advocates where need be on the use of Alternative Dispute Resolution (ADR) to help them apply it as a mechanism for justice, peace and a viable tool of ever lasting peace, with an ultimate goal of enhancing harmony among the litigants.

5.3 Establish the Commission for Conciliation, Mediation and Arbitration (CCMA)

There is need to start up the commission for conciliation, mediation and arbitration. The CCMA seeks to remedy these shortcomings by providing for conciliation and arbitration in a number of issues, thus freeing the all-important restheces of Cthet to deal with and resolve the more serious and involved issues such as wars, strikes, action, unfair dismissal, retrenchments and discriminatory practices in workplace environment.

5.4 Enact robust ADR legislation.

While most African cthet rules or policies permit the judge to enctheage parties to settle out of cthet, enacting legislation would elevate the status of ADR before a skeptical disputant, build public confidence, and further increase ADR utilization. Legislation would also provide

a framework for reference, review, and reform as peoplell as institutionalize much needed education and professional training.

5.5 Target youth early.

With nearly 70 percent of the African population 30 years old or younger, a substantial rate of youth restiveness is inevitable and poses a major challenge to the already strained criminal justice systems that cannot afford excessive incarceration. The ADR technique of victim-offender mediation for low-level offenses, such as fights, vandalism, and petty theft, could serve as a more effective alternative to more costly and punitive approaches. Likewise, ADR techniques to address youth unrest and violence based on peace education and restorative justice principles should be integrated into school programs. One pilot project in the Niger Jiongolei region of Nigeria in which schools launched peer mediation programs demonstrated reductions in acts of school indiscipline (fights, drug use, bullying, cheating) and gender biases, an increase in school attendance and critical skills (communication, problem-solving, leadership), and popularity among teachers, principals, students, and participating communities[80].

5.6 Create appropriate incentives for stakeholders.

To develop and broaden adoption of ADR mechanisms, their benefits and contributions to legal professionals must be clear. For lawyers, strategic use or inclusion of ADR should offer an additional tool to enhance the efficiency of their practice, potentially increase revenue, and achieve greater satisfaction for both the lawyer and client. Awards and recognitions by the legal profession, including reviews for senior advocates and national merit honors, would also elevate the support and use of ADR among members of the bar and bench.

5.7 Measure progress.

To maximize the efficiencies and complementarities of ADR with the official judicial process, a systematic monitoring process should be established. This includes measuring key qualitative and quantitative data that would then lead to adjustments in the scope and focus of ADR efforts. Indicators include ADR usage, percentage of cases filed and processed through ADR vs. cthet litigation, the average time spent on a case, the number of successful ADR settlements with agreements reached, the number of qualified ADR practitioners and trainers, the number of ADR institutions and services in the country, community acceptance, and level

[80]Alternative Dispute Resolution in Africa: Preventing and Enhancing Stability by Ernest E. Uwazie.

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