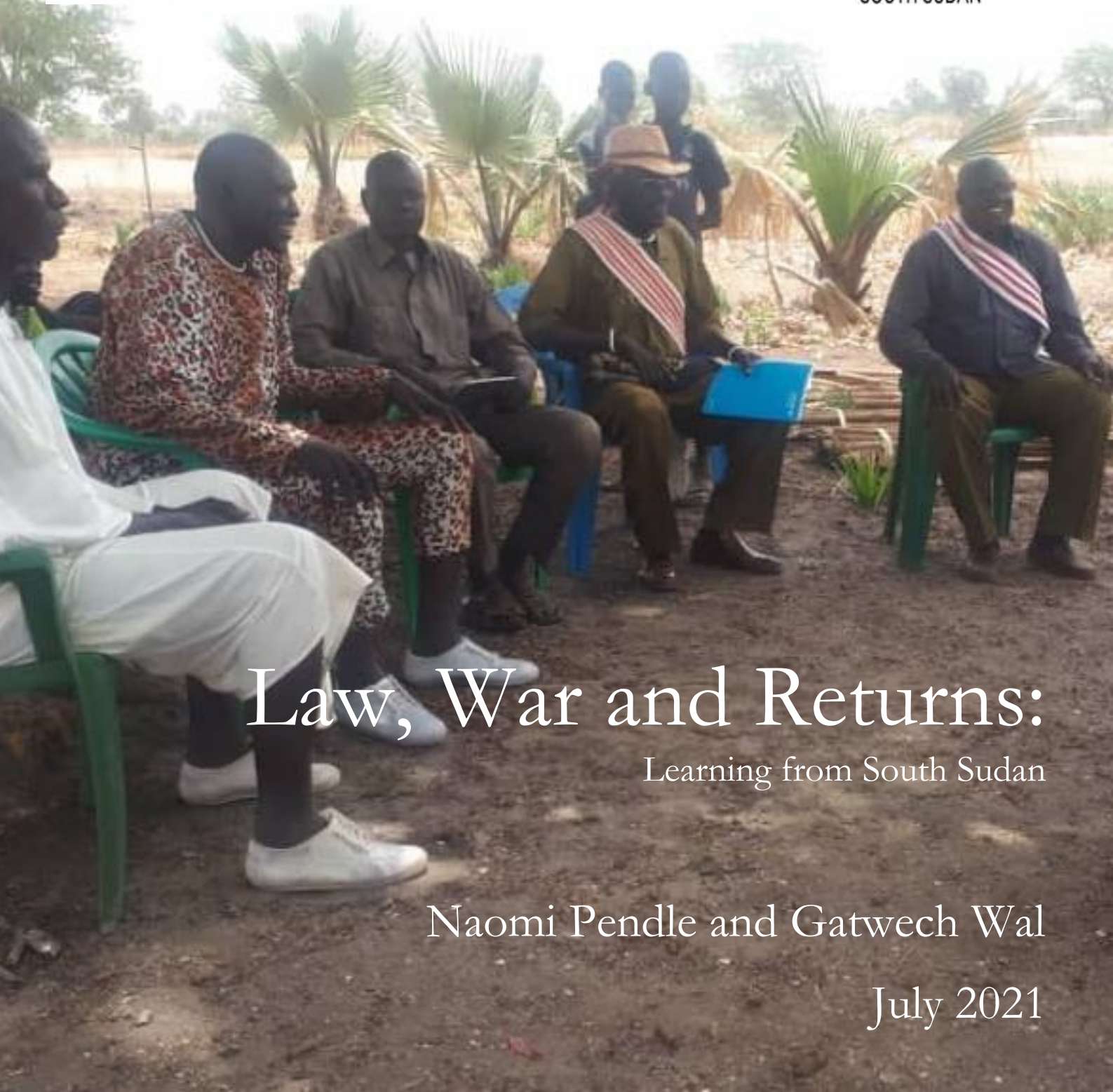




Firoz Lalji Institute
for Africa

world relief™
SOUTH SUDAN



Law, War and Returns:

Learning from South Sudan

Naomi Pendle and Gatwech Wal

July 2021

Picture: Chiefs in the Mobile Court in Miirmiir (Koch County), March 2020



Arts and
Humanities
Research Council



CPAID
Centre for Public Authority
and International
Development



Global Challenges Research Fund

Acknowledgements

This research project was conceived and supported by World Relief. Special thanks is owed to Ric Hamic and Lawrence Peter who played a key role in facilitating this research and its logistics while working for World Relief. Isaac War (World Relief South Sudan) has also been central in helping us formulate ideas through discussion. Gatwech, Isaac and I continue to work on further documentation of legal realities and evolving dynamics in Koch to inform a larger report on these findings.

Naomi is based at the Firoz Lalji Institute for Africa and the Centre for Public Authority and International Development (CPAID), both at the London School of Economics and Political Science. Naomi has also received support from the AHRC funded Safety of Strangers grant (AHRC grant - AH/T007524/1). I am grateful for their support to make this work possible.

This report was written to help inform the South Sudan Multi-Partner Trust Fund for Reconciliation, Stabilization, and Resilience and to support work by CARE International, Mercy Corps, Danish Refugee Council and World Relief in Koch County (Unity State).

Table of Contents

Introduction	3
Part 1 - Lessons from war, law and return in South Sudan since 2005	
a) Law reforms after war	9
b) Law as a cause of conflict: a case study of Lakes State	17
c) Law during war	25
Recommendations Part 1	28
Part 2 - Law reform after peace: a legal analysis of Koch County (Unity State), 2020 – 2021	29
a) Chiefs, authority and safety against armed groups	34
b) Governing through law in war	39
c) Displacement and dealing with a plurality of legal orders	41
d) Law during returns	43
e) Women and chiefs' courts	48
f) Chiefs' training and meetings	51
Recommendations Part 2	53

Introduction

It would be easy to underestimate the prevalence of law in the last decade in South Sudan. Since the growing violence in Jonglei and Unity States in 2012 and the eruption of conflict in Juba in December 2013, there has now been nearly another a decade of large-scale armed conflict, displacement and connected uncertainty across South Sudan. Many areas fell under rebel control, and the reach of the South Sudan government was ambiguous. Since December 2013, over four million South Sudanese have fled their homes to seek safety elsewhere in South Sudan or across international borders.¹ Furthermore, approximately two hundred thousand have died as a direct result of violence, and previous wartime ethics have been violated.²

In such a context it could seem almost nonsensical to discuss the power of legal norms and institutions. As conflict escalated, many foreign aid donors withdrew aid for legal programming. After the 2005 Comprehensive Peace Agreement that ended the war between the Sudan People's Liberation Army/Movement (SPLA/M) and the Government of Sudan, there had been donor support for justice programming and for reform to legal institutions. For donor governments and the UN in the post CPA era, legal programming was usually framed as part of building the new state of South Sudan and ensuring its compliance with human rights. After December 2013, with a few notable exceptions such as the EU and the British Council, funding for work on law and justice almost instantly ended. The UK government ended planned funding for a rule of law programme and UNMISS shrivelled its Rule of Law Department. Individuals within these institutions firmly protested these shifts but without results.³ Afterall, what place could law have in war and emergency?

In contrast to the international response, South Sudanese quickly turned to legal institutions despite this context of crisis. Law remained powerful in this conflict arena.⁴ In sites where South Sudanese fled, including refugee camps in Sudan and Protection of Civilian sites (PoC sites) in South Sudan, South Sudanese quickly formed chiefs' courts to help govern these moving communities. Sometimes these courts had state support (such as in Sudan),

¹ USA for UNHCR: The UN Refugee Agency, "South Sudan Refugee Crisis." Accessed at: <https://www.unrefugees.org/emergencies/south-sudan/>

² Checchi et al, *Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018*, < <https://www.lshtm.ac.uk/south-sudan-full-report>>

³ Discussion with FCDO member, April 2018. Interview in Juba with former UNMISS staff, July 2019.

⁴ Ibreck, Rachel and Alex De Waal, *South Sudan's Injustice System: Law and Activism on the Frontline* (London: Zed Books, 2019).

and sometimes they had more ambiguous support, such as the cautious relationship between chiefs' courts and UNMISS in the PoC sites.⁵

South Sudanese military commanders also quickly turned to courts and legal norms as a way to govern and remake political communities. Legal norms and institutions have a long history in the Sudans of being constructive of political order including authoritarian rule.⁶ The Anglo-Egyptian Condominium government explicitly used chiefs' courts as a key tool for controlling the Sudan. This pattern continued after independence and through the decades of the SPLA war. As Massoud has argued, the morality of law and the rule of law cannot be taken for granted.⁷ Law is part of the political struggle.⁸ Political leaders and governments were able to draw upon and reshape these institutions to continue to assert authoritarian leadership.⁹

At the same time, law has also been used to constrain and provide protection against the arbitrary exercise of state power that has driven conflict in South Sudan. Non-state authority figures have built their authority through legal norms and provision of access to justice. This includes Nuer prophets.¹⁰ Law gains its authority by appealing to notions of consistency and being set-apart from contemporary politics, sometimes allowing elites to even be restrained by these norms.¹¹ South Sudanese's long experience of being governed by law also means that many South Sudanese use contestations in the courts to push back against hierarchies of power and their conditions of violence. People use and promote various technologies of law (legal texts, doctrines, arrangements, and resources) to achieve political, social, or economic objectives.¹² Ibreck has recorded how, even during the civil war and despite pervasive violence, South Sudanese lawyers and community activists monitored injustices and promoted legal and social change¹³.

In 2018, the South Sudan government made a peace deal with the SPLA-IO and later signed a peace agreement with a broader collection of armed opposition. The international community was eager for the peace to last and for South Sudanese to return home. Many discussions among international actors in South Sudan since 2018 have focused on the implementation of Revitalized Agreement on the Resolution of Conflict in South Sudan (R-

⁵ Gatket, Machar and Pendle, Naomi, "He cannot marry her": reconstituting political communities among Southern Sudanese in Sudan', *Diaspora*, Forthcoming.

⁶ Massoud, Mark, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (Cambridge: Cambridge University Press, 2013).

⁷ Lev, Daniel S. "Social Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experiences," in *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. Greenberg, Douglas, Stanley N. Katz, Melanie Beth Oliviero and Steven C. Wheatley (New York: Oxford University Press, 1993): 139-158.; Nietzsche, Friedrich, *On the Genealogy of Morality*, ed. Ansell-Pearson, Keith, trans. Diethe, Carol (Cambridge: Cambridge University Press, 2007).

⁸ Ellett, Rachel, "Rethinking Law and State Building in Sub-Saharan Africa." *Law & Social Inquiry* 41, no. 2 (2016): 471-479.

⁹ Massoud, *Law's Fragile State*; Kindersley, Nicki. "Rule of Whose Law? The Geography of Authority in Juba, South Sudan." *The Journal of Modern African Studies* 57.1 (2019): 61-83.

¹⁰ Pendle, Naomi, 'Politics, prophets and armed mobilizations: competition and continuity over registers of authority in South Sudan's conflicts', *Journal of Eastern African Studies*, 14 no.1 (2020), 43-62.

¹¹ Thompson, E. P., *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975).

¹² Massoud, *Law's Fragile State*, 24-27.

¹³ Ibreck and De Waal, *South Sudan's Injustice System*.

ARCSS). With the signing of R-ARCSS, there has been a return among international actors to support a state-centred peace. With this, in recent years there has slowly been a donor and UN return to paying attention to the law. For example, the UNMISS Rule of Law department is growing and has been active in encouraging special courts in Malakal and Bentiu.

At the same time, attention to justice and the law is not enough. Historically, ill-informed legal reforms have been easily manipulated by those in power and have increased violent conflict in South Sudan. International rule of law programming and its universalising discourse can too easily mask the inherent politics of law reform.¹⁴ In the Sudans, legal reform has a long history of centralising power. Plus, it is not just that actors who instrumentalise the law and its reform may have a multiplicity of goals including personal gain.¹⁵ It is also that law reforms can create or prevent massive ruptures and reforms in moral systems.

This report focuses on the question of the role of legal norms and institutions in war, peace and returns in South Sudan. What does law in South Sudan have to do with war? Why is it important to think about law during and after war? And why is law also so central to peace, security, protection and returns? How have people in South Sudan put law and legal reform to use? How have elites used law to build power and reshape the political order? Plus, how have more vulnerable South Sudanese used law to contest physical and structural violence? What impact have aid and development interventions had? And, ultimately, what role should programming on law and justice have in making peace and allowing safe returns in South Sudan?

This report provides analysis of examples of recent legal reforms, developing norms and institutions in order to inform policy makers about the role of law in war, peace and returns. The report uses a public authority lens to grapple with the realities of law as experienced by South Sudanese in the everyday. The concept of ‘public authority’ is generally understood as implying ‘a minimum of voluntary compliance’; people do not simply comply because of brute force and involuntary subjugation, but have an interest in obedience.¹⁶ Scholars who have advocated for a recognition of public authority were first driven by noticing the reality that power is not limited to the state and is held by a variety of actors and institutions beyond the state. This focus has allowed scholars to not only focus on the way that the state is built but on the realities of competing public authorities and the way that they build power.

In relation to the rule of law, a public authority lens allows us to move beyond the distraction of different categories of courts. In South Sudan, people often talk about ‘statutory’, ‘formal’, ‘government’ courts and have compared

¹⁴ Leonardi, Cherry, Deborah Isser, Leben Moro and Martina Santschi, “The Politics of Customary Law Ascertainment in South Sudan.” *Journal of Legal Pluralism* 63 (2011): 111-142.

¹⁵ Massoud, *Law's Fragile State*.

¹⁶ Hoffman, Kasper and Tom Kirk, *Public Authority and the Provision of Public Goods in Conflict-Affected and Transitioning Regions* (The Justice and Security Research Programme and LSE): 8-9.

them to ‘traditional’ or ‘informal’ courts. Furthermore, assumptions are often made about the legitimacy and power of a court based on such categorisations. Alternatively, this report starts from the legal realities as experienced by South Sudanese themselves. We assume that all of the plurality of legal actors in South Sudan, as in any legal regime, are in a constant process of making and remaking their power and legitimacy. We focus on empirical material about the realities of struggles over power, and how these interact with legal reforms. The report focuses on people’s lived experiences of the law.

Therefore, this report does not focus on whether legal reform *should* happen but instead learns from what has happened in the past and notices the ongoing prevalence and adaptability of legal regimes in South Sudan.¹⁷ This public authority lens helps us notice the powerful role of law even during periods of conflict and even when (and sometimes because of) the absence of statutory courts. It also allows us to move beyond normative debates about the virtues of certain legal structures and law’s abstract meaning.

The report is in two parts. The first half of the report discusses war, law and return in South Sudan generally, drawing on specific examples since the 2005 Comprehensive Peace Agreement that ended the war between the Sudan government and the Sudan People’s Liberation Army/Movement (SPLA/M), and that created the Government of South Sudan. This is a particularly useful moment to focus on what happened during post-CPA law reforms, as South Sudan is entering a similar post peace-agreement moment that is also likely to be coloured by continuing outbreaks of armed conflict (as after the CPA). Reflecting on example of post-CPA rule of law and justice programming, highlights the range of initiatives implemented but also the misconceived assumptions asserted by some international actors. Focusing on legal reform in Lakes State, we highlight how legal reform can be linked to the rise in revenge killings in the post CPA era. This was partly due to the diminishing adequacy of cattle compensation when bride wealth increased. More crucially, legal reforms resulted in ambiguity over the authority of the chiefs’ courts and the permanence of their rulings. These legal reforms were veiled in claims of applying statutory and constitutional law, but were steeped in politics, assertions of power and radical reforms to legal practice. This created a legal vacuum, especially for the most serious offenses. Self-help justice in the form of revenge killings was a predictable result.

Having recognised that legal reform can be problematic, the report discusses the importance of legal norms to South Sudanese and their use of law to provide safety and protection. This includes using law to resolve disputes, but also to push-back against predatory governments and armed groups.

The second section provides an analysis of legal institutions, norms and justice in Koch County (Unity State) in 2020 and 2021. Since oil was discovered in Koch, the last four decades have been dominated by brutal and divisive

¹⁷ Ellet, “Rethinking Law and State Building in Sub-Saharan Africa.”; Merry, Sally Engle, “The Rule of Law and Authoritarian Rule: Legal Politics in Sudan.” *Law and Social Inquiry* 41, no. 2 (2016): 465-470.

conflict. Yet, despite the prevalence of war, there has not been an absence of law. The section describes how the chiefs' courts were the dominant providers of judicial justice in Koch throughout the 2013-2018 war years, and how they are also offering redress as people now navigating movement back to Koch after displacement. Warring parties have used legal institutions to build their authority and unity in their areas of control. In SPLA-IO areas, there has been some coordination between courts in Koch and in sites of displacement. At the same time, chiefly authority and laws have evolved differently in government and SPLA-IO controlled areas. Now that a new commissioner is appointed and now that he has appointed chiefs, tensions have increased. Finally, the report reflects on forthcoming legal dilemmas in South Sudan and the space for supporting legal norms and institutions to encourage peace-building access to justice.

PART ONE

Lessons from war, law and return in South Sudan since 2005.

a) Law reforms after war

In 2005, the SPLA signed the Comprehensive Peace Agreement (CPA) with the Sudan government, ending twenty-two years of armed conflict. The CPA did not just create a cessation of hostilities, but also new constitutional arrangements that included the creation of an oil-rich Government of Southern Sudan and the promise of South Sudan's possible independence after a referendum. After almost unanimous Southern support for independence, South Sudan became independent in 2011. The idea that the CPA was creating a new state of South Sudan focused much donor attention and UN energy on an idea that they could build the state and its institutions. Support for legal institutions and legal reforms were part of these state-building efforts. Support to the rule of law was framed as something essential to ensure the core functions of the state. Below are some of the common features and practices of these post CPA law reforms. This section does not provide a comprehensive evaluation, but does provide brief outlines of debates about the consequences for justice and peace of notable post CPA rule of law programming.

Starting from scratch?

'This meant doing everything from scratch'.¹⁸

International actors after the CPA often assumed there was not an existing legal system. For example, one report described how, 'the prolonged conflict severely eroded the core institutions of the State including rule of law infrastructure. There is a lack of fully trained and experienced judges, lawyers, police and prison staff. Much of the population has little confidence in these institutions, and they have little information about the formal legal framework. They rely instead on customary mechanisms.'¹⁹

South Sudanese were presented as resorting to customary justice and chiefs' courts because the state institutions of justice were not available. There was a lack of statutory courts in South Sudan, with few states initially having high-courts and most counties never having a court with a legally trained judge. In 2005, Justice Ruben Madol Arol, then high court judge in Rumbek, estimated that South Sudan needed 749 judges but that there were only

¹⁸ Interview with Mbu, Nelson (UNDP Rule of Law). Accessed at: <https://www.youtube.com/watch?v=iEKIkcHOV78&index=115&list=PLA274DA71E80651E6>

¹⁹ United Nations Development Programme, *Promoting the Rule of Law* (United Nations Development Programme): 1. Accessed at: <http://www.undp.org/content/dam/southsudan/library/Fact%20Sheets/UNDP-SS-Rule-of-law-flyer.pdf>

29. ‘We don't have stationery for running of these courts, much less reference material,’ he says. ‘You cannot run the court as a professional judge by remembering your law or using common sense.’²⁰

However, at the time of the signing of the CPA, there was a legal system in Southern Sudan with a long history; chiefs’ courts had been the central tenant of the legal system of government for a century.²¹ Chiefs courts after the CPA, as before, delivered most of the justice in South Sudan, and these institutions provided a resilient and distinctive modality of government that had a history of evolving in interaction with different regimes of government.²² In 2010, Leonardi et al highlighted the histories of chiefs’ courts and emphasised that their creation was closely entangled with governments’ histories.²³ After British and Egyptian forces claimed control over regions of southern Sudan in the first decades of the 20th Century, they repeatedly worked through chiefs and assumed oversight of their courts. The chiefs’ courts were placed under the control of the District Commissioners and ultimately the Anglo-Egyptian government. The 1931 Chiefs’ Court Ordinance entrenched the chiefs’ courts as part of the system of government.²⁴ Since the Anglo-Egyptian Condominium era in the first half of the 20th Century, governments have used the rule of law as part of its strategy to secure public authority.²⁵ In the post CPA-era, chiefs’ courts in much of South Sudan were still seen as part of government and a clear expression of government at the local-level.

Claims of the discontinuity of the power of chiefs’ courts during periods of war were also fictional. When the state government had minimal reach over communities in South Sudan, including during armed conflict, public authority figures, including rebel groups, have continued to perform the state through the application of law and the remaking of legal institutions that often resemble those of the state. The SPLA rebelled against the Sudan government in 1983. Within its first few years of rebellion, the SPLA created its own judiciary with mobile high and appeals courts.²⁶ Commanders relied heavily on chiefs and their courts, sometimes incorporating these courts into local structures that included appeals to the commander. SPLA judicial reforms continued in the 1990s as the rebels tried to establish a visible, civil administration. In 1994 at the Chukudum convention, chiefs’ courts gained a codified, central position in the SPLA/M’s administrative structure.

²⁰ Crilly, Rob, “Air of optimism in Rumbek as \$4.5bn in aid is pledged,” (The Irish Times, 2005). Accessed at: <https://www.irishtimes.com/news/air-of-optimism-in-rumbek-as-4-5bn-in-aid-is-pledged-1.432232>

²¹ Leonardi, Cherry, Leben Moro, Martina Santschi and Deborah Isser, *Local Justice in South Sudan* (London: Rift Valley Institute, 2010).

²² Ibreck and De Waal, *South Sudan’s Injustice System*; Leonardi, Cherry. *Dealing with Government in South Sudan: History of chieftship, community and state* (Woodbridge: James Currey, 2013).

²³ Leonardi, Cherry, Leben Moro, Martina Santschi and Deborah Isser, *Local Justice in South Sudan* (London: Rift Valley Institute, 2010).

²⁴ Ibid.

²⁵ Pendle, Naomi, ‘Politics, prophets and armed mobilizations; Massoud, *Law’s Fragile State*.

²⁶ Alor Kuol, Monyluak, “The Anthropology of Law and Issues of Justice in the Southern Sudan Today.” MPhil Thesis, University of Oxford, 2000; Leonardi et al., *Local Justice in South Sudan*

The SPLA again made chiefs' courts and their regulation central to their administrative structures.²⁷ SPLA military authorities now assumed oversight of the chiefs' courts in areas they controlled. This built on long histories of local executive oversight of the courts. These courts helped to prevent self-help justice, violence and raiding within SPLA liberated areas, and started to construct a common legal community.²⁸ Ultimately working through the chiefs and their courts allowed the SPLA to maintain authority over large areas that they controlled.²⁹ Chiefs and their courts assumed a key role in mediating between the SPLA and the civilian population.³⁰ Chiefs often remade legal norms and jurisdictions as a way to bring more certainty into this mediated relationship.³¹

After the CPA, chiefs' courts remained the main legal institutions used by almost all South Sudanese.³² Furthermore, customary law gained a statutory and constitutional mandate. The Interim Constitution of Southern Sudan (ICSS) identified customary law both as law and a "source of legislation." This recognition has also been preserved in the Transitional Constitution of South Sudan (TCSS). In addition, several substantive laws, including the Local Government Act of 2009, the Judiciary of Southern Sudan (JOSS) Act of 2008, the Ministry of Legal Affairs and Constitutional Development (MOLACD) Act of 2008 and the Codes of Civil and Criminal Procedure lay out a framework for the operation of customary courts and how they complement the statutory justice system.³³

As there were legal institutions in place at the signing of the CPA, the legal system was not been developed from scratch. Instead, new legal norms and institutions were legal reforms, and many of these were radical legal reforms that broke with a century of legal practice. Claiming the legal landscape as a blank slate was a way to conceal the reality that empowering certain new legal figures would radically disempower others and revolutionise legal hierarchies. There was much appetite for reform, but this needed to be a process and was informed by politics. It was not experienced as merely a technical exercise by South Sudanese experiencing radical legal reforms.

Codifying the customary

A common debate during post CPA judicial reform was whether the customary laws should be written, codified or even harmonized.³⁴ In 2009, GOSS-UNDP developed a strategy to ascertain and codify customary laws

²⁷ Johnson, Douglas, "The Sudan People's Liberation Army and the problem of factionalism," in *African Guerrillas*, ed. Clapham, Christopher (Oxford: James Currey, 1998): 53-72.

²⁸ Ibid.; Pendle, Naomi, "Learning from customary law: Forging ethnic and national identities in South Sudan," in *The Struggle for South Sudan: challenges of security and state formation*, ed. Logan, Sarah and Luka Biong Deng Kuol (London: I.B. Tauris, 2019): 7-26.

²⁹ Johnson, "The Sudan People's Liberation Army," 68.

³⁰ Leonardi, *Dealing with Government*.

³¹ Chirilo Madut Anei and Naomi Pendle, *Wartime trade and the reshaping of power in South Sudan: learning from the market of Mayen-Rual*. Nairobi: Rift Valley Institute, 2018.

³² Apach, Gabriel Mading and Garang Geng, "UPDATE: An Overview of the Legal System of South Sudan," (Hauser Global Law School Programme, 2018). Accessed at: https://www.nyulawglobal.org/globalex/South_Sudan1.html

³³ Local Government Act 2009, Art. 98(1).

³⁴ Leonardi et al., "The Politics of Customary Ascertainment in South Sudan.," Henry, Alban, *Ascertainment of Customary Laws in South Sudan* (United Nations Development Programme, 2016). Accessed at: <https://silotips/download/ascertainment-of-customary-laws-in-south-sudan-discussion-paper>

through ‘self-statement’ by ‘traditional communities’. In 2012, UNDP in partnership with the South Sudan government commissioned an ascertainment study of the customary laws of fourteen ethnic groups in South Sudan. There was a drive to harmonize the customary law and bring it in line with human rights norms.³⁵

South Sudanese leaders justified the ascertainment and codification of customary law in various ways. In the 1990s, the increasingly Islamic government in Sudan was threatening the continuity of the customary law and claiming its lack of modern relevance. Codifying and writing the customary law were ways to highlight its contemporary relevance and protect it from these Sudanese pressures. One of South Sudan’s first Chief Justices had himself written the Dinka customary law in the 1980s as a means of preservation. Plus, after the CPA, if customary laws were written it was also suggested that statutory judges would be more willing and able to use them.

However, scholars expressed concerns. Leonardi et al. argued that ‘the real drive to ascertain customary law was coming from the new government’s desire to exercise greater control over the provision of local justice’.³⁶ There was an appetite to centralise and homogenise judicial power. Summarising customary laws on a couple of sides of paper created vague written codes that could have given statutory judges excessive powers of interpretation if used.

Academics also argued that codification is itself be problematic as the law becomes ‘petrified’ and unresponsive to social demands, attempting to change the very nature of the law itself.³⁷ The way it is petrified will also entrench the power of existing authorities who control the codification process. Authorities since the colonial period, including chiefs, have instrumentalised such processes of codification.

A further justification for codification was the need to reform customary law to ensure its upholding of human rights including those of women. The codification of the law was said to make it clear which laws were non-compliant with human rights commitments, allowing reform. At the same time, the scale of social and political reform needed to transform women’s position was much more radical. There was a need to be realistic about the dominance of male leaders not only in customary courts but also in the leadership of judicial reforms and codification.

³⁵ Ibid: 4.

³⁶ Leonardi et al., “The Politics of Customary Ascertainment in South Sudan,” 115.

³⁷ Hessbruegge, Jan Arno, “Customary Law and Authority in a State under Construction: The Case of South Sudan.” *African Journal of Legal Studies* 5, no. 3 (2012): 310. doi: <https://doi.org/10.1163/17087384-12342014>

The power of Constitutions and Acts of Parliament

Law can be surrounded by a particular mythology that conjures an uncritical enthusiasm for legal solutions.³⁸ Legal documents in themselves can also carry an authority that is less commonly questioned. This can be used to assert the legitimacy of norms over people and previous legal orders without the need for further reasons or justifications. The CPA and the formation of the new state of South Sudan prompted a series of constitutions, including the 2005 Interim Constitution of Southern Sudan and the 2011 Transitional Constitution of the Republic of South Sudan. The formation of the Southern Sudan Legislative Assembly also prompted a proliferation of new statutory laws. Pieces of paper kept being written and appeared to have authority.

International donors often saw the rule of law and the constitutional and statutory incorporation of human rights as a key part of their vision for the post-CPA South Sudanese state. For example, Norway funded the building of the South Sudan Legislative Assembly with the intention of supporting law reform from a Human Rights perspective. The intention was to make the texts of the law consistent with the CPA and human rights.³⁹

For most South Sudanese, pieces of paper typed in Juba seemed irrelevant. At the county-level in much of South Sudan, few people (including the courts and local government authorities) had access to copies of the laws, nor did they have the literacy or legal training to understand them or make use of them. While South Sudan literacy grew in the post-CPA era, the high levels of written comprehension needed to unpick the meaning of statutory laws drafted by trained, foreign lawyers made these written laws completely incomprehensible. Plus, for at least a century, law had been heavily based on the recollection of case law. Therefore, long, written documents had ambiguous significance in the real judicial worlds of South Sudan. There was an existing, detailed legal vocabulary long established and used by the chiefs' courts in South Sudan, but these terms and concepts were absent from the written laws.

At the same time, despite their incomprehensibility and their distance, these statutes and constitutions intermittently and unevenly impacted the everyday workings of the courts and people's daily experiences of justice. They were evoked as a supreme authority and were often interpreted in a way that allowed the centralising of power. The lack of local knowledge of these laws made it hard for local actors to contest these interpretations. Plus, the constitution and laws were often wrapped up with the symbolically powerful image of the new nation of South Sudan, making them hard to contest.

³⁸ Lev, "Social Movements, Constitutionalism, and Human Rights," in *Constitutionalism and Democracy*.

³⁹ Bye, Vegard, Abdel-Rahman El Mahdi and John Gachi, *Democracy Support through the United Nations* (The Organisation for Economic Co-operation and Development, 2010). Accessed at: <https://www.oecd.org/countries/sudan/48085726.pdf>

For example, Doggie Di Katz, a popular South Sudanese singer, in 2019 released a song called ‘*Mulanaa*’ (Lawyer). He describes how people who want to grab land bring their lawyers and use statutory laws. This allows the elite to grab pieces of land and leaves those too poor for lawyers without a home.⁴⁰

A clear example is the use of the constitutions and statutes to limit the powers of the chiefs’ courts. There has been lots of contestation over the jurisdiction of the chiefs’ courts. The 2009 Local Government Act codified recognition of the customary law courts and gave them jurisdiction over ‘the customs, traditions, norms and ethics of the communities’. Their jurisdiction explicitly excluded criminal cases unless they have a ‘customary interface’ and have been referred to the customary law court by a statutory court.⁴¹ A common complaint against the chiefs’ courts after the CPA was about their adjudication of cases outside of their jurisdiction, such as homicide or theft.⁴²

Importantly, the ability of statutory courts to limit chiefs’ courts powers to adjudicate on crimes was a legal revolution and a significant shift of power in favour of the statutory courts. Historically the 1931 Chiefs’ Courts Ordinance had given criminal jurisdiction to chiefs’ courts.⁴³ Before this, local authorities dealt with all cases. After this, chiefs’ courts continued throughout various governments to judge in criminal cases and to issue punishments. So, as the chiefs’ courts in the post CPA era no longer had jurisdiction this was, *de jure*, a radical rupture with previous law. The reduction in the jurisdiction of chiefs’ courts amounted to a significant increase in the jurisdiction of the statutory courts. This revolution was given legitimacy with reference to statutory and constitutional law as if these were incontestable sources of legitimacy. Chiefs continued to rule in a variety of cases as before.

However, in many ways the statutory law was still ambiguous about the jurisdiction of the chiefs’ courts and there was wide scope for interpretation. Chiefs’ courts had previously had criminal jurisdiction including over serious offenses and so, if the customary law was law administered by the chiefs’ courts, all criminal cases had a ‘customary interface’. Based on the Local Government Act, they still needed to be referred by statutory courts. However, most South Sudanese had no realistic access to statutory courts. In order to access judicial justice for serious crimes committed against them, South Sudanese continued to refer even the most cases to the chiefs’ courts. However, as the chiefs’ courts’ jurisdiction was now ambiguous, their rulings had greater potential to be arbitrarily overturned by invoking the statutory limitations of their jurisdiction. This ambiguity and uncertainty created space

⁴⁰ Paanluel Wël, “The Role of Lawyers in the Society: The Case of South Sudanese Lawyers and Judges,” (2019). Accessed at: <https://paanluelwel.com/2019/03/29/the-role-of-lawyers-in-the-society-the-case-of-south-sudanese-lawyers-and-judges/>; Doggie Di Katz, “Mulanaa,” (YouTube, 2019). Accessed at: <https://www.youtube.com/watch?v=20Hzs-S7yY0>

⁴¹ Local Government Act 2009, Sec. 98(2).

⁴² Mertenskoetter, Paul and Dong Samuel Luak, “An Overview of the Legal System and Legal Research in the Republic of South Sudan,” (Hauser Global Law School Programme, 2012). Accessed at: https://www.nyulawglobal.org/globalex/South_Sudan.html#_edn45

⁴³ Apach and Geng, “UPDATE: An Overview of the Legal System of South Sudan,” Section 6 of the Chiefs’ Court Ordinance, 1931 Laws of Sudan.

for powerful individuals to more easily intervene; as they had more access to knowledge of the statutory laws and constitution, these documents could be deployed at their whim and for their benefit.

Paralegals

Another approach to legal reform was supporting South Sudanese paralegals. Over time various international organisations have provided paralegal training including UNDP, Search for Common Ground, Justice Africa, the British Council and, recently, IDLO.⁴⁴

Local South Sudanese paralegals have often responded to legal conundrums and aspirations of reform by ‘dissecting the actualities of power and producing practical strategies to respond to them’.⁴⁵ Ibreck describes a workshop in Nimule in April 2015 where abstract discussions of human rights quickly moved to matters of practice and tangible examples. Conversation was dominated by how these norms might be applied in reality and gain acceptance in specific cases by the chiefs and parties.⁴⁶

In 2020, a lawyer employed by World Relief was planning to conduct a legal training with chiefs in Koch. He had studied law at university and had practiced as a lawyer in Juba including in the chiefs’ courts in Juba. Until his graduation in 2017, he had also worked as a paralegal, often in the chiefs’ courts. In the design for his Koch training, he had hopes of sharing some of the basic tenets of South Sudan’s statutory laws, as well as human rights commitments, with these chiefs. He planned in time to teach about these laws. At the same time, most of the sessions were left open for discussion; he correctly anticipated that the chiefs would want to grapple with what these norms really meant. He articulated the reality that the logistical support and local politics would prohibit many of these laws being applied in reality. Yet, the chiefs might be persuaded to think of creative ways to reinterpret the customary law to incorporate these other legal norms.

Lawyers and paralegals can have a rigid understanding of the legal and moral authority of certain parts of the law. Lawyers and paralegals gain their distinctiveness and authority among communities through education and a knowledge of statutory laws and human rights. Their power relies on these legal documents being meaningful. Therefore, there can be a tendency to assume the moral authority of written laws and demand compliance in abstract discussions.

At the same time, many paralegals in South Sudan have showed flexibility in their work and a nuanced appreciation of the realities of power. This approach of working to persuade existing powerful legal actors meant that paralegals

⁴⁴ IDLO, “Facilitating Access to Justice,” (2017). Accessed at: <https://www.idlo.int/what-we-do/initiatives/facilitating-access-justice>

⁴⁵ Ibreck and De Waal, *South Sudan’s Injustice System*, 197.

⁴⁶ Ibid.

consistently saw the need to build relationships with the chiefs.⁴⁷ Paralegals needed to show that they respected the traditional norms and customs. The lawyer in Koch described how, when he was a paralegal, he had sat in chiefs' courts for months and come to know the chiefs well. Over time they trusted him and would ask him for advice on cases, allowing the law to slowly evolve. This lawyer's approach was not to enforce legal reform but to slowly build trust with figures of authority and negotiate a slow evolution of the law over time, case by case.

Documenting cases has been another means for paralegals to demand accountability and consistency from the courts. Since the first decades of the 20th Century, chiefs' courts kept written records of the facts of the case and the ruling. In recent decades court records have often been scarce due to a lack of stationary and a lack of literate record keepers in the courts. Instead, chiefs rely heavily on their own and the communities' memories about previous cases. Paralegals' record-keeping in the court has usually been openly welcomed by chiefs, and the historic precedent for record keeping is often cited. The keeping of records has also bestowed on the courts the symbolic authority of written documents.

Legal anthropologists have also long spent time observing court cases as a way to understand the real socio-political dynamics in the legal system. This practice encouraged the use of court documentation as a method of both research as well as activism. A host of South Sudanese paralegals in 2017 were hired to support research in chiefs' courts in South Sudanese towns and the Bentiu and Juba PoC sites.⁴⁸ The paralegals' presence in the courts did not only facilitate observations but also resulted in opportunities for activism by the paralegals. This activism repeatedly championed adherence to human rights, to South Sudanese statutory laws and to the promotion of women's voices.

Recently, the EU has funded the capacity building of over 300 chiefs and 70 court clerks in 45 customary courts, involving more than 500 community representatives. Over 1,500 customary court cases have been supported. Since 2018, they have also supported the capacity building of 200 legal professionals.⁴⁹

⁴⁷ Ibid, 198.

⁴⁸ Ibreck, Rachel and Naomi Pendle, "Community Security and Justice under United Nations Governance: Lessons from Chiefs' Courts in South Sudan's Protection of Civilians Sites." *Stability: International Journal of Security & Development* 6, no. 1 (2017).

⁴⁹ European Commission, International Cooperation and Development, Where we work, "South Sudan," (Europa). Accessed at: https://ec.europa.eu/international-partnerships/where-we-work/south-sudan_en

b) Law as a cause of conflict: a case study of Lakes State

In the post-CPA era and until now, Lakes State has gained an unfortunate reputation for armed conflict between clans, sections and counties. These conflicts have often not had a clear, easily visible link to national warring parties. At the same time, they have continued over the last decades and the scale of the conflicts has been significant. Over the last two decades, tens of thousands have died. For example, in December 2019 alone, there were reports of 79 killed in Maper.⁵⁰ In February 2020, 61 people were recorded as being killed in the Gony-Rup clashes.⁵¹

These conflicts have been dominated by revenge killings. Revenge is not simply a result of hot anger, nor a product of out-of-controlled, uneducated youth.⁵² They are also not the result of ancient hatreds, but are rooted in contemporary politics. Revenge often has a popular moral value linked to a demand for justice, and this value is reshaped and contested over time. In other parts of South Sudan in recent years, revenge has been reshaped by shifting government policies, changing political economies, changing legal practices, and their interaction with deeply held moral and spiritual norms.⁵³

Revenge killings have not only occurred in Lakes State. Across South Sudan revenge killings have been a rising concern. For example, in areas such as Koch (Unity State), revenge killings in 2018 and 2019 were killing dozens and interrupting humanitarian activities. However, there are worrying trends in Lakes State that may still be preventable elsewhere. For example, in many parts of South Sudan NGO workers and the educated have not been routinely targeted in revenge killings, and people have often been able to find safety from the threat of revenge in the towns. In the last couple of years these norms are being challenged, but their violation still prompts moral disgust. In Lakes State it has now become too common for educated people to be killed in revenge for killings by their clan members, and killings have taken place in urban centres, including targeted assassinations as well as larger, revenge-motivated battles.

⁵⁰ Hodal, Kate, "UN peacekeepers intervene after violent clashes in South Sudan," (The Guardian, 2019). Accessed at: <https://www.theguardian.com/global-development/2019/dec/06/un-peacekeepers-intervene-after-violent-clashes-in-south-sudan>

⁵¹ Wote, Charles, Joakino Francis and Jale Richard, "Juba is responsible for deadly Lakes conflict – MP," (eyeRadio, 2020). Accessed at: <https://eyeradio.org/juba-is-responsible-for-deadly-lakes-conflict-mp/>

⁵² Pendle, Naomi, "'The dead are just to drink from': recycling ideas of revenge among the western Dinka, South Sudan." *Africa* 88, no. 1 (2018): 99-121.

⁵³ Pendle, "'The dead are just to drink from'; Stewart, P. J. and A. J. Strathern, *Peace-making and the Imagination: Papua New Guinea perspectives*. (Brisbane: University of Queensland Press, 2011).

Violent conflict in Lakes State has many explanations. There are long histories of tension based on histories of certain families' centralising power.⁵⁴ For example, the 1972 Addis Ababa Peace Agreement created a new political confidence that South Sudanese could participate in all levels of the state, and powerful South Sudanese religious authorities were incorporated into government structures. Anger and violence expanded as people feared these new centralised authority figures. More recently, during the CPA negotiations in the early 2000s, the re-division of counties across South Sudan caused new competitions for government positions, boundaries and land. This prompted violent conflict in Lakes State and with neighbouring counties in other states.⁵⁵ At the same time, revenge has often been cited as the justification for violence and has often been used by antagonists to mobilise young men to fight.

Law and revenge

Here we consider the role of legal reforms in changing understandings of revenge and making violent conflict in Lakes State. Legal norms and institutions play an important role in remaking the norms of revenge and levels of popular moral support for revenge.

In Lakes State, legal norms and institutions have been commonly used as a way to control conflict and reduce feuds. For example, in 1998 the communities of Agar Pakam (Maper, Rumbek North) and Jalwau (Cueibet) fought over an extra-marital pregnancy and an extra-judicial killing. While the conflict is narrated as between Pakam and Jalwau, it was also an opportunity for the SPLA-led to assert its authority and legal governance.⁵⁶ The conflict killed over two hundred people and over three thousand head of cattle were looted.⁵⁷ The SPLM formed large courts in 1999 and 2002 to resolve the issue. Chiefs often headed these courts. In a 2004 peace meeting about the same conflict, the first recommendation was for a court and cases to be heard by a special high court and 'a competent judge' and for him to be assisted by 'a committee of chiefs from different counties and include a woman'.⁵⁸ Legal settlement was seen as the way to end the feud and restore relations.

Cattle compensation has played a significant role in the legal settlement of feuds. Throughout the last hundred years, divine authorities and governments in Lakes State and elsewhere in South Sudan, when they have sought to end relations of feuding and revenge, have enforced or encouraged the acceptance of compensation as an alternative to revenge. The payment of a large number of cattle by the killer's family allows this family to also feel

⁵⁴ For example, in 1976 Makuer Gol (master of the byre – a powerful divine authority) became Court President in Rumbek Town. This was a significant rupture in Rumbek as it merged the power of chiefs and government with the powers of the spear masters. Mawson, A. N. M., "Bringing What People Want': Shrine Politics among the Agar Dinka." *Africa: Journal of the International African Institute* 61, no. 3 (1991): 354-369.

⁵⁵ The Panakar Peace Council, *The Panakar Peace Council's Rapid Response In the Lakes and Mvolo Sub-region May – July 2004 Consolidated Report, Edition 34* (Sudan Open Archive, 2004).

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid., 6.

pain and for the victim's family to feel a sense of justice. This deters their resort to self-help justice through revenge.

Furthermore, through compensation, courts had the ability to offer a second chance at life to the deceased and to prevent a relationship of feud between the warring families or communities. As elsewhere in South Sudan, compensation had historically been used to buy a posthumous wife for the deceased, allowing him to keep having legal children after his death, for his name to continue through them and for his life to socially continue. A wife for the dead was a way to end the moral demand for a feud from the family of the deceased and brought a realistic chance of peace.

At the same time, in the early 20th Century, compensation rates became fixed through government legal reforms, and the compensation rate for killing was set at a fix amount.⁵⁹ Hutchinson has highlighted how this fixing of compensation rates elsewhere in South Sudan delinked the compensation rates from the fluctuating rates for bride wealth. The consequence was that compensation was not always adequate to afford a posthumous wife and end the feud.⁶⁰

In recent years, the power of compensation to end feuds and the demands for revenge has again been challenged. Shifts in the South Sudanese political economy after the CPA, and oil-rich government leaders, resulted in shifts of wealth including in cattle, with some very large herds forming. This reduced the power of compensation as payment of compensation from a large herd seemed to be without consequence for the killer, reducing the power of compensation to cool the heart of the aggrieved.⁶¹ Furthermore, the wealth of South Sudanese leaders and Diasporas had inflated bride prices.

Lakes State in the post CPA era was a prime example of bride price inflation. There were notorious incidents where bride prices reached many hundreds of cattle. There was a notorious 2018 case where Facebook bids for a bride reached 500 cows, three luxury cars and 10,000 USD.⁶² Most bride prices remained much lower, but were increasing. Courts observed in Lakes State in the post CPA-era were declaring marriages legal if thirty-one cows were exchanged. In these rulings, the courts referenced the Wathel laws that had their origins in colonial-era chiefs' meetings. At the same time, in these post-CPA court rulings, the courts emphasised that this small amount of cattle with rupture the friendship between the bride and groom's parents as it was such a small amount. In the

⁵⁹ Hutchinson, S. (1996) *Nuer Dilemmas: coping with money, war, and the state*. Berkeley CA: University of California Press; Hutchinson, S. (1992) 'The cattle of money and the cattle of girls among the Nuer, 1930–83', *American Ethnologist* 19 (2): 294–316.

⁶⁰ Hutchinson, S. (1996) *Nuer Dilemmas: coping with money, war, and the state*. Berkeley CA: University of California Press; Hutchinson, S. (1992) 'The cattle of money and the cattle of girls among the Nuer, 1930–83', *American Ethnologist* 19 (2): 294–316.

⁶¹ Pendle, "The dead are just to drink from."

⁶² Toby, Hellen and Nita Bhalla, "Facebook auction of South Sudan child bride could inspire other families: activists," (Reuters, 2018). Accessed at: <https://uk.reuters.com/article/us-southsudan-women-child-marriage/facebook-auction-of-south-sudan-child-bride-could-inspire-other-families-activists-idUSKCN1NI1II>

post CPA era, in courts in Lakes State, the Wathalel demand for payment of thirty-one cattle for marriage had become a minimum payment to secure legally recognition of marriage. However, to show that the girl was valued and that her family was respected, the bride groom's family was expected to offer much more and often at least double this amount.

In Lakes State in the post-CPA era, the fixed compensation rate for killing was thirty-one cattle. With the compensation rate equating to an offensive bride price, the payment of compensation did not solve the feud but encouraged a deepening antagonism. As compensation rates were fixed, these cattle were never enough to afford a good wife for the dead. This often resulted in disgruntled-relatives and extremely violent further revenge, sometimes including the targeting of whole families. When compensation seemed to be too small, the parties also often heavily criticised the Local Government for taking a cut through their significant fines and fees.⁶³

In response to these challenges, one Lakes State governor had increased compensation payments for killing from thirty-one to fifty-one cattle.⁶⁴ People continued to see the courts and compensation as a viable solution to end a feud if a reasonable amount of cattle could be agreed upon. The following section goes on to describe legal reforms in Lakes State and the declining power of the courts.

Legal reform in Lakes State

In 1997, during its ongoing war with the Sudan government, the SPLA captured Rumbek (the largest town in what became Lakes State). It already controlled much of the surrounding rural areas. Rumbek became the SPLA's headquarters in South Sudan and there were new judicial initiatives. After the CPA era, Lakes State and its capital, Rumbek, was one of the main areas in South Sudan to experience significant attempts at judicial reform. When the 2005 CPA was being signed, Rumbek was the capital of the SPLA-controlled areas of South Sudan. Therefore, at the signing of the CPA, the Headquarters of the Southern Sudan Judiciary and the Court of Appeal were in Rumbek. As well as the SPLA, there was a large UN and NGO presence attracting money and educated people to the city. The signing of the CPA prompted an influx of judges and advocates to Rumbek. While many went on to Juba when the capital was moved, Rumbek has continued to attract judges and international legal support. In every state in the new South Sudan there was meant to be a High Court. Rumbek hosted one of the most active High Courts in South Sudan. The geography of Lakes State also made it relative accessible (within a day's drive) for most of its residents for most of the year. As time passed, donors, UN agencies and NGOs also carried out various rule of law programmes.

⁶³ I am grateful for Lawrence Peter for his important suggestions for this section.

⁶⁴ Pendle, "Learning from customary law," in *The Struggle for South Sudan*.

As in other SPLA controlled areas across South Sudan, the SPLA had previously relied heavily on the chiefs' courts for local administration and justice. Chiefs' courts and their interpretation of customary law were the justice system in Lakes State. The influx of judges, and their support from internationals and the new government, brought unfamiliar competition to the chiefs' courts.

There was also an attempt to codify the customary law in Lakes State. For example, in 2010, the Lakes State Customary Act was adopted by the Lakes State Assembly with little public consultation or debate. The Act provided harsh penalties, including the death penalty for killing an 'educated and civilized person'. The Act gained particular controversy when it was used by the High Court to imprison for fourteen years young men who had impregnated girls. These cases did not involve accusations of a lack of consent. While chiefs' courts often previously heard cases of young men getting women pregnant before marriage, judgements had previously usually involved the exchange of bride wealth or fines in cattle. Instead Judge Geri Raimondo Legge applied the Penal Code, the Child Act and this 2010 Customary Law Act to come up with these rulings of prolonged imprisonment.⁶⁵ Young men felt aggrieved by these imprisonments both as it was a radical change in the law and because the rulings effectively favoured older, wealthier men. Unable to compete with a higher bride wealth against older men, younger men would often use elopement to secure marriage. As girls' marriage would often occur from puberty, elopement that waited until after seventeen would be too late. The governor and parliamentary speaker objected to the court's ruling.

After this, there were attempts to ease tensions between the judges and chiefs. For example, in 2012, while Chol Tong was governor, UNDP funded a National Customary Law Centre in Rumbek. One of the aims was to train the government on the customary law.

During this post CPA period, the High Court also became increasingly active in overturning cases from chiefs and other courts including cases about revenge and feuding. It became commonplace for the High Court in Rumbek to overturn the rulings of other courts, diminishing the authority of these courts. This brought new ambiguities as well as inabilities for the courts in Lakes State to enforce compensation and to guarantee justice. For example, in February 2008, the High Court ordered the release of forty-five detainees from Rumbek Central Prison after their charges were found to be without merit.⁶⁶ This lack of merit was based on evidential standards that were impossible to uphold in the realities of Lakes State. The ruling hinted at the potential impossibility of any conviction as evidence would never be possible to satisfy the High Court.

⁶⁵ Mayom, Manyang, "Lake state government criticized over customary law," (Sudan Tribune, 2011). Accessed at: <https://sudantribune.com/Lakes-state-government-criticized,38436>

⁶⁶ Human Rights Watch, "There is No Protection": Insecurity and Human Rights in Southern Sudan," (2009): 39.

‘The appeal court asked how we explain this case and brought the document. These people cannot sit again to settle the case. If people can appeal, then it causes confusion. And they will go back and revenge. Only the convicted will appeal’.⁶⁷

People started to lose their confidence that courts could provide justice, and instead revenge seemed more morally necessary.

2013 provides a further significant example when the High Court in Rumbek overturned a series of rulings by Special Courts. After fighting between two sections of the Kok Clan, then Governor Matur Chuot Dhuol had ordered the arrest of fifty men from each side ‘regardless of whether there was evidence they participated in the fighting’.⁶⁸ They were held at a military barracks. In February 2013, Human Rights Watch criticised the ‘rough justice’ being enacted in Lakes State.⁶⁹ The methods of arrest and detention undoubtedly violated statutory and human rights norms.

To avoid holding those in detention indefinitely, Dhuol sanctioned a Special Court composed of chiefs to try the cases. The Special Court was dominated by senior chiefs, and issued sentences including compensation and imprisonment.

The legality of these special courts was immediately contested by the judiciary because they had not been created by the judiciary and nor did the judiciary have oversight over the court. According to the 2008 it is legal to create ‘such other Courts or tribunals as deemed necessary to be established’ and the special courts have been repeatedly seen as within this category (Judiciary Act 2008, S 7. (f)). However, the Act also gives judiciary, and ultimately the Chief Justice, the power to form these courts. As the special court in Lakes had been formed by the governor, its legality was challenged.

The High Court went on to overturn many of the Special Courts’ rulings. There were various reasons given by the High Court for overturning the Special Court’s rulings. Some of these were procedural. The Special Courts were temporary courts and they had a specific time period to hear and rule on cases. When rulings occurred after the time period allocated to the Special Court, these rulings were overturned by the High Court. This tight application of procedure was part of the political game between the governor and the judiciary. These details in procedure created confusion between the clans and parties especially as few knew about these time limits or had experience of such time limits in courts. They saw the High Court overturning cases where there was relative

⁶⁷ Chief from Rumbek, UNMISS workshop in Rumbek, 3rd July 2013.

⁶⁸ Human Rights Watch, “South Sudan: ‘Rough Justice’ in Lakes State,” (2013). Accessed at: <https://www.hrw.org/news/2013/06/24/south-sudan-rough-justice-lakes-state>

⁶⁹ Ibid.

confidence in the party's guilt, sometimes even through their own confession. This reinforced notions that judicial justice was not available and that revenge was necessary and that the courts were simply a tool of the politically powerful.

Some cases from this Special Court were overturned for other reasons. For example, the Special Court had established that one man had killed another. The special court ordered the killer's family to pay compensation to that of the family of the deceased. However, the killer had been killed in another dispute by the time of the court case. After the special court ruled that the family of the killer should pay compensation, his family appealed to the High Court. The High Court said that the killer 'had been sentenced by death itself' and that crime was lax for reason of the person's death. The ruling that the family had to pay compensation was overturned. This angered the family of the man who had been killed, and left a state of feud between these families. It also undermined key judicial idioms in the chiefs' courts that utilised the collective responsibility of families to make peace.

There were also disputes about the evidence used. In Lakes State, as elsewhere, courts had long- practiced sending people to the *bany bith* (the spear master – a Dinka spiritual leader) to swear an oath as a method of establishing the facts. Other methods of evidence gathering used elsewhere, such as forensic science, were very far from being used in Lakes State. The Special Court in 2013 was sending some defendants and witnesses to the *bany bith* in Maper to testify. Many young men still feared the power of the *bany bith* and swearing in-front of him did often produce confessions. However, in 2013, the High Court with the encouragement of state ministers was overturning cases that had been sent to the 'kujur' irrespective of the other facts and merits of the case.⁷⁰

The Special Courts and the use of the court system by the governor was problematic. It fell short of many idealised standards. Governor Matur was often accused of siding with Kuei in the Rup-Kuei conflict. His son-in-law came from Kuei. In October 2013, he ordered the arrest of chiefs from Rup. One chief was apparently tortured. People accused him of using the justice system as part of his tools for revenge.

However, the way the judiciary responded by overturning cases created a particularly judicial ambiguity that prevented people having certainty in the outcome of legal cases. Chiefs' courts could no longer provide compensation with confidence, leaving feuds without resolution and effectively creating a context of a plurality of unend-able feuds. This uncertainty encouraged violent, self-help justice and entrenched these violent relationships. Plus, this repetitive ambiguity over the jurisdiction of the courts made for easy political interference.⁷¹

⁷⁰ Interview with minister, Rumbek, July 2013.

⁷¹ Interview with advocate in Rumbek, 2020.

Who appoints chiefs?

There was also a broader contestation about who were the legitimate chiefs. The 2008 Judiciary Act gives the Chief Justice the role of establishing payam and county courts (2008 Judiciary Act, S. 16) and the power to appoint judges. Chiefs' courts are not explicitly mentioned in the Act. The Judiciary Act also requires all judicial appointments to have LLB degree or equivalent qualification. If chiefs' courts appointments were included in this, then there would be a nationwide vacuum in court provision.

For a hundred years, the head of the local government had appointed chiefs. However, ministers in Lakes State interpreted these Acts to mean that the commissioners' appointments of Executive Chiefs to courts were illegal.⁷² Ministers argued that 'Everyone is supposed to protect the constitution.'⁷³ At a meeting with chiefs in July 2013 in Rumbek, one minister specifically said that the appointment of twelve Executive Chiefs to court in Rumbek North was illegal, an act against the central government, and that 'we must fight him'. These public contestations over the legitimacy of chiefs further undermined their power. People cited the constitution as if it was certain (even though it was ambiguous) to justify revolutionary shifts that diminished the power of chiefs courts, shifted the power to appoint chiefs from local government to central government, and that claimed that all court fees should be sent to the government in Juba (instead of acting as a salary for those who sat in the courts).⁷⁴

Confusion in the legal system and over legal authority has encouraged violence. As one chief described a decade before, 'Our problem is not the lack of law, but confusion in our system'.⁷⁵ As another chief said, 'Tension will always remain if justice is not seen to be done.'⁷⁶

⁷² Lakes State Minister, Workshop, Rumbek July 2013.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Rumbek Chief in Pankar Consultive Meetings, *Pankar Consultive Meetings: A Series of Two Meetings to Address the Rising Trend of Inter Communal Conflict in the Lakes Area of Bahr El Ghazal Region and Mvolo County* (Sudan Open Archive, 2002): 2.

⁷⁶ Ibid., 3.

c) Law During War

In 2012 and 2013, armed conflict started to escalate in Jonglei State and in Unity State. This followed previous rebellions after the 2010 elections. The significance of this violence became clear in December 2013 when fighting broke out in a barracks in Juba. This quickly divided the SPLA, prompted urban fighting in Juba, Bor, Malakal and Bentiu, and initiated years of fighting that would spread to other urban centres and many rural areas across South Sudan.

While law reforms have created uncertainty in the law in parts of South Sudan, legal norms have remained central to safety and governing. While international actors largely lost their legal interest after December 2013, for South Sudanese law remained prominent in their daily lives and experiences of public authority. What is striking is how quickly and actively courts are sustained or recreated in the midst of conflict.

Protection during crisis

As fighting escalated in South Sudan, hundreds of thousands of South Sudanese sought safety in the UN Protection of Civilian sites, in other camps and across international borders into Sudan, Kenya and Uganda. In refugee camps across the region, South Sudanese chiefs' courts were quickly set up. The remaking of chiefs' courts in recent displacements followed patterns in the 1980s and 1990s.

Since 2013, in the nascent PoC sites, chiefs' courts also emerged in the first couple of months of PoC site life.⁷⁷ The eruption of war was a vibrant moment for law. While sites of refuge provided safety from the growing armed conflict, PoC sites, IDPs and refugee camps also carried the potential of being unsafe spaces. South Sudanese recreated chiefs' courts to control violence and bring safety during displacement.

Plus, many South Sudanese have fled north to Sudan and were encouraged into refugee camps in Kosti and elsewhere. In Sudan, chiefs' courts were created by refugees with support from Sudanese police.⁷⁸ Only the most serious cases were referred to the main Sudanese judiciary. This mimicked courts among South Sudanese in northern Sudan during the 1990s. Other South Sudanese fled to East Africa, including to Kakuma Refugee Camp

⁷⁷ Ibreck, Rachel and Naomi Pendle, "Community Security and Justice under United Nations Governance: Lessons from Chiefs' Courts in South Sudan's Protection of Civilians Sites." *Stability: International Journal of Security & Development* 6, no. 1 (2017).

⁷⁸ Gatkett and Pendle, "He cannot marry her".

in Kenya. People who fled to Kakuma Refugee Camp (Kenya) were also governed by chiefs' courts in a system that referenced what was happening in South Sudan but that had also developed over Kakuma's own twenty-year history and in coordination with the Kenyan legal system.

Legal norms and institutions have also been used by communities to not only solve internal disputes, but to govern relationships with the armed groups. This is visible in the histories of SPLA-community relations in the 1980s and 1990s. Chiefs have often played a crucial role in community protection against occupying armed forces; their role has often been to mediate between and 'deal' with government in a broad sense.⁷⁹ From its formation in the 1980s, the SPLA often had a fraught and violent relationship with chiefs. At the same time, SPLA commanders relied heavily on chiefs not only for recruitment and material support, but also for keeping order in SPLA controlled areas. In the 1990s, as the SPLA's judicial institutions were formalised, the chief's judicial role was also formally included.⁸⁰ At a local level, chiefs often used their courts and the remaking of laws in order to provide protection to their communities from the SPLA. For example, in the 1990s, large numbers of SPLA were in Gogrial and made material demands on households and traders. Initially these demands were ad hoc, unpredictable and often enforced with violence. The chief instead introduced a tax, enforced by his chiefs' court, that appeased the demands of the SPLA and significantly reduced predatory attacks on the local civilian population.⁸¹

Continuity in crisis

There is a paradox at the heart of common descriptions of South Sudan. Wars have ruptured life in South Sudan, and brought turmoil and change. Armed conflict has brought physical, political and social rupture that seems too large to exaggerate. Millions of people have had family members killed. Hundreds of communities have been forced from their homes and land, and have now spent years in new homes and settlements. Life in South Sudan involves dramatic change and fluidity. At the same time, it is common to hear NGOs evoke ideas of South Sudanese 'culture' to explain behaviour that frustrates them as if culture was unchanging. Plus, perceptions that South Sudanese culture is timeless fail to notice the constant contestations and re-enactments of social norms. At the same time, South Sudanese also draw upon ideas of tradition to justify moral norms and sanctions.

⁷⁹ Leonardi, *Dealing with Government*.

⁸⁰ Monyluak Alor Kuol 1997, Alor Kuol, "The Anthropology of Law and Issues of Justice in the Southern Sudan Today."; Johnson, Douglas, *The Root Causes of Sudan's Civil Wars* (Oxford: James Currey, 2003); Rolandsen, Øystein H., "Guerrilla Government: Political Changes in the Southern Sudan during the 1990s." *Nordiska Afrikainstitutet* (2005); Leonardi, Cherry, "Violence, sacrifice and chieftship in Central Equatoria, Southern Sudan." *Africa* 77, no. 4 (2007): 535-558; Mampilly, Zachariah Cherian, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (New York: Cornell University Press, 2011).

⁸¹ Chirilo Madut Anei and Naomi Pendle, *Wartime trade and the reshaping of power in South Sudan: learning from the market of Mayen-Rual*. Nairobi: Rift Valley Institute, 2018.

The chiefs' courts have played a crucial role in producing a sense of continuity despite crisis. Even during conflicts, chiefs' courts have tried to offer resolution to disputes, compensation for loss and food for the hungry.⁸² This continuity despite crisis has allowed South Sudanese to challenge the repetitive liminality of conflict produced both by war and by the humanitarian demand for emergency.

However, this continuity has also muted the possibilities of social reform during turmoil. For example, sites of displacement often provide opportunities for young men and women to contest norms that restrict them. For example, in the PoC sites, there have been an unusually large number of women seeking divorce and contesting the enforce patriarchal systems that confine them. Many young men have also asserted their rights to marry without cattle, giving them greater freedom and less reliance on male elders. The chiefs' courts and their authority have played a significant role in contesting these possibilities for change.

⁸² Newton, C. et al. (2021) Chiefs' courts, hunger, and improving humanitarian programming in South Sudan. London: London School of Economics and Political Science. Available at: <http://eprints.lse.ac.uk/108930/>.

Recommendations

1. Paying attention to the law is central for peace, protection, safety and security

Authorities in South Sudan repeatedly govern through the law and paying attention to these legal realities is essential for understanding leaders and communities' political hopes and experiences. It is also essential for understanding how South Sudanese try to stay safe and build peace.

2. The UN, NGOs and donors must be honest about South Sudanese legal realities.

Repeatedly foreigners have opted to imagine South Sudan as a blank slate or an idealised context in which distant notions of human rights and foreign evidential standards can easily be recreated. However, South Sudanese legal institutions, norms and authorities have a long history. Plus, these legal histories and processes have continued through times of war. Therefore, legal programming, including those that aim to build the rule of law, are legal reforms and are often a radical shift in legal authority and norms. Radical, fast changes in the law dangerous uncertainties, frustrations conflict and violence.

3. Legal reformers ask if (in practice) they will create legal uncertainty and a lack of non-violent justice options.

Legal reforms can result in *ad hoc* legal changes that are limited not permanent but that undermine the authority of more established legal institutions and norms. A lack of legal certainty that is created by radical legal reforms can remake revenge as a moral necessity increasing violence and armed conflict.

4. Supporting paralegals and chiefs' forums has facilitated gradual legal reforms

South Sudanese legal institutions and norms are not all inclusive and some entrench militarised and gendered inequities. Supporting paralegals and chiefs' forums have been one way to encourage gradual and, therefore less risky, legal evolution and reform. Both these methods invest in local South Sudanese actors, lawyers and activists who have a nuanced understanding of the existing legal context and who understand the significance of the reforms that they are advocating for.

PART TWO

Law reform after peace
– a legal analysis of Koch County
(Unity State), 2020 – 2021.

In the context of reduced armed conflict, there has been a push by the UN and others to ‘restore’ rule of law. For example, in August 2017 in Malakal, the refurbished Malakal courthouse was reopened.⁸³ For internationals, R-ARCSS appears to have remade the South Sudan government as a legitimate partner to work with. This restored support for the South Sudan government and potential of the state is encouraging a return to various post-CPA programmes including a renewed discussion of rule of law programming. Plus, UNMISS and UNHCR are actively encouraging ‘returns’. For places to be safe enough to encourage people to move, there must be legal certainty and access to justice.

As above, law has continued to be used and to be of utmost importance during recent years of war. However, these last years have left a complex legal arena for legal engagement and support. The following example of Koch County, central Unity State highlights the importance of the law and the accompanying complexities of reform in South Sudan including rural South Sudan.

The Context of Koch County (Unity State)

Central Unity State, including Koch County, is strategically pivotal to national political dynamics in South Sudan. For example, the 2018 peace deal between the government and Riek Machar’s SPLA-IO (SPLA-IO RM) was partly made feasible by the promise of the resumption of oil production in Unity State. The strategic importance of oil has meant that Koch County has seen repeated episodes of violence and has been fought for by the various warring parties, including, in the last decade, the government, the SPLA-IO RM and, during 2016 and 2017, Taban Deng’s SPLA-IO (SPLA-IO TD). Leer County, to the south of Koch County, being the birth place of Riek Machar has also made this central part of Unity State symbolically important.

The importance of Koch County and central Unity State is nothing new. In the late 1970s, oil was discovered in central and northern Unity State. War broke-out between the Sudanese government and the Sudan People’s Liberation Army (SPLA) in 1983, and the 1990s saw a renewed Sudanese government effort to access this oil. The early 2000s saw the pipeline established down to the Tharjath oilfields (Koch County) and the start of the exporting of this oil. The oilfields were secured from rebels and other insecurity by pro-government militia who were based in Mayom County (Unity State). These pro-Sudan government militia who became the South Sudan Defense Forces (SSDF) had their origins in forces who fought against the Sudan government. Their leadership had fought for Southern independence in the 1960s and 1970s, and rebelled against the Sudan government again in the early 1980s. However, after the formation of the SPLA, they opposed the SPLA’s brutal leadership of the southern rebellion and gained Sudan government support for this opposition.

⁸³ Adongo, Janet, “Rule of Law Restored in Malakal,” (UNMISS, 2017). Accessed at: <https://unmiss.unmissions.org/rule-law-restored-malakal>

Riek Machar led the SPLA in Unity State for part of the 1990s, violently opposing and trying to control forces that would later become the SSDF. Riek Machar rebelled against John Garang's leadership of the SPLA in 1991, but Riek Machar never formed an alliance with the SSDF despite their shared distrust of Garang. In the late 1990s, Riek Machar, like the SSDF, were both funded by the Sudan government but the Sudan government encouraged antagonism and not unity between its partners. Communities and individuals in Unity State were split between these pro-SSDF and pro-Machar loyalties and experiences of governance.

This Sudanese politics encouraged the SSDF to accept support from Khartoum to clear away the SPLA, Riek Machar's forces and associated communities from the oilfield security.⁸⁴ This created a large-scale Nuer civil war.⁸⁵ During these pro-government raids into central unity, extreme violence was used including against civilians, encouraging displacement. Soldiers were often also forcibly recruited creating new ruptures in wartime practice such as brothers fighting brothers.

The divisions in Unity State were visibly portrayed in the 1997 election for Unity State Governor.⁸⁶ At the time, the ruling party in Khartoum backed the SSDF figure of Joseph Nguen Monytil for Unity State Governor. Riek Machar instead backed Taban Deng Gai as Governor. Taban won the governorship in 1997 and again in 2010. Joseph Monytil became Governor in 2013 after President Salva Kiir dismissed Taban. These divisions and contestations for control of Unity State continue.⁸⁷

In 2005, the SPLA signed the CPA with the Sudan government. In 2006, the SSDF signed the Juba Declaration with the SPLA, bringing these forces into the SPLA. Despite this peace, deep social and spiritual divisions remained among the people of central Unity partly as a consequence of this violence of the late 1990s and early 2000s. Furthermore, the military divisions in Unity State during this time left a vacuum in the opportunity to solve grievances between families. Chiefs repeatedly explained the need to wait until the end of the war to resolve grievances.

After the signing of the CPA, chiefs in central Unity State including Koch came together to solve serious cases and grievances that had been suspended because of the wars. Chiefs from different counties sat together to solve hundreds of cases. However, the local government in Unity State often lacked authority to enforce such rulings. Local government leaders were often figures who had fought against the same communities that they now

⁸⁴ Craze, Joshua, Jérôme Tubiana and Claudio Gramizzi. *State of Disunity: Conflict Dynamics in Unity State, South Sudan, 2013-15*. Switzerland: Small Arms Survey, 2016; Gagnon, Georgette and John Ryle. *Report of an Investigation into Oil Development in Western Upper Nile*. Canadian Auto Workers Union; Steelworkers Humanity Fund; The Simons Foundation; United Church of Canada, Division of World Outreach; World Vision Canada, 2001.

⁸⁵ Johnson, *The Root Causes of Sudan's Civil Wars*.

⁸⁶ Craze et al, *State of Disunity*.

⁸⁷ Craze et al, *State of Disunity*.

governed. There was a lack of trust. In Unity State, the governor Taban Deng also often appointed educated commissioners with little or no military experience which communities often resented.

Plus, engagement with the High Court in Bentiu was minimal. Bentiu was days of travelling away and court cases that were heard in English or Arabic immediately alienated parties. In this context, the local government and chiefs were struggling to provide judicial redress.

The violent enacting of resulting feuds was dragging many youth into violence and protracted experiences of insecurity as they carried out and hid from tit-for-tat acts of revenge. New, large-scale raids from neighbouring states were also encouraging the youth to demand an end to internal feuds and division.

As violence grew, Nuer prophets gained authority by providing justice and settling feuds. Nyachol is a prophetic figure who was seized by the divinity of MAANI in Mayendit Country in 2010.⁸⁸ Nyachol quickly became popular among the armed youth as she offered the ability for families to reconcile their differences and end the feuds between them. She did this by offering legal resolution by hosting an *ad hoc* but popular court in her *luak*. Cases that could not be solved by the chiefs were brought to her, sometimes at the specific referral of the chiefs. Her divine authority and ability to detect *nueer* – pollution that could result from killing – gave her authority that was lacking in the government courts.⁸⁹ Galuak Gatkuoth in Leer also took on a similar, quasi-judicial role.

Historically the Nuer prophets had not claimed authority through adjudicating the customary law in this same, direct manner. However, since the mid 20th Century, some prophetic lineages in Unity State had taken chiefly authority, merging these roles. Plus, the post CPA Nuer prophets were eager to fill the vacuum of justice provision.

In Koch, the prophets of MAANI were the most powerful prophetic figures. This included Kolang Ket and his daughter, Nyaruac Kolang, who died in the mid 1970s.⁹⁰ In recent years, the family of Nyaruac have refused to recognise that Nyachol has been seized by MAANI and are still waiting for the next prophetic seizure by MAANI. However, among the descendants of Nyachol remain figures with divine power. This family has also provided senior chiefs in Koch and some of the most powerful chiefs in Unity State.

The merging of divine and chiefly powers in Koch in the family of Kolang Ket is controversial. Many chiefs and elders in Koch now speak of being disgruntled that this family has such a significant concentration of power.

⁸⁸ Hutchinson, Sharon and Naomi Pendle, “Violence, legitimacy, and prophecy: Nuer struggles with uncertainty in South Sudan.” *American Ethnologist* 42, no. 3 (2015): 415-430; Pendle, ‘Politics, prophets and armed mobilizations’.

⁸⁹ Ibid.

⁹⁰ Riek, Jedeit J. and Naomi Pendle, *Speaking Truth to Power in South Sudan: Oral histories of the Nuer prophets* (The Rift Valley Institute, 2018).

They also describe being afraid to contest this concentration of power in case MAANI punishes them for objecting. In the late 1990s, aware of this tension, Riek Machar's administration divided Koch County into three, limiting the reach of this family's chieftaincy to just one third of the county.

Since 2013, the counties of Koch, Mayendit and Leer have been confronted by some of the most extreme violence during the armed conflicts since 2013. Pro-government attacks into southern Unity in 2015 and subsequent years killed thousands, took cattle, destroyed crops and homes, and forced mass displacement. People ran to the swamps and other areas far from the road. In 2015, large numbers travelled to Bentiu UN PoC site. Others continued to Sudan. Those who had more means also travelled to Juba and East Africa.

By 2015 clear patterns of control had emerged in central Unity. Government and pro-government forces controlled the northern parts of Koch and some of the urban centres in central Unity including Leer Town and Mayendit headquarters. The SPLA-IO controlled many of the rural areas and had significant bases in smaller urban centres such as Miirmiir and Tochriak. They controlled southern areas in Koch around MiirMiir. Miirmiir became a significant SPLA-IO based in Unity State not only governing Koch but housing various commanders and soldiers operating in the region.

The 2018 Revitalized Agreement on the Resolution of Conflict in South Sudan (R-ARCSS) signed in September 2018 brought hope of peace. However, uncertainty remains over the realities of local power sharing and whether this can be peacefully implemented. The 2021 appointment of the new government commissioner in Koch has only brought further uncertainty. The appointed commissioner had headed large-scale offensives against southern Koch, Leer and Mayendit during the war years, and trust will be hard to rebuild. Plus, revenge killings continue to bring fear and disrupt life especially as humanitarian workers have become of target of revenge killings. Furthermore, the division and reunification of countries since 2015 has enhanced land tensions and conflicts.

a) Chiefs, authority and safety against armed groups

Chiefs, as other legal actors, have to establish and maintain their authority in order for their rulings to result in compliance and for them to have power to settle feuds. Chiefs often draw on various different personal histories and skills to establish their authority. For example, as discussed above, people in Koch have repeatedly been confronted with violence by armed groups. This includes during offensives as well as the predatory behaviour of occupying armed groups. One of the key ways over time in which a chief gains authority in the community is through negotiating safety and ruled governed relationships with occupying armed groups. This was the case with the SPLA in the 1980s and 1990s, and with the government and SPLA-IO in recent years. They have negotiated safety through asserting legal and rule governed relations between soldiers and communities.

Below are three examples of how contemporary chiefs in Koch became chiefs.

Example - Chief Marco

Marco was born in 1961 in Kuachlual Payam. He grew up to become a youth leader who was responsible for overseeing the distribution of food at the cattle camps. He handled related disputes between youth. In 1989, he was then appointed as a community chief in recognition of his fairness in food distribution, and his system of prioritising food for guests at the camps. He was also lauded for never leaving injured youth behind during battle. He was appointed as a strategy to unite two communities who had been in conflict. On the week of his appointment, people from his community carried out an attack on the other community and killed six people. He was angry with his community and refused to leave the area until he had helped respectfully bury those that his own community had killed. He arrested those responsible for killing and handed them to the government, which was then Riek Machar's SPLA. He was appointed as head chief for his community in 1997.

Example - Chief Isaac

Chief Isaac is Head of the Mobile Court in SPLA-IO controlled areas in Unity State. His story of becoming a chief is a good example of how authority is built through the ability to broker law governed relationships between armed groups and the community.

Isaac was born in the 1960s in Mayendit County and, when a youth, was initiate in Leer County. His father was not a chief but was a community leader who would settle disputes. His uncle was also an important spiritual leader who had the power to protect cattle. When he was a young man, he joined the SPLA and, after training, he was deployed back to Unity State.

In August 1985, in the SPLA-controlled areas in Unity State, the SPLA initiated new elections for chiefs. At the time, the chief was Tap Liep who had been chosen by the community. Chief Tap ran again in the 1985 elections. Some soldiers also wanted to compete to be chief. An agreement was made between the SPLA and local leaders that the chief could be either soldier or civilian, but they had to be from the local area. Isaac won partly as he could claim to belong to both Leer and Mayendit communities. People also were glad that Isaac bridged the gap between the community and the SPLA.

The relationships between the SPLA and community were particularly tense at the time. One SPLA officer had been particularly brutal against the community. Isaac was able to handle this through his relationship with the SPLA and his ability to persuade them that they should comply with local laws. He awarded compensation to various families in the communities for the rough treatment at the hands of the soldiers.

When the SPLA-IO formed its legal and administrative structures in 2014, Isaac was the fourth most senior chief in central and southern Unity. He became head of the Mobile Court after the other three died or became inactive due to age. Chief Isaac has won elections to be chief four times.

Example - Chief James, Gany Payam

James was born in 1973 in Gany Payam and first gained leadership responsibility when he was appointed as a youth leader. Annually, during cattle migrations to pasture, those in the cattle camps move a distance from the chiefs. This is as the cattle camps are generally seen as being spaces for young men, women and children, and not elders like chiefs. In their absence, youth leaders are appointed to resolve small disputes that can be settled without moving back to the chiefs. James was given particular responsibility for monitoring borders between different groups of youths, ensuring that they only grazed and fished in areas allocated to them. In 2000, as he became an older member of the community, he was appointed chief of Kuey clan.

The years of war have challenged the authority of elders, chiefs and Nuer law. Some of this is because the youth have been armed by the government and SPLA-IO during the war years.⁹¹ Plus, new social structures and practices have emerged. The chiefs' legitimacy is heavily reliant on the acceptance of the authority of older community members (such as the chiefs themselves) and the Nuer customary law. Yet, these things are being challenge.

For example, control over initiation into adulthood for men has long been a key expression of authority in the community. Initiation indicates transition into a period of militarized responsibilities and status among the community. Even in the late 19th Century, prophets in Koch tried to establish their authority by controlling when initiation occurred.⁹² Since 2015, in the midst of war, youth started to be initiated without their father's and elders' consent. This system gained the name 'Ngerdor'.⁹³ The chiefs have declared Ngerdor illegal, but its continued practice challenges their authority.

The chiefs are often also closely associated with the government-type power, whether this is the power of the South Sudan government itself or that of rebel groups, such as the SPLA-IO. This makes the chiefs' legitimacy ebb and flow with the legitimacy of government. For example, the head of a C Court in a government-area was appointment by the commissioner of the time without consultation among other chiefs or the community. His authority was heavily reliant on that commissioner retaining power in Koch.

⁹¹ Chiefs, Koch, January 2021.

⁹² "Prophets of war or peace?" Report for Rift Valley Institute's Customary Authority Project in Juba. Co-authored with Jedeit Jal Rick.

⁹³ Chief, Koch, January 2021.

At the same time, chiefs' courts in Koch are repeatedly busy and are able to provide justice in hundreds of cases. They regularly hear cases of elopement, divorce, unpaid debts, theft and misappropriation of money or property. With the exception of the Nuer prophets, they remain the only justice provision in Koch County.

The chiefs' courts also hear cases of murder and accidental death. Murder is sadly common in Koch. For example, in Koch County in September and October 2020, a total of eight people were killed extra-judicially. The chiefs' courts are the only courts accessible for people to seek redress of these serious grievances. Without the option for judicial redress and the exchange of compensation through the courts, most families would feel the need to seek violent revenge. Therefore, the chiefs' courts are active in publicly and expeditiously solving these cases of extra-judicial killings in order to prevent an escalation in intra-community violence.

During cases, experienced chiefs often lead the in-court questioning and investigations. Some chiefs show incredible skill and knowledge when questioning the parties in the case. Their deep knowledge of the social context helps this questioning.

In Koch, the chiefs apply a combination of customary laws, rely heavily on established precedent and sometimes also reference statutory laws. The Fangak Laws date back to the early 20th Century and chiefs' meetings during the Anglo-Egyptian Condominium. In most cases, chiefs claimed that the legal norm they applied was part of the Fangak Laws. The White Book Laws are revisions to the Fangak Laws that were made by Riek Machar in the 1990s. In government, controlled areas, the Wangkech laws are applied in cases of murder, grievous bodily harm and other serious crimes. Wangkech increased the scale of compensation for many of these serious offenses. For the most serious offenses chiefs also issue prison sentences of five to eight years without necessarily referencing the law to justify this.

Chiefs' court rulings are not always accepted. For example, chiefs in Koch in late 2020 described how they even sometimes moved the court location when they feared that prisoners who had disliked their judgements and had been released would take revenge. Plus, chiefs are not seen as detached from their clan identity but are still fundamentally part of these communities. Therefore, chiefs themselves can also be targets of revenge killings in response to acts of violence carried out by someone in their clan. For example, a man from Gany Payam (Koch County) killed an important person in SPLA-IO controlled Mirmir. The killer was a relative of William, the former head chief of Bhang C court. Therefore, the deceased's relatives decided to carry out revenge by targeting Chief William. At the time, he was promoted to Koch C Court. Because of this threat of revenge, he was allowed to carry his gun. The chiefs' court also agreed to move closer to the police station in Koch Town for his safety.

At the same time, many chiefs gain their authority when they are able to settle murder cases and conflicts, and bring feuds to an end. Chiefs narrate over time how they have bought peace by insisting on the exchange of blood wealth between families.

The problem of a lack of detention

Chiefs described how a major challenge for their attempts to assert their legitimacy was the arbitrary release of people they had sentenced to serve time in prison.⁹⁴ One chief described how he had convicted a cattle raider to six months in prison after he was found guilty. The chief ordered that he be sent to Bentiu prison for detention. However, in less than four day, he was released from the Koch detention facility and never reached the Bentiu prison.

As one chief from a government-controlled area described, ‘As per Wangkech customary law of 2017, we have convicted and sentenced those who have committed rape, defilement, murder and cattle thefts and sent them to Bentiu for detention. But some of them are illegally released as soon as they arrive in Bentiu’.⁹⁵

One youth representative responded to the chief, ‘I think the issue of releasing prisoners before completing their term in the prison may be because the chiefs here in Koch are sending them to detention facilities in Bentiu while no budget is being given to those in charge of prison from the South Sudan Prison Services. Therefore, maybe, these prison officers make a deal with the prisoners to pay in cash in order that they do not keep them in prison for long time’. The chiefs thought that the youth leader was probably right.

The release of prisoners did not only undermine the power and authority of the court. The chiefs also were afraid to rule against the youth as a result. Their imprisoning of youth acted against these youth, and their rapid release meant that they were quickly free to act and threaten the chiefs. The youths were angered by the chiefs’ detention of them, but then empowered by the government releasing them. They had proved their effective immunity.

Whatever the reasons for prisoners being released when they are sent to the state judiciary, or perceptions that they are, this is undermining trust both in the statutory and chiefs’ courts. A decade of investment in prisons in South Sudan by international actors has not provided a system of predictable detainment. International actors must be honest about this reality and appreciate the ways that chiefs are trying to provide justice despite this.

⁹⁴ Discussions by World Relief legal expert with chiefs in Liech and Gany Counties, August – October 2020.

⁹⁵ Discussions by World Relief legal expert with chiefs in Liech and Gany Counties, August – October 2020.

b) Governing through law in war

As the SPLA-IO coalesced in Unity State, this rebel group followed the historic patterns of the state and used law as a key tool for governance. While rebel groups oppose the government of the day, it is common for them to draw upon state-like repertoires to build their own authority.⁹⁶

In December 2013, James Koang (originally from Upper Nile) was commander of the SPLA's Division 4 in Bentiu. He rebelled against the government a few days after the killing of civilians in Juba. Opposition and government forces carried out a series of battles over the town but the opposition was eventually pushed out of Bentiu and south into areas around Koch, Mayendit and Leer. At the time Peter Gadet (originally from Mayom, Unity State) was Division Commander in Bor and also rebelled against the government. As the SPLA-IO drew together around the leadership of Riek Machar, Gadet was sent to government opposition forces in Unity State.

On taking command in Unity State, one of Gadet's first initiatives was the formation of a Unity State appeals court. The court was comprised of senior chiefs from different areas under opposition control, and heard cases from across these areas that were referred to it by more junior chiefs. This chiefs' appeal court promised to create a sense of unity and order among SPLA-IO controlled areas.

The SPLA-IO Mobile Court involved a useful hybrid of well-respected chiefs and a trained lawyer. They sat together and, while the lawyer made the final decision, the chiefs sat with him, advised on the ruling and the lawyer never dismissed their suggestions. Chiefs narrated this cooperation as unique to the war years but incredibly fruitful for being able to create peace.

The IO appeals court was disrupted by large-scale government raids in 2015. However, by 2020, chiefs had reformed and were based in Miirmiir in southern Koch County. They were also working with a senior, experienced lawyer and they were collectively adjudicating on cases.

In SPLA-IO controlled areas, the Mobile Court oversaw a wide variety of serious cases from SPLA-IO controlled areas in Unity State. They heard appeals from all courts in the area, and they heard murder cases. They also heard

⁹⁶ Hoffman, Kasper and Koen Vlassenroot, "Armed groups and the exercise of public authority: the cases of the Mayi-Mayi and Raya Mutomboki in Kalehe, South Kivu." *Peacebuilding* 2, no. 2 (2014): 202-220.

cases in response to inter-community conflict, including conflict between Bul and Leek, Leek and Nyikany, Jegai and Leek, Jegai and Haak, Dok and Haak, Nyuong and Haak.

At the same time, many of the orders of the court made during wartime were clear that they should only be executed in peacetime. The Mobile Court has ruled on numerous murder cases and has kept records of these rulings. However, they repeatedly allowed the defendants to delay payment of compensation until peace returned. This period of emerging peace will bring various demands for this compensation and likely more court cases and tensions when payments are delayed.

The implementation of compensation can also be a real struggle for chiefs across all of Koch. Many chiefs end up personally paying compensation for their community members to prevent a murder escalating into an inter-community conflict. Recent years have also seen the dramatic redistribution of cattle through raiding backed and armed by warring parties. This means that some are now able to pay compensation with little consequence to their wealth, while others cannot access this opportunity to bring peace. Raiding without judicial redress does not only bring inequities in wealth but also in access to justice and peace.

c) Displacement and dealing with a plurality of legal orders

As violence increased in Koch over the following years, some families remained and some fled. Those who fled sought safety in the Bentiu Protection of Civilian site (PoCs), in refugee camps in Sudan, in cities in Sudan, in Juba and its PoCs, in Kenya and in Uganda. Wherever communities congregated, repeatedly people set up chiefs' courts to help keep order and build a new sense of community.

Repeatedly these courts referred to the Nuer customary law as their source of legal authority. At the same time, as laws are a process and are not static, they evolved in different ways in these different sites of displacement. For example, in the Juba PoC site there was a joint appeals court that was hearing cases from across all Nuer regions and merging differences.

Across opposition aligned communities, there was some coordination between the chiefs' courts. For example, in 2015, when more communities fled to the Bentiu PoC site, many chiefs from opposition-controlled rural areas took on chiefly roles in the PoC site. The courts in the PoC site also occasionally sent instructions and letters to courts in rural, SPLA-IO controlled areas. After the 2018 peace agreement, a new senior court in opposition-controlled Dingding was formed. This allowed cases from the PoC site to be sent to this opposition-area court.

In government-controlled areas of Koch, law also changed for people who had remained and not fled. In 2017, in an UNMISS sponsored meeting, various chiefs gathered in Wangkech (Mayom County, Unity State). Following historic patterns of law reforms, the gathering of chiefs and government officials reformed some of the details of the customary law including changing compensation rates in the chiefs' courts. This increased the consequences of killing and the burden of compensation, but it pulled compensation rates out-of-line with those in SPLA-IO controlled areas.

This wartime plurality of laws provides the dilemma of how to reconcile these systems if and when communities come together in new ways. Closely linked to this is the questions of which chiefs will retain their authority if local government systems are merged. According to arrangements made under the R-ACRSS transitional government, the government will control the local government authority in Koch. The existing chiefs in government areas have a variety of personal histories and political affiliations. At the same time, in 2019 and 2020, Miirmiir, in southern Koch, hosted significant leadership figures from the SPLA-IO and the chiefs' appeal

court had moved to this area. These chiefs claimed to be more senior chiefs than those in government-held areas, with long histories of being chiefs. Many asserted their authority by giving the example of their attendance the 1999 Wunlit Peace Meeting.

In 2021, the commissioner appointed new chiefs in Koch and excluded the chiefs in SPLA-IO areas, including previously senior chiefs. These chiefs and other leaders in SPLA-IO areas refused to accept these appointments. Plus, communities in SPLA-IO areas see chiefs in government-controlled areas as instruments of a predatory state and county administration. It is unclear how these chiefly hierarchies will be integrated and whether these tensions can be solved without violence.

At the same time, chiefs in Koch narrate long experience of reunifying legal systems after conflict, displacement and divisions. The post 2005 CPA period was given as an example. During this time, communities and chiefs returned, and areas of administration were reunited. At this time, the government organised chief elections to allow the communities to select the head chiefs in each reunified area.

d) Law during returns

The legal system itself is also a method to resolve other dilemmas that emerge in the community during return. Observations in chiefs' courts in Koch in 2020 and 2021 make it clear how central chiefs' courts are in order to enable peaceful returns. Periods of displacement are often understood as periods of exception when usual obligations are suspended and paused until people return home. As people come back from Khartoum, Bentiu PoC site and Juba to Koch, many promises made during displacement are now being implemented. When they are not, people seek judicial redress. The chiefs play a key role in deciding when this period of exception has ended, and when those who obligations to others should now seek to fulfil these promises and legal obligations.

For example, in December 2020 in a case in Kuachlual chiefs' court, the claimant described how he had allowed the defendant to elope his sister when they were refugees in Khartoum. However, on their return, the defendant had not paid. The defendant argued that things were so different now in South Sudan that he could not be expected to pay. The court ruled that a divorce should be granted, the defendant should pay three cattle to his ex-wife's family and one cattle as a fine. Both families accepted the ruling and emphasised that there was no enmity between them.

In another example, on the 15th January 2021, one man brought another man to the Town Court in Miirmiir over unrepaid money. The claimant had lent 350 USD to the defendant in 2015 and then the defendant had disappeared. The defendant described how he had gone to Khartoum in 2015 as planned. Then, because of the war, he could not return until now. He could not even communicate. The court ruled that the defendant should be forgiven for his absence as the conflict had kept him away, but that he should return the 350 USD within seven days.

The chiefs' courts have shown a willingness to take account of the reality that life and economic resources are still now fully restored.

For example, on the 6th January a father-in-law took his son-in-law to court in Kuachlual for failure to pay the bride wealth. In 2017, his daughter had met this man while they were both refugees in Sudan. She had become pregnant. At the son, the man paid her father 7000 SP and promised 35 cows when they returned to South Sudan. This allowed their marriage. However, now, although they had returned to

Koch, the son-in-law had failed to pay the bride wealth. The defendant said that he currently could not afford to pay and only had ten cows available. The court gave the defendant seven days to pay these ten cows, and then urged the father-in-law to be patient and wait for the rest.

Law, Land and Return

Wartime and the returns after war create incredible complexity around land and property that can challenge hopes of peace.⁹⁷ People dispute whether wartime changes and dynamics should have a bearing on who owns pieces of land when peace returns. In Koch since 2013, there have been multiple waves of displacement, as well as the looting and destruction of property. A survey of nearly four hundred households in Koch in 2020 by Matthew Pritchard and David Deng reported that 93% of those households interviewed had been displaced from their homes on at least one occasion between 2013 and 2018.⁹⁸ Drawing on their 2020 research, Pritchard and Deng described how land and property related dilemmas have ‘reduced incentives for large-scale sustainable returns and undermined livelihood security and socio-political relations within and between different section-based territorial polities. Most importantly, data collected throughout the course of this study demonstrate significant shifts in the HLP rights of people residing in Greater Koch. Some of these impacts are unintended consequences of the underlying conflict, others are deliberate efforts at population control by individuals and groups in positions of power.’⁹⁹

As armed conflict reduced post 2018, people started to move to Koch. Many people who were returning to Koch wanted to live in more urbanised centres to access services and greater physical security.¹⁰⁰ Many people in Koch have ended up living on others’ land. In Pritchard and Deng’s study, 92% of IDPs admitted living on land owned or held by someone else, with only 49% of these people saying that they had permission. The vast majority of those with permission were on the land of family members.¹⁰¹

The demand for land in urban spaces has come at a time of proliferation in urban spaces. There have also been new or enlarged administrative centres as a result of the proliferation of local government-like authorities in Koch, each of which had a different administrative headquarters. The SPLA-IO developed its administration in Miirmiir. Plus, in 2016, when the government increased the number of counties, government held Koch was divided into

⁹⁷ Jon Unruh, Emily Frank, and Matthew Pritchard, *A Digital Advance for Housing, Land and Property Restitution in War Affected States: Leveraging Smart Migration*, 6 International Journal of Security and Development 1-17 (2017); Badiey, Naseem. *The State of Post-conflict Reconstruction : Land, Urban Development and State-building in Juba, Southern Sudan*. 2014.

⁹⁸ Pritchard, Matthew and Deng, David, February 2020, *Rapid Assessment of Housing, Land and Property (HLP) Issues in Greater Koch, South Sudan*, Danish Refugee Council, Unpublished, p. 12.

⁹⁹ Pritchard, Matthew and Deng, David, February 2020, *Rapid Assessment of Housing, Land and Property (HLP) Issues in Greater Koch, South Sudan*, Danish Refugee Council, Unpublished.

¹⁰⁰ Pritchard, Matthew and Deng, David, February 2020, *Rapid Assessment of Housing, Land and Property (HLP) Issues in Greater Koch, South Sudan*, Danish Refugee Council, Unpublished, p.13.

¹⁰¹ Pritchard, Matthew and Deng, David, February 2020, *Rapid Assessment of Housing, Land and Property (HLP) Issues in Greater Koch, South Sudan*, Danish Refugee Council, Unpublished, p.22.

Liech and Gany Counties. Liech County headquarters was in Koch Town and Gany County headquarters was in temporarily (while the SPLA-IO controlled areas to the south) in Bhang, just a mile south of Koch Town. At this point, people returning to Greater Koch and those living in Koch Town whose families and ancestors were associated with the areas that now fell in Gany, faced pressure to relocate to Bhang.¹⁰² This was part of the government's making of the new county. Yet, this often forced people to abandon property and move to an area with few services. In February 2020, President Kiir then returned to a ten-state system, reinstating Koch Town as the headquarters of the whole of Koch. These shifts have complicated people's perceptions in the value of land and their strategies to settle back in Koch.

The complexity of these new significant administrative centres comes as they shift the nature of land and its ownership. This was especially the case in Gany County when people were encouraged to move to Bhang, remaking Bhang into a new, administrative, quasi-urban hub. Since the Anglo-Egyptian Condominium period in the early 20th Century, the nature and law that governs land in urban centres has been distinction from the nature and law that governs land in rural chiefdoms. In urban centres, the land is often seen as 'government land' and is administered by the government often through ownership of survey, documented, individual plots. The temporary creation of a county headquarters in Bhang prompted the commissioner to assert the land as that of the town and government, significantly changing rights over the land and depriving many of previous rights. The ending of Bhang as a headquarters has further remade ambiguity over the nature of land in this area.

The chiefs' courts have taken a pragmatic approach to their jurisdiction over land disputes. At a national level, land governance can seem haphazard and is still under development. R-ARCSS explicitly calls for a review of the national land policy.¹⁰³ Yet, the reviews and developments of land policy in the post Comprehensive Peace Agreement era did not provide certainty for most South Sudanese over land rights. In this complex and shifting national landscape of land law, the chiefs have long assumed jurisdiction to try to assert some certainty and some option for judicial settlement of land disputes.

The main land disputes that reached the chiefs' courts in Koch were over land in the vicinity of the major settlements of the county. The chiefs in Koch have repeatedly framed the wartime as an exceptional period, where legal rights over land were not acquired. This post-2018 period of peace and return was then a time to return the situation to the 'normal', pre-time order. Therefore, pre-wartime owners were repeatedly able to reclaim their land as long as they could provide witnesses or papers to prove their ownership. Sometimes the witnesses were the chiefs themselves if they were from the area and knew the families and land well. At the same time, the chiefs did not just uphold rights to family land, but also enforced rights to individualised, purchases plots. For example:

¹⁰² Pritchard, Matthew and Deng, David, February 2020, *Rapid Assessment of Housing, Land and Property (HLP) Issues in Greater Koch, South Sudan*, Danish Refugee Council, Unpublished, p.15.

¹⁰³ R-ARCSS, Ch. IV, Art. 4.8.2.1.

On the 1st February 2021, a man brought a case to the Kuaclual Chiefs' Court accusing another man of building a *tukal* on his land. The claimant had bought the land in 2007 for 7000 SSP. The claimant fled to Khartoum in 2013. When he returned, he found that the defendant had built a house on his land. The court ruled in the claimant's favour and told the man to evict the site.

While this upholds pre-war land rights, it can cause dilemmas for those returning. Many of those who have settled on others' land have done so as they have returned to Koch and believe they have no other land to go to. Some previously lived in more rural areas. Yet, after nearly a decade in urban centres such as the Bentiu PoC site, they have no desire to return to rural areas. These are no longer their 'homes'.

Furthermore, there is no clear record or set of conditions through which ownership can be established. The chiefs were not content with evidence that land had been paid for unless it was clear that the person who had received their money actually owned and had the right to sell the land. Land surveys have often been informal and administrators or local officials have charged for the allocation of plots. They are often repeated and end up creating multiple claims over pieces of land. Plus, many people have lost land documentation during the war. In this very blurry context, even those who have attempted to secure rights over land with money in preparation for returning to Koch, have often been thwarted by the ambiguity of legal ownership. For example,

On the 27th January 2021, a man brought a case in the Kuachlual chiefs' court against a defendant who was living on what he claimed was his land. The defendant had occupied the land when the claimant was away. The claimant had asked the defendant to leave, but he had refused. The defendant described how he had bought this plot of land two months ago from someone while living in the Bentiu PoC site. He bought the land in preparation for his return to Koch. The court ruled in the claimant's favour and order the man's eviction from the land. He was not fined or punished.

In SPLA-IO controlled Miirmiir, chiefs have applied similar legal norms but have been more active in finding a solution for all the parties involved. For example:

On the 30th January 2021, a man brought a case to Miirmiir Town Court against a man who had built a home on what he claimed was his land. The claimant said that the land had been occupied by the defendant while he was in Khartoum but he now wanted the property back. The defendant argued that he had bought the land from the owner in 2017. The chiefs' court took into account the fact that the defendant had spent significant money constructing a home on this land. Therefore, the court ruled that the defendant should be allowed to continue living there. At the same time, to appease the claimant, the court awarded another plot in Miirmiir Town to the claimant. The parties were all content.

In a further example:

On the 10th February 2021, a widow brought a man to court. She accused him of building a house on a plot that had been bought by her husband. She narrated how her late husband had bought the plot from an old man in 1992. While that old man had died, his son and others in Mirmir were witnesses to that sale. The defendant had found the plot empty and built on it. The chiefs ordered the defendant to disassemble his house within a month and they criticised him for not consulting the chiefs about the plot. At the same time, even though the chiefs were critical, they told the defendant to consult them so that they could help him find a new plot.

What is very clear from the chiefs' courts in Koch is that many in the community seek the chiefs' courts support in resolving land disputes. They are a key institution to influence and collaborate with as land policy at the country-level is developed. However, what is still unclear is who is excluded from seeking redress in courts, and if there are certain interests that such redress favours.

e) Women and chiefs' courts

A repetitive concern with chiefs' courts in South Sudan has been the inequity gendered dynamics that they entrench. Chiefs' courts have been accused of both excluding women from the court, and of enforcing legal norms that deprive women of their rights and of safety from harm.

Women are able to access the chief's courts in Koch, although women are a minority of litigants. Of the 109 cases observed by World Relief court observers from December 2020 – February 2021, only 18 (6%) were brought by women.

Many cases in the chiefs' courts are about property, and women's lack of access to courts is partly based on their lack of property rights in Nuer customary law and as upheld by social norms more broadly. At chiefs' meetings in early 2021 in Koch, chiefs described how 'nyaal thiele wec' – girls do not belong to any one place as they can move through marriage to different places irrespective of clan, tribe and race. Chiefs in Koch described how women are equivalent to visitors who come and go. This uncertainty in women's continued belonging prevents them inheriting property.

At the same time, if women's ownership of property could be established, the chiefs were willing to uphold these rights.

For example, on the 4th January, a lady returning from Khartoum brought a case to the court in Kuachlual against her late husband's friends. She had entrusted him with her five cows when she fled to Khartoum, and now he was not returning them. The man claimed in court that all the cows had died in the cattle camp in 2020, but the woman refuted this. The chiefs were unsure of the facts and so ordered that further investigations be carried out about these five cattle. At the same time, their ruling affirmed the legal right of the woman to have her cattle restored to her if they had survived.

Many of the cases brought by women to the court involved petitions for divorce based on the violence and mistreatment by their husbands. The court often accepted the woman's account and rebuked the husband for his behaviour. However, they resisted the award of divorce and that ultimate protection for the woman.

For example, on the 11th January 2021, a wife brought her husband to court in Kuachlual. She described to the court how her husband would get drunk and beat her. The court lectured and shamed the husband for his behaviour against his wife. However, the court did not allow her to divorce him.

Nuer customary law has long understood marriage as between two families and not just between the bride and groom. Despite the seismic economic and political changes in South Sudan in recent decades, there has been a resilience to these understandings of marriage. Therefore, divorce is complicated and requires an elaborate plurality of consent from different parties. During World Relief hosted chief trainings in Miirmiir, chiefs made it clear that they still upheld the need for a woman who was requesting divorce to have the support of her relatives. This was necessary as her father, brother and uncles would have to return the cows.

At the same time, the courts in practice do allow divorce.

For example, on the 2nd December 2020 in the payam-level court in Gany, a wife petitioned for divorce from her husband. She sought to leave her husband because of severe domestic violence. The divorce was granted.

At the same time, in this case, the court applied more conservative interpretations of child custody, basing the ruling over the child on long-held Nuer law and not the child's welfare.

In this 2nd December case, the court ruled that the child would return to the father when the child reached seven-years of age if the father paid four cows. This is based on Fangak Laws. The husband was fined 2700SSP. The wife was happy and pleased to have custody of the child for now. She could hope that the father could never pay the cattle to claim the child.

Occasionally court rulings can show a slow leaning towards easing the conditions for a woman's ability to divorce.

In a case in Miirmiir on the 17th December 2020, a husband brought his ex-wife's partner to court, claiming adultery. The court had previously issued a letter of divorce. However, the wife's family had not yet returned all the bride wealth – there were four cows remaining unreturned. The husband claimed that this meant that the divorce had not been completed, that the wife was still married to him and that, therefore, adultery had been committed. The court however ruled that it was the letter from the court and not the final exchange of all the cattle that made this a divorce.

This makes divorce more possible for women as it makes divorce dependent on a court ruling and not the movement of cattle. At the same time, the court would not have ruled in the wife's favour if the return of the bride price had not been promised and, in this case, it was nearly completed.

f) Chiefs' trainings and meetings

While the chiefs' courts are essential for access to justice and the opportunity for peaceful redress, much of the statutory law is a promise for the future at best, and distributive of justice at worst. People in Koch are clear that there is an absence of a trusted alternative to the chiefs' courts including when dealing with cases of murder and rape. At the same time, most chiefs' courts require reform in order to comply with various legal and social norms formally being advocated by the South Sudan government. Therefore, while working with chiefs' courts is essential, it is also important for debates and reforms among chiefs to be encouraged.

Chiefs' courts in South Sudan, is that they have never been rooted in a static past, but have long been incredibly dynamic and malleable to changing circumstances and norms. As lots of this report has described, chiefs' courts in Koch have been confronted with immense changes over time and have continued through their ability to adapt to (and to restrict) communities' and governments' demands. The 2017 Wangkec laws are a good example of the ability of the customary law, and its application in the chiefs' courts, to evolve. Through a meeting of the chiefs, including with UN and government influence, the compensation rates were increased in order to deter killing with guns.

In 2020 and 2021, World Relief, as part of its project for UNMISS Trust Fund for Reconciliation, Stabilization, and Resilience, supported a series of chiefs' meetings and trainings. The trainings were focused on bringing chiefs together to discuss and solve dilemmas that they faced. They were also an opportunity for a South Sudanese lawyer to share knowledge of South Sudan's statutory law. The specialist was intentionally recruited for their knowledge of Nuer customary law as well as their knowledge of the statutory law. This helped the lawyer work through with the chiefs how these laws overlapped and clashed. This involved the South Sudanese lawyer engaging in careful, everyday discussions with chiefs about many dilemmas that they were grappling with.

One significant example illustrates the potential impact of this careful, everyday renegotiation of legal norms. In 2020, and soon after he had been in a World Relief chiefs' meeting, Chief Dungdit in Koch defended the rights of a girl who had been forcibly detained in order that she be married against her will. The chief ruled in the girl's favour despite customary norms being cited to suggest that this force should be allowed. In October 2020, the Unity State government summoned Chief Dungdit to Bentiu over this case. The Bentiu Appeal Customary Court ordered his detention. The legal specialist the intervened and argued for Chief Dungdit's release based on the

Penal Code. The governor then ordered the release of Chief Dungdit and instead arrested the head-chief of the Bentiu Appeal Customary Court, Chartuot Nger. Chartuot was also eventually released, but the girl's freedom was upheld.

There has been significant demand for legal training by the chiefs' themselves in Koch. For example, when chiefs in Jaak Payam heard about the World Relief trainings held with chiefs' elsewhere, they travelled to petition for such trainings.

The chiefs identified various benefits of the trainings. Two key benefits stand out:

1. Knowledge of the law

One way for chiefs to navigate shifting national legal regimes is to actually know the national law and to have space to interpret it to ensure both that justice can be provided and that legal norms as applied in Koch can evolve to be compatible with national demands. Chiefs repeatedly described how they were hearing various parts of the statutory law for the first time. This allowed them to discuss how as chiefs they might then apply them in Koch.

2. Unity of chiefs

The bringing together of chiefs in itself has the benefit of unifying the chiefs further, overcoming previous divisions based not only on wartime separation but also local politics and lack of familiarity.

At the same time, there are various dilemmas faced by communities and chiefs which sometimes do not have obvious answers from national statutory laws and international norms. For example, many chiefs in chiefs' meetings complained of the type of dancing that was being imported to their communities from East Africa, especially when it encouraged pre-marital, public sexual relations. They wanted to ban this dancing and South Sudanese statutory laws do offer statutory provisions for the protection of culture. At the same time, this freedom of association and relationships by can remake gendered social norms and be a key way for society to evolve.

Recommendations

1. Recognise the importance of legal redress of grievances

People in central Unity State have been eager to find legal ways of redressing grievances to prevent feuds and the repeated insecurity of killings. Nuer prophets have built their authority on the provision of access to justice, reconciliation and protection. The importance of law and justice for future peace, security and returns is hard to exaggerate.

2. Facilitate representation in discussions

As the chiefs' courts from different territories become unified across South Sudan, power will be asserted through the details of these arrangements and agreements. Support should be provided for open discussion of the political decisions being made that will shape the configuration of the legal systems after return and that will support inclusive logics of authority.

3. Be honest about the strengths and gaps in access to justice

After ten years of internationally-supported legal reforms and investments in prisons, chiefs and communities still have a lack of trust, understanding and sympathy about the norms of detention at the state level. There needs to be an appreciation of the centrality of chiefs for access to justice and a lack of revenge. There also needs to be better communication between state-level judicial institutions and county-level chiefs.

4. Build on successful examples of chiefs' meetings

The UNMISS-supported Wangkech meeting in 2017, that was dominated by chiefs, significantly reformed the customary law in government held areas in order to control gun usage and deter revenge. These specific laws do not have the ownership of SPLA-IO supporters and chiefs. Yet, the model is useful and powerful, and something that could be replicated with a wider constituency.

5. Providing politically nuanced support

Through work on rule of law and access to justice we support chiefs and build their authority. In 2021 and 2022, various chiefs will be competing to be part of the hierarchies of the new legal arrangements as R-ARCSS is implemented. NGOs and the UN should be careful not to exclude certain groups of chiefs and run the risk of being partisan.

6. Supporting the locally-led settlement of outstanding cases

The delay in settling serious crimes and cases until times of peace makes these both a key indicator of peace and an important way to entrench peace. On the other hand, the continuity of feuds and unsettled cases makes armed mobilisation easier. The settlement of cases will also be needed to resolve the myriad of feuds and spiritual uncertainties after this period of protracted conflict. Local chiefs and courts have long experience in trying to do this but they must be given power and authority to resolve these feuds. Chiefs in SPLA-IO Koch have shown a willingness to work in partnership with trained judges. This partnership has been more useful for fostering judicial confidence and peace.

7. Land

People in Koch are asking chiefs to solve land cases. As land policy develops at this county-level, especially in relation to returns, working with chiefs will be key to ensure this has the potential to be peaceful and consistent.

References

Akoi, Abraham and Pendle, Naomi, "I Kept My Gun?: Displacement's Impact on Reshaping Social Distinction During Return", *Journal of Refugee Studies*, Forthcoming,

Adongo, Janet, "Rule of Law Restored in Malakal," (UNMISS, 2017). Accessed at: <https://unmiss.unmissions.org/rule-law-restored-malakal>

Alor Kuol, Monyluak, "The Anthropology of Law and Issues of Justice in the Southern Sudan Today." MPhil Thesis, University of Oxford, 2000.

Apach, Gabriel Mading and Garang Geng, "UPDATE: An Overview of the Legal System of South Sudan," (Hauser Global Law School Programme, 2018). Accessed at https://www.nyulawglobal.org/globalex/South_Sudan1.html

Bye, Vegard, Abdel-Rahman El Mahdi and John Gachi, *Democracy Support through the United Nations* (The Organisation for Economic Co-operation and Development, 2010). Accessed at <https://www.oecd.org/countries/sudan/48085726.pdf> [unsure if the authors should be named or if it should just be OECD]

Francesco Checchi, Adrienne Testa, Abdihamid Warsame, Le Quach and Rachel Burns. *Estimates of crisis-attributable mortality in South Sudan, December 2013-April 2018*, September 2018 (London, London School of Hygiene and Tropical Medicine, 2018). < <https://www.lshtm.ac.uk/south-sudan-full-report> > (September 2018).

Chirriilo Madut Anei and Naomi Pendle, *Wartime trade and the reshaping of power in South Sudan: learning from the market of Mayen-Rual*. Nairobi: Rift Valley Institute, 2018.

Craze, Joshua, Jérôme Tubiana and Claudio Gramizzi. *State of Disunity: Conflict Dynamics in Unity State, South Sudan, 2013-15*. Switzerland: Small Arms Survey, 2016.

Craze, Joshua, *The Politics of Numbers: On Security Sector Reform in South Sudan, 2005-2020* (LSE, 2020). OR Craze, Joshua, *Displaced and Immiserated: The Shiluk of Upper Nile in South Sudan's Civil War, 2014-2019* (Geneva, Switzerland: Small Arms Survey, 2019).

Crilly, Rob, “Air of optimism in Rumbek as \$4.5bn in aid is pledged,” (The Irish Times, 2005). Accessed at: <https://www.irishtimes.com/news/air-of-optimism-in-rumbek-as-4-5bn-in-aid-is-pledged-1.432232>

DefendDefenders, “On the Legal Frontline: Lawyers and Paralegals as Human Rights Defenders in the East and Horn of Africa,” (2020). Accessed at: <https://defenddefenders.org/on-the-legal-frontline-lawyers-and-paralegals-as-human-rights-defenders-in-the-east-and-horn-of-africa/>

Doggie Di Katz, “Mulanaa,” (YouTube, 2019). Accessed at: <https://www.youtube.com/watch?v=20Hzs-S7yY0>

Ellett, Rachel, “Rethinking Law and State Building in Sub-Saharan Africa.” *Law & Social Inquiry* 41 no. 2 (2016): 471-479.

European Commission, International Cooperation and Development, Where we work, “South Sudan.” Accessed at: https://ec.europa.eu/international-partnerships/where-we-work/south-sudan_en

Gagnon, Georgette and John Ryle. *Report of an Investigation into Oil Development in Western Upper Nile*. Canadian Auto Workers Union; Steelworkers Humanity Fund; The Simons Foundation; United Church of Canada, Division of World Outreach; World Vision Canada, 2001.

Gatket, Machar and Pendle, Naomi, “‘He cannot marry her’: reconstituting political communities among Southern Sudanese in Sudan”, *Diaspora*, Forthcoming.

Grabska, Katarzyna, *Gender, Home and Identity: Nuer Repatriation to Southern Sudan* (Woodbridge: James Currey, 2014).

Henry, Alban, *Ascertainment of Customary Laws in South Sudan* (United Nations Development Programme, 2016): 4. Accessed at: <https://silo.tips/download/ascertainment-of-customary-laws-in-south-sudan-discussion-paper>

Hessbruegge, Jan Arno, “Customary Law and Authority in a State under Construction: The Case of South Sudan.” *African Journal of Legal Studies* 5, no. 3 (2012): 295-311.

Hodal, Kate, “UN peacekeepers intervene after violent clashes in South Sudan,” (The Guardian, 2019). Accessed at: <https://www.theguardian.com/global-development/2019/dec/06/un-peacekeepers-intervene-after-violent-clashes-in-south-sudan>

Hoffman, Kasper and Koen Vlassenroot, “Armed groups and the exercise of public authority: the cases of the Mayi-Mayi and Raya Mutomboki in Kalehe, South Kivu.” *Peacebuilding* 2, no. 2 (2014): 202-220.

Hoffman, Kasper and Tom Kirk, *Public Authority and the Provision of Public Goods in Conflict-Affected and Transitioning Regions* (The Justice and Security Research Programme and LSE): 8-9.

Human Rights Watch, “‘There is No Protection’: Insecurity and Human Rights in Southern Sudan,” (2009): 39.

Human Rights Watch, “South Sudan: ‘Rough Justice’ in Lakes State,” (2013). Accessed at:

<https://www.hrw.org/news/2013/06/24/south-sudan-rough-justice-lakes-state>

Hutchinson, S. (1996) *Nuer Dilemmas: coping with money, war, and the state*. Berkeley CA: University of California Press.

Hutchinson, S. (1992) ‘The cattle of money and the cattle of girls among the Nuer, 1930–83’, *American Ethnologist* 19 (2): 294–316.

Hutchinson, Sharon and Naomi Pendle, “Violence, legitimacy, and prophecy: Nuer struggles with uncertainty in South Sudan.” *American Ethnologist* 42, no. 3 (2015): 415-430.

Ibreck, Rachel and Alex De Waal, *South Sudan’s Injustice System: Law and Activism on the Frontline* (London: Zed Books, 2019).

Ibreck, Rachel and Naomi Pendle, “Community Security and Justice under United Nations Governance: Lessons from Chiefs’ Courts in South Sudan’s Protection of Civilians Sites.” *Stability: International Journal of Security & Development* 6, no. 1 (2017).

IDLO, “Facilitating Access to Justice,” (2017). Accessed at: <https://www.idlo.int/what-we-do/initiatives/facilitating-access-justice>

Interview with Mbu, Nelson (UNDP Rule of Law). Accessed at:

<https://www.youtube.com/watch?v=iEKIkHOV78&index=115&list=PLA274DA71E80651E6>

Johnson, Douglas, “The Sudan People’s Liberation Army and the problem of factionalism,” in *African Guerrillas*, ed. Clapham, Christopher (Oxford: James Currey, 1998): 53-72.

Johnson, Douglas, *The Root Causes of Sudan’s Civil Wars* (Oxford: James Currey, 2003).

Kindersley, Nicki. "Rule of Whose Law? The Geography of Authority in Juba, South Sudan." *The Journal of Modern African Studies* 57.1 (2019): 61-83.

Leonardi, Cherry, "‘Liberation’ or Capture? Youth in between ‘hakuma’ and ‘home’ during civil war and its aftermath in Southern Sudan." *African Affairs* 106, no. 424 (2007): 391-412 OR Leonardi, Cherry, "Violence, sacrifice and chieftship in Central Equatoria, Southern Sudan." *Africa* 77, no. 4 (2007): 535-558

Leonardi, Cherry, Deborah Isser, Leben Moro and Martina Santschi, "The Politics of Customary Law Ascertainment in South Sudan." *Journal of Legal Pluralism* 63 (2011): 111-142.

Leonardi, Cherry, Leben Moro, Martina Santschi and Deborah Isser, *Local Justice in South Sudan* (London: Rift Valley Institute, 2010).

Leonardi, Cherry. *Dealing with Government in South Sudan: History of chieftship, community and state* (Woodbridge: James Currey, 2013).

Lev, Daniel S. "Social Movements, Constitutionalism, and Human Rights: Comments from the Malaysian and Indonesian Experiences," in *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. Greenberg, Douglas, Stanley N. Katz, Melanie Beth Oliviero and Steven C. Wheatley (New York: Oxford University Press, 1993): 139-158.

Mampilly, Zachariah Cherian, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (New York: Cornell University Press, 2011).

Massoud, Mark, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (Cambridge: Cambridge University Press, 2013).

Mawson, A. N. M., "'Bringing What People Want': Shrine Politics among the Agar Dinka." *Africa: Journal of the International African Institute* 61, no. 3 (1991): 354-369.

Mayom, Manyang, "Lake state government criticized over customary law," (Sudan Tribune, 2011). Accessed at: <https://sudantribune.com/Lakes-state-government-criticized,38436>

Merry, Sally Engle, "The Rule of Law and Authoritarian Rule: Legal Politics in Sudan." *Law and Social Inquiry* 41, no. 2 (2016): 465-470.

Mertenskoetter, Paul and Dong Samuel Luak, “An Overview of the Legal System and Legal Research in the Republic of South Sudan,” (Hauser Global Law School Programme, 2012). Accessed at: https://www.nyulawglobal.org/globalex/South_Sudan.html#_edn45

Nietzsche, Friedrich, *On the Genealogy of Morality*, ed. Ansell-Pearson, Keith, trans. Diethe, Carol (Cambridge: Cambridge University Press, 2007).

Paanluel Wël, “The Role of Lawyers in the Society: The Case of South Sudanese Lawyers and Judges,” (2019). Accessed at: <https://paanluelwel.com/2019/03/29/the-role-of-lawyers-in-the-society-the-case-of-south-sudanese-lawyers-and-judges/>

Pendle, Naomi, “‘The dead are just to drink from’: recycling ideas of revenge among the western Dinka, South Sudan.” *Africa* 88, no. 1 (2018): 99-121.

Pendle, Naomi, “Learning from customary law: Forging ethnic and national identities in South Sudan,” in *The Struggle for South Sudan: challenges of security and state formation*, ed. Logan, Sarah and Luka Biong Deng Kuol (London: I.B. Tauris, 2019): 7-26.

Pendle, Naomi Ruth, ‘Politics, prophets and armed mobilizations: competition and continuity over registers of authority in South Sudan’s conflicts’, *Journal of Eastern African Studies*, 14 no.1 (2020), 43-62.

Riek, Jedeit J. and Naomi Pendle, *Speaking Truth to Power in South Sudan: Oral histories of the Nuer prophets* (The Rift Valley Institute, 2018).

Rolandsen, Øystein H., “Guerrilla Government: Political Changes in the Southern Sudan during the 1990s.” *Nordiska Afrikainstitutet* (2005).

Rumbek Chief in Pankar Consultive Meetings, *Pankar Consultive Meetings: A Series of Two Meetings to Address the Rising Trend of Inter Communal Conflict in the Lakes Area of Bahr El Ghazal Region and Mvolo County* (Sudan Open Archive, 2002).

Stewart, P. J. and A. J. Strathern, *Peace-making and the Imagination: Papua New Guinea perspectives*. (Brisbane: University of Queensland Press, 2011).

The Panakar Peace Council, *The Panakar Peace Council’s Rapid Response In the Lakes and Mvolo Sub-region May – July 2004 Consolidated Report, Edition 34* (Sudan Open Archive, 2004).

Thompson, E. P., *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975).

Toby, Hellen and Nita Bhalla, “Facebook auction of South Sudan child bride could inspire other families: activists,” (Reuters, 2018). Accessed at: <https://uk.reuters.com/article/us-southsudan-women-child-marriage/facebook-auction-of-south-sudan-child-bride-could-inspire-other-families-activists-idUSKCN1NI1II>

United Nations Development Programme, *Promoting the Rule of Law* (United Nations Development Programme): 1. Accessed at: <http://www.undp.org/content/dam/southsudan/library/Fact%20Sheets/UNDP-SS-Rule-of-law-flyer.pdf>

USA for UNHCR: The UN Refugee Agency, “South Sudan Refugee Crisis.” Accessed at: <https://www.unrefugees.org/emergencies/south-sudan/>

Wote, Charles, Joakino Francis and Jale Richard, “Juba is responsible for deadly Lakes conflict – MP,” (eyeRadio, 2020). Accessed at: <https://eyeradio.org/juba-is-responsible-for-deadly-lakes-conflict-mp/>