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## Position paper on the status of the Agreement on the Resolution of the Conflict in the Republic of South Sudan

### Executive summary

The signing of the peace Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCRSS) in 2015 sparked cautious hope for a road to peace and putting back on track the state building process. However, two scenarios would determine the relevance of the agreement. The scenario for the best outcome meant some degree of political will and trust would move the implementation of the peace agreement forward, some milestones are reached with signs of economic upturn and reduced levels of fighting in parts of the country.

The scenario for the worst outcome means continued intransigence and a lack of political will illustrated by a collapse of the implementation process, resumed violent conflict throughout the country, increased poverty, human rights abuses, further economic deterioration, and the collapse of the formal market economy.

This policy brief looks beyond the relevance of the agreement and examines its legality. The brief points to the importance of the process given that a law-making system is legitimate when a prima facie duty of obedience exists either (a) if there is actual unanimous consent to the jurisdiction of the lawmaker or, in the absence of consent, (b) if laws are made by procedures which assure that they are not unjust. The arguments put forward illuminate the status of the agreement and the legal implications of allowing ARCSS to collapse.

The grave consequences of which bear highly significant risks to long term stability and peace in the region for not doing things right, when the lessons and rules of the game aren't heeded anymore by those who mediated the 9<sup>th</sup> January 2005 Comprehensive Peace Agreement (CPA,) between the Sudanese Peoples Liberation Movement and the Sudanese Government least TROIKA (United States of America, United Kingdom and Norway) and IGAD partners. IGAD is the Inter Governmental Authority on Development and its member States include: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda.



### 1. Introduction

On 17 and 26 August 2015, the Sudan People's Liberation Movement in Opposition (SPLM-IO), the SPLM Leaders (Former Detainees or FDs), the Alliance of Political Parties,[1] and the SPLM in Government (SPLM-IG) [2] signed the Agreement on the Resolution of the Conflict in the Republic of South Sudan (the Agreement) in Addis Ababa, Ethiopia and Juba, South Sudan respectively. The

Agreement was meant to create an enabling environment that would bring a final settlement to the civil war that broke out on the 16 December 2013. The National Legislative Assembly ratified the Agreement on 10 September 2015 in accordance with the provisions of the Agreement.[3]

The Agreement had three main components: The Security Component, the Governance component, and the Peace building Component.

- Security component: This section provided for a cessation of hostilities,[4] provided that the armed parties will maintain two armies as confidence building mechanism,[5] Juba the Capital of South Sudan will be demilitarised,[6] and the different armies will be demobilised, cantoned, demilitarised and integrated into civilian live.[7]
- The Governance component: This component provided for a power map that shared power among the different parties,[8] established the Transitional Government of National Unity (TGoNU),[9] created a collegial presidency with the

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President and 1<sup>st</sup> Vice President taking some decisions through consensus,[10] provided roadmap for constitutional making and institutional reforms.[11]

- Peace building component: The Agreement provided for the establishment of a National Commission on truth, healing and reconciliation, [12] the creation of a Hybrid Court to ensure accountability for atrocities committed,[13] the creation of a reparation fund.[14]

The Agreement provided concrete milestones, tight deadlines and clear responsibilities for implementation, monitoring and reporting. The Transitional period was to start 90 days after the signing of the Agreement while the constitution of the TGoNU was to be completed within 90 days upon the signing of the Agreement. [15] Constitutional amendment to ensure the incorporation of the Agreement into the Transitional National Constitution of South Sudan (TCSS) was to be fully adopted within 21 days upon signing.[16] The separation, assemble and cantonment of forces were to be implemented within 30 days of signing of the Agreement.[17] Six months into the transitional period, the Commission on Truth, Reconciliation and Healing was to be formed while within the same period, a legislation paving the way for permanent constitution making process was to have been adopted. [18]

The Agreement provided for effective monitoring and oversight mechanisms – the Ceasefire and Transitional Security arrangement Monitoring Mechanism (CTSAMM) and the Joint Monitoring and Evaluation Commission (JMEC). [19] JMEC, as the overall oversight mechanism had a mandate to ensure implementation and compliance with timelines and schedules, where there is non-compliance, recommend corrective action and in the case of deadlock among the parties, JMEC could negotiate the role of resolving such deadlocks – effectively giving JMEC the powers of interpretation of the different provisions of the Agreement.[20]

The Agreement provided for ratification by the highest legislation mechanisms of the parties. Once ratified, the Agreement specified procedures for its incorporation into the TCSS. The Agreement states that in an event of inconsistency between the provisions of the Agreement and the TCSS or any subsidiary legislation, the provisions of the Agreement shall prevail. [21] The legal supremacy of the Agreement is not conditional on its incorporation into the TCSS. [22] The United Nations Security Council adopted the Agreement and incorporated it in its Resolutions on South Sudan. [23] No single party shall amend, review or revise the provisions of the Agreement. Amendment of the Agreement required the votes of the parties and the Guarantors. [24]

## 2. The status of the Implementation of the Agreement

There are divergent opinions on the status of the implementation of the Agreement. This Position Paper outlines the author's assessment of the state of implementation of the Agreement. For the purpose of this assessment, the provisions of the Agreement have been classified into:

- Procedural provisions: Refer to provisions dealing with the HOW the Peace Agreement was meant to be implemented. These include schedules, constituting institutions and more broadly the 'form and manner' prescription around decision-making processes.
- Substantive provisions: Refer to provisions relating to the WHAT substantive and structural changes are expected after the Agreement. Such changes included distribution of power, transformation and reform of governance culture and institutions, management of public resources and addressing past injustices.

- Provisions dealing with organisations or institutions: Refer to provisions pertaining to the WHO of the Agreement. There were two main institutional provisions provided for in the Agreement that will be assessed. These are: implementation mechanisms and peace building mechanisms. The implementation mechanisms provide oversight and guidance, neutral monitoring, priorities setting and ensuring commitments are honoured. The peace building mechanisms deals with addressing the past and ensuring non – occurrence of similar violence in the future.

## 2.1. Procedural provisions

The Agreement stipulated strict timelines and provided for clear procedures for undertaking agreed tasks and decision-making processes. Under the security component of the Agreement, for instance, there were clear timelines, schedules and decision-making procedures. [25] The Agreement provided for the process of cessation of hostilities, disengagement, separation and withdrawal of forces to start within 72 hours of the signing of the Agreement. [26] This stipulation is yet to be implemented. Instead of ceasing, hostilities have escalated, intensified and spread across the country. [27] Even though some state security actors withdrew from South Sudan, this was not done within the 45 days stipulation in the Agreement. The Peace Agreement provided for non-state security actors to be disarmed, demobilised and repatriated within 90 days. This stipulation has not been implemented.

The warring parties undertook to refrain from impeding or delaying humanitarian assistance, acts of sexual or gender based violence, recruitment of children, offensive, provocative or retaliatory actions and acts of hostility, intimidation and violence against civilians. [28] Instead of stopping, these acts have escalated. [29] Hence these provisions have not been implemented nor has the commitment to immediately and unconditionally release all prisoners of war. Similarly, the pledge to separate, assemble and canton forces within 30 days of signing the Agreement is yet to be honoured.

The commitment to make a complete declaration to Strategic Defense and Security Review Board (SDSRB) of personnel and equipment of forces not in cantonment has not been implemented. The Agreement provides for the redeployment of all military forces outside the radius of 25 kilometers from the city Centre. This was expected to start within 30 days of signing the Agreement and be completed within 90 days from the signing of the

Agreement. This provision is yet to be implemented. The Agreement provided for a comprehensive, inclusive and transparent strategic defense and security reform to be undertaken in 4 stages: Stage 1 to be completed in 120 days, stage 2 to be completed in 150 days, stage 3 in 150 days and stage 4 within eighteen (18) months. These processes are yet to be implemented.

Thus, an assessment of all the key provisions of the security component of the Agreement reveals that these provisions have not been implemented. In

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fact, it is not only that the security provisions of the Agreement have not been implemented, but also that the security situation in the country has worsened after the signing of the Peace Agreement compared to the situation before the signing of the Agreement. [30] The integrity of a Peace Agreement significantly depends on the state of implementation of the security component of such an Agreement. The Peace Agreements in Rwanda, Angola and Liberia, for instance, collapsed with devastating consequences, once the security components collapsed.

## 2.2. The Governance component of the Agreement

The Agreement is the only legal basis for governance in South Sudan. [31] It extended the terms for office and mandate of the Government of South Sudan. The Agreement established the (TGoNU) and entrusted it with the task of implementing the Agreement. Thus, the reason d'être of the TGoNU is the implementation of the Agreement.

Even though the TGoNU was not formed within the timeframe stipulated in the Agreement, it was, nonetheless, established mainly within the stipulation of the Agreement. The crucial question, though, is if the TGoNU has collapsed or is still operational. The Agreement does not stipulate nor anticipate the circumstances under which the TGoNU could collapse nor provide for procedures for reconstitution of TGoNU. A satisfactory answer to this question will require an assessment of the

legality and legitimacy of the Government, the composition and functional capacity of the Government.

The question of the legality and legitimacy of the Government will be dealt with further below. At this point, the question being investigated relates to the composition and functionality of the Government. According to the Agreement, power was shared among the Government of South Sudan, the SPLM–IO, the Alliance of Political Parties and the Former Detainees. [32] From the perspectives of cessation of hostilities and peacemaking, the main parties to the Agreement and subsequently of the TGoNU are the Government of South Sudan (GoSS) and the SPLM – IO. These two parties held 86% of power in the TGoNU. [33] When the Permanent Ceasefire broke down in July 2016 and civil war started in

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Juba, Dr. Riek Machar, the then First Vice President and Chairman of the SPLM –IO withdrew from Juba with his forces.

In the absence of Dr. Machar, General Taban Deng Gai together with the remnants of the SPLM – IO advance team, that were left in Juba, purported to appoint Gen. Gai as a replacement to Dr. Machar and subsequently, Gen. Salva Kiir the President purportedly appointed Gen. Gai as the First Vice President. Before, the purported appointment of Gen. Gai, Dr. Machar who was still the substantive Vice President of the Republic of South Sudan per the Agreement and the Chairman of the SPLM–IO issued a Decree relieving Gen. Gai from his membership and position within the structures of the SPLM–IO and the TGoNU.[34]. So at the point of his supposed appointment, Gen. Gai had effectively ceased to be a member of the SPLM–IO and so it could therefore concluded that he does not represent or act on its behalf.

Even if General Taban Gai was a bona fide member of the SPLM–IO, at the point of his appointment as vice president, the procedures followed were inconsistent with internal norms for such appointments within the SPLM–IO, as well as with the provisions of the Agreement. Internally, the SPLM–IO Political Bureau recommends for

appointments and the Chairman then decrees the appointments.[35]\_ However since the alleged meeting of the SPLM–IO Political Bureau to recommend General Taban Gai as a replacement lacked quorum, their recommendations was deemed invalid and the substantive Chairman of the SPLM–IO did not decree his appointment.

It is worth noting that the mechanism for leadership change within the SPLM - IO is provided for in the Agreement.[36]\_ The Agreement anticipated changes to leadership within the different parties only during the transitional period.[37]. The Agreement provided for a pre-transitional period of 90 days and a transitional period of 30 months.[38]\_ The transitional period was envisaged to start 90 days from the signing of the Agreement.[39].

The Agreement granted the TGoNU a term in office of 30 months. This 30 months mandate was to be preceded by 90 days of pre-transitional period. It is not clear whether the two 90 days provided for in section 1 (1) and (2) of the Agreement refer to the same thing. Since such an interpretation is illogical, the preferred interpretation is that if the transitional period started when the TGoNU was constituted, the Agreement provided for a 3 months period for the TGoNU to settle in and 30 months fro implement the respective provisions of the agreement.

The TGoNU was formed on 28 April 2016. The Pre-Transitional period ended 28 July 2016. Gen. Gai was appointed on 25 July 2016. This appointment took place within the pre-transitional period making it effectively inconsistent with the Agreement. In addition, the Agreement stipulated that only the top leadership at the time of the signing of the Agreement could initiate a replacement of leadership within its allocated positions.[40] The Office of the Chairman of the SPLM–IO acting on the recommendation of the Political Bureau constitutes top leadership as envisaged in the Peace Agreement. So without the active consent of the Chairman of the SPLM–IO, Dr. Machar, no replacement of the TGONU Vice President position is valid.

Thus, procedurally and substantively, the purported appointment of Gen. Gai to replace Dr. Riek Machar has no legal basis. According to the legal principle nihil fit ex nihilo (nothing comes from nothing) any subsequent appointments, decisions and actions taken by Gen. Gai stand null and void. The direct implication of this conclusion is that one of the two-armed parties to the Agreement is no longer part of the TGoNU. It would, therefore, mean that both the security and governance component of the Agreement collapsed in July 2016.



Functionally, the TGoNU was established to implement the Agreement. This included provision of humanitarian assistance and resettlement of refugees and IDPs, ensuring national healing, oversee the process of permanent constitution making, reform public financial management, carry out the normal functions of Government, implement reforms, ensure security sector reform [41], rebuild

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the country and prepare for elections among others. [42] South Sudan is still in dire humanitarian crisis, the Government impedes access to humanitarian assistance, the country is still exporting refugees and IDPs are still in the Protection of Civilian Sites (PoCs), there is no national process for healing as stipulated in the Agreement, no permanent constitutional making process, mismanagement of public resources have continued and reform process has not started. [43] So, even functionally, the Government is not performing its core mandate under the Agreement.

### **2.3. Peace building component**

The Agreement provides for a Commission for Truth, Reconciliation and National Healing. In addition, the Agreement provided for the establishment of Hybrid Court to ensure accountability. [44] 17 months into the 30 months transitional period, there is no indication that the Government will implement this provision either.

The validity and efficacy of a peace agreement should be measured by its effect on ending violence, its ability to bring finality to war on a self-enforcing basis. The inability of a peace agreement to transform a conflict from violent to non-violent forms is an important indicator of a failed agreement. This is because such an agreement does not enjoy sufficient level of commitment and the degree of support from parties to an agreement. Since peace agreements thrive on the basis of the duty of good faith and fair dealings, a lack of commitment and support indicates that in the absence of a crude and credible external threat to implement such an agreement, it is clinically dead.

So when parties to an agreement are persistently non-compliant or have withdrawn their consent all together as is the case in South Sudan now, it is reasonable to consider the Agreement as failed or as collapsed agreement. In such a case, there is no valid and subsisting agreement between the parties. Therefore, it is illusionary to attempt to hold the parties to the terms of the Agreement or to use such an agreement in an absence of efforts to revive it, to reconcile irreconcilable parties.

### **3. The legal status of the Agreement**

There is no consensus among legal scholars as to whether peace agreements are legal documents with binding force. In the absence of consensus, drafters of peace agreements normally take deliberate efforts to clout the agreement with legal features so as to enhance its bindingness. The drafters of the Agreement achieved this aim through the requirements of ratification of the legislative bodies of the parties, the incorporation into the Constitution and conferring on the Agreement the powers of 'peremptory' norms ensure that the provisions of the Agreements trumps constitutional provisions. [45]

Therefore, irrespective of the debates around the legal nature of peace agreements more broadly, the Agreement is a contract between the parties and the citizens of South Sudan. Like any other contracts, however, misrepresentation and non-performance could vitiate the contract. Even though the parties committed themselves to 'unreservedly'[46] comply with the Agreement, the parties have in effect abrogated the Agreement through

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their actions and inactions. So to speak of the Agreement as valid and subsisting is a legal aberration. With the war escalating, the Permanent Ceasefire has collapsed. Without the SPLM –IO representation in the Government, the political Agreement has collapsed too. So there is no valid and subsisting Agreement on the Resolution of the Conflict in the Republic of South Sudan.

#### 4. The implications of the collapsed Agreement

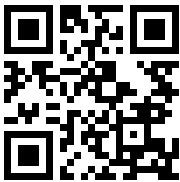
The following are the legal implications of the collapse of the Peace Agreement:

- a) In the absence of a valid and subsisting Agreement, the Government of South Sudan has no legal basis to function as a government. Thus, the decisions and actions of the Government of South Sudan now have no legal backing and thus null and void.
- b) In the absence of a valid and subsisting Agreement, oversight institutions established by the Agreement such as JMEC and CTSAMM have no legal basis to operate. The decisions and actions of these oversight institutions, lacking legal backing, are, therefore, of no effect at all. Since these oversight institutions have nothing to oversee or monitor, their continued existence is not only illegal but also a waste of resources.
- c) In the absence of a valid and subsisting Agreement, South Sudan is back to full-scale war. It is either that the Agreement be resuscitated, reviewed, revised or a new agreement be negotiated to bring the war to an immediate end.
- d) The international community (UNSC, TROIKA) works with the African Union for restoration of a political order and legitimacy in which a revised, more inclusive and people-centric agreement would be implemented under AU and UNSC oversight institutions together with a mandate to enforce compliance.
- e) IGAD to play a supporting role to AU and UNSC lead for restoration of legitimacy and doing things right by not changing the rules of the game that led to collapse of the Agreement in the first place.

*END*

## References

1. This group of parties were the first to sign the Agreement in Addis Ababa, on 17 August 2015.
2. The Government refused to sign the Agreement in Addis Ababa. It signed the Agreement in Juba on 26 August 2015. When it signed, the Government entered 16 reservations to the Agreement. These included power sharing formula, the composition of the Presidency and collegial decision making within the Presidency, the mandate of oversight mechanisms such as JMEEC and CATSMM, amendment procedures and the security arrangements including separate armies, cantonment and demilitarisation of Juba.
3. See Chapter VIII article 1 of the Agreement
4. Chapter II article 4.1 of the Agreement
5. Chapter II article 2.1 of the Agreement
6. Chapter II article 5.1 of the Agreement
7. Chapter II article 7.3 of the Agreement
8. Chapter I article 1.6 of the Agreement
9. Chapter I article 1.1 of the Agreement
10. Chapter I article 9.1.1 and 9.1.2 of the Agreement
11. See chapter VI of the Agreement
12. Chapter VI article 2.1.1 of the Agreement
13. Chapter VI article 3.1.1 of the Agreement
14. Chapter VI article 4.1 of the Agreement
15. Chapter I article 1.2 of the Agreement
16. Chapter I article 13.1.1 of the Agreement
17. Chapter II article 2.1 of the Agreement
18. Chapter VI subsection 2 of the Agreement
19. Chapter II article 4.1 and Chapter VII article 1 of the Agreement
20. Chapter VII, section 2 subsection 7 of the Agreement
21. Chapter VIII subsection 2 of the Agreement
22. Chapter VIII article 2 and 3 of the Agreement
23. Chapter VIII article 2 of the Agreement
24. Chapter VIII article 4 of the Agreement
25. Chapter II article 6.6 of the Agreement for an example
26. See chapter II article 1.1 of the Agreement for an example
27. Paula C. Roque & Remember Miamingi, Beyond ARCISS: New Fault lines in South Sudan, Institute for Security Studies in Africa, 2017, available at <https://issafrica.org/research/east-africa-report/beyond-arciss-new-fault-lines-in-south-sudan>
28. See Chapter II article 1.7 ff
29. Lauren Ploch Blanchard, Conflict in South Sudan and the Challenges Ahead, Congressional Research Service, September 22, 2016 available at <https://fas.org/sgp/crs/row/R43344.pdf>
30. See note 27 above
31. Chapter I section 1 subsection 1 provides that '*There shall be a Transitional Government of National Unity (TGoNU) established in South Sudan entrusted with the task of implementing this Agreement.*' Chapter 1 section 1 subsection 4 continues '*The term and mandate of the incumbent President, Vice President and State Governors in the Republic of South Sudan shall be extended for the duration of the Transitional period, until such time that elections are held, except as provided for in Chapter I article 15.1 and 15.2 of the Agreement;*' these articles for exceptions with respect to State Governments regulated by the Agreement.
32. Chapter 1 article 1.6 of the Agreement
33. Chapter 1 article 1.6 provides that '*The power sharing ratio in the Executive of TGoNU shall be applied as follows: Executive body as 53%, 33%, 7% and 7% for the GRSS, the South Sudan armed opposition, Former Detainees and other Political parties respectively.*
34. See <http://www.sudantribune.com/spip.php?article59694>
35. Interview with SPLM IO senior official.
36. Chapter I article 6.4 of the Agreement provides '*In the event that the post of the First Vice President falls vacant during the transitional period, for any reason, ... the replacement shall be nominated by the top leadership body of the South Sudan Armed Opposition as at the signing of this Agreement...*'
37. Chapter I article 1.2 provides for two important periods: Transitional Period and Pre-Transitional Period. Throughout the Agreement, there are activities for the Transitional Period and others for the Pre – Transitional period. Change of leadership is provided for in Chapter I articles 6.4 is an activity anticipated during the transitional period.
38. Chapter I article 1.2 of the Agreement
39. See 41 above
40. See note 39 above
41. Security sector reform and rule of law are intertwined. Observing the rule of law is essential for the sustainability of security sector reform. There has been a total failure to establish rule of law since independence in 2011.
42. See Chapter 1 article 2.1 of the Agreement
43. <http://www.itv.com/news/2017-01-12/south-sudan-the-worlds-newest-country-facing-a-humanitarian-crisis/>
44. See note 12 above
45. See Chapter 8, articles 2 and 3 of the Agreement
46. The last paragraph of the preamble provides '*Unreservedly committed to the terms of this Agreement...*'



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## About UUPDM

The United People's Democratic Movement (UUPDM) is a popular grassroots Movement formed by concerned South Sudanese in the country and the Diaspora; in response to the political crisis and fast deteriorating economic, humanitarian and security situation in the Republic of South Sudan, amid heightened ethnic polarisation and devastating conflict in the country, encouraged and abated primarily by President Salva Kiir's divisive Government policy, incompetent, oppressive and corrupt leadership.

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