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The United Nations, the African Union and the Rule of Law in Southern Sudan

By

Charles Riziki Majinge

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Supervisors:

Prof. Chaloka Beyani

&

Prof. Christine Chinkin

To

Angelica. My dear wife.

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Asanteni sana.

CM.

London, Dar es Salaam, March 2013.

Declaration

I certify that the thesis I have presented for examination for the MPhil/PhD degree of the **London School of Economics and Political Science** is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it). The copyright of this thesis rests with the author.

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Abstract

The argument of this thesis is that measures taken by international bodies to establish the rule of law in post-conflict situations are undertaken in the mistaken belief that they will automatically enhance conditions for the rule of law to flourish. In fact, examination of the situation in Southern Sudan demonstrates that there is a wide disconnection between the measures pursued and the outcome of the process. This study will therefore inquire into the different meanings attributed to the concept of the rule of law in order to establish what the concept signifies in the context of statebuilding, with a focus on Southern Sudan. How does the theoretical understanding of the rule of law correlate with the legal and institutional measures taken by international organizations such as the United Nations and the African Union to build the effectiveness of the state in Southern Sudan? The study will further address issues such as what kind of state institutions are envisaged by rule of law reforms, together with the historical and theoretical imperatives which orient and drive the rule of law building process in post-conflict situations. The research is envisaged as a contribution to the debate on how to make 'rule of law work on the ground'. It is hoped that if practitioners and policy makers take into account the findings of this study, their contribution to rule of law reforms in countries like Southern Sudan that have experienced protracted conflicts will not only achieve their objectives of reforms but also significantly improve the social and economic wellbeing and human rights protection of the people in whose name these reforms are pursued.

Acronyms

AU	African Union
CPA	Comprehensive Peace Agreement
CA	Constitutive Act
DPKO	Department of Peacekeeping
ECOWAS	Economic Community of West African States
EU	European Union
GoS	Government of Sudan
GoSS	Government of Southern Sudan
HEC	High Executive Council
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
IGAD	Inter-Governmental Authority on Development
IGADD	Inter-Governmental Authority on Development and Desertification
IMF	International Monetary Fund
IOs	International Organizations
IPs	Implementing Partners
MDGs	Millennium Development Goals
MINUSTAH	United Nations Stabilization Mission in Haiti
NATO	North Atlantic Treaty Organization
NEPAD	New Partnership for Africa's Development

NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
PSC	Peace and Security Council
POLISARIO	Frente Popular de Liberación de Saguía el Hamra y Río de Oro
SADC	Southern African Development Community
SPLM	Sudan People's Liberation Movement
SSLM	Southern Sudan Liberation Movement
UN	United Nations
UNSMIL	United Nations Support Mission in Libya
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children Fund
UNMIL	United Nations Mission in Liberia
USAID	United States Agency for International Development
WB	World Bank
WFP	World Food Programme
WTO	World Trade Organization

Table of Instruments

- African Union Constitutive Act: OAU Doc. CAB/LEG/23/15, *entered into force* 26 May 2001
- African Charter on Human and Peoples Rights: OAU Doc. CAB/LEG/67/3, *entered into force* 21 October 1986.
- African Charter on Democracy, Elections and Governance: *entered into force* 15 February 2012.
- African Charter for Popular Participation in Development and Transformation: *entered into force* February 1990.
- Comprehensive Peace Agreement: *entered into force* January 2005.
- Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations: U.N. Doc. A/5217, 1970.
- International Covenant on Civil and Political Rights: U.N. Doc. A/6316, 1966, 999 U.N.T.S. 171, *entered into force* 23 March 1976.
- International Covenant on Economic, Social and Cultural Rights: U.N. Doc. A/6316, 1966, 993 U.N.T.S. 3, *entered into force* 3 January 1976.
- European Convention on Human Rights: 213 U.N.T.S. 222, *entered into force* 3 September 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
- OAU Charter: 479 U.N.T.S. 39, *entered into force* 1 September 1963.
- The United Nations Charter: 59 Stat. 1031, T.S. 993, *entered into force* 24 October 1945.
- Universal Declaration of Human Rights: U.N. Doc A/810, 1948.
- Vienna Declaration and Programme of Action: U.N. Doc. A/CONF.157/24 (Part I), 1993.

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Introduction

A. The statement of the problem

Since the early 1990s, there has been a proliferation of legal and institutional measures undertaken by international organizations and other actors under the banner of promotion of the rule of law in countries emerging from armed conflicts. The main research of the thesis is to examine the conceptual understanding and application of the concept of the rule of law in the context of building a constitutional and institutional framework of democratic governance in South Sudan, a newly independent state that has emerged from armed conflict.

The argument behind the thesis is that international measures taken to establish the rule of law in post-conflict situations are undertaken in the mistaken belief that they will enhance conditions necessary for the rule of law to flourish. However, closer examination reveals that there is a wide disconnection between the measures taken and the ensuing consequences. The disconnection stems from the fact that the concept is framed, understood, and applied in different contexts. For this reason, the thesis seeks to contribute to the conceptual understanding and application of the rule of law norms within the larger goal of statebuilding under a legal framework in which people have faith to guarantee their rights and advance their collective wellbeing as a society.

The study will therefore inquire into the different meanings attributed to the concept of the rule of law, in order to establish what the concept signifies in the context of statebuilding, taking Southern Sudan (now the independent South Sudan) as a case in point. How does the theoretical underpinning of the concept of the rule of law correlate with the legal and institutional measures taken by international organizations, notably the United Nations and the African Union, to build the effectiveness of the state in South Sudan?

In considering this question, the study will address a wide range of issues such as what kind of state institutions are envisaged by rule of law reforms, together with the historical and theoretical imperatives which orient and drive the rule of law building process in post-conflict situations. Major problems or *lacunae* intended to be redressed by establishing the rule of law, and the reasons why this seems to be important, will be investigated and analyzed as well. This will entail a consideration of the minimum attributes of the rule of law that are relevant to legal and institutional reforms pertaining to statebuilding. Which laws and institutions are targeted for reform, and on what basis? These questions are examined in detail in chapter six which examines institutions built to support the rule of law such as an independent judiciary and law and order institutions. When donors provide money to build the rule of law, what exactly are they promoting and for whose benefit? In other words, what kind of world do they want to see by investing a significant amount of their resources in the rule of law cause? All these issues inform the study in order to examine, for example, how rule of law reform can lead to building legal institutions such as an independent judiciary to underpin a state that is based on the rule of law. A question of fundamental importance is whether establishing the rule of law requires nothing less than the transformation of social norms regarding armed conflict and state power allocation, and whether international actors can succeed in ushering in a reconstructed, effective democratic state based on the rule of law?

The setting in which this study is situated shows that there are international dimensions to the rule of law. It seems that the United Nations (UN) organization, inspired by its underlying principles and institutional architecture, is the largest and most influential international actor in the field of building the rule of law, with an unmatched capacity to disseminate the theme of the rule of law as an essential component of statebuilding. Alongside the UN, the African Union

(AU) is also considered as a regional organization that has a normative basis for promoting the rule of law and its application. In 2006 it adopted a post-conflict reconstruction policy with Southern Sudan as its major focus. Indeed the AU Constitutive Act of 2000, which establishes the AU, declares that the rule of law is one of its fundamental values among its principal objectives.

For the sake of seeking clarity on the content of the rule of law, it is worth noting that the practice of the UN in promoting reforms based on the rule of law in post-conflict situations tends to equate human rights and the rule of law. In other words these two concepts are invoked synonymously, in the belief that they are two sides of the same coin. A critical examination of this claim is of some importance to this study, to establish how the rule of law is understood and applied in post-conflict contexts in which respect for human rights is a critical part of state building and reconstruction.

An early writer such as Albert Dicey, to whom the origin of the concept is widely credited, while he wrote extensively on the rule of law was silent on the correlation between the rule of law and human rights. In fairness, the concept of human rights as it is known today did not exist during Dicey's time; could it be that in coining the idea of the rule of law, Dicey had the same underlying concerns as those that are dealt with by human rights today? Clearly modern writers, jurists, and institutions with interests in the subject consider both the rule of law and human rights as essential to achieve collective human advancement.

But why should this study be concerned with the theme of the rule of law in the specific context of reconstruction of states emerging from conflict? The proposal to tackle the question of the rule of law in this regard arises because of the conceptual and theoretical belief of the

international community in the vital role of the rule of law in achieving effective institutional reforms to guarantee peace and stability in such states. Given these assumptions, this study will examine these claims in light of the international efforts undertaken to build the rule of law in Southern Sudan. The study will further address the legal dimension of the question of whether the rule of law as a juridical concept that historically developed, and is entrenched, in some Northern countries like Britain can successfully be replicated in other countries, especially those emerging from conflict, even though the latter countries have had little or no historical association with the concept as understood within the former's context.

The study aims to critically examine what constitutes a post-conflict situation and specific issues relating to the rule of law in this context. Under what circumstances or conditions can a given area be considered or identified as being in a post-conflict situation? For example, countries and regions with and without active armed conflict seem to be joined in international practice under the heading of a 'post-conflict situation'. Yet there are significant differences between these two situations in terms of needs and challenges. In this regard, this study will attempt to critically examine the criteria or conditions that should be taken into account when considering a situation to fall within the 'post-conflict' category. This analysis is crucial because the way the term is used has practical implications for the kind of steps to be taken, and the context for doing so, in order to reconstruct states that are in a post-conflict situation. It is argued here that this clarification will contribute to deeper understanding of the rule of law in post-conflict context and how it can be translated from theory into practice.

While it can be argued that the conflict in Southern Sudan has ended, the implementation of the Comprehensive Peace Agreement (CPA) on which this peace and stability hinges is uncertain.¹ Some of its major components agreed upon by the parties have not been implemented, which to a great extent threatens the implementation of the whole Agreement. It is against this reality that this study will address the rule of law in Southern Sudan within a specific time frame after signing of the CPA, from 2005 to 2011. This timeframe was chosen because after this period Southern Sudan became an independent state separate from Sudan.

B. Background of the study

The idea to write this thesis was conceived while I worked at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg in Germany as a Senior Fellow in the Africa Projects (Sudan and Somalia). During this period, I had extensive involvement with Sudan where I conducted training for judges and lawyers from different departments of the government.

While in Southern Sudan, I was fascinated by a wide array of activities carried out by different international actors under the rubric of the rule of law. Different activities ranging from training of women for self-employment to training of local chiefs in dispute resolution in Rumbek, promoting health services for women in Yei, prison or classroom construction in Kapoeta, poverty alleviation programmes in West Nile, British Council-supported English language training in Nairobi and Dar es Salaam, or legal training for lawyers and police in Juba, all these activities had something in common. They were being carried out as part of rule of law reforms. When I asked some local officials how these activities would contribute to their quest for a democratic society enshrined in the Comprehensive Peace Agreement (CPA), few seemed to

¹ For in-depth discussion of the CPA see chapter two.

understand the nature and objectives of these reforms. It was at this time that I made a decision to conduct an inquiry into the rule of law reform process.

Perhaps it is important to explain why the research will focus on Southern Sudan. That country was an autonomous region within the sovereign State of Sudan until it voted for secession in January 2011. As will be shown in chapter two, the history of Southern Sudan is replete with examples of gross violations of human rights and total collapse of the rule of law. It is this state of affairs that compelled the UN and the AU as international actors to take measures to address these challenges. This research was therefore underpinned by the desire to examine the rule of law reform efforts undertaken by international actors to address these challenges within the context of Southern Sudan.

The need to build and strengthen the rule of law has become arguably the primary focus of the international community's engagement in Southern Sudan, given that it has emerged from protracted conflict and is still fragile. Nowhere is this challenge more critical than in post-conflict Africa where the majority of countries emerging from conflict have either very few rule of law institutions with their attendant norms and values or, in some cases, none at all. Consequently, the engagement of the United Nations and the African Union has become increasingly vital, and in some cases indispensable, to help address these challenges. For the African Union this role has become pressing owing to the protracted nature of conflicts in Africa and the ever expanding role of the organization which is being looked to by African countries to play a larger role in addressing continental problems in line with its newly adopted vision of 'African solutions for the African problems'.²

² John Akokpari et al. (eds), *The African Union and Its Institutions*, Johannesburg: Jacana Media, 2008.

This study does not intend to address the question of transitional justice in the context of Southern Sudan. The reason is that while gross violations of human rights and international humanitarian law were committed during the conflict, negotiators of the CPA did not include provisions for redress in the final peace agreement. While it is difficult to discern the reasons for their decision, it is evident that redress for past atrocity crimes would have not boded well for senior government officials both in the government and in the Sudan's Peoples Liberation Movement (SPLM) under whose leadership these crimes may have been committed, and whose future role was key to successful implementation of the agreement. Because of this decision of negotiators to exclude transitional justice in the final peace agreement, this study will address the efforts to build the rule of law as envisaged in the CPA without specifically focusing on the question of transitional justice.

C. Significance and contribution of the research

The significance of this study lies in its potential to clarify the content and international application of the rule of law to statebuilding in the context of post-conflict situations. There has been a growing conceptual divergence in the theoretical conceptualization of the rule of law and its application in the context of statebuilding, and this appears to have had a negative impact on rule of law reforms. Different writers and institutions define the concept depending on how they want the definition to advance their claims. This study will demonstrate that different conceptions of the rule of law reflect several instantiations which would depict the ideal world of the rule of law in varying ways. The study questions the assumption that reforms instigated under the rule of law can automatically lead to stronger and effective legal institutions in post-conflict contexts. The author sets out to demonstrate that the continued multiple usage of the concept of the rule of law has practical consequences on the lives of the beneficiaries. This is because some of the wide ranging actions under the banner of the rule of law not only cause

more harm to the people but also achieve goals that may have little correlation with the needs of those in whose name the actions are pursued.

Crucially, the importance of this inquiry is its promise to critically unpack the normative content of the rule of law concept and examine mechanisms by which it can be translated from an ideal concept into a concrete value. This clarification is essential because any successful efforts to build the rule of law greatly depend on how the term is conceptualized and applied.

In this regard, the study adds further significance by contextualizing the discussion in what the author characterizes as the two waves of rule of law transfer. The first wave in the 1960s and 1970s is characterized by the 'law and development movement', which was an attempt by Western countries, especially the US, to build Western-type legal institutions in Africa to spearhead democracy and development. The second wave is a modern rule of law reform effort which is considered virtually to aim at all positive attributes of a Western liberal market state including democracy, corruption-free government, and commitment to human rights among others. Yet, both initiatives met a common fate. They both seem to have failed to attain their legal and economic objectives and both were originated internationally and undertaken by international actors with little or no consultation with local constituents. The contribution of this study is to examine what should be done differently, if the modern rule of law transfer is to be effective or different from the previous initiative under the law and development movement.

D. Methodology of research

Because of the nature of the study, its different components required a combination of different techniques. Primary data were obtained by way of field research and interviews in Southern Sudan. This was relevant to chapters two, five and six. The researcher visited Southern Sudan

several times in 2007, 2008, 2009 and 2010. During this time he collected vital material relating to the functioning of major rule of law institutions in the country, including the Supreme Court, Court of Appeal and High Court. He also worked with judges of the High Court at the state level (in all ten states in Southern Sudan). This work provided him with access to material and firsthand experience of the rule of law challenges facing Southern Sudan. During the same period, the author had access to policies, material, and techniques developed by major national and international actors involved in promoting the rule of law reforms in Southern Sudan. These include the United Nations Development Programme, the United Nations Mission in South Sudan, the office of the United Nations High Commissioner for Human Rights and various national and international NGOs. The author's engagement with these organizations significantly exposed him to their working approach and how they conceived and implemented rule of law oriented reforms.

The author further conducted interviews with judges of the Supreme Court, the Registrar of the Supreme Court, and judges of the Court of Appeal and the High Court both at the central government level in Juba and at the state level. Interviews were also conducted with the chief advocate general of Southern Sudan, the head of the legal aid department, the head of the correctional services department, the office of the prosecutor general, the office of the Anti-Corruption Commission, and the children's department in the Ministry of Legal Affairs, among other high ranking officials and departments. The interviews were essentially conducted to find out how these officials and institutions approached rule of law reforms and addressed challenges that confronted them in the process. Interviews were conducted on a one to one basis. This approach was preferred because it gave an opportunity to the author to conduct interviews while witnessing the 'reality on the ground' at first hand. Further, the author avoided making use of questionnaires because of the risk that he would not obtain important information, given the

language barrier in the country where despite English being the official language, Arabic is still a language widely spoken and understood, and there are several African languages also. Face to face interviews were therefore preferred because they enabled the author to seek clarification or more information whenever it was warranted.

E. Sources of research

Four major sources were consulted in course of writing this work:

- (i) Major sources of international law were used in accordance with Article 38 of the Statute of the International Court of Justice: international conventions and treaties, international customs and general principles of international law. Further, the key to understanding the rule of law was Dicey's original work on the rule of law as discussed in chapter one of this study, along with other theoretical studies.
- (ii) The study has made reference to the work of the United Nations organizations such as the UNDP and UNHCR in rule of law reform. It has also made reference to different reports of the Secretary General on rule of law reforms.³ Similarly, primary documents like the situational and analytical reports by the African Union Heads of State and AU Assembly Resolutions reports of the AU Peace and Security Council, decisions of the AU Post-conflict Reconstruction Committee, and various reports by the African Union Commission on the rule of law were analyzed. It has also made reference to sub regional instruments such as the SADC, ECOWAS and EAC Treaties and their subsequent protocols.

³ 'Uniting our Strengths: Enhancing United Nations Support for the Rule of Law': Report of the Secretary General, 2006. For a comprehensive list of some treaties that have direct relevance to the rule of law see also, <http://au.int/en/treaties>. And www.unrol.org. Accessed March 2013. See also A/Res/60/180 & S/Res/1645 (2005).

- (iii) Lastly, this work drew upon significant experience of the researcher in the rule of law sector in Sudan, having worked in the region for some time.

F. Structure of the thesis

The thesis comprises seven chapters. Chapter one provides an in-depth discussion of the rule of law concept and how it is understood by different writers and institutions. It examines the content of this concept and how it is used by international actors to achieve their objectives in statebuilding. Since the concept has always been associated with different instantiations, the chapter identifies minimum attributes which it believes provide minimum benchmarks for the rule of law concept. The second chapter introduces Southern Sudan as the subject matter of the study and gives a historical account of the country and especially of how its constitutional history affected the development of the rule of law. The third chapter discusses the concept of self-determination in international law in the context of Southern Sudan. This discussion is warranted by the fact that the historical struggle for self-determination in Southern Sudan was largely underpinned by the desire to build a society based on the rule of law and yet no sufficient attention was paid to discussing how such a society would be built once self determination was achieved. The key argument in this chapter concerns whether attaining self-determination automatically leads to a society that upholds the rule of law.

Chapter four examines the law and development movement sponsored earlier by international actors, and its nexus to the modern rule of law reforms. Is there any correlation between the two? The chapter argues that for modern rule of law reform to succeed its promoters must learn from challenges encountered during the earlier initiative of the law and development movement. Since the study looks at the role of two major organizations, the UN and the AU, in building the rule of law, chapter five examines the legal basis for the involvement of these two institutions to

build the rule of law in a post-conflict context like that of Southern Sudan. The chapter looks not only at how these institutions conceive and implement rule of law reforms but also at the existing legal framework that guides their vision of the rule of law. Chapter six looks into how building an independent judiciary and law and order institutions can enhance the rule of law. The judiciary and law and order institutions were chosen because of the key role of an independent judiciary to guarantee fair hearing and protection of fundamental rights and freedoms through access to justice and equality before the law. The chapter also provides a detailed discussion of the role of the traditional justice system in enhancing the rule of law in Southern Sudan. The Thesis concludes with some recommendations and proposals for a way forward.

Chapter One

I. The Rule of Law and Post-conflict Statebuilding

A. Introduction

This chapter introduces and analyzes the concept of the rule of law as a crucial component of statebuilding in countries emerging from conflict. The analysis of the concept of the rule of law will be situated in the context of Southern Sudan, a region which is just emerging from four decades of conflict and attempting to build its institutions of governance. By deciphering its potential use in statebuilding in Southern Sudan, this chapter examines whether the rule of law is a standalone juridical concept or part of an applicable framework of rules and practice. In other words, how and to what extent can the rule of law concept be useful in statebuilding where it underlines formal institutions with legal authority, such as an independent judiciary, a representative legislature and an accountable executive?

This chapter first highlights the concepts of statebuilding and post-conflict situations in part one; part two examines the rule of law as a theoretical norm by analyzing various definitions advanced by scholars, judicial officers and public officials (bureaucrats) involved in the promotion of the rule of law. Part three discusses minimum attributes which manifest the rule of law in a given

society. Mindful of different descriptions of the rule of law concept advanced by different writers and institutions, in part four the chapter argues that the rule of law should be considered from the institutional as well as from a values approach, to ensure that a holistic understanding of the concept is achieved. Part five considers the rule of law as an export product by analyzing its nature and content as an exported product whose outcome is influenced by the law and development movement, which previously attempted to export the rule of law in terms of development. The last part provides a critical discussion on how minimum attributes can inform the rule of law as an export product. This part concludes by arguing that it is important to pursue and measure the impact of rule of law reforms on the basis of minimum attributes identified in part three of this chapter.

Statebuilding has been defined by the Organization for Economic Cooperation and Development (OECD) as purposeful actions to develop the capacity, institutions and legitimacy of the state in relation to an effective process for negotiating mutual demands between a state and its polity.¹ Statebuilding can therefore be considered as attempts to establish or re-establish and strengthen public structures in a given territory capable of fulfilling core functions associated with the state, such as guaranteeing peace and security to the citizens and providing essential services to them.² The need for statebuilding emanates from state failure which can be considered as the failure of public institutions to deliver public services to the people, on a scale likely to undermine the legitimacy and existence of the state itself.³

¹ Concepts and Dilemmas of State Building in Fragile Situations: From Fragility to Resilience, Paris: OECD, 2008, 14.

² Armin Von Bogdandy et al., 'Statebuilding, Nation-Building and Constitutional Politics in Post-conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches', *Max Planck Yearbook of United Nations Law*, vol. 9, 2005, 580.

³ *Ibid.*

The key assumption behind statebuilding is that the task of transferring Western-type institutions and their attendant values to states that are perceived as failing is not a matter of whether but only of how.⁴ This narrative posits that statebuilding as a tool for society transformation can be attained as long as international actors improve coordination and cooperation, both underpinned by continued commitment of the international community to provide requisite resources to achieve these objectives.⁵ International actors assume that their role is to solve already identified local problems such as corruption, bad governance or disregard of human rights. Yet what is evident is that statebuilding as a tool of conflict transformation does not take place in a historical vacuum and does not involve consistent technical assistance beyond the duration determined by the funding imperatives of the donors.⁶ As argued by Chesterman, statebuilding is an attempt to mould non-Western states where these reforms are pursued into modern good societies compatible with governance, democracy and the rule of law.⁷

Given that these reforms are pursued in the name of local people, it is important to question the role of local polities in the statebuilding process, to determine how their participation informs the process. It is argued that given the increasingly powerful role of international actors in determining what states complying with the rule of law, human rights or democracy look like, the reforms undertaken under the banner of statebuilding may not reflect needs and aspirations of a local polity, especially when its needs fail to align with the assumptions of international actors. Despite various assumptions underlying statebuilding, it is argued that when the concept is examined in the context of Southern Sudan it is evident that there has been a total collapse of

⁴Bliesemann Berit de Guevara, *Statebuilding and State Formation: The Political Sociology of Intervention*, Abingdon, Oxon.: Routledge, 2012, 1.

⁵*Ibid.*

⁶*Ibid.*

⁷Simon Chesterman, *You the People: The United Nations, Transition Administration and Statebuilding*, Oxford; Oxford University Press, 2005.

public institutions which has greatly undermined the legitimacy of the state and hence justified the role of international actors to build these institutions. It is because of this reality that this research intends to explore these issues in light of efforts undertaken by international actors to build rule of law in Southern Sudan.

The World Bank defines post-conflict reconstruction as support for transition from conflict to peace in a country emerging from armed conflict through rebuilding social economic framework of the society. Hence, for the Bank, post-conflict reconstruction has two objectives, to facilitate transition to peace and to support social economic development.⁸ In 1992, the UN Secretary General Boutros Boutros-Ghali in his Report *Agenda for Peace* conceived post-conflict reconstruction as efforts pursued to strengthen and solidify peace in order to avoid a relapse into conflict, by rebuilding the institutions and infrastructures of states torn by civil war and strife and addressing causes of conflict such as economic despair, social injustices and political oppression.⁹ His successor Kofi Annan in his report *In Larger Freedom* stressed an urgent need to build lasting peace in war-torn countries.¹⁰ In this Report Annan recommended the establishment of the UN Peace Building Commission whose mandate was *inter alia* 'to marshal resources at the disposal of the international community to advise and propose integrated strategies for post-conflict recovery, focusing attention on reconstruction, institution building and sustainable development in countries emerging from conflict'.¹¹

It is not only institutions that have attempted to define post-conflict reconstruction; individual writers have also addressed the matter. For example, Jensen contends that post-conflict

⁸Steven Holtzman et al., *Post-conflict Reconstruction and the Role of the World Bank*, Washington, DC: The World Bank, 2008, 13.

⁹ Boutros Ghali, *Agenda for Peace*, United Nations: New York, 1992, para 21.

¹⁰Kofi Annan, *In Larger Freedom*, United Nations: New York, 2005, para 15.

¹¹UNGA Res. 60/180/2005 and UNSC Res. 1645/2005.

reconstruction entails military and civilian activities conducted across the spectrum from conflict to peace to establish or maintain order in states or regions.¹² Davis conceives post-conflict reconstruction as consisting of four clusters: guaranteeing physical security and a long-term process of reconciliation, rebuilding the country's physical infrastructure, creation of sustainable self-government and social economic development.¹³ On his part Jeong posits that post-conflict reconstruction entails 'a wide range of sequential activities, proceeding from ceasefire and refugee resettlement to the establishment of a new government and social economic reconstruction.'¹⁴ However, there are some scholars who note that post-conflict reconstruction is not a straight forward process but should rather be patterned depending on the prevailing situation.¹⁵

Examining these definitions advanced by scholars and institutions, it can be argued that the primary objective of post-conflict reconstruction is to build institutions of governance and an infrastructure for social economic development. And the aftermath of war provides an opportunity for international actors to implement these objectives of 'moulding' these societies into states compliant with human rights, democracy and the rule of law. However, as experience in Southern Sudan has shown, it is difficult to set a specific timeframe for post-conflict reconstruction, mainly because the length of the process depends on the availability of resources and commitment of international actors to continue their engagement. It is further argued that the timeframe depends on the prevailing conditions on the ground mainly because international actors cannot impose peace on people unless and until they are ready to peacefully coexist.

¹²Eric Talbot Jensen, 'Post Conflict Reconstruction', *New England Journal of International and Comparative Law*, vol. 14, 2007, 35.

¹³Peter Davis, *Corporations, Global Governance and Post Conflict Reconstruction*, Abingdon, Oxon.: Routledge, 2013, 25.

¹⁴Ho-Won Jeong, *Peacebuilding in Post Conflict Societies: Strategy and Process*, Boulder: Lynne Rienner, 2005, 1.

¹⁵Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations*, Princeton, NJ: Princeton University Press, 2006, 18.

A key question to pose, however, is when can it be determined with certainty that a particular conflict has ended? For example, parties to a conflict may have declared an end to a conflict and signed an agreement like the Sudanese Comprehensive Peace Agreement while small intensity hostility still continues within a country. For the sake of this research Southern Sudan is considered a post-conflict country mainly because the protracted conflict between the Sudanese government and the SPLM officially ended in 2005 with the signing of the Comprehensive Peace Agreement. While it is clear that Southern Sudan still faces complex security challenges, especially from within the country and from neighbouring Sudan, it is evident that the full-scale conflict witnessed prior to the signing of the CPA is not likely to erupt again. Indeed, international and regional efforts are underway to peacefully address these challenges.¹⁶ Hence this research considers Southern Sudan as a post-conflict situation.

B. Rule of law as a theoretical norm

But why is it important for the purpose of this thesis to define the rule of law? Two reasons favour defining this concept: (i) the need to seek clarity on the concept itself and (ii) the necessity to spell out the ingredients of the rule of law to demonstrate that it is a viable juristic principle and not merely a vague political aspiration. The rule of law is both a legal and a constitutional concept, it carries the force of law, and it operates in diverse political and social contexts.¹⁷

¹⁶ The African Union Peace and Security Council continues to support the efforts of the AU High Level Implementation Panel on Sudan, chaired by Thabo Mbeki, former President of South Africa. The role of this Panel has been to facilitate negotiations relating to Southern Sudan's independence from Sudan, including disputes over oil, security arrangement, citizenship, debt obligation and the common international boundary between the two countries. See the Panel's Report December 2012 (PSC/PR/2 (CCCXLIX)).

¹⁷ Mortimer Sellers, 'An Introduction to the Rule of Law in Comparative Perspective' in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspective*, Dordrecht, Springer Publishers, 2010, 4-9. See also Geoffrey Walker, *The Rule of Law: Foundation of Constitutional Democracy*, South Carlton, Victoria: Melbourne University Press, 1988, 2-12.

Further, the imperative of defining the rule of law is premised on the fact that its conception differs significantly from situation to situation. The question is, how different is it when applied in a post-conflict situation, or in developing or fragile states in general, in the context of statebuilding? For example, while international support for countries emerging from conflicts is characterized as ‘rule of law support’, similar support extended to developing and fragile states is characterized as support for ‘democratic governance or ‘deepening democracy’, the phrase commonly used by the United Nations Development Programme.¹⁸

Despite the importance of defining the rule of law, there is no universal definition or agreement as to what the term ‘rule of law’ actually means, and there are indeed several different meanings attached to it.¹⁹ Albert Vienny Dicey, writing in 1885, advanced three features which collectively manifest as the rule of law. First, according to Dicey, there should be absolute supremacy of the law. This is opposed to the influence of arbitrary power and is demonstrated when a person is only punished for a breach of law in the ordinary legal manner before the ordinary courts of the land and nothing else. Second, there should be equality before the law of all persons and classes. This includes the government and government officials. Thus Dicey argues that every person, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of tribunals. Third, and last, the rule of law requires full incorporation of constitutional law as part of the ordinary law of the land, not as a separate constitutional code which might be vulnerable to suspension in times of emergencies or at the whims of the rulers.²⁰ Reading these elements of the rule of law, it is clear that Dicey employed the concept as a

¹⁸Human Development Report 2002: *Deepening Democracy in a Fragmented World*, Oxford; Oxford University Press, 2002.

¹⁹ For a conceptual analysis of the rule of law see Albert Vienny Dicey, *Introduction to the Study of the law of the Constitution*, 9th edn, London: Macmillan Publishers, 1945; John Rawls, *Theory of Justice*, Cambridge, MA: Harvard University Press: Cambridge, 1971; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press, 1979, 210-229 and Lord Bingham, *The Rule of Law*, London: Penguin, 2010.

²⁰ Dicey, above note 19, 179-193.

description of the distinctive political culture in Victorian England, and did not speculate at much length on its normative implications.²¹

For example, even if the rule of law were to be fully incorporated as in constitutional law as part of the law of a country, constitutions generally allow suspension of certain laws during emergencies, and it is in such periods that a government can appropriate to itself a wide range of powers to justify its actions even if such actions infringe or inhibit freedom and liberty of the people. What is crucial therefore is that before the suspension occurs there are strict institutional and legal procedures which are designed to minimize the possibility of abuse. It can further be argued that, Dicey's dislike of wide discretionary powers to public officials and institutions can be attributed to his fear that such powers might be abused by those entrusted with it hence his desire to see all English people protected by the rule of law. Indeed, his fear may have also emanated from the reality that in this period, officials and institutions in England had wide discretionary powers which could be abused at the detriment of the citizens.

Decades later, to add to Dicey's definition, the American political philosopher John Rawls sets out a general definition of the concept of the rule of law by giving three of his own precepts which, he believes, in their totality reflect the concept. First, Rawls argues that the actions which the rule of law requires or forbids must be of a kind which people can reasonably be expected to do or avoid. He further argues that the law must not impose impossible requirements and judges and legislators must act in good faith and belief that the laws can be obeyed and executed. Second, he argues that similar cases must be treated similarly, thereby limiting the discretion of judges and others in authority. It compels them to justify the distinctions they make between

²¹ Thom Ringer, 'Development, Reform and the Rule of Law: Some Prescriptions for a Common Understanding of the Rule of Law and its Place in Development Theory and Practice', *Yale Human Rights Development Law Journal*, vol. 10, 2007, 190.

persons by reference to the relevant legal rules and principles. Third, every offence must be reflected in the law. This notion requires that laws must be known and expressly promulgated, that their meaning must be clearly defined, that statutes must be general in expression and intent and prospective rather than retroactive.²²

However, these elements stipulated by Rawls do not explain how the subjects of the law can limit the exercise of discretionary powers by those in authority. Rawls assumes that judges and legislators will always rely on their moral values to limit their discretionary powers, something which is unrealistic given the prevalence of dictatorship in different countries. In other words, this theory of Rawls can only be relevant in areas where the government acts in accordance with the will of the people. And it is only within the democratic context that the government can act in accordance with the will of the people.

In his book *The Morality of Law*, the American Legal Scholar Lon Fuller identified so-called ‘vital elements’ or ‘canons’ which collectively constitute the rule of law. Fuller argues that in order for the rule of law to exist, laws must exist and be obeyed by all, be consistent, be written with reasonable clarity, published, prospective, general and avoid contradictions. He further argued that laws should not command the impossible and all official actions should be in conformity with law.²³ Fuller labeled his canons the ‘inner morality of law’, suggesting that they are not simply conditions of efficacy of a legal system but moral requirements. He further argued that the practice of the rule of law limits the kind of injustice which governments can pursue. To him, law is the enterprise of subjecting human conduct to the governance of agreed rules between the citizens and the authorities. Examining features identified by Fuller, it can be contended that he conceived the rule of law as a critical component in advancing human dignity.

²² John Rawls, above note 19, 7-18.

²³ See generally Lon Fuller, *The Morality of Law*, New Haven: Yale University Press, 1969.

However, one can argue that Fuller confused a legal system with a good legal system, or minimum conditions of a legal system with the conditions of an effective legal system. Admittedly, these canons can make a legal system more efficient, but not necessarily morally good.²⁴ For example, the fact that a law imposing tax is retrospective might infringe the rights of taxpayers, nevertheless it remains a law, and anyone not complying with it can be sanctioned for breaking the law. Similarly while a law sanctioning detention without trial may infringe on fundamental rights of citizens, it remains a valid law under which a person can be punished. These examples illustrate the reality that the law to be enforced need not necessarily be morally good as argued by Fuller. As argued by Raz (discussed below), rule of law may also enable the law to serve bad purpose contrary to Fuller's assertion.

Another influential scholar, Joseph Raz, in his seminal essays on law and morality argued that most of the content of the rule of law doctrine can be subsumed into two propositions, (i) that people should be ruled by the law and obey it and (ii) that the law should be such that people will be able to be guided by it. He argues that people can obey the law only if part of their reason for conforming is their knowledge of the law. The law must be such that people can find out what it is and act on it.²⁵ Raz argues that the rule of law should not be confused with democracy, justice or equality or dignity of people, and considers these elements as the preserve of human rights which should be distinguished from the rule of law. Indeed, he argues that 'the law may institute slavery without violating the rule of law'. As will be seen in this work, it is argued that compliance with the rule of law necessarily entails respect for the dignity of the person who is the beneficiary of the law in the first place. Consequently, if a state supports slavery, it breaches

²⁴ David Luban, 'The Rule of Law and Human Dignity, Re-examining Fuller's Canons', *Hague Journal on the Rule of Law*, vol. 2, 1, 2010, 32.

²⁵ Joseph Raz, above note 19, 214.

its most basic obligation to ensure that each agent subject to its powers is equally regarded as a person capable of possessing legal rights.²⁶

Closely re-echoing the rule of law elements advanced by Dicey, Chesterman argues that the core definition of the rule of law consists of three elements. The first element is the supremacy of the law, which necessarily requires the state to refrain from the arbitrary exercise of power. The second attribute is that the law must apply to the sovereign and instruments of the state, with an independent institution such as a judiciary to apply the law in specific circumstances. The third and last element is equality before the law. He argues that law should offer equal protection without discrimination. For him, where these three elements – the supremacy of the law, equality before the law, and government bound by laws – are observed the rule of law is upheld.²⁷

Most recently in 2010, the British judge and jurist Lord Bingham suggested that the rule of law is a concept which requires that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts.²⁸ Lord Bingham admits that his conception of the rule of law is not comprehensive, nor can it be universally applied without exception or qualification. Yet he argues that any departure from this conception of the rule of law calls for close consideration and clear justification by relevant bodies.²⁹

The question to pose here is, what has motivated the re-emergence of interest in the rule of law subject by jurists and scholars, as attested in the efforts of Lord Bingham? Is it because of fears

²⁶ Evan Fox Decent, 'Is the Rule of Law Really Indifferent to Human Rights?' *Law and Philosophy*, vol. 27, 2008, 565.

²⁷ Simon Chesterman, 'An International Rule of Law?' *American Journal of Comparative Law*, vol. 56, 2008, 15.

²⁸ Lord Bingham, above note 19, 9.

²⁹ David Luban, above note 24.

that it is being undermined by powerful states such as the UK or the US in their counter-terrorism efforts? Or is it because of the perceived threat posed by fragile or rogue states? It can be argued that this interest is partly motivated by the desire and belief of jurists, judges and scholars who consider the rule of law essential for protecting human rights and general human advancement. Hence its advocacy not only within domestic legal systems but also at the international level.³⁰ Indeed it was on this basis that after the end of the Cold War in the early 1990s, international actors assumed the role of building the rule of law in the belief that such a process was key in post-conflict state reconstruction.

The Charter of the United Nations³¹ in 1945 echoed the language of the rule of law in its preamble when it sought to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Similarly, the preamble to the Universal Declaration of Human Rights 1948 explicitly stipulated that 'human rights should be protected by the rule of law'.³² What is evident is that these international instruments have made a clear link between the presence of the rule of law and enjoyment of human rights.

International human rights organisations have amplified this approach. In 1959 the International Commission of Jurists in its report made the connection between the rule of law and human rights by declaring the rule of law to constitute certain rights and freedoms, such as an independent judiciary and improved social, economic and cultural conditions conducive for human dignity. Similarly the International Bar Association, an institution extensively involved in the promotion of the rule of law worldwide, conceived the rule of law to consist an independent

³⁰ Andre Nollkaemper, 'The Internationalized Rule of law', *Hague Journal on the Rule of Law*, vol. 1, 1, 2009, 74-78.

³¹ Charter of the United Nations, 59 Stat. 1031, T.S. 993, *entered into force* 24 October 1945.

³² Universal Declaration of Human Rights, UNGA Res. 217A (III), U.N. Doc A/810 (1948).

and impartial judiciary, due process of law, equality of all before the law and government bound by the law. The views of such bodies matter because they have been at the fore in translating their vision of the concept into concrete results in different parts of the globe, thus combining rule of law activism with theory. Indeed, today many actors building rule of law institutions have sought to advance their activities on the basis of those institutions' conception of the rule of law.

Beyond scholarly writing we can also look towards legal precedent and practice as a way of understanding the concept of the rule of law. The Nuremberg Tribunal in 1946 identified important elements whose existence manifests the rule of law in criminal proceedings. The Tribunal asserted that the rule of law in the context of international criminal proceedings includes (i) the right of the accused to know the charge against him/her within a reasonable time before the trial, (ii) the right of the accused to the full aid of counsel and preferably counsel of their own choice, (iii) the right to be tried by an unprejudiced judge or impartial tribunal, (iv) the right of the accused to give or introduce evidence, (v) the right of the accused to know the prosecution evidence, and (vi) the general right to a hearing adequate for a full investigation of the case.³³ These manifestations of the rule of law in criminal proceedings are captured in international human rights law in which they extend to the requirement of a fair hearing by a competent, independent, and impartial tribunal.³⁴

However, as the debate on the precise meaning of the rule of law has progressed, the concept has attracted critics, especially academics who have argued that the term 'rule of law' has become so rhetorical that it is increasingly seen as no more than a shorthand description of the positive

³³ 'Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of Tribunal' reproduced in the *Yearbook of the International Law Commission*, 1950, 373-377. See also Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge: Cambridge University Press, 2009, 11-18.

³⁴ Article 14 of the ICCPR. See also chapter six pp. 280-295 of this work on the correlation between the rule of law and an independent judiciary.

aspects of any given political or legal system.³⁵ Professor Judith Shklar argued that this expression may have become meaningless owing to ideological abuse and general over-use. She contends that the concept may have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. She suggests that no intellectual effort needs to be wasted on this bit of ruling class chatter.³⁶

Echoing Shklar's criticism, Tamanaha describes the rule of law as an exceedingly elusive notion giving rise to a rampant divergence of understanding and analogous to the notion of 'the good' in the sense that everyone is for it, but all have contrasting convictions about what it is.³⁷ Tamanaha further contends that some practitioners believe that the rule of law includes protection of individual rights, some believe that democracy is part of the rule of law, while others believe that the rule of law is purely formal in nature requiring only that laws should be set out in advance in general, clear terms and be applied to all. He concludes by arguing that 'there are almost as many conceptions of the rule of law as there are people defending it'.³⁸

Part of this criticism emanates from the belief that the concept is being invoked by different actors simply to justify certain actions in a given context. It is the way in which the concept is invoked that raises many questions as to whether the concept is a viable juridical concept worth pursuing. Nevertheless, despite this criticism by some scholars and practitioners, the international community has progressively attempted to find a 'common language' to serve as an all-encompassing tent for the rule of law activities.

³⁵ Judith Shklar, 'Political Theory and the Rule of Law', in Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology*, Carswell: Toronto, 1987, 1. See also Martin Loughlin, *Foundations of Public Law*, Oxford: Oxford University Press, 2010, especially chapter 11.

³⁶ Judith Shklar, *ibid.*

³⁷ Brian Tamanaha, *On the Rule of Law: History, Politics and Theory*, Cambridge: Cambridge University Press, 2004, 8-10.

³⁸ Tamanaha, *ibid.* 48.

In 2004, the then UN Secretary General Kofi Annan advanced a widely acclaimed definition which has been heralded by both academicians and practitioners as a new beginning for the rule of law.³⁹ The Secretary General conceived the rule of law to be a 'Principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.⁴⁰ This definition has been hailed because it is seen to include all positive attributes of a state that upholds the rule of law.

In his definition the Secretary General transcends the fact that the rule of law is not so much a norm or a certain way of organizing a justice system, but a multifaceted cultural achievement that also includes certain values and practices in everyday social life as a part of governance.⁴¹ This definition has sparked a lively discussion within and outside the United Nations and in the process has accorded the concept a higher profile within the international community.⁴² However, as this work will show, this conception of the rule of law by the Secretary General, despite its wide acceptance, is almost entirely aspirational because it lists items which would be

³⁹ Stefan Bariga and Alejandro Alday, 'The General Assembly and the Rule of Law: Daring to Succeed?' *Max Planck Year Book of the United Nations Law*, vol. 12, 2008, 382-387.

⁴⁰ See generally United Nations, 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies', *The Report of the Secretary General*, S/2004/616, August 2004.

⁴¹ Thomas Fitschen, 'Inventing the Rule of Law for the United Nations', *Max Planck Yearbook of International Law*, vol. 12, 2008, 347-380.

⁴² *Ibid.*

difficult to attain not only in a post-conflict context but even in countries enjoying political and economic stability such as Western developed countries. It is these difficulties that raise some questions on the practical application of this definition.⁴³

From the various analyses enumerated in this section we can identify three approaches to the concept of the rule of law. The first approach is that of various scholars and academics such as Dicey, Rawls and Raz who are largely interested in exploring the theoretical concept and general understanding of the concept. However, it should be emphasized that because of the nature of the theoretical context of these definitions, they may have little appeal to the practitioners involved in building institutional conditions that support the rule of law. The second approach entails the rule of law definition advanced by national and international judicial institutions or officials (such as the Nuremberg Tribunal or Lord Bingham) who envision the rule of law concept as a legal norm which should be observed by all branches of government such as the executive, judiciary and legislature. The definition by these institutions and officials is mainly shaped by the day to day experience of interpreting the law and maintaining international and constitutional order where the law is supreme and obeyed by all.

The third approach entails what one may term as a functional or bureaucratic definition which has been advanced mainly by international practitioners (such as the UN, IBA and ICJ) seeking to make the rule of law a reality. This approach is essentially guided by the prevailing assumptions of what a society upholding rule of law looks like. It derives from the daily experience of institutions like the United Nations in building the rule of law and also the experience of the rule of law practitioners on what they imagine a society with the rule of law to be like. Among these three approaches, it is argued that the challenges lay with the last approach

⁴³ Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/Res/67/1, 2012.

advanced by practitioners. This approach tends to associate the rule of law with ‘all positive attributes’ of a liberal state, which essentially, one would contend, exist in some developed countries. The danger of this approach is that it is highly idealistic and ignores that local political conditions in any context dictate how things work in practice.

The debate above on various definitions of the rule of law raises an important question as to whether there is a direct link between the rule of law and the protection of human rights. Does efficient human rights protection depend on the rule of law? Critical analysis of the arguments of various scholars like Dicey or Raz would show that the rule of law is all about certainty of the law and government acting in accordance with the law of the land irrespective of the ideals advanced by that law. But this conception of the rule of law clearly fails to appreciate that laws exist to serve the interests and wellbeing of the subjects of a state. Indeed, as stated already, the Universal Declaration of Human Rights clearly states that the rule of law is essential in advancing and protecting human rights.⁴⁴ Hence these two concepts (human rights and the rule of law) are intertwined, in the sense that enjoyment and advancement of human rights greatly depend on the extent to which the rule of law is upheld in a given society.

For example, freedom of speech or movement will be meaningless unless there are institutional mechanisms created to secure them when infringed or violated. It is in recognition of this reality that the rule of law has become an essential condition through which to realize human rights, whether civil or social-economic rights.⁴⁵ The absence of institutional conditions to advance the rule of law as understood in a democratic society⁴⁶ allows human rights abuses to occur, because

⁴⁴ Preamble of the Universal Declaration of Human Rights.

⁴⁵ Thomas Franck, ‘Democracy, Legitimacy and the Rule of Law’, *Public Law and Legal Theory Working Paper Series 2*, New York University, 1999, 2-6.

⁴⁶ Susan Marks, *The Riddle of all Constitutions*, Oxford: Oxford University Press, 2000, 30-49.

there are inadequate legal restrictions on violent conflict or state abuse, or because the pre-existing legal order condones such abuse. Thus one may argue that while human rights comprise the corpus of substantive rights accorded to each individual, it is only through strong and accessible rule of law institutions that these ideals of human rights can be secured.⁴⁷ Now this Chapter examines what may be considered minimum attributes of the rule of law.

C. Minimum attributes of the rule of law concept

From the different attributes and standards of the rule of law propounded by the previous scholars and institutions, to establish a general understanding of the concept and the ideals it embodies, these standards can be categorized as the institutions and values of the rule of law – that is, the qualities that inhere in the concept of positive law such as generality, certainty and stability of law on one hand, and institutional conditions for an effective legal order necessary for the protection and advancement of the rule of law on the other, such as an accessible and independent judiciary and judges or an accountable government. These standards are elaborated below:

- a. The rule of law requires that laws be relatively certain, clearly expressed, open, and adequately publicized.⁴⁸ Distinction should be made between the publicity and availability of laws. In any given jurisdiction there are countless statutes which are enacted to regulate a wide range of activities, and so the authorities are required to ensure that these laws are widely available whenever anyone wants to make use of them or seek recourse to justice through them. The value of

⁴⁷ Carolyn Bull, *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration*, Tokyo: United Nations University, 2008, 48-50.

⁴⁸ Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in J. Jowell and D. Oliver (eds), *The Changing Constitution*, Oxford: Oxford University Press, 2007, 5-21.

promulgation renders the law transparent and open for public deliberation and criticism regardless of its functional aspects.⁴⁹ Further, a legal system should be internally consistent and coherent, so that laws do not conflict with each other. In addition laws should be prospective, sanctioning only behaviour which takes place after their enactment.⁵⁰

- b. The rule of law further requires that substantive law be guided by the principle of ‘normativism’, i.e. substantive law should possess characteristics of certainty, generality and stability.⁵¹ The law’s failure to create a predictable legal environment would amount to a double predicament: functional and moral. From a functional perspective, the law would fail to guide people’s conduct since it would undermine their ability to plan their activities in advance. And from a moral perspective, such a legal regime would manifest a profound disrespect for people’s freedom and autonomy because it might interfere with people’s legitimate expectations of the legal system.⁵² Further, enactment of vague laws that may directly or indirectly infringe rights of the people should be avoided. This was acknowledged by Lord Diplock, a former member of the UK House of Lords, who in 1975 opined that ‘the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it’.⁵³ Under the rule of law the state commits itself to guarantee

⁴⁹Andrei Marmor, *Law in the Age of Pluralism*, New York: Oxford University Press, 2007, 15-18.

⁵⁰ Rachel Kleinfeld, ‘Competing Definitions of the Rule of Law’, in T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington, DC: Carnegie Endowment for International Peace, 2006, 31-70.

⁵¹ Neil MacCormick, ‘Natural Law and the Separation of Law and Morals’ in R. George (ed.) *Natural Law Theory*, Oxford: Oxford University Press, 1992, 104-105.

⁵² F. Hayek, *The Road to Serfdom*, London: Routledge Press, 1944, 76-90.

⁵³*Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG* (1975) AC 591, 638 D.

all people under its sovereignty the possibility to foresee the legal consequences of both their own behaviour and that of the other social subjects they necessarily interact with. The specific contribution of the certainty of law is the possibility for all citizens to confidently take care of their own business and to claim their rights, with a good chance of success with respect to both their social peers and political authorities.⁵⁴

- c. Closely related to legal certainty is that the rule of law presumes that a law is in place and manifests its content, particularly its consistency with international human rights standards, its supremacy in the hierarchy of power structure, the institutions and procedures for its implementation and enforcement, and the fairness with which it is applied in any given case. A system of government established under the rule of law connotes transparency of institutions, policies, practices and programmes that affect all aspects of life which are essential for any functioning society. Under the transparency principle, society at large is able to monitor a state's compliance with its obligations.⁵⁵ This observation contrasts with the arguments of scholars like Joseph Raz who argue that rule of law should be distinct from human rights.
- d. The rule of law also must mean freedom from public lawlessness and anarchy. It calls upon the government to be bound by substantive law not only by the constitution but also, as far as possible, by the same laws as those that bind its individual citizens.⁵⁶ Admittedly, the government can allocate itself power to impose arbitrary laws such as discriminatory taxation or declare a state of

⁵⁴ Danilo Zolo, 'The Rule of Law: A Critical Reappraisal', in Pietro Costa and Danilo Zolo, (eds), *The Rule of Law: History, Theory and Criticism*, Dordrecht: Springer, 2007, 24.

⁵⁵ Report of the Secretary General, 2004, above note 40, 1.

⁵⁶ Geoffrey Walker, *The Rule of Law: Foundation of Constitutional Democracy*, South Carlton, Victoria: Melbourne University Press, 1988, 24-25.

emergency, the arbitrary conduct by the government against an individual is an exception to the rule of law.⁵⁷ The government cannot claim that it is advancing the rule of law if it is breaking the very tenets of the rule of law it claims to uphold.

- e. The rule of law further presupposes that all individual subjects should be equal before the law. Subjective situations falling within a given legal framework are treated alike, namely in the light of the same normative principles and in accordance with the same rules.⁵⁸ This observation is well captured by the International Commission of Jurists which contends that ‘the essential value, however of insisting on equality before the law lies in the necessity that it places on the legislature to justify its discriminatory measures by reference to a general scale of moral values’.⁵⁹ Equality before the law and non discrimination-are thus the opposite of arbitrariness, and in spite of the difficulty of their interpretation, lie at the root of the rule of law.
- f. An independent judiciary is another vital feature of the rule of law. But what is an independent judiciary and why does it matter? An independent judiciary means the existence and operation of a judicial system capable of dispensing justice without fear or favour and free from influence whether political or otherwise.⁶⁰ It matters because an independent, effective, and least corrupt judiciary plays an important role in promoting the rule of law in any given society, by restoring faith of the public in institutions exercising public authority. It also reflects the judiciary’s role in ensuring the lawful exercise of public powers by members of

⁵⁷ *Ibid.*

⁵⁸ Danilo Zolo, above note 54, 39.

⁵⁹ *Report of the Committee of the International Congress of Jurists*, New Delhi, 1959.

⁶⁰ Andrei Marmor, note above 49, 3-35.

the legislative or executive branches of the government.⁶¹ Impairing judicial independence undermines confidence in the courts as a dispute settlement mechanism because it can threaten the stability, and eventually the existence of the social order. Judicial independence is also ensured by the inherent jurisdiction of the court to punish contempt of court and to make any orders necessary for the preservation of the subject matter of the suit or otherwise enabling the court to perform its function. While the rule of law requires that judges must be independent, they must also be bound by law. Their function is to interpret the law and the fundamental principles and assumptions that underlie it.⁶²

Closely related to the independent judiciary is the presence of an independent and responsive legal bar association which can play a crucial role in producing access to justice, especially for the poor. The role of an independent bar in enhancing the rule of law is well captured by Justice Khanna of the Supreme Court of India, who observed that ‘there can indeed, be no greater indication of decay in the rule of law than a docile bar, a subservient judiciary and a society with a choked or coarsened conscious’.⁶³

- g. To establish a state that abides by the rule of law, the standards for individual protection must not only exist but also include reliable, accessible and timely enforcement of rights.⁶⁴ The rule of law requires that there must be an existing

⁶¹ Nihal Jayawickrama, ‘The Bangalore Principles of Judicial Conduct’ in Chris Maina Peter and Hellen Kijo Bisimba (eds) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, Dar es Salaam: Mkuki & Nyota, 2007, 265-274.

⁶² *Ibid.*

⁶³ M.P Singh, ‘Securing the Independence of the Judiciary-The Indian Experience’, *Indiana International and Comparative Law Review*, vol. 10, 1999-2000, 245.

⁶⁴ Jon Mills, ‘Principles for Constitutions and Institutions in Promoting the Rule of Law’, *Florida Journal of International Law*, vol. 16, 1, 2003, 118-125.

constitutional commitment or international obligation to guarantee individual rights, granting their holders the power to claim them on a judicial level whether against their fellow citizens or the state and its organs.⁶⁵ To support the rule of law means advocating the protection of individual rights as the primary aim of both legal and political institutions.⁶⁶ The true source of the values of the rule of law, even in countries with written constitutions and stable democracy, is reflected in the patterns of behaviour and belief of the people and their representation by the institutions of the legal system.⁶⁷

- h. The rule of law requires a general congruence of law with social values. Where the law consists solely of recognized customs, all that is needed is a willingness on the part of the courts to give due recognition to new customs as they become established and displace the old ones.⁶⁸ Yet, it should be acknowledged that it is not the laws on the book which measure the law's success in guiding human conduct, but its application in practice. The application mechanisms of the law are therefore crucially important in determining law's success or failure in fulfilling its putative functions.⁶⁹ However, it is essential that the social values in question should be consistent with human rights standards. For example, while the African Charter of Human and Peoples' Rights was keen to reflect African values such as an individual obligation to one's family and community, it

⁶⁵ Danilo Zolo, above note 54, 4.

⁶⁶ *Ibid.*

⁶⁷ Michel Rosenfeld, 'The Rule of Law and Legitimacy of Constitutional Democracy', *Southern California Law Review*, vol. 74, 2011, 1308-1340.

⁶⁸ Balakrishnan Rajagopal, 'Invoking the Rule of Law in Post Conflict Rebuilding: A Critical Examination', *William and Mary Law Review*, vol. 49, 4, 2008, 1347-1360.

⁶⁹ Andrea Marmor, above note 49, 30.

nevertheless ensured consistency with universal human rights which recognize individual rights and freedoms.

- i. The rule of law depends on the existence of a government capable of enforcing law and order. This aspect is crucial precisely because law and order are central to the popular understanding of the rule of law. It is essential in protecting the lives and property of citizens, and is a prime way of protecting the human rights of the poor and other marginalized populations who often face the greatest threat from a lack of security.⁷⁰ Without this enforceable reciprocity law cannot operate as a restraint on power. Law enforcement traditionally has been confined within the purview of the executive but the executive also has to be subject to the law. Government officials must be amenable to criminal prosecution and effective civil remedies must be available for persons adversely affected by unlawful government acts.

It is argued that these minimum attributes represent qualities inherent in the rule of law and the institutional conditions which augment the rule of law. Consequently, where they are observed and advanced, they connote the minimum standards for the rule of law. It should be noted that the quest to craft minimum standards emanates from the need not necessarily to come up with the definition of the rule of law concept, but rather to build clear benchmarks or standards which should serve as a mark of applicability to those with an interest in the advancement of the concept both from theoretical and practical perspectives. In the following section, the chapter provides an analysis of both the institutional conditions necessary to advance the rule of law and the values or qualities which inhere in the rule of law.

⁷⁰ Rachel Kleinfeld, 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington, DC: Carnegie Endowment for International Peace, 2006, 31-65.

D. Towards a common understanding of the rule of law

An approach to the rule of law informed by an understanding of, or at least sensitivity to, the dynamic nature of institutional interactions needs to be at the centre of any such efforts to better understand the concept.⁷¹ The rule of law may not be a single concept at all: rather, it can be considered a system of principles that relate to the legal governance of society, but not itself primarily a legal system. The rule of law anchors and stabilizes legality without freezing the conception of any given state. It allows change and adaptation of the law with changes in legal practices.⁷² Indeed this assertion was well articulated by the Organization for Security and Cooperation in Europe (OSCE) when it stated that ‘the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of supreme value of the human personality and guaranteed by institutions providing a framework for their full expression.’⁷³

Consequently, if the concept entails institutional safeguards on one hand and values or qualities which are augmented by these institutions on the other, then it is desirable that conditions which dictate success or failure in the application of these norms should be examined in depth. Admittedly, this categorization does not answer the fundamental question as to why rule of law reform succeeds in some countries and fails in others, but it can shed light on what conditions reflect and sustain the rule of law. The desirability of relating the rule of law institutions and

⁷¹Thom Ringer, above note 21, 206.

⁷² Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Promoting the Rule of Law and Strengthening the Criminal Justice System: Working Paper prepared by the Secretariat*, Doc. A/CONF.187/3.

⁷³ In the context of the OSCE, the concept of rule of law encompasses not only formal legal aspects, but also the idea of justice aimed at the full respect for human dignity. The concept of the rule of law endorsed by the OSCE has been clarified in some important documents such as the Charter of Paris for a New Europe, Nov. 21, 1990 and the Copenhagen Document of June 29, 1990.

values is reinforced by the reality that ends and means to secure the rule of law are closely interlinked. For example, successful access to justice will greatly depend on the institutional strength of the judiciary and its judges, while proper guarantee of the right to fair trial will not only depend on the stability and generality of statutory laws but also on the effectiveness of the prosecution, correctional services and police departments. Similarly enjoyment of fundamental rights and freedoms do not depend only on their entrenchment in the constitution but also on the kind of institutions created to secure them.

i. Constitutional and institutional approach

This approach is more concerned with building or creating a constitutional order under which independent and effective institutions can be established, an order capable of not only commanding the faith of the people but of guaranteeing and acting in their interests as well. For example, it requires the building of an independent and accessible judiciary which can impartially adjudicate disputes among people, and also an effective government to maintain law and order to guarantee security for the citizens and their property as discussed in chapter six. It is worth noting that although most scholars define the rule of law by its ends, most ‘rule of law promotion’ programmes implicitly define the rule of law by its institutional attributes.⁷⁴ This is because, unless there is a mechanism in place to implement the requirements of the law to serve the interests of those it was created to regulate, it will be meaningless. However, it should be carefully noted that while all these institutions exist in most countries, albeit in different forms, how they facilitate and respond to the needs of citizens greatly differs. The mere presence of a police service or a judiciary is not enough to determine that a particular society upholds the rule of law; it clearly depends rather on how those institutions respect and promote individual rights.

⁷⁴Rachel Kleinfeld, above note 70. See also Charles Sampford, ‘*Reconceiving the Rule of Law for a Globalizing World*’ in Spencer Zifcak (ed.), *Globalization and the Rule of Law*, London: Routledge, 2005, 12-28.

Creating the rule of law requires, in addition to strong institutions, credible commitments that protect those institutions and ensure their sustainability. Institutions should be impersonal, in the sense that their functioning does not depend on the idiosyncrasy of individuals and is not affected by replacement of the individuals who have to act in accordance with its rules.⁷⁵ The element of sustainability is reinforced by the fact that the rule of law concerns not only what the law is today, but also what it will be in the future. In particular, it is concerned with its continued ability to guide with certainty the day to day actions of those subject to the law. Creating a state that honours the rule of law today as well as tomorrow requires institutions with two characteristics. First, they must commit the state (both politicians and bureaucrats) to honouring of agreed rules and rights. Second, they must commit all major players in society to respect the constitutional rules. But how can politicians and those in authority commit to respect for the law? It comes down to the power of the law to regulate and restrain activities of all citizens, and also the ability of institutions like the judiciary to carry out their functions without interference.⁷⁶

Despite the importance of institutional conditions in safeguarding the rule of law, it is nevertheless argued that, if the rule of law is considered from the institutional perspective alone, it could survive even under a military dictatorship or in non-democratic countries. The existence of institutional conditions that manifest the rule of law in any given society cannot be measured by the presence of rule of law institutions alone in isolation from the values that underpin them. A holistic approach that incorporates values or qualities should be adopted when analyzing general conditions which manifest the rule of law in any given context.

⁷⁵ Ignacio Sanchez-Cuenca, 'Power, Rules and Compliance' in Adam Przeworski and Jose Maria Maravall (eds), *Democracy and the Rule of Law*, Cambridge: Cambridge University Press, 2003, 62-63.

⁷⁶ Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Cooperation*, Antwerp-Oxford: Intersentia, 2006, 8.

ii. Values approach

Values or qualities inherent in the law such as stability, generality and certainty are relevant in so far as they are inherent in the institutions that support the rule of law. Yet, unless the dominance of these values within a given legal system is clearly established and vindicated through law administered by independent institutions, the rule of law cannot be considered to exist. For example, even an impartial and efficient judiciary cannot be of value in and of itself if a society never had a dispute to resolve.⁷⁷ Rather it is of value because it is believed that such a judiciary will enable disputes to be resolved efficiently and without recourse to violence. This will create predictability and will provide a source of case law for similar cases. It is these ends, among others, that compose the intrinsic goods that the rule of law brings.⁷⁸ However, it is critical that social values conform to international human rights standards. For example, while constitutions in Islamic contexts tend to reflect the social values of these societies, it is evident that some of these values are inconsistent with universal human rights norms. An independent judiciary must therefore guarantee equality of all citizens, especially marginalized groups such as women, children and persons with disabilities, before the law, and equal access for all.

Whether the rule of law can be said to exist or not in a given society is largely reflected in the commitment displayed by the society concerned, not only in the creation of institutional conditions such as an independent judiciary to support the rule of law but also in defending the values for which these institutions stand. For example, to ensure the independence of the judiciary it is necessary to examine how the requirements for an independent judiciary are met, to what extent judicial decisions are given without external or internal influence, the extent of executive involvement in the work of the judiciary, access to courts by the downtrodden in the

⁷⁷ Rachel Kleinfeld, above note 70.

⁷⁸ *Ibid.*

society, and the way judges decide their cases. What is crucial is that the judiciary should be independent and able to effectively guarantee enjoyment of fundamental rights of all citizens.

In the introductory chapter one of the questions raised was, how can values which augment the rule of law be translated into concrete results? This question is relevant considering that the absence or presence of the rule of law has a direct implication in the lives of the people. It was further questioned whether international actors such as the donor countries or organizations involved in building the rule of law can successfully compel local authorities to comply with or nurture rule of law values as espoused by the former. It is argued that this task requires both international actors and domestic beneficiaries to articulate the same language as to what should constitute the rule of law. There must be an acknowledgement that the only means of establishing the rule of law is through state based enforcement structures, and that upholding the rule of law is a core state function that can only be delivered by a functioning state.

Having an excellent constitution reciting all international human rights instruments within itself cannot guarantee a state compliant with the rule of law. Rather, how these ideals are respected and enforced in the day to day lives of the people will reflect commitment to the rule of law and human rights. The definitional confusion, or lack of a definition consensus, stems from the attempt to treat the rule of law as a single discrete concept, rather than as a label which could be applied to a number of models lying at various points on the power-law spectrum.⁷⁹ Approaching the rule of law on the basis of both the institutional conditions and the values or qualities they are intended to achieve within a society provides more clarity and will help focus practice on the means and end goals of the rule of law. In other words, the rule of law concept

⁷⁹*Ibid.*

cannot be considered strictly as a legal concept without taking into account the qualities that inhere in the concept itself.⁸⁰

Can institutional conditions of the rule of law can exist or survive in an autocratic or authoritarian state? For example, countries such as Myanmar,⁸¹ North Korea,⁸² Afghanistan⁸³ and Sudan⁸⁴ have been condemned by both international organizations (the UN General Assembly or the UN Human Rights Council) and individual countries (US and Britain) for not respecting the rule of law. Yet some of these countries have institutions which collectively develop the rule of law, similar to those existing in countries that are making the condemnation and consider themselves compliant with the rule of law.

Most of the elements that presuppose commitment to the rule of law, such as constitutions setting out rights and duties of citizens, or a judiciary to determine disputes among the people, do exist in these countries just as in countries that claim to uphold the rule of law. Admittedly these institutions are different in terms of their effectiveness and ability to protect individual rights, but these differences exist globally even among and within countries considered to uphold the rule of law. For example, in Apartheid South Africa in 1986 the judiciary struck down government emergency legislation which the court argued was inconsistent with the rule of law.⁸⁵ Yet it was clear that South Africa was a country whose legal system was premised on

⁸⁰ Michael Barnett and Christoph Zurcher, 'The Peace builder's Contract; How External State Building Reinforces Weak Statehood' in Roland Paris and Timothy Sisk (eds), *The Dilemmas of State Building: Confronting the Contradictions of Post War Peace Operations*, London: Routledge, 2009, 30-35.

⁸¹ A/HRC/10/L.28/ 2009.

⁸² A/HRC/10/L.27/2009.

⁸³ UNSC Res. 1868/2009.

⁸⁴ A/HRC/Res/9/17/2008.

⁸⁵ Richard L. Abel, 'Legality without a Constitution' in David Dyzenhaus (ed.), *Recrafting the Rule of Law*, Oxford: Hart Publishing, 1999, 66-75.

discrimination among its citizens. It is therefore not enough for laws to exhibit stability, generality and certainty, in addition these laws must comply and protect fundamental rights and freedoms so that those supposed to abide by them can rely on them with expectations that they will be capable to address their grievances and protect them.

E. The rule of law as an export product

Having examined the minimum attributes which can collectively be considered as augmenting the rule of law generally, one may wonder whether the norms that augment the rule of law can be successfully exported from one country or society to another. This question is posed in light of the ongoing attempts by international actors to build the rule of law in post-conflict countries. These actors are guided by the assumption that countries emerging from conflict lack adequate institutional conditions to promote the rule of law, and that it is through international support that they can create the necessary environment to promote the rule of law. In other words, can a society considered to uphold values of the rule of law successfully transfer its rules and values which have served it well to another society? This question is pertinent especially when considered in light of the prevailing belief of rule of law reformers who view post-conflict society and developing countries in general as incomplete versions of developed states, that is, as lacking essential ingredients of developed society in the Western world.⁸⁶

The argument of those champions of the rule of law has been that if, in particular, developing countries and post-conflict societies want genuine economic and social progress, they must commit to the rule of law as understood and previously experienced by the Western developed

⁸⁶ John Orth, 'Exporting Rule of Law', *North Carolina Journal of International Law and Commercial Regulation*, vol. 24, 1, 1998/99, 71-72.

world.⁸⁷ However, the reformers neither define the ‘developed society’ nor articulate how the rule of law can lead to a ‘developed society’; rather it is taken as self-evident. It is partly on the basis of this belief that the rule of law has witnessed a resurgence of international and supranational organizations as actors in their own right, together with a countless number of NGOs advancing their own causes by pushing, challenging and monitoring states to comply with the values and the institutional legal order which collectively manifests the rule of law as understood in the Western context.⁸⁸

If the concept of the rule of law can be exported from one society to another, then it is worth asking, what kind of the world is imagined by the exporters? And what are the theoretical and historical imperatives that drive the process? It is argued that international actors have different assumptions which underpin their involvement in building the rule of law. For example, the UN presupposes that any society emerging from conflict, in order to achieve peace and stability and enjoy human rights, can only do so with firm commitment to the rule of law.⁸⁹ So the UN’s involvement in building the rule of law is partly motivated by the need to promote human rights and access to justice, peace and stability which are considered vital for human progress. Similarly, the efforts of international financial institutions such as the World Bank, while they argue that their primary interest in promoting the rule of law is to address corruption and venal governance, both considered detrimental for achieving sustainable development, are evidently geared towards

⁸⁷ Rachel Kleinfeld and Kalypso Nicolaidis, ‘Can a Post-Colonial Power Export the Rule of Law? Elements of General Framework’ in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law*, Oxford: Hart Publishing, 2009, 139-169.

⁸⁸ Anne-Marie Slaughter, ‘Breaking Out: The Proliferation of Actors in the International System’ in Yves Dezalay and Bryant G. Garth (eds), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*, Ann Arbor: University of Michigan Press, 2005, 19-26.

⁸⁹ Report of the Panel on the UN Peace Operations (Brahimi Report), 2000.

advancing their core interests in promoting free market economies and investment opportunities.⁹⁰

Collectively, institutions involved in building the rule of law assume that societies committed to the rule of law enjoy peace and stability, economic development, and accountable government which upholds human rights and democratic ideals, that they have an independent and impartial judiciary and, in general, a society premised on justice and equality and a favourable investment climate. Even then, there is little evidence to back up the assumption that establishment of the formal dimension of the rule of law will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law necessary to realize these assumptions as imagined by these international actors.⁹¹

Furthermore, it is pertinent to inquire into the motive of those involved in building the rule of law institutions in other countries. Rule of law promotion is an activity undertaken by agents in one set of countries but conducted in another set of countries, such that it is neither mandatory nor an interaction of the equals. So why do countries not affected by strife decide to promote the rule of law in those that are affected by strife or have emerged from it? It is argued that there are multiple considerations involved in export of the rule of law from one country to another by different actors. For example, since the breakdown of the institutions of governance in any given society may lead to transboundary insecurity, flow of refugees to neighbouring countries, and safe havens for terrorists or a sanctuary for rebel movements destabilizing other countries, assisting countries to overcome these challenges within their own borders may work in the

⁹⁰ Joel M. Ngugi, 'Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse', *University of Pennsylvania Journal of International Economic Law*, vol. 26, 3, 2005, 514-597. See also George Joffe, 'Foreign Investments and the Rule of Law', *Mediterranean Politics*, vol. 5, 1, 2000, 33-49.

⁹¹ Rosa Brooks, 'The New Imperialism: Violence, Norms and the 'Rule of Law'', *Michigan Law Review*, vol. 101, 2003, 2284.

broader interests of the neighbouring countries and international community at large. It is on this basis that prevention forms an integral part of the concept of responsibility to protect populations from mass crimes. As acknowledged by the United Nations, the failure of state institutions anywhere in the world weakens the protection of every state against transnational threats such as terrorism and organized crimes. Hence addressing these challenges is presented by international actors as a matter of necessity rather than choice.⁹²

Increasingly, the global war on terror and security continues to define and underpin global perspectives on building the rule of law in post-conflict contexts. This raises the question of whether the rule of law is a 'neutral term'. From Somalia to Afghanistan both the European Union and the United States, arguably the largest donors to the rule of law promotion cause, consistently justify their involvement in these countries by the need to build rule of law institutions to address insecurity challenges emanating from terrorist groups based in these countries.⁹³ However, despite these pronouncements the plight of ordinary Afghans or Somalis rarely features in their considerations. From this it can be argued that the export of the rule of law is not something done primarily to help common people in these countries, but is commonly conceived and undertaken to advance and protect interests of donor countries.⁹⁴ Admittedly,

⁹² United Nations, 'A More Secure World: Our Shared Responsibility', *Report of the High Level Panel on Threats, Challenges and Change*, New York: United Nations, 2004, 1.

⁹³ See report by SENLIS Council (Security and Development Policy Group), *Chronic Failures in the War on Terror: From Afghanistan to Somalia*, London: MF Publishing Ltd, 2008, 18-56.

⁹⁴ One would clearly argue that the UN as an international institution treats the rule of law concept as a neutral term and hence that its activities are neutral. But a closer look would reveal that even the activities of the UN are funded by donor countries promoting their political or security interests. This scenario has meant that in countries where donors have interests, such as Kosovo, the EU has provided large amounts of both technical and financial resources to build the rule of law institutions, but in contrast, in places like Somalia, the Central African Republic or even Southern Sudan, the UN has struggled to raise required resources to support rule of law programmes because donors have little interests in these countries. Arguably, there is now an international focus on Somalia, but the focus is concentrated on piracy which is a direct threat to Western maritime and security interests. In Afghanistan

local populations may benefit from these activities because of improved security and rule of law institutions built in the process. Yet, there is a danger that this ‘spillover effect’, if it comes from activities undertaken by external actors without engaging the locals, may not reflect the needs and aspirations of the people in these countries, rather may end up causing more instability than the stability it seeks to bring.

The export of the rule of law has not been limited to export by the developed Western countries to Africa; similar examples may be found elsewhere, indeed Kosovo is a case in point.⁹⁵ The European Union has invested heavily, both financially and technically, in supporting the rule of law reform programmes in the area, yet rule of law challenges such as corruption and insecurity persist.⁹⁶ An example of how international actors become preoccupied with the desire to ‘remake’ legal structures in post-conflict societies akin to those in their own countries is exemplified by the remarks of the former UN Special Representative to Kosovo, General Steiner, who stated that ‘We want the rule of law instead of the rule of the jungle. *We want to build here a civil society after the model we see everywhere in the rest of Europe.....* if one wants to join the club of European democracies one has to accept the fundamental rules.....and part of the

President Karzai, regarding the pending withdrawal of international forces, questioned whether such withdrawal was because Western powers had achieved their objective of making their countries safe from international terrorism or because the original intervention was wrong. See, ‘Karzai questions effectiveness of west’s intervention in Afghanistan’ <http://www.guardian.co.uk/world/2013/feb/03/hamid-karzai-security-helmand-british-troops> (accessed March 2013).

⁹⁵ In Kosovo, rule of law activities are conducted under the auspices of the European Union Rule of Law Mission in Kosovo (EULEX). For more information see, <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>. Accessed March 2013.

⁹⁶ Lara Appicciafuoco, ‘The Promotion of the Rule of Law in the Western Balkans: the European Union’s Role’, *German Law Journal*, vol. 11, 8, 2010, 741-768; Martina Spennbauer, ‘EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date’, *German Law Journal*, vol. 11, 8, 2010, 769-802.

fundamental rules is the rule of law'.⁹⁷ It is this kind of vision that raises a question as to whether the legal system of a particular country can be transformed from outside by international actors to reflect the rule of law as understood by other countries without taking into account their practical and peculiar challenges.

But the major questions on rule of law export are: can it, and should it be done? Before answering these questions, it is useful to examine who should be the exporter and importer of the rule of law. Normally in post-conflict society the rule of law importer is the society concerned, emerging from conflict, while the exporter tends to be the international community through multilateral organizations like the United Nations, the World Bank, donor organizations, regional organizations, non-governmental organizations or individual countries through bilateral assistance and cooperation. However, the perennial governance challenges facing post-conflict societies in their quest to build the rule of law cast a shadow of doubt, despite substantial resources devoted by donors to the cause, on the effectiveness and sometimes on the relevance of the exercise itself. This is true especially when societies emerging from conflict slide into violence again after a short spell of time, despite substantial help to build rule of law institutions provided by donors.⁹⁸

Underlying rule of law export is a fairly complete but undefined vision of what society is and how it should look in the eyes of the exporters. The goal is not simply to construct or reform institutions, it is to actively reform the way people in these societies behave and inculcate ideals about how the state should be sustained. Several assumptions are made, such as corruption being detrimental to good governance and the private sector being good for free market advancement,

⁹⁷ Carolyn Bull, above note 47, 48-50.

⁹⁸ Henriette von Kaltenborn-Stachau, *The Missing Link: Fostering Positive Citizen-State Relations in Post Conflict Environment*, Washington, DC: World Bank, 2008.

in the cause of enabling the poor to fully engage in economic activities. Yet, these actors hardly articulate a mechanism for creating the right environment to enable the poor to participate in the realization of these positive values and desires associated with the rule of law. The idea that if the poor participate in the free market economy it will improve their wellbeing is treated as self-evident, without examination of how this participation will be achieved, or admission of empirical evidence of its failure in many cases.

The rule of law as an export product faces a myriad challenges because the ‘goals’ of the rule of law keep on expanding, depending on the actors involved in the export process. For example, while the rule of law was originally associated with an independent judiciary or a certain and predictable legal system, increasingly it is considered vital for encouraging investment, achieving good governance, strengthening civil society, promoting human rights, fighting impunity, combating corruption, and justifying action against terrorism, among many elements. From this narrative, the rule of law has come to be interpreted differently, to achieve a wide range of objectives. Increasingly, in some Western countries, war is considered as an opportunity to ‘remake’ states in the image of rule of law compliant states. Civil societies in these Western countries are confronting expanded powers of governments to limit civil liberties in the name of preserving the rule of law.⁹⁹ Yet, in post-conflict countries and other developing countries, similar legislation which limits the enjoyment of civil liberties is justified in the name of

⁹⁹ For example, when President George H.W. Bush announced the start of the Gulf War in 1991 he stated that ‘we have before us the opportunity to forge for ourselves and for future generations a new world order – a world where the rule of law, not the law of the jungle, governs the conduct of nations’. See speech to Congress 6th March 1991. The Japanese Minister of Justice claimed that capital punishment is vital to preserve the rule of law in Japan Available: <http://www.guardian.co.uk/world/2013/feb/21/japan-executions-resume-three-hangings>. And Louise Arbour, regarding the rule of law, has noted that ‘do gooders and democrats try to convince dictators to improve rule of law while repressive regimes refer to the rule of law as they crackdown on dissent in their countries’. See: ‘The Rule of Law’ available: http://www.nytimes.com/2012/09/27/opinion/UN-general-assembly-on-the-rule-of-law.html?_r=0. Accessed March 2013.

advancing the rule of law. The concept of the rule of law is assumed to cover a wide range of elements that are increasingly becoming difficult to analyze so as to determine whether it can be achieved within the prescribed context by international actors.

Despite the ongoing activities by international institutions and donor countries to build the rule of law in post-conflict contexts, these actors have dismally failed to actively engage and integrate the needs and aspirations of the presumptive beneficiaries in what they conceive and understand to constitute the rule of law. For example, despite rule of law actors being against centralization in any context, the programmes undertaken by these institutions to achieve the rule of law are themselves centrally planned by a small group of powerful institutions in Western capitals without any likelihood of accountability for their actions to those in whose name these activities are carried out. Similarly, these institutions have done little to reconcile and inter-relate different assumptions which to them manifest the rule of law into a coherent goal worth a common pursuit. It is dangerous to treat rule of law programmes as if they were being imposed on a host country in ways that ignore the legal history of such countries and as if such countries had no legal history at all.¹⁰⁰ In addition, new institutions created to build the rule of law must reflect the present and future needs of a given country. Further, it is critical for these institutions to analyze whether existing laws require amendment, modification or modernization, or should be abolished or replaced with different laws.

The nature and methodology of export will determine whether the rule of law can successfully be exported to other countries, especially those in transition or emerging from conflicts. Normally the methodology of export of the rule of law varies depending on the society concerned. For example, in Southern Sudan or Somalia the export has ranged from conducting training for

¹⁰⁰ Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice*, Cambridge: Cambridge University Press, 2010.

judicial officials and writing constitutions and other legislation to supporting the new government in its role of maintaining law and order, or helping it create a conducive environment for business and investments – all elements that are considered to be crucial for peace consolidation. In fragile states or developing countries the methodology has ranged from restructuring the available laws to complying with the international norms and standards while also supporting those countries in efforts to ‘deepen’ democracy.¹⁰¹ In the next section below, the chapter will examine what has been the content of rule of law export especially in post-conflict contexts in Africa. This part of the chapter will also lay out what would be considered as increasing the effective export of the rule of law.

i. The content of the export

If the rule of law can be considered as an export product, what kind of product is it that is exported or imported? The argument here is that before attempts to export the rule of law are made, exporters must know the needs of their ‘clients’ or importers and what kind of product will suit their needs. Further, they should be mindful of what they are exporting – not simply anything they consider to be ‘best practice’ or ‘international standards’ as applied in their home countries or other countries facing similar challenges. In the same way importers must be informed and certain of what they are importing and whether the product itself conforms to their peculiar needs and environment. Arguably the bargaining power between the exporter and importer is clearly tilted in favour of the former, because the latter is either too weak or too poor to mount an effective negotiating strategy to ask for better terms on what it considers to be suitable for its needs. Thus the success or effectiveness of this process will greatly depend on how the exporter exercises its dominant position to ensure that the unique needs and prevailing

¹⁰¹ Barry Weingast, ‘Why Developing Countries Prove so Resistant to the Rule of Law’ in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds) *Global Perspectives on the rule of Law*, Abingdon, Oxon.: Routledge, 2010, 28-52.

conditions of the beneficiary are taken into account before the final export package is determined.

The primary value of the rule of law is derived from the understanding that institutionalized legal rules and structures constrain and regulate both the state apparatus and the broader society, establishing and maintaining social order. Hence the primary goal of exporting the rule of law should be to reform or build institutions of the state as the primary means by which important functions such as security, protection and advancement of human rights could be guaranteed to the wide population. It is possible to export technical assistance such as resources to build rule of law institutions but it is not so easy to export the culture where these institutions are respected. Indeed in most post-conflict societies what is missing is not only the rule of law institutions but also the political will among society's top leaders to make these institutions work effectively. Institutional reforms like strengthening judicial independence, establishing appropriate court jurisdiction over executive and administrative actions, or reforming the countries' statutes and regulations generally require political leadership, especially the willingness to be restrained by the law. This is something that cannot be exported but must come from within the society itself.

The rule of law reform or export should take into account historical factors or cultural components when arguing for reforms in a post-conflict context. This argument stems from the reality that the rule of law reforms do not take place in a vacuum. Every African society has indigenous legal traditions in addition to the laws received from their former colonial masters and their customs and traditions. Similarly, in these societies there are often quasi-institutional means for resolving disputes among members as well as established traditions for arbitrating legal rights and entitlements. Hence reforms which do not take into account these traditional institutions and customs that have existed for many years will very likely fail.

It is contended that building the rule of law cannot be undertaken as a self-evident enterprise. In other words, international institutions, donors and civil society cannot assume that all it takes to build the rule of law is to create institutions resembling those that already exist in other countries which they consider to uphold the rule of law. These institutions must advance strategies for making these reforms work and fit in the lives of the people in that particular context. The danger of attempting to export the rule of law to countries uninterested in the whole package of the concept, or unaware of what they are importing, is that export efforts may be wasted and misused. Instead of strengthening the rule of law, reform efforts aimed at improving the efficiency of courts or police or prosecutors may end up strengthening *rule by law*- a repressive use of law by authoritarian leaders to control the population.¹⁰²

The question of 'best practices' has been controversial in developing countries and post-conflict societies, in particular where the assumption has been that if these countries adopt laws which have served well other countries in similar situations then there is a higher chance for them to successfully replicate themselves in other society. The argument has always been that Africa is not special, rather it is part of the international community with shared values, so that what successfully worked in other countries can also work in the continent.¹⁰³ But these arguments, however meritorious they might be, conveniently ignore the reality that, by its very nature Africa is unique because of its chequered past and continuous challenges which continue to adversely afflict the continent. And in any case not all African countries are the same, because of their different historical and current levels of development.

¹⁰² Bergling, above note 76, 14-19.

¹⁰³ Maxwell Chibundu, 'Globalizing the Rule of Law: Some Thoughts at and on the Periphery', *Indiana Journal Global Legal Studies*, vol. 7, 1, 1999-2000, 79-80.

For example, it would be unrealistic to ask a local chief in Malakal in South Sudan who never went to school and who does not speak English to discard informal justice mechanisms which have shaped his entire life of dispute resolutions solely on the ground that such systems contravene ‘international standards and values’, without giving him an alternative system which he could easily understand, identify with and use in managing conflict in ‘his’ society. Certainly, a local system may be repugnant to known norms of international legal system which countries like Sudan have accepted to be bound by, but it is equally true that change cannot come overnight. A system which has existed for hundred years cannot be successfully replaced by a donor-funded rule of law project of two to three years. Rather, a genuine rule of law reformer should commit to working with such a chief and collectively discuss how such an informal system would be enriched by a synergy of international norms, without necessarily replacing the entire system.

To understand the enforcement of the rule of law we must consider the differences between the universalists’ and the relativists’ positions as to the way rule of law norms should be interpreted.¹⁰⁴ While universalists argue that the idea of law is universal and must be evenly applied, with no exceptions or excuses, relativists insist that laws are culturally contingent and must be applied only according to prevailing local circumstances. The arguments of both universalists and relativists, with regard to building the rule of law in post-conflict society, hold merit. In the international context, rules need to be both universal in their reach and relative in their interpretation and application. This is because the world is an intricate and heterogeneous place and comprises of many societies and as many forms of cultural expression, all of which

¹⁰⁴ Paul H. Brietzke, ‘Globalization, Nationalism, and Human Rights’, *Florida Journal of International Law*, vol. 17, 3, 2005, 633-691. See also Michel Rosenfeld, ‘Can Human Rights Bridge the Gap between Universalism and Cultural Relativism? A Pluralist Assessment based on the Rights of Minorities’, *Columbia Human Rights Law Review*, vol. 30, 2, 1999, 249-280.

have powerful, dominant actors and vulnerable, subordinated ones.¹⁰⁵ An Naim notes that the credibility of international human rights standards will be enhanced if they are perceived to be legitimate within the various cultural traditions of the world.¹⁰⁶ Much as rule of law reformers should insist on international standards, these standards should be informed by local knowledge and a wide comprehension of prevailing circumstances for people to appreciate them.

F. What would constitute effective rule of law export?

After activities of building the rule of law institutions are undertaken, how is the success, progress or failure established? Rule of law reform initiatives, if they are to be effective, must be patterned on the minimum attributes of the rule of law identified above, such as an independent judiciary and a predictable legal framework consistent with international human rights standards.¹⁰⁷ It is through these benchmarks that success, failure or progress is to be measured and through which accountability can be exercised.¹⁰⁸ Yet, the conceptual divergence among development theorists, experts and donor agencies noted earlier has meant that parties assessing them may have something quite different in mind to those implementing them.¹⁰⁹ Similarly, this varied understanding of the rule of law among different constituents may likely produce competing and conflicting standards in different states and systems.¹¹⁰ The importance of this approach is that minimum attributes provide a clear framework of objectives which reflect the needs of local polity in the reform process. Aligning rule of law reforms with these attributes will ultimately enable the reformers to pattern their reforms against established objectives instead of

¹⁰⁵ See generally Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Intervention*, Cambridge: Cambridge University Press, 2006.

¹⁰⁶ Abdullahi Ahmed An Naim (ed.), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus*, Philadelphia: University of Pennsylvania Press, 1992, 2-3.

¹⁰⁷ Thom Ringer, above note 21.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

pursuing reforms that may have little or nothing to do with beneficiaries in societies where these reforms are undertaken.

One of the institutions that has fallen victim to this conceptual anarchy of the rule of law has been the United Nations itself. Examining the UN definition of the rule of law identified above, it is evident that the organization has developed such a broad conception of the rule of law that it is simply difficult to measure whether these attributes can be achieved.¹¹¹ This highly aspirational approach to defining the rule of law by identifying it with a flourishing welfare state such as we would recognize in a very few developed states is highly controversial when measured across countries facing different economic and political challenges.

This definition assumes moral and political commitments to multiculturalism, formal gender equality and democracy.¹¹² Clearly, this approach to understanding the rule of law would obviate any meaningful distinction between the rule of law and the just society; as Shklar observes, if the rule of law means *everything*, does it still mean *anything*?¹¹³ Any attempt to measure success or failure in building the rule of law by both international organizations and donor countries should clearly try to separate the idea of the rule of law from its several instantiations, if only to see if there is anything at all in the idea itself that is coherent and capable of being analyzed without a ‘wish list’ of preconceived assumptions.¹¹⁴

It is highly unrealistic for the rule of law reformers to conceive their own assumptions, which to them constitute an ideal world, without articulating a plan for how these claims, such as the free

¹¹¹ *Ibid.*

¹¹² *Ibid.*, 193-194.

¹¹³ Shklar, note 35.

¹¹⁴ *Ibid.*

market or respect for human rights, would be achieved. If training of law enforcement officials, strengthening the criminal justice system, development of a market economy, an independent judiciary, a constitution with a strong human rights protection regime or accountable government are all considered to fall under the rubric of the rule of law, it will clearly be difficult to measure success or failure of the rule of law. For example, in a country like Somalia which has been embroiled in civil war for the past two decades, in the process of building the rule of law a constitution which enshrines human rights or commitment to independent judiciary may be achieved, yet such a constitution may not command legitimacy beyond the enclave of Mogadishu. In such instances it is highly unrealistic to measure the rule of law on the basis of such lofty goals and assumptions; rather progress and failure should be measured against minimum standards identified in this chapter and not vague assumptions imagined by the reformers.

Despite this divergent conception of the rule of law, and the failure to articulate a clear plan for ways to achieve the ever expanding list of instantiations associated with the rule of law, the concept should be reclaimed especially by those involved in building the rule of law, to ensure that the applicability of the concept is limited to building institutions and nurturing values vital to support the rule of law. It can be reclaimed by ensuring that efforts to build the rule of law are underpinned by the ultimate objective of achieving minimum attributes of the concept identified above. This is to be recommended in light of the tendency of international institutions and donor countries to invoke the rule of law to achieve a wide range of goals which unfortunately may not be in congruence with the rule of law needs of the local people. For, example when an operation focused on getting rid of Al Qaida in Afghanistan or Mali or Al Shaabab in Somalia invokes the rule of law to justify its activities, it greatly compromises not only the legitimacy of the concept but also people who become hostile to the whole exercise of building the rule of law

– because of a belief that such claims advance the interests of international actors rather than helping to address the plight of the people.

The advantage of reclaiming the rule of law concept is that it will enable international actors involved in the reform process to measure the impact or success of their efforts through well established objectives reflected in these attributes. It will further address the challenge of ‘conceptual anarchy’ where the rule of law is conceived and justified to achieve a wide range of goals and objectives of different actors which may have nothing to do with the interests of local beneficiaries. It is counterproductive to invoke the rule of law to justify a wide range of activities which as a matter of fact may have nothing or little to do with those in whose name these activities are undertaken. The biggest challenge facing the current rule of law reform initiatives is very much related to the constant invocation of the concept to justify activities which to local people may be considered detrimental to their progress and wellbeing. Thus, reclaiming the concept begins with acknowledging and embracing minimum attributes as key benchmarks upon which all reforms should be patterned.

The danger of viewing the rule of law as a combination of all positive attributes which a state should reflect has meant that even genuine efforts to build rule of law have been resisted by some quarters who view the whole enterprise as imperialistic. Arguably, institutional conditions such as an independent and accessible judiciary and the ability of the legal system to be predictable and provide protection and order for those under its jurisdiction can contribute to the general development of the rule of law. But before development of these institutions, actors need to regain legitimacy and credibility among the people who continuously consider the rule of law as synonymous with the advancement of Western interests and values.

G. Conclusion

This chapter has demonstrated that the continued conceptual anarchy regarding the rule of law has meant that the term is understood to mean different thing to different people. Because of this fact the chapter has identified minimum attributes of the rule of law which provide clear benchmarks for those interested in rule of law reforms. The chapter has argued that there is a great need for coherence between those implementing the rule of law reforms and those supposed to benefit from these activities. This coherence can be achieved when reforms are based on minimum attributes which take into account aspirations and needs of the local polity. It has also been emphasized that constant invocation of the rule of law concept to justify activities which in some cases have no correlation with the actual needs of the people has been detrimental to the overall efforts of building the rule of law.

It has therefore been suggested that the term ‘rule of law’ needs to be reclaimed by international actors involved in rule of law reform from the ‘conceptual anarchy’, to ensure that their efforts reflect actual needs of those in whom reforms are pursued. Reclaiming the rule of law will entail a need to ensure that the applicability of the rule of law concept is limited to building strong institutions and nurturing values that underpin these institutions. Reclaiming the rule of law concept will help international actors regain credibility and legitimacy from their beneficiaries who increasingly consider rule of law reforms as a means to advance Western interests and values on the pretext of helping other countries to address various social, economic and political challenges they face. As argued in the introduction to this chapter, ultimately, if rule of law reforms are to be effective, post-conflict society will require strong institutions such as an independent judiciary and law and order institutions such as police, correctional services and effective prosecution services, underpinned by a constitutional legal order which represents aspirations of the concerned polity. Because of their key role in the realization of the rule of law, these issues are examined in detail in chapter six of this study. In the following discussion, the

next chapter will examine the impact of constitutional development on the rule of law in Southern Sudan, to introduce Southern Sudan as the focus of the study and explain why it merits this inquiry.

Chapter Two

II. The Impact of the Constitutional Development on the Rule of Law in Southern Sudan.

A. Background

This chapter introduces Southern Sudan as the focus area of this study. It examines the constitutional development in Southern Sudan and connects this development to the overall quest of building the rule of law in the country. It addresses the constitutional issues within the wider Sudanese context. This aspect is underpinned by the fact that although Southern Sudan voted for independence in January 2011, it has been part of Sudan and as such its constitutional development cannot be examined without being linked to Sudanese constitutional history and how it affected the development of the rule of law in Southern Sudan.

The relevance of this chapter is to demonstrate that while the constitution is vital to guarantee fundamental rights and freedoms of the citizens in a given polity, it must be anchored in a legal and political framework capable of advancing the ideals reflected in the constitution. For example, such a framework must reflect separation of powers or checks and balances among the key organs of government such as the legislature, judiciary and the executive. The framework should also reflect fundamental rights and freedoms of the citizens such as equality before the law and access to justice. This aspect is significant because, among the key attributes discussed in

the introductory chapter, the rule of law depends on the existence of a government capable of enforcing law and order to guarantee security for citizens and their properties, an independent judiciary, respect for human rights, equality of citizenship and non-discrimination. Examining different examples, this chapter will demonstrate how disregard and absence of these attributes not only led to the erosion of the rule of law but also lay behind a protracted conflict between the SPLM and successive governments in Khartoum until 2005 when the CPA was signed. The chapter proceeds as follows: the first part will examine a brief history of Sudan, part two will provide an examination of the constitutional history of Sudan and the way constitutional evolution affected the development of the rule of law. The events leading to the negotiation and signing of the Comprehensive Peace Agreement in 2005 will be examined as well and its impact on the rule of law analyzed.

It is imperative to discuss the constitutional history of Sudan to clearly articulate the relevance of this history to the development of the rule of law in Southern Sudan. Although the negotiations and eventual adoption of the Comprehensive Peace Agreement in 2005 ushered in a new constitutional framework in Sudan, the way this framework was designed to ensure that it attains its objectives is a subject that warrants further enquiry. For example, the Interim Constitution of Southern Sudan reaffirms that the rule of law and constitutional democracy are the core ideals of Southern Sudan's constitutional order. Yet the question must be asked, what are the mechanisms within which this constitutional order can be achieved? What will be done differently to ensure that the rule of law and democratic governance which underpin this constitution are realized? It may further be of interest to investigate why the previous constitutional legal orders failed to support the rule of law: can it be contended that this new order adopted after the signing of the CPA will be any different from previous ones? It is in the hope of understanding these complexities that this chapter will discuss the constitutional history of Sudan and how the evolution of this history impacted the general development of the rule of law. The constitutional

history of Sudan will further help us understand the challenge of building the rule of law in the current statebuilding efforts in post-conflict Southern Sudan.

B. Brief history of Sudan

Before discussing the nexus between the constitutional development and how it impacted the rule of law in Southern Sudan, it is worth examining the history of Sudan to understand what makes Sudan warrant this inquiry and how it contributes to the broader question of rule of law reform in Southern Sudan. The history of the modern Sudan traces its origin to the first quarter of the 19th century when it was conquered by the Viceroy of Egypt Mohamed Ali in 1821.¹ Before that period there did not exist a single political entity known as Sudan. The Sudanic kingdoms of Sennar and Darfur controlled much of what is today Northern Sudan while the largest tribes in the South, Dinka, Shilluk, Anuak and Nuer, controlled the South. In the period preceding the Turco-Egyptian conquest of the Northern Sudan, the Southerners maintained their own independence by resisting raids and invasions from the Northern kingdoms.²

It was when Mohamed Ali sought gold and slaves in the Sudan to establish his financial and political autonomy from the Ottoman Sultan that the Viceroy decided to establish contact with the South. He felt that Northern Sudan's gold was too little to meet his needs and its population too small to provide the slaves he needed for his army, and so he decided to conquer the Southern kingdoms which were previously beyond the reach of the Northern kingdoms.³ In his efforts he was supported by Northern Sudanese many of whom not only wanted to be relieved from the harsh demands now placed on them but also saw a possibility to seek opportunities in

¹ Deng Akol Ruay, *The Politics of Two Sudans: The South and the North 1821-1969*, Uppsala: Scandinavian Institute of African Studies, 1994, 11-29.

² See generally, R.L. Hill, *Bibliography of the Anglo-Egyptian Sudan*, London, 1939 and Richard Gray, *A History of Southern Sudan, 1839-1889*, Oxford: Oxford University Press, 1961.

³ Abel Alier, *Southern Sudan: Too Many Agreements Dishonoured*, London: Ithaca Press 1990, 11.

the land which was previously beyond their reach. By 1860s the slave trade was so profitable that the military and commercial networks were expanded throughout the South by both Northern Sudanese and Turco-Egyptian officials, sometimes working in competition but often working in conjunction with each other.⁴ Thus it can be argued that the first interaction between the North and the South happened purely on account of the financial motives of foreigners working together with Northerners who wanted to exploit resources for their own benefit.

In 1881-96 there was internal revolution popularly known as the Mahdist revolution, whose goal was to free the North from Egyptian control. But this revolution was defeated in 1898 by the Anglo-Egyptian forces who wanted to control the whole of Sudan to extend their sphere of influence to acquire vital resources for trade.⁵ With the victorious establishment of Anglo-Egyptian rule in Sudan after the defeat of the Mahdists, the British decided to administer Southern Sudan as an integral part of Sudan. The decision was strategic and dictated more by the exigencies of the European scramble for Africa than by local consideration for improvement of the plight of Southerners who were considered extremely poor and backward by the invading British forces.⁶

Strategically, Britain wanted to occupy the South to maintain its control of the Nile basin which was crucial to secure the whole of Nile valley to safeguard its colonial interests in Sudan and Egypt.⁷ Effective control of Sudan by the British meant that Southern Sudan became part of the British colonial empire primarily because of its strategic location and the British fear that other

⁴*Ibid.*, 12.

⁵ Mohamed Omer Beshir, *The Southern Sudan: The Background to Conflict*, London: C. Hurst and Co., 1968, 2-5; M.W. Daly, 'Broken Bridge and Empty Basket: The Political and Economic Background of the Sudanese Civil War' in M.W. Daly and Ahmad Alawad Sikainga (eds), *Civil War in the Sudan*, London: British Academic Press, 1993, 3-5.

⁶ Lam Akol, *Southern Sudan: Colonialism, Resistance and Autonomy*, Ewing Township, NJ: Red Sea Press, 2007, 5.

⁷*Ibid.*, 5.

colonial powers like France and Germany might extend in the North and conquer the area, which would jeopardize its economic interests. Southern Sudan became an integral part of Sudan largely as a strategy to satisfy the economic interests of the British and Egyptians.

With this brief introduction explaining how Southern Sudan became an integral part of Sudan, it is pertinent to examine the historical development of Sudan and what influenced the political developments that led the South to fight for autonomous status within the country and subsequently to seek total independence through self-determination.⁸ What gives Southern Sudan a significant and distinguished identity is the minimal degree of coexistence it maintained with other areas in Sudan, in comparison with other parts of Sudan and even with other African countries. This occurred partly because of the imposition of the segregatory British colonial policy, which from its inception in 1922 introduced the Closed District Ordinance and Passports and Permits Ordinance that were meant to control movement between Northern and Southern Sudan.⁹ Although the British justified this policy on the basis of a need to protect the Southerners from pressures from the North, its enforcement separated them and exacerbated their differences.¹⁰

The official British policy towards Southern Sudan became clearer soon after the Second World War. But even before the end of the war, in 1944 the British Civil Secretary, Sir Douglas Newbold, issued a new policy on the South stating that 'the approved policy of the government is to act upon the fact that the people of the Southern Sudan are *distinctly African and Negroid*'. He went on to emphasize that 'our obvious duty to them therefore is to push ahead as far as we can with economic and educational development so that these people can be equipped to stand up

⁸ For extensive discussion on the right to self-determination, see chapter three of this work.

⁹ Sudan Government, *Laws of the Sudan*, 1941, 137-143.

¹⁰ Edgar O'Ballance, *Sudan, Civil War and Terrorism, 1956-1999*, London: Macmillan Press, 2000, 1.

for themselves in the future whether their lot be eventually cast with the Northern Sudan or with East Africa'.¹¹ An examination of this policy demonstrates two competing and contradictory visions of the British for Southern Sudan. On the one hand the British had recognized that the people of that region had much more in common with their fellow East Africans than with Northern Sudan, but on the other hand, because of its strategic economic position and specifically because of the Nile river, the colonial government was keen for this region to be part of Sudan, so as to effectively control the Nile for its economic benefit. The unintended consequence of this policy is that it furthered the marginalization of Southerners.

When British colonial government convened the Juba Conference in 1947 to allow Southerners to participate in decisions concerning them, the major question as to whether Southern Sudan would continue to be part of the united Sudan or would be independent on its own with its own constitutional structure had already been settled;¹² Southern Sudan would continue to be an integral part of the united Sudan. Instead the Juba Conference was meant to solicit views on how best could Southerners be included in political arrangement between the North and the South after the departure of the colonial government.¹³ During the Conference, the main argument of Southern Sudanese was that the South should first be afforded an opportunity to prepare itself before joining hands with the North which was more advanced, before it could determine its future. Southern representatives recalled the past experience of slavery and oppression and argued that it would take time to develop mutual respect and promote a genuine sense of equality of citizenship before genuine unity was forged.¹⁴ These demands were rejected by

¹¹ Abel Alier, above note 3, 18. See also M. Abdel Rahim, 'The Development of British Policy in the Southern Sudan 1899-1947', *Middle Eastern Studies*, vol. 2, 3, 1966, 227-245.

¹² James W. Robertson, *Transition in Africa*, London: Hurst, 1974, 107.

¹³ Elias Nyamlell Wakoson, 'The Politics of Southern Self-Government 1972-83' in M.W. Daly and Ahmad Alawad Sikainga (eds), note 5, 35.

¹⁴ M. Abdel Rahim, above note 11, 227-245.

Northerners supported by the British. However, it should be noted that Britain's support was premised on its desire to win Northerners' backing against the influence of the Egyptians.¹⁵

When Sudanese independence, to take effect on 1 January 1956, was imminent, Southerners insisted that without being given complete autonomy they would not agree to full Sudanese independence from the departing Anglo-Egyptian colonial masters. It was in response to this hardline position of Southerners that the Northern members eventually agreed reluctantly to the insertion of a provision into the independence resolution which stipulated that the Southern demand for a federal system of government with expanded autonomy would *be considered* after independence.¹⁶ In response, Southern politicians deferred the question until after independence in exchange for posts in the government to be formed.¹⁷ Yet in December 1957, Prime Minister Khalil announced that 'the Constitutional Committee had given the Southern claim for federal status very serious consideration, but had found that it would not work in Sudan and hence the issue would be dropped'.¹⁸ This was a severe setback to Southerners and it galvanized their belief that Sudanese leaders were not willing to honour their commitments to their compatriots in the South by affording them full rights as citizens in the country. To Southerners, their full participation in the affairs of the country would have paved the way for a unified country based on justice, equality and coexistence with the North.

The subsequent governments which assumed power after independence, whether elected democratically or installed by military takeover, emphasized the Muslim and Arab identity of the Sudan, disregarding the stark reality of the varied composition of the populace in the country.

¹⁵ Paul Nantulya, 'Preventive Diplomacy in Sudan' in Hussein Solomon (ed.) *Towards Sustainable Peace: Reflections on Sustainable Peace in Africa*, Pretoria: Africa Institute of South Africa, 2003, 125-127.

¹⁶ Bona Malwal, *People and Power in Sudan: The Struggle for National Stability*, London: Ithaca Press, 1981, 47.

¹⁷ Dunstan M. Wai, *The African-Arab Conflict in the Sudan*, London: Africana Publishing Company, 1981, 35.

¹⁸ Bona Malwal, above note 16, 48.

This assertion was famously echoed by one senior government minister who stated that ‘Sudan is an Arab country and whoever doesn’t feel Arab should quit’.¹⁹ Indeed Sadiq Al Mahdi, one of the influential politicians in the modern Sudan and once a Prime Minister, stated that ‘...the dominant feature of our nation is an Islamic one and its overpowering expression is Arab, and this nation will not have its entity identified and its prestige and pride preserved except under an Islamic revival’.²⁰ It was this failure of successive Sudanese governments to address demands of Southerners that led to the outbreak of the conflict which, save for a brief period in 1972-1983, continued until the signing of the CPA in 2005.

C. The Comprehensive Peace Agreement 2005

Two decades of civil war²¹ between the North and South formally ended on 9 January 2005, when the Government of Sudan and the Sudan People’s Liberation Movement/Army (SPLM/A) signed the Comprehensive Peace Agreement (CPA) in Nairobi in Kenya. The CPA is comprehensive in the sense that it addresses the core dispute between Sudanese government and the SPLM/A.²² The origin of the peace process between the Sudanese government under President Bashir and the SPLM/A can be traced in efforts launched by the Inter-Governmental Authority on Development and Desertification (IGADD) in the early 1990s.²³ In 1994, IGADD initiated formal negotiations between the SPLM/A and the Sudanese Government. The interest of IGADD in these negotiations was essentially premised on its role as a regional organization

¹⁹ Lam Akol, ‘The Present War and its Solution’ in F.M. Deng and P. Gifford (eds), *The Search for Peace and Unity in Sudan*, Washington, DC: Wilson Center Press, 1987, 16.

²⁰ Dunstan M. Wai, above note 17, 117.

²¹ Sudan experienced continuous armed conflict since its independence, apart from an eleven-year period of peace, until 2005. The conflict which ended in 2005 is considered to have lasted for two decades because it was uninterrupted conflict since 1983.

²² See generally C. Murray and C. Maywald, ‘Sub national Constitution-Making in Southern Sudan’. *Rutgers Law Journal*, vol. 37, 4, 2006, 1203-1234.

²³ *Ibid.*, 1203-1234. It is worth noting that IGADD was initially formed in 1986 as an organization with focus on drought and desertification. However, its name was changed to IGAD in 1996 to focus on development only.

keen to promote peace and security within its member states. After an initial unsuccessful round of talks, it presented the parties with a Declaration of Principles (DoP) intended to provide the basis for the agreement.²⁴

The DoP required from the parties a commitment to five principles fundamental to the struggle of the South: a right to self-determination; separation of state and religion; equitable sharing of resources; security arrangements; and a referendum in the South with independence as an option.²⁵ It should be noted from the outset that IGADD assumed the mediation role in Sudan mainly because other institutions such as the UN and the OAU before were not involved in resolving this conflict; this can be attributed to the geopolitical configuration of the Cold War, in the case of the UN, and the doctrine of non-intervention in internal affairs which characterized most of the OAU's history.²⁶ It should also be emphasized that the fact that Sudan was a member of IGADD and most of the countries in this regional grouping were experiencing civil conflicts provided a compelling need for the Organization to get involved in resolving these conflicts which were afflicting its member states.²⁷

Below we examine the constitutional development in Southern Sudan and how it affected development of the rule of law. This discussion is critical to understand the differing perspectives and approaches between the Southerners and their counterparts in the North in addressing the root causes of the conflict. Further, the imperative of this discussion is premised

²⁴*Ibid.* See also Korwa G. Adar, John Nyuot and Eddy Maloka, *Sudan Peace Process: Challenges and Future Prospects*, Pretoria: Africa Institute of South Africa, 2005, 15.

²⁵ Francis Deng and Mohamed I. Khalil, *Sudan Civil War: The Peace Process before and Since Machakos*, Pretoria: Africa Institute of South Africa, 2004, 6-13.

²⁶ Art. III of the OAU Charter. 25th May 1963. In fact the UN and the OAU joined much later in support of the efforts of IGADD in the early 2000s.

²⁷ See generally, Waithaka Waihenya, *The Mediator: Gen. Lazaro Sumbeiywo and Southern Sudan Peace Process*, Nairobi: East African Educational Publishers Ltd, 2006.

on the fact that building the rule of law requires a constitutional framework spelling out rights and duties of citizens and their leaders, to guarantee responsibility and accountability in nation building. Only through critical examination of the constitutional development of this region is it possible to understand factors inhibiting or advancing the rule of law and how they shaped the subsequent Southern Sudanese constitutional discourse.

D. Constitutional development in Southern Sudan

Arguably the constitution making process is one of the most important components to guarantee the rule of law, whether in a conflict or a non-conflict context. Thus how a constitution is made and what it says matter. A constitution's legitimacy does not merely rest on its substantive content but equally on the process surrounding its making, and the degree to which it is rooted in the society concerned or imposed from above ultimately determines the long-term endurance of the constitution itself.²⁸ A constitution must also include and guarantee fundamental rights and freedoms of citizens. In Southern Sudan this was achieved because negotiation of the CPA involved international actors such as the UN, the AU, IGAD, the US, the UK, Norway and the Netherlands who impressed upon parties a duty to commit to international human rights standards. However, having a constitution and respecting what is written in it are two different things and in most cases conflicts have tended to centre on the latter aspect.

When a country is plunged into a conflict because of the failure of the existing constitutional framework, the challenge is how to amend or make and adopt another constitution recognizing the interests of distinct groups without giving such groups special privileges at the expense of others. And precisely how the people in whose name the constitution is made participate in the process and the role of international actors will either legitimize or compromise the process and

²⁸ Abdullahi Ahmed An-Na'im, 'Constitutional Discourse and the Civil War in Sudan' in M.W. Daly and Ahmed Alawad Sikainga (eds), above note 5, 97.

the actual outcome. Hence one of the major challenges of the post-conflict context in constitution making processes is how to ensure that the process reflects not only the interests and aspirations of the people but also how people actively and effectively participate in the process.

From the outset it is important to clarify the nexus between a constitution making process and the rule of law. The constitution underpins the system within which the governors and the governed interact in a given polity. It articulates the rights and obligations of both the citizens and their leaders. To successfully regulate this relationship the constitution must enshrine and guarantee the enjoyment of the basic rights of the people, provide the mechanisms for their enjoyment and protection, and articulate the institutional framework through which the society can seek redress for violation of their rights. Thus it may be argued that having a constitution articulating fundamental rights and freedoms does not automatically translate into a society respecting the rule of law; rather the respect and advancement of the rule of law in any given context will depend on respecting and enforcing what is provided for in the constitution.²⁹

Whether it is written or unwritten, flexible or rigid, the existence of a constitution is inevitable. It creates the various organs of government, determines their relationship to each other and the relationship between these organs and the people who are its main subjects, whether in their individual or collective capacities.³⁰ In a post-conflict context especially, the constitution provides a framework for power and resource allocation. This is crucial because conflicts in most countries emanate from failure to equitably allocate resources and power within the polity. Successful constitutions may be negotiated by political leaders and drafted by lawyers, but they

²⁹ See James Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting the DRC and Kenya', *William and Mary Law Review*, vol. 49, 2007-2008, 1109-1138.

³⁰ Benjamin Obi Nwabueze, *Constitutionalism in the Emergent States*, Hurst: London, 1973, 2-3.

are made by the realities on the ground.³¹ Ultimately a constitution must achieve a good balance between individual needs for personal freedom and social justice and organization of institutions of government.

When searching for a new constitutional order in a war-torn country like Sudan it is imperative that the interests of different and at times unrelated groups should be accommodated without jeopardizing the interests of others.³² Indeed this has been the major challenge facing Sudan since its independence in 1956: to devise a workable constitutional structure which accommodates varied groups and their interests while maintaining the unity of the country. Below we examine different constitution making process in the history of Sudan and how each process advanced or inhibited the quest for the rule of law in the country.

i. The Independence Constitution

The history of the constitutional development of post-independence Sudan dates back to the pre-independence period. Soon after the conclusion of the Juba Conference in 1947, the British colonial powers through the Legislative Assembly Ordinance of 1948 set up the Legislative Assembly consisting of 93 members of whom 65 were elected, 10 were nominated by the Governor General and 18 others were ex officio members by virtue of their ministerial positions in the Executive Council. Thirteen of the 93 represented Southern Sudan.³³ The Constitution Amendment Commission, operating under the auspices of the Legislative Assembly, was appointed by the Governor in 1951 to spearhead efforts of constitution making.³⁴ The

³¹ Abdullahi Ahmed An-Na'im, above note 28, 97.

³² Muna Ndulo, 'Constitution Making in Africa: Assessing both the Process and the Content', *Public Administration and Development*, vol. 21, 2001, 101-108.

³³ Abel Alier, above note 3, 22.

³⁴ Abel Alier, 'The Southern Question' in Dunstan Wai (ed.), *The Southern Sudan: The Problem of National Integration*, London: Routledge, 1972.

Commission had only 13 members; Judge Stanley Baker from England was appointed as its Chairman. One person represented the South in this new Commission.³⁵ Although this Commission was later disbanded by the Governor, its deliberations were the basis on which Judge Baker drafted the Self Rule Statute that ushered the country to independence in 1956.³⁶

Sudan achieved its independence without the rival political groups having agreed on the form and content of a permanent constitution. The Constituent Assembly adopted a document known as the 'Self Rule Statute' of 1953 as the country's first Transitional Constitution in December 1955. The Transitional Constitution replaced the Governor General as the head of State with a five-member Supreme Commission³⁷ elected by a parliament composed of an indirectly elected Senate and a popularly elected House of Representatives-essentially a Westminster model.³⁸ In addition to defining the constitutional structures and powers of the self-rule institutions, the proposed draft constitution called for solid guarantees for the South, a proposal which was however rejected by the Northerners. By January 1956, Sudan became an independent unitary state with the Self Rule Statute as amended on the eve of independence as the Transitional Constitution for the Republic of Sudan.³⁹

The adoption of the Self Rule Statute as the independence constitution raises some profound questions relevant to the rule of law. Its adoption was not made through a participatory and democratic process. Rather it was drafted under the auspices of the British colonial power and a few Northern elites without the full involvement of Southerners. As such, this Statute lacked

³⁵ Abel Alier, above note 3, 22.

³⁶ *Ibid.*

³⁷ It is worth noting that out of the five commissioners four were from the North and one, Siricio Iro, from the South.

³⁸ Abdullahi Ahmed An-Na'im, above note 28, 100.

³⁹ *Ibid.*

legitimacy and credibility because it did not reflect hopes and aspirations of those it was made to govern. Admittedly, citizens' participation does not within itself augment respect for the rule of law, but it can be argued that the people's involvement in constitution making is critical for the process and outcome which take into account people's concerns on different issues as discussed in the minimum attributes of the rule of law.

In chapter one we have seen that one of the major attributes of the rule of law is equality before the law and avoidance of discrimination between citizens on any basis. However, the period following independence had negative consequences on the rule of law because it sowed and confirmed the mistrust and discrimination long feared by the Southerners. This period saw the entrenchment of the Northern Arab Islamic identity over the South, and the institutional framework formulated after independence did not create or encourage the basis of equality and coexistence among the people. Thus it set a stage for some sections in the society being treated with discrimination and oppression while others were accorded privileges of citizenship. The decision of the regime to consider Sudan as an Islamic state, disregarding the rights of non-Muslims, further complicated the quest for a new inclusive constitutional order. Indeed it was under President Abboud's regime that policies of Islamization and Arabization were intensified. The regime imposed restrictions on the activities of missionaries in the South which it viewed as a threat to national unity, and imposed Arabic and Islam on the South contrary to the constitution.⁴⁰ The actions of the government were discriminatory and detrimental to Southerners because they disregarded their citizenship rights as non-Muslims. In 1964, the government of General Abboud was toppled and another attempt to draft a new constitution was embarked on. Below we examine this process and its outcome.

⁴⁰ O'Ballance, Sudan, note 10, 22.

ii. The 1965 Conference

Before discussing the process and outcome of this Conference it is pertinent to clarify some aspects of the North-South conflict during this period. This conflict started soon after independence in 1956. When Southerners realized that the independence government was not willing to honour their demands they decided to rebel against the government, establishing a movement called Anya nya in 1958.⁴¹ The main reason given by Southerners for starting the conflict was the refusal of the central government to accord them regional autonomy in the South within which they could make decisions on vital issues that affected them without interference of the government.⁴² Hence, when preliminary negotiations to seek peaceful resolution of the conflict were being carried out, already an armed conflict was actively going on.

It can further be argued that the Northern rejection of Southerners' claim for regional government with autonomy to make decisions affecting them without interference greatly contributed to the start and continuation of the conflict. This conflict had consequences for the institutions supporting the rule of law because critical institutions of governance such as the judiciary, police and correctional services were destroyed during the conflict. This destruction was not limited to institutions only; many people in the South became refugees in neighbouring countries while those who remained behind were unable to engage in any economic activities because of insecurity. Similarly, because of the conflict the government was unable to undertake reconstruction measures in the South, which reinforced the marginalization of Southerners.

⁴¹ The Anya nya movement was the rebel group which advanced the cause of Southerners. It is Dinka word which literally means 'poisonous snake'. See for example Alexis Heraclides, 'Janus of Sisyphus? The Southern Problem of the Sudan', *Journal of the Modern African Studies*, vol. 25, 2, 1987, 219-222.

⁴² See generally, George W. Shepherd Jr, 'National Integration and the Southern Sudan', *Journal of Modern African Studies*, vol. 4, 2, 1966, 193-212.

After the transitional government replaced the military rule of General Ibrahim Abboud through a popular uprising in 1964, it soon arranged what later came to be known as the Round Table Conference of March 1965. The main goal of this Conference was to discuss the ‘Southern question’ and address Southerners’ grievances through a new constitutional arrangement, in order to satisfy both the regional interests of the South and the national interests of Sudan as a whole.⁴³ All political parties in the country were represented in the Committee appointed on a North-South basis, with six representatives from the North and six representatives from the South.⁴⁴ However, neither women nor young people participated, the composition was all men. The impact of this exclusion was significant because it meant that concerns or suggestions of these groups were not included in the constitutional making process. Despite this non-inclusion of other groups, it may be argued that this Conference was crucial in the sense that it demonstrated the willingness of the Transitional Authority to address governance challenges within the country.

The Committee agreed on a number of things, including the need to transfer some powers hitherto exercised by the central government to each of the regions in Sudan.⁴⁵ Further, there was an agreement among the members on a right for the South to preserve and develop its own languages and culture. Similarly there was unanimity on the need to establish regional legislatures which would among other things enact regional laws, elect members of the government and supervise the executive machinery. Finally, the Committee agreed to recommend the parliamentary system of government in preference to a presidential system which was viewed as giving too much power to the executive. However, the right to secede for the South was

⁴³ *Ibid.*, See also Bona Malwal, ‘The Roots of Current Contention’ in Deng and Gifford (eds), *The Search for Peace and Unity in Sudan*, above note 19, 9-11.

⁴⁴ Deng Akol Ruay, above note 1, 120.

⁴⁵ Abel Alier, above note 3, 35.

unanimously rejected by the Committee. The implication of this rejection was obvious; Southerners were compelled to demand and address their grievances within the united Sudan, a difficult task given their previous experience and the unwillingness of the previous regime to treat them as citizens with equal rights and obligations.

Areas of agreement were overshadowed by several areas of disagreement. The Committee failed to address some critical issues whose solution would have given impetus to the accelerated process of constitution making. The Commissioners could not agree on the manner of selection of the head of the executive of the proposed region. The Southern representatives preferred that the head of the executive in the region be elected either directly or indirectly by the people of the region, because of their concern at the possibility that an appointed person would be indifferent to the plight of Southerners or would be imposed from Khartoum. The Northern representatives suggested that the head of state would select three persons from the region as candidates and the people of the region would be entitled to choose one of them through an electoral college.⁴⁶ To Southerners this proposal represented another danger to their quest for autonomy because it would have been easy for the President to nominate three people of his choice and let the Southerners choose one person. This would have ensured that in whatever the outcome the President's choice would be guaranteed to assume the office. Therefore this proposal was rejected by Southerners.

There was further disagreement on whether the South should be one region as Southerners wanted or three regions as Northerners wanted. Chiefly, Southerners wanted one region whose size and population would be part of its strength, while the Northern representatives argued that the South was too big to be administered as one region, and moreover, the creation of one

⁴⁶ *Ibid.*, 36.

region would perpetuate a confrontational posture between the Southern region and the central government.⁴⁷

The failure of the constitution making process in this period had implications for the development of and respect for the rule of law in Sudan. Notably, the Committee failed to agree on the broader issues of constitutionalism and governance which were critical to the successful resolution of the conflict. The decision of the regime to disregard the views and aspirations of Southerners eroded any confidence Southerners had in the regime's ability to address their cause. Also, the fact that the regime attempted to treat the conflict in the South as a regional problem rather than a national problem which required a national solution meant that people in the South were compelled to resort to violence as the only way to advance their cause.

In May 1969, General Nimeiry toppled the transitional government and outlined the reasons that led him and other members of the Revolutionary Council to take over power. Two reasons stand out as relevant to the advancement of rule of law and resolution of the Southern question. Firstly, the new government claimed it would work for the social justice and self sufficiency for the people, especially the underprivileged living in rural areas, of whom Southerners constituted a majority. Secondly, there was the failure of previous governments to solve the Southern problem(s) through an inclusive constitution. Subsequently the government issued a statement recognizing (i) the existence of the Southern problem, (ii) the cultural and historical differences between North and South, (iii) the right of Southerners to develop their separate cultures and traditions, and (iv) the right of Southerners to have their regional self government.⁴⁸

⁴⁷Dunstan M. Wai, above note 17, 97-104.

⁴⁸Ali Suliman Fadlalla, 'The Search for a Constitution' in Muddathir Abd Al-Rahim et al. (eds), *Sudan Since Independence: Studies of the Political Development Since 1956*, Aldershot: Gower Publishing Company, 1986, 41-49.

Soon after assuming power, the government launched peace talks which culminated in what was to be known as the Addis Ababa Agreement, on the basis of which the government adopted the 1973 Constitution. These two landmark events had a profound impact on the advancement of the rule of law and it is worth examining them and their implication to the ensuing Sudanese constitutional legal order in this period.

iii. The 1972 Addis Ababa Peace Agreement

When Nimeiry came to power in 1969, the conflict was escalating. His government decided to take initiatives to resolve this conflict by recognizing the national dimension of the ‘Southern question’. It was following this initiative that the Addis Ababa Agreement and subsequent 1973 Constitution were adopted. The Addis Ababa accord which granted the South self rule and gave recognition to the country’s multifaceted diversity was concluded in March 1972 after intensive negotiations between the government and the South. The agreement, known in legal terms as Southern Provinces Self Government Act, was later incorporated into the 1973 Constitution.⁴⁹ The importance of the Addis Ababa Agreement is that it was an accord which effectively ended the first phase of the civil war and set the stage for the only period of peace which Sudan enjoyed, from 1972 to 1983. It should also be noted that this was the accord that granted considerable autonomy to Southern Sudan, something which had never happened before.⁵⁰

The Addis Ababa Agreement was in essence a series of settlements on specific matters, contained in three main parts. The first part comprised a draft organic law which defined powers of self rule for the Southern Provinces of the Sudan and regulated their relationship with the

⁴⁹ See generally, Donald Rothchild and Caroline Hartzell, ‘The Peace Process in the Sudan, 1971-1972’, in Roy Licklider (ed.), *Stopping the Killing: How Civil War Ends*, New York: New York University Press, 1993, 63-90.

⁵⁰ Catherine Jendia, *The Sudanese Civil Conflict, 1969-1985*, Frankfurt am Main: Peter Lang Publishing, 2002, 94-105.

central government.⁵¹ It also provided for separate items of revenue and grants from the central government to the Southern Region. Perhaps crucially, it also had provisions guaranteeing fundamental rights and freedoms.⁵² The second part addressed ceasefire arrangements while the third was the protocol on interim arrangements, comprising four subjects: interim administrative arrangements; temporary arrangements for the inclusion of the units of the People's Armed Forces in the Southern Regional forces;⁵³ Amnesty, and Judicial Arrangements; and the Repatriation, Relief and Rehabilitation and Resettlement Commission.⁵⁴

As a result of the Addis Ababa Agreement, Southern Sudan was granted its own Regional Assembly, a High Executive Council (HEC) acting on behalf of the national President, regional civil service departments and regional development institutions. The South gained authority over education, police and cultural development in the South. Arabic remained the official language of Sudan, but English was designated the principle language for the Southern Region without prejudice to the use of any other languages which might serve a practical necessity for the efficient and expeditious discharge of the executive and administrative functions of the Region.⁵⁵ In addition, the regional government had an independent budget, whose revenue was to come from local taxes, fees, natural resources and special allocations and grants-in-aid from the central government. The Southern Region was to be represented in the National Assembly in proportion to its population. The Agreement further provided for the equality of all citizens

⁵¹ Richard Stevens, 'The 1972 Addis Ababa Agreement and the Sudan's Afro-Arab Policy', *Journal of Modern African Studies*, vol. 14, 1976, 247-274.

⁵² Appendix A, Addis Ababa Agreement.

⁵³ *Ibid.*, Article 27.

⁵⁴ Stevens, above note 51.

⁵⁵ Art. 6, Addis Ababa Agreement.

before the law and guaranteed equality of opportunity without discrimination on the basis of race, national heritage, birth, language, sex, or economic status.⁵⁶

Under the arrangement, the South was granted both executive and legislative powers. It is critical to evaluate the powers granted to the regional government and whether the core demands of Southerners were fulfilled under this Agreement, and to what extent this Agreement advanced the rule of law in the country. It is argued that the impact of this Agreement on the rule of law should not be examined for its allocation of powers among different organs of the state, but rather for the way it contributed to the creation of stable institutions critical to the advancement of the rule of law.

a) Legislative powers under the Addis Ababa Agreement

Chapter V of the Addis Ababa Agreement vested regional legislative authority in a People's Regional Assembly elected by Sudanese citizens resident in the South. The Regional Assembly had the power to legislate for the preservation of public order, internal security, efficient administration, and the development of the Southern Region in cultural, economic, and social fields.⁵⁷ Nevertheless, the central government had exclusive powers on certain issues which the Regional Assembly had no competence to legislate upon, including among others communication and telecommunication, customs and foreign trade, external affairs, currency and coinage, inter regional river transportation, national defence, nationality and immigration, planning and public audit.⁵⁸ The Regional Assembly could by a two-third majority request that a national law it deemed detrimental to Southern interests be suspended from entering into force,

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, Article 11.

⁵⁸ *Ibid.*, Article 7.

though the President had a right to accept or reject such a request.⁵⁹ While the President could veto any Bill deemed contrary to the national constitution, the Regional Assembly could reintroduce such a Bill, and according to article 107 of the 1973 Constitution, a two-thirds majority of the National Assembly could override a presidential veto.

Examining these powers under the Addis Ababa Agreement, it can be argued that although the Assembly had considerable powers in matters affecting the South, the President of the Republic had overriding powers precisely because he could veto any decision made by the members of the Assembly. In fact this was one of the major weaknesses of the Agreement because the Assembly could not compel the President to approve a Bill it wanted to be passed. Furthermore, the fact that some members of the Assembly were appointed by the President allowed the government to influence decisions made by the Assembly. Despite these weaknesses in the Agreement, it is worth acknowledging that the recognition of the right of Southerners to take part in making decisions which directly affected them was a major achievement of the Agreement, given the previous unsuccessful attempts by Southerners to participate in the decision making process.

b) Executive powers under the Addis Ababa Agreement

Under Chapter VI of the Agreement the regional executive authority was vested in the High Executive Council (HEC) which acted on behalf of the President of the Republic. According to article 18 of the Agreement, the HEC was charged with specifying the duties of the various government departments in the Southern Region. The National President appointed the President of the HEC on the recommendation of the People's Regional Assembly.⁶⁰ The HEC

⁵⁹*Ibid*, Article 14.

⁶⁰*Ibid*, Article 19.

President in turn proposed its members to the National President for appointment, the process being the same for removing appointees from office.

As the overall accounting officer for Southern affairs, the President of the High Executive Council had the mandate to promulgate administrative regulations and efficient administration of the region. The Agreement was unclear on the exact relationship between the High Executive Council and various central government ministries, except for providing that the national President should from time to time regulate the relationship between the two. Provisions dealing with the relationship between the HEC President and the National President were unclear. Article 17 stipulated that the Council acted on behalf of the national administration, but Article 21 made the Council responsible to the People's Regional Assembly and the President. It can also be argued that this Agreement contradicted the requirement of accountability and effective exercise of state power by the Regional President. For example, the power to veto bills emanating from the Regional Assembly was vested in the President of the Republic rather than in the Head of HEC. Similarly, the Agreement vested in the President rather than the judiciary the power to determine the constitutionality of any bill to be tabled before the Assembly. These aspects clearly violated the cardinal principle of the separation of powers already discussed in chapter one.

The allocation of power under the Agreement failed to guarantee independent functioning of the HEC President because the incumbent of that office was appointed by the President of the Republic on the recommendation of the People's Regional Assembly, and the President was not compelled to appoint the candidate proposed by the Assembly. This arrangement ensured unfettered influence of the President in the affairs of Southern Sudan. Indeed, as later remarked by Clement Mboro, a Southern politician, '...the mere fact that the North was to elect a leader for us was to give the South a government without powers and void of the basic principle of

democracy which advocates that the governed should elect their own representatives....⁶¹ It is partly the combination of these weak and intrusive provisions within the Agreement that Addis Ababa Agreement did not survive for long. Below we examine the factors which led to the fall of the Addis Ababa Agreement and ensuing consequences for the general constitutional development of Sudan. But before this examination, it is crucial to consider the significance of this Agreement, especially the way it affected the rule of law and the Sudanese constitutional discourse.

iv. The significance of the Addis Ababa Agreement

This Agreement had a significant impact on the constitutional development and the rule of law in Sudan. It was on the basis of this Agreement that the Sudanese government for the first time made serious attempts to create a constitutional legal order to accommodate and address the Southern question within a framework of justice and equality, which had been the core demand of Southerners since independence. Some notable achievements of this Agreement include the peace and stability ushered in immediately after the signing of the Agreement in 1972, and the promulgation of the Permanent Constitution of 1973. Furthermore, Southern Sudan had its own autonomy exercised through the Regional Legislative Assembly and Higher Executive Council. Notably, the Agreement provided constitutional protection for cultural diversity and decentralized economic development. In general, it can be contended that this Agreement paved way for economic opportunities by ushering in a period of relative peace and stability crucial for economic development.

The Addis Ababa Agreement was significant in the sense that it reaffirmed and granted the long denied rights and claims of Southerners. For example, the regime recognized that an Islamic

⁶¹ Elias Nyamlell Wakoson, above note 13, 40.

state as favoured by the Northern elites would be detrimental to national unity and that there were historical and cultural differences between the South and the North which required fresh thinking from Northerners. This recognition boosted the trust of Southerners in the government and their willingness to abandon armed resistance to build a unified country where they could co-exist with their Northern compatriots.⁶²

However, it is worth asking, why should the government decision to accord one section of a society rights and entitlements more than others be considered positive for rule of law development? It is contended that this aspect should be considered in the historical context of the Sudanese polity. Since independence it had been Southerners who demanded equal treatment with the rest of the country from the central government. Indeed, a closer examination of the political development in Sudan would show that a large part of Sudanese society was united against the Southerners, a fact which may be attributed to the Islamic identity as a unifying factor among the Northern societies. Further, it was the Southerners who were marginalized by successive governments denying them equal economic, social and political opportunities with their Northern counterparts. It can therefore be argued that under the Addis Ababa Agreement, there was positive discrimination focused to redress injustices suffered by Southerners at the hand of Northern governments in Khartoum. This aspect should also be considered in the context of the minimum attributes identified in chapter one, where it was argued that equality and non-discrimination are essential for the rule of law. Below we examine the major reasons that led to the fall of the Addis Ababa Agreement.

⁶² Francis M Deng, *War of Visions: Conflict of Identities in Sudan*, Washington, DC: Brookings Institution, 1995, 159.

v. The fall of the Addis Ababa Agreement

Although the Addis Ababa Agreement had settled most important issues imperative to the South, the question of how the provisions would best be observed and maintained in the future remained unresolved.⁶³ Practical implementation of the Agreement largely hinged on the willingness and ability of the President to uphold and implement the content of the Agreement. Various reasons can be attributed to the failure of the Addis Ababa Agreement.

Firstly, it should be noted that Southerners agitated for self-rule, among other reasons, because they wanted equal opportunities in development programmes with their Northern counterparts. Unfortunately these were never realized. Southern Sudan continued to lag behind economically and most of its inhabitants were marginalized from most of the economic opportunities, contrary to what had been promised to them in the Agreement. It can therefore be argued that addressing economic issues was critical to the overall success of the implementation of the Addis Ababa Agreement, which was a political issue. The Regional Authority could not adequately finance its budget and hence was unable to launch critically needed development projects. For example, when oil was discovered in the South in the mid-1970s, the central government decided that oil income should accrue to the central government rather than to the South. In fact, as a result of the oil discovery, the central government decided to redraw the borders to ensure that oil producing regions were transferred from the South to the North. This decision restricted economic benefits which the South could benefit from oil exploitation.⁶⁴

The Republican Order of June 1983 by President Nimeiry ended recognition of regional languages and English as the principal languages of the South. Instead, it provided that the use of

⁶³ *Ibid.*

⁶⁴ Steven Wondur and Ann Lesch, *Battle for Peace in Sudan: An Analysis of the Abuja Conferences 1992-1993*, Lanham, MD: University Press of America Inc, 2000, 5.

non-Arabic languages was conditional on obtaining permission from authoritative decision makers within government circles.⁶⁵ The Order effectively left Arabic as the only language in the South for official work and as the medium of instruction in formal education. The same Order dissolved the institutions of self-rule as had been agreed upon in Addis Ababa, namely the Regional Assembly and High Executive Council. Three regions were created and a Governor for each region (Bahr El Ghazal, Equatorial and Upper Nile) was appointed. All these decisions were made contrary to the provisions of the Agreement which mandated a two thirds majority and a referendum for such changes.

The introduction of Islamic laws of Sharia to cover the whole of Sudan, including Southern Sudan, in 1983 was another factor contributing to the failure of the Agreement. It should be noted however that the promulgation of Islamic laws of Sharia did not explicitly subvert the Constitution of 1973, since Sharia was already included in the Constitution as one of the main sources of legislation. Rather, it was the decision to promulgate the laws across the entire country that went contrary to the spirit of the Addis Ababa Agreement. Just like any other agreement, the Addis Ababa Agreement required political will by the government and concrete commitment for implementation of what had been agreed upon by the parties. It was through the neglect and ultimate indifference by the central government under the same President Nimeiry who had negotiated the Agreement that the whole arrangement collapsed ten years after its conclusion.

Despite all these shortcomings and the ultimate abrogation of the Agreement by President Nimeiry, 1972 remains a significant year in the political and constitutional development of Sudan for having brought about and maintained peace for a decade thereafter. In the following part this

⁶⁵ Peter Woodward, 'Sudan after Nimeiry', *Third World Quarterly*, vol. 7, 4, 1985, 958-972.

Constitution will be critically examined in detail to analyze how it affected both the rule of law and constitutional development in Sudan during its existence.

vi. The 1973 Constitution

Soon after the signing of the Addis Ababa Agreement in 1972 the government decided to embark on a constitution making process. In the same year Sudan's People's Assembly was elected with the sole purpose of preparing a Permanent Constitution for Sudan. The government decided to prepare a new constitution in the spirit of the Addis Ababa Agreement to incorporate the Agreement in the constitution, so as to allay any fear among Southerners of any attempt to dishonour the Agreement.⁶⁶ The new Permanent Constitution was approved and promulgated in May 1973. This process and its outcome were significant because it was for the first time that a Constitution recognizing rights of non Muslims in the country was adopted.

The new Constitution established a presidential secular and a unitary republic in Sudan. Article 1 of the Constitution stated that Sudan was a democratic, unitary, socialist and sovereign republic and part of both Arab and African entities. Not only did the Constitution attempt to incorporate the provisions contained in the Addis Ababa Agreement, it also tried to satisfy the demands of two competing groups which claimed recognition of their identities. It incorporated the desire of Southerners to acquire their autonomy within Sudan and specifically stated that within the country there should be self-government for the South in accordance with the Southern Provinces Regional Self Government Act of 1972.⁶⁷ So it can be contended that the 1973 Permanent Constitution concretized the Addis Ababa Agreement by ensuring that the

⁶⁶ Steven Sherman, 'Sharia Law in the Sudan: Why it Does Not Work under the Sudanese Constitutions of 1973 and 1985', *Dickinson Journal of International Law*, vol. 7, 1988-1989, 277-300.

⁶⁷ Article 8 of the 1973 Constitution. See also Peter Woodward, 'Constitutional Framework for Peace and Stability' in Sharif Harir and Terje Tvedt (eds), *Short-Cut to Decay: The Case of Sudan*, Uppsala: Nordiska Afrikainstitutet, 1994, 248-278.

Agreement would have constitutional force and would not be abrogated without following procedures laid down in the Constitution. Below we examine some of the salient features of this Constitution and their impact on the development of the rule of law.

a) Salient features of the 1973 Constitution:

Despite the fact that the 1973 Constitution was the outcome of a compromise meant to resolve conflict and differences between warring parties, it had all hallmarks of dictatorship where powers were concentrated in the hands of the executive. The President could appoint and remove the Prime Minister, as well as officers of the armed forces, heads of diplomatic missions and senior public servants without consultation.⁶⁸ He could declare a state of emergency for a maximum of thirty days and suspend any of the freedoms and rights guaranteed in the Constitution. In the event that the President decided to dissolve the National Assembly, the matter was to be presented to the newly elected assembly at its first sitting.

When this Constitution is examined from the rule of law perspective, it is clear that it contained some provisions which undermined the spirit of the Addis Ababa Agreement. For example, the Constitution legitimized a single party state system and vested enormous powers in the hands of the President. It designated the President as ‘the symbol of sovereignty and national unity and the representative of the people’s will’.⁶⁹ Further, the President was elected for a term of six years, but with no limitations as to the number of times he could present himself for re-election. This aspect had adverse effects on the political system; not only did it breed cynicism, it also encouraged ambitious elements to resort to unconstitutional means to oust the President.⁷⁰ The Constitution empowered the President, when the People’s Assembly was not sitting or in cases

⁶⁸ Graham Thomas, *Sudan 1950-1985: Death of a Dream*, London: Darf Publishers, 1999, 104-108.

⁶⁹ Ali Suliman Fadlalla, above note 48, 41-49.

⁷⁰ *Ibid.*, 47.

of ‘importance and urgency’, to make provisional orders which had the force of law immediately when made, subject to their future endorsement by the Assembly. The determination of what was urgent or important was the prerogative of the President. Clearly this was the antithesis of the rule of law because the Executive could manipulate the legislative process to its advantage.

The implication of this constitutional arrangement was to effectively disenfranchise the majority of people, especially Southerners, denying them opportunity to fully participate in decision making at the national level. Admittedly the Constitution had provided for decentralization of power to the regions, but in reality most of these provisions had clauses which subjected them to the whims of the President. Similarly, the Permanent Constitution underwent several amendments which later proved to undermine it. For example, one amendment granted powers to security forces to make preventive arrest and detention without recourse to the judiciary.⁷¹ This not only undermined the rule of law, it raised a possibility and an opportunity for the central government and its security officials to arrest people it deemed a threat to national security. Even if allegations were unfounded, there was no court of law to determine the lawfulness of such arrests or detentions.

The Permanent Constitution promulgated in 1973 by President Nimeiry did not outlive him. When he unconstitutionally abrogated through the Republican Order of June 1983 the Addis Ababa Agreement which could be considered as a foundation upon which the Permanent Constitution had been built, it spelt the end for the Constitution and his administration.⁷² The failure to create an inclusive constitutional legal order for Sudan not only had a negative impact

⁷¹ Ann Elizabeth Mayer, ‘The Fundamentalist Impact on Law, Politics and Constitutions in Iran, Pakistan and the Sudan’ in Martin E. Marty and R. Scott Appleby (eds), *Fundamentalism and the State: Remaking Politics, Economics and Militancy*, Chicago: University of Chicago Press, 1993, 132-135.

⁷² Francis Deng and Prosser Gifford, above note 19, xiv.

on the development and consolidation of the rule of law, it also meant that Sudan was once again going to require a new constitutional order to reflect the realities of the Sudanese polity.

b) The constitutional order in Sudan after the military coup, 1985-1997.

Before discussing constitutional development after the fall of the Nimeiry regime in 1985 it is important to examine factors which led to the resumption of the conflict between the North and South in this period. It was the interplay of many factors that led to the resumption of the conflict in 1983 after a decade of calm. The decision of President Nimeiry to declare Sudan an Islamic State through the introduction of 'September laws' greatly contributed to the demise of the Addis Ababa Agreement. The implication of this decision was evident: it plunged the country into conflict again because it prompted Southerners to form their resistance movement in 1983 under the umbrella of the Sudanese People's Liberation Movement/Army (SPLM/A).⁷³ The establishment of the SPLM was directly linked to the decision of the government to annul the Addis Ababa Agreement and the subsequent 1973 Constitution which had been promulgated to underpin implementation of that Agreement.

After the overthrow of Nimeiry in 1985 by a military coup, the Permanent Constitution of 1973 was terminated. The coup led to the formation of the Transitional Military Council (TMC) and an Interim Council of Ministers, which ruled for one year before handing over to an elected Parliament and Council of Ministers. The Transitional Military Council (TMC) and the Transitional Council of Ministers restored the Regional Self Government Act of 1972.⁷⁴ But its provisions were highly diluted from its original wording in Addis Ababa in 1972, so that it was

⁷³ Gabriel Warburg, 'Islam and State in Numayri's Sudan', *Africa: Journal of the International African Institute*, vol. 55, 4, 1985, 400-413.

⁷⁴ Abel Alier, above note 3.

rejected by Southern political forces. For example, the TMC gave itself the power to amend the Addis Ababa Agreement wherever it believed it was necessary to do so, contrary to the previous guarantees which required a two thirds majority and a referendum for amendment.

Notable efforts to prepare a new constitution for Sudan during this period were reaffirmed in the Koka Dam Declaration comprising the SPLM and other opposition groups in Sudan. This Declaration among other things called for the creation of a new Sudan free from racism, tribalism, and sectarianism.⁷⁵ Importantly, the Declaration committed the parties to establish a constitutional conference to define the ‘new Sudan’, which would address the problems of Sudan collectively instead of focusing on Southern Sudan alone. However, these efforts also had no success because the Transitional Military Council which was supposed to convene the proposed constitutional conference handed over power to the new government, which as it turned out later was not committed to this Declaration.

In June 1989 the civilian government of Sadiq Al Mahdi, which had come to power in 1986, was overthrown by the military under the leadership of Brigadier General Omar Al Bashir. The government of Bashir suspended the 1985 Constitution, dissolved the Constituent Assembly and banned all political parties and trade unions.⁷⁶ Indeed almost ten years passed under the government of General Bashir before a new Constitution was promulgated in 1998. This Constitution had a far reaching impact given that it was promulgated amidst the intensifying conflict in the South between the government forces and the SPLM/A.

Before examining the implication of the 1998 Constitution for the general development of the rule of law in Sudan, it is useful to highlight some issues. It is striking that Sudan was unlike the

⁷⁵ Koka Dam Declaration, March 1986.

⁷⁶ An Na'im in Daly and Sikainga (eds), above note 28, 100-101.

majority of countries in Africa, whose political and economic development was largely characterized by foreign intervention. Despite its vast natural resources like oil, most of the political instability in Sudan was internally instigated with little outside interference, especially after independence in 1956. This was the period of the Cold War between East and West where countries got involved in the affairs of other countries for purely strategic reasons, but despite this Sudan saw little meddling by Western countries or the Soviet Union in its internal political affairs, by comparison with other African countries.

The Organization of African Unity, adhering to its long established tradition of non-interference in internal matters, considered the Sudanese political instability as essentially a domestic affair, and so it barely discussed Sudanese political problems. A few countries like Uganda and Ethiopia broke ranks with the OAU to support the SPLM/A, to the chagrin of the Organization. It is also worth noting that while the great famine in Ethiopia in 1984-85 attracted the attention of millions of people from all over the world to the suffering of Ethiopians, in Sudan it was different. Despite the long running civil war which had claimed thousands of lives while forcing thousands of others to flee as refugees, serious attempts to help by the international community were only registered in the late 1980s when the UN launched Operation Lifeline Sudan.⁷⁷ This Operation was made possible by unwritten agreement between the United Nations, the Sudanese government and the SPLM to allow humanitarian access to civilians affected by the ongoing conflict. It involved different UN organizations like UNICEF, WFP and UNHCR and other international non-governmental organizations providing relief in war zones, especially in the

⁷⁷ Larry Minear and Tabyiegen Agnes Abuom, *Humanitarianism under Siege: A Critical Review of Operation Lifeline Sudan*, 1st edn, Ewing Township, NJ: Red Sea Press, 1991. See also Lam Akol, 'Operation Lifeline Sudan: War, Peace, and Relief in Southern Sudan', 2005, <http://www.c-r.org/accord-article/operation-lifeline-sudan>. Accessed March 2013.

South.⁷⁸ Although the Sudanese government agreed to this arrangement, the Operation was short-lived because of the intransigence of Khartoum regarding its continuation.

It can therefore be argued that political events in Sudan were largely dictated by internal factors rather than outside influence. Unlike other African countries, Sudanese had relatively better opportunities to rebuild their country based on an inclusive constitution and in the process strengthen the rule of law and institutions of governance. This argument is made precisely because, the various peace negotiations especially the Addis Ababa Agreement between the government and the rebels in Southern Sudan, had provided an excellent opportunity for the country to address wide range of issues which had been a key obstacle to social, economic and political progress in the country.

vii. The 1998 Constitution

An examination of the 1998 Sudanese Constitution shows that it had a major impact on development of the rule of law and general constitutional discourse in the entire Sudan. It was under this Constitution that for the first time Sudan acknowledged and accepted the diversity of nationalities and equal treatment of religions. Unlike other constitutions which had been adopted in the past, the 1998 Constitution was from its inception negotiated during the civil war between the government and the rebels in the South. It was because of inadequate consultation among Sudanese, and especially non-participation of Southerners in the process, that its credibility and legitimacy were highly compromised. Nevertheless it was embraced by some Northern opposition groups who felt that the document offered a new beginning amidst the escalating challenges, of both an economic and a security nature, within the country.⁷⁹

⁷⁸*Ibid.*

⁷⁹ However, despite the impact of this constitution on the development of the rule of law, one can argue that it incorporated some provisions that were contradictory to its stated goal of protection of fundamental rights,

A question to pose is, why did the Sudanese government decide to adopt a new constitution almost ten years after coming into power? There are varied reasons for this decision. For example, the end of the Cold War and the shift in the world order compelled most countries to embrace constitutional reforms to guarantee the rule of law and a market economy. Further, the government had come to power through a military coup in 1989, and as a way of seeking legitimacy before its own people and cementing its democratic credentials it had to adopt a new constitution to guarantee fundamental rights of its citizens. But this decision ought also to be examined in light of the prevailing political development in Africa during this period. Leaders who had come to power through military coups were adopting new constitutions by which they sought legitimacy through the electoral process. The major reason for this development was the end of the Cold War, with the collapse of the Soviet Union, and the changing nature of alliances between Western countries and developing countries, which were now dependent on respect for human rights, democracy and the rule of law. Admittedly, this electoral process was not democratic as it should have been because in most cases it was conducted under a single party rule or a legal framework that favoured the incumbents, but the fact that leaders could subject themselves to the popular will of their people enabled them to claim democratic credibility to their Western critics from whom they needed economic support.

Perhaps more compelling was the fact that the Sudanese government was coming to terms with the reality that it could not win the war in the South through military means, and adopting a new constitution recognizing some of the grievances of Southerners was considered one of the best

especially for the non-Muslims. See generally John Luk Jok, 'The Basis of Human Rights in the Present Sudan Constitution' in Ed Brady and Cirino Hiteng (eds), *Building a Multi religious Society in the Context of Islamic Fundamentalism: Challenges and Appropriate Christian Responses*, Nairobi: AMECEA, 2001, 51-58. See also M. Hoebink (ed.), 'Constitutional perspectives on Sudan: proceedings of the IDF seminar', Working Paper Series, Centre for Middle Eastern and Islamic Studies, University of Durham, 1999.

ways to resolve the conflict. The challenge posed by this new constitution was that it lacked legitimacy for Southerners because of their non-participation and non-inclusion of their key demands such as the right to self-determination. It also maintained Islam as the guiding source of law in the country, which alienated Southerners. Below we examine some of the features of the 1998 Constitution and their impact on development of the rule of law.

a) Executive powers under the 1998 Constitution

Executive power under the 1998 Constitution was vested in the hands of the President of the Republic.⁸⁰ The Constitution designated the President as the ruler and highest sovereign authority of the country, responsible for the command of the armed forces and other organized forces. Other functions of the President included supervising justice and public morals, representation of the government and public opinion at public occasions, and initiation of constitutional amendment.⁸¹ The President was also to appoint two Vice Presidents to assist him in his work. He could also appoint advisers and assistants and define their seniority and duties.⁸² While making these appointments the President was under no obligation to ensure fair reflection of the diverse Sudanese nationalities, which partly explains the grievances of other Sudanese groups who felt marginalized by the new Constitution.

At the state level, the Constitution provided for a governor for each state, to take office in accordance with the Constitution and law that could be enacted for that purpose. Specifically, the Constitution compelled each state to present six names to the President of the Republic who in turn was to select three names.⁸³ Then, in governorship elections people chose among the

⁸⁰Article 42, 1998 Constitution.

⁸¹ *Ibid.*

⁸²*Ibid.*, Article 44.

⁸³*Ibid.*, Article 56.

three approved candidates and the candidate getting more than fifty percent of the votes would be declared Governor-elect.⁸⁴ Clearly, these provisions for governorship elections were the antithesis of the rule of law, because the election method ensured that all those candidates who were on the ‘wrong side of the system’ or against the President’s agenda were disqualified; only those candidates whom the President favoured were eventually nominated. With this arrangement, it can be persuasively argued that this Constitution did little to advance constitutional democracy and the rule of law in Sudan.

b) Legislative powers under the 1998 Constitution.

The Constitution allocated legislative powers between a federal legislature⁸⁵ and state legislatures.⁸⁶ Among the functions and powers of the federal assembly were to endorse plans, programmes and policies of the state and society, approve constitutional amendments, laws and temporary decrees, supervise executive performance and issue resolutions concerning public affairs.⁸⁷ The Constitution granted powers to the federal legislature, in course of supervising the work of the executive, to issue recommendations to the President for the removal of any minister who lost the confidence of the National Assembly, as long as that decision was taken after a general debate and the resolution received the approval of fifty percent of members present and voting. Article 97 established state assemblies with legislative authority in each state and any other powers as might be determined by the Federal Constitution. Each state assembly was granted powers similar to those wielded by the National Assembly taking into account the character of state assembly as an organ of a state, with the State Governor replacing the President, and state ministers replacing federal ministers.⁸⁸ The Constitution reaffirmed

⁸⁴*Ibid.*, Article 56.

⁸⁵*Ibid.*, Article 67.

⁸⁶*Ibid.*, Article 97.

⁸⁷*Ibid.*, Article 73.

⁸⁸*Ibid.*, Article 98.

federalism as the governing system in Sudan and divided the country into twenty-six states. The aspect of federalism was significant because it came closer to responding to the Southern grievances on their claim to the right to self-determination. But despite this rather positive step Southerners rejected this Constitution for failing to reflect their views and aspirations.⁸⁹ Indeed their rejection was demonstrated by the decision of the SPLM to continue the war against the government.

The next part will analyze the process which preceded the adoption of the Interim National Constitution and the Interim Constitution of Southern Sudan 2005 which replaced the 1998 Constitution. This unprecedented constitutional development in the history of Sudan since independence not only changed the constitutional structure for the country but also heralded a new era where governance and the rule of law were fully integrated in both constitutions for the first time. Further, these changes were profound in the sense that for the first time after almost fifty years of conflict between the South and successive regimes in Khartoum, the claim to the right to self-determination for the Southerners was recognized and affirmed, allowing Southerners to vote for the independence of their new state. Whether these events which were marked by intense and protracted peace negotiations between the rebels and the government resulted in the advancement of the rule of law in Southern Sudan is a subject of the following analysis.

E. The CPA and constitutional development in Southern Sudan

The continuation of the conflict in the South even after the adoption of the 1998 Constitution between the SPLM and the government greatly influenced the decision of the government to change its approach towards the resolution of the conflict in the South. The government

⁸⁹ Ahmed T. el-Gail, 'Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan', *Harvard International Law Journal*, vol. 45, 2, 2004, 504-534.

adopted a softer line by going back to the negotiating table in efforts to come up with a further new constitution which would fundamentally take into account the key demands of Southern Sudanese, namely, their claim to the right to self-determination. Contentious issues like equitable distribution of natural resources (especially oil), separation of religion and the state and Southern representation in decision making were all considered crucial to the eventual resolution of the conflict.

While introducing this chapter I discussed how the Comprehensive Peace Agreement was one of the defining features of post-conflict Southern Sudan. Earlier, in the introductory chapter I also discussed the reasons why Southern Sudan (now independent South Sudan) is considered to be in a post-conflict situation, by showing that the CPA signed between SPLM and the Sudanese government ended the protracted conflict between the parties. While the CPA was instrumental in ending the war, it is important that peace agreements of this nature should also be considered in the context of their role in addressing gender inequality and discrimination by reaffirming respect for the fundamental rights of all citizens.⁹⁰ The CPA created a framework which recognized equality of citizenship as the pillar of the new constitutional legal order. This was therefore a significant achievement for Southern Sudanese who had waged an armed struggle against the government because of the entrenched discrimination against them.

The negotiations under the auspices of IGAD between the parties marked the beginning of the serious dialogue that eventually led to the signing of the 2005 Comprehensive Peace Agreement in Nairobi.⁹¹ The Protocol recorded the agreement of the parties on a number of key issues and

⁹⁰ Christine Chinkin, 'Gender, Human Rights and Peace Agreements', *Ohio State Journal on Dispute Resolution*, vol. 18, 3, 2003, 867.

⁹¹F.A. Kornegay, 'Regional and International Implications of the Sudanese Peace Agreement' in K.G. Adar et al. (eds), *Sudan Peace Process: Challenges and Future Prospects*, Pretoria: Africa Institute of South Africa, 2004.

provided a framework for future talks. It reaffirmed national unity as the guiding principle for both parties and the right of the Southern Sudanese to self-determination through an internationally supervised referendum after an interim period of six and a half years.⁹² This was a key demand which had greatly defined the Southern struggle against successive governments in Khartoum. The Machakos Protocol is regarded as a breakthrough in the pursuit of constitutional order in Sudan because it was in this Protocol that major disputed questions which had haunted Sudan for much of its history were addressed.

Despite these concessions, one can ask, why was the North willing to make concessions it had previously rejected, such as self-determination? Many factors influenced the government's decision but chiefly, the military cost of fighting the war which was approaching its twentieth year and the toll on civilians in both North and South provided a compelling reason for the parties to reconsider their approach to resolve the conflict. Further, the economic costs of the conflict were becoming prohibitive because the SPLM had designated all oil installations in the South as a legitimate military target. The implication of this was clear – the Sudanese government could neither invite foreign investors in the lucrative oil sector nor enjoy the economic benefits of the newly found oil wealth. But in addition, outside intervention by regional organizations such as the OAU and IGAD and Western countries like the US and its allies compelled Sudan to accept negotiations and dialogue as the only mechanism to resolve the conflict.⁹³

It can further be argued that for international actors, the assumption was that once Sudan signed a peace agreement with SPLM, it would automatically enhance respect for human rights and help

⁹² Philipp Dann and Zaid Al-Ali, 'The Internationalized *Pouvoir Constituant*: Constitutional-Making under External Influence in Iraq, Sudan and East Timor', *Max Planck Yearbook of the United Nations Law*, vol. 10, 2006, 442-449.

⁹³ It is also worth noting that during this period Western pressure on Sudan was high, especially after its designation by the US as a country sponsoring terrorism.

improve the rule of law. Indeed, the Sudanese situation is not unique, rather it was part of the broader attempt by the international community in 1990s and 2000s to support peace agreements believing they would lead to the respect for human rights and the rule of law. However, as Sudanese example has demonstrated, peace agreements do not automatically lead to the realization of these objectives without strong commitment from the parties to carry out the terms of such agreements. Below we examine the constitutional arrangement under the CPA and how this arrangement impacted rule of law development.⁹⁴

i. Constitutional arrangements under the CPA

Taking into account the historical development of the constitutional legal order in Sudan, one may ask whether the new order was different from the previous arrangements such as the Addis Ababa Agreement in 1972. What distinguished the 2005 constitutional arrangement was that it was more attuned to the concerns of Southerners. Under the constitutional framework put in place by the CPA, the source of law for legislation with legal force in the North alone would be Sharia and the consensus of the people.⁹⁵ This provision not only allowed those who are not Muslims (especially in the South) to opt out of Islamic laws, but also conceded the long held demand by Southerners for the separation of state and religion. However, this provision was based on a wrong premise, assuming that Sudan was equally divided into Northern and Southern blocs where people were Muslims and Christians living without interaction. In reality, even in the North there are people of different beliefs who would be excluded by this arrangement.

Administratively the CPA divided the country into 26 states, sixteen in the North and ten in the South. Although the CPA granted powers to each level of government, states in Southern Sudan were subject to the control of the Government of Southern Sudan. A key provision of the CPA

⁹⁴ See generally, Christine Bell, *Peace Agreements and Human Rights*, Oxford: Oxford University Press, 2004.

⁹⁵ Section 3.2.2 of the CPA.

in this regard required all linkages between the national government and the governments of Southern states to be through the Government of Southern Sudan – no Southern state was to engage with the national government independently.⁹⁶ As to why the requirement existed only for states in Southern Sudan and not those in the North, this may be attributed to the desire of the Government of Southern Sudan to limit interaction between the central government and the states within the South. It also reaffirmed the supremacy of the SPLM in determining affairs of the South without central government intervention. As to why the CPA made provisions for the adoption of a federal system, this can be attributed to the desire of negotiators to address the question of marginalization which had been a core claim of various Sudanese both from the North and the South.

The CPA was different from the previous arrangements such as the Addis Ababa Agreement because the former, unlike the latter, established a mechanism to guarantee its implementation. The guarantors, in the form of the Commission on Assessment and Implementation, drew its members from select countries and institutions that had supported the negotiations and eventual adoption of the CPA.⁹⁷ Further, the CPA put in place a defined time limit within which Southerners were to exercise their right to self-determination through an internationally observed referendum, whereas the Addis Ababa Agreement did not even consider the question of self-determination. In fact the parties were required to make unity attractive as a condition for unified Sudan to be preserved. Ultimately, in July 2011, Southerners voted for secession, a fact which can be attributed to the failure of both parties to honour their obligation under the CPA.⁹⁸ This

⁹⁶Murray and Maywald, above note 22.

⁹⁷ They include the UN, the AU, the EU, the Arab League, IGAD, the Netherlands, the USA, the UK, Norway and Italy.

⁹⁸ While both the SPLM and the government were required by the CPA to make unity attractive, the SPLM campaigned for separation. The explanation of this is that the SPLM, having fought for more than two decades, was keen for the South to secede rather than remaining part of Sudan.

failure was due to the fact that the Sudanese government failed to undertake necessary social, economic and political reforms to adequately address marginalization and injustices which had been the basis of the Southern struggle.

Although the CPA was credited with ending the North-South conflict, there is an issue regarding the legitimacy of this Agreement. This stems from the discussion in chapter one which saw public participation in decision making as a key attribute of the rule of law. The CPA was an agreement between the two dominant political forces in the country, the ruling National Congress Party (NCP) and the Southern Sudan People's Liberation Movement/Army (SPLM/A) with no prior consultation with Sudanese people. It was approved by a popular referendum neither in the North nor in the South. This raises some concerns as to the legitimacy of this Agreement which fundamentally changed the Sudanese constitutional legal order through the writing of the new constitutions both for the South and the North. Given the importance of these Constitutions in the management of national affairs, it is argued that it was crucial that they are approved by the people through a popular referendum even if the CPA, as a peace document resulting from negotiation and compromise between the warring factions to end the war, was not subject to referendum. It may further be challenged as to who appointed the SPLM as the sole representative of Southerners in dealing with the North? This question cannot be answered without examining the origin of the SPLM/A itself and the process leading to the signing of the Addis Ababa Peace Agreement in 1972. It was in this period that different Southern political forces organized themselves under the Anya-nya rebel force and its political wing, the Southern Sudan Liberation Movement (SSLM), to negotiate with the government. It is this same group that later transformed itself into the SPLM/A to wage war against the government in 1983. So it can be argued that SPLM/A was a product of the Anya-nya movement and the SSLM, founded in 1983 to advance the cause of Southerners. Admittedly, later in 1991 there was a split in the SPLM/A ranks when one of the most influential leaders of the movement broke away to form a

different rebel movement, SPLM/A-Nasri.⁹⁹ But these differences were resolved and in 1997 the movements reunited again under the original SPLM/A. It was this movement which eventually negotiated and signed the Comprehensive Peace Agreement in 2005.

F. The rule of law in the Southern Sudan constitutional legal order

Examination of the constitutional development in Sudan since independence until the signing of the Comprehensive Peace Agreement in 2005 shows that the period is marked by failure to adopt an all embracing constitution which could guarantee fundamental rights and freedoms for diverse Sudanese polity. As already discussed in chapter one, the rule of law connotes meaningful and enforceable laws where decisions are transparent, fair and predictable, basic security with personal safety, protection of individuals and property rights, and an independent judiciary that safeguards both.¹⁰⁰ Different constitutions did not embody or promote these attributes essential to guarantee the rule of law.

The decision of successive Sudanese governments to embrace Islamic Sharia at the expense of other faiths ensured constant violent struggle by the minorities against the government. The failure to build an independent judiciary to guarantee individual and collective rights negatively impacted the development of the rule of law. For example, while the 1972 Addis Ababa Agreement had granted significant autonomy to the South, this autonomy was violated and ultimately abrogated by the same government without due regard to the implications for or reaction from the other signatory to the agreement. Similarly, the government decision to impose Arabic as the national language and restrict the use of other languages in the South greatly

⁹⁹ Riek Machar led the SPLM/A-Nasri and John Garang the SPLM/A Torit. Douglas H. Johnson, *The Root Causes of Sudan's Civil Wars*, Kampala: Fountain Publishers, 2011, 91-125.

¹⁰⁰ Maria Dakolias, 'Are we there yet? Measuring Success of Constitutional Reforms', *Vanderbilt Journal of Transnational Law*, vol. 39, 2006, 1178.

deprived Southerners of their right to political participation, cultural rights and freedom of worship. As already discussed, during and after independence Southerners had wanted limited autonomy rather than full-fledged separation. But this decision to demand limited autonomy in lieu of a separate state was conditioned on the willingness of the government to improve necessary social and economic conditions which would have paved the way for consolidation of the rule of law and social justice based on equality of citizenship.

It was only after the signing of the Comprehensive Peace Agreement that we saw a real commitment of the Sudanese government to the rule of law and its attendant features such as the Bill of Rights which was incorporated in the Constitution. It was in this period we saw both the ICSS and the ICS recognizing that all international human rights instruments to which Sudan is a party would automatically become part of the new constitutional legal order.¹⁰¹ The commitment to human rights in the CPA can be attributed to the fact that its negotiation involved different parties and in particular Western countries such as the US, Germany, Britain and Norway and international institutions such as the UN, the AU and IGAD. It is clear that these international actors could not have agreed to support a peace agreement which was not based on international human rights standards and commitment to the rule of law.

G. Conclusion

The chapter has discussed constitutional development in Sudan and how this development affected the rule of law in the country. It has been shown that it was the lack of the rule of law as reflected in the minimum attributes identified in the introductory chapter, and complete disregard of human rights by successive governments in Khartoum and the general absence of an acceptable constitutional legal framework able to accommodate needs and aspirations of

¹⁰¹ Article 27 (3) INC & 13 (3) ICSS respectively.

various Sudanese nationalities, that underlay the protracted conflict between the SPLM and the Sudanese government. It has also been shown that the general absence of legal institutions such as an independent judiciary to guarantee equality before the law for all citizens, law and order institutions to protect all Sudanese without discrimination, guarantees of fundamental rights such as freedom of worship, freedom of expression and the right to cultural heritage exacerbated the marginalization of Southerners in the Sudanese polity.

It was in the quest to address these challenges and end the conflict between the parties that the SPLM and the government negotiated and eventually signed the CPA. On examining the CPA it is evident that the rule of law is envisioned and associated with respect for human rights, an independent judiciary, strong law and order institutions, an accountable executive, and improved social and economic conditions among many other objectives. It is these that will be the subject of the next discussion in the context of self-determination as enshrined in the CPA. The chapter will examine the correlation between the demand for self-determination on the one hand and the advancement of the rule of law and protection of fundamental rights within Southern Sudan's context on the other.

Chapter Three

III. Southern Sudan and the Right to Self-determination in International Law.

A. Introduction

This Chapter introduces the right to self-determination as recognized and applied in international law. The right is examined in the context of the CPA which led to the formation of a new state of South Sudan.¹ It is this formation of a new state that raises some questions pertinent to the protection of human rights and advancement of rule of law in Southern/South Sudan. The core question in this chapter is, how does self-determination square with the secession and the protection and advancement of human rights and the rule of law in Southern Sudan?

Can we contend that by exercising the right to self-determination Southern Sudan is likely to create an environment more amenable to promotion of the rule of law and enjoyment of human rights? Or, more fundamentally, is the claim of self-determination inherently antithetical to the rule of law? The discussion in this chapter will trace the development of self-determination in international law by specifically examining various international and regional instruments such as the UN Charter, the International Bill of Human Rights, and the African Charter on Human and

¹ Francis Deng, *Sudan at the Brink: Self Determination and National Unity*, New York: Fordham University Press, 2010.

Peoples Rights on how they address the right to self-determination. The chapter will further examine how the concept has been understood and framed not only as a mechanism to resist injustice and oppression but also as a justification for advancing human rights and the rule of law in post-independence Africa.

B. The concept of self-determination in international law

The concept of self-determination is one of the most contentious and contested in the realm of international law and also an important aspect of the international law of statehood.² It is a most commonly and passionately expressed concept in international relations, invoked by peoples who find themselves struggling against a variety of actual or perceived oppressive situations.³ It can mean the right of a political unit within a federal system, such as Southern Sudan or Kosovo, to secede from a federation or a unified state and become an independent sovereign state. Self-determination not need necessarily lead to an independent state, it may simply mean the right of an ethnic, linguistic or religious group within an existing sovereign polity to a greater degree of autonomy and linguistic or religious identity without forming an independent state.⁴

It has both internal and external dimensions providing a gloss on the notions of state sovereignty, the equality of states and non-intervention.⁵ Contestation over self-determination arises from its definition and its basis and meaning.⁶ Despite this contestation the concept has been widely accepted as a legal right of peoples to determine their political, economic, social and

² Hilary Charlesworth and Christine Chinkin, *the Boundaries of International Law: A Feminist Analysis*, Manchester: Manchester University Press, 2000, 151.

³ Gebre Hiwet Tesfagiorgis, 'Self Determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea', *Wisconsin International Law Journal*, vol. 6, 1987, 76.

⁴ Morton Halperin, David Scheffer and Patricia Small, *Self Determination in the New World Order*, Washington, DC: Carnegie Endowment for International Peace, 1992, xi.

⁵ Hilary Charlesworth and Christine Chinkin, note 2.

⁶*Ibid.*

cultural destiny.⁷ The right also embraces disposition and control over natural resources and the right not to be deprived of the means of sustenance.⁸

Despite the recognition of the right to self-determination in international law, the concept continues to be contentious because it challenges some of the fundamental principles of international law. It challenges the sovereignty of states and their territorial integrity, it interferes with matters within domestic spheres of states such as the protection of human rights of minorities, and it makes international relations, based on equality of states, uncertain.⁹ It is against this claim that self-determination in post-colonial Africa was either viewed with limited enthusiasm or exercised with extreme caution, especially when the claim to self-determination contained an aspiration for secession or independence. Since the striving for external self-determination which was characterized by a bitter struggle between the colonizers and the colonized came to an end, African countries were less interested in supporting the internal dimension of self-determination, in the belief that such support would challenge territorial integrity of states and encourage secessionist claims.

The tendency of post-independence African leaders to accumulate state resources for their own good and grant money and influence disproportionately to the members of their ethnic groups at the expense of other ethnic groups meant that resentment and rivalry against various ethnic groups complicated the entire quest for statebuilding in post-colonial Africa. Similarly, general poor governance led some of their own citizens to demand greater involvement in the management of both political and economic affairs in their countries, if necessary by force. It

⁷Common Art.1, ICCPR and ICESCR. See also Guyora Binder, 'The Case for Self Determination', *Stanford Journal of International Law*, vol. 19, 1992-1993, 223.

⁸ A. Cassese, *'Self Determination of Peoples: A Legal Reappraisal'*, Cambridge: Cambridge University Press, 1999.

⁹ Robert McCorquodale, *Self Determination in international law*, Aldershot: Ashgate, 2000, xi.

was partly because of this failure to involve other ethnic groups in benefiting from economic and political opportunities available that most of the struggles for the right to self-determination occurred in post-independence Africa.

The key question to pose is, who are the beneficiaries of the right to self-determination? International law contends that the beneficiaries of this right are the ‘peoples’, but hardly it explains who the peoples are and how we identify them. The use of variants such as ‘national self-determination’ or ‘self-determination of peoples’ may seem to indicate that groups which may invoke the principle include ‘nations’ and ‘peoples’. But how do we identify the ‘self’? This question is relevant when considered in the context of Southern Sudan. While in his report for the United Nations the UN Special Rapporteur on Prevention of Discrimination and Protection of Minorities, Aureliu Cristescu, argued that ‘people’ denotes a social entity possessing a clear identity and its own characteristics, it implies a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population. In the same report he cautions that people should not be confused with ethnic groups whose status is recognized in different international legal instruments.¹⁰

Examining this description by Cristescu, it is clear that ‘peoples’ share common attributes such as commonality of interests, group identity, distinctiveness and a territorial link.¹¹ However, understanding ‘people’ in this context raises some complex questions such as ‘who *is* the people’ and ‘who *belongs* to the people’. In addition to the discussion on Southern Sudan in this chapter, it can be noted that the same challenge has been witnessed in Western Sahara over the past four

¹⁰ A. Cristescu, *The Right to Self Determination, Historical and Current Development on the Basis of United Nations Instruments*, New York: United Nations, 1981, para 279.

¹¹ Richard Kiwanuka, ‘The Meaning of ‘People’ in the African Charter on Human and People’s Rights’, *American Journal of International Law*, vol. 82, 1988, 83-84.

decades.¹² Despite these complexities, it is worth noting that the term ‘peoples’ has increasingly been clarified to include a community of individuals bound together by mutual loyalties, an identifiable tradition, and common cultural awareness, with historic ties to a given territory.¹³

The Committee of experts that drafted the African Charter on Human and Peoples Rights never defined the concept of ‘peoples’. Rather, the Chairman of the drafting Committee, Judge Keba Mbaye, in his report to the OAU Council of Ministers concluded that ‘the Committee refused to indulge in the definitions of such notions as ‘peoples’ so as not to end up in difficult discussion’.¹⁴ The International Commission of Jurist made an attempt to define what constitutes ‘peoples’ in the context of self-determination. It suggested that communities recognized as people have certain common attributes which can be historical, ethnic, racial, cultural, linguistic, religious, geographical, economic or territorial. Yet it emphasized that none of the attributes are in themselves sufficient to prove that a community constitutes a people.¹⁵

Self-determination is increasingly becoming both a uniting and a divisive factor. Parts wanting to break away from unified states have justified their position by invoking the right to self-determination. Equally, some societies and countries have argued their case for reunification based on self-determination. Classic examples of the latter are the reunification of Yemen and of the Federal Republic of Germany and the German Democratic Republic (GDR) after the fall of

¹² For a historical account of this conflict see Thomas Franck, ‘The Stealing of the Sahara’, *American Journal of International Law*, vol. 70, 1976.

¹³ Robert A. Friedlander, ‘Proposed Criteria for Testing the Validity of Self Determination as it Applies to Disaffected Minorities’, *Chitty’s Law Journal*, vol. 25, 1977, 335-336.

¹⁴ Michael Addo, ‘Political Self Determination within the context of the African Charter on Human and People’s Rights’, *Journal of African Law*, vol. 32, 2, 1988, 184.

¹⁵ *Report of the International Commission of Jurist on the Events in East Pakistan 1971, 1972*, 70.

the Berlin Wall.¹⁶ The treaty on the final settlement for the formation of a unified Germany formally acknowledged that German unity was brought about as the result of the exercise by the German people of its right to self-determination.¹⁷ Yet, it can be argued that these examples are unique in the sense that they have not been replicated elsewhere. Rather, most peoples have invoked self-determination as a basis for separation rather than unification.¹⁸ From the colonial territories demanding their independence to the disintegration of the former Yugoslavia,¹⁹ the break-up of the Soviet Union, the secession of Eritrea and now South Sudan, self-determination to form independent countries has been central to their claims.

C. The development of the concept of self-determination

Self-determination gained prominence in the early 20th century during the First World War when the United States under President Wilson became its foremost proponent. President Wilson's support was motivated by the belief that 'people had the right to choose their own sovereignty and be free from external coercion or alien domination'.²⁰ He supported upholding 'the liberty, the self government and undictated development of all peoples'. To him it was clear that no 'people should be forced under sovereignty under which it does not wish to live and no territory should change hands except for the purpose of securing those who inhabit it a fair chance of life

¹⁶ Michael Meyer, *The Year that Changed the World: The Untold Story Behind the fall of the Berlin Wall*, New York: Simon & Schuster, 2009. See also Peter Schweizer (ed.), *The Fall of the Berlin Wall: Reassessing the Causes and Consequences of the End of the Cold War*, Stanford: Hoover Institution Press, 2000.

¹⁷ Christian Tomuschat, 'Self Determination in a Post Colonial World' in C. Tomuschat (ed.) *Modern Law of Self Determination*, Dordrecht: Martinus Nijhoff Publishers, 1993, 3.

¹⁸ C. Tomuschat, *ibid.*, 4.

¹⁹ See Richard Iglar, 'The Constitutional Crisis in Yugoslavia and the International Law of Self Determination: Slovenia's and Croatia's Right to Secede', *Boston College International and Comparative Law Review*, vol. 15, 1, 1992, 213-240. See also Garry Wilson, 'Self Determination, Recognition and the Problem of Kosovo', *Netherlands International Law Review*, vol. 56, 3, 2009, 455-481, and Steve Terret, *the Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peacemaking Efforts in the Post-Cold War Period*, Aldershot: Ashgate, 2000.

²⁰ Message from President Wilson to Russia, June 9, 1917, Washington.

and liberty'.²¹ What this statement of Wilson demonstrates is the belief that people should be free to determine their own destiny without being coerced to accept any form of sovereignty which may be imposed on them against their wishes'.²²

However, President Wilson's support for self-determination should not obscure the larger goal of this commitment. The idea of self-determination was combined with that of the liberal state which President Wilson was committed to advance. In the liberal context, political authority derives from individuals. It assumes that individuals are free and equal and the purpose of political institutions is to protect that freedom. A liberal state is characterized by constitutionalism and the rule of law as the best means of guaranteeing individual freedoms, as well as its representative and democratic character. The authority of government is seen to derive from the people in a generic rather than a national sense, as the group of individuals composing the population of a state.²³ Yet, it is clear that not everybody, not even all Wilson's colleagues in the government, shared his views on the liberty of all 'mankind' and their right to choose their own destiny.

For example, Robert Lansing, the Secretary of State, raised a legal critique and was categorical that this declaration by President Wilson was 'unfit' for some races. He asked, 'when the President talks of 'self-determination', what unit had he in mind? Did he mean a race, a territorial area or a community? Without a definite unit which is practicable, Lansing thought, application of this principle is dangerous to peace and stability; the more he thought about the President's declaration on the right of self-determination, the more convinced he was of the danger of

²¹*Ibid.*

²² W. Wilson, 'An Address to a Joint Session of Congress' in A.S. Link (ed.) *The Papers of Woodrow Wilson*, Princeton, NJ: Princeton University Press, 1984, vol. 46, 318-24.

²³J. Rawls, *the Law of the Peoples*, Cambridge, MA: Harvard University Press, 1999, 14.

putting such ideas into the minds of certain races.²⁴ It was bound to be the basis of impossible demands on the post-war Peace Congress and create trouble in many lands, Lansing considered; the phrase was simply loaded with dynamite, it would raise hopes which could never be realized.²⁵

Reading the views of Secretary Lansing, one can point out that he was afraid of the fact that black people in the US who had been subjected to injustice and oppression, might have relied on the declaration to demand more rights from the US government. It can further be argued that Secretary Lansing was being sympathetic to European colonial powers which controlled vast territories across the world. Reaffirming the right to self-determination of peoples in colonial territories would mean repudiating colonial powers' interests in these territories. Indeed, when he stated that 'I am of the danger of putting such ideas into the minds of certain races' he was saying categorically that self-determination would be relied upon by the people in these colonial territories and the US itself to claim their freedoms as such it was seen as a dynamite. It is not surprising therefore that within the US and colonial metropolis they did not interpret this concept as granting an avenue for freedom or independence for those they oppressed or colonised.

In the 1941 Declaration of Principles the President of the United States and the Prime Minister of the United Kingdom reaffirmed that 'the signatories desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned and that the signatories respect the right of all peoples to choose the form of government under which they will live, and they wish to see sovereign rights and self government restored to those who have been forcefully

²⁴ Robert Lansing, *The Peace Negotiations: A Personal Narrative*, Boston: Houghton Mifflin, 1921, 97-98.

²⁵ *Ibid.*

deprived of them'.²⁶ Similarly the Yalta Declaration of 1945 reaffirmed and pledged signatories to the 'earliest possible reestablishment through free elections of government responsive to the will of the people'.²⁷

D. Self-determination and the United Nations

The objectives outlined in the Yalta Declaration were concretized by the adoption of the United Nations Charter in San Francisco in 1945.²⁸ The Charter categorically affirmed the principle of equal rights and self-determination of peoples.²⁹ The purposes of the United Nations were 'to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace'.³⁰ It is the recognition and subsequent incorporation of this principle in the UN Charter that made the United Nations the undisputed platform in which claims and counterclaims arising from the principle were historically advanced.³¹ Indeed, the United Nations General Assembly has unequivocally reaffirmed the right of 'all peoples to have the right to self-determination' through different resolutions and declarations.³²

However, it should be pointed out that the biggest contradiction of the UN's inclusion of self determination in the Charter was that South Africa was one of the founding members of the United Nations despite its *apartheid* system. Similarly, United Kingdom, France and Portugal,

²⁶'The Atlantic Charter'. Available at: http://www.nato.int/cps/en/natolive/official_texts_16912.htm. Accessed March 2013.

²⁷ Patrick Thornberry, 'The Democratic or Internal Aspect of Self Determination' in Christian Tomuschat (ed.), above note 17, 108.

²⁸Charter of the United Nations.

²⁹ Art. 1 (2) of the UN Charter.

³⁰*Ibid.*, Article 1.

³¹Tsfagiorgis, above note 3, 83.

³² See for example, UNGA Resns 1514 and 1541 of December 1960.

founding members of the Charter, had vast colonies which directly contravened the ideal of self determination they were reaffirming in the UN Charter. It is this reality which challenges the commitment of the UN founding members to the principle of self determination.

It was after the Second World War that self-determination in international law became directly linked to colonialism and decolonization.³³ Even before the war the concept was widely recognized as the basis upon which the colonized and the oppressed could base their claims for independence, but it was after this period that colonized countries and territories came out to assert their independence claims by invoking the right to self-determination.³⁴ The importance of the UN Charter in advancing the right to self-determination can be seen in its role in the decolonization process. Chapters XI and XII of the Charter provided for the 'non-self governing territories' and 'trust territories'. Articles 73 and 76 of the Charter called upon states administering non-self-governing territories 'whose peoples have not yet attained a full measure of self government' to promote 'self government, take due account of the political aspirations of the peoples and assist them in the progressive development of their free political institutions'. The significance of these provisions lay in their promotion of self-government regardless of any internal ethnic, linguistic or religious divisions.³⁵

While the Universal Declaration of Human rights adopted in 1948 does not expressly mention 'self-determination', nevertheless the declaration has some provisions which can be considered to support self-determination. For example, the Declaration states that 'the will of the people shall be the basis of the authority of government; which shall be expressed in periodic and

³³ See generally Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (de)composition of Law' in Diane Kirkby and Catherine Coleborne (eds), *Law, History, Colonialism: The Reach of Empire*, Manchester: Manchester University Press, 2001, 9-25.

³⁴ Patrick Thornberry, above note 27.

³⁵ Morton H. Halperin et al., above note 4, 19-21.

genuine elections by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'.³⁶ What this provision means is that people should be given and guaranteed an opportunity to determine their authority over affairs which concern them. This aspect can be considered to relate to self-determination which equally calls for guarantee of peoples' right to determine their destiny.

The adoption of the two international human rights covenants on economic, social and cultural rights and civil and political rights further crystallized the right to self-determination beyond the confines of decolonization, by explicitly recognizing it as part of human rights.³⁷ The common Article 1 addresses self-determination not only on the political front but also on the economic and cultural front, by observing that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law'.³⁸ What is notable in these instruments is that they give self-determination the characteristics of a collective right and also a prerequisite for existence and realization of individual rights, mainly because the latter cannot be attained without a full exercise of self-determination. Further, the significance of the ICCPR in articulation of the rights of minorities can be seen in Article 27 which reaffirms that 'in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.³⁹

³⁶ Art. 21 (3) UDHR.

³⁷ ICCP & ICESCR.

³⁸ See common Art. 1, *ibid*.

³⁹ Art. 27 ICCPR.

The 1970 Declaration on Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations reaffirms that by virtue of the principle of equal rights and self-determination of peoples enshrined in the UN Charter, all people have a right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development.⁴⁰ Arguably the importance of this Declaration is immense in the sense that it explicitly links rights of the governed, territorial integrity and the welfare of peoples. Specifically, paragraph 7 of the Declaration states that ‘nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour*’(emphasis added).

The International Court of Justice (ICJ) has also reaffirmed the inherent right of peoples to self-determination. For example, in its Advisory Opinion in the case of *South West Africa* (Namibia) the Court reaffirmed the inherent right to self-determination for peoples in a defined territory, with a strong support for the demand for secession (from South Africa).⁴¹ In this case the Court opined that the right to self-determination is generally accepted as part of customary international law. For the ICJ, self-determination was more than a guiding principle to be heeded and promoted by the United Nations, it was a fully fledged right that could be invoked by its holders to claim separate statehood and sovereign independence. Similarly, in the *East Timor* case

⁴⁰ UNGA Resolution 2625 (XXV) (*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*), October 1970.

⁴¹ ‘Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970)’, Advisory Opinion, (1971) ICJ Rep 16; (Namibia case). For further discussion on this case see for example Michla Pomerance, ‘Case Analysis, The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment’, *Leiden Journal of International Law*, vol. 12, 1999, 425-436.

between Portugal and Australia, the ICJ agreed with Portugal that the people of East Timor had the right to self-determination to determine their destiny. In its decision the Court opined that not only do the East Timorese people have the right to self-determination, but also the right to self-determination has assumed the character of *erga omnes* amply recognized by the UN Charter and the Court's jurisprudence.⁴²

However, the key question is, when does internal self-determination become external? This question can only be answered by examining the context of Principle 5 of the Declaration on Friendly Relation discussed above. To comply with the principle of equal rights and self-determination of peoples a state must have a government 'representing the whole people belonging to the territory without distinction as to race, creed or colour'. Thus, if the government does not comply with these requirements, it cannot claim to represent the people.⁴³ What this Declaration demonstrates is that the state is under a basic obligation to protect the life and the physical integrity of its citizens for it to claim sovereignty over them. But when does the state not represent the whole people without distinction as to race, colour or creed? For example, if the state persecutes its own people or specific group of its population by committing genocide or war crimes, that particular group cannot be held or expected to remain loyal under the jurisdiction of that state.⁴⁴ In this perspective, self-determination moves from being a legal right *per se* to also connote a principle and process of legitimacy.

⁴²*East Timor (Portugal v Australia)*, (1995) ICJ Rep 90; 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', Advisory Opinion, (2004) ICJ Rep 136.

⁴³ M.G. Nayar, 'Self-Determination beyond the Colonial Context: Biafra in Retrospect', *Texas International Law Journal*, vol. 10, 1975, 337.

⁴⁴Christian Tomuschat, 'Self-Determination in a Post- Colonial World', in Tomuschat (ed.) above note 17, 9.

E. The OAU and the right to self-determination

The preceding discussion has outlined the development of the right to self-determination in international law, and how it has evolved from being a right exercised in the colonial context to a fully-fledged right guaranteed by various international human rights instruments. This discussion provides a compelling need to further examine the development of the right to self-determination within the African context and with reference to Southern Sudan in particular. This discussion is crucial because Africa is a continent where for the right to self-determination continue to be contested by different groups of people. Citing different examples, the discussion will demonstrate that in post-colonial Africa various demands for self-determination have been premised on the basis of human rights violation and disregard of the rule of law, as in Biafra, Eritrea or Southern Sudan.

The right to self-determination has a long and protracted history in Africa. In the struggle leading to independence most African countries underwent shared experiences – the debilitating effects of the slave trade and colonialism by Western powers and Arabs.⁴⁵ When African countries achieved independence, mostly in the 1960s, they faced a myriad challenges in remaining as viable states as had been defined by their departing colonial masters without altering their existing territorial borders.⁴⁶ This is because with the advent of colonialism, states and nationalities had been arbitrarily divided, unrelated communities and people were arbitrarily joined together just as united people were torn apart.⁴⁷ The irrationality and selfishness by which the borders had been drawn by the colonial powers were recognized by African countries, but it

⁴⁵ U.O. Umozurike, *Self Determination in International Law*, Hamden, CT: Archon Books, 1972, 96.

⁴⁶ E.K.M. Yakpo, 'The African Concept of Uti Possidetis-Need for Change?' in E.K.M. Yakpo and T. Boumedra (eds), *Liber Amicorum: Judge Mohammed Bedjaoui*, Dordrecht: Martinus Nijhoff Publishers, 1999, 274-277.

⁴⁷ Muna Ndulo, 'Constitution Making in Africa: Assessing both the Process and the Content', *Public Administration and Development*, vol. 21, 2001, 104.

was hoped by some that independence would be followed by a re-drawing of boundaries in order to put split national groups within the same territorial units.⁴⁸

However, Africa's post-independence leaders believed that, while there were injustices, they could better be dealt with through functional arrangements between sovereign states.⁴⁹ To address this challenge and others, independent African states decided to establish the Organization of African Unity (OAU).⁵⁰ The OAU Charter reaffirmed that 'determined to safeguard and consolidate the hard won independence as well as the sovereignty and territorial integrity of our states, and to fight against the neo colonialism in all its forms....the Organization shall have the following purposes (c) to defend their sovereignty, their territorial integrity and independence'.⁵¹ As a way of concretizing the aspirations of peaceful coexistence and respecting territorial integrity of its member states the African leaders made a provision for the establishment of the Permanent OAU Commission on Mediation, Conciliation and Arbitration to adjudicate any future territorial disputes between African states.⁵²

Closer scrutiny of the application of the concept of self-determination in the African context reveals that it was limited to the external dimension, directed against colonial powers. In other words self-determination was seen as a right only guaranteed to colonized and oppressed people against non-African powers.⁵³ This is shown by the fact that African leaders never replicated

⁴⁸ Makau Mutua, 'Why Redraw the Map of Africa: A Legal and Moral Enquiry', *Michigan Journal of International Law*, vol. 16, 4, 1995, 1113-1177.

⁴⁹ Thomas Franck, 'The Stealing of the Sahara', *American Journal of International Law*, vol. 70, 1976, 698.

⁵⁰ The Charter of the Organization of African Unity, 479, *U.N.T.S.* 39, entered into force September 13, 1963.

⁵¹ Art. II of the OAU Charter.

⁵² *Ibid.*, Art. XIX.

⁵³ Tom Franck, *Fairness in International Law and Institutions*, Oxford: Oxford University Press, 1995, 154-162. See also D. Cass, 'Rethinking Self determination: A Critical Analysis of Current International Law Theories', *Syracuse Journal of International Law and Commerce*, vol. 18, 1992, 28-32.

their efforts at the international level within their own borders. For example, while they claimed a right to economic self-determination through the doctrine of permanent sovereignty over natural resources against the colonial masters, African leaders did not grant these rights to their own people.⁵⁴ Similarly, while they sought freedom against oppression by the colonizers, they were at the forefront of oppressing their own people by denying them what they had demanded strenuously from colonial masters. The situation in South Africa under apartheid rule was different; it can be considered as 'internal' colonization.

It can be argued that human rights violations and disregard of the rule of law significantly influenced the embracing of self-determination as an integral component of human rights in Africa. Indeed, the gross violations of human rights that characterized post-independence Africa led to the negotiation and eventual adoption of the African Charter on Human and Peoples Rights in 1981.⁵⁵ Article 20 of the Charter specifically reaffirms that '1. All peoples shall have the right to existence and shall have the unquestionable and inalienable right to self-determination to freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community and 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural'.⁵⁶

⁵⁴ E. Harsch, 'Accumulators and Democrats: Challenging State Corruption in Africa', *Journal of Modern African Studies*, vol. 31, 1, 1993, 31-48.

⁵⁵ Rachel Murray, *Human Rights in Africa: From the OAU to the African Union*, Cambridge: Cambridge University Press, 2004.

⁵⁶ Art. 20 ACHPR.

The African Commission on Human and Peoples Rights has also contributed in the reaffirmation of the right to self-determination as stipulated in the African Charter on Human and Peoples Rights. In the case of *Katangese Peoples' Congress v Zaire*, the Commission was very keen to balance between the right to self-determination and territorial integrity of Zaire.⁵⁷ The brief facts of this case are as follows: the Katangese Peoples' Congress (KPC) was an organization claiming to represent the population of Katanga, a mineral rich region of Zaire (currently DR Congo), which had previously attempted to secede from the Congo in 1960. The aim of the application in 1992 was to obtain recognition for the organization as a liberation movement entitled to international support to achieve independence as an independent state distinct from Zaire (DRC).⁵⁸

Two issues stood out as central to the claim of the Katangese Peoples Congress against the government of Zaire: the alleged violations of human rights by the government against Katangese people and the claim that the people of Katanga were denied the right to participate in government affairs as guaranteed by Art. 13 of the African Charter.⁵⁹ On both aspects the Commission found against the applicants, concluding that 'the Katangese were therefore obliged to exercise a variant of self determination that is compatible with the sovereignty and territorial integrity of Zaire'.⁶⁰ What these findings by the Commission demonstrate is that the Commission believed that allegations of human rights violation or non-participation of the people in governmental affairs were issues that could be addressed within the domestic context of the polity concerned, without a region of that polity necessarily opting for independence. However,

⁵⁷*Katangese Peoples' Congress v Zaire*, Communication No. 75/92.

⁵⁸ For more information on this case see Rachel Murray and Malcolm Evans (eds), *Documents of the African Commission on Human and Peoples' Rights*, Oxford: Hart Publishing, 2001 and 2009.

⁵⁹ Article 13 guarantees the right of every citizen to participate freely in the government, equal access to the public service and the right of access to public property and services in strict equality of all persons before the law.

⁶⁰*Ibid.*, above note 57.

if the opposite outcome is contemplated, it would have reaffirmed the fact that governments have responsibility to 'represent the whole people without distinction' as provided for in various international and regional human rights instruments.

What is significant in this case is the approach of the Commission, which seems to have been concerned to balance the right to self-determination and the territorial integrity of Zaire. Addressing the question of self-determination, the Commission opined that this could be exercised in a variety of ways such as through 'independence, self government, local government, federalism, confederalism, unitarism or any other form that accords with the wishes of the people'.⁶¹ However, the Commission was of the view that the exercise of these options had to be fully cognizant of other recognized principles of international law such as state sovereignty and territorial integrity. Reinforcing its conviction on the latter aspect, the Commission stated that it had a duty 'to uphold sovereignty and territorial integrity of Zaire as OAU member state and a party to the African Charter on Human and Peoples' Rights'.⁶²

It can therefore be argued that the decision of the Commission was not different from the practice of the OAU and its members, which were keen to preserve the territorial integrity of the member states at the cost of alleged violations of human rights and abuse of the rule of law. The Commission's interpretation of self-determination as reflected in the Katangese question reaffirms the views that African countries and institutions have been willing to support self-determination but have wanted to see it limited to responses to foreign domination.

Despite the above discussion which illustrates the strict interpretation of self-determination by the OAU as limited to the colonial context, there are some instances where the organization has

⁶¹ *Ibid.*

⁶² *Ibid.*

been willing to support self-determination even if it leads to violation of the territorial integrity of its member states. The examples of Biafra, Eritrea and Western Sahara demonstrate the consistent nature of the OAU position on self-determination. While it rejected Biafra's claim to self-determination it endorsed Eritrea's and Western Sahara's claims albeit based on different circumstances. The OAU endorsement of the self determination for Eritrea can be attributed to the fact that in Eritrea there was an internal arrangement between the new (1991) Ethiopian government and the Eritrean People's Liberation Front which had fought alongside the Ethiopian party forming the new government against the Mengistu regime in Ethiopia. While in Western Sahara the OAU and later AU supported self-determination because the situation was considered in the context of colonial rule and decolonisation. It can therefore be argued that the situations in Sudan and Eritrea both were endorsed by the continental body after internal arrangement which had agreed to self determination.

The African Union Constitutive Act, successor to the OAU Charter, similarly makes respect for the territorial integrity and sovereignty of states the foundation upon which its members relate. It requires all member states to refrain from interfering in internal matters of another without express authorization to do so.⁶³ Yet, the Constitutive Act, unlike the OAU Charter, puts protection of human rights and advancement of rule of law at the core of its primary objectives. It also grants power to the AU and its member states to intervene in internal affairs in cases of atrocity crimes or threats to peace and security of the continent. The question to pose is, does this departure from the strict interpretation of the OAU doctrine of non-intervention and respect for territorial integrity signal a new era when the organization can intervene in case of gross violations of human rights and rule of law as stipulated in the Constitutive Act? As Southern Sudan's example shows, the reaction of the AU to claims for self-determination is

⁶³ Art. 4 of the African Union Constitutive Act. See also Pierre Englebert and Rebecca Hummel, 'Let's Stick Together: Understanding Africa's Secessionist Deficit', *African Affairs*, vol. 104, 2005, 401.

premised on the need to preserve territorial integrity of its members even when such claims are justified by gross violations of human rights and the rule of law. However, the organization has been willing to support self-determination when it is a result of an internally agreed arrangement, as happened in Sudan.

F. Self-determination and secession

Where independence is the goal, acceptance of one group's claim to self-determination necessarily implies denial of another group's competing claim of territorial integrity.⁶⁴ Naturally, the argument would be that no state would accept the principle that at its own choosing some segments of people in its territory will be free to secede either to become independent or to join a neighbour. Exercising the right to self-determination need not always involve secession to form an independent state,⁶⁵ but it is evident that the major challenge in international law has been and continues to be reaffirming the right of peoples to self-determination while adhering to the doctrine of territorial integrity.⁶⁶ Indeed, this observation is echoed by Crawford who observes that 'Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent states if the secession is opposed by the government of that state'. He further notes that 'since 1945 no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the predecessor state'.⁶⁷

There is a tension between territorial integrity and self-determination; while the former seeks to preserve the territorial status quo, the latter is at least potentially aimed at territorial

⁶⁴Hurst Hannum, 'Rethinking Self-determination', *Virginia Journal of International Law*, vol. 34, 1993, 41.

⁶⁵ UNGA Res. 1541/1960. See also, Rupert Emerson, 'Self Determination', *American Journal of International Law*, vol. 65, 1971, 464.

⁶⁶ Dietrich Murswiek, 'The Issue of a Right to Secession-Reconsidered' in Christian Tomuschat (ed.), above note 17, 21-35.

⁶⁷ James Crawford, *The Creation of States in International Law*, 2nd ed. Oxford: Clarendon Press, 2006, 390.

reconfiguration. The challenge is due to the reality that the emergence of a new state to the detriment of an older sovereign entity disrupts the composition of international society and challenges the very foundations of its main actors.⁶⁸ Despite this fact it is worth noting that the decolonization process through which many countries became independent was never considered by international law as a case of secession. In fact the UN General Assembly reaffirmed this distinction by stating that ‘the territory of a colony or other non self governing territory has under the Charter a status separate and distinct from the territory of the state administering it’.⁶⁹

But can we contend that self-determination explicitly leads to secession? To answer this question an examination of the decision of the International Court of Justice in the *Kosovo Case* may be helpful.⁷⁰ While the majority opinion in this case did not address the question of secession in international law,⁷¹ the *Kosovo Case* remains a significant legal landmark in the development of the principle of self-determination with a possibility of secession in international law.⁷² The separate dissenting opinion of Judge Abdulqawi Yusuf categorically and explicitly reaffirmed the recognition of the right to self-determination with the possibility of secession under certain circumstances. Judge Yusuf, while conceding that ‘the right to self determination chiefly operates inside the boundaries of existing states’,⁷³ went on to opine that: ‘International law does not turn

⁶⁸ Marcelo G. Kohen, ‘introduction’ in Marcelo G. Kohen (ed.), *Secession: International Law Perspective*, Cambridge: Cambridge University Press, 2006, 1.

⁶⁹*Ibid.*, above note 40.

⁷⁰*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010.

⁷¹ ‘Request for an Advisory Opinion on the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law’, UNGA, 63rd Sess., UN Doc A/Res/63/3 (2008).

⁷² Andrew Coleman, ‘Determining the Legitimacy of Claims for Self Determination: A Role for the International Court of Justice and the Use of Preconditions’, *St. Antony’s International Review*, Vol. 6, No. 1, 2010, 57-78.

⁷³*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, (2010), *Separate Opinion* of Judge Yusuf, para 9.

a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of self-determination but also subjects them to discrimination, persecution, and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law'.⁷⁴

Judge Yusuf further noted that 'to determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be considered, such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government. All possible remedies for the realization of internal self-determination must be exhausted before the issue is removed from the domestic jurisdiction of the State'.⁷⁵

Examining the Opinion of Judge Yusuf, it is evident that a self-determination claim should be distinguished from a demand to secede. This is critical because most societies demanding self-determination have always put secession at the heart of their claims.⁷⁶ But one can argue that secession constitutes a matter of considerable importance to the international community in a number of ways. Secession has an impact on the structure of states and how they relate. Territories resulting from secession may lack, at least in early years, the economic and military strength of the previous unified state able to defend its borders. Taking South Sudan as an example, it is clear that secession has resulted in an independent state heavily dependent upon the international community for its continued viability, for purposes of economic and social

⁷⁴ Opinion of Judge Yusuf, *ibid.*, para. 11.

⁷⁵ *Ibid.*, para. 16.

⁷⁶ See generally David Raic', *Statehood and the Law of Self determination*, Dordrecht: Martinus Nijhoff Publishers, 2002.

protection.⁷⁷ But in addition secession, depending on the grounds leading to it, may encourage similar movements elsewhere, when people in such territories consider themselves to be in a similar situation.⁷⁸

After examination of various international and regional instruments as pronouncements of the International Court of Justice or the African Commission on Human Rights on self-determination, it is contended that in international law the recognition of and respect for the territorial integrity of a particular state are not protected to an unlimited extent.⁷⁹ States have an international obligation to ensure that their conduct does not disrupt international peace and security and they do not commit international crimes such as genocide, war crimes or crimes against humanity against their own people. In other words, states must earn the protection of their territorial integrity. Indeed, it is on the basis of this basic duty that modern international law recognizes the concept of humanitarian intervention and responsibility to protect to avert humanitarian catastrophes.⁸⁰

It can further be argued that there has been inconsistent recognition and application of standards when it comes to support for self-determination, especially self-determination with the potential for secession. While clearly many states agree that self-determination with the possibility of

⁷⁷ The UN ranks Southern Sudan as one of the poorest countries in the world with the least likelihood of attaining the Millennium Development Goals.

⁷⁸ Aaron Kreuter, 'Self Determination, Sovereignty and the Failure of States: Somaliland and the Case for Justified Secession', *Minnesota Journal of International Law*, vol. 19, 2010.

⁷⁹ An example of this position is well articulated by Switzerland in its submission to the ICJ during the Kosovo proceedings. See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 'Written Statement of Switzerland' (25 May 2009).

⁸⁰ See Miles Kahler, 'Legitimacy, Humanitarian Intervention and International Institutions', *Politics, Philosophy and Economics*, vol. 10, 1, 2011, 20-45.

secession may be exercised as a last resort, as demonstrated by submissions by Germany⁸¹ and the Netherlands⁸² to the ICJ during the Kosovo case, other states have different views. For example, Russia has acknowledged this aspect but with stringent conditions.⁸³ The implication of the latter conditions submitted by Russia are so restrictive that they effectively nullify any value such a principle regarding secession may have in international law. Other countries such as Bolivia,⁸⁴ China⁸⁵ and Azerbaijan⁸⁶ have rejected any possibility of self-determination with the

⁸¹ In its submission Germany argued that limiting the right to self-determination to the colonial context would 'render the internal right of self-determination meaningless in practice. There would be no remedy for a group which is not granted the self-determination that may be due to it under international law'. Germany further contended that, in exceptional circumstances, a right to remedial secession arises under two conditions. The first condition requires 'an exceptionally severe and long-standing refusal of internal self-determination by the State in which a group is living'. The second condition requires 'that no other avenue for resolving the resulting conflict'. See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 'Written Statement of Germany' (15 April 2009).

⁸² In its submission the Netherlands argued that the exercise of the right to external self-determination is subject to the fulfilment of substantive and procedural conditions that apply cumulatively. Such a right only arises in the event of a 'serious breach' of (a) the obligation to respect and promote the right of self-determination, or (b) the obligation to refrain from any forcible action which deprives peoples of this right (substantive condition). The Netherlands further argued that this obligation is breached when fundamental human rights are denied or the government does not represent all of the people belonging to its territory. Before exercising the right to secession, 'all effective remedies must have been exhausted to achieve a settlement (procedural condition)'. See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 'Written Statement of the Netherlands' (17 April 2009).

⁸³ Russia in its submission contended that the 1970 Declaration on Friendly Relations 'may be construed as authorizing secession under certain conditions. However, these conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question. Russia further made it clear that secession in such circumstances must be 'invoked both contemporaneously with the extreme circumstances and also, only, as a last resort'. See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 'Written Statement of the Russian Federation' (16 April 2009).

⁸⁴ Bolivia explicitly stated that 'the fact that a State pursues a discriminatory policy against an ethnic group cannot, as such, give rise to a right to unilateral secession'. See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 'Written Comments of Bolivia' (17 July 2009), 4.

⁸⁵ China argued that 'territorial integrity has constituted the most important principle of international law and the basic norm governing international relations'. It further rejected any claim of secession by stating that 'secession is not recognized by international law and has always been opposed by the international community of States':

possibility of secession based on claims such as gross human rights violations. Rather these states view such claims as foreign intervention with geopolitical interests. Yet it can be argued that the restrictive position of these countries should be understood in light of their own position in which they are experiencing significant calls for self-determination within their own territories; they may consider that endorsing secession on whatever grounds in international fora such as the ICJ could indicate that they agree with claims advanced by these movements in their respective countries—position which they wish to avoid.

From an international law perspective, the right to self-determination entails the right of the people to determine their destiny without external influence. However, it is worth noting that progressively international law has reaffirmed the duty of states and peoples to exercise this right responsibly. In other words, each state has a responsibility to ensure that its sovereign actions are consistent with international human rights standards and the United Nations Charter. For example, although a country decides on how it conducts its affairs, it also owes an obligation *erga omnes* to the international community to ensure that its conduct does not endanger international peace and security.⁸⁷

From examination of various cases and situations of self-determination in Africa, it can rightly be argued that in post-independence Africa, self-determination has been pursued as the direct

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 'Written Statement of China' (16 April 2009), 2-8.

⁸⁶ Azerbaijan, rejecting any right to claim secession in international law, argued that 'international law does not create grounds and conditions for legitimizing unilateral or non-consensual secession in any sense. Such secession from an existing sovereign State does not involve the exercise of any right conferred in international law'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 'Written Statement of Azerbaijan' (17 April 2009), 5.

⁸⁷Oscar Schachter, 'The Legality of Pro-democratic Invasion', *American Journal of International Law*, vol. 78, 3, 1984, 645-650.

remedy for disregard of the rule of law. Yet, it is this scenario that provides a compelling need to question whether self-determination does indeed create an amenable environment where rule of law can be guaranteed and protected. It is in a quest to answer these questions that the following discussion will examine these claims in the context of Southern Sudan.

G. Self-determination in the context of Southern Sudan

Southern Sudan represents a classic example of the tragic failure of one of the many post-independence African states to involve its diverse nationalities in the management of political as well as economic benefits accruing from their resources.⁸⁸ This example illustrates how economic, social and political marginalization of people in the South by the Sudanese government led to the growing chorus in the South not only for economic self-determination but also for complete secession to form a new state of Southern Sudan. As is widely recognized in international law, a group seeking self-determination is, by definition, one which feels that it has been excluded, albeit unjustifiably, from the community of legal individuals and the attendant benefits of citizenship recognized under international law.⁸⁹

A major challenge which faced negotiators of the Comprehensive Peace Agreement concerned (i) the identity of the 'peoples' who were entitled to exercise the right to self-determination and (ii) whether they had such a claim under international law. It was on the basis of this challenge that people in Abyei were excluded from the general framework of self-determination agreed under the Comprehensive Peace Agreement.⁹⁰ However, until today, seven years after the signing of the CPA the parties have failed to agree on who constitute the 'peoples' in Abyei for the

⁸⁸ Graham Thomas, *Sudan: Death of a Dream*, London: Darf Publishers, 1990, 181-223.

⁸⁹ Nathanael Berman, 'Sovereignty in Abeyance: Self Determination and International Law', *Wisconsin International Law Journal*, vol. 7, 1, 1988-1989, 52.

⁹⁰ While the negotiators adopted a separate protocol providing for a referendum in Abyei, as of 2013 they have failed to agree on the 'composition of peoples' entitled to exercise this right.

exercise of their right to self-determination. Clearly the issue of Abyei is not an isolated case. The current disagreement between Morocco and POLISARIO is due to the failure to identify 'people' who should vote in the referendum to determine the destiny of Western Sahara. This standoff illustrates the correlation between the collective right to self-determination and the individual's right to participate in co-determining his or her destiny. In the case of Western Sahara, while one side wants to rely on the census results of 1974, the other party proposes the inclusion of all people residing in the territory. It is this deadlock that has blocked any realistic implementation of the ICJ decision which calls for a referendum for people of Western Sahara to determine its destiny.

In the context of Abyei, what does this failure to identify the 'peoples' mean? It clearly shows that the right to self-determination cannot be taken as a self-evident right which can be invoked by a group which perceives itself as being reasonably distinct from its neighbour or marginalized by the centre. Why then has the Northern Sudanese government been so reluctant to allow the residents of Abyei exercise their right to self-determination as stipulated in the CPA Protocol? The definition of 'peoples' goes beyond the normative criteria identified by various international instruments and scholars identified above. When such residents occupy areas with strategic resources like oil, it is highly likely that their identity and plight will be contested between the parties, each party keen to identify or define the 'peoples' in the way that suits or advances its interests. For example, in Abyei the Khartoum government has argued that the Misseriya, a nomadic tribe largely from the North, should be considered as one of the 'peoples' allowed to vote in any referendum to determine the future of the region. That government's trick is simple. Allowing these people to vote would likely tilt the results in favour of the North, handing Abyei territory with its potential resources to the North. Because of this fear the Southerners rejected this proposal.

Examining the situation in Southern Sudan, which aspect of self-determination can be considered to have come about? Is it internal self-determination or the external aspect? It is argued that there were elements of both in Southern Sudan. Before opting for self-determination leading to independence the region had negotiated limited autonomy where it had been granted federal status within a unified state and the ability to determine its own affairs, under the Addis Ababa Agreement discussed in chapter two.⁹¹ Further, the negotiations and eventual signing of the CPA did not automatically lead to secession of the South, rather it led to the adoption of a new constitutional order for the entire country. Southern Sudan adopted its own constitution which granted it its own government and stipulated that the arrangement would last for six years, a period during which the central and regional governments had a duty to make the 'unity attractive'. Thus self-determination with an external dimension came as a response to the failure of the internal aspect of self-determination.

Southern Sudan's claim to the right to self-determination is unique in the sense that it was historically claimed not against external forces such as colonial powers, but rather against its own government. Unlike Biafra or Katanga where the secessionist forces were acting against the will of the government of the day in power and, by proxy, of the international community which faithfully adhered to the doctrine of territorial integrity, in Sudan the central government willingly agreed to the right to self-determination, albeit through political and military pressure from the rebels and desire to bring the war to an end. In other words, in Southern Sudan self-determination was seen as an internal arrangement to end the protracted conflict between the government and the rebels. It is also worth noting that it is in this period external actors assumed a prominent role to address the Sudan conflict peacefully. For example, IGAD was keen to ensure that the devastating conflict in one of its member state was addressed. Thus one can

⁹¹ See chapter two of this work. Pp. 90-98.

argue that it was a combination of factors both internal and external that led to the decision of the government and the SPLM to negotiate and eventually sign the CPA to end the conflict.

But can a state on its own decision decide to break up and form distinct territories as successor states? The sovereign choice of Sudan to determine its internal affairs through self-determination follows a principle affirmed by the International Committee of Jurists commissioned by the Council of the League of Nations in its report in 1920 on a dispute between Finland and Sweden, when it opined that ‘a dispute over whether a particular group is to be granted the right to determine its own political fate is one which under normal conditions.....international law leaves entirely to the domestic jurisdiction of the state’.⁹² Indeed, the practice of the UN in rejecting secessionist movements within its member states has gradually been discarded in favour of a more conciliatory approach. For example, in February 2010 the UN Secretary General Ban Ki Moon, addressing the AU Summit in Addis Ababa, vowed to work towards a ‘no vote’ for Southern Sudan’s pending ‘independence referendum’ in 2011, but after a strong protest from the regional government of Southern Sudan, the Office of the Secretary General later issued a statement which reaffirmed that the role of the UN in the process would be neutral and essentially limited to offering its support to the fair and transparent conduct of the referendum exercise, and that the Organization was ready to support either outcome whether it was secession or affirmation of unity.⁹³

What were the major reasons advanced by Southern Sudanese to claim their right to self-determination? The region spelled out different factors such as racial discrimination, ethnic extermination, widespread violations of human rights, denial of educational opportunities, and

⁹² League of Nations- *Official Journal*, October 1920.

⁹³ United Nations Secretary-General’s speech at the African Union Summit February 2010, available at: <http://www.africa-union.org/root/au/conferences/2010/january/summit/speeches.html>. Accessed March 2013.

economic and social marginalization among many others. Examining these factors, can we contend that they provide ground for the right to self-determination and ultimate secession? As already argued in this chapter, self-determination can be claimed by ‘peoples’ who have been treated contrary to the recognized norms of international law or international human rights standards. Yet, one could be tempted to pose a question, who determines the illegality of this treatment of the ‘peoples’? As succinctly stated by Cristescu in his UN Report, the right to self-determination does not automatically entitle a particular population to separate themselves from a state of which they form part by simple expression of a wish; rather, a compelling case must be made on how continued association with the unified state endangers the existence of the ‘peoples’.⁹⁴ It can therefore be argued that the government of Sudan failed the test of ‘representativity’ as provided for in the Declaration on Friendly Relations. Among other things the Declaration requires ‘a government representing the whole people belonging to that territory without distinction as to race, creed or colour’.⁹⁵ It is on the basis of the government’s failure in this respect that the claim of self-determination by Southern Sudan was premised and attained.

H. The nexus between self-determination and the rule of law

The discussion on self-determination would be incomplete without examining how self-determination relates to the concept of human rights and the rule of law. The nexus between self-determination and human rights is undeniably strong and compelling. Even the strongest proponents of self-determination like President Wilson advanced it in the name of ‘liberty and freedom’. President Wilson’s guiding beliefs on self-determination were rooted in its ability to spread liberal democracy where individual rights and freedoms were respected and defended, though it is evident from his pronouncement that Wilson’s approach was more focused on the

⁹⁴ Aureliu Cristescu, above note 10.

⁹⁵ See also Jure Vidmar, ‘Conceptualizing Declarations of Independence in International Law’, *Oxford Journal of Legal Studies*, vol. 32, 1, 2011, 153-177.

political aspect of self-determination rather than social and economic rights. Subsequent international instruments and declarations have equally reaffirmed the nexus between self-determination and human rights.

Perhaps nowhere was self-determination directly linked to human rights and the rule of law more than in the decolonization process. Admittedly, in this period nationalism was also a key factor, yet it can be argued that the aspect of nationalism was directly linked to colonial disregard of the rule of law and gross violations of human rights of the natives. While it is clear that the colonized territories fighting for their freedom invoked self-determination as the mechanism within which they could attain this freedom and equality as citizens, it is equally true that the human rights movement emerged later, after the decolonization movement. Despite this fact it is evident that decolonization claims were partly grounded in the quest to address injustice and oppression by colonial powers. In fact the Universal Declaration of Human Rights makes it clear that human rights, in order to be protected, must be guaranteed by the rule of law. The implication here is clear: it is only through the rule of law that people in a given polity can enjoy human rights guaranteed under various international instruments. However, as evidenced by post-colonial Africa, the realization of the right to self-determination does not automatically lead to improved human rights and rule of law.

Despite evidence that self-determination in post-colonial Africa had little impact on the rule of law, the events after the collapse of Soviet Union reinforced the claim by Western powers to directly associate self-determination with liberal democracy and the rule of law. For example, the Charter of Paris in its introductory section entitled 'Human Rights, Democracy and the Rule of Law' notes that democratic government is based on the will of the people, expressed regularly through free and fair elections. The Charter further notes that democracy has its foundation in

respect for the human person and the rule of law.⁹⁶ Indeed, before the final dissolution of Soviet Union and Yugoslavia, European countries and the United States explicitly conditioned their recognition of the breakaway states on their commitments to democracy, rule of law and human rights. While it is questionable if the US and its allies followed through on these conditions, it is evident that the decision to recognize these countries was motivated by a desire to spread liberal democracy, human rights and the rule of law.

The growing role of different actors such as the USA, the United Nations and the European Union in particular to support rule of law reforms in the aftermath of the exercise of self-determination further reaffirms the nexus between self-determination and the rule of law. As will be discussed in chapter four, the European Union under its EU Rule of Law Mission in Kosovo (EULEX) has allocated substantial resources to build the rule of law. This allocation stems from the belief that Kosovo lacks the rule of law and it is through such support that self-determination can become an efficient outcome for the Kosovar society. Further, the United States since the fall of Berlin Wall has spent substantial resources on rule of law promotion activities such as training of judicial officials in Eastern European countries, on the assumption that it is through such support to these newly independent states that they can attain rule of law. Similarly, the increased support from the United Nations for rule of law reforms in places such as Southern Sudan, Somaliland, Kosovo and other countries in Eastern Europe further shows that the international community in the post-Cold War era equates state building with improved rule of law and respect for human rights.

Examining the situation in South Sudan, it is contended that advancement of the rule of law goes beyond the declaration of independence. It requires an unflinching commitment by the elites and

⁹⁶Charter of Paris for a New Europe, Paris 1990.

authorities to respect and govern within the law and guarantee fundamental rights of their people. While African countries based their struggle for independence on oppression and exploitation by colonial powers, they themselves committed oppression and exploitation after independence. Mindful of this reality, it is argued that for South Sudan, improved human rights and respect of the rule of law will largely depend on the commitment of authorities to the constitution and various institutions it creates, such as the Anti-corruption Commission and the Human Rights Commission. This commitment will require strong institutions such as an independent and effective judiciary, an accountable legislature and executive and law enforcement bodies able to guarantee rights and freedoms of all South Sudanese without discrimination.

During the negotiations for the two human rights covenants, the major question which later emerged between the colonizers and the colonized was not whether self-determination was a right but whether the right was immediate or progressive.⁹⁷ While from its inception the ‘trusteeship’ and ‘non-self governing’ systems were based on the progressive development of self-government dependent on the capacity of a population to govern themselves, this assumption contrasted with the provision of Article 1 of both Covenants which stated that legitimate political authority resided with peoples. In other words, while the Covenants conferred on peoples an immediate right to determine their destiny, the ‘trusteeship’ system required these peoples to progressively develop capacity for self rule.

This contrast can be seen in the different views which were advanced by developing and colonized countries to counter the assumptions of the trusteeship authority. For example, Yugoslavia reminded the delegates at the United Nations that ‘if the colonial powers had not

⁹⁷ James Summer, *Peoples and International Law: How Nationalism and Self Determination Shape a Contemporary Law of Nations*, Dordrecht: Martinus Nijhoff Publishers, 2007, 176.

been able to bring their colonial peoples to an adequate stage of development in two centuries they would unlikely be able to do so in the two ensuing decades'.⁹⁸ Afghanistan opined that 'peoples were ready for self determination as soon as they had been awakened and demanded it'. Similarly Saudi Arabia noted that 'the metropolitan states averred that, if they were to withdraw from the territories under their control, the peoples of those territories would cut one another's throats, the fallacy of that argument had been proved by experience but even if it were true, that risk was preferable to their position of subjugation'⁹⁹ What is clear from the different arguments by these countries is that self-determination was no longer being considered as a principle, rather it was seen as an essential element for the enjoyment of human rights and rule of law by the marginalized in colonial territories.

It may further be argued that since the common Article 1 of the ICCPR and ICESCR relates human rights and self-determination into a legal synthesis, these two primary documents on human rights have unequivocally concretized the relationship between respect for human rights and self-determination. The inclusion of the right to self-determination in the ICCPR and ICESCR and in the Vienna Declaration and Programme of Action reaffirms that the right to self-determination is an integral component of human rights law which has universal application for peoples. In other words, the right to self-determination is a prerequisite for the enjoyment of other human rights and fundamental freedoms enshrined in different international human rights instruments. It further concretizes the belief that states have responsibility to respect, ensure, achieve and guarantee the rights and freedoms specified in human rights instruments.¹⁰⁰

⁹⁸Yugoslavia, 7 GAOR (1952) 3rd Committee, 447th Meeting, (A/C.3/SR.447) para 28.

⁹⁹Saudi Arabia, 6 GAOR (1951)3rd Committee, 398th Meeting, (A/C.3/SR.398) Para 37.

¹⁰⁰ Father Robert Araujo, 'Sovereignty, Human Rights, and Self Determination: The Meaning of International Law', *Fordham International Law Journal*, vol. 24, 2000-2001, 1499.

The interrelation between economic rights and self-determination has been concretized through various international instruments which have reaffirmed the right of the peoples to economic self-determination. In 1962, the United Nations General Assembly adopted what has been considered a landmark resolution, the Declaration on the Principle of Permanent Sovereignty over Natural Resources.¹⁰¹ The Declaration reaffirmed that sovereignty over natural resources and wealth must be exercised in the interests of the national development and the wellbeing of the people. After the adoption of this Declaration in 1962, developing countries became keen to have this principle reaffirmed in all major international negotiations related to natural resources. For example, the principle was reaffirmed in the negotiations culminating in the establishment of the United Nations Conference on Trade and Development (UNCTAD) where it was recognized that in the spirit of self-determination each state could freely dispose of its natural resources in the interests of the economic development and wellbeing of its own people.¹⁰²

The protracted negotiation and eventual adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly in 2007 can be considered as a further reaffirmation of international law of the right of the indigenous peoples to exercise their right to self-determination on both political and economic fronts.¹⁰³ The Declaration reaffirms that ‘indigenous people have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural

¹⁰¹ For comprehensive background information see K. Hossain et al. (eds), *Permanent Sovereignty over Natural Resources in international law; Principle and Practice*, London: Frances Pinter Publishers, 1984; K. Gess, ‘Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis’, *International Comparative Law Quarterly*, vol. 13, 1964, 398-449; N. Schrijver, *Permanent Sovereignty over Natural Resources, Balancing Rights and Duties*, Cambridge: Cambridge University Press, 1997, and N. Schrijver, ‘Natural Resources, Permanent Sovereignty over’, *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2009.

¹⁰² UNCTAD 1, General Principle 3, UNCTAD Res. 46 (III) and TDB Res. 88 (XII).

¹⁰³ Caroline E. Foster, ‘Articulating Self Determination in the Draft Declaration on the Rights of Indigenous Peoples’, *European Journal of International Law*, vol. 12, 1, 2001, 141-157.

development'.¹⁰⁴ It also provides that 'indigenous peoples, in exercising their right to self determination, have the right to autonomy or self government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous functions'. Yet, in a traditional warning against secession, the Declaration states that 'nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations'.¹⁰⁵

Arguably there is a potential conflict of norms between the right to self-determination and the protection and enjoyment of human rights especially for the minority groups within a territory, mainly because the right to self-determination and rights of minorities are two sides of the same coin.¹⁰⁶ As amply demonstrated in Southern Sudan, when reasonable demands for local autonomy or minority rights have been rejected by the government, that may ultimately compel minorities to claim their right to self-determination, even through violent means.¹⁰⁷ This argument was concretized in the era of the League of Nations by the conclusion of the Commission of Rapporteurs in its 'Aaland Report' where it stated that secession may be available as a 'last resort when the State lacks either the will or the power to enact and apply just and effective guarantees of minority rights'.¹⁰⁸ Further, in 1992 the UN General Assembly Declaration on Minority Rights called on states 'to protect the existence' of the minorities granting them the 'right to participate effectively in cultural, religious, social, economic and public life'.

¹⁰⁴*Ibid.*, Article 3.

¹⁰⁵*Ibid.*, Article 46 (1).

¹⁰⁶ Patrick Thornberry, 'Self determination, Minorities, Human Rights: A Review of the International Instruments', *International and Comparative Law Quarterly*, Vol. 38, 1989, 867.

¹⁰⁷ Robert Trisotto, 'Seceding in 21st Century: A Paradigm for Ages', *Brooklyn Journal of International Law*, vol. 35, 2010, 419-450.

¹⁰⁸ 'The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs,' Doc. B7.21/68/106 (1921), 27-28.

Article 27 of the ICCPR states that ‘in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’. Yet, it is more often the failure of governments to guarantee the legitimate human rights of their own people to promote and protect their social, economic, culture and traditions that has lain behind demands for self-determination. Hence, to address this potential conflict of norms between the need to protect the rights of minorities and the need to preserve territorial integrity, governments must be subjected to further scrutiny and no longer allowed to hide behind the veil of national unity without explaining how minority rights are being protected.¹⁰⁹ In other words, governments must find appropriate mechanism to guarantee effective participation by all citizens in the economic and political life of the country.¹¹⁰ In fact it has been argued that preservation of the territorial integrity of states is often a reason for gross violations of human rights and the rights of minorities and small nations, or even an excuse for war and a hotbed for crisis.¹¹¹ As argued by Cassese, the right to self-determination establishes general and fundamental standards of behaviour. Governments must not decide the life and future of peoples at their discretion; peoples must be enabled to freely express their wishes in matters concerning their conditions.¹¹²

¹⁰⁹ Hurst Hannum, ‘the Specter of Secession: Responding to Claims for Ethnic Self Determination’, *Foreign Affairs*, vol. 77, 1998, 15-17.

¹¹⁰*Ibid.*, 14.

¹¹¹The Submission by Slovenia supporting the Unilateral Declaration of Independence for Kosovo. See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ‘Written Statement of Slovenia’ (17 April 2009).

¹¹²Cassese, above note 8, 68.

The nexus linking self-determination and human rights has been expounded not only by international human rights instruments but also through interpretation by bodies established for that purpose. For example, the Human Rights Committee in its general comment on Article 1 stated that ‘The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights’.¹¹³ The Committee further noted that ‘the provision is particularly important in that it imposes specific obligations on State Parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise, or have been deprived of, the possibility of exercising their right to self-determination.’¹¹⁴

However, it can be persuasively argued that despite the unequivocal recognition of the nexus between human rights and right to self-determination, its interpretation has been limited to the individual dimension. For example, the jurisprudence of the Human Rights Committee has been limited in its ability to consider claims by peoples alleging violations of their right to self-determination because the Optional Protocol to the ICCPR allows only individuals to bring claims.¹¹⁵ This position of the Committee is reflected in the case of *Lubicon Lake Band* which had brought a claim of self-determination before the Committee. In this case the Committee stated that ‘while all peoples have a right to self-determination as stipulated in the ICCPR, the question whether the applicant constitutes a ‘people’ is not an issue for the Committee to address under the Optional Protocol to the ICCPR.’¹¹⁶ Despite this decision of the Committee, one can argue

¹¹³ General Comment No. 12 on Self determination of peoples, Article 1, March 1984.

¹¹⁴ *Ibid.*

¹¹⁵ Robert McCorquodale, ‘Self Determination: A Human Rights Approach’, *International and Comparative Law Quarterly*, vol. 43, 1994, 852-882.

¹¹⁶ *Ominayak and the Lubicon Lake Band v Canada*, H.R.C. Report Doc.A/45/40, vol. II, Annex IX.

that international human rights jurisprudence has developed largely through concentration on violations of individual rights, especially civil and political rights.¹¹⁷

I. Conclusion

The primary objective of this chapter was to examine the concept of self-determination in international law in the context of Southern Sudan. The discussion has demonstrated that self-determination, while well enshrined in international and regional instruments such as the United Nations Charter and the African Charter on Human Rights, does not necessarily result in secession with an independent state. Further, it has been shown that while international law recognizes and protects the territorial integrity of states, this protection is being challenged by the imperative to respect and uphold human rights and the rule of law. States have an inherent obligation to guarantee and protect the rights and freedoms of their people if they are to enjoy exclusive right to determine their affairs independently.

Citing different examples in Africa and elsewhere, the chapter has argued that self-determination with the possibility of secession has been pursued largely against claims of human rights violations and disregard of the rule of law. However, the discussion has also argued that available evidence suggest that the exercise of self-determination does not automatically lead to improved human rights and rule of law for the polity concerned. This is evidenced by the practice of post-independence African countries that continued practices similar to those of colonial powers, contrary to their previous assertion that it was only through independent states that they could better promote the rule of law and guarantee human rights for their people.

¹¹⁷ Robert McCorquodale, above note 115,872.

The impact and implication of this trend are clear, especially as regards to Southern Sudan. While the struggle for self-determination in Southern Sudan has significantly addressed challenges identified in chapter two, such as the absence of a constitutional legal framework to guarantee fundamental rights and freedom, an independent judiciary, access to justice or equality of citizenship, it is evident that the successful exercise of self-determination has not led to the improved human rights protection and advancement of rule of law enshrined in the Constitution. For the right to self-determination to be meaningful and translate into concrete value in the lives of the people, the government of South Sudan will have to break from the record of the previous government which it accused of gross violation of human rights and disregard of the rule of law.

The following chapter will examine and discuss the historical precursors to the current rule of law based reforms. This examination will help us understand the basic motives for current efforts to build the rule of law in other countries. Citing post-colonial Africa as an example, the chapter will demonstrate that current efforts in Southern Sudan essentially build on the previous failed efforts to achieve similar objective of advancing rule of law in developing countries.

Chapter Four

IV. The Rule of Law and the Law and Development Movement.

A. Introduction

Prior to the promotion of the rule of law by the UN, AU, and other international actors, notable attempts were made by the 'law and development' movement to utilise law as an aid to development in Sudan and other developing states. This chapter will examine role of the law and development movement in this respect and how this movement influenced the current rule of law promotion. Are there any parallels between these two initiatives? And if there are, are there any lessons that the current rule of law reform can learn from the previous law and development movement? Clarifying this will help us understand how the challenges in the current rule of law reforms can be addressed.

The underlying claim of rule of law reform is that legal and institutional reforms are critical to the political and social economic advancement of a given polity, that only through strong institutions can countries attain development and improved welfare of their people. However, these initiatives raise some profound concerns relating to their viability and effectiveness. Is there any available evidence to suggest that building the rule of law can automatically lead to

improved economic conditions?¹ The significance of this chapter lies in its potential to establish and clarify the linkage between building the rule of law and claims that such measures would lead to effective legal institutions and social economic progress.

But before examining the claim that building the rule of law automatically leads to strong legal institutions, this chapter will first examine the precursors to the modern rule of law reform initiatives. It is argued that it is through an in-depth examination of the previous efforts undertaken by external actors to shape African legal institutions akin to those existing in the Western countries that we can clearly appreciate limitations and strength of current efforts to build the rule of law in a post-conflict context like Southern Sudan.

B. The law and development movement

In the aftermath of the decolonization period, independent African states were confronted with the need to build legal systems and institutions to address the myriad social, economic and political challenges facing them. While confronting these challenges it was clear that the continent lacked both material and human resources to realize this vision. This inability necessitated the continent to look 'somewhere else' for resources and support. The law and development movement was therefore conceived and undertaken by Western scholars and institutions as a direct response to these challenges. It is also worth noting that these initiatives were undertaken in the immediate period after the independence of most African countries in 1960s. It was predicated on the assumption that strong and predictable legal systems were essential for sustained economic development. And since Western developed countries went

¹ Lawrence M. Friedman, 'On Legal Development', *Rutgers Law Review*, vol. 24, 1969-1970, 11-50. In this article the author questions whether Western countries 'knew enough' to give meaningful advice to other countries about the modernization of law. He rejected the claim that Western countries could 'export' law and development without taking time to study legal institutions of others in Third World countries.

through a similar process to achieve their prosperity, it was assumed that African countries should undergo that route to build institutions akin to those existing in the West.

At the outset, it is worth pointing out that Africa was not the first continent to experience law and development assistance as conceived and exported by Western countries. Earlier, similar initiative had been pursued by a small but influential army of American lawyers who designed legal assistance programmes to reform Latin America legal education and legal systems. As argued by Gardner, these efforts while ‘well motivated in the usual sense of the term’ were poorly equipped for the tasks undertaken. Because these lawyers and professionals did not fully understand local dynamics such as language, laws, politics, economics or culture. As a result the legal assistance was inept culturally and uninformed, perceiving and assisting these countries in Latin America in its own self image.²

Earlier, in chapter one, we have seen that the rule of law is associated with positive attributes of the state such as improved social and economic conditions and enjoyment of civil and political rights. It was on the basis of this belief in what ‘good’ the rule of law can deliver that international actors embarked on different initiatives to build the rule of law in post-independence Africa. This assumption was premised on different factors, but the chief one was the belief that social and economic development was dependent on predictable legal institutions and systems and how they responded to the needs and aspirations of citizens.³ The culture of corruption and venal governance which characterized most African countries in the post-independence period reinforced this belief.

² James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*, Madison: University of Wisconsin Press, 1980.

³ See generally Scott Newton, ‘The Dialects of Law and Development’ in David Trubek, and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal*, Cambridge: Cambridge University Press, 2006, 174-202.

But what was the nexus between law and development, and how were these two concepts inter-related? Essentially, legal development assistance was originally justified as a rational and effective method to protect individual freedom, expand citizen participation in decision making, enhance social equality and increase citizens' capacity to control events and shape their social life.⁴ Law was seen as both a necessary element in development and a useful instrument to achieve it.⁵ Governance through law was considered to lead to more inclusion and equality of citizens in terms of opportunities and self-development, protect individual freedom, curb arbitrary governmental powers and increase government responsiveness to the needs of people. Development was assumed to lead to an increase in people's capacity to control their world and thus enhance material well-being. As an ideal, development held the promise of life that would be richer and improve the welfare of Third World people.⁶ Law and development involved projects designed to bring about major changes in legal systems and norms in the interests of efficiency and justice. So we see that law during this period was considered essential to improve both the welfare of the people and development of the state. Indeed, it was this conception of the role of law in development that later inspired the adoption of the Declaration of the Right to Development in 1986. The key feature of this Declaration was that it reaffirmed the collective role of the international community in providing necessary support to developing countries to attain development.⁷

⁴ David M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', *Yale Law Journal*, vol. 82, 1972, 1-7.

⁵ David Trubek and Marc Galanter, 'Scholars in Self-Estrangement; Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review*, 1974, 1073.

⁶ *Ibid.*, 1075. See also Snyder Francis, 'Law and Development in the Light of Dependency Theory', *Law and Social Review*, vol. 14, 1980, 723-730.

⁷ Law and development has been defined as the specialized area of study in the US concerned with the relationship between the legal systems and development (social, economic and political changes) taking place in developing countries: see generally Trubek and Galanter, above note 4, 1062-1070.

The United States is considered as the major force behind the law and development movement because it adopted specific legislation making this initiative a defining element of its foreign policy in sub-Saharan Africa. The Foreign Assistance Act was passed in the US Congress in 1966 specifically to ‘determine ways of assisting developing countries in all spheres including legal field’.⁸ This legislation among other things authorized the US Agency for International Development (USAID) to emphasize the assurance of ‘maximum participation in the task of economic development on the part of the people of the developing countries, through the encouragement of democratic private and local government institutions’.⁹ Their emphasis, consistent with the view of law as a means of social advancement, was that reform of legal education and legal profession in these countries was a crucial tool for achieving development objectives.¹⁰

But why was the US interested in promoting law and development in the first place in African countries? And what were the underlying motives in its involvement? The United States, unlike European countries, did not have a notable history of colonial administration and therefore had not had much occasion to ponder the role of law in the development process, especially in the post-colonial context. However, it can be argued that the interests of the US were primarily predicated on its desire to promote Western liberal democracy and the market economy, aspects considered crucial for social economic development of newly independent countries in Africa. There was also its desire to ensure that these countries did not adopt socialist policies championed by the USSR, and so the main Cold War ideological rivalry reinforced US

⁸ Maxwell Chibundu, ‘Globalizing the Rule of Law: Some Thoughts at and on the Peripheral’, *Indiana Journal Global Legal Studies*, vol. 7, 1999-2000, 79-117.

⁹ Foreign Assistance Act, 22 U.S.C, 2218 (1970); Quintin Johnstone, ‘American Assistance to Africans’ Legal Education’, *Tulane Law Review*, vol. 46, 1972, 657.

¹⁰ Trubek, above note 4, 1-8.

involvement to promote law and development in developing countries. The emphasis, consistent with the view of law as a means of social advancement, was that reform of legal education and the legal profession in these countries was a tool for achieving development objectives.¹¹

Western countries and institutions conceived the rule of law through strong legal institutions of governance such as an independent and well resourced judiciary, an accountable and equitably operating police force, and access to justice to the marginalized – elements they considered missing in many African countries. Since the relationship between law and development was assumed to be invariable, its core conception was more focused on the export of Western legal systems than on efforts to understand the legal systems of Third World countries.¹² It was on the basis of these assumptions that Western institutions and donors embarked on the process of building and reforming legal institutions as a catalyst to promote social economic development. Yet, one can ask whether building the rule of law could have conclusively guaranteed the presence and functioning of strong legal institutions as conceived by Western actors. The law and development movement did not conceive the rule of law as a culture which needed to be developed by the society concerned, rather it was seen as something that could solely be attained through improved legal institutions supported by Western developed countries which had undergone a similar process.

However, one may ask, why was the law and development movement focused on improvement of legal education through investment in law schools? This question is relevant because the focus ignored the already established institutions in a country like the judiciary, the bar association, the police or the legislature. A closer examination of this approach by international actors, ignoring

¹¹ John Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement', *American Journal of Comparative Law*, vol. 25, 1977, 473-483.

¹² Trubek, above note 4, 11.

existing local institutions, would demonstrate that it was reinforced by the belief that changes should start from below. Those actors considered legal education as both highly autonomous and influential, and by focusing on this they would easily support changes in modes of adjudication and methods of lawyering. The bench in most African countries was considered as too bureaucratic and resistant to change.¹³ Legal education was also considered important on a long-term basis precisely because it was assumed that this focus would enable more people to enter a legal profession where they could contribute to bring about changes envisaged.

But there were other factors in addition. The proponents of the law and development movement considered law critical to the promotion of democracy and good governance. In general, strong legal institutions were considered critical to promoting of political development, the rule of law, participatory democracy and in general more humanistic notions of development.¹⁴ From this understanding law was considered by the reformers to have a potential to simplify policy making and lead to inclusive economic development. To them development was not only seen as a universal phenomenon, it also meant the adjustment of developing societies to an economic framework of universal validity predicated on the Western model. What the reformers did not take into account was the reality that development must mean something different to the specific market conditions of transitional or developing societies and to the cultural setting of each national economy.¹⁵

¹³ David Trubek, 'The 'Rule of Law' in Development Assistance: Past, Present and Future' in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*, Cambridge: Cambridge University Press, 2006, 77.

¹⁴ Robert Allen Sedler, 'Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System', *St. Louis University Law Journal*, vol. 13, 1968, 195-220.

¹⁵ David Kennedy, 'Law and Developments', in John Hatchard and Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century*, London: Cavendish Publishing, 2003, 17-20.

It should also be noted that the need to promote democracy through the law and development movement was observed during the Cold War between the West and the East. Much as the Western countries wanted to build strong legal institutions in developing countries, it was also seen as an opportunity for African countries to adopt neo-liberal economic and social policies considered vital not only for building of a market economy but also for limiting the influence of the USSR and socialist ideologies on the continent. Western countries wanted to prove that it was not necessary to sacrifice freedom for the sake of development, rather it was possible to achieve both. And to them, legal reform was one of the mechanisms to achieve both.

For Western countries, the standard development formula was to build three features: government institutions, a market economy and a democratic system within which these institutions and markets could flourish.¹⁶ Despite this belief, it is clear that there was no prior consensus or evidence on how law could lead to development or on the precise kind of assistance that was suitable to help the continent to transform itself. In other words, the proponents of the law and development movement assumed that strong legal institutions would translate into economic development and democracy, yet no one could explain how this development and democracy would be attained and sustained on a long term basis. That strong legal systems and institutions could result in development was taken as self-evident because Western countries had developed through embarking on similar reforms. But this assumption ignored the reality that what had worked in Western countries was not necessarily going to work in Third World countries with different histories, needs and aspirations.

¹⁶ Brian Z. Tamanaha, 'The Lessons of Law-and-Development Studies', *American Journal of International Law*, vol. 89, 1995, 470-486; Brian Tamanaha, 'The Primacy of Society and the Failure of Law and Development', *Cornell International Law Journal*, vol. 44, 2011, 209.

Within the law and development movement there were disagreements on how to achieve the objectives of the movement. While a significant number of participants in the movement argued that changes could be effected through legal reforms, others were of the view that proper legal reforms could only be undertaken when broader changes in a society has already been made.¹⁷ Despite these varying views, still there was consensus that for Third World countries to address their economic challenges they needed to adhere to the rule of law, which could only be transplanted by Western countries that had undergone similar process.¹⁸ What does this perspective of the reformers demonstrate? That they did not believe that developing countries could address economic and social challenges without adopting Western policies and institutions which had enabled the West to attain development. While it is clear that African countries had their own laws and legal institutions which had been left by colonial powers on the eve of independence, it was widely believed by the reformers that these laws and institutions required refinement to reflect the changes in the Western countries. It was on this basis that the gap between the law in the books and the law in action in developing countries was widely appreciated and one of the solutions was seen to be professional education.¹⁹

The popular belief was that improving legal systems offered the hope that constitutional restraint and anti-corruption laws would address major challenges, especially poverty and venal governance which had consistently bedevilled these countries.²⁰ Similarly there was increasing

¹⁷ Charles Sherman, 'Law and Development Today: The New Developmentalism', *German Law Journal*, 2009, vol. 10, 1260-1264.

¹⁸ John Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement', *American Journal of Comparative Law*, vol. 25, 1977, 457-490.

¹⁹ Elliot Burg, 'Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'', *American Journal of Comparative Law*, vol. 25, 1977, 492-530. See also Beverly M. Carl, 'Peanuts, Law Professors and Third World Lawyers', *Third World Legal Studies*, 1986, 1.

²⁰ Randall Peerenboom, 'What Have we Learned about Law and Development? Describing, Predicting and Assessing Legal Reforms in China', *Michigan Journal of International Law*, vol. 27, 2006, 824-830.

appreciation that strong property rights could encourage productive activities by allowing people to reap the reward of their labour, tax laws could secure investment through a strong legal framework, and contract law could allow and enable people to conduct transactions at a distance over time, allowing them to reliably calculate costs and benefits of proposed exchanges. Effective criminal laws could maintain social order, bring general security, and enable people to pursue their private activities rather than expending resources protecting their property or themselves.²¹ However, all these assumptions were determined and imposed by external actors denying the beneficiaries freedom to choose what was appropriate to their conditions.

Despite these assumptions behind the law and development movement, it is evident that there was a significant disconnect between law as understood by external actors and by the beneficiaries. For example, how could colonial judicial institutions constructed on two tier systems serve the wide and diverse interests of African polities without modification? This aspect is crucial because African countries adopted colonial institutions wholesale without significant modification while the elites previously excluded from their administration were asked to assume positions of authority in these institutions. As a result any efforts to link law and development should have given consideration to the role and place of post-colonial institutions and how they were conceived and accessed by various African societies.

C. Evaluating the law and development movement

Most of these efforts came to a halt in the mid-1970s with little accomplishment of the original mission. Different scholars and practitioners have advanced several arguments to explain why the law and development movement did not achieve its objectives of transforming social

²¹Beverly M. Carl, above note 19.

economic conditions of the beneficiaries through legal reforms.²² For example, it has been argued that the movement failed partly because corruption was endemic among legal and government officials, legal institutions were dysfunctional and legal codes amounted to little more than words on paper, and generally a supportive legal culture and habits of obedience to law and respect for the law were lacking.²³

However, it can be argued that it is simplistic to attribute the failure of the law and development movement to African institutions and officials; rather, donors and supporters of the law and development movement ought to have fully taken responsibility for this failure. The movement failed because from the beginning it was premised on wrong assumptions. It took the form of refining and consolidating already existing legal institutions and codes which had been transplanted by colonial powers before. The danger of this approach was that it never took into account existing African institutions and the place of these institutions in African polity. It is also worth pointing out that many African countries were happy to maintain *status quo* of colonial laws precisely because they felt that they could use the same laws to oppress or 'deal' with their opponents considered as a threat to their stay in power. It was therefore in the interests of political elites to maintain these laws without pushing for their amendment or repeal.

Further, the exclusive focus on legal professionals and the role of lawyers in affecting the desired reforms conveniently ignored the fact that a majority Africans resided in rural areas where they had limited or no access to formal justice institutions. How precisely could the law and development movement lead to the improved material welfare of the poor majority? If the objective of the movement was to champion development in the lives of the people, then it is

²² David Kennedy, 'The Rule of Law, Political Choices, and Development Common Sense' in David Trubek and Alvaro Santos (eds), above note 12, 95-97.

²³ Lawrence M. Friedman, 'Legal Culture and Social Development', *Law and Society Review*, vol. 4, 1, 1969, 29-44.

clear that strategies were not devised to articulate how common people could benefit from these reforms.²⁴

Garth notes the ‘conceptual anarchy’ of the law and development movement – that a lack of consensus between legal experts and development theorists, practitioners and agencies on the functional meaning of the rule of law contributed significantly to the movement’s failure. He argues that continued conflict between legal reformers and donors about the relative advantages of investments in corporate law versus public interest law and the precise role that the law should play in the state and state reforms led to uneven and poorly sustained efforts to invest in the rule of law.²⁵ Indeed, the law and development model advanced by the Western scholars sharply contrasted with the reality in most African countries. Instead of political pluralism, most societies had significant social stratification, sharp class differences, and authoritarian governments. More often legal rules were promulgated in the interests of the ruling elites. All these things made it difficult for rule of law transfer to succeed.²⁶

Since colonial times Africans had been excluded from using or accessing legal institutions, which made them less able to identify themselves with these institutions. The law and development movement repeated mistakes made during the colonial period when legal education and institutions were built on a Western model without taking into account African institutions. The proponents of this approach did not bother to take into account ‘African realities’, nor did they ask beneficiaries what was appropriate for their needs and priorities. Initiatives were conceived in

²⁴ Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, Cambridge: Cambridge University Press, 2011.

²⁵ Bryant G. Garth, ‘Building Strong and Independent Judiciaries through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results’, *DePaul Law Review*, vol. 52, 2002, 383-386.

²⁶ Trubek and Santos, above note 13, 473-474.

Western capitals and implemented by top scholars from Western countries who understood neither the prevailing conditions in countries where reforms were to be undertaken nor the needs of their target groups.²⁷ Under such circumstances it was clear that Western expatriates were attempting to fashion legal institutions from what they understood to be the situation in their own countries.

The movement was predicated on supporting the development of a market economy and democratic culture where democracy could facilitate the free market. Yet, it is clear that a significant number of countries where these reforms were to be made were not willing to adopt the free market system of their former colonial masters because they considered the model ripe for exploitation and oppression. For example, Presidents Nyerere of Tanzania, Milton Obote of Uganda and Kenneth Kaunda of Zambia rejected the capitalist system as an unsuitable model for economic development of their countries. These leaders did not reject the rule of law as a concept, rather they objected to the notion that legal institutions as conceived in Western countries were an important factor in the development process.²⁸

Further, the desire of Western countries to promote democracy and the market economy raises questions as to the kind of democracy the proponents of the law and development movement were keen to promote. Democracy and its attributes vary from one country to another. African countries were asked to accept support for reform and building of their legal institutions, but they were not asked what kind of democracy they thought was suitable for their social-economic development. For example, a significant number of African countries adopted 'African socialism'

²⁷ Laure Helene Piron, 'Time to Learn, Time to Act in Africa' in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington, DC: Carnegie Endowment for International Peace; 275-298.

²⁸ See S. Adelman and A. Paliwala, *Law and Crisis in the Third World: African Discourse*, Lochcarron, Ross-shire, Scotland: Hans Zell Publishers, 1993.

as their economic model, and this decision was at odds with the liberal democracy underpinned by a free market and foreign investment advocated by Western countries which were major supporters of the law and development movement. What these efforts demonstrate is that the movement was conceived and advanced largely to satisfy foreign interests of those who wanted to create better climate for effective functioning of the market economy.

The assumption of law and development proponents that investment in legal education could advance free markets and democracy failed to consider the wider needs of their beneficiaries. Chief among them was to attract assistance in areas which they deemed critical for their survival as newly independent states. African countries were keen to invest in training in fields such as agriculture, health and engineering, which they considered critical for their economic emancipation.²⁹ Furthermore, the donors' insistence on democracy and free markets was seen as another display of neo-imperial domination by the West in the guise of assisting African countries.³⁰

There was a lack of faith in the political environment in which many African law schools and universities operated.³¹ The reluctance of African countries to support or prioritize legal education can in fact be compared with the unwillingness of previous colonial governments to support legal education in Africa because they considered it to be a source of radicalism and critique of their colonial administration.³² As some scholars have noted, the law and

²⁹ Emmanuel Kwabena Quansah, 'Educating Lawyers for Transnational Challenges: Perspectives of a Developing Country-Botswana', *Journal of Legal Education*, vol. 55, 2005, 528.

³⁰ See generally Muna Ndulo, 'Legal Education in Africa in the Era of Globalization and Structural Adjustment', *Pennsylvania State International Law Review*, vol. 20 2002, 487-504.

³¹ Brian Z. Tamanaha, above note 16, 470.

³² Sandra Joireman, 'Inherited Legal Systems and effective Rule of Law: Africa and the Colonial Legacy', *Journal of Modern African Studies*, vol. 39, 4, 2001, 580.

development movement suffered from unfamiliarity with the target culture and society (including its legal systems), lack of theory, and relative immunity to consequences of their actions, making the whole enterprise ineffectual or harmful as technical assistance and peripheral as scholarship.³³

However, it is evident that even African governments greatly contributed to the unsuccessful attempt at legal reforms during this period. There was political unrest in many African countries, as well as the prevalence of one-party states that were not supportive of legal reforms, which significantly contributed to this lack of success.³⁴ Given the geopolitical configuration in post-independence Africa, few countries were willing to allow the exercise of fundamental rights and freedoms as conceptualized by the Western countries. For example, some countries like Tanzania, soon after independence, decided to dispense with the Bill of Rights left by the previous colonial government in their new constitutions.³⁵ This example of Tanzania challenged the central claim of law and development proponents who assumed that the inclusion of a Bill of Rights and fundamental rights and freedoms was essential to guarantee social, economic and political development, aspects that were key to the law and development ideas.

The failure of the law and development movement was further manifested in the fact that changes the reformers had hoped for did not materialize. The educational institutions such as universities and colleges which had attracted strong support from reformers proved more resistant to change than the reformers had expected. Even where some changes occurred, they failed to have the system-wide impact hoped for.³⁶ Equally challenging was the fact that legal

³³Merryman, above note 18, 481.

³⁴ Emmanuel Kwabena Quansah and Tom Geraghty, 'Africa Legal Education: A Missed Opportunity and Suggestions for Change: A Call for Renewed Attention to a Neglected Means of Securing Human Rights and Legal Predictability', *Loyola University Chicago International Law Review*, vol. 5, 1, 2008, 87-105.

³⁵ See generally, Chris Maina Peter, *Human Rights in Tanzania*, Cologne: Rüdiger Köppe, 1998.

³⁶David Trubek, the 'Rule of Law' in Development Assistance: Past, Present and Future', above note 13, 78.

codes transplanted as part of the wider efforts to consolidate legal systems and institutions were ignored by the ruling class or else remained in books without any impact. In addition, the ruling elites considered these laws as inhibiting their hold on power and their ability to effectively govern their countries without interference from Western countries. With the deterioration of living conditions of the majority in these countries, venal governance, corruption, and suppression of dissenting or alternative voices, the reformers got disillusioned, foundations which had been providing financial support lost interest, and for the moment the law and development movement ran out of steam.³⁷ It is no wonder that by the mid-1970s the law and development movement was declared a failure by those who were its ardent supporters.³⁸

Indeed, during the period from 1975 to 1990, attention shifted to *ad hoc* assistance to legal infrastructure, particularly the training of judges and government legal advisers. Scholars who had been ardent supporters of the law and development movement argued that a conception of the relationship of the law and society based on individualism, legal positivism and primacy of formal judicial institutions was highly Western and could find little relevance in countries where they were being imported.³⁹ They concluded that the law and development movement had privileged the few and the elites at the expense of the majority in whose name these reforms had been pursued. In the following period, assistance for the law and development movement was scaled down and there were very few donor funded programmes designed to support legal and institutional reforms. Indeed, with the intensification of the Cold War there was little incentive to continue supporting legal reforms; rather, Western countries decided to focus on creating and sustaining alliances with countries notwithstanding their democratic or human rights record. So one can argue that the period from 1970s to the end of the Cold War in 1989, Western support

³⁷ *Ibid.*

³⁸ See generally, Francis G. Snyder, 'The Failure of 'Law and Development'', *Wisconsin Law Review*, 1982, 373-395.

³⁹ *Ibid.*

for legal institutions to promote development came to be limited to faculty exchanges among some African and Western educational institutions.

So what lessons can be drawn from this failure of the law and development movement aimed at modern rule of law reforms? From previous discussion in chapter two which examined of the impact of constitutional development on the rule of law in Southern Sudan, it is clear that the reformers have lessons to learn from the history of that region. A critical examination of the rule of law dispensation during the colonial period demonstrates that legal systems and institutions created during that period were structured in a context of furthering the interests of the colonial powers rather than benefiting the local population. While various laws were imported into colonial territories, they were meant to control rather than advance the ability of Africans to govern themselves. The fact that the colonial laws were premised on a two-tier justice system discriminating between the natives and the citizens of the colonial powers ensured that from the beginning natives were prohibited from seeking recourse to colonial law except when specifically allowed to do so. This greatly inhibited the ability of Sudanese to benefit from colonial legal systems and institutions. Despite these limitations, on the eve of independence Sudanese were required to build the rule of law through and within the framework passed onto them by the departing colonial masters, from whose creation and application they had been excluded.

There is a compelling need for rule of law reformers to take these complexities into account. The challenge confronting rule of law reformers in Southern Sudan is to link the modern understanding of the rule of law concept to the existing realities in the country. As argued already in this chapter, the major reason for the failure of the law and development movement was the evident disconnect between assumptions and outcomes. The assumption that developing countries, to attain development, had to undergo a similar process to that experienced by Western countries took no account of the time taken by Western countries to build their legal

institutions. However, as experience has shown this approach hardly succeeded, because it failed to build on the existing local institutions. It is this unsuccessful attempt by Western countries and institutions to reform legal institutions in Africa in their own images that brings us to the next question. What happened after this unsuccessful attempt? Below we examine the answer.

D. From the law and development movement to rule of law promotion

The end of the law and development movement in the 1970s did not mean that legal reforms came to an end. Rather, legal reforms continued in different countries, though clearly these reforms lacked the unifying concept of 'law and development' and support from Western governments and institutions by comparison with efforts promoted by the law and development movement.⁴⁰ The obvious transition was towards the use of the rule of law as a galvanizing concept for legal and democratic change. To understand the transition from the law and development movement to promotion of the rule of law, one needs to revisit the original primary mission of the law and development movement. As discussed earlier, the assumption underlying the law and development movement was that growth and cultural transformation would lead to democracy, the free market and protection of human rights in developing countries. The failure to realize these objectives meant that they had to be pursued independently and within a new framework. The challenge was how to create this framework within which these objectives could be attained. It is argued that the rule of law became the natural avenue for channelling this challenge. But it is important to understand why Western countries and institutions continued to work on the 'promotion of the rule of law' despite the failure of its earlier attempt. There are different reasons, some of which are examined below.

⁴⁰Tamanaha, above note 16, 216-217.

The end of the Cold War and the breakup of the USSR provided an opportune moment for Western countries and institutions to promote liberal democracy and free markets as the new defining element between them and developing countries. In this period there was no longer any broad support for reforms that were not based on some forms of democratic market model of state economy. Similarly, the fact that many countries in Africa had become embroiled in protracted internal conflicts, such as Somalia, Rwanda, Burundi, Liberia and Sierra Leone, provided a window for intervention by Western countries to reinforce their claim that it was only through the rule of law that countries can achieve economic development and effective legal institutions to guarantee fundamental rights of their people. It was at the beginning of the 1990s that Western countries supported peace processes and constitutional reforms in post-conflict countries. Support for reforms was seen as key in promoting the rule of law and respect for human rights. Indeed, Western commentators stated in this period that the end of the Cold War represented the end of history and the beginning of a new era where Western liberal democracy and values would be universal.⁴¹

The law and development movement emerged before the human rights movement which had sought to reaffirm the realization and universality of human rights. While it is true that during the law and development movement period in the 1960s and early 1970s the international community had made significant progress in adopting human rights norms and creating different mechanisms to enforce them, it is evident that inadequate protection of human rights at the domestic level was still common. Indeed, this aspect is well captured by the Helsinki process on human rights launched in August 1975, which drew attention to the inadequate enjoyment of fundamental rights at domestic levels in developing countries, which meant a need for legal reforms to ensure adequate protection of human rights. One of the objectives of rule of law

⁴¹ Francis Fukuyama, *The End of History and the Last Man*, New York: Free Press, 1992.

reform after the Cold War was therefore to reinforce the enjoyment of fundamental rights and freedoms, as reflected in various human rights instruments adopted during and after the Cold War.⁴²

In the post-Cold War period, the rule of law was seen both by donor countries and by influential multilateral institutions like the United Nations and the European Communities as an important factor in rebuilding of countries emerging from conflict, as in the post-Second World War era. As discussed in the following chapter, while the rule of law was conceived as a panacea for developing countries emerging from conflict, the approach taken by the reformers was not neutral but rather represented a set of values, aspirations and subjective experiences of statehood. Both institutions and donors emphasized that in an ideal world the rule of law would be central to attempts to build the institutions necessary for a peaceful and prosperous state and in the process enhance the ability of states to promote reconciliation and accountability for crimes of past regimes.⁴³ The assumption here was that modern Western, secular, political structures were the norm or the aspiration of much of the world, even though most rule of law reform activities took place in non-Western, underdeveloped, conflict-ridden, and in some cases non-secular societies.⁴⁴

There are many factors that compelled developed countries to invest their resources in the reconstruction of other countries that were affected by conflict. Rebuilding these countries was considered essential to allow them become part of the ‘international community’ underpinned by

⁴² David Trubek, ‘Law and Development: Then and Now’, *American Society of International Law Proceedings*, vol. 90, 1996, 224.

⁴³ Oliver Richmond, ‘The Rule of Law in Liberal Peacebuilding’ in Chandra Lekha Sriram and Olga Martin-Ortega and Johanna Herman (eds), *Peacebuilding and Rule of Law in Africa*, Abingdon, Oxon.: Routledge, 2011, 49.

⁴⁴ *Ibid.*, 51.

‘universal values’ of the respect of human rights and democracy.⁴⁵ The latter objectives had been declared essential by Western powers in the wake of the fall of the Berlin Wall.⁴⁶ It can further be argued that helping these countries to ‘stand on their own feet again’ was consistent with the idea of globalization whose success depended on stable countries guaranteeing markets for global trade. But in addition the challenge of refugees flocking into Western shores to seek asylum and prevailing insecurity emanating from these countries meant that they needed international support to address these challenges within their borders. Further, since failed states were likely sanctuaries for terrorists and other elements with potential to destabilize international peace and security, helping countries to effectively defend their borders and citizens was in the best interests of the international community, especially at the turn of the 20th century and after the 9/11 terror attack on the US.

Many assumptions underlay the nexus between the rule of law and post-conflict peacebuilding. The assumption was that the rule of law was a transferable technology transmitted by international organizations, states and donors, the main actors involved in peacebuilding in post-conflict countries. This approach failed to appreciate that the rule of law is an outcome of a long and varied social, political and context which may be distinct from the experience and history of rule of law reform in a particular country. It is further assumed that there is local commitment to democratic forms of governance and human rights as espoused by the reformers. The understanding is that countries emerging from conflicts will subject themselves to the expert

⁴⁵ David Tolbert and Andrew Solomon, ‘United Nations Reform and Supporting the Rule of Law in Post- Conflict Societies’, *Harvard Human Rights Journal*, vol. 19, 2006, 29-60.

⁴⁶ For a critique of this approach see Charles Gore, ‘The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries’, *World Development*, vol. 28, 5, 2000, 789-804.

advise and programming of external reformers who themselves are subject to and consent to the same rule of law.⁴⁷

For the reformers in Southern Sudan to validate their assumption that building the rule of law can automatically lead to effective legal institutions and states based on constitutional order, they must address the social, economic, cultural and political roots of the conflict which provided the basis for their involvement in Southern Sudan in the first place. They should not merely engage with local elites but should also identify themselves at the local level beyond political, social, cultural and economic elites in the country.⁴⁸

The increasing articulation of human rights and democracy in international organizations such as the United Nations and in individual countries, especially those in the West, provided another opportunity to examine how countries could be helped to advance institutions critical for development and realization of human rights and democracy.⁴⁹ The international community made great progress in specifying human rights norms, creating mechanisms for their enforcement and ensuring that global human rights norms became part of the discourse in domestic context.⁵⁰ It is worth noting that a few years before the end of the Cold War, the United Nations General Assembly adopted the Declaration on the Right to Development which among other things recognized the central role of the rule of law, respect for human rights and good governance in realizing the social economic development.⁵¹ What this articulation of the

⁴⁷Oliver Richmond, above note 43, 49-51.

⁴⁸*Ibid.*, 54.

⁴⁹Tom Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, vol. 86, 1992, 46. See also Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' *European Journal of International Law*, vol. 22, 2, 2011, 507-524.

⁵⁰Trubek, above note 13, 84.

⁵¹ Declaration on the Right to Development, adopted by the United Nations General Assembly Resolution 41/128, December 1986.

language of rights connotes is that the importance of the rule of law in the development narrative gradually shifted from individual countries and became incorporated in the mainstream agenda of global institutions.

The implication of this shift was clear – the rule of law debate was ‘internationalized’ while ensuring that Western countries could push for the rule of law as a ‘universal shared value’ because most countries were involved in its negotiation and advancement.⁵² Indeed the subsequent World Human Rights Conference, held in Vienna in 1993, reaffirmed the role of developed countries in assisting weak countries to build necessary institutions to support the rule of law. It is this Declaration that provided a decisive legal framework for external actors to build the rule of law in developing countries and post-conflict countries in particular. Admittedly, the ‘rule of law’ had been earlier enshrined in the Universal Declaration of Human Rights in 1948, yet it can be argued that the impact of this Declaration was minimal because of the Cold War which started about the time of its adoption.

But also, some developments and changes in Africa convinced African countries that they needed to embrace the rule of law. For example, immediately after the end of Cold War and the fall of the Berlin Wall, African countries desirous of improving human rights and public participation in decision making adopted a Declaration on Public Participation in Africa.⁵³ Although it can be argued that this decision to develop the rule of law was reinforced by the new realities of the end of the Cold War, it is clear that African countries were aware that public participation in decision making and respect for the rights of their citizens were critical for

⁵² This argument should not obscure the resistance of some countries in the global South, such as China, to the general understanding and promotion of the rule of law and human rights. For example see, Ann Kent, *China, the United Nations and Human Rights: The Limits of Compliance*, Philadelphia: University of Pennsylvania Press, 1999.

⁵³ African Charter for Popular Participation in Development and Transformation, Arusha 1990.

the progress of the continent. Indeed, this decision validated the claim that people's participation in decision making was the legitimate concern of the international community through different international instruments which had been adopted to that effect.

It can thus be argued that the need to promote human rights at the global level, and international recognition that such efforts would be insufficient without strong domestic institutions, galvanized the desire of international community to support rule of law reform in the post-Cold War period. How was the link between human rights and the rule of law squared? Human rights champions convinced of the universalism of human rights began to look at domestic institutions as a critical mechanism in realizing human rights objectives. Countries notorious for dictatorship and abuse of human rights were encouraged to reform their constitutions to guarantee independence of state institutions such as the legislature and the judiciary. Indeed, in this period countries were encouraged to establish national human rights institutions which were seen by international actors as key to guaranteeing of fundamental rights and freedoms and advance the rule of law. Examining these developments, one would rightly argue that it was only a matter of time before the rule of law was to be adopted as an official lexicon and a condition by donors and international institutions when dealing with developing countries.

Who were the major actors in the reform process? As noted earlier, the law and development movement was guided by assumption that developing countries needed to undertake legal and institutional reforms similar to those already undertaken by Western countries. Yet, these reforms were 'pre-packaged' items with no inputs from those required to implement them and ultimately reap their benefits. This failure raises some questions as to how the reformers were planning to carry out their vision of building the rule of law and a 'culture of human rights' in post-Cold War era. What was to be done differently this time? Were there any lessons learnt or

identified in the first movement that were relevant in this new initiative? And if there were any, how did the reformers envisage addressing these lessons?

While the law and development movement was promoted under the auspices of foreign governments through prominent institutions such as the United States Agency for Development (USAID) and educational institutions including universities, rule of law promotion goes beyond this confine of institutions and educational establishments.⁵⁴ Its chief disseminators include foreign governments, international institutions, non-governmental institutions and international financial institutions such as the World Bank and the International Monetary Fund.

The Washington consensus and globalization, which laid emphasis on the market economy and privatization, were also key factors in the rule of law reforms, in contrast to the previous approach under the law and development movement, which focused on central planning and import substitution industrialization. The need to promote human rights at the domestic level and the desire to reform legal institutions to make them effective for the operation of a globally linked market economy also underlay the rule of law objectives. As argued by Trubek, from the domestic perspective rule of law reforms were considered essential to attract foreign investors while at the international level they were seen critical in helping foreign investors take advantages of scale and other economies created by dramatic changes in the global market economy.⁵⁵

What prompted agencies like the World Bank and the IMF, whose focus had primarily been on investment in infrastructures and setting economic policies, to get involved in promoting

⁵⁴ Amichai Magen and Leonardo Morlino, 'Hybrid Regimes, the Rule of Law, and External Influence on Domestic Change' in Amichai Magen and Leonardo Morlino (eds), *International Actors, Democratization, and the Rule of Law: Anchoring Democracy?* London: Routledge, 2008.

⁵⁵ Trubek, above note 13.

democracy and human rights?⁵⁶ In fact, it can be argued that the World Bank and the IMF were not pioneers in promoting democracy and rule of law in Africa rather this leadership had been assumed by some African intellectuals and higher learning institutions who had unsuccessfully attempted to demand democratization and fundamental rights in their countries, efforts that were thwarted by African politicians through marginalization and state sanctioned repression. In fact the World Bank can be considered to have been an obstacle in the promotion of rule of law in this period because it insisted that it could not involve itself in domestic affairs of its member states. The Bank's founding Articles of Agreement categorically state that 'the Bank and its officers shall not interfere in the political affairs of its members'.⁵⁷

But many changes occurred which reinforced the Bank's role concerning the rule of law. These changes were influenced by the Bank's role in public sector reform, structural adjustment policies and the deteriorating economic conditions in developing countries. With this changing scenario, the Bank argued that it was time for the Articles of Agreement to be interpreted in a manner which reflected the modern challenges.⁵⁸ Writing in 1990, Ibrahim Shihata, the Legal Counsel to the Bank, stated that 'rule of law was the aspect of the legal system in client countries which fell within the Bank's ordinary sphere of intervention, comprising a set of systemic norms that are a basic requirement for a stable business environment for modern state'. He further contended that the Bank must have a legitimate interest in safeguarding the rule of law in member states, since its absence 'could render meaningless any process of economic reform'.⁵⁹ For the Bank, any meaningful and successful economic reforms were dependent on the rule of law.

⁵⁶*Ibid.*, 81.

⁵⁷World Bank Articles of Agreement, Article 1, 10.

⁵⁸ Jonathan Cahn, 'Challenging the New Imperial Authority: The World Bank and Democratization of Development', *Harvard Human Rights Journal*, vol. 6, 1993, 163-165.

⁵⁹ Ibrahim Shihata, *The World Bank Legal Papers*, 1990, 157.

The involvement of the Bank in promoting rule of law reforms raises some questions pertinent to development of the rule of law in developing countries and countries emerging from conflicts in particular. How did the Bank conceive and understand the rule of law? And how did this understanding influence its policies related to reforms? It is important to understand and answer these questions because of the central role of the Bank in funding rule of law reform activities and its influence in determining which countries qualify for the loans/aid/debt relief, in most cases using the rule of law as a determining factor. The Bank's understanding of the rule of law is underpinned in the rubric of 'good governance' and 'private sector development'. To the Bank, good governance means 'the manner in which a community is managed and directed, including the making and administration of policy in matters of political control, as well as in such economic issues as may be relevant to the management of the community's resources.'⁶⁰ It also means maintenance of efficient and accountable institutions, entrenchment of pro-development principles, respect for the rule of law and the provision of a mechanism for popular participation in governance and decision making.⁶¹ To the Bank, the alleviation of poverty is dependent on economic growth; this is said in turn to depend on the nurturing of a market economy and integration in the global market, both of which depend on the rule of law.⁶²

However, it is evident that the involvement of the international financial institutions such as the World Bank in building the rule of law cannot be solely attributed to their desire to assist their member states build legal institutions for the benefit of their people. It should be noted that the

⁶⁰ Ibrahim Shihata, 'The World Bank and 'Governance' Issues in its Borrowing Members', in *The World Bank in a Changing World*, vol. 53, 1991. See also Okezie Chukwumerije, 'Rhetoric Versus Reality: The Link between the Rule of Law and Economic Development', *Emory International Law Review*, vol. 23, 2009, 383-425.

⁶¹ Daniel Kauffmann, 'Myth and Realities of Governance and Corruption', *Global Competitiveness Report*, 2005-2006, 82-83.

⁶² Stephen Humphreys, *Theatre of the Rule of Law: Transitional Legal Intervention in Theory and Practice*, Cambridge: Cambridge University Press, 2010, 132.

Bank is a profit making institution and among its objectives is to create an enabling environment for business and successfully promote its trade and investment policies. While the Bank has consistently argued that it promotes the rule of law as a prerequisite for the accountability of programmes it supports and money it lends, this conveniently ignores the motives of its involvement as explained above. Examining its preference for private sector as the engine of economic growth, it can be argued that the kind of 'rule of law' being promoted by the Bank is not characterized by the traditional 'rule of law activities' such as access to justice, prison reforms or codification of customary law. Rather the Bank is preoccupied with legal reforms in areas with direct relevance to its mission, such as reform of tax codes, contract laws, international trade agreements and intellectual property laws among other legislations. This reaffirms the core argument in this research that international actors' involvement in rule of law reforms is often informed by the need to advance their primary objectives.⁶³

Are there any parallels between the earlier law and development movement and the contemporary rule of law reform efforts? It is argued that both in substantive and performative aspects, there is a clear resemblance in their motivating themes. On the one hand economic, social, and political development has been an underlying factor motivating the involvement of international actors in building the rule of law in other countries.⁶⁴ On the other hand, the mode of intervention concentrates on reforming the criminal justice system, drafting legal codes, building market structures, building judiciaries, training judicial officers and administrators, all with a view to allocating and safeguarding economic and political capacities. Similarly, as in the law and development movement, activities aimed at rule of law reforms prefer an expedient

⁶³ See James Gathii, 'Retelling Good Governance Narratives on Africa's Economic and Political Predicaments; Continuities and Discontinuities in Legal Outcomes between Markets and States', *Villanova Law Review*, vol. 45, 5, 2000, 971-1025.

⁶⁴ Humphreys, above note 62.

legislative process working with a small group of reform minded locals to achieve lasting effects.⁶⁵ Yet, despite these similarities, it is useful to acknowledge that the two operate in different conditions and periods. While law and development operated mostly in the aftermath of independence, rule of law reform efforts came much later when countries had had an extended opportunity of trial and error in the process of governing themselves.

Despite some similarities between law and development and post-Cold War rule of law promotion, modern rule of law reform efforts are distinct because of the motives and actors involved. While the law and development movement was primarily dependent on the willingness of the beneficiaries to cooperate, modern rule of law reforms are conceived as a ‘universal’ condition which developing countries must fulfil to attain a certain level of development already determined by the reformers. The implication of these changes has been immense. While previously donor institutions interacted directly with governments as the primary focus or target of assistance, the new language of the rule of law has increasingly alienated governments and instead embraced civil societies and private actors who work independently of governments. The latter groups are considered to represent the people by working at the grassroots level, while governments are considered corrupt and inefficient. Further, it should also be acknowledged that these private actors increasingly operate in a difficult environment in that they have to struggle to produce modest changes in extremely hostile terrain and in turn have to painstakingly demonstrate to the donors that their cause is real and produces some tangible changes.⁶⁶

Can we say that democracy which involves election of leaders in a free and fair process is sufficient to augment the rule of law? Similarly, what precise level of development should a given society attain to be considered as rule of law compliant? The rule of law is no longer a country’s

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

choice, rather is considered by the developed countries as a prerequisite to attract foreign assistance through aid, favourable international trade regime or debt relief. Despite this insistence on the primacy of the rule of law in social-economic development, it is clear that the assumptions and dissemination strategies have not changed from those that characterized the law and development movement. Programmes are conceived outside and implemented in countries without asking for the opinions or inputs of those who are to benefit from them. And the central assumption that Western inspired democracy, a human rights protection regime and 'legal culture' are critical to all countries working towards development continue to be a major defining element of the modern rule of law promotion agenda.

There are no specific indicators of the rule of law, rather each donor determines these indicators in a way that advance its specific interests. For example, adopting and having a constitution that enshrines a Bill of Rights, or conducting free and fair elections regularly, may not necessarily be enough to augment the rule of law. Depending on the donor, the rule of law may require compliance with favourable terms of international trade, foreign investments, strong legal institutions to address potential disputes between states and foreign investors, among other things. For the United Nations, the rule of law is increasingly seen as a prerequisite to the realization of Millennium Development Goals (MDGs) and other reforms undertaken in the statebuilding context. It is precisely this approach of Western countries and other international actors that contrasts with the Chinese approach to the rule of law. While China claims to respect the rule of law, it emphasizes the right of states to determine their internal affairs without external interference. It is the Chinese approach that increasingly appeals to developing countries who feel that Western donors, while supporting rule of law reform, excessively interfere in their internal affairs.

E. Parallel lessons for modern rule of law reforms

Having examined how the rule of law became a global agenda defining the foreign policies of donor countries, powerful international financial institutions and other international institutions such as the United Nations and its plethora of affiliated agencies, it is pertinent to ask how these institutions promote the rule of law in practice. Have they learned any lesson from the previous law and development initiatives? How do these institutions conceive the rule of law, and – perhaps crucially – how are their activities informed by local realities and needs of their target groups?⁶⁷ Decades after the failure of the law and development movement, have these institutions understood that ‘local conditions matter’? Or they have maintained the ‘business as usual’ attitude?

We cannot determine whether rule of law reforms have been effective without understanding the needs of the beneficiaries and how they perceive such reforms. As argued earlier in this chapter, rule of law reforms continue to largely reflect the interests and desires of reformers. This has greatly inhibited reforms that have direct impact on and relevance to those for whom these reforms are pursued. For example, while most reform activities are undertaken from a desire to build strong legal institutions and systems, these institutions rarely take into account how people ‘on the ground’ are likely to benefit. The World Bank serves a good example. While one can argue that reforms in tax codes, contract law, property laws, intellectual property laws, or investment laws are critical to a country’s development, these elements hardly constitute a priority to the majority who lack access to these institutions or do not understand the concept of the free market and how the markets work. The danger of this kind of reform lays in the fact that success or effectiveness of reforms tends to be viewed in light of the priorities of reformers. Reforms in investment laws tend to be measured through the volumes of foreign investment in a

⁶⁷ Cynthia Alkon, ‘The Cookie Cutter Syndrome: Legal Reform Assistance under Post-Communist Democratization Programs’, *Journal of Dispute Resolution*, Issue 2, 2002, 327-330.

country or the way investors' business is facilitated, rather than the way people have benefited from these investments, in the process improving their living conditions or quality of life.

The majority of international institutions continue to define and conceive the rule of law in a highly aspirational context. Just as was the practice in the law and development movement where the rule of law was associated with democracy, development and improved social economic conditions of the beneficiaries, so the current rule of law reform efforts pursue those aspirations. Today the rule of law is conceived as accommodating all positive attributes of the 'ideal state'. For example, the United Nations has conceived the rule of law as leading to good governance, electoral reforms equated with free fair and periodic elections, democracy, and respect for human rights among many other elements.⁶⁸ Just like the World Bank, the United Nations does not articulate how these elements can be attained.

Furthermore, one would wonder how these elements associated with the rule of law can be attained through reform programmes undertaken on an *ad hoc* basis by foreign organizations and governments. The international conception of the rule of law is highly idealistic because these attributes would be difficult to attain even in major developed countries, let alone countries emerging from conflicts. The challenge of viewing the rule of law as a universal common good reflected in the 'ideal state' is not only limited to international institutions like the World Bank and the United Nations, rather it has also influenced the work of different NGOs working to promote the rule of law. NGOs and foundations continue to promote the rule of law on the basis of what they consider to be essential for countries to attain social economic development akin to what they see in their own countries, without precise articulation of how to achieve it.

⁶⁸ 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies', Report of the Secretary General, Doc. S/2004/616, 2004.

It is no longer the international financial institutions like the World Bank and the IMF that have adopted the rule of law as their defining element in their relationship with developing countries. Increasingly, foreign donor governments make their financial and technical support to developing countries conditional on rule of law reforms. Countries are compelled to adopt specific measures to satisfy these conditions as long as they want to qualify for economic assistance. For example, the United States in its quest to promote democracy and good governance decided to establish its own private initiative independent of the UN and the World Bank. It established the Millennium Challenge Account (MCA) which primarily extends financial assistance to those countries considered to have complied with the goals of advancing governance and the rule of law, investment in their people and economic freedom.⁶⁹ But who determines the criteria for countries to qualify for financial assistance from this Account? Essentially, it is the United States that determines whether the country complies with the objectives establishing the Account. The government relies on information from some influential US think tanks such as Freedom House and the Heritage Foundation which have on some occasions been accused of advancing their own conservative agendas and bias.

It is argued that this practice of conditioning economic assistance on rule of law reforms has led to confusion and despair among many developing countries, because donor countries are not homogeneous, rather they have different foreign policy priorities and interests. As developing countries receive economic assistance from multiple sources, equally they have to undertake

⁶⁹ This Account is run by the Millennium Challenge Corporation. It bases its decision on three criteria: ruling justly (the level of civil liberties, political rights, accountability, rule of law, control of corruption and government effectiveness), investing in people (immunization of children, public expenditure on health, girls' primary education completion rates, and public expenditure on public health,) and economic freedom (natural resources management, business startup, inflation, trade policies, fiscal policy and land rights and access). It relies on data from different sources but chiefly from Freedom House, Brookings Institutions, the World Bank, the IMF, the Heritage Foundation, the World Health Organization, IFAD and education institutions such as Yale University. See www.mcc.gov. Accessed March 2013.

different reforms to satisfy wide range of interests as demanded by countries in question. What is the implication of this state of affairs? Reforms tend to be modelled on donors' priorities with little or no consideration of the relevance of reforms in the lives of those in whom these reforms are undertaken. Examining rule of law reforms in different countries, especially those emerging from or still trapped in protracted conflicts, it is clear that such reforms continue to pose greater challenges because there is a lack of coherence in priorities between the donors and beneficiaries.

What constitutes a post-conflict situation, and specific issues relating to the rule of law in this context, is another issue that requires clarification from international actors. Whether it is in countries or regions with or without active armed conflict, like Darfur, Somalia or Southern Sudan, international practice appears to be one of joining such cases together under the banner of 'rule of law in post-conflict situations'. Yet there are significant differences between these situations in terms of needs and challenges peculiar to each designation. The practice seems also to be common in countries not having experienced high intensity conflict but with severely weak institutions of governance, such as Chad or the Central African Republic. The implication of this practice is that international financial institutions and donor countries tend to conceive 'rule of law projects' with a post-conflict context in mind. It is contended that there is a need to make a practical distinction between these different situations, because the way the term is used to describe a situation affects the overall initiatives to build the rule of law in terms of resources provided by donors to achieve this objective.

It has been a practice of external actors to cast the rule of law in a negative perception, associating the term with poor countries, countries emerging from conflicts and countries in the global South in general. It is argued that if there is a consensus that the rule of law is a 'common good' desirable for both the rich and the poor, then its dissemination should not be confined to a specific group of countries or societies. For example, although there are huge social-economic

differences between a country like Russia and countries like Chad, the Central African Republic or Sudan, to rule of law reformers all these countries seem to lack ‘rule of law culture’.⁷⁰ Yet, no country with an advanced economy is associated with rule of law reforms, irrespective of its type of democracy.⁷¹ In fact, as a country advances economically its association with rule of law reforms recede. For example, while previously South Korea and Taiwan were associated with the law and development movement, today these countries have joined ranks with other Western countries such as the US, Britain and Japan which consider themselves as rule of law compliant.

As stated by Tamanaha, a wholly negative criterion for inclusion deprives the rule of law of shared qualities upon which to build and justify these reforms.⁷² Indeed, it is this negative association of the rule of law with poverty and conflicts that casts doubt on the effectiveness of reforms suggested and coordinated by foreign institutions and donor countries. This is because experience in countries considered to uphold the rule of law does not necessarily become relevant to countries where these reforms are undertaken. The practice of viewing rule of law reform as the preserve of the poor countries and those emerging from conflicts deprives the rule of law of the universality claim advanced by its proponents, precisely because it is seen as a one way exercise prescribed and exported by the rich and powerful to the poor and those less fortunate.

To understand how the impact or effectiveness of reforms is established, it would be worth considering an example of USAID whose involvement in rule of law reform spans more than

⁷⁰ See Thomas Carothers, ‘The Problem of Knowledge’, in Thomas Carothers (ed.), *Promoting the Rule of law Abroad*, Washington, DC: Carnegie Endowment, 2006.

⁷¹ There have been no rule of law initiatives championed by Western countries and organizations in countries such as Saudi Arabia or Bahrain.

⁷² Tamanaha, ‘The Primacy of Society and the Failure of Law and Development: Decades of Stubborn Refusal to Learn’, Faculty Research Paper, *Washington University St. Louis School of Law*, paper no. 10-03-02, 2010.

100 countries, most of them in the global South. The mission of the Agency in market reform is *inter alia* to promote legal reform in commercial laws, revision of national constitutions, facilitate business environment by enhancing corporate governance. The Agency also supports commercial dispute resolution, property rights, WTO accession, anti-corruption measures and intellectual property protection. An interesting question would be how the Agency establishes whether its programmes have had an impact.

For example, international actors tend to measure the outcome of rule of law efforts through legislation enacted in particular countries or numbers of judges or magistrates trained, yet one can challenge whether the rule of law is enhanced by merely assisting countries to draft legislation. This concern is addressed by Humphreys who convincingly argues that rule of law promotion extends well beyond technical assistance for drafting laws to support capital markets and business transactions. He contends that reforms require nurturing the multiple interlocking constituencies who will cumulatively ensure that the law comes to life. Business groups and lawyers must be shown how to activate these laws to their benefit.⁷³

Explaining the imperative of the case management system in overall goal of rule of law reform, USAID contends that ‘improved case management leads to a more effective justice system by decreasing case backlog and case disposition time’. In the 2011 financial year, the organization contends that as a result of US assistance, a total of 742 courts improved their case management systems, exceeding the target of 624.⁷⁴ However, one may be inclined to ask, how does USAID measure the improved case management systems of courts? The Agency assumes that delays in disposal of cases can be attributed to the lack of proper training of the court officials. Ample

⁷³ Humphreys, above note 62, 130.

⁷⁴ See <http://www.state.gov/s/d/rm/rls/perfrpt/2011performancesummary/html/191492.htm>. Accessed March 2013.

evidence in places like Southern Sudan demonstrate that it is a combination of many factors that leads to this state of affair. For example, corruption and inefficiency exist in the judiciary not because court officials lack training but rather because of poor working conditions, lack of morale and weak institutions to address these problems. It is highly simplistic to contend that offering training courses in case management to a certain number of people or officials will automatically lead to improved rule of law in a given jurisdiction.

From examination of modern rule of law reform activities, it is clear that there are many lessons of the previous law and development movement which have not been learned. While the failure of the law and development movement was attributed to the lack of 'legal culture' of the recipients, so is the failure of the modern rule of law reforms in a given context. The failure of reforms is always attributed to national rather than international rules, norms and institutions. Yet it is clear that there are well recognized economic, political and social pressures on countries which limit their capacity to act independently or implement policies reflecting their needs and conditions.⁷⁵ When these policies fail to achieve their objectives it is always blamed on internal factors such as 'rampant corruption, dictatorship and unwillingness to reform'. To most international institutions any failure in the rule of law reforms is attributed to domestic institutions and leadership.⁷⁶

It is argued that if modern rule of law reforms are to succeed and attain their objectives, external reformers must accept their role in the failure (or success) of their initiatives. This acceptance could provide a compelling need for reformers to re-examine their reform strategies and perhaps

⁷⁵ See Korinna Horta, 'Rhetoric and Reality: Human Rights and the World Bank', *Harvard Human Rights Journal*, vol. 15, 2002, 227-240. See also Gerald K. Helleiner, 'Markets, Politics and Globalization: Can the Global Economy be Civilized?' UNCTAD 10th Raul Prebisch Lecture, CIS Working Paper Series No. 2000-1, Dec. 2000.

⁷⁶ Kerry Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social', *Michigan Journal of International Law*, vol. 26, 2004, 208.

change the way they deal with the local actors by integrating their views when formulating reform packages. The practice of solely laying blame on internal actors clearly fail to admit the truth that most of these policies and reforms are conceived and implemented largely by foreign experts with little or no input from the beneficiaries, who in most cases are considered incapable of undertaking these reforms. Admittedly, internal factors do play a part in reform failure, but these factors must be examined from the local perspective and the desire of beneficiaries not only to assert authority over these reforms but also to condition them to their needs and realities. If modern rule of law reform is to be different from the previous law and development movement, it must mark a difference through its reform strategies. Effective reforms cannot be achieved while the overall reforms are dictated by and dependent on the interests of the reformers. More often, reforms are funded and carried out in the name of the people but these people clearly lack agency and participation in determining the kind of reforms relevant to their conditions.

F. Conclusion

The key argument in this chapter was that any meaningful reforms must reflect the needs and aspirations of the local polity. While international standards may be useful in informing the reform process, it should not be undertaken at the expense of legitimate concerns of those who are likely to live under these reforms. It is obvious that modern rule of law reforms build on the previous failed attempt under the law and development movement, based on the claim that building rule of law would automatically lead to improved social economic conditions and effective legal institutions in countries where these reforms were undertaken. However, the available evidence demonstrates that there was a significant disconnect between claims made and the outcome of the process itself. The discussion has also shown that modern rule of law reform efforts have failed to learn any lesson from the previous attempt of the law and development movement. This failure is reflected in the similar approach used by the reforms where local

beneficiaries lack agency in reform process. The next chapter will examine the legal basis of the UN and AU for engaging in rule of law reforms in Southern Sudan, because of the central role played by these institutions in the post-conflict rule of law reform process.

Chapter Five

V. The Legal Basis of the UN and AU for Building the Rule of Law.

A. Introduction

This Chapter examines the legal framework of the United Nations and the African Union in building the rule of law in countries emerging from conflict, with specific reference to Southern Sudan. In doing so, the chapter will investigate how these two organizations approach the rule of law, since both have embraced rule of law as the underlying objective in their involvement in countries emerging from conflict, especially in Africa, to strengthen legal institutions such as an independent judiciary and police service. This involvement is carried out despite the fact that these two organizations' primary role is to regulate relations among states rather than interfering in their domestic affairs. It will further be shown that there is a significant disconnect between activities by these organizations in the rule of law reform process and the objectives underpinning their involvement. It is this that shows a need to inquire further into the legal framework within which both organizations implement measures to realize their objectives of building the rule of law.

The chapter further demonstrates that while the United Nations and the African Union have assumed a central role in rule of law reforms, behind the scenes there are several NGOs and

philanthropic foundations, especially from the developed countries, involved in a wide range of activities under the banner of rule of law reform. Although clearly these NGOs and foundations hardly attract attention similar to that of the UN or AU from international policy makers, they play a key role in the reform process. In fact some of these NGOs have far more ‘on the ground’ contacts with the local polity than the UN and the AU bureaucracy, and this tremendously increases their clout and influence in countries where they work.

The chapter will first examine the UN Charter and the institutional mandate of the UN to build the rule of law in post-conflict countries. How does the United Nations understand and distinguish rule of law at the national and international levels? This distinction is important in order to demonstrate how the rule of law concept is applied within and between states. This aspect will further our understanding of the role of international institutions in building the rule of law at both national and international levels. International actors depend upon state frameworks and their institutions, taking them to be universal in their inspiration and intent. They assume that the rule of law institutions and process that regulate these interactions between people and their governments employ universally accepted norms, practices and neutral institutions. The assumption is that the rule of law is universal rather than a choice among many.¹ Yet, one must ask how this claim of universality of the rule of law gets implemented.

Since the thesis is focused on Southern Sudan, the discussion will address the specific role of international actors such as the UN Mission in South Sudan, UN agencies and NGOs in building the rule of law in Southern Sudan. The chapter will discuss how the UN’s understanding of the rule of law at the international level informs its continued involvement in building the rule of law in Southern Sudan. Recognizing the significant role of regional institutions, the chapter will

¹ Oliver P. Richmond, ‘The Rule of Law in Liberal Peacebuilding’ in Chandra Lekha Sriram et al. (eds) *Peacebuilding and Rule of Law in Africa: Just Peace?* London: Routledge, 2010, 44.

further examine the role of the African Union in post-conflict reconstruction by focusing on the AU Constitutive Act and the Post Conflict Reconstruction Policy respectively. The underlying objective of this chapter is to build on the first chapter which discussed the rule of law concept and how it is understood by different actors involved in its realization. This chapter strives to establish an institutional framework within which the rule of law is implemented with a focus on Southern Sudan.

B. The UN Charter and the institutional mandate to build the rule of law

The United Nations Charter has been the centre piece for the maintenance of international peace and stability since the UN's founding in 1945. However, nowhere in the United Nations Charter is building the rule of law in post-conflict areas indicated as a primary responsibility of the organization. So it is necessary to examine the reasons behind the organization's involvement to build the rule of law in post-conflict countries. In fact it may be argued that the UN's involvement in building the rule of law is a significant shift from its core role, which is to regulate interstate relations and not domestic governance issues within its member states.² To reaffirm this point, the Charter specifically states that 'nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.³

² Erika De Wet, *Chapter VII Powers of the United Nations Security Council*, Oxford: Hart Publishing, 2004.

³ Art. 51 of the UN Charter. See also, Edwin M. Smith, 'Collective Security, Peacekeeping and ad hoc Multilateralism' in Charlotte Ku and Harold K. Jacobson (eds), *Democratic Accountability and the Use of Force in International Law*, Cambridge: Cambridge University Press, 2003, 85-87.

The pertinent question to ask then is: can the failure or inability of a UN member state to promote the rule of law constitute a threat to international peace and security such as to warrant intervention of the world body? To answer this question one has to examine the purposes and objectives of the United Nations Charter. Among the principles of the Charter are to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁴ The Charter imposes an obligation upon all member states to provide assistance required by the organization to carry out its functions.⁵ It also establishes the UN to be a centre for harmonizing the actions of nations in the attainment of its common aims.⁶

It can therefore be argued that, under the Charter, it is within the responsibility of the United Nations to promote the rule of law if failure to observe it inhibits the attainment of its objectives. Indeed, as already discussed in chapter three, Article 56 of the Charter lays down international cooperation as the basis of achieving the objectives of the Charter. The Preamble to the Universal Declaration of Human Rights (UDHR) makes an express provision that the rule of law is necessary in the advancement and realization of human rights. This link between human rights and the rule of law can be seen in the United Nations Secretary General's definition of the rule of law discussed in chapter one.

While the UDHR does not define the rule of law, by juxtaposing the desired protection of human rights through law, the provision can be construed or inferred to suggest that rule of law is the formal and procedural safeguard for advancing human rights. The inclusion of 'rule of law'

⁴Article 1(3) UN Charter.

⁵Article 25, UN Charter.

⁶Article 114, UN Charter.

in a landmark document like the Universal Declaration of Human Rights is significant because it concretizes and legitimizes the role of the United Nations to promote rule of law as an essential requirement to guarantee the realization of human rights. The Universal Declaration of Human Rights provides the foundational basis for the activities of the United Nations and its agencies in promoting human rights. The definition of the rule of law advanced by the former UN Secretary General and discussed in the introductory chapter equally notes that individuals and institutions must be accountable to laws which are not only publicly promulgated and independently adjudicated but also consistent with international human rights norms and standards.

In 1993, during the World Conference on Human Rights in Vienna, the rule of law was noted as the essential element to protect and enjoy human rights.⁷ The Conference noted the fall of the Iron Curtain, and reaffirmed and encouraged the promotion and protection of human rights, peace, democracy, justice, equality, self-determination, pluralism, development and the rule of law.⁸ The Conference condemned systematic violations of human rights and other situations that constitute obstacles to the full enjoyment of all human rights, while encouraging the promotion of the rule of law as the direct remedy for this situation.⁹ The Vienna Declaration, while recommending measures to address human rights violations, stated that countries which so requested should be assisted to 'create conditions' whereby each individual could enjoy all human rights.¹⁰

The adoption of this Declaration was significant in two ways; it recognized that breakdown of the rule of law was a major cause of violations of human rights and an impediment to the full

⁷World Conference on Human Rights, Vienna Declaration and Programme of Action, Doc. A/CONF.157/23, July 1993.

⁸*Ibid.*, Preamble of the Declaration.

⁹*Ibid.*, para 30.

¹⁰*Ibid.*, para 9.

realization of human rights, and it recommended reforms in critical areas such as penal and correctional establishments, education and training for lawyers, judges and security forces, and in human rights and any other sphere of activity relevant to the good functioning of the rule of law.¹¹ Admittedly this Declaration was not a binding legal document, but the fact that it was endorsed almost by all members of the United Nations attending the meeting in Vienna provided a much needed platform for the United Nations to engage in activities geared to improving the rule of law.¹²

However, the key question is, how did the UN jump from recognition of the breakdown of the rule of law as a source of instability to direct engagement in specific countries to build rule of law? As discussed in chapter four, this decision, while it can be attributed to the end of the Cold War which enhanced the legitimacy of the UN as the primary institution to address global challenges, both developed and developing countries considered the UN an ideal institution to help countries realize these norms at the domestic level. It can therefore be argued that this was a significant shift in the international community, from recognition of the breakdown of the rule of law to allowing the UN to engage in activities to strengthen the rule of law. Can the UN intervene to build the rule of law in absence of a request or consent by the state concerned, as provided for under the Vienna Declaration? It is argued that the Security Council can authorize intervention in the absence of a specific request or consent as part of its mandate to maintain international peace and security. While the Council's action may not be premised on building the rule of law, experience demonstrates that activities undertaken in the process either by the peacekeeping missions or by UN agencies are closely aligned with the rule of law reform process.

¹¹*Ibid.*, para 69.

¹² The United Nations General Assembly subsequently endorsed the Declaration through Resolution 48/121, December 1993.

It is important to note that some developing countries' mistrust of the political agenda and self-interest of developed countries underpinning various rule of law reform initiatives in developing or post-conflict countries have elicited resistance from these countries. Developing countries have increasingly asserted their right to sovereignty and non-intervention. Reflecting this resistance, China has argued that 'development of the rule of law in a country is by nature a sovereign matter, as such, in principle, allows no intervention from any other country or international organization unless with the consent of the country concerned'.¹³ The example of China demonstrates the ongoing challenge facing developed countries and international organizations in assisting the rule of law in developing countries or post-conflict situations. To address this problem it is essential for these actors to ensure that they pattern reforms in accordance with local needs and priorities reflected in the minimum attributes identified in the introductory chapter.

C. The rule of law at the international level

The preceding discussion has demonstrated that the UN involvement in rule of law reform is predicated on the UN Charter, GA resolutions, declarations and policy statements adopted to enhance the role of the organization to attain wider objectives contained in the UN Charter. Building on the discussion in the introductory chapter which examined different facets attributed to the rule of law, this section aims to examine the framework within which the rule of law is realized in the international context.¹⁴ However, it is important first to distinguish rule of law at the national and international levels. Rule of law at the national level addresses the rule of law within domestic context – for example, the way rule of law institutions discussed in chapter one,

¹³ Duan Jielong, 'Statement on the Rule of Law at the National and International Levels', *Chinese Journal of International Law*, vol. 6, 1, 2007, 185-188.

¹⁴ Mattias Kumm, 'The International Rule of Law and the Limits of the Internationalist Model', *Virginia Journal of International Law*, vol. 44, 2003-2004, 22.

such as the judiciary, the police or human rights institutions, perform their functions or respond to the needs of their beneficiaries. Rule of law at the international level essentially addresses rule of law between states – for example, how states uphold their international obligations contained in the UN Charter and various international human rights instruments.

Despite the lack of precise definition of international rule of law, in general it can be argued that the concept connotes reliance on law as opposed to arbitrary power in international relations; substitution of settlement by law for settlement by force; and realization that law can and should be used as a means for the cooperative international furtherance of social and economic justice, in such a fashion as to preserve and promote the values of freedom and human dignity for individuals.¹⁵ But it is also worth noting that development of and respect for the international rule of law has been gradual, largely dependent on a wide range of state interests that promote the rule of law in international relations.

International rule of law is underpinned by the establishment of the International Court of Justice as an integral part of the UN Charter. The legal regime for the peaceful settlement of disputes is part of the mechanism to enhance international rule of law. Article 92 of the Charter designates the Court as the ‘principal organ of the United Nations’ whose primary role is to settle legal disputes between states peacefully.¹⁶ While other organs stipulated within the Charter such as the General Assembly or the Security Council may take measures toward peaceful settlement

¹⁵ William W. Bishop, ‘The International Rule of Law’, *Michigan Law Review*, vol. 59, 4 1961, 553-574.

¹⁶ Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, Cambridge: Cambridge University Press, 2005; Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honor of Sir Robert Y. Jennings*, Cambridge: Cambridge University Press, 1996.

of disputes through different mechanisms such as mediation and reconciliation, it is only the Court that is mandated by the Charter to legally adjudicate disputes among states.¹⁷

While the first chapter discussed how the UN and member states conceive the rule of law, it is important to understand also how they conceive the rule of law at the international level, because of the importance of the rule of law concept in regulating relations among states. In 1999 the UN Secretary General, while launching his report on the key policy goals for the Organization in the new century, identified the international rule of law as one of the most important objectives, noting that ‘establishing the rule of law in international affairs is a central priority’.¹⁸ From the Secretary General’s point of view, the international rule of law could contribute to the maintenance of international peace and security, peaceful settlement of disputes, and protection of human rights, and in the process enhancing international peace and security. The Secretary General also saw international rule of law as the ability of states to carry out their international obligations in good faith. He noted that ‘realizing the promise of the framework of global norms developed by the international community is of critical importance. Without such a commitment, the international rule of law will remain little more than a remote abstraction’.¹⁹ However, despite this recognition, the Secretary General did not articulate strategies for realizing his vision of international rule of law.

¹⁷ Rosalyn Higgins, ‘The ICJ, ECJ and the Integrity of International Law’, *International and Comparative Law Quarterly*, vol. 52, 2003, 1-23; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford: Oxford University Press, 1999. See also speech by the then President of the ICJ Rosalyn Higgins, ‘The ICJ, the UN System and the Rule of Law’ given at the LSE in 2006. At: http://www2.lse.ac.uk/newsAndMedia/news/archives/2006/Judge_Higgins.aspx. Accessed March 2013.

¹⁸ Report of the Secretary General on the Work of the Organization, U.N. Doc. NO./a/55/1 (2000).

¹⁹ *Ibid.*

In 2005, UN member states unanimously recognized the need ‘for universal adherence to implementation of the rule of law at both the national and international level’ and reaffirmed their commitment to an ‘international order based on the rule of law and international law’.²⁰ There are many reasons to explain the basis of this uncommon consensus between the developed and developing countries, though clearly each side had its own distinct reasons. For developing countries insistence on the international rule of law was reinforced by the existing disparity among states and the quest to have all countries, both weak and powerful, operate within the existing legal framework of the UN Charter, especially in matters related to the maintenance of international peace and security.²¹

Asymmetries in power and the potential for political abuse that such asymmetries entail galvanized the developing countries’ desire for international rule of law. The practice of rich and powerful countries to intervene in the domestic affairs of weak countries further concretized the desire of developing countries to insist on a global order based on the international rule of law.²² It is only within the UN Charter framework that poor and weak countries can realistically restrain powerful countries from taking actions which may affect their wellbeing and sovereignty.²³ Certainly, to some extent any asymmetries of power are likely to be reflected in the rules of the international legal system. Even so, the existence of such rules, if obeyed, provide

²⁰UNGA Res. 60/1/2005 World Summit Outcome Document Para 11. See also Simon Chesterman, ‘An International Rule of Law?’ *American Journal of Comparative Law*, vol. 56, 2008, 331-362.

²¹ See the Declaration adopted after the Bandung Conference in Indonesia, 1955.

²² See generally Balakrishnan Rajagopal, *International Law from Below: Developments, Social Movements and Third World Resistance*, Cambridge: Cambridge University Press, 2003. See also an address by Jack Straw, ‘We are in Iraq to Bring about Democracy’, given to the Labour Party Conference, Brighton, 28 September 2005, <http://www.globalpolicy.org/empire/humanint/2005/0928strawspeech.htm>. Accessed March 2013.

²³ Christine Chinkin, ‘Rethinking Legality/Legitimacy after the Iraq War’ in Richard Falk et al. (eds), *Legality and Legitimacy in Global Affairs*, Oxford: Oxford University Press, 2012, 219-245.

some degree of protection and security for the weak nations.²⁴ For developing countries the rule of law at the international level requires respect for the authority of the UN Charter by all countries and joint management of international affairs through negotiations on an equal footing, and no country should be above the international law or apply it selectively or with double standards.²⁵

Developed countries had distinct motives in supporting the international rule of law. In the West the consensus was that the lack of democracy, accountability and good governance, and human rights violations continued to inhibit development in the South.²⁶ In fact, in the World Summit Outcome document it was agreed that rule of law at the international level was ‘essential for sustained economic growth’.²⁷ The argument was that ‘a highly developed legal system leads to a highly developed economy’.²⁸ This recognition of the nexus between the rule of law and economic development was premised on the developed countries’ eagerness to advance liberal democracy which considered periodic elections and respect for civil and political rights as not just necessary but largely sufficient to advance rule of law.²⁹

But also international rule of law can be considered in the context of legitimacy in international relations. It is through respecting international law and norms that powerful countries can urge developing countries to respect and observe the rule of law. While it is true that powerful

²⁴Mattias Kumm, above note 14, 25.

²⁵Statement of the Chinese Representative to the General Assembly, above note 13.

²⁶ Roland Paris, ‘International Peacebuilding and the Mission Civilisatrice’, *Review of International Studies*, vol. 28, 4, 2002. See also ‘Declaration of G8 Foreign Ministers on The Rule of Law’, Potsdam 2007.

²⁷UNGA Res. 60/1/ 2005, para 11.

²⁸Brian Tamanaha, ‘The Primacy of Society and the Failures of Law and Development’, *Cornell International Law Journal*, vol. 44, 2011, 211.

²⁹ Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality*, Cambridge: Cambridge University Press, 2011, 183.

countries have not always respected international rule of law, their ability to influence developing countries to observe rule of law largely depends on how they enforce and uphold these norms at the international level among themselves and among themselves and developing countries.

It was therefore essential to internationalize these elements as universal ideals shared between both the rich and the poor. Demonstrating the West's desire to promote democracy in post-Cold War era, developed countries meeting under the auspices of the OSCE in 1990 reaffirmed that 'democracy is an inherent element of the rule of law'³⁰. As argued by Franck, in this period the question was not whether democracy was necessary but rather whether global society was ready for an era in which only democracy and the rule of law could validate governance.³¹ Hence it can be argued that the quest for liberal democratic legitimacy significantly motivated Western countries to push for the rule of law in the post-Cold War period.

The fact that the growing threat of terrorism mostly emanates from countries considered to be failed such as Somalia, Pakistan or Afghanistan has reinforced the belief by Western powers that it is through internationally accepted standards that they can take measures to address these threats without being seen as imperialists trying to impose their values on others. Indeed, it was through this perspective that developed countries strongly supported the Responsibility to Protect and humanitarian intervention, unlike their Southern counterparts who were skeptical of these developments.³² Despite these divergent goals regarding the international rule of law, this consensus has helped elevate the rule of law at the international level with support from both

³⁰Charter of Paris, 1990.

³¹ Tom Franck, 'The Emerging Right to Democratic Governance', *The American Journal of International Law*, vol. 86, 1992, 46-50.

³²International Commission on Intervention and State Sovereignty (ICISS), Ottawa, 2001. See also Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' *The American Journal of International Law*, vol. 101, 1, 2007, 99-120.

powerful and weak countries. In other words, the international rule of law can be considered as ‘unqualified human good’ precisely because it serves the interests of both rich and poor countries albeit in different perspectives.³³

But what is the usefulness of the international rule of law? Why should it be embraced? In addition to the different motives of the developed and developing countries already identified, there are some other tangible benefits from embracing the international rule of law at the global level. It is assumed that international rule of law may contribute to the protection and enhancement of rights of the citizens guaranteed under international law, which is reflected through the oversight role of international human rights institutions established for that purpose.³⁴ An effective institutionalization of the international rule of law may limit a domestic authority’s opportunity to insist on non-interference in domestic affairs and use this as justification to trample on the rights of their citizens. But crucially, international rule of law can also provide a valuable institutional resource by serving as an effective instrument enabling and fostering the establishment of welfare-enhancing cooperative endeavours among nations and support a globalized economic system.³⁵

D. The rule of law at the national level

How are rule of law commitments made at the international level implemented within the domestic setting? This aspect is important because ultimately international commitments, to be translated from theory into reality, require national implementation. In other words, the strength of a country’s adherence to the international rule of law is directly linked in substantial measure

³³ Judith Shklar, ‘Political Theory and the Rule of Law’, in Allan C. Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987, 1-16.

³⁴ Kathryn Sikkink, *the Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York: W.W. Norton, 2011.

³⁵ Mattias Kumm, above note 14, 25.

to the extent to which international law can be enforced through national mechanisms.³⁶ This implementation is premised on the relationship between international law and national law in domestic legal systems, which varies from one country to another and is also fluid and shifting.³⁷

Implementation of the international rule of law in the national setting largely depends on the availability of strong institutional and legal mechanisms to ensure that states fulfil their obligations. International obligations anchored in different instruments require strong institutions such as the legislature, judiciary, police force and correctional services to translate them from mere ideals into a reality. For example, the Commonwealth's *Latimer House Principles* (2003) require that 'judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.'³⁸ While legally not binding, they provide a clear framework for states to advance rule of law.

It is further argued that the ability of countries to implement their international commitments differs from one country to another. Indeed it is in recognition of this fact that the international community through various forums such as the United Nations, regional organizations and individual countries has worked to create a framework to provide international assistance to countries unable to fulfil their international commitments to advance the rule of law. This framework firmly anchored under Article 56 of the United Nations Charter has further been reaffirmed by the Vienna Declaration and the Programme of Action discussed earlier.

³⁶ John Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge: Cambridge University Press, 2004, 74.

³⁷ *Ibid.*

³⁸ Commonwealth *Latimer House Principles*, 2003. See also Conference Report by the Venice Commission on Democracy through Law on 'Sustaining Rule of Law to Promote Social-Economic Development in the Eastern and Southern African Region', Kasane, Botswana, 7-8 August 2009. www.venice.coe.int.

However, it is important to question whether a state that fails to uphold the rule of law at the domestic level can uphold it at the international level. Consider these facts: Mike Campbell, a white farmer in Zimbabwe sought to challenge a government threat to expropriate his property with little or no compensation. After unsuccessful attempt for legal redress in Zimbabwe, he went to the Southern African Development Community (SADC) Tribunal (of which Zimbabwe is a founding member) where he won the case.³⁹ But his request to have the decision enforced was rejected by the High Court in Zimbabwe on the ground that the Tribunal's decision was contrary to national public policy.⁴⁰

This action of the High Court demonstrates the challenge of upholding international rule of law if the state does not respect the rule of law domestically. It further shows that enforcing the rule of law goes beyond the requirement of strong institutions and requires political will and commitments to enforce national as well as international obligations. What is worth noting is that this Tribunal was suspended in 2010 by SADC member states at the instigation of Zimbabwe. This suspension challenges the commitment of SADC member states to the international rule of law, if they can suspend institutions simply because they disagree with their decisions.

Despite the growing consensus of the international community on the primacy of the international rule of law, it should be acknowledged that there is also a significant disagreement among states on how to frame and attain it. While developing countries insist on the importance of social and economic conditions as the basis upon which countries can attain international rule of law, developed countries contend that it is through respect for human rights and civil liberties that developing countries can attain social economic progress. It is on the basis of this sharp

³⁹*Mike Campbell (Pvt) Ltd & Others v. Republic of Zimbabwe* (2/2007) 2008 SADCT 2 (Nov. 2008).

⁴⁰*Gramara (Pvt) Ltd & Colin Bailie Cloete v. Zimbabwe*, HH 169-2009, HC/33/09.

disagreement that the next discussion will examine the development of the international rule of law within the United Nations' two most important organs, the Security Council and the General Assembly. How do these organs conceive and implement their visions of rule of law? We cannot answer this without examining how the development of the rule of law by these two important organs has unfolded.

i. The UN General Assembly and international rule of law

The debate in the United Nations on the international rule of law as an international agenda has been largely championed and shaped by the UN General Assembly where developing countries dominate. Many reasons have influenced this development. The UN Charter designated the General Assembly as the principle organ to spearhead progressive codification of international law and social and economic issues.⁴¹ Hence development of international rule of law within the Assembly has been undertaken in a general framework of international law development. Indeed, in the immediate aftermath of the Cold War the General Assembly designated 1990-1999 as the 'UN decade of international law'.⁴² Among the main objectives of this Decade were (a) to promote acceptance of and respect for the principles of international law, (b) to promote means and methods for the peaceful settlement of disputes between states, including resort and full respect for the International Court of Justice, (c) to encourage progressive development of international law and (d) to encourage teaching and dissemination and wider appreciation of international law. One can argue that in adopting this declaration the primary objective of the General Assembly was to promote the rule of law in international relations based on the United Nations Charter, which had been marginalized by the big powers during the Cold War period. In other words the declaration was geared towards promoting the rule of law between states in their

⁴¹Article 13 of the UN Charter.

⁴² R. Abeyratne, 'The United Nations Decade of International Law', *International Journal of Politics, Culture and Society*, vol. 5, 3, 1992, 511-523.

dealings with each other, an aspect which would be achieved through peaceful settlement of disputes through the UN-sanctioned mechanisms such as the International Court of Justice.

Other efforts by the Assembly to position the rule of law as an ‘international common good’ can be seen in the period after the end of Assembly’s designated decade of international law. In 2006 two UN member states, Mexico and Liechtenstein, addressed a letter to the UN Secretary General requesting the inclusion in the agenda of 61st Session of the General Assembly of an item ‘The Rule of Law at the National and International Level’.⁴³ The explanatory note annexed to the letter explained the importance these countries attached to the concept of the ‘international rule of law’. The note stated that: ‘The international and national dimensions of the rule of law are strongly interlinked. The international legal order serves not only as a framework relation and source of rights and obligations for states and other actors, but also as a source of inspiration for the development of national legal standards, in particular in the field of human rights. The strengthening of the rule of law at the international level thus has a direct impact on the rule of law at the national levels’. The note concluded by observing that ‘the General Assembly, as the United Nations’ chief deliberative policy making and representative organ, with its central role in the area of development and codification of international law, is uniquely positioned to fill that gap and to promote universal adherence to the concept of the rule of law, in particular at the international level’.⁴⁴

⁴³ Doc.A/61/142 of May 2006. ‘Request for the inclusion of an Item in the provisional Agenda of the Sixty-First Session, the Rule of Law at the National and International Levels’, Letter dated 11 May 2006 from the Permanent Representatives of Liechtenstein and Mexico to the United Nations Secretary General.

⁴⁴*Ibid.*

On the basis of this request, the General Assembly adopted resolution A/RES/61/39⁴⁵. This reaffirmed *inter alia* the General Assembly's 'commitment to the purposes and principles of the Charter of the United Nations and international law'. It reaffirmed that 'human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations'. The Resolution further reaffirmed the need for universal adherence to and implementation of the rule of law and a 'solemn commitment to an international order based on the rule of law and international law', and emphasized the existing nexus between the rule of law, development, human rights and international security. This linkage emanates from the Assembly's belief that it is through respect for international law that the rule of law in international affairs can be enhanced.⁴⁶

A salient feature we see in this resolution is that it linked the rule of law and development, which had been the major concern of developing countries. This meant that developing countries considered development a prerequisite for the rule of law. The resolution ends by stating that 'the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations'. This paragraph is significant because it places justice and good governance at the centre of the UN's objectives to promote the rule of law.

More recently, in September 2012, the General Assembly adopted a Declaration entitled 'Rule of Law at the National and International Levels'.⁴⁷ What is notable about this Declaration is that it

⁴⁵ A/RES/61/39, Dec 2006, adopted upon recommendation by the Sixth Committee.

⁴⁶ *Ibid.*

⁴⁷ Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, September 2012.A/Res/67/1. For example, during the debate the President of Benin contended that 'the rule of law was the optimal framework for a functioning democracy and it was up to States to put in place credible stable institutions that fostered democracy'. The President of Honduras said the 'concept of the

equates the rule of law with virtually everything that reflects the international legal order underpinned by the UN Charter, so that it becomes difficult to determine whether it can be achieved at all. For example, the UNGA equates the rule of law with sustainable development, a fair international trading system, the fight against terrorism, good governance, social cohesion, access to justice and an independent judiciary. It also equates the rule of law with informal justice mechanisms, rights of children, conflict prevention, peacekeeping, respect for international humanitarian law, combating impunity, and prevention of corruption.⁴⁸ Yet, as with the UN Secretary General's Report cited earlier, the General Assembly did not explain how this long list of objectives would be achieved.

Despite this commitment of the General Assembly in elevating the rule of law to the international agenda, the Assembly has not responded to the major challenge of defining the rule of law, a challenge which has also faced national levels in addressing the same subject. The struggle to come up with a definition of the rule of law at the international level is reflected in the multiple definitional concepts advanced by different countries during the deliberations in the General Assembly on the subject, as already discussed in chapter one. Indeed some countries

rule of law promoted development and, in turn, development strengthened the rule of law', while the President of Iran stressed that 'regulating sound social relations and establishing order, peace, freedom, public welfare and long-term security depended on the implementation of the rule of law'. The President of Kenya said that 'the rule of law was essential for democracy and ensuring sustainable development for all'. The President of South Africa argued that 'the rule of law and human development were inextricably linked'. The representative of Venezuela stated that 'without the existence of a truly democratic system within the United Nations, particularly regarding the make-up and decision-making mechanisms of the Security Council, the rule of law will forever be a utopian dream'. Belgium's representative noted that 'there could be no sustainable development without the rule of law because businesses can not invest in countries where it was weak', and Eric Holder, Attorney General of the United States, stated that establishing the rule of law was 'essential in the fight against terror threats and efforts to strengthen civil society'. www.unrol.org. Accessed March 2013.

⁴⁸*Ibid.*

were against attempts to define the term at the international level.⁴⁹ Those which favoured the attempt at definition acknowledged that a definition could only encompass some common denominators and would not be exhaustive.⁵⁰ However, critical examination of efforts of the UNGA to create an international system premised on the rule of law shows clearly that these efforts reaffirm the primary objective of the 1970 Declaration on the Friendly Relations among States, which is to create an international system based on equality and justice.⁵¹

From the General Assembly perspective, countries agree, despite their differences, that the rule of law is central in the conduct of international affairs and the realization of the goals of the UN Charter and other international treaties. An implicit challenge facing the rule of law at the international level is how to create the synergy of rule of law at the international level and the national level. A further challenge is how to realize rule of law norms conceived at the international level within the domestic setting of countries with varying legal systems and economic capabilities. Critics in both the developing and the developed world argue that laws will always be inseparable from the greater geographical, political and cultural context, and that the Western pursuit of reforms is a function of desire for global hegemony through the universalization of Western values.⁵²

For example, the proponents of the 'Asian and African values' have consistently argued that Western and Asian or African notions of culture are simply incompatible and that the former

⁴⁹ For example see comments submitted by France, Doc. A/62/121, 16, 2007.

⁵⁰ Statement by Mexico, Doc.A/C.6/62/SR.14, para 51. 2007.

⁵¹ See Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, *adopted* 24 Oct. 1970, UNGA. Res. 2625 (XXV).

⁵² Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Cooperation*, Antwerp-Oxford: Hart Publishing, 2006, 25.

seeks to destroy the latter.⁵³ The critics of the international rule of law concept are also quick to underline the limited participation of developing states in the fora where important policy decisions are made, which means that the rule of law and human rights agenda covers many issues which previously would be considered beyond the remit of any international organization. However, the debate on the formulation of the international rule of law cannot be considered to be dominated by developed countries. Infact, if we are to go by statistics, the General Assembly is overwhelmingly dominated by developing countries. Hence it will be useful for developing countries to get fully involved in the discussion to ensure that they are part of the norm creation process as the attempts to defining international rule of law and all its attending norms unfold.

This section has demonstrated that the debate on the international rule of law crystallized in the General Assembly as part of the overall objective of both developing and developed countries to promote the rule of law in the conduct of international affairs within the UN Charter framework. It has further been shown that while the international community essentially agrees on the importance of the international rule of law, it has come short on the precise definition of the concept. It is because of this failure that countries define and understand the rule of law in waysthat advance their respective objectives, whether in the domain of peace and security or social economic development. It has also been noted that while the General Assembly has taken efforts to 'internationalize the rule of law' through debates in the Assembly, the task of translating the debate from political ideals into concrete actions has been undertaken by the UN Security Council. For that reason the next section will turn to examine the primary role of the Council's involvement in building the rule of law.

⁵³ Brett Bowden and Hillary Charlesworth, 'Defining Democracy in International Institutions', in Brett Bowden et al. (eds), *The Role of International Law in Rebuilding Societies after Conflict*, Cambridge: Cambridge University Press, 2009, 90-110.

ii. The United Nations Security Council and the rule of law

A primary question under this section is, why precisely should the Council be interested in promoting the international rule of law?⁵⁴ The rule of law assumed a prominent position in the Council's debates in the aftermath of the Cold War, a fact which can be attributed to two main reasons. First, as already discussed under chapter four on the law and development movement, the end of the Cold War provided an opportunity for Western powers to define and build a global order based on liberal Western democracy, something they were unable to do during the Cold War because of the competing ideologies between West and East. These debates also provided a convenient basis for arguing that human rights as set out in various conventions and treaties were universal. As remarked by Henkin, the universality claim was reinforced by the fact that the end of the Cold War did not produce any call for major revisions of the human rights standards.⁵⁵ The second reason was that during the Cold War the rule of law carried some ideological baggage,⁵⁶ being most often equated with liberal democracy, and developing countries with no permanent representation on the Security Council were critical of the concept for the failure to guarantee equitable distribution of wealth among citizens.⁵⁷ This was especially true in the aftermath of the failure by developing countries to push for the New International Economic Order (NIEO) in the General Assembly. Indeed, examination of the record of the UN Security Council in addressing the rule of law during the Cold War period, one would note that the

⁵⁴ See generally Simon Chesterman, *The Role of the Security Council in Strengthening a Rules-based International System, Final Report and Recommendations from the Austrian Initiative 2004-2008*, Institute for International Law and Justice, New York, 2008.

⁵⁵ Louis Henkin, 'A Post Cold War Human Rights Agenda', *Yale Journal of International Law*, vol. 19, 1994, 249-255.

⁵⁶ Jeremy Farrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after conflict' in Brett Bowden et al. (eds), above note 53, 140.

⁵⁷ Jeremy Farrall, *ibid.*

Council made a reference to the rule of law just once, in a resolution on the Congo crisis in 1961.⁵⁸

In 1992, during the Summit of world leaders on the theme ‘the Responsibility of the Security Council in the Maintenance of International Peace and Security’ leaders from different countries committed themselves to strengthen the rule of law in international affairs. This was the first Security Council meeting held at the Summit level to underline the importance of the rule of law in international relations of states.⁵⁹ However, what was the basis for this sudden change in the Council’s approach? To answer this question we have to refer to the previous discussion in this chapter, where we saw that the UN Charter prohibits intervention in domestic affairs unless the intervention is predicated on the maintenance of international peace and security. However, it is evident that continued instabilities and proliferation of conflicts significantly influenced the Council to embrace the rule of law as the core aspect of reasserting and maintaining international peace and security.⁶⁰ Over the period the Council has adopted different resolutions reaffirming the importance of the rule of law in addressing various challenges, for example gender equality and the role of women in peacemaking (Res. 1325/2000) and the rule of law as a tool for conflict prevention and statebuilding.⁶¹

It is on the basis of this linkage between denial of the rule of law and conflicts that since the end of the Cold War the Security Council has extensively made reference to the importance of the

⁵⁸ UNSC Res. 161/1961. In the Resolution said the Council noted ‘with deep regret and concern the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law’.

⁵⁹ UN Doc.S/PV.3046/1992.

⁶⁰ The UN Security Council has made reference to the rule of law in almost all country specific and thematic resolutions since the early 2000s. See Security Council Report: Cross Cutting Report on the Rule of Law, No. 3, 2011, 15. Available: <http://www.securitycouncilreport.org/cross-cutting-report/lookup-c-gIKWLeMTIsG-b-7829857.php>. Accessed March 2013.

⁶¹ UNSC Res. 1366/2001.

rule of law, by reaffirming its support in different ways without embracing a particular definition or model of the rule of law. Examining the practice of the Council in supporting the primacy of the rule of law, one can argue that its understanding and application of the term have been imprecise. Over time the concept of the rule of law has been used or invoked to signify different things in different contexts as determined by the Council.⁶² The interests of the Council in the rule of law can be considered to reflect the general trend of the United Nations in the post-Cold War period when the organization assumed a greater role in internal affairs of its member states in the belief that such involvement could enhance international peace and security. At least five basic clusters of meaning of the rule of law as understood by the Security Council can be identified.⁶³

The first cluster of meaning is that which connotes the preservation of law and order. It is on this basis that the Council authorized peacekeeping missions to restore law and order in areas such as the DRC,⁶⁴ Ivory Coast,⁶⁵ Angola⁶⁶ and Libya⁶⁷. The second meaning of rule of law in the practice of the Security Council equates the rule of law with efforts to hold alleged war criminals accountable for human rights atrocities and war crimes, as in Rwanda. The Council has invoked the rule of law as a mechanism to fight drug trafficking in the Americas and West Africa.⁶⁸ It has also invoked the concept when calling on the international community to act against piracy off the coast of Somalia⁶⁹ or re-establish independence of the judiciary in countries like Guinea

⁶² Jeremy Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press, 2007, 32.

⁶³ *Ibid.*

⁶⁴ UNSC Res. 1493/2003, para 5, 11.

⁶⁵ UNSC Res. 1528/2004, para 6 (q).

⁶⁶ UNSC Res. 1433/2002, para 3b (i).

⁶⁷ UNSC Res. 2011/580.

⁶⁸ S/PRST/2012/1.

⁶⁹ S/PRST/2012/1.

Bissau⁷⁰ and Sudan.⁷¹ Lastly, the Security Council has emphasized the role of rule of law in conflict prevention.⁷²

Although these general clusters of attributes emerge from the Council's reference to the rule of law, the Council does not apply any specific term to a particular situation; rather, it incorporates different clusters in similar or different circumstances.⁷³ On the basis of these attributes, it can be contended that the Council's understanding of the rule of law consists of (i) the maintenance of law and order, (ii) addressing impunity, (iii) peaceful settlement of disputes in accordance with the law, and (iv) protection and advancement of human rights. The Security Council has also reaffirmed the importance of the rule of law in relation to women, peace and security.⁷⁴ The diversity of meaning ascribed to the rule of law by the Security Council demonstrates yet again the difficulty of identifying a comprehensive definition of the rule of law. Despite this it is useful to note that all these clusters are consistent with the attributes of rule of law identified in chapter one, especially those that equate the rule of law with principled and accountable governance and the protection and advancement of human rights.⁷⁵ Examining the various ways the Security Council uses the rule of law, it can therefore be argued that the Council invokes the concept to justify its use of a chapter VII mandate.

Having established how the Security Council prescribes the rule of law in different situations to pursue its objectives, it is worth examining how the Council implements its rule of law visions. Since early 1990s the Security Council resolutions on peacekeeping have authorized peacekeepers

⁷⁰UNSC Res. 1580/2004, para 2(h).

⁷¹UNSC Res. 1590/2005, para 4(a) (viii).

⁷²S/PRST/2010/14.

⁷³Jeremy Farral, above note 62, 146.

⁷⁴UNSC Res. 1325/2000.

⁷⁵See the first chapter. Pp. 42-48.

to conduct activities which directly affect the development of the rule of law. These missions have been involved in a wide range of functions including but not limited to peace agreements, disarmament, strengthening of judicial and state institutions, correctional services and general reconstruction of economic infrastructure. This jump from understanding the rule of law concept to direct intervention by the Council to build the rule of law should be seen in the context of achieving the Council's primary objective of maintaining international peace and security. In the Council's view, peacekeeping is a mechanism to help countries torn by conflicts create conditions for stability and security through assistance in preserving peace agreements and ceasefire regimes and serving as a guarantor of peace and stability. This involvement of the Council is undertaken under the authorization of Chapter VII of the UN Charter which empowers the Council to take measures it may deem appropriate to maintain international peace and security.

It may further be argued that, from the Council's perspective, peacekeeping can be for peace enforcement or prevention of further conflict. The purpose is to ensure that there are minimum conditions for peace and stability so that political negotiations can take place to resolve the causes of the conflict especially when the mission was established to resolve an existing conflict. While as already stated the objectives of the mission are stated in its mandate, in general, peacekeeping missions are considered by the Council as ideal avenues to promote institution building in conjunction with their mandate to advance rule of law.

A few examples demonstrate the practice of Security Council involvement in building the rule of law. In Haiti the Council invoked the rule of law to establish the UN Stabilization Mission in the country.⁷⁶ In the earlier report by the UN Secretary General on the situation in Haiti, he

⁷⁶ UNSC Res. 1529/2004.

described the Haitian National Police (HNP) as under-resourced, heavily politicized and corrupt. He further observed that the human rights situation was dire and extra-judicial killings, arbitrary arrests, wrongful detentions, human trafficking and use of child soldiers were rampant.⁷⁷ On the basis of this Report, the Council mandated the Mission to monitor and report on the human rights situation, re-establish the correctional system and investigate violations of human rights and humanitarian law. The mission was further tasked to help rebuild the country, restore the rule of law, and reform and restructure the Haitian National Police, which was to be subjected to a vetting system checking whether its personnel have committed grave human rights violations.⁷⁸

In his report proposing the establishment of the UN Mission in Liberia (UNMIL) the Secretary General observed that Liberia's judicial institutions had greatly suffered because of the long running conflict. The police force was not only a symbol of oppression but was also endemically corrupt and heavily politicized, correctional services were barely functioning, and court infrastructures were completely worn out. The report further noted that the conflict had opened the way to gross violations of human rights, including arbitrary killings, disappearances, rape and the use of child soldiers.⁷⁹ Following these observations, the Secretary General recommended a UN Mission to assist the transitional government of Liberia in its efforts to enhance the rule of law through a wide range of activities such as security and justice sector reform.⁸⁰

Identifying a 'long list' of what ails these countries, the Council assumes that the best answer is to set up peacekeeping missions to address these challenges. However, this approach is fraught with problems because it does not distinguish the legal or practical challenges in different

⁷⁷ See Report of the Secretary General on Haiti, UN Doc. S/2004/300, para 31-34.

⁷⁸ UNSC Res. 1542/2004, para 7.

⁷⁹ Report of the Secretary General to the Security Council on Liberia, UN Doc. S/2003/875 (September 2003).

⁸⁰ UNSC Res. 1509/2003.

countries. For example, while peace missions were established in both Liberia and Haiti, the sources of challenges in the two countries were quite different. While Liberia had experienced civil conflict for many years, Haiti had not. Haiti, though devastated by natural disasters, has had no major conflict apart from sporadic fighting which can purely be attributed to the breakdown of law and order. Rather, what affects Haiti is poverty and economic challenges. Yet, in the eyes of the Council these two countries require the rule of law which can only be attained through the establishment of peacekeeping missions. This is apparent because in both countries peacekeeping missions were tasked with efforts to build rule of law institutions, train police forces, and support social and economic reconstruction.

It is difficult to discern the underlying assumptions behind the Council's response to the 'dire situation' facing such countries like Haiti or Liberia. For example, if it is clear that the police are heavily politicized, under-resourced and corrupt, how precisely does a UN mission address these challenges? While the Council's resolutions provide a mandate for the missions to assist rebuilding or building judicial infrastructures, it is not clear how the mission can go about depoliticizing the entire police force or eliminating corruption in the entire system. Asking the mission to assist with the restoration and maintenance of the rule of law, as in the Haiti resolution setting up MINUSTAH, the Council takes these challenges as self-evident, assuming that the presence of the mission will automatically address them.⁸¹ It is clear that challenges facing Haiti can only be addressed through comprehensive measures of economic reforms which would potentially empower citizens to improve their social-economic conditions. Indeed, given the ongoing impact of natural disasters and difficult social-economic conditions, peacekeeping forces have hardly managed to re-establish the rule of law as mandated by the UN Security

⁸¹ UNSC Res. 1542/2004.

Council. This failure can be attributed to the reality that it is easier for the Council to identify challenges than to address structural concerns facing the country.

It is simplistic to assume that by identifying corruption as a problem international actors can effectively address such challenges by simply setting up a peacekeeping mission. In most post-conflict situations such as Southern Sudan or Liberia, many cases of corruption in the judicial system stem from the reality that officials get extremely meagre salaries and corruption is considered a means to 'top up' their government income. In such situations the challenge is more structural and requires a long-term solution to improve the working conditions of judicial workers and in the process disincentive them from engaging in corruption. This challenge cannot be addressed by *ad hoc* peacekeeping missions, rather it requires long-term institutional and policy commitments and bringing together national and international actors and their programmes, which can hardly be attained by the mere presence of a UN mission.

From two examples of Haiti and Liberia, it may rightly be argued that while the United Nations Security Council remains pivotal in addressing the rule of law, its approach remains flawed and purely technical. The approach assumes a willingness on the part of host country authorities to engage in strengthening the rule of law as internationally understood, on the grounds that it is good for the country and will strengthen the state authority and consolidate peace. This approach by the Council fails to sufficiently consider both internal and external actors' incentives in the process and it does not provide a mechanism to address situations in which national actors with the power to effect change are not willing to do so.⁸²

⁸²Robert A. Pulver, 'Rule of Law, Peacekeeping and the United Nations' in Chandra Lekha Sriram et al. (eds), above note 1, 60. See also R. May and G. Cleaver, 'African Peacekeeping: Still Dependent?', *International Peacekeeping*, vol. 4, 2, 1997, 18.

Worth noting is that while the Security Council has justified its intervention in the affairs of the member states on the basis of the rule of law, it has on different occasions failed to uphold rule of law values in its own practices. For example, the existence of permanent Security Council membership with veto power undermines the Council's capacity to ensure that all states are treated equally when Chapter VII powers are invoked. While it is true that all members of the United Nations are equal in theory and have a potential to sit on a Security Council, some are entitled not only to sit permanently on the Council but also to prevent the Council from adopting decisions with which they disagree or which impact their interests or those of their allies. It is further argued that the Council needs to give greater consideration to the question of accountability for those who violate human rights while acting under its authority in peacekeeping missions. This aspect is crucial because such violations have the potential to erode the legitimacy and credibility of the missions before the people among whom they are stationed. It is therefore suggested that the Council should reform its working practices to ensure that its decisions reflect transparency, equality among states, non-selectivity and due process for individuals and institutions affected by its decisions.⁸³ All these elements constitute minimum attributes of the rule of law such as equality before the law and transparency in decision making, discussed in chapter one. In the following section, we examine the specific role of the Council in building the rule of law in Southern Sudan.

iii. UNMIS and rule of law reform in Southern Sudan

The preceding discussion has shown how the General Assembly and the Security Council conceive and implement their rule of law visions. While the UN General Assembly is involved in the rule of law debates, the Security Council, in addition to the norm creation process, has taken concrete steps of building the rule of law primarily through the creation of peacekeeping

⁸³ Joyner Daniel, 'The Security Council as a Legal Hegemon', *Georgetown Journal of International Law*, vol. 43, 2, 2012, 225; Rudiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law*, Heidelberg: Springer, 2008.

missions, as evidenced by the resolutions setting up peacekeeping missions in Sudan and elsewhere.⁸⁴ However, it has also been argued that the Security Council approach is based on flawed assumptions that the presence of the missions can automatically enhance the rule of law.

Peacebuilding has been defined by the former UN Secretary General Kofi Annan as actions undertaken by the United Nations at the end of a conflict to consolidate peace and prevent recurrence of armed confrontation between parties.⁸⁵ Peacebuilding missions can therefore be considered as part of larger efforts by the United Nations to prevent recurrence of conflict in countries that have emerged from protracted conflicts, such as South Sudan. In the practice of the United Nations these missions comprise military personnel contributed by member states and civilian personnel hired by the UN on the basis of their knowledge and skills relevant to the goals of the mission. However, it is also important to note that in some cases governments contribute civilian personnel and private contractors who work in these missions.

To fully appreciate the extent to which the UN Security Council has been involved in building the rule of law in Southern Sudan it is useful to consider the work of the United Nations Peacekeeping Mission in Southern Sudan (UNMIS),⁸⁶ a mission authorized by the Council with explicit mandate to promote the rule of law and assist the parties to the CPA.

The mandate of UNMIS is set out in resolution 1560 adopted by the Council in the aftermath of the signing of the CPA between the government of Sudan and the SPLM. The decision of the Council to authorize a peacekeeping mission in Southern Sudan was premised on the belief that such a mission would be key to assisting parties to implement the CPA. A closer examination of

⁸⁴ UNSC Res. 1590/2005.

⁸⁵ 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa', Report of the Secretary General to the Security Council, S/1998/318, para. 63.

⁸⁶ This Chapter will address the work of UNMIS which was later transformed into UNMISS after the independence of South Sudan in July 2011. This Mission was set up by UNSC Res. 1996/2011.

this resolution demonstrates the Security Council's continued belief that simply setting up peacekeeping missions will automatically address peace and security challenges by strengthening the rule of law. However, as already discussed in the context of Haiti and Liberia, these assumptions are seen to be flawed precisely because they hardly lead to the hoped-for outcome, owing to the unrealistic way they are conceived and implemented. They are unrealistic because they are conceived to achieve a wide range of objectives without taking into account peculiar challenges facing, for example, Southern Sudan, such as a high level of illiteracy, extreme poverty or a high level of insecurity and rampant corruption in key state institutions.

Specifically, Resolution 1590 mandated UNMIS, among other things, to perform the following tasks:

1. Assist the parties to the Comprehensive Peace Agreement in promoting understanding of the peace process and the role of UNMIS by means of an effective public information campaign, targeted at all sectors of society, in coordination with the African Union.
2. Assist the parties to the Comprehensive Peace Agreement in addressing the need for a national inclusive approach, including the role of women, towards reconciliation and peacebuilding.
3. Assist parties to the Comprehensive Peace Agreement, in coordination with bilateral and multilateral assistance programmes, in restructuring the police service in Sudan, consistent with democratic policing, to develop police training and evaluation programme, and to otherwise assist in the training of civilian police.
4. Assist the parties to the Comprehensive Peace Agreement in promoting the rule of law, including an independent judiciary, and the protection of human rights of all people of Sudan through a comprehensive and coordinated strategy, with the aim of combating impunity and contributing to a long term peace and stability and to

assist parties to the Comprehensive Peace Agreement to develop and consolidate the national legal framework.

5. To ensure an adequate human rights presence, capacity and expertise within UNMIS to carry out human rights promotion, civilian protection and monitoring activities.

An examination of the mandate of UNMIS raises some questions regarding the role of this mission to build the rule of law in Southern Sudan. In the resolution, the Council conceives the mission as a tool to achieve an independent judiciary, protection of human rights, and measures against impunity, and also as a means to consolidate national legal framework. However, reading these objectives, one can argue that the resolution takes the rule of law as self-evident, assuming that once the mission is established it will automatically lead to the realization of these objectives. For example, how precisely does the presence of the mission contribute to the enjoyment and advancement of human rights or combat impunity? The resolution lists all ‘good attributes’ which can be assumed to reflect a society that upholds the rule of law but neither the resolution nor those tasked to implement it clarify how exactly this society can attain these attributes.

The resolution neither makes provisions for nor requires cooperation by the Mission with local institutions to enhance the latter’s capability to promote the rule of law. The assumption here is clear – it is only through institutions built by international actors that rule of law that meets ‘universal standards’ of human rights can be successfully promoted. This marginalization of or indifference to the critical role of local actors complicates an already complex situation because it assumes that local societies that have experienced the conflict for many years lack requisite skills to contribute to the process. But one can challenge this assumption because it is highly unlikely that international actors understand challenges facing local people better than the latter

themselves who live and experience these challenges in their day to day lives.⁸⁷ Indeed, this marginalization is evident in Southern Sudan, where local institutions of dispute settlement were left outside the rule of law building process by the Mission and other actors.

A closer look at the Mission's operation in Southern Sudan shows that while it was involved in various activities under the rubric of the rule of law, it largely concentrated on its 'core mandate' of monitoring implementation of the CPA. Its activities included observation of the implementation of the Joint Forces Unit and ensuring that the protagonists (SPLM and GoS) observed the ceasefire. Activities to further the rule of law mainly focused on the police and correctional services. While acknowledging the fact that these clusters are crucial, building the rule of law is a daunting task which goes beyond these two security sectors. It requires a holistic approach including supporting an independent judiciary, capacity building for the judges, legal advisers, and empowering the local population to understand and identify themselves with the reforms being undertaken. In general it requires changing political culture to ensure social acceptance of these reforms.

It is argued that peace missions like UNMIS should move beyond seeing their efforts as mere technical assistance, to see them rather as a long-term engagement to address rule of law aspects which can contribute to the attainment of peace and stability. While the implementation of the CPA was critical for peace and stability in the country, the failure of the Mission to adequately focus on other rule of law aspects such as support for the judiciary greatly undermined its ability to contribute to the general realization of the rule of law in Southern Sudan. Admittedly, long-

⁸⁷ Astri Suhrke and Monica Juma, *Eroding Local Capacity: International Humanitarian Action in Africa*, Uppsala: Nordic African Institute 2003. See also Michael E. Hartmann and Agnieszka Klonowiecka-Milart, 'Lost in Translation: Legal Transplants without Consensus-based adaptation' in Whit Mason (ed.), *The Rule of Law in Afghanistan: Missing in Action*, Cambridge: Cambridge University Press, 2011, 266-295.

term involvement would require significant and extended commitment to provide resources to achieve these objectives. However, if these reforms are to make a real impact, the international community should be prepared to undertake this task and ensure that strategies are drawn up to make these reforms sustainable. Further, it is crucial that officials recruited to run the mission have adequate skills and knowledge of the country; they should understand the historical basis of the ongoing challenges and propose acceptable framework within which to address them. While most senior officials running the mission are recruited within the guidelines of the United Nations, most of these officials assume their duties with scanty or no knowledge of peculiar challenges facing Southern Sudan. With inadequate knowledge of the challenges facing the country it has been easier for these officials to develop a 'one size fits all' attitude to the detriment of the beneficiaries.

Theoretically UNMIS was the overall lead agency in Southern Sudan because of its Security Council mandate, which expressly empowered the Mission to promote the rule of law. Indeed UNMIS was headed by a Deputy Special Representative of the Secretary General (DSRSG) who reported directly to the SRSG.⁸⁸ But in practice, different organizations involved in the rule of law activities in Southern Sudan work independently of each other. This trend was reinforced by the reality that each organization raises required resources independently. As experience over time has demonstrated in Southern Sudan, it is difficult to identify the lead organization for the coordination purposes since resources are independently acquired and projects are independently negotiated and executed by organizations that manage to secure financial resources.

Despite these challenges, UNMIS had significant achievements in promoting the rule of law in Southern Sudan. For example, as part of the wider efforts to enhance its rule of law delivery

⁸⁸ After South Sudanese independence in July 2011, UNMISS was headed by an SRSG.

capability, UNMIS established the Rule of Law and Judicial System Advisory Unit as a coordinating body for its rule of law activities in Sudan. The main task of the unit was ‘monitoring parties adherence to their rule of law commitment in the CPA and providing technical assistance where needed’.⁸⁹ The Mission managed to conduct training for the police and judiciary which significantly contributed to the improved performance of the officers in these departments in addressing human rights violations.⁹⁰ Yet this emphasis on the observance of the peace agreement meant that the capability of the Mission to deliver on other aspects of the rule of law was highly constrained. This confirms that peace missions tend to focus on the rule of law aspects which have a direct linkage to the underlying conflict. In Southern Sudan the major cause of the conflict was the hostility between the SPLM and government forces, hence the interest to resolve this conflict being designated as the ‘core activity’ of the Mission.

In this section I have demonstrated that UNMIS (and now UNMISS) is the major actor in rule of law promotion in Southern Sudan. The mandate of the mission was derived from the resolution adopted by the Security Council as part of its overall responsibility to maintain international peace and security. Despite the critical role of the Mission, the discussion has shown that it faced serious challenges in fulfilling its mandate. It is because of this uninspiring record of the Mission in promoting rule of law in Southern Sudan that the next section will examine the work of other major actors involved in rule of law reform in Southern Sudan.

⁸⁹UNSC Res. 1590/2005, para 4.

⁹⁰Interview with the Head of the Rule of Law Unit in Juba, 2009 and Head of Research and Training in the Ministry of Justice.

iv. The mandate of other UN Agencies to promote the rule of law: the case of the UNHCR and UNDP

A closer examination of the UN agencies' involvement in building the rule of law, especially in post-conflict contexts, demonstrates that a significant number of organizations within the UN system like UNICEF, UNHCR, UN Habitat and UNDP undertake rule of law reforms over and above their original mandate prescribed in their founding instruments.⁹¹ As the discussion on the role of international financial institutions in chapter four has shown, this involvement has been accomplished by broadly realigning their mandates with the evolving challenges they face in their day to day functions, which in some cases were not or could not be foreseen at the founding of these institutions. The recurrence of conflicts and the assumption that the absence or deterioration of the rule of law has been a major cause of these conflicts have equally reinforced the involvement of different UN institutions in building the rule of law.⁹²

The UNHCR is an example of how UN agencies have realigned and broadened their original mandate to include the promotion of the rule of law.⁹³ UNHCR involvement in rule of law promotion has mainly covered challenges related to property rights of returning refugees in their countries of origin. This aspect has been necessitated by the fact that most refugees when they return to their countries of origin after a long absence in exile find most of their property, especially land that they had owned before occupied or taken by others. Considering also the weak and at times absent dispute settlement institutions in these countries, the UNHCR assumes that it is only strengthening of these institutions that can contribute to resolving disputes before

⁹¹ Oliver P. Richmond, 'The Rule of Law in Liberal Peace Building' in Chandra Lekha Sriram et al. (eds), above note 1, 44-45. See also James C.N. Paul, 'The United Nations and the Creation of an International Law of Development', *Harvard International Law Journal*, vol. 36, 2, 1995, 307-328.

⁹² Kofi Annan, 'Democracy as an International Issue', *Global Governance*, vol. 8, 2, 2002, 135-142. See also David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention*, London: Pluto Press, 2002.

⁹³ Erika Feller, 'Giving Peace a Chance: Displacement and Rule of Law during Peacebuilding', *Refugee Survey Quarterly*, vol. 28, 1, 2009, 78-94.

they give impetus to fresh conflicts. Indeed, at its 46th Session, the Executive Committee of the High Commissioner's Programme endorsed the need for the UNHCR to promote rule of law reforms as a means to enhance legal and judicial institutions for dispute settlement.⁹⁴

To support the claim that forced displacement is a result of rule of law breakdown, the Executive Committee of the High Commissioner noted that 'for states to fulfill their humanitarian responsibilities in receiving refugees and in reintegrating returning refugees, and in addressing some of the causes of refugee movements, an effective human rights regime is essential, including institutions which sustain the rule of law, justice and accountability; and in this connection call on UNHCR to strengthen its activities in support of national legal and judicial capacity-building, where necessary, in cooperation with the United Nations High Commissioner for Human Rights'.⁹⁵ The UN General Assembly later reaffirmed in its resolution that the effective promotion and protection of human rights and fundamental freedoms are an essential means of addressing some of the causes of refugee movement and helping states to reintegrate their returning refugees. In this connection it called on the Office of the High Commissioner to strengthen its support of national efforts at legal and judicial capacity building.⁹⁶ To implement this mandate UNHCR continues to take measures to support rule of law institutions critical to resolve property related disputes such as land disputes, to ensure that returning refugees and non-refugees can co-exist peacefully.

⁹⁴EXCOM Conclusion (A/AC.96/860, Para 19(i)). Reproduced in, *Refugee Survey Quarterly*, vol. 16, 2, 1997, 141-146.

⁹⁵ *Ibid.*

⁹⁶ UNGA Res. A/50/152/1995.

v. The UNDP and rule of law reform in Southern Sudan

The United Nations Development Programme (UNDP) as the United Nations' biggest UN development agency is extensively involved in the rule of law field.⁹⁷ The organization has been in Southern Sudan since 1994, first as a humanitarian agency providing relief services to the displaced refugees in the war zone and since the beginning of 2000 by supporting peace process.⁹⁸ After the signing of the CPA in 2005, the UNDP focused on both the programmatic and capacity building activities for the judiciary, various departments of the ministry of legal affairs, civil society organizations, law enforcement and general strengthening of the legal profession.⁹⁹ It may be argued that while the UNDP is an independent development organization with its own governing board, its rule of law activities are undertaken in the collective framework of the United Nations, often underpinned by Security Council resolutions especially in the post-conflict context.

UNDP has aligned its original mission of supporting and promoting development goals to include a wide range of issues such as human rights, good governance, gender and equality and constitution making assistance.¹⁰⁰ In 1978 the UNDP concluded a Standard Basic Assistance Agreement (SBAA) with the Government of Sudan providing the basis for the organization's work in the country.¹⁰¹ Country Programme Documents are signed between the UNDP and host countries from time to time to mandate the organization to promote rule of law activities. For

⁹⁷ Carlos Santiso, 'Promoting Democratic Governance and Preventing the Recurrence of Conflict: The Role of the United Nations Development Programme in Post Conflict Peace-Building', *Journal of Latin American Studies*, vol. 34, 3, 2002, 555-586.

⁹⁸ Interview with the former UNDP Resident Coordinator in Sudan 1994-1998, July 2012.

⁹⁹ www.sd.undp.org/ruleoflaw.

¹⁰⁰ The UNDP issues an annual report on the rule of law, highlighting the efforts undertaken to build the rule of law in post-conflict countries. For example, see *Strengthening the Rule of Law in Crisis-Affected and Fragile Situations: Global Programme Annual Report 2011*.

¹⁰¹ Signed on 24 October 1978 and ratified by Sudan on 2 January 1980. On file with the author.

example, the Country Programme Document¹⁰² for Sudan for 2009-2012 provides that as one of its overall objectives in Sudan, the UNDP will ensure that human rights are upheld and protected through accountable, accessible and equitable rule of law institutions.¹⁰³ The document further notes that the organization will provide capacity development support to the judiciary, the Ministry of Justice and law enforcement institutions, with special attention to equitable access to justice for vulnerable groups including women and people living with HIV/AIDS. It further commits the UNDP to help address the challenges arising from the dual system of formal courts and customary/traditional norms and values.¹⁰⁴

Justifying the UNDP's involvement in building the rule of law, the former UNDP Administrator Mark Malloch Brown argued that rule of law is not only an element of democracy promotion and post-conflict peacebuilding, but also an element of conflict prevention.¹⁰⁵ As a result of this broad interpretation by international institutions like the UNDP and UNHCR of their original mandates, other organizations like UNICEF have assumed greater roles in rule of law reform. These organizations have focused on particular areas of reform with a direct relevance to their work. For example, UNICEF has interpreted its mandate to cover areas such as juvenile justice and children's rights, partly by integrating and defining these issues broadly to fit in their original mandate of promoting children's welfare. It can therefore be rightly argued that increasingly the United Nations and its specialized agencies have developed an understanding of the rule of law that continues to align with their core mandate reflected in their founding instruments. While previously different organizations carried out their rule of law based reforms independently, increasingly the Secretary General has argued various UN bodies and funds to coordinate their

¹⁰² Document DP/DCP/SDN/1 considered by the UNDP Executive Board during its annual session in 2008.

¹⁰³ www.sd.undp.org.

¹⁰⁴ Part B (15) (a-c). See also www.sd.undp.org.

¹⁰⁵ See Mark Malloch Brown, 'Democratic Governance: Toward a Framework for Sustainable Peace', *Global Governance*, vol. 9, 2003, 141-146.

work for coherence and impact optimization.¹⁰⁶ Despite this initiative, in South Sudan international organizations continue to struggle to coordinate their rule of law work, precisely because each organization pursues its mandate independently in line with its original objectives. This divergence continues to have a negative impact on reforms, as evidenced by the current efforts in South Sudan.

However, it can be pointed out that while these agencies are involved in building the rule of law, there continues to be a significant disconnect between the objectives of building the rule of law and the actual outcome. This disconnect continues because different agencies tend to promote rule of law activities closely aligned with their original mandates, which hinders a holistic approach to promote rule of law. As shown by the examples of the UNDP and UNHCR, each organization undertakes rule of law reform that closely aligns with its original mandate which underpins its existence in the first place. The implication of this disconnect is that rule of law activities that do not form core part of the original mandate of these organizations are hardly taken into account during the planning and carrying out of these reforms.

E. The AU Legal framework for the rule of law reform in post-conflict societies

i. The AU Constitutive Act

While the preceding discussion dealt with the role of international institutions in promoting the rule of law in post-conflict Southern Sudan, it should be noted that there are also some regional actors involved in this process. Although their activities may not equal those undertaken by international organizations in terms of technical and financial resources, it is nevertheless

¹⁰⁶Annual Report on Strengthening and Coordinating UN Rule of Law Activities: Report of the Secretary General', A/67/290/2012.

important to examine their role. This importance stems from their significant influence through both policy and concrete actions undertaken to build rule of law in Southern Sudan.

Africa's commitment to post-conflict reconstruction predates the African Union.¹⁰⁷ The Organization of African Unity (OAU) was established in 1963 and its central role was to promote African solidarity, while the rule of law and human rights were marginal issues. Specifically, the objectives of the Charter included: to coordinate and intensify member states' cooperation and efforts to achieve better life for the peoples of Africa, to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights, and to defend their sovereignty, territorial integrity and independence.¹⁰⁸ The OAU was more concerned with the struggle against colonialism than with the aftermath of the struggle.¹⁰⁹ Despite the fact that several countries slid into violence during the existence of the OAU, the organization hardly intervened in any of them to support peacebuilding and the rule of law.¹¹⁰ Admittedly, there was not only a lack of institutional

¹⁰⁷ Constitutive Act of the African Union, OAU, 11 July 2000, OAU Doc CAB/LEG/23.15 (entered into force 26 May 2001); Abdulqawi Yusuf and Fatsah Ouguergouz, *The African Union: Legal and Institutional Framework*, Dordrecht: Martinus Nijhoff, 2012; Corrine A. Packer and Donald Rukare, 'The African Union and Its Constitutive Act', *The American Journal of International Law*, vol. 96, 2002, 365. See also Tiyanjana Maluwa, 'The Constitutive Act of the African Union and Institution-Building in Post-Colonial Africa', *Leiden Journal of International Law*, vol. 16, 1, 2003, 157-170.

¹⁰⁸ Art. II (I) of the OAU Charter. See also P. Mwet Munya, 'The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation', *Boston College Third World Law Journal*, Vol. 19, 1999, 537-51; Solomon Gomes, 'The Peace Making Role of the OAU and AU: A Comparative Analysis' in John Akokpari, Angela Ndinga-Muvumba and Tim Murithi (eds), *The African Union and Its Institutions*, Johannesburg: Jacana Media, 2008, 113-17, and Pierre Englebert, *Africa: Unity, Sovereignty & Sorrow*, Boulder: Lynne Rienner, 2009.

¹⁰⁹ Samuel M. Makinda and F. Wafula Okumu, *The African Union: The Challenges of Globalization, Security and Governance*, London: Routledge, 2008, 14-25.

¹¹⁰ Christopher Clapham, *Africa and the International System: The Politics of State Survival*, Cambridge: Cambridge University Press, 1996, 8-32. See also Margaret Vogt and Monde Muyangwa, *An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution, 1993-2000*, New York: International Peace Academy, November 2000.

framework to respond to these challenges, but also inadequate or non-existent commitment on the part of African leaders.¹¹¹

In 1993, the OAU adopted the Declaration on the Mechanism for Conflict Prevention, Management and Resolution charged with consultation with other relevant stakeholders to deploy efforts and take necessary initiatives to prevent, manage and resolve conflicts. From Africa's standpoint the rule of law was conceived as a critical factor in preventing and resolving conflict. Earlier, in 1992, the Joint OAU/IPA (International Peace Academy) Task Force had described peace-building as a continuous process that involves a broad range of activities aimed at consolidating peace, and seeks to address both the root causes of conflict and measures for bolstering peace agreements in the aftermath of conflict.¹¹² Specifically regarding the rule of law, the Declaration stated that the Mechanism will be responsible for undertaking peacemaking and peacebuilding functions in order to facilitate the resolution of conflicts while enhancing the rule of law.¹¹³

In the wake of the adoption of the Constitutive Act (CA) in 2001 creating the AU as the successor to the OAU, the organization's role in promoting the rule of law in post-conflict countries took a new trajectory.¹¹⁴ The Constitutive Act of the African Union makes the promotion of the rule of law and democracy core objectives.¹¹⁵ Subsequently, the organization

¹¹¹ See Abdulqawi Yusuf, 'Reflections on the Fragility of State Institutions in Africa', *African Yearbook of International Law*, vol. 2, 1994, 2.

¹¹² See generally Ian Johnstone and Tandeka Nkiwane, *The OAU and Conflict Management in Africa, Report of the Joint OAU/IPA Consultation*, Addis Ababa, May 1993.

¹¹³ Art. 15 of the Declaration. See also Jeremy Levitt, 'Conflict Prevention, Management and Resolution: Africa-Regional Strategies for the Prevention of Displacement and Protection of the Displaced Persons: The Case of OAU, ECOWAS, SADC & IGAD', *Refugee Survey Quarterly*, vol. 20, 1, 2001, 156-90.

¹¹⁴ Constitutive Act of the African Union, above note 107.

¹¹⁵ *Ibid.*, Art. 4.

has adopted various institutional and legal measures which reaffirm its commitment to promote the rule of law in its member states. Some of these instruments include the Peace and Security Council Protocol,¹¹⁶ the African Convention on Preventing and Combating Corruption,¹¹⁷ the African Charter on Democracy, Election and Governance,¹¹⁸ the Maputo Protocol on the rights of women¹¹⁹ and the Declaration on the Rejection of the Unconstitutional Change of Government.¹²⁰ At the sub regional levels there are also instruments which reaffirm the commitment of sub regional states to the ideals reflected in the AU Constitutive Act. For example, the founding treaties of the Economic Community of West Africa States (ECOWAS), Southern Africa Development Community (SADC) and the East African Community (EAC) reaffirm the primacy of the rule of law and commitment to fundamental rights and freedoms in improving social and economic conditions of Africa and its people. Similarly, the decision to revamp the African Court of Human and Peoples' Rights, and the establishment of the Pan African Parliament, the Commission on the Rights and Welfare of Children and the African Commission for Human and Peoples' Rights concretized the desire of the African Union to position the rule of law as its defining objective.

Another instrument which provides a legal basis for the AU to enhance its involvement in post-conflict reconstruction is the AU Protocol of the Peace and Security Council (PSC). The PSC is

¹¹⁶ Constitutive Act, *ibid.*, Art. 5(2). The AU-PSC was established under the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU, 9 July 2002 (entered into force 26 December 2003). See further Jakkie Cilliers, 'Hopes and Challenges for the Peace and Security Architecture of the African Union' in Hany Besada (ed.), *Crafting an African Security Architecture: Addressing Regional Peace and Conflict in the 21st Century*, Aldershot: Ashgate, 2010, at 37-50.

¹¹⁷ See Melissa Khemani, 'Corruption and the Violation of Human Rights: The Case for Bringing the African Union Convention on Prevention and Combating Corruption within the Jurisdiction of the African Court on Human and Peoples Rights', *African Yearbook of International Law*, vol. 16, 2008, 213-234.

¹¹⁸ *Entered into force* 15 February 2012.

¹¹⁹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

¹²⁰ Decision on Unconstitutional Changes in Government, AHG/Dec. 142 (XXXV), 2000.

tasked with promoting peacebuilding and post-conflict reconstruction under Article 6 (e). It is also required to promote and implement peacebuilding and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence, in Article 3(c). As part of the overall goal to promote the rule of law and peacebuilding in post-conflict countries, the PSC is further tasked with consolidation of the peace agreements that have been negotiated, establishing conditions for political, social and economic reconstruction of a country's society and government institutions and implementation of disarmament, demobilization and reintegration programmes (Article 14 (3)).

Examining these legal and policy initiatives, one can ask, how then has the organization succeeded in promoting the rule of law in countries emerging from conflict? In practice, the involvement of the organization in building the rule of law in these areas has been abysmal or non-existent. Historically most of the OAU-approved and later AU-approved peacekeeping missions were meant to monitor violations of ceasefire agreements rather than getting involved directly in substantive initiatives for building the rule of law. Indeed these missions could not go further than expressing their concerns about any violations or potential violations of human rights in their final reports. Even after the establishment of the AU in 2002, the organization's involvement in rule of law issues remain constrained by the limitation of resources and lack of political will of most member states to defend rule of law and human rights ideals as reflected in various AU instruments.

ii. The AU Post-conflict Reconstruction Policy Framework

Perhaps in recognition that the Constitutive Act and the subsequent PSC Protocol did not provide a specific legal framework to deal with post-conflict reconstruction, the AU Executive Council resolved to adopt a Decision mandating the AU Commission to develop a

comprehensive AU policy on post-conflict reconstruction in Africa.¹²¹ It was in response to this Decision that the Commission working together with NEPAD prepared the Post Conflict Recovery and Development Policy (PCRDP) of the AU. This Policy, established in 2006, was envisaged as a specific instrument to operationalize the contents of the AU Constitutive Act and PSC Protocol provisions on post-conflict reconstruction.¹²² The primary objective is to guide the organization in its efforts to deal and coordinate its support in areas emerging from conflicts. At least theoretically, the Policy reaffirms the commitment of the organization to promoting the rule of law in post-conflict areas. The instrument provides a clear mandate for the organization to fully assist post-conflict societies to promote the rule of law and good governance.¹²³ The importance of this policy may be seen in its potential to provide an overall guidance framework for countries and institutions keen to provide assistance for countries emerging from conflicts.

The adoption of this Policy stems from the realization by the AU that post-conflict reconstruction which lacks sufficient local involvement can hardly be sustainable in the long term. This Policy is therefore conceived to serve as a guideline for international actors (Africans and non Africans) involved in post-conflict reconstruction efforts in Africa. It is premised on the promotion of democracy, upholding the rule of law and respect of human rights as the cornerstone of assistance to states in the aftermath of conflicts. The Policy also has key dimensions such as maintenance of security, political transition, good governance, popular participation, social economic progress, justice and reconciliation and respect for human rights. In order to achieve effective reconstruction of states emerging from conflicts, the Policy calls for mutual reinforcement between these dimensions.

¹²¹Decision EX.CL/191(VII), July 2005.

¹²²AU Post Conflict Recovery and Development Policy, 2006. See also, Tim Murithi, 'The AU/NEPAD Post Conflict Reconstruction Policy: An Analysis', *Conflict Trends*, 2006, and Dirk Kotze and Hussein Solomon (eds), *The State of Africa: Post-Conflict Reconstruction and Development*, Pretoria: Africa Institute of South Africa, 2008.

¹²³Articles 3 and 4 of the Constitutive Act.

A closer examination of the role of the AU in post-conflict reconstruction demonstrates that major challenges facing the organization in promoting the rule of law are not due to lack of a comprehensive mandate. Rather, the cause is that most of its members who are supposed to implement AU's vision to build the rule of law are in the first place struggling to establish themselves as stronger states after decades of conflicts which have affected virtually all sectors of their governance structures.¹²⁴ In other words a considerable number of AU members are either in conflicts or just emerging from conflicts and need external support to promote rule of law in their own borders. This further complicates the AU's efforts to promote the rule of law on the continent, especially in weak countries emerging from conflict. Below the discussion examines what role the organization has played in rule of law reforms in Southern Sudan.

F. The African Union and rule of law reform in Southern Sudan

Having discussed the Constitutive Act, the AU Protocol on PSC and the Post-conflict Reconstruction Policy which underpin the involvement of the African Union in building the rule of law in countries emerging from conflicts, it is pertinent to examine the extent of this involvement. How does the organization ensure that its rule of law vision reflected in those instruments is translated into concrete results? A closer examination of the AU engagement in Southern Sudan demonstrates that its involvement stems from the decision of the African Union taken during its Assembly of Heads of State and Government to establish a Ministerial Committee for Post Conflict Reconstruction in Southern Sudan, chaired by South Africa.¹²⁵ The Committee's functions include supporting efforts of the organization and member states to build

¹²⁴ See Dirk Kotze, 'Post Conflict Reconstruction' in Dirk Kotze and Hussein Solomon (eds), note 122, 107-115.

¹²⁵ The decision was made in Maputo in 2003. The original Committee members were: Algeria, Egypt, Ethiopia, Gabon, Kenya, Nigeria, Senegal and Sudan.

the rule of law, good governance, promotion and protection of human rights, justice and reconciliation and infrastructure development.

In February 2008 the then Chairman of the African Union Commission, Alpha Oumar Konare, appointed a Nigerian diplomat, Ambassador Oluyemi Adeniji, as the Special Envoy for Southern Sudan. He also appointed Ambassador Mahmoud Kane as the head of AU's Liaison Office in Sudan.¹²⁶ The Envoy was specifically tasked with monitoring the implementation of the Comprehensive Peace Agreement between the government and the SPLM. Similarly the President of Kenya, Mwai Kibaki, who was instrumental in the negotiations and subsequent signing of the CPA, appointed the former President of Kenya, Daniel Toroitich Arap Moi, as his regional envoy for Sudan to monitor the implementation of the agreement. It would be an overstatement to contend that these efforts of the Commission had a major impact on the overall strategy of the organization in supporting the rule of law in Southern Sudan. Nevertheless they demonstrated how far the African Union has come in committing itself to promote rule of law and democratic institutions in post-conflict situations on the continent by taking actions to preserve peace and stability. But these initiatives also reaffirm the arguments made earlier in the discussion that the AU conceives the rule of law from the peace and security perspective.

Rather than taking direct initiatives to support rule of law institutions, such as strengthening the judiciary or police, the African Union devotes much of its efforts and resources to promote dialogue among the warring parties to ensure that they don't return to conflict. For example, since the signing of the CPA, the AU through its mediator has supported and facilitated negotiations to resolve boundary disputes between the parties and provided a framework to implement the Abyei Protocol which requires the parties to hold a referendum as agreed in the

¹²⁶ See 'AU Appoints Special Envoy for Sudan's CPA'. <http://www.sudantribune.com/spip.php?article26111>. Accessed March 2013.

CPA. The AU High Level Panel on Sudan, otherwise known as the Mbeki Panel, has taken concrete measures to resolve some of the problems between Sudan and South Sudan. For example, in its recent report in 2012 the Panel made a wide range of recommendations to the parties such as withdrawal of forces from the contested area in Abyei, withholding of support by either party from rebel groups seeking to destabilize the other, and resumption of talks between the parties under the auspices of the AU. Indeed the UN Security Council has endorsed these recommendations and encouraged the Panel under the leadership of ex-President Mbeki to continue with its work. These efforts, though not directly linked to institutional building, can be considered as reflecting the role of the organization in preventing conflicts and promoting peaceful settlement of disputes in accordance with the CA to enhance the respect for the rule of law.

G. NGOs and the process of building the rule of law

As argued at the beginning of this chapter, non-governmental organizations (NGOs) continue to play a major role in building the rule of law in countries emerging from conflicts.¹²⁷ No vibrant democracy can develop in the absence of strong civil society as a check on governance. It is this importance that provides a compelling need to discuss their role in the situation in Southern Sudan. Increasingly NGOs are a visible and active part of international life. They work in a large variety of areas and promote a wide range of aims and goals.¹²⁸ The most prominent examples of NGOs' involvement are found in the fields of human rights, the rule of law, environment, development assistance, humanitarian aid and peace. The increasing intensity of their activities

¹²⁷ Lester M. Salamon and Helmut K. Anheier, *The Emerging Non Profit Sector: An Overview*, Manchester: Manchester University Press, 1996; Stephen Hobb, 'Global Challenges to Statehood: The Increasingly Important Role of Non-governmental Organizations', *Indiana Journal of Global Legal Studies*, vol. 5, 1997, 192-105.

¹²⁸ Kerstin Martens, 'Examining the (Non-) Status of NGOs in International Law', *Indiana Global Legal Studies Journal*, vol. 10, 2, 2003, 1-24. See also Michael Posner and Candy Whittome, 'The Status of Human Rights NGOs', *Columbia Human Rights Law Review*, vol. 25, 1993-1994, 269-290.

that were traditionally considered a preserve of sovereign governments, like the rule of law and human rights, demonstrate that they have become an integral part of the procedures and structures of global governance.¹²⁹

It is also important to clarify the relationship between NGOs and international organizations in the context of Southern Sudan. Because of their contacts with and proximity to the local people, most NGOs, in addition to their primary functions in rule of law reforms, also work as Implementing Partners ('IPs') of international organizations. This role entails the NGOs getting funds from IOs to perform various activities on their behalf. Indeed in South Sudan most NGOs perform various activities such as human rights training for civil society, training for lawyers and judges or building physical infrastructure on behalf of IOs such as the UNDP, UNICEF or UNHCR.

At present, there are no regulations under international law governing the establishment, requirements, and legal status of NGOs.¹³⁰ NGOs are obliged to accept the national legislation of the state in which they have been established and where they are based.¹³¹ National laws differ, however, from country to country, and therefore NGO status also varies. Recognition, rights, and duties depend on the respective national conditions.

The main questions on the operation of NGOs in Southern Sudan revolve around two key issues: whether there is a legal framework defining the legal status of NGOs and thus setting rules for their involvement and the modality of such involvement, and whether there is a

¹²⁹ *Ibid.*

¹³⁰ Kerstin Martens, *NGOs and the United Nations: Institutionalization, Professionalization and Adaptation*, Basingstoke: Palgrave Macmillan, 2005, 20.

¹³¹ *Ibid.*

mechanism for subsequent monitoring of accredited NGOs. Determining the legal basis upon which NGOs operate in Southern Sudan is complex. Extensive inquiry in South Sudan indicates that there is no legal framework regulating the work of NGOs promoting the rule of law in the country. As a matter of practice one cannot even consider a national legal framework for NGOs in the context of Southern Sudan, because even if such a framework had existed in Sudan it could hardly have extended to the South. NGOs basically operate on the basis of personal relationship between specific organization and the department concerned. Despite the fact that before independence in July 2011 foreign affairs and immigration, were matters reserved to the national Sudanese government, most NGOs operating in Southern Sudan hardly registered in Khartoum.¹³² The Government of Southern Sudan, through its ‘technical missions’ abroad, had the right to issue ‘SPLM travel permits’ for people who wanted to travel to Southern Sudan without following national immigration requirements.

Indeed the majority of people, including NGOs’ personnel, who travelled to Southern Sudan applied for these permits to enter Sudan without acquiring a Sudanese visa. This meant that unlike NGOs operating in the North or in Darfur, NGOs working in the South did not have serious problems to enter Southern Sudan and conduct their work. For example, one of the biggest NGOs operating in Southern Sudan, Norwegian People’s Aid (NPA) which deals extensively with issues such as land rights, access to justice for women and health care, started operating in Southern Sudan well before the signing of the CPA.¹³³ Similarly, when the National Government expelled ten humanitarian NGOs from Darfur in early 2009, the President of Southern Sudan not only deplored the action of the national government (of which, incidentally, he was a part as the First Vice President) but also asked the expelled NGOs interested in

¹³² Schedule A, Art. 5 of the Interim National Constitution placed immigration and aliens affairs among those reserved to the national government.

¹³³ Interview with the Head of NPA Office in Juba, December 2008.

transferring their services to Southern Sudan to do so.¹³⁴ This demonstrates that even if there was a national legal framework regulating the work of NGOs, it did not apply in Southern Sudan.

A question to pose is, how are NGOs involved in rule of law reform in Southern Sudan to operate in the absence of regulatory legal framework? This question takes into account the central role and significant resources spent by NGOs in promoting rule of law. It also recognizes that the activities of NGOs, especially those transcending national boundaries, are required to conform to the national laws of countries where they operate. But examining the practice ‘on the ground’ shows that this has not been the case, because the government hardly has a mechanism in place to provide sufficient oversight on the work of these NGOs. In Southern Sudan, the practice is for NGOs to negotiate directly with the department concerned, whether it is the Ministry of Justice or the Judiciary, and agree on the work to be done. There are no binding rules that NGOs are required to observe, and no accreditation formality. For example, if an NGO wants to work with the judiciary it will present a ‘concept paper’ or a ‘proposal’ to the Chief Justice or his representative who will then discuss the proposal with the organization and determine its work. Rarely are such proposals rejected.¹³⁵ However, this aspect can be attributed to the fact that most NGOs came in with their financial resources already, so that they hardly need an agreement with or support from the relevant department to secure funding, which simplifies their interaction with government authorities.

Do the NGOs consider the absence of a regulatory legal framework to be a pressing concern or something that affects their activities? The government and NGOs have different perspective on

¹³⁴ See ‘Sudan expels ten aid NGOs and dissolves two local groups’, available at: <http://www.sudantribune.com/Sudan-expels-10-aid-NGOs-and,30382>. Accessed March 2013.

¹³⁵ Interview with government officials in the Advocate General’s Office, Juba, July 2009.

this issue. While most of the NGOs feel that this absence partly eliminates the perpetual bureaucracy prevalent in the government departments, so allowing these NGOs to provide critical assistance unhindered, the government officials have different views. They feel that the absence of legal regime to regulate the work of NGOs provides a free pass to NGOs to conduct rule of law reform without being held accountable by the government.¹³⁶ In general the absence of a regulatory legal regime reflects the weak institutional capacity common in South Sudanese governance. Indeed it has enabled some NGOs to be accountable solely to their donors who give them funds, with little governmental oversight.¹³⁷

The apparent ease with which NGOs work in South Sudan, it should be noted, is limited to international NGOs. Local NGOs involved in specific clusters of rule of law building hardly exist, and where they exist not only are they underfunded and weak but their survival depends on funding from international NGOs and donor countries. Hence the work of local NGOs in Southern Sudan is extremely marginal and limited to advocacy.¹³⁸ In contrast NGOs from Western countries have more clout with various government departments in Southern Sudan primarily because of their significant human and financial prowess compared with that of their local counterparts.

The importance of a regulatory legal framework for NGOs cannot be underestimated. NGOs play a critical role in rule of law promotion activities. With the weak government institutional capacity in place, NGOs conduct various activities including capacity building for judicial personnel, legal advisers, and members of the civil society, and help for infrastructure development necessary to sustain the rule of law, among other functions. The absence of a

¹³⁶*Ibid.*

¹³⁷Interview with the senior official in the judiciary (name withheld on request).

¹³⁸Interview with the private lawyer in Juba, October 2009.

comprehensive regulatory legal framework to verify whether NGOs conform to relevant substantive values and norms may not only hamper their effectiveness but also render their rule of law reform activities less useful and relevant to the needs of the local beneficiaries.

Despite the arguments made in this section, it is important to differentiate between oversight and control. This section does not advocate for the enactment of draconian legislation to control the work of NGOs especially those that may not always support the position of the government on a particular matter. Indeed, we have seen how government decision to enact laws to ‘regulate’ the work of NGOs (Zimbabwe for example), have lead to disastrous consequences such as the banning of some NGOs for contravening the ‘national security or economic interests’ or being accused for serving as ‘agents of imperialism’. It is therefore argued that for national laws to provide effective oversight on the work of NGOs, must be crafted in a way that it advances transparency and accountability in a democratic and pluralistic society.

H. Conclusion

The primary objective of this chapter was to examine the legal framework of international actors such as the UN, the AU and NGOs involved in building the rule of law in Southern Sudan. It was also interested in determining how these actors build the rule of law in practice. The discussion has shown that the involvement of the UN in rule of law reform is underpinned by the United Nations Charter, international human rights instruments and other policy statements issued by the United Nations and its organs. It has further been shown that the General Assembly and the Security Council continue to play key roles in the way the concept is conceived and implemented both at the international and national levels.

However, it has been argued that despite this involvement the approach of the UN remains flawed and purely technical. Despite the efforts of the Secretary General to support various

initiatives for UN to coordinate its rule of law reform work, the discussion has shown that different organizations such as the UNHCR, UNDP and UNICEF continue to push reforms directly aligned with their original mandates. The implication of this has been discussed as well. The chapter has also discussed the role played by the AU in rule of law reform, arguing that the legal framework of the organization is grounded in the Constitutive Act, the Peace and Security Council Protocol, the Post Conflict Reconstruction Policy and other decisions that may be made by the Assembly.

This chapter has further demonstrated that even though the AU has adopted a score of instruments to underpin its post-conflict reconstruction involvement, its rule of law based reforms remain minimal. Rule of law activities undertaken by the organization are in most cases linked to the preservation of peace and security rather than reform of domestic legal institutions. It is against this fact that the chapter has examined various initiatives of the AU to address rule of law in Southern Sudan, such as the work of Mbeki Panel and its recommendations and the work of the AU Ministerial Committee for post-conflict reconstruction in Southern Sudan. Since this thesis is attempting to challenge whether rule of law reforms can lead to attributes such as improved social economic conditions or strong and effective judicial and law and order institutions in countries where these reforms are undertaken, the next chapter will provide an examination of these claims.

Chapter Six

VI. Building Rule of Law Institutions in Southern Sudan.

A. Introduction

In the introductory chapter we saw that judicial independence is one of the core attributes of the rule of law, and that the rule of law and human rights are interlinked. For example, both Rawls and Dicey agree that for the rule of law to exist laws must be prospective and interpreted by the judiciary as an independent and judicial body. But how does this theoretical attribute translate into institutions capable of interpreting laws independently? This chapter will examine whether the rule of law reforms undertaken by international actors can contribute effectively to the building of an independent judiciary and law and order institutions in the reconstruction of South Sudan. The focus on the judiciary is due to its key role in safeguarding human rights, checks and balances of other arms of government and guaranteeing the rule of law. In terms of the rule of law this discussion will draw attention to the fact that fair trials are critical not only to guarantee individual human rights but also in the overall administration of justice including the independence of the judiciary to review executive actions. It is through the standards governing the right to a fair trial that the independence, impartiality and competence of the judiciary are determined in international human rights law. In addition, the value of an independent judiciary inheres in its potential to guarantee access to justice and a fair trial, both of which connote the rule of law.

Parts I, II and III of this chapter examine the nexus between judicial independence and fair trial and how the former can be realized in the context of the latter. This examination will serve two purposes. It will help clarify how an independent judiciary can foster the rule of law and also inform the participation of international actors in achieving this objective. Clarifying these issues will help us understand how the concept of the rule of law at both the international and national levels can be transformed from an abstract ideal into stronger institutions to guarantee the rule of law.

The chapter will further attempt to demonstrate the nexus between an independent and impartial judiciary and the separation of powers. The question is important in considering whether an independent judiciary can contribute to an equitable and stable balance of power within a government through executive accountability. This examination is especially crucial in the Southern Sudan context given that the current governing party and senior government office holders are mostly former guerrillas who are attempting to transition from a rebel movement into a viable political party respecting the rule of law and the constitution. In addition, the fact that the constitution grants wide powers to the executive branch is a reason for further inquiry into how an independent judiciary can contribute to provide check and balances to the exercise of these powers.

Earlier, in chapter two, the discussion has shown that in a society emerging from conflict, more often vital institutions like the judiciary, police and correctional services are either non-existent or weak and corrupt, and so incapable of fulfilling their core functions of protecting people and dispensing justice. The subsequent question is: how does the rule of law reform help or contribute to addressing these challenges? And what are the role and contribution of international actors in addressing these challenges? A closely related question is, how do these

actors reconcile their quest for maintenance of international standards with the ‘one size fits all’ problem? These questions stem from the fact that often international actors assume that rule of law reform will automatically lead to stronger institutions such as the judiciary, police or correctional services. However, this chapter will show that while rule of law reforms can indeed help strengthen an independent judiciary, actors involved in this process take these assumptions at face value.

While discussing judicial independence it is essential to reaffirm that this means individual independence for the judges and institutional or collective independence for a court or tribunal as an independent entity.¹ Commenting on the nexus between individual and institutional independence, the Human Rights Committee noted that ‘States parties should specify the relevant constitutional and legislative texts which provide for the actual independence of the judiciary from the executive branch and the legislature. They should also specify the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office and conditions governing their functions’.²

Despite the imperative nature of judicial reform in a post-conflict context, it is clear that its realization continues to face serious challenges. The challenges and obstacles vary in different countries, but common challenges tend to be generally associated with transparent and merit based appointments procedures, relevant training, building structural protection for impartial decision making by increasing the transparency and accountability of judicial operations, providing adequate resources and budgets including adequate pay, supporting independent court

¹Judith Resnik, ‘Judicial Independence’, in Vikram David Amar and Mark V. Tushnet (eds), *Global Perspectives on Constitutional Law*, Oxford: Oxford University Press, 2009, 25.

² Human Rights Committee, General Comment No. 13: *Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (Art. 14), 13/04/1984.

monitoring organizations, and investing in legal education.³ Despite the varying opinions on how to establish judicial independence, it may persuasively be argued that the ability of the judiciary to dispense justice without fear of external influence or repercussions is a hallmark of judicial independence.⁴ It is worth examining the concept of judicial independence in detail and how building the rule of law can enhance its effectiveness. The starting premise here is that the independence of the judiciary is an essential attribute of the right to a fair hearing by an independent impartial and competent tribunal.

i. Right to a fair trial and an independent judiciary

The right to a fair trial is well enshrined in the Universal Declaration of Human Rights,⁵ the International Covenant on Civil and Political Rights and other international treaties and instruments.⁶ Relevant provisions on this right are also reflected in declarations and non-treaty instruments which have been adopted by the UN General Assembly and other organizations with the aim of codifying basic principles on matters such as the independence of the judiciary and the role of lawyers in the administration of criminal justice.⁷ Human rights courts and tribunals and other supervisory bodies have also contributed in the elaboration of fair trial standards.

³ Jane Stromseth, David Wippman and Rosa Brooks (eds), *Can Might Make Right? Building the Rule of Law after Military Intervention*, Cambridge: Cambridge University Press, 2006, 247.

⁴ M.P. Singh, 'Securing the Independence of the Judiciary-The Indian Experience', *Indiana International and Comparative Law Review*, vol. 10, 1999-2000, 245-250.

⁵ Universal Declaration of Human Rights, Article 10 & 11.

⁶ ICCPR, Article 14. See also European Convention on Human Rights Art. 6, American Declaration of the Rights and Duties of Man, Arts. XVIII and XXVI, American Convention on Human Rights, Art. 8, African Charter on Human and Peoples Rights, Arts 7 and 26 and Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Art. 6.

⁷ General Assembly Resolutions 40/32 of 29 November 1985.

International human rights law reflects a fundamental requirement of the rule of law, that trial should be by an independent and impartial court or tribunal established by law and competent to determine the matter.⁸ It is because of this requirement that we need to examine how attributes associated with an independent judiciary can contribute to enhance a right to a fair trial. Reaffirming the nexus between an independent judiciary and a fair trial, especially regarding the use of ‘special courts’ to try civilians, the Human Rights Committee observed that ‘while the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that trying civilians by such courts should be exceptional and take place under conditions which genuinely afford full guarantee of fair trial’.⁹ This observation by the Committee reaffirms the critical role of an independent judiciary in making the right to a fair trial effective.

At the regional level both the African Charter on Human and Peoples Rights¹⁰ and the European Charter of Human Rights¹¹ have reaffirmed the critical role of an independent judiciary to enhance the right to a fair trial. For example, in one of its decision the Commission stated that ‘Article 26 of the African Charter reiterates the rights enshrined in Article 7 but is even more explicit about State Parties’ obligations to ‘guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter’.¹² While Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right.¹³ So it can be argued that international law

⁸ Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, Oxford: Oxford University Press, 2005, 154.

⁹ Human Rights Committee, General Comment 13, above note 2, para. 4.

¹⁰ Articles 7 & 26 of the Charter guarantee the right to a fair trial and an independent judiciary respectively.

¹¹ See for example, the *European Charter on the Statute for Judges*, Adopted by the Council of Europe in July 1998.

¹² See *Civil Liberties Organization v Nigeria*, Communication 129/94 9th Annual Activity Report 1995 – 1996

¹³ *Ibid.*

considers judicial independence essential in the general realization of the rule of law, mainly because it guarantees the fundamental rights and freedoms of citizens.

One of the major elements of a fair trial relates to the character of the tribunal or the court before which the defendant is tried. From the international law perspective the relevant question here is: what key constituents of a fair trial pertain to the independence of the judiciary as a requisite of the international human rights law? Fair trial standards apply to a wide range of processes, actors and institutions. They apply to all kinds of legal proceedings and all parties affected, both defendants and victims.¹⁴ For the victims of crime, they have rights to redress where human rights violations have occurred, and failure to initiate criminal proceedings due to a general amnesty for crime perpetrators may violate the victim's right to a fair trial.¹⁵

Scholars like Dicey and Fuller, and institutions like the United Nations and the Nuremberg Tribunal discussed in the introductory chapter, cite an independent judiciary as the key component of the rule of law on account of its role to ensure access to justice and equality before the law. Despite judicial independence being a well established legal doctrine, which has been recognized by national laws, case law and the international community through different instruments, still there has been no precise definition of what it is; rather, different entities seem to agree on what judicial independence should consist of, rather than its precise definition.¹⁶ The United Nations General Assembly has attempted to describe the attributes of judicial independence.¹⁷ For example, the Basic Principles on the Independence of the Judiciary¹⁸ state

¹⁴ ICCPR, Art. 14. See also Marks, above note 8, 152.

¹⁵ *Ibid.*

¹⁶ Robert Stevens, *The Independence of the Judiciary*, Oxford: Oxford University Press, 1993, 3-20. See also Steven Lubet, 'Judicial Discipline and Judicial Independence', *Law and Contemporary Problems*, Vol. 61, 1998, 59-74.

¹⁷ See the United Nations Basic Principles on the Independence of Judiciary, 1985 endorsed by the United Nations General Assembly Resolutions 40/32 (1985).

that: ‘The independence of the judiciary shall be guaranteed by the State and enshrined in the constitution and it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary’.¹⁹ Similarly, the *Latimer House Principles* adopted in 2003 by Commonwealth countries reaffirm that ‘an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice’.²⁰ And the Universal Charter of the Judge reiterates similar commitments.²¹ While these Principles are not legally binding, they reflect international commitment to further the rule of law and provide guidance for states to guarantee judicial independence.

Going back to the discussion in the introductory chapter on the core attributes of the rule of law, it can be argued that the right to a fair trial is key to enhance the integrity and independence of the judiciary to administer justice in accordance with the law and the facts without improper influence.²² Judicial independence further requires (i) that judges should decide lawsuits free from any outside pressure, personal, economic, or political, including any fear of reprisal, (ii) that the courts’ decisions should be final in all cases except as changed by general prospective legislation, and (iii) that there should be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.²³ Examination of these

¹⁸UNGA Res. Note 7.

¹⁹Above note 17, Principle 1 &2.

²⁰ *Latimer House Principles*, available at:

<http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=37744>.

²¹ The Charter was unanimously approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on 17 November 1999.

²² Chris Maina Peter, ‘Independence of the Judiciary in Tanzania: Many Rivers to Cross’ in Frederick Jjuko (ed.), *The Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa*, Kampala: Kituo cha Katiba, 2005, 59.

²³ Archibald Cox, ‘The Independence of the Judiciary: History and Purposes’, *University of Dayton Law Review*, vol. 21, 1995-1996, 566-580.

attributes confirms that the judiciary has the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective.²⁴

The realization of an independent judiciary is closely linked to the doctrine of the separation of powers discussed in the introductory chapter. The doctrine means that the three arms of the government, the legislature, judiciary and executive, should be clearly separated from each other and each should operate independently of the others. In its broader sense the doctrine means that one branch of government should not be in a position to dominate the other. In reality, however, it is impossible to have pure separation of powers where each organ of the state acts independently, largely because the business of a constitutional government is so complex that it cannot define the area of each department in such a manner as to leave each one independent and supreme in its allotted sphere.²⁵ This separation is mainly to ensure that powerful organs such as the executive do not use their influence and resources to interfere with the judiciary, especially when the latter gives decisions which may disagree with policies of the executive.

The Kenyan and South African Constitutions both guarantee separation of powers in their respective countries. For example, the 2010 Kenyan Constitution provides that ‘in the exercise of judicial authority, the judiciary shall be subject to the constitution and the law and shall not be subject to the control or direction of person or authority’.²⁶ The importance of this provision is that it guarantees the ability of the judiciary and the judges to dispense justice without fear of reprisal from the executive. This aspect is also crucial to ensure that the judiciary can be relied upon by citizens as an independent and fair arbiter of disputes between and among themselves

²⁴ Yash Vyas, ‘The Independence of the Judiciary: a Third World Perspective’, *Third World Legal Studies*, 1992, 127-145.

²⁵ William Wade and Christopher Forsyth, *Administrative Law*, (10th Ed), Oxford: Oxford University Press, 2009, 1-10.

²⁶ Article 160, 2010 Kenya Constitution.

and the state. Similarly, the South African Constitution designates the judiciary as the ‘sole and independent organ to determine all disputes resulting from the Constitution’. This designation essentially reaffirms the crucial attributes of the rule of law identified earlier, which require that the judiciary must be capable to interpret the law without interference.

ii. Independence of the judiciary in the Southern Sudanese context

In the introductory chapter it was shown that one of the minimum attributes of the rule of law is an independent judiciary. An independent judiciary promotes the rule of law by restoring the faith of the public in institutions of public authority, by ensuring equality before the law and non-discrimination among citizens. In Southern Sudan, during the colonial period, the judiciary was an integral branch of the executive with primary responsibility to enforce law and order and uphold colonial rule and the *status quo*. This had implications for the general development of the rule of law in Sudan because it violated one of the core attributes of the rule of law, which require equality before the law among individuals and the state. To most people the judiciary was considered an oppressive tool by the state and hence viewed with suspicion. This attitude which depicted the judiciary as an instrument of oppression did not change with independence, because leaders continued to manipulate judicial institutions for their own end at the expense of their citizens.²⁷

Because of this situation in Sudan where the judiciary was always viewed with suspicion, the assumption of international actors that building the rule of law can automatically enhance judicial independence is questioned. Arguably, the major concern of international actors in building the rule of law is the belief that the existence of the rule of law reflected in institutions like an independent judiciary can further guarantee the enjoyment of fundamental rights and freedoms

²⁷ See Lino J. Lauro and Peter A. Samuelson, ‘Towards Pluralism in Sudan: A Traditionalist Approach’, *Harvard International Law Journal*, vol. 37, 1, 1996, 65-120.

enshrined in various international human rights instruments. The major challenge however is not only building the rule of law conceived in the form of institutions like the judiciary, but also creating institutions that respond to the expectations and concerns of their beneficiaries.

In Southern Sudan judicial independence derives its origin from the Interim Constitution of Southern Sudan (ICSS)²⁸ and a number of international instruments which Sudan has ratified.²⁹ The constitution regulates in general ways crucial features of the independent judiciary including the role and position of the judge in the administration of justice, the procedures for the appointment and dismissal of judges, the remuneration and tenure of judges, case assignment and the qualifications for serving as a judge. While the CPA and the Constitution list these important elements to further the independence of the judiciary, they do not provide how they will be achieved. Rather the task of creating conditions in which these elements can be realized is assumed by the ‘international community’ represented by donor countries, international organizations and NGOs. This is based on the belief that since Southern Sudan is in a post-conflict situation it cannot on its own create conditions necessary for advancement and realization of these objectives, and therefore requires external support. However, this support is more often grounded in what is called ‘international standards’ which essentially discard anything considered inconsistent or incompatible with the assumptions of international actors.

In the previous chapter various reasons were identified to explain why countries and organizations not affected by strife decide to promote or build the rule of law in countries affected by conflict. It is argued that this involvement should be informed by local realities of the beneficiaries. While international actors may have a role to play in helping post-conflict South

²⁸Article 128, *Interim Constitution of Southern Sudan*.

²⁹ Article 13 (3) ICSS states that ‘all rights and freedoms enshrined in the international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill’.

Sudan to build an independent judiciary, it is important to recognize that their help has limitations. For example, although donors can provide funds to support various initiatives like building judicial infrastructure or providing essential legal materials, ultimately it will be South Sudanese who are required to sit in the courtrooms and adjudicate cases, interpret the constitution and laws and ensure that justice is done to victims of injustice. Similarly, while donors can provide financial resources or technical expertise to enable a ministry to draft laws, it is for the domestic players to ensure that these laws serve the interests of the people by applying them fairly and making them available to the wider polity. The next section will examine how building the rule of law can enhance individual independence of judges and hence contribute to the realization of an independent judiciary.

iii. Individual independence of judges

As already discussed, independence of the judiciary requires not only institutional independence but also individual independence of the judge.³⁰ This aspect was reiterated by Judge Bingham, quoted in chapter one, who contends that to exercise fair trial judges should be independent of anybody or anything that might compel them to decide issues on any other basis than the law and facts before them. Individual independence of the judge and his or her ability to conduct a fair trial are associated and mutually interdependent. Article 134 of the Interim Constitution of Southern Sudan provides for the individual independence of judges, specifically that:

134. (1) Justices and Judges of Southern Sudan are independent and shall perform their functions without interference. The provisions of this constitution and the law shall protect their independence.

³⁰ Human Rights Committee, *General Comment No. 32*, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, 2007.

- (2) Justices and Judges shall uphold this constitution and the rule of law and shall administer justice without fear or favour; they shall enjoy such immunities as shall be determined by law.

From this provision it is clear that the Constitution provides for both rights and obligations of judges as part of the independence of the judiciary. On the one hand judges' independence is guaranteed by the Constitution and the 'law'. Although the provision does not specify the exact law apart from the Constitution itself, one can argue that the law includes any legislation which may be enacted to protect the independence of judges. Further, the Constitution imposes an obligation on judges to uphold the Constitution and the rule of law. This requirement can be attributed to a desire of the drafters to ensure that judges uphold and operate within the confines of the Constitution as a prerequisite for enhanced rule of law. But reading this provision of the Constitution raises some questions relevant to the independence of the judiciary. The provision talks of 'justices' and 'judges' as the individuals protected by this provision. But how about the low ranking judicial officials? They seem to be ignored. Below the judges and justices there are many court officers such as magistrates who are involved in the dispensation of justice in day to day functions of the courts. Admittedly, it is possible to assume that these low ranked officials are included in this categorization as spelt out in the Constitution. But reality in day to day practice demonstrates the contrary, as will be seen in this discussion.

If the judiciary cannot be relied upon to decide cases impartially and in accordance with laid down laws, without being subjected to external pressures and influences, its role is greatly compromised and public confidence in the government may be undermined.³¹ As noted in the introductory chapter, impairing judicial independence undermines confidence in the courts as a

³¹ Antoine Garapon, 'A New Approach for Promoting Judicial Independence' in Randall Peerenboom (ed.), *Judicial Independence in China: Lesson for Global Rule of law Promotion*, Cambridge: Cambridge University Press, 2010, 37-50.

dispute settlement mechanism because it can threaten social order and stability. This belief in the independence of the judiciary was echoed by the then President of Tanganyika Mwalimu Julius Nyerere when he stated that ‘our judiciary at every level must be independent of the executive arm of the state. Real freedom requires that any citizen feels confident that his or [her] case will be impartially judged, even if it is a case against the Prime Minister himself’.³² And since the independence of the judiciary is intertwined with the independence of its judges, it is critical that judges are guaranteed independence to ensure their work is not compromised by external influences.

Another key attribute of an independent judiciary is the requirement that judges should be accountable. Under the Interim Constitution of Southern Sudan the President of the Supreme Court is accountable to the President of the Government of Southern Sudan (GoSS) for the administration of the court. Specifically Art. 126 states that:

Art. 126 (8) The President of the Supreme Court of Southern Sudan, as the head of the Judiciary of Southern Sudan, shall be answerable to the President of the Government of Southern Sudan for the *administration* of the Judiciary.

This provision can be construed as a mechanism to demand accountability from the judiciary. It should be noted that there is a marked difference between independence and accountability of the judiciary. While the former means freeing the judiciary from prior control of its decision making, accountability, on the other hand, focuses on having a mechanism in place by which the judiciary as an independent body is required to explain its operations after the fact. But is this requirement of accountability to the President who is the head of the executive not a hindrance

³² Julius Nyerere, *Freedom and Unity: A Selection from Writings and Speeches 1952-1965*, Dar es Salaam: Oxford University Press, 1966, 131.

to judicial independence? It is argued that while accountability is desirable, it should be exercised by an independent organ such as a judicial service commission. This is to avoid instances where the executive can interfere in the work of the judiciary or deny the court necessary resources when the former is not happy with cases being handled by the court.

Perhaps the most controversial provision in the Interim Constitution of Southern Sudan relates to the accountability of judges at the state level. The constitution requires the President of the High Court to be accountable to the Governor in the *performance* and *administration* of the state judiciary. The provision states that:

Art. 132 (2) The most senior judge of the High Court who shall be its President, shall be answerable to the Governor of the state for the *performance* and *administration* of the State Judiciary.

The implication of this requirement is that it subordinates the judiciary to the whims of the executive, and this may in the long run affect its work of dispensing justice. For example, the president of the High Court will have to explain and be accountable for the performance of the state judiciary, not to the chief justice or the judicial service commission but rather to the governor who is an integral part of the executive. This aspect would be complicated if the judiciary was to rule against the government on a matter in which the latter might have an interest. This would necessarily call into question the relationship between the government and the judiciary. As argued earlier, whether the rule of law can be said to exist in a given society is largely reflected in the commitment displayed by the society concerned, not only in the creation of institutional conditions such as an independent judiciary but also in defending the values for which these institutions stand. Indeed this is one of the provisions which judges in Southern Sudan have continuously complained of, saying it has been misinterpreted by the executive at the

state level to interfere in their work.³³ It is argued that the correct approach to determine the effectiveness of the judiciary or its performance would be to leave it to the judiciary or an independent body established for that purpose.

Individual independence of judges is further predicated not only on the ability and willingness of the executive to respect and implement decisions rendered by the courts but also on the individual competence and confidence of the judge. Indeed, one of the attributes of the rule of law identified earlier is that laws should possess characteristics of certainty, generality and stability. They should also be clearly expressed, open and publicised. The judge cannot be confident and competent if he/she is not well versed with the laws which she/he is responsible to adjudicate. Under the Interim Constitution of Southern Sudan (ICSS) both English and Arabic have equal status and neither language can claim higher status against the other.³⁴ But closer scrutiny shows that the entire judicial system in Southern Sudan and now the independent South Sudan relies on and uses English language as the primary language of communication. For example, in Southern Sudan most judges and magistrates were educated in Khartoum and other countries, especially Arabic speaking countries where Arabic rather than English is the main language of legislation and communication. While efforts have been made to offer on and off training opportunities in current legal system of Southern Sudan, available evidence demonstrates that these efforts have not successfully addressed this challenge.³⁵

The prevailing assumption among international actors is that independence of judges can be enhanced through ‘capacity building’ of judges by giving them trainings in human rights or legal

³³ Interview with the President of the High Court for the Eastern Equatorial state in Torit, December, 2008.

³⁴ Art. 6(2) (3) (4) ICSS.

³⁵ Efforts have essentially been undertaken by the British Council and other international institutions like the UNDP and RCN (Belgium) involved in rule of law reform programmes in the South.

related subjects depending on the specific needs of the relevant department. Indeed, in Southern Sudan, donors such as the British Council and NGOs continue to offer regular training to some members of the judiciary on various aspect of law such as international human rights law, constitutional law and criminal law. While on the face of it these efforts and training may prove useful to enhance educational skills of judges, they raise some serious problems that relate to the independence of judges. The major concern relates to the target of the training. More often it is directed at senior officials in the judiciary, necessarily excluding some of the judges and magistrates at the county and local levels. The danger with this selective focus is that it ignores the fact that most of the judicial functions are performed at the lower and rural areas where more than 80% of Southern Sudanese reside. But in addition training materials used are those brought in by international experts who adapt them to reflect their training role in Southern Sudan. Indeed this practice is similar to the previous efforts undertaken under the law and development movement where experts and scholars from some Western law schools were hired to provide training for senior judges and lawyers in some African countries in the hope that this would improve the rule of law.

It is highly unrealistic to assume that provision of ‘capacity building courses’ offered on an ad hoc basis can automatically lead to individual competence of judges and in the process enhance the independent judiciary. One of the possible means to address this challenge is for the magistrates and county judges in lower courts to be given opportunities to attend continuous legal and English-language training courses which would allow them to keep abreast with the development of events in the legal field both nationally and internationally, which is crucial to their work. The problem with the current approach is that most of this training is not sequenced, rather it is offered when donors have made funds available to that effect, and even when offered it is directed at the higher judicial personnel like judges of the Supreme Court, Court of Appeal and High Court located in the capital, Juba.

a) Appointment of judges

How then does the rule of law affect the appointment of judges? Perhaps more important, why should the mechanism or process through which judges are appointed be of any significance or merit discussion? Since power is exercised by individual judges and through the judiciary as an institution, how a judge is appointed and promoted greatly matters. If the appointment is not based on merit and transparency it can greatly tarnish the credibility of the judge, and the judiciary as an institution, which in effect can compromise a judge's impartiality. Appointment based on merit requires that judges should be appointed on the basis of their qualifications and ability to discharge their functions, while transparency of the process requires the appointing authority to ensure that the entire process is open to the public so that any objection or concern regarding a candidate is addressed before the appointment is made. The European Court of Human Rights has reaffirmed that 'in order to establish whether a tribunal can be considered as 'independent' regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'.³⁶

In Southern Sudan the appointment of judges is provided for under Art. 135 of the Interim Constitution of Southern Sudan. The provision states that;

135.

- (1) The President of the Government of Southern Sudan shall appoint the President, Deputy President and Justices of the Supreme Court, the Presidents and Justices of the Courts of Appeal, having regard to competence, integrity, credibility and impartiality as shall be determined by this Constitution and the law.

³⁶ Decision of the European Court of Human Rights, *Findlay v. United Kingdom*, 1997, 24 E.H.R.R., Para 73.

- (2) The appointment of the President, Deputy President and Justices of the Supreme Court shall be subject to approval by a two-thirds majority of all members of the Assembly.
- (3) The Southern Sudan Legislative Assembly shall enact a law to provide for appointments, terms and conditions of service of Justices and Judges of Southern Sudan.
- (4) All Justices and Judges shall, before assuming their duties, take and subscribe to the judicial oath of allegiance as shall be prescribed by law.

Although the Constitution provides for the appointment of the President, Deputy President and Justices of the Supreme Court and the Justices of the Court of Appeal, it does not expressly provide for the appointment of the lower court judges; rather it leaves this task to other laws which may be enacted for the same purpose.³⁷ In the absence of the law, how are the lower court judges appointed? Since the signing of the CPA, the practice has shown that these appointments are made by the President of the Supreme Court who doubles as the Chief Justice, an aspect which gives him enormous power in appointing lower court judges and magistrates and the high court judges who are not subject to presidential appointment. What criteria guide the President of the Supreme Court in making appointment to the bench? Admittedly, the constitution requires the President when making appointment of Justices to take into account competence, integrity, credibility and impartiality. Despite this constitutional safeguard there is no mechanism to ensure that these criteria are observed.

Furthermore, there are problems with this requirement because it is capable of being abused by the executive to safeguard its own interests. Unlike in other countries where the appointment of

³⁷ Article 133 of the Interim Constitution of Southern Sudan.

justices of higher courts is made with consultation and recommendations of a Judicial Service Commission or Council, in Southern Sudan there is no such body and the President takes the decision on whom to appoint as a Judge. The absence of an independent body to oversee the appointment process for justices does not fit well with the claim that rule of law reforms can automatically lead to an independent judiciary.

In accordance with article 135 (2) of the ICSS the appointment of the President of the Supreme Court and his deputy and the Justices of the Supreme Court is subject to the approval by a two-thirds majority of all members of the Assembly. This requirement is indeed (at least theoretically) one of the safeguarding constitutional mechanisms to ensure transparency and integrity in the selection and appointment of judges of the highest court. The challenge is to have the appointment process adhered to by the appointing authority. The flaw in this process is that the powers of the President to appoint justices are unchecked, so that he or she can use these powers to make appointments which may compromise the independence of the judiciary as an institution, for example by selecting judges who are unqualified or who would side with the government when determining critical issues in which the government may have an interest. It would be useful therefore if an independent body like a judicial service commission – comprising members of the judiciary and the bar association, the attorney general or his or her representative, and representatives of the public service commission among others – was involved in the process.³⁸ This would ensure that all the candidates submitted to the legislative assembly for approval have been thoroughly vetted and their qualifications and integrity are not in doubt.

³⁸ For example, in Uganda the Judicial Service Commission includes select members of the judiciary, a representative of the Attorney General, representatives of the Public Service Commissioner and the Law Society, and lay people appointed by the President. See Art. 146, 1995 Uganda Constitution.

While not legally binding, the Commonwealth guidelines on preserving judicial independence discussed earlier reaffirm that every jurisdiction should have an appropriate independent process in place for judicial appointments. Indeed the UN practice recognizes the imperative nature of these guidelines in strengthening the rule of law. Where no independent system already exists, appointments should be made by a judicial service commission (established by the constitution or statutory law) or by an appropriate officer of state acting on the recommendation of such a commission.³⁹ The guidelines further stipulate that the appointment process, whether or not involving an appropriately constituted and representative judicial service commission, should be designed to guarantee the quality and independence of those selected for the appointment at all levels of the judiciary. As to the main criteria for the appointment, the guidelines insist that judicial appointments at all levels should be made on merit with appropriate provisions for the progressive removal of gender imbalances and of other historical factors of discrimination.⁴⁰ While these guidelines are not binding they provide a framework to enhance the independence of the judiciary.

Despite these guidelines, there are no clear rules guaranteeing that a certain process of appointing judges will be more successful than the rest. Rather, the success of each process will largely depend on the history, culture and political context of the country and the immediate problem that is being addressed.⁴¹ Further examination of the above guidelines would show that there are some common denominators which, if used especially in Southern Sudan, can tremendously improve the appointment process of judges. These may include:

³⁹ *Latimer House Guidelines*, abovenote 20,17.

⁴⁰ *Ibid.*

⁴¹ See generally USAID, Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality*, Washington, DC: Technical Publication Series, 2002, 15-20.

- (i) Transparency in the process: here several measures may be undertaken such as to advertise judicial vacancies whenever available, to publicize candidates' names, their background and selection process, to invite public comments on the profiles of the candidates, and to entrust this task in the hands of an independent and a competent body like a judicial council or commission. To further enhance the independence of the judiciary, the appointment process of judges should strictly be based on meritocracy and transparency. These considerations would enable the judiciary to recruit best candidates available in the pool of applicants.⁴²
- (ii) Closely related to the above is the composition and integrity of the judicial council or commission. The council or commission should be an independent body comprising different players from different organs. For example, the council or commission should comprise lawyers and non-lawyers alike – though clearly, the process used by the judicial council or commission is more critical than even the composition of the council itself.

In South Sudan the above objectives can be achieved by advertising these vacancies within South Sudan and also on the websites of the country's missions abroad. This is important because there are many South Sudanese who have been living outside the country because of the conflict. Some of them are well educated and capable to contribute to the building of their country. It is therefore critical to give an opportunity to such people to apply for various vacancies in the judiciary and other relevant offices by allowing them to present their candidacies for consideration.

⁴²*Ibid.*

Mindful of the diversity of ethnicities and nationalities in South Sudan, it is argued that when making appointments of judges especially at the highest court like the Supreme Court and the Court of Appeal, the appointing authority must be keen to reflect the society in which it operates. This matter is eloquently captured by Shetreet who argues that an important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially and culturally. This is based on the doctrine of 'fair reflection' which may be supported by additional arguments. The judiciary is a branch of the government, not merely a dispute resolution institution, and as such it cannot be composed in total disregard of the society it represents.⁴³ In the context of South Sudan this aspect can be achieved by ensuring that while taking into account merit and individual qualifications, the appointing authority appoints qualified men and women from different nationalities. While it is not possible to accommodate all nationalities in the appointment process, equally it is not desirable to have all vacancies filled from a few major nationalities.⁴⁴

b) Tenure and dismissal of judges:

What should be the mechanism for safeguarding judges' tenure? For a judge to remain independent while in office, security of tenure is of paramount importance. Lifetime or long-term tenures provide judges with the necessary employment security to avoid fear of non-renewal of their appointments. Should judges be subject to short tenure, that may render them susceptible to political pressure or other influences endangering their independence.⁴⁵ The importance of security of tenure for judges has been reaffirmed by the Human Rights Committee, which recommends the protection of judges against conflict of interests and

⁴³ Shimon Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges', in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: Contemporary Debate*, Dordrecht: Martinus Nijhoff Publishers, 1985, 594.

⁴⁴As of 2010, the Dinka ethnic group, which is one of the largest nationalities in South Sudan, represented more than 60% of all Justices of the Supreme Court.

⁴⁵ USAID Report, note 42, 19-23.

assurance of their tenure.⁴⁶ Recommended measures to protect judges against physical harm may include such elements as provision for security guards on court premises or police protection for judges who may become or are victims of serious threats.

On the importance of the security of tenure and procedures for dismissal of judges, the United Nations Basic Principles note that:

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Reaffirming the importance of the security of tenure for judges, the Human Rights Council has expressed concern at the lack of security of tenure for judges in some countries by stating that short-term or non-guaranteed tenure for judges weakens the judiciary and affects their independence and ultimately their professional development as judges.⁴⁷ Similarly, the Burgh House Principles on the Independence of the International Judiciary reaffirm that judges should have security of tenure in relation to their term of office and may only be removed from office upon specified grounds and in accordance with appropriate procedures and specified evidence.⁴⁸ Though these latter principles talk of the international judiciary, they serve as guidelines for the national judiciary as well.

⁴⁶Human Rights Committee, *General Comment 32*, para 19.

⁴⁷Report of the Special Rapporteur on Independence of Judges and Lawyers Leandro Despouy, A/HRC/11/41, 2009, para 53-64.

⁴⁸Burgh House Principles, 3.1.

The Interim Constitution of Southern Sudan guarantees the tenure of judges to ensure that their employment is not dependent on or affected by their decisions. Specifically, article 134 (3) of the constitution provides that ‘the tenure of office of justices and judges shall not be affected by their judicial decisions’. The Constitution further reiterates that judges can only be removed from office owing to gross misconduct which brings the office of the judge into disrepute, or for incompetence in discharging the functions of their office. In respect of disciplinary measures against the judges and justices, the Constitution vests power to the President of the Supreme Court.⁴⁹ The removal of Justices of the Supreme Court can be made by the President of the Government of Southern Sudan on the recommendation of the President of the Supreme Court and with approval of a two thirds majority of the Legislative Assembly.⁵⁰

Despite legal safeguards embedded in the Constitution for the judges and judicial officers of lower courts, in practice ‘word text’ is quite different from the existing reality ‘on the ground’. For example, how can ‘adequate remuneration, conditions of services or pension’ be guaranteed in Southern Sudan where more than 80% of the population live below a poverty line and a similar percentage is illiterate?⁵¹ Because of these existing challenges there is a compelling need to question whether the current approach of rule of law reforms can lead to an independent judiciary as assumed by international actors.

⁴⁹Article 136 (1) ICSS.

⁵⁰Article 136 (2) ICSS.

⁵¹ World Bank, *World Development Report: Conflict, Reconstruction and Development*, Washington, DC: The World Bank, 2011.

c) Salaries and service conditions of judges

While it is widely accepted that reasonable and decent salaries are a necessary element of judicial independence, increments in salaries alone cannot ensure judicial independence.⁵² To start with, why should judges be treated differently from other public servants? This question is critical especially when governments operate on a tight budget, in some cases struggling to meet the wage bill for public officials. Despite this reality, it should be acknowledged that dispensing justice fairly and effectively does not come cheap. In most cases it is difficult to reduce low level corruption among judges unless they are able to support the essential needs of their families. Increasing and guaranteeing salaries of judges may contribute to improvement of the status of the judiciary, increase judges' self respect, and attract a broader pool of qualified professional applicants who may be inclined and equipped to uphold the integrity of the judicial office. This aspect has been reaffirmed by the Special Rapporteur on the independence of the judiciary, who has consistently argued for the improved working conditions of judges as an integral part of judicial independence.⁵³

However, it is debatable whether increased salaries alone can decrease the temptation to accept bribes. A study commissioned by the World Bank concluded that there was no evidence that increasing salaries without taking other measures of reform could lead to significant reductions in corruption. Rather, reducing corruption appears to be much more closely linked to increasing transparency and meritocracy in hiring, promotion and discipline.⁵⁴ The study therefore recommended that salary increases should be part of the reform package rather than an end within itself. These observations by the Bank confirm that the contribution of rule of law reform

⁵² For example see Special Rapporteur's report, E/CN.4/2006/52/Add.3, Para. 47 on the impact of delayed salary payment on judicial independence.

⁵³ *Ibid.*

⁵⁴ Sandra Oxner, 'The Quality of Judges' in Ko-Yung Tung (ed.), *The World Bank Legal Review: Law and Justice for Development*, World Bank Legal Review, The World Bank, 2003, 343-344.

to judicial independence is not automatic, rather it requires a holistic approach to ensure that reforms are consistent and reflect existing problems. Pension benefits are an equally important component of benefit packages. Decent or comfortable pension prospects, coupled with security of tenure, increase the likelihood that judges will remain on the bench until the end of their careers. This in turn may incentivize judges to resist bribes and corrupt behaviour.

Independence of the judiciary means independence not only from partisan political pressure but also from socially powerful litigants. The main way by which the socially powerful influence the judicial process is through bribes. Arguably there have been significant changes in the judiciary in Southern Sudan since the signing of the CPA, so that now judges in higher courts receive considerably higher pay compared with other civil servants in the government. However, in South Sudan, many of the provisions that guarantee judicial independence apply only to the Supreme Court, Court of Appeal and High Court judges, leaving lower court officials like the magistrates almost untouched by these guarantees and protection. Yet this is the part of the judiciary which handles the bulk of judicial work and it is also the level where the problem of corruption is most severe, partly because of widespread poverty and illiteracy which hinder common people from accessing justice at the higher courts. Indeed, in some countries including South Sudan, while judges of the High Court, the Court of Appeal and the Supreme Court have been for a long time exempted from paying tax on their income, magistrates' and county court judges' income is subjected to tax.⁵⁵

⁵⁵ The wide disparity in remuneration between different judges has been blamed for the failure to attract and keep judges in rural areas. This challenge was recognized by the Special Rapporteur in the report submitted before the Human Rights Council See E/CN.4/2005/60/Add.2, Para. 37. See also Steven Jjuuko, *The Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa*, Kampala: Kituo Cha Katiba, 2005.

There are other factors which contribute to the involvement of judges in unethical practices that can compromise their integrity. For example, Peter argues that judges' emoluments should match their status and the seriousness of the matters they handle in exercising their judicial functions, and he concludes by stating that it is unfair to expose judicial personnel to inducements and other questionable attractions due to genuine hardships.⁵⁶ This danger is more pronounced in South Sudan, where there is no sound pension scheme across the entire government sector to guarantee not only a decent living but also a dignified retirement for civil servants including judges.

iv. Rule of law reform and institutional independence of the judiciary

This section will focus on the institutional independence of the judiciary in the Southern Sudan context. The discussion will examine the role and contribution of international actors in building an independent judiciary. From the international human rights perspective, institutional independence of the judiciary is assumed to be vital not only for the protection of individual and collective human rights but also to further the rule of law. This assumption is reflected in efforts undertaken by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which in September 1985 adopted Basic Principles on Independence of the Judiciary. These Principles were subsequently endorsed by a UN General Assembly resolution.⁵⁷

To further understand this concept a provision in the South African constitution may be instructive. The provision states that 'the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice'

⁵⁶Chris Maina Peter, above note 22, 66.

⁵⁷ UNGA Res., above note 7.

and further requires that ‘no person or organ may interfere with the functioning of the courts’.⁵⁸ Reading this provision it is clear that successful institutional independence of the judiciary requires that other branches of the government such as the executive and the legislature play their role in enabling the judiciary to discharge its functions without external interference. To achieve this objective the executive should take a lead in implementing decisions rendered by the court and also allocate adequate resources for the judiciary to carry out its functions as required. Similarly, the legislature would be required to refrain from passing legislations to preempt courts’ decisions, especially when such decisions are considered to be against the government’s or the ruling party’s interests.⁵⁹

This concept of institutional independence is well enshrined in the Southern Sudanese Constitution. Article 128 of the Interim Constitution reaffirms that:

- (i) The Judiciary of Southern Sudan shall be independent of the executive and the legislature, its budget shall be charged on the consolidated fund and it shall have the necessary financial independence in the management thereof.
- (ii) The Judiciary of Southern Sudan shall be subject to this Constitution and the law which the Judges must apply impartially and without political interference, fear or favour.
- (iii) The executive and legislative organs at all levels of the government in Southern Sudan shall respect and protect the independence of the Judiciary.

⁵⁸Section 165 of the 1996 Constitution of the Republic of South Africa.

⁵⁹ For example, the legislature in Tanzania passed a law in 1994 to pre-empt a court’s decision allowing independent candidates to run for public office. See the decision of Lugakingira J (as he then was) in *Rev. Christopher Mtikila v. Attorney General, High Court of Tanzania* at Dodoma, civil case no. 5 of 1993 (reported in *Commonwealth Human Rights Law Digest*, Vol. 1, 1996, 11).

The Interim Constitution calls on other branches of the government to respect and protect the independence of the judiciary. However, a closer examination of the ‘reality’ in Southern Sudan shows that the bigger challenge is not whether judicial independence is well enshrined in the Constitution, but whether other organs of the government such as the executive and the legislature are willing to implement what is written in the Constitution to ensure not only that the judiciary is independent but that it is seen to be independent. The constitutional or foundational laws are the starting point in the process of securing institutional independence of the judiciary. Ultimately the independence depends on the totality of a favourable environment created and supported by all state organs, including the judiciary itself, and public opinion.⁶⁰

Institutional independence of the judiciary should correspond with the ability of the judiciary to perform its functions in favourable conditions. Otherwise this independence means little when the courts cannot be allocated adequate resources to address some of the challenges facing it. In most cases the judiciary in Southern Sudan has had to rely on external partners like the UNDP and other international donors to fund some of its activities. Yet, it is clear that this practice has its own dangers. The practice not only makes the judiciary dependent on the resources of donors, which are neither predictable nor sustainable, it also hinders the ability of the judiciary to set long-term plans and goals for its effective functioning. Admittedly, the ability of the government to allocate funds for the proper functioning of the judiciary and the entire government is limited, but it should be noted that the government has a responsibility to match the constitutional provisions with the commitment to allocate sufficient resources. It is therefore crucial for international actors to ensure that their assistance is tailored to the actual needs of the local beneficiaries to enhance the latter’s role in the reform process.

⁶⁰M.P. Singh, above note 4, 246.

What can be done to enhance the institutional independence of the judiciary in Southern Sudan? Both local and international actors have crucial but complementary roles to play. The independence of the judiciary or its effectiveness can be achieved neither by the infrastructure alone nor by constitutional provisions drafted with assistance from donors. Rather, the independence should be determined by the extent to which these constitutional provisions are enjoyed by the citizens, the extent to which the executive and legislature respect and enforce the decisions rendered by the judiciary, and the extent to which people can access the judiciary to resolve their dispute among themselves or with the government. However, the current approach to reforms is underpinned by flawed assumptions which place undue focus on infrastructure development and drafting legislations. The approach fails to appreciate that unless these elements have practical application in the day to day lives of those in whose names are built or written, they remain redundant with little impact on those people's lives. It can therefore be argued that for the rule of law to have a significant impact on judicial independence, reforms should clearly articulate how these constitutional and other legislative measures adopted can be translated into concrete outcome. This can be achieved through increased involvement of the local polity in the reform process. International actors must recognize that building the rule of law is the primary responsibility of the local polity; hence their support should always reflect the needs and priorities of the local people rather than what these external actors consider crucial for successful reforms.

B. Creating and strengthening law and order institutions

Building and strengthening the rule of law requires not only an independent judiciary but also law and order institutions enjoying a strong degree of public support and confidence. Indeed this is one of the core attributes of the rule of law identified in chapter one. Stable law and order constitutes a vital element in enhancing the protection and advancement of both individual and

collective human rights of members of a given polity.⁶¹ Often cut off from the populations they are meant to serve and protect, in a post-conflict context these institutions tend to operate more like military contingents than public security institutions.⁶² It is on the assumption that rule of law reforms can address these challenges that international actors continue to justify their activities. Examination of the situation in Southern Sudan demonstrates that in the past law and order institutions have functioned as instruments of control, repression, and intimidation rather than protecting people.⁶³ It is this history which provides a compelling need to question whether the involvement of international rule of law reformers can contribute to addressing these problems.

The imperative of building effective law and order institutions is a precondition for a successful political and economic development in any post-conflict society.⁶⁴ As already discussed in chapter four, without strengthening of law and order institutions all other reforms are unlikely to succeed. For example, without a trained police force to guarantee domestic peace and security, a country can hardly attract foreign or domestic investors to invest their capital. Similarly, the absence of strong prosecution services to prosecute wrongdoers may erode the credibility of the state to fight crime and protect citizens and their property. But even undertaking rule of law reforms alone cannot guarantee effective law and order institutions, rather such efforts must proceed in tandem with other reforms in key sectors like the judiciary, because of their interdependence and their mutually reinforcing nature. This argument is reinforced by the fact that without a holistic approach, problems such as extended pretrial detention, lack or flawed

⁶¹ See UN Secretary General Report, *Strengthening and Coordinating United Nations Rule of Law Activities*, August 2011. Available at: www.unrol.org.

⁶² Jane Stromseth et al., *Can Might make Right?: Building the Rule of Law after Military Interventions*, above note 3, 134-170

⁶³ See generally chapter two.

⁶⁴ See the United Nations Report, 'Civilian Capacity in the Aftermath of Conflict: Independent Report of the Senior Advisory Group', A/65/747-S/2011/85, 2011.

due process, and unfairness in the treatment of suspects will greatly undermine the impact of overall rule of law reforms.

Despite the imperative context of these reforms, the way they are carried out continues to challenge the basis of their implementation. For example, despite the continued rhetoric of reformers about reforms that are ‘owned’ by local constituents, the reforms continue to be dominated by international actors such as the UN, bilateral donors and non-governmental organizations. Essentially there is a top-down approach whose implication is that it alienates local people as the legitimate participants in the determination and implementation of reforms. The absence of local people’s participation makes it difficult for international actors to impart skills, knowledge and tools so that local institutions are stronger and capable to contribute to the reform process especially when donors and international institutions have left. Below, we examine reforms of specific law and order institutions to establish whether and to what extent the effectiveness of such institutions has been enhanced by the ongoing rule of law reform efforts in Southern Sudan.

i. Police reform in Southern Sudan

The UN resolution authorizing the creation of UNMIS mandates the mission to undertake police reform in Southern Sudan. Specifically the resolution requires the mission to ‘assist parties to the Comprehensive Peace Agreement, in coordination with bilateral and multilateral assistance programmes, in restructuring the police service in Sudan, consistent with democratic policing’.⁶⁵ A question to pose is, why should the Security Council get involved in law and order institutional reforms in places like Southern Sudan? As discussed in chapter five, the involvement of the Council is underpinned by several assumptions, but mainly by the belief that strong law and

⁶⁵ UNSC Res. 1590/2005.

order institutions significantly contribute to the maintenance of peace and security at the national and international levels. Indeed, this belief of the Council is well captured by the UN definition of the rule of law discussed in the introductory chapter.

It is these assumptions that continue to inform the role of major players involved in police reform within the United Nations system including the DPKO, the DPA, the UNDP and the OHCHR. The question is whether the content of this kind of resolution responds to the existing practical challenges. For example, major challenges facing the police force in Southern Sudan include corruption, illiteracy, poor working conditions and continued violations of human rights. Reading this resolution raises some significant questions. The resolution requires reformers to undertake reforms consistent with 'democratic policing'.⁶⁶ But what does democratic policing signify, especially in the Southern Sudan context, and what are the precise objectives underlying this concept? International actors identify key attributes of democratic policing as including police accountability to the law, protection of human rights, transparency of police operations and giving priority to serving the needs of the public.⁶⁷ The main goal envisaged under the concept is a police force that understands itself as functioning in the public interest, with the aim of fair enforcement of the law and protection of basic rights, within a system of government that is accountable under the law.

While these attributes of democratic policing are laudable, the challenge is how to achieve them and how they fit within local conditions. How do international actors transform former combatants who have spent most of their adult lives waging guerrilla war into an accountable

⁶⁶ See generally Christopher E. Stone and Heather H. Ward, 'Democratic Policing: A Frame Work for Action', *Policing and Society: an International Journal of Research and Policy*, vol. 10, 1, 2000, 11-45.

⁶⁷ For example see Organization for Security and Cooperation in Europe (OSCE), *Guidebook on Democratic Policing*, 2nd edn, Vienna, 2008. See also Gemma Celador, 'Police Reform: Peace Building Through 'Democratic Policing'?', *International Peacekeeping*, vol. 12, 3, 2005, 364-376.

and human rights respecting police force? What mechanism can be employed to achieve this goal? While the international community has promoted democratic policing through police reforms with significant success in Liberia and Sierra Leone, it is clear that these countries differ markedly from Southern Sudan. Although Liberia and Sierra Leone endured a long spell of conflict, at least they had a prior semblance of law and order institutions. This can be contrasted with the situation in Southern Sudan, where in most parts of the country there was no police force and only local militias were responsible to guarantee security. It is these marked and peculiar differences confronting different post-conflict countries that are often not taken into account by international actors.

Building a functioning police force that enjoys public legitimacy may require a brand new police force created either from scratch or by vetting and retraining some existing forces, or through some combination of the two. To achieve democratic policing requires a fundamental shift in the current approach by international actors rather than using common denominators in different countries where the UN may be involved. In other words, reforms should reflect the existing needs and expectations of the local polity rather than the 'world imagined by reformers'. The central goal of UNMIS in conducting police reform has been stated as to 'significantly facilitate the transformation of Sudanese police into a professional, efficient, community orientated police service capable of ensuring safety and security of the common citizen of Sudan'.⁶⁸ The Mission is further tasked to 'help reform and restructure the Sudanese police service, and develop evaluation programs and train Sudanese police'.⁶⁹ Arguably, an effective and professional police force is key to guarantee fundamental rights and protect citizens and their properties. The question is, how precisely does building the rule of law enhance the effectiveness of the police service? Perhaps a larger concern is, how does the Mission evaluate the success of its objectives

⁶⁸Mission statement of UNMIS.

⁶⁹*Ibid.*

or the impact of its outcome? Considering these objectives in the Southern Sudan context, they are highly aspirational and taken at face value because there are no tangible benchmarks upon which the Mission can evaluate whether the reforms have led to democratic policing. It is argued that the Mission must have concrete benchmarks reflecting existing reality in the society concerned to determine whether the objectives underpinning its mission have been achieved.

The Mission has invested relatively significant resources in police reform compared with the judicial reforms or any other rule of law cluster. This aspect can partly be attributed to the ongoing security challenges facing the country, threatening the peace process upon which all other reforms depend. However, as already stated above, police reform in Southern Sudan should be analyzed against the historical context of policing in Southern Sudan. Before the signing of the Comprehensive Peace Agreement in January 2005 the police force was seen as an instrument of oppression imposed by the central government in Khartoum. Indeed, after the signing of the CPA this perception hardly changed, especially in view of widespread accusations of corruption and human rights abuse by the force and violence that continues to characterize Southern Sudan.⁷⁰ To successfully attain democratic policing it is therefore essential for international actors to treat each post-conflict country uniquely, taking into account peculiar challenges facing each country. In the case of Southern Sudan international actors, while undertaking police reforms, should take into account historical challenges that have defined policing in the country rather than assuming that ‘one particular approach or mode’ of reforms is suitable to all countries.

⁷⁰ Human Rights Watch Report on Southern Sudan, *There is no Protection: Insecurity and Human Rights in Southern Sudan*, New York: Human Rights Watch, 2009.

ii. Correctional services reforms

It is important that we examine how the rule of law can enhance correctional service in a post-conflict situation. In the introductory chapter we saw how equality is central to the rule of law. It is this attribute that provides a compelling need to examine whether the rule of law reform can automatically enhance correctional services. Correctional services in post-conflict countries and developing countries in general are considered less important mainly because they are meant to improve living conditions of ‘criminals’ who have broken the law. Thus it is assumed, wrongly, that such resources should be used to improve the living conditions of law abiding citizens instead of being spent on criminals. It is to challenge this narrative that this section intends to demonstrate and reaffirm that a functioning and humane prison system is an integral element to the rule of law.⁷¹ However, the way such a thing is developed challenges the assumption that rule of law reform in post-conflict countries can automatically enhance the effectiveness of correctional services.

What precise criteria does the Council use to determine whether the rule of law can enhance correctional services in a given post-conflict context? More often it is simply taken as self-evident that rule of law reform will lead to the improvement of correctional services. An examination of the Libyan situation would illustrate how international actors take these claims as self-evident. Resolution S/2011/580 establishing the UN Support Mission in Libya (UNSMIL) mandates the Mission to support the Libyan national efforts to ‘restore public security and order and promote rule of law’ and ‘extend state authority through strengthening accountable institutions’. The correctional service unit in the Mission is required to participate in the ‘development and implementation of the Mission’s strategies related to strengthening and development of all aspects of the corrections system, including: implementation of applicable

⁷¹ Michael J. Trebilcock and Ronald J. Daniels, *Rule of law Reform and Development: Charting the Fragile Path of Progress*, Cheltenham: Edward Elgar Publishing, 2008, 170-175.

international standards; review and development of relevant legislation; management of prisoners and staff; management of critical strategic and operational issues; and supporting the development of effective linkages with the police and the court system’.

From the wording of the mandate of this unit, it can be argued that there are many assumptions that make one wonder whether they can be achieved at all. These goals are not only highly aspirational, they are also premised on a flawed assumption. For example, one cannot see how international actors can strengthen ‘*all* aspects of correction systems in Libya or manage prisoners and staff both uniformed and non-uniformed’. It is assumed that previously Libya lacked a legislative framework for correctional services, so that it was necessary to develop one, and that correctional services were poor and therefore in need of rehabilitation from outside. The mandate assumes that the existing framework was incompatible with international standards, hence the need to apply all applicable international standards. It is also assumed that there was no linkage between prison services and the court system, hence the need to develop an effective linkage between these institutions.

Equally, the mechanism to achieve these objectives renders it questionable whether this approach is realistic. The objectives would be achieved by ‘coaching and mentoring local correctional officers’ and ‘developing and implementing corrections training programs for all levels of staff’. However, it is not clear who is going to do this and with what means. A question worth posing is whether the NATO intervention that lasted less than six months destroyed correctional services in Libya so completely as to warrant international actors undertaking a ‘complete review and development of a new legal framework, train all levels of staff and strengthen all aspects of correction service’. These questions are important because until the

intervention by NATO in March 2011, Libya was a stable and relatively developed country without any form of internal conflict.⁷²

The example of Libya is one among many scenarios where international actors draw up a list of highly abstract goals of reforms that can hardly be achieved in the real world. For example, Libya and Southern Sudan, now independent South Sudan, are two markedly different countries. While Libya was considered a dictatorship during Gaddafi's rule, it had institutions that were able to guarantee peace and security for its citizens, access to justice and protection of human rights. Imperfect as these institutions might have been, nevertheless they existed. This can be contrasted with the situation in Southern Sudan which, owing to the long running conflict, lacked rule of law institutions. Yet, examining the role and contribution of international actors in promoting the rule of law in these places shows that they are guided by similar objectives without acknowledging the differences and how these could affect their work. Clearly, under these circumstances the rule of law can hardly contribute to the effectiveness of correctional services, precisely because there is a complete disconnection between practical realities and assumptions made by reformers.

The UN Standard Minimum Rules for the Treatment of Prisoners provide guidelines upon which prison service reform can be undertaken.⁷³ However, one might be inclined to question whether the application of these guidelines and principles in Southern Sudan context is viable.

⁷² By 2010, the per capita GDP of Libya was estimated to be US\$9,150; 2010 statistics estimated life expectancy in Libya to be 77 and 72 for men and women respectively. For comprehensive statistics on different economic indicator see, <http://data.un.org/CountryProfile.aspx?crName=Libyan%20Arab%20Jamahiriya>. Accessed March 2013.

⁷³ United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 30 August 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

This question is significant because applying these standards in a place like Southern Sudan itself presents a challenge. In Southern Sudan the correctional services are basically non-existent and where they do exist they are devastated and squalid, poorly equipped and poorly run. The implication of this dire situation is that it has discouraged major donors and international community who, when faced with competing priorities, tend to focus on more ‘quick impact projects’ in the domain of law and order, especially projects for the police and the judiciary, as these are seen as likely to have quick and positive impact in the reform process. As stated above, domestic attitudes, especially in poor societies like South Sudan, make it even harder to consider prison reform as a matter of priority when ordinary people struggle to secure social and economic rights amidst economic hardships and poverty.⁷⁴

The overall objective of prison service aid in a post-conflict context should be to contribute to the maintenance of sustainable peace and security by building national prison staff capacity to develop and manage a viable, safe, secure and humane prison system. At its most basic level, strengthening and re-establishing a prison system is about rehabilitating buildings which are ‘fit for purpose’, recruiting and training appropriate staff to manage those prisons, and developing legislation, policies, procedures and systems which enable the system to function in a coherent, integrated and accountable manner.⁷⁵ Collectively these efforts not only advance the rule of law but help in promoting fundamental rights and freedoms and human rights of all citizens. The fact that a person is in prison does not deprive him or her of the basic rights enshrined in the constitution or other international human rights instruments. It is in the quest to promote these

⁷⁴ See generally Frans Viljoen, ‘The Special Rapporteur on Prisons and Conditions of Detention in Africa: Achievements and Possibilities’, *Human Rights Quarterly*, vol. 27, 1, 2005, 125-171.

⁷⁵ See generally, ‘Supporting National Prison Systems: Lessons Learned and Best Practices’. Available at www.pbpu.unlb.org.

rights that rule of law reforms, when pursued within a correct approach, can have a significant impact in enhancing correctional service delivery.

Correctional services reform is important both as a reaffirmation of international human rights standards and as a development of the rule of law, but the way these reforms are conceived and implemented will continue to challenge the approach used by international actors and the outcome of the process itself. Reformers should not simply assume that rule of law reform will automatically address challenges facing correctional services or any other law and order institutions. Rather each situation should be treated differently. The desire to transform post-conflict countries like Libya or Southern Sudan to resemble an imaginary world of rule of law compliant states conceived by international actors inhibits successful reforms. While international actors continue to insist on ‘national ownership’ of the reform process, perhaps to allay fears and accusations of domination, their contribution will have little impact, if any, as long as they continue to set and support such highly abstract and imaginary objectives that would be difficult to achieve even in the most developed countries. Rather they should condition and promote their reforms on the basis of the actual needs of each country to achieve desired objectives on behalf of the local beneficiaries.

iii. Assistance to the Ministry of Legal Affairs and Constitutional Development

An examination of institutions critical for the advancement of the rule of law would be incomplete without an inquiry into whether rule of law reform can enhance the role and function of the Ministry of Legal Affairs in the overall objective of legal service delivery in Southern Sudan. This ministry is the key government department entrusted with various functions including prosecution, legislative drafting, legal education, provision of legal aid and access to

justice, and above all it serves as the chief legal adviser to the government as a whole.⁷⁶ Clearly, there is a correlation between the rule of law reforms and functions of these departments.

In rule of law reform the prosecution system is central because of the importance of its functions. The significance of the prosecutorial function lies in the prosecutor's responsibility to represent the public interest in criminal proceedings. Contrary to widely held views, the role of the prosecutor is not to secure conviction by any means, but rather to ensure that the law is respected and enforced.⁷⁷ This aspect is succinctly noted by an American judge who stated that 'the prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His [or her] objective like that of the court should simply be justice; and has no right to sacrifice this to any pride of professional success. And however strong may be his [or her] belief of the prisoner's guilt, he [or she] must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community'.⁷⁸

The interest of international actors in strengthening prosecutorial services is predicated on the assumption that such reforms can enhance protection and promotion of human rights. This belief is reflected in the United Nations and other regional initiatives reaffirming the importance of effective prosecution in the realization of human rights. The UN guidelines provide extensive criteria upon which prosecutors should be selected, promoted, remunerated and disciplined. Some of these criteria require that (i) prosecutors should have appropriate qualifications and training, be selected without discrimination, and be made aware of the ethical duties of their

⁷⁶ Article 138(2), ICSS.

⁷⁷ See generally the United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

⁷⁸ *Hurd v People*, 25 Mich. 404, 415-16 (1872). Quoted from Bruce A. Green, 'Why Should Prosecutors "Seek Justice"?' *Fordham Urban Law Journal*, vol. 26, 3, 1998, 613.

office; (ii) their promotion must be based on objective factors, such as professional qualifications and experience, and assessed in accordance with impartial procedures; (iii) their remuneration, tenure, and pensions and age of retirement should be legally provided for in published rules; and (iv) disciplinary procedures for prosecutors must be based on law that guarantees an objective evaluation.⁷⁹ The guidelines also seek to ensure the independence of prosecutors by placing responsibility on the state to protect prosecutors from any form of intimidation, harassment and improper interference.

Lack of public confidence in the public prosecution service is unfortunately common in Southern Sudan where prosecutors must overcome a history of unequal application of the law. Given an entrenched history of widespread and continuous human rights abuse, prosecution of criminals who in some cases may include those in decision making positions is a critical step in demonstrating equal application of the law. How to accomplish this continues to present a serious challenge to both national and international actors. The assumption that provision of ‘capacity building courses’ will enhance the effectiveness of prosecution services ignores the fact that challenges facing prosecution services are varied and interdependent. For example, corruption, insufficient manpower and inadequate knowledge constitute some of the most serious problems facing the department. Similarly, while prosecution services are critical in realization of important rights such as access to justice, the involvement of international actors has not addressed this aspect. To address these problems requires a holistic and innovative approach involving both formal and informal means of dispute resolutions. It is the latter aspect that the next discussion will address.

⁷⁹ United Nations Guidelines on the Role of Prosecutors, note 77.

C. Traditional justice institutions and rule of law reform in Southern Sudan

In the introductory chapter, one of the attributes of the rule of law considered was predictability, clarity and stability of the law. For example, Joseph Raz observed that a central component of the rule of law is knowledge of the law by those likely to be affected by it. The preceding discussion has further examined the critical role of rule of law reforms in enhancing the effectiveness of legal institutions and the myriad challenges that continue to inhibit the realization of this objective. But if these institutions are still weak and unable to serve the interests of all Southern Sudanese, how then can rule of law reforms enhance their effectiveness to deliver legal services, especially in rural areas? Taking into account that a majority of Southern Sudanese are illiterate and reside in rural areas, how then do they access these institutions? This question is significant because during the war Southern Sudan hardly had any 'modern' legal infrastructure such as the judiciary, the police, correctional services or prosecution services. It is this reality that prompts the discussion of mechanisms they used to resolve disputes.

In the absence of formal justice institutions, customary law has played an important role in forming the core of the legal system in Southern Sudan. The role of customary law was formally recognized in Sudan for the first time by the colonial administration through the enactment of the Civil Justice Ordinance 1929 and the Chiefs' Courts Ordinance 1931. The latter explicitly recognized the legal authority of the chiefs to exercise their traditional authority in their areas of competence. This formal recognition galvanized the powers of traditional chiefs to adjudicate disputes outside the realm of formal justice institutions. For example the law provided that 'the chiefs' court shall administer the native law and customs prevailing in the area over which court exercises its jurisdiction provided that such native law and custom is not contrary to justice, morality or order.'⁸⁰

⁸⁰Section 7, Chiefs Court Ordinance, 1931.

This enactment not only strengthened the powers of the traditional chiefs to settle disputes, it was also a recognition of Sudan's diverse and cosmopolitan society which had its own ways of living way before the coming of colonialism. However, customary law was required to comply with 'morality and order', although one notes that it did not assert whose concept of morality and order was to be taken into account. While colonial powers recognized the imperative of customary law, they wanted to retain overall control over that law and its application. Hence customary law was allowed to apply as long as it did not contravene common law or what the colonial powers deemed to be 'morals and good order'. It was this subordination of customary law to colonial law that defined and indeed continues to define its application in modern-day Southern Sudan.

The role of customary law in the administration of justice was not limited to the colonial Sudan, it was also recognized in post-independence Sudan when in 1977 the government enacted the People's Local Court's Act of 1977. While this new law repealed the colonial law of 1931, it maintained the authority of the chiefs as before, subject to 'compliance with the constitution'. But why was the newly independent government keen to maintain the role of local chiefs in the administration of justice? This recognition can be attributed to the government's realization that formal institutions of justice administration were expensive to build to match the needs of the population, and also the fact that people could easily identify themselves with these local institutions rather than foreign inspired institutions and legislations.

Examining the current status of customary law in Southern Sudan, one would not fail to note that the current Constitution expresses a clear recognition of the role of customary law in advancing rule of law and human rights. Article 5 of the Interim Constitution of Southern Sudan provides that 'customs and traditions of the people of Southern Sudan shall be one of the

sources of legislation in Southern Sudan'. Similarly the Comprehensive Peace Agreement makes an express recognition of customary law and traditional institutions in the advancement of the rule of law. This recognition of customary law in the legal order of Southern Sudan can be attributed to the fact that, as Southern Sudan had experienced protracted conflict for many years, it would be extremely difficult for the government to ensure availability and accessibility of formal justice institutions for all citizens. This recognition of customary law in the constitutional legal order of Southern Sudan provides a compelling need for international actors to clearly articulate how rule of law reforms can strengthen informal institutions which have traditionally stood as a symbol of access to justice and dispute resolution in the absence of formal institutions.

After the CPA the Local Government Act of Southern Sudan made some profound changes in the administration of justice to the level never seen before.⁸¹ For example, the legislation established the Customary Law Council (CLC) as the highest customary law authority in the Country.⁸² Among the duties of the Council was to maintain, monitor and ensure proper administration of the customary law and protect, promote and preserve traditions, norms, cultures and customs of the communities.⁸³ Similarly, the law establishes Customary Law Courts (CLC) with functions to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities and ensure that freedoms and rights enshrined in the constitution are upheld and respected in the customary law courts.⁸⁴

⁸¹ The Act was enacted in January 2009.

⁸²Section 93, Local Government Act.

⁸³*Ibid.*, Article 95.

⁸⁴*Ibid.*, Article 98 (1).

In what may be considered as a desire to fashion the customary courts and customary council alongside the formal judicial institutions, the legislation provides for the independence of customary law courts and also grants their members immunity from criminal proceedings for any act committed while in office unless the immunity is waived by the relevant authority. Despite these notable efforts, it is clear that they do not enjoy same level of independence as formal judicial institutions. For example, the head chiefs who preside over these courts are elected by the chiefs and sub-chiefs with the approval of the County Commissioner or the Mayor as the case maybe.⁸⁵ Disciplinary action against the chairpersons and members of the Customary Law Courts may be taken by the Customary Law Council.

A closer examination of this legislation shows that it presents several challenges which could significantly inhibit its ability to administer justice and promote the rule of law. For example, despite the requirement of constitutional compliance, it is not clear how compliance can be enforced given that local chiefs are not experts in formal constitutional law or international human rights standards. Similarly, the legislation fails to provide for a minimum formal education requirement for members of the customary courts, especially the presiding chiefs. This implies that any chief can be appointed to preside over these courts, which is likely to negatively affect the ability of local chiefs to administer justice in the absence of clear guidelines, and may also lead to miscarriages of justice if the chiefs are not trained in the application of statutory law, mainly because their function is to be based on hybridization of customary and statutory laws.

Having examined how the law recognizes the role of local institutions in the administration of justice, it is pertinent to ask, how precisely do these local institutions work in practice? As in much of the post-colonial African societies, in Southern Sudan customary law is not written

⁸⁵*Ibid.*, Article 105.

anywhere and those interpreting it have hardly had any formal training. While it is true that the interpretation of customary laws varies and at times is subject to bias or prejudice against some groups of people such as women, children or the disabled, nevertheless they have remained a cornerstone of addressing conflicts in Southern Sudan in particular – so essential to everyday culture and practice that some commentators have argued that to view customary practices as ‘law’ is essentially a Western-centric approach which may not be the most effective approach to understanding societies and their legal systems.⁸⁶ Indeed, for Southern Sudan customary law is being projected not only as a central element in the Southern identity for which the people fought, but as an important source of legislation, constitutionalism and advancement of the rule of law necessary to build a society premised on the ideals reflected in the Comprehensive Peace Agreement.⁸⁷

It can therefore be argued that despite the widely held views suggesting that justice is ‘universal’, reality has consistently challenged this claim by demonstrating that justice and its performance differ from one society to another. This aspect requires that any successful rule of law initiative must twin increasingly globalized rule of law institutions and values with local meanings and practices of justice.⁸⁸ At the same time, local justice practices must be articulated within international human rights norms and standards because countries are bound by their international obligations. It is this requirement to link local justice practices with international standards that continues to challenge the efforts to make rule of law reforms. For example, how can rule of law reformers integrate ‘international best practices’ in an environment where a majority of the targeted beneficiaries struggle to understand or identify with such reforms? It is

⁸⁶ Aleu Akechak Jok et al., *A Study of Customary Law in Contemporary Southern Sudan*, 2004. See also Sally Engle, ‘From Law and Colonialism to Law and Globalization’, *Law and Social Inquiry*, vol. 28, 2, 2003, 569-573.

⁸⁷ Francis Deng, *Customary Law in the Modern World: The Cross-Fire of Sudan’s War of Identities*, Oxford: Routledge, 2010.

⁸⁸ Jennifer Widner, ‘Courts and Democracy in Post Conflict Transitions: A Social Scientist Perspective on the African Case’, *American Journal of International Law*, vol. 95, 2001, 64-66.

this reality that provides a compelling need to examine how rule of law reforms can enhance the effectiveness of local justice institutions without contravening international human rights standards that underpin these reforms.

Earlier the discussion in the introductory chapter argued that reforms of judicial institutions must be examined in terms of their accessibility by the local population and how they respond to their needs and aspirations. More often international actors argue that ‘access to justice’ is closely linked to poverty reduction, contending that being poor and marginalized means being deprived of choices, opportunities, access to basic resources, and a voice in decision making. Indeed the UNDP argues that lack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.⁸⁹ But what these actors and especially the UNDP do not explain is the linkage of poverty and access to justice. What kind of justice are these actors promoting? The challenge is to create synergy between local institutions and international standards, and available evidence shows that local justice institutions have not been given necessary recognition and support as a vehicle to promote the rule of law. Without clear articulation of how international norms can be incorporated in local institutions to embody the values the local citizenry can identify with, rule of law reforms will continue to be an ‘elite driven’ enterprise with little impact on those for whose benefit these reforms are justified.

The traditional justice mechanism in any post-conflict society constitutes an essential component of the rule of law and access to justice in particular. Often, during a long-running conflict local people devise and adhere to their own means of justice dispensation and general maintenance of law and order within their communities to enable them to coexist peacefully. Admittedly, these

⁸⁹ Quoted in Michael J. Trebilcock and Ronald J. Daniels, note 71, 236.

informal mechanism may not necessarily conform to the ‘universal standards’ as recognized by international actors. This may be because traditional rules are in some cases unwritten and justice is administered by local chiefs who may lack legal training in important issues concerning human rights and constitutional law. However, despite these features, they are the same mechanisms which to a large extent enable members of a local polity to coexist side by side amicably and punish the wrongdoers in their midst in the absence of government authority to intervene. Indeed, traditional local justice institutions have been key in resolving land and property (especially cattle) disputes among people in Southern Sudan in the absence of formal judicial institutions.

If one of the key attributes of the rule of law is knowledge of those likely to benefit from the law, how then can reformers expect to successfully build the rule of law in societies like Southern Sudan where a majority of people can hardly understand various legislation drafted and adopted in the English language which they cannot comprehend? Arguably, reforms can improve the effectiveness of traditional institutions if international actors acknowledge the important role of traditional institutions in the overall discourse of reforms. The profound challenge which must be addressed is that a society like Southern Sudan, though having undergone and experienced the tragic history of war for many decades, has managed to survive the war. With this reality, the objective of rule of law reforms should focus on how precisely such reforms can contribute to the improvement of traditional justice institutions which have served people for many years.

The challenge with customary law is that its ability to dispense justice in fairness hinges on the willingness and ability of chiefs to apply it in a fair and impartial manner. But who determines that the law is not ‘repugnant to justice and morality?’ This question is relevant because ‘justice, morality or order’ as espoused by the colonial powers was a relative term subject to varied interpretation. For example, what constitutes ‘morality’ in the eyes of a British trained judge may

not seem the same to a local chief somewhere in Bor or Maridi in the interior region of Southern Sudan. It is worth noting too that most areas covered by customary law such as marriage, adultery, divorce, child custody and property rights have a great impact on enjoyment of international human rights standards. It is perhaps on this basis that international reformers have been critical of customary law and traditional justice institutions for their potential to inhibit the realization of the rule of law and human rights.

Having identified the numerous challenges which may inhibit the effective implementation of constitutional provisions and the Local Government Act, one must ask, what can be done to address them? Admittedly, it is not possible to give all the local chiefs a formal legal education as a way of enhancing their understanding of formal constitutional law or human rights norms, considering the practical challenges facing Southern Sudan's legal and economic sectors. However, there are comparisons of 'best practices' in other African countries that underwent similar challenges which can usefully be made. This comparison is made in the belief that customary law is a living law and as such it has to change with time to respond to the needs of the society concerned. Indeed many African countries have had to contend with the challenge of reconciling customary laws with modern laws and institutions. For example, in Tanzania primary courts, which are the equivalent of customary courts envisaged under the Local Government Act in Southern Sudan, use both tradition and statutory laws. While the assessors who sit in these courts are not trained in the formal legal system, they form an integral part of the decision making body under the presiding magistrate, who is required to have a certificate in formal legal training.⁹⁰ Under this system assessors have a dual role. They operate as a safeguard for the rights

⁹⁰ Luhekelo Kyando and Chris Maina Peter, 'Lay People in the Administration of Criminal Justice: The Law and Practice in Tanzania', *African Journal of International and Comparative Law*, vol. 5, 3, 1993, 661-682. See also Luhekelo Kyando and Chris Maina Peter, 'The People's Representation in the Courts of Law in Tanzania: The Need to Retain the Assessors', *Commonwealth Law Bulletin*, vol. 20, 1, 1994, 317-328.

of those accused of crime and also provide a guarantee to native population that their own customs and habits are not misunderstood.⁹¹ This ensures that decisions are reached by consensus and local 'realities' are taken into account when reaching a decision. In case of any disagreement between magistrates and assessors, on a point of law the former can prevail as long as he or she gives reasons. Similarly, in Zambia local court judges are appointed by the judicial service commission with both territorial and substantive jurisdiction. The former relates to the town or area of the chief's authority and the latter to the monetary value or the sentence it may impose.⁹² These courts may enforce customary law as long as they are not repugnant to or inconsistent with the constitution or other statutory law. This approach, if adopted, has a potential to contribute to legal service delivery in South Sudan also.

Customary courts when operational will be more convenient than the formal courts, mainly because of their simple rules and the fact that they are cheap and accessible. In a place where the majority use informal justice mechanisms access to justice may become more practical than the current system, which heavily relies on formal procedures that are not only limited in scope and marred by technicalities but also expensive and 'elite driven'.⁹³ There is also a need to create a synergy between informal and formal justice institutions to coexist successfully and collectively serve the interests of the people. To realize this objective the traditional chiefs could serve as assessors in customary courts with the magistrates trained in formal justice administration. The advantage of this synergy would be two fold. It could allow traditional chiefs to get involved in the direct administration of justice using both formal and informal laws, and also enable the judiciary keep an oversight role on traditional justice institutions by letting people use their

⁹¹ Lord Atkin in *Mablikilili Dhalamini v R* [1942], AC 583.

⁹² Munyonzwe Hamalengwa, 'The Legal System of Zambia: Law, Politics and Development in Historical Perspective' in P. Ebow Bondzi-Simpson (ed.), *The Law and Economic Development in the Third World*, New York: Praeger Publishers, 1992, 26-28.

⁹³ Jennifer Widner, above note 88.

preferred means of dispute resolutions. This kind of arrangement could also mitigate miscarriages of justice resulting from improper interpretation of the law such as the Bill of Rights, which is an integral part of the Southern Sudan Constitution.

In light of the prevailing conditions in South Sudan, it is clear that a state-centric justice system will take more than a generation to establish and even then will, most likely, be unsustainable.⁹⁴ Because of this reality international actors must devote their resources equally to strengthening local justice institutions as a mechanism to enhance the rule of law and advance human rights. With a myriad challenges facing the justice sector in South Sudan, it is highly counterproductive to assume that rule of law reforms will strengthen formal legal institutions to serve the interests of all South Sudanese. Ultimately the population, challenged by inadequate resources, extreme poverty, illiteracy and corrupt and inefficient central government, will look to what they know, use, and find consistent with their own values underpinned by traditional justice mechanisms for dispute resolution.⁹⁵

The need for the rule of law reforms to refocus on informal institutions is further confirmed by the fact that under-staffed and under-resourced formal justice institutions in South Sudan are hardly in a position to compete with highly resilient, locally legitimate, and resource independent informal community courts and modes of dispute resolution.⁹⁶ However, the need to support informal institutions should not obscure the critical role of formal institutions in preservation and enhancement of the rule of law. Ultimately, the state-wide promotion of rule of law and the proliferation of inter-community exchange and communication which accompanies the

⁹⁴ Bruce Baker and Eric Scheye, 'Access to Justice in a Post Conflict State: Donor Supported Multi-dimensional Peacekeeping in Southern Sudan', *International Peacekeeping*, vol. 16, 2, 2009, 171-185.

⁹⁵ Jennifer Widner, above note 88.

⁹⁶ Jennifer Widner, *ibid.*, 64-66.

emergence of stronger national authorities require strengthening of the formal justice system as more and more cases involving parties from different cultural background emerge. With this recognition, it is useful for the two systems to collaborate to ensure that South Sudan's legal sector protects and advances the interests of both its rural majority and 'minority elites' such as foreign investors and urban dwellers.

D. Conclusion

The aim of this chapter was to challenge the prevailing assumption that building the rule of law can automatically lead to an independent judiciary or effective law and order institutions in South Sudan. Deciphering differing examples, the chapter has demonstrated that international actors take these assumptions as self-evident without linking the assumptions with the existing 'reality' on the ground. It has been argued that while international actors may indeed play a key role in enhancing the effectiveness of these institutions, especially in a post-conflict context, successful reform requires that these assumptions should reflect the practical needs of the beneficiaries. Taking into account the attributes of the rule of law discussed in the introductory chapter – such as a general predictable legal system, access to justice, equality before the law and general congruence of law with social values consistent with international human rights standards – this chapter has argued that external reformers should equally focus on informal justice institutions as a mechanism to enhance the legal service delivery.

The importance of informal institutions in the South Sudanese context cannot be underestimated, mainly because more than 80% of the population resides in rural areas with little or no access to formal legal institutions. It is this reality which requires international actors to adopt a holistic approach to reforms which takes into account the challenges facing southern Sudanese polity. This approach will ensure that while rule of law reforms can indeed enhance the independence and effectiveness of formal institutions, they should be adapted to the challenges

facing South Sudan to enhance the effectiveness of informal institutions which continue to be relied upon by majority of the population for dispute settlement.

Chapter Seven

VII. Conclusion

A. Summary

The objective of this thesis was to inquire into different meanings attributed to the rule of law, in order to establish what the concept signifies in the context of statebuilding, taking Southern Sudan as a case in point. By doing this, the study sought to contribute to the conceptual understanding and application of rule of law norms in the larger goal of statebuilding under a legal framework in which people have faith, to guarantee their rights and advance their collective wellbeing as a society. The research has critically unpacked the normative content of the rule of law by developing what the study terms as ‘minimum attributes of the rule of law’. It has been argued that for international actors to succeed in the reform process, they should pattern their efforts based on these attributes. The advantage of doing this will ensure that the success and impact of these reforms can be measured against clearly identified goals.

The main assumption by those who promote rule of law (the UN and regional organizations among others) is that societies emerging from conflict face a host of challenges including inadequate or lack of institutional mechanisms to support rule of law development. And since these societies are incapable of undertaking these reforms on their own, they require external help. It is these claims that provided a basis for inquiry into whether these actors can transfer or export these values and institutions as conceived and understood in their respective societies. From this examination of the involvement of the UN and the African Union, it has been argued that, while indeed the rule of law can be useful in statebuilding to attain a state based on constitutional legal order, international actors have only marginally succeeded in positioning their assistance to reflect the needs of their target groups. In other words, they have failed to

recognize that while the rule of law has some attributes which can be considered universal, the means to realize these attributes differ from one society to another.

B. Implications of minimum attributes for the rule of law

Recognizing the ongoing variations in the way the rule of law concept is conceived by different scholars and practitioners, research has developed minimum attributes of the rule of law. It is hoped that developing these attributes will enable reformers to conceive and apply the concept on the basis of well-known benchmarks. The universal validity of these attributes is reflected in their consistency with the UN Charter, the international bill of rights, the Constitutive Act of the African Union and various international and regional human rights instruments. Hence the intrinsic value of these attributes lies in their ability to serve as a guideline for rule of law reformers and in the process address the current anarchy in the way the rule of law concept is conceived and applied.

Some of the attributes identified include certainty, generality and stability of law and institutional conditions for an effective legal order necessary for protection of the rule of law, such as an independent judiciary and accountable government. I argued that focusing on these attributes will lessen the chances or possibilities of the rule of law being invoked to justify different activities or reforms such as international action against terrorism, which may have little or no correlation with the needs and aspirations of those in whose names these reforms are undertaken.

The identification of the minimum attributes of the rule of law has further been necessitated by the reality that the rule of law is not a neutral concept. Rather it can be used by different actors to achieve independent objectives contrary to their claims of assisting post-conflict countries to build strong institutions and improve their social and economic conditions. For example,

whether it is the World Bank pushing for intellectual property law reforms or better tax regimes in poor countries, some Western powers using drones to fight Al Qaida in Afghanistan or piracy in Somalia, or an Irish or French NGO promoting literacy in Yambio in a remote part of Southern Sudan, all justify their respective activities in the name of the rule of law. It was to address this challenge of divergent conceptions of the rule of law that the study developed the minimum attributes in chapter one.

The relevance of the minimum attributes further emanates from the reality that building the rule of law involves both an institutional approach and a values approach. While international actors can significantly contribute towards building strong institutions to support the rule of law, they cannot create a culture in which values underpinning these institutions are upheld and respected. The latter task can rather be undertaken by local actors who are likely to benefit from and live with the outcome of such reforms. Hence the need to enhance their capability through technical and financial support to fulfill this role. It is also important to note that while rule of law institutions may exist in different countries, this does not automatically lead to respect for the rule of law. Rather, the way these institutions uphold the values underpinned by the rule of law determines the respect for it. Citing different examples, the research has shown that even countries such as Zimbabwe or North Korea have well-built judicial institutions just like those in countries claiming to be rule of law compliant like Britain or the United States. The difference resides in how these institutions serve the interests of the people and uphold basic tenets of the rule of law.

C. Challenges identified in the research

The discussion has established several varied challenges that continue to have a negative impact on successful efforts to build the rule of law in Southern Sudan. The examination of these challenges has helped us understand major impediments to the realization of the rule of law both

at the national and international levels. The key challenge identified relates to the different understanding attributed to the rule of law by different actors. It has been shown that most actors continue to define the rule of law in a way that advances their primary interests. The implication of this is significant. It means that rule of law reforms tend to reflect not only a particular understanding advanced by a specific actor, but also that actor's own interests.

Citing the role of international financial institutions in rule of law reforms as an example, one of the findings was that these institutions support reforms related to their primary objectives. For example, both the World Bank and the International Monetary Fund direct their rule of law efforts towards measures that significantly contribute to enhancing conditions for a market economy and foreign investment. Similarly, powerful countries have been funding rule of law reforms which advance issues that are important to their national or regional interests, such as combating terrorism. While it is evident that these measures may fall under the rubric of the rule of law, the question posed was whether such activities reflect and address primary concerns and priorities of the target groups in whose names these activities are justified.

The research has further shown that lack of local participation in building the rule of law remains one of the major hindrances to successful reforms in Southern Sudan. While a few organizations like the UNDP have made significant efforts to seek and incorporate opinions and views of local actors (at least senior governmental officials) in the overall conception and implementation of the rule of law programmes,¹ this practice is not uniform among major actors involved in these reforms. The inherent danger of this approach is that reforms continue to reflect external rather than internal priorities.

¹ The researcher attended one of the strategic meetings convened by the UNDP which involved senior officials of the Ministry of Legal Affairs to determine priority areas of reforms in Juba, in December 2008.

Inadequate participation by local actors in rule of law reforms is not only limited to the implementation of policies, it is also reflected in legislative process. While it is clear that laws are debated and passed by a country's parliament, some laws are drafted by international experts assisted by a few local personnel appointed by the relevant departments. A closer look of the practice in Southern Sudan shows that these experts bring their own draft models of laws from other countries facing similar challenges and adapt them to reflect their current assignments.² However, the danger of this practice is clear. Even if countries face similar challenges and share a common legal heritage such reforms may not necessarily lead to similar results. This aspect is crucial because a common or shared legal history, modified by a multitude of different influences, may not necessarily produce similar outcomes in different locations.³ Admittedly, as pointed out in chapter four, in some cases foreign models can be the best legal basis for other countries, especially in areas like commercial law or the taxation system – in fact it can discourage the concerned polity from 'reinventing the wheel'. But the problem lies in the pursuit of law reform processes that generally do not permit the end beneficiaries to adapt the draft to local conditions, in the spirit of maintaining 'international standards'.⁴

Another key challenge identified is the inadequate capacity to translate legal text into concrete value. In the wider framework of access to justice, the law mandates the state to provide legal aid to those who cannot afford legal services. However, closer examination of the capacity of different departments shows that their efforts to achieve this objective are constrained by inadequate resources. For example, at the ministry's headquarters where the department dealing

² Interview with the senior officials in the Department of Legislative Drafting in the Ministry of Legal Affairs, December 2009.

³ See generally Sandra Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy', *Journal of Modern African Studies*, Vol. 39, No. 4, 2001, 571-596.

⁴ Wade Channell, 'Lessons Not Learned about Legal Reform' in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington, DC: Carnegie Endowment for International Peace, 2006, 140.

with legal aid is located there are fewer than five legal counsel for the task.⁵ At the state level government supported legal aid does not exist. In fact very few people are aware that they are entitled to free legal services provided by the government. What then is the implication of this aspect to the right to access justice enshrined in the Constitution? It is that some of those accused and convicted of crimes and offences are sent to jail without being offered legal assistance because few of them can afford private legal assistance which is neither adequate nor effective. The disconnect between the law and its implementation requires changes to the current approach to reform where external actors tend to concentrate on institutional reform without examining how such reforms impact the target groups. As argued throughout this discussion, it is critical that rule of law reform should be undertaken on a holistic basis by balancing institutional reforms and the way ultimate beneficiaries access them.

The research has further pointed out that rule of law reforms do not provide sufficient focus on issues that may have significant impact on the majority and the poor in particular. However, some of the issues given less priority including access to land and house and property ownership more often constitute the main cause of conflict. Greater focus on such issues would serve two purposes. It would enhance protection of human rights, especially the right to property ownership, which has the potential to reduce conflicts emanating from land related disputes. It would also contribute to improved social economic rights for the people, through guaranteeing the right to undertaking productive economic activities such as farming and trade. Indeed this would not only empower citizens to own land but could significantly reduce the perennial tensions that stem from land ownership and have in most cases been a source of inter-tribal clashes in Southern Sudan.

⁵Visit to the Ministry, June 2009.

The causes of land and property ownership disputes in post-conflict societies are varied and interdependent. They range from increased demographic pressure, resource scarcity, agricultural transformation, and exploitation of valuable natural resources to tenure insecurity and inequalities in land and property distribution, in particular along ethnic and other cleavages, and intergenerational tensions over land ownership and use.⁶How can international actors address these challenges? It is argued that such support may include supporting the government to enact relevant legislation to address land and property issues. But crucially, it may involve building and strengthening both formal and informal legal institutions to effectively address existing and potential disputes and tensions related to property ownership. This is needed because situations characterized by large scale displacement, abandoned land and property, illegal occupation, overlapping claims, reduced housing stock, lack of documentary evidence and gender discrimination in access to land and property assets are frequent and often create potential for renewed violence.⁷

The existing disconnection between formal and informal legal institutions in Southern Sudan is another significant challenge discussed. The assumption of international actors is that informal legal institutions have the potential to contradict international human rights standards and perpetuate discrimination, especially against women and other vulnerable groups like children. However, the key question to pose is, how precisely did these societies resolve their disputes during the war in absence of functioning and effective formal legal institutions? This research has reiterated that it is through answering such questions that assumptions made by international actors can have correlation with practical needs of their target groups.

⁶ See generally, Agnes Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights*, Boulder: Lynne Rienner Publishers, 2008, 195.

⁷ Hurwitz & Huang, *ibid.*, 195.

For example, to address land and property ownership conflicts, it is evident that traditional dispute institutions can play a significant role, especially when the land is communally owned as it is in Southern Sudan. International actors should not direct their resources towards building and enhancing capacity of formal institutions only, but equally towards building and enhancing the role of traditional institutions in dispute resolution. While it has been acknowledged that enacting land legislation is not a panacea for successful rule of law reforms, such initiatives backed by strong institutions may provide an avenue where reforms contribute to address challenges identified.

D. What is likely to condition the success or failure of the rule of law reforms?

Having identified and discussed multifaceted challenges that continue to inhibit successful building of the rule of law at both the national and international levels, one must ask, what can be done to address these challenges? While it is evident that there are no uniform measures to address them because of their varying nature and context, there are specific measures that can be undertaken which could significantly enhance the impact of the rule of law reform at the national and international levels. Below, specific measures that could potentially contribute to this are examined.

The discussion of the law and development movement has shown that the current rule of law reform efforts are essentially a continuation of the former, albeit in a different context and era. It is therefore crucial for reformers to identify and learn lessons from the law and development movement. The research has further pointed out in chapter six that one of the major factors inhibiting rule of law reform is the ‘top-down’ approach whereby reforms are conceived by international actors and imposed on the local polity. While it has been acknowledged that reformers often reaffirm through policy declarations and recommendations that local

participation should be central to these reforms, various examples have shown that this rhetoric has found little traction in the ‘real world’ where these actors work.⁸

To address the challenge of local participation, it is suggested that reformers take deliberate measures to enhance vibrant civil society in Southern Sudan. The effectiveness of the latter can significantly contribute to enhancing of the rule of law through acting as an intermediary between the local people and decision makers in the government and among international actors. This objective can be achieved through significant allocation of resources and provision of additional skills through training of members of civil society, especially women and those with disabilities, to ensure that they effectively advocate for issues of concern to these marginalized groups. It is further argued that while it is important to stick to international standards and best practices, this objective should not be achieved at the expense of legitimate aspirations of members of a local polity to pattern such reforms to their specific needs and challenges.

The Local Government Act cited and discussed in chapter six is a starting point in the realization of this objective. However, success will significantly depend on how both the government and reformers incorporate these local institutions in the mainstream framework of reforms through adequate allocation of resources and continued capacity building of local officials who are key in the administration of justice and dispute settlement in the framework of these institutions.

International cooperation will also be crucial for realization of the rule of law in South Sudan. The discussion in chapter five has shown that building the rule of law at the national level requires states to work together to address common challenges. Article 56 of the UN Charter reaffirms the imperative of this cooperation to enhance realization of the ideals of the Charter,

⁸ See generally discussion in chapter six

especially those related to human rights and peace and security. Similarly, the Vienna Declaration and Programme of Action acknowledges this aspect by encouraging states, working through the United Nations and bilaterally, to extend assistance to countries which so require to enhance the effectiveness of rule of law institutions. However, as shown in this discussion, this objective has been difficult to achieve largely because in most cases, states provide assistance when doing so directly or indirectly advances their interests. It is therefore essential that there should be a rethink of the international cooperation approach, ensuring that views and needs of the beneficiaries are taken into account in the development process.

There is equally a strong need to improve service delivery in South Sudan as part of the rule of law reforms. This is because most of the rebel movements in Southern Sudan justified their actions on the grounds of the failure of the government to translate the ‘dividend of peace’ into concrete results.⁹ Effective rule of law reforms should encompass predictable and timely delivery of services to the citizens, because without effective institutions to deliver services, the confidence of citizens in the institutions of the state will be undermined, as it already has been in Southern Sudan. The capacity of institutions of justice administration such as the police, correctional services and the civil justice administration should be enhanced to deliver concrete services to the people as enshrined in the Comprehensive Peace Agreement and the Constitution. Outside the context of state institutions, rule of law reforms can significantly enhance the effectiveness of professional associations of lawyers, prosecutors and judges, academic and policy research institutions, paralegal organizations and advocacy organizations. It is therefore important for international actors to provide technical and material support to these institutions to contribute towards effective legal service delivery.

⁹ See generally Elizabeth Tesfaye Haile, *South Sudan's Post-Independence Challenges: Greed or Grievance?* Available at http://www.monitor.upeace.org/innerpg.cfm?id_article=855. Accessed March 2013.

It has also been stated that in South Sudan rule of law reforms can contribute towards enhancing protection and improvement of the rights and conditions of the most vulnerable groups, especially women, the disabled, and children. A weak and sometimes non-existent legal framework perpetuates gender inequality in state institutions and discrimination in critical areas such as health, employment, political participation and property rights. All these factors limit women's access to justice institutions and discourage them from reporting crimes committed against them. Yet it is evident that women play a key role in the social and economic development of their communities, and so state and international partners should take deliberate measures to empower them by eliminating major hurdles that inhibit the realization of their potential and actively facilitating their participation in the reform process.

To uphold the international rule of law will further require strong international and regional dispute resolution mechanisms. These institutions are crucial because they allow states to settle their disputes peacefully. Indeed, under the UN Charter, the Security Council and the General Assembly have the ability to make use of these institutions like the International Court of Justice to seek Advisory Opinions. Commitment to this would ensure that actions undertaken by states or international organizations are in accordance with the United Nations Charter and hence grounded in international law. However, the discussion has noted that some of these institutions lack adequate enforcement capabilities for their decisions. For example, the ICJ does not have compulsory jurisdiction as states have discretion whether to refer a matter to the Court or not. It is suggested that states should resolve to recognize the compulsory jurisdiction of the ICJ on matters connected with the UN Charter. This argument is noted by Higgins who observes that

‘the absence of a compulsory recourse to the ICJ falls short of a recognizable ‘rule of law’ model’.¹⁰

At the regional level institutions of dispute resolution either do not exist or, where they do, have been weak and ineffective. While it is clear that almost all regions such as Europe, Africa and Americas have in place regional mechanisms for dispute resolution and human rights protection, their ability to perform their functions differs. Because of this reality there is a compelling need for the international community to provide adequate support to some of these organizations that are weak and resource constrained, to enable them to contribute to advancement of the rule of law at the regional level. For example, the ineffectiveness of the African Commission for Human Rights and the African Court of Human and Peoples Rights continues to inhibit their ability to address serious violations of human rights on the continent. International support for the Commission and the Court would potentially enhance their institutional effectiveness. Having strong human rights institutions at the regional level can significantly contribute to realization of rule of law in South Sudan through addressing violations of human rights submitted to the Court and the Commission.

E. Conclusion and way forward

In conclusion, the research reiterates the finding in the introductory chapter where rule of law was identified as a concept whose realization is manifested both in the institutions built to underpin its existence and in the values or attributes of the law that form an integral part of these institutions. It has further been argued that while there continues to be varying invocation of the rule of law to justify actions and interests of powerful actors, the concept needs to be reclaimed. The legitimacy and credibility of building the rule of law will increasingly hinge on the extent to

¹⁰ Rosalynn Higgins, ‘The Rule of Law: Some Sceptical Thoughts’ Grotius Lecture at the British Institute of International and Comparative Law, October 2007.

which beneficiaries identify themselves with the reforms being undertaken under the banner of the rule of law.

While the rule of law is desirable in any particular society, its realization is not dependent on a specific framework; rather each society may pursue this concept in way that best reflects its past history and shared international commitments. It is the latter aspect that elevates the rule of law to being an important component in international cooperation to address common challenges facing the international community. It is therefore pertinent to reaffirm the argument that while international actors are critical to provide assistance in rule of law reform in countries emerging from conflict like Southern Sudan, the success of these efforts will largely depend on how the hopes, expectations, needs and concerns of the local polity are taken into consideration to reflect both their past history and their commitment to international shared values underpinned by international law.

This inquiry, while examining the role of the UN and the AU in building rule of law in Southern Sudan, did so within a specific time frame from 2005 to 2011. This period was chosen because of its significance in the constitutional development in Southern Sudan. It was the period which followed the signing of the CPA and saw the large scale involvement of international actors to build the rule of law. These efforts were examined during the period when Southern Sudan had complete autonomy from the North. While it was not the objective of the research to go beyond this period it is worthwhile to highlight the fact that in January 2011 Southern Sudanese exercised their right to self-determination by overwhelmingly voting for secession to form an independent state, which was officially proclaimed as the Republic of South Sudan in July 2011. Indeed, whenever issues with relevance to the post-independence period were discussed, attempts were made to situate them into South Sudan reflecting to the new name of the country.

While it is too early to evaluate whether rule of law reform efforts in Southern Sudan have been a success, an independent South Sudan faces many social, economic and political challenges. Insecurity, poverty, illiteracy, and poor or non-existent infrastructure remain major challenges confronting the country. The state is increasingly becoming autocratic, suppressing any voice of dissent and limiting the enjoyment of fundamental rights and freedoms of its people. The CPA on which its relationship with the Republic of Sudan is based remains shaky with both countries amassing military personnel along their common border. Furthermore, there are several issues in the CPA that remain unaddressed to date, such as the Abyei dispute, determination of the boundary between the two countries, citizenship, and division of national debt. All these issues have made it difficult for the two states to have a normal diplomatic relationship. Because of these challenges that face South Sudan, it is crucial that international actors involved in building the rule of law in the country reassess their approach to achieve their objectives. Successful efforts will call for sustained involvement of the local polity in undertaking reforms that adequately reflect these challenges.

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