International Center for Transitional Justice

RESEARCH REPORT

'Some Level of Peace'

Addressing Intercommunal Violence Through Customary Justice in South Sudan

November 2024

ICTJ Justice Truth Dignity

Cover Image: Community members take part in a UNDP-supported traditional court session in the city of Torit, in the state of Eastern Equatoria, South Sudan, in May 2016. (Photo@undp/southsudan)

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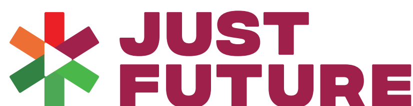
Agatha Ndonga



About the Author

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The Just Future Alliance aims to strengthen the capacity of civil society organizations and enable their collective action to bring about more inclusive, constructive, and legitimate power relations. The alliance consists of established civil society organizations and networks from the Global North and South, and is funded by the Netherlands Ministry of Foreign Affairs.

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ACRONYMS

CPA	Comprehensive Peace Agreement
CRA	Compensation and Reparations Authority
CTRH	Commission for Truth, Reconciliation and Healing
GPAA	Greater Pibor Administrative Area
NSCC	New South Sudan Council of Churches
PPP	People-to-people peace process
R-ARCSS	Revitalized Agreement on the Resolution of the Conflict in South Sudan
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SSP	South Sudanese Pound
UNMISS	United Nations Mission in South Sudan
USD	United States Dollar

Executive Summary

Customary and informal justice systems are understood to be a key element of a people-centered approach to building peaceful, just, and inclusive societies. As such, they are integral to the broader sustainable peace and development agenda.[1] The role of customary and informal justice in contexts that have experienced serious and massive human rights violations is also an important subject in the field of transitional justice.[2] At the regional level, the African Union Transitional Justice Policy articulates an approach to transitional justice in which traditional justice mechanisms are a constitutive component. However, an understanding of the relationship between customary and informal justice systems and transitional justice in practice is underdeveloped. This report provides a case study of South Sudan in order to contribute to empirical, qualitative research and evidence on this issue.

South Sudan has experienced violent conflict and abuse for decades. Despite its independence in 2011, an initial peace agreement in 2015, and a revitalized peace agreement in 2018, intercommunal violence at the subnational level continues to afflict the country. The character of the violence is cyclical, disruptive, and at times widespread, causing internal and external displacement, loss of life, sexual and gender-based violations, serious injury, and massive destruction of property, among other harms. Persistent areas of conflict have torn the social fabric of the nation, making it harder to build a cohesive state. The lack of accountability and redress for human rights violations has also gravely undermined the rule of law in the country, contributing to a culture of impunity and revenge. The result has been the further militarization of society and increasing perception of the illegitimacy of the national government.

This report examines the role of customary justice in the context of massive human rights violations in South Sudan. It takes into consideration the actual and potential role of customary structures to redress violations of victims' rights while providing a space for atonement for perpetrators and reconciliation and reintegration after gross human rights violations and the breakdown of social relationships. The report also examines the potential relationship of customary mechanisms with the transitional justice mechanisms set out in Chapter V of the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), including the Commission for Truth, Reconciliation and Healing (CTRH) and the Compensation and Reparations Authority (CRA).

1 Working Group on Customary and Informal Justice and SDG16+, "Diverse Pathways to People-Centred Justice: Report of the Working Group on Customary and Informal Justice and SDG16+ for the Sustainable Development Goals Summit," 2023.
2 See Working Group on Transitional Justice and SDG16+, "Toward Victim-Centered Change: Integrating Transitional Justice into Sustainable Peace and Development," 2023; Lisa Denney and Pilar Domingo, "Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development are Reshaping the Field," in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies,* ed. Roger Duthie and Paul Seils (New York: ICTJ, 2017).

The report begins by providing an overview of the history and current status of customary justice in South Sudan. Customary courts are presided over by chiefs and community elders, while statutory courts are courts with trained legal personnel, such as judges and lawyers. Given the accessibility of customary justice and the inadequacy of state judicial capacity, it has long been the primary way in which most communities resolve disputes, although it has reduced capacity and legitimacy as a result of armed conflicts in Sudan and then South Sudan. Moreover, while customary justice forms part of a dual system of customary and statutory justice in the country, there is no clear division between the two systems, such that customary justice is often used to address criminal and other matters that it is not necessarily designed to address. This report also elaborates on the limitations of customary justice in general, which include issues of capacity, legitimacy, security, gender discrimination, and politicization.

The report then examines the problem of intercommunal conflict in South Sudan and its impact on lives and livelihoods in local communities, including killings, destruction of property, theft of cattle, sexual violence, abduction, forced displacement, and forced starvation. As a type of conflict perpetuated by cycles of revenge, intercommunal conflict in South Sudan has also evolved to become more militarized over time. This report explains that the customary justice system was not intended to deal with more extreme elements of intercommunal conflict, including serious human rights violations. However, in practice it does respond to them in some instances. Further, the customary justice system responds to disputes by incorporating elements recognized as parts of transitional justice, including accountability, compensation, and acknowledgment. This is exhibited in the use of people-to-people peace (PPP) and reconciliation processes led by customary justice system actors.

Customary justice can play a role in resolving disputes and repairing relationships in South Sudan, including in the context of intense violence and serious violations. In such contexts, however, customary justice faces additional or more intensified challenges than it does in general, including challenges related to the power imbalance between traditional authorities and armed youth, militarization of violence and the role of security sector actors, and the inadequate capacity to enforce decisions. Overall, there is a level of complexity to the violence and a lack of clarity on customary justice's proper role that limits its value.

While intercommunal violence persists, especially in certain areas and regions, this report suggests that the transitional justice framework set up by the R-ARCSS provides opportunities to develop a hybrid approach using both customary and formal justice that takes this complexity into account and offers clarity, support, and guidance for both government and customary actors. This potential is especially clear with regard to the CTRH, which is tasked with supervising customary justice in facilitating truth, reconciliation, healing, and reparation. It corresponds with the notion of fostering coherence in justice ecosystems in the context of conflict-affected societies.[3] The report concludes with recommendations for the CTRH and other stakeholders to address these challenges, take advantage of opportunities, and adapt customary justice in a victim-centered manner in the context of cyclical, evolving, and intercommunal violence.

3 Working Group on Customary and Informal Justice and SDG16+, "Diverse Pathways," 31-36.

Methodology

Research carried out for this report included the collection and analysis of key informant interviews (KII), qualitative analysis of responses, and review of secondary sources and literature. In total, 42 informant interviews were conducted in person in Juba, Bentiu, and Bor, South Sudan. Additional online interviews were conducted with informants from Malakal town. Interviewees consisted of jurists, lawyers, chiefs, community leaders, educators/academics, and civil society representatives. Interviews were carried out from February 1–18, 2023. Interviews were semi-structured, using open-ended questions in order to elicit descriptive responses. This allowed interviewers to draw out participants' perspectives based on their own lived experience. Secondary sources included desk-based research materials and recommendations from key experts.

A "do-no-harm" policy was observed throughout the data collection process. At the beginning of each interview, the interviewer asked each participant if they consented to be recorded. A number of interviewees declined, preferring answers to be handwritten by the interviewer. For identification purposes, all interviewees preferred to remain anonymous, due to what the perceived sensitivity of the topic. Some targeted interviewees declined to be interviewed due to fear of reprisals. Some government officials also felt uncomfortable with the subject matter and declined to be interviewed. Other interviewees expressed concern about how participating in the study might affect their safety but nonetheless participated, noting that such interventions will contribute to positive change in the country. To ensure the confidentiality and anonymity of all individuals involved, each interviewee was informed about the nondisclosure of their names and avoidance of language and descriptions that might reveal their identity.

The terms *customary justice* and *traditional justice* are used synonymously in this report. This system of justice is differentiated from the state's statutory or formal system of justice. The term *customary and informal justice* is used only in reference to international policy discussions on the topic.

Customary Justice in South Sudan

Historical Overview

Historically in South Sudan, people have lived in dispersed, largely autonomous territorial areas governed by family heads and senior elders, cutting across lineage and clan affiliation, and connected to wider forms of religious and spiritual authorities.[4] In this context, customary justice has been the main way that South Sudanese communities have resolved disputes,[5] through either a central authority system, which includes ethnic groups such as the Azande, Shilluk, and Anyuak, or a decentralized authority system, which includes the Dinka, Nuer, Acholi, Bari, and Fertit ethnic groups, among others.[6]

In the early 1900s, the British colonial government, in a bid to administer control over The Sudan and Southern Sudan, as it was called then, introduced indirect rule through recognition of the traditional justice system, given the role that traditional authorities played in governance at the community level, especially in resolving conflicts and restoring peace.[7] While Great Britain's 1929 Civil Justice Ordinance officially recognized customary law and institutions in Sudan and particularly Southern Sudan (now South Sudan),[8] under the 1931 Chiefs Court Ordinance hereditary traditional and spiritual authorities were replaced by more loyal colonial government chiefs.[9] Supervised by British district commissioners, the chiefs exercised executive and judicial power as administrators and magistrates.[10]

Following Sudan's independence in 1956, successive post-colonial regimes enacted laws that limited and weakened the powers of traditional leaders, although the administrative structure

4 Cherry Leonardi, "Dealing with Government in South Sudan: Histories of Chiefship, Community and State," British Institute in East Africa, 2015, 105.
5 Douglas Johnson, *Judicial Regulation and Administrative Control: Customary Law and the Nuer, 1898–1954* (Cambridge University Press, 2010).
6 Justice Aleu Akechak Jok at al., "A Study of Customary Law in Contemporary Southern Sudan," World Vision International, March 2004, www.csrf-southsudan.org/repository/study-customary-law-contemporary-southern-sudan
7 Mafred O. Hinz. M.H., "Report on the Strategy to Strengthen South Sudan Customary Law as a Source of Law in an Autonomous Legal System," South Sudan Ministry of Justice Library and the UNDP South Sudan Rule of Law/Governance Unit, 2009, 78.
8 See Civil Justice Ordinance, 1929, 10 Laws of the Sudan (1955); William Tate Olenasha, Tim Monybuny Williams, and Nyuon Ruai, "In Search of a Working System of Justice for a New Nation: The Ascertainment of Customary Laws of the Toposa, Lokuto (Otuho), Lango and Lopit Communities of the Eastern Equatoria State of South Sudan," Series 1, Volume 1, Ministry of Justice (Government of South Sudan), Local Government Board (Government of South Sudan), and UNDP South Sudan, 2012, 21.
9 Leonardi, "Dealing with Government," 49–55.
10 Cherry Leonardi, Leben Nelson Moro, Martina Santschi, and Deborah H. Isser, "Local Justice in Southern Sudan," Rift Valley Institute the United States Institute of Peace and the Rift Valley Institute, 2010, https://riftvalley.net/publication/local-justice-southern-sudan, 19. See also Leonardi, "Dealing with Government," 87–97.

endured until the end of the first civil war (1963–72). During the second civil war (1983–2005), the extensive militarization of society, especially of young men, further eroded the power of chiefs to enforce the orders of their courts.[11] In 1984, after the Sudan People's Liberation Movement (SPLM) recognized customary law in the areas under its control,[12] it began using traditional authorities to maintain social order and cohesion. The Sudan People's Liberation Army (SPLA) used chiefs to forge a relationship with the people.

In 1994, the SPLM formally established an independent judiciary and recognized the traditional courts operated by chiefs as occupying the lowest tier of its judicial hierarchy, although they remained at the core of the SPLM administration.[13] While the SPLA increasingly endorsed chiefs in promoting "traditional authority, customary law, cultural rights, and ethnic nationalities,"[14] its poor treatment of chiefs themselves reduced their legitimacy. Chiefs could be punished for the alleged misconduct of their communities and the failure to collect taxes or provide recruits for armed rebel groups.[15]

In 2005, the Comprehensive Peace Agreement (CPA) brought further recognition of customary law in South Sudan. After the CPA, there was strong demand for quality chiefship based on hereditary traits or lineage. Chiefs increased in number and began receiving a salary (which they no longer do), but they lost the right to collect taxes. Then, the Local Government Act of 2009 enshrined ethnic and cultural rights: "Every ethnic and cultural community within a local government territory shall have the right to freely enjoy and develop its cultural practices, its own customs, and traditions."[16] It created traditional authorities that were to be semi-autonomous, exercising judicial and executive functions with decentralized power. Chiefdoms were therefore fixed more firmly within the structure of traditional authorities. The act also provided for the establishment of Councils of Traditional Authority at both the national and state levels as fora for dialogue with the government on matters of custom and tradition. A select number of more educated and politically experienced chiefs came to be referred to as "paramount chiefs."

Current Situation

In the lead up to South Sudan's independence in 2011, chiefs were more politically oriented, mobilizing the population for the referendum vote that led to the country's secession from the Sudan. After independence, however, chiefs were left with little power. The rise and proliferation of paramilitary groups—*gelweng* (cattle guards) among the Dinka, the White Army among the Nuer, and the Arrow Boys among the Zande—left chiefs and traditional law institutions weak and vulnerable.[17] At the same time, continued internal conflict, limited judicial capacity, and the weakness of the central government have placed new demands on chiefs, which they continue to fill.[18]

In South Sudan, the term *Traditional Authority* refers to kings, chiefs, elders, and spiritual leaders, such as community-recognized prophets. The 2011 Transitional Constitution of

11 Leonardi et al, "Local Justice," 43.
12 Monyluak Alor Kuol, "Administration of Justice in the (SPLM/A) Liberated Areas: Court Cases in War-Torn Southern Sudan," University of Oxford's Refugee Studies Program, 1997, 14–15.
13 Douglas Johnson, "The Sudan People Liberation Army and the Problem of Factionalisms," in *African Guerrillas*, ed. Christopher Clapham (Oxford, Oxford University Press: 1998), 181.
14 Ibid.
15 Leonardi et al, "Local Justice," 177–9.
16 Section 11(2).
17 Machot Amuom, "What Happened at Wunlit? Reliving South Sudan's Most Successful Peace Conference (blog)," Rift Valley Institute, August 11, 2021, https://riftvalley.net/news/what-happened-wunlit-reliving-south-sudans-most-successful-peace-conference
18 Ibid.

South Sudan recognizes the institution and role of chiefs as part of Traditional Authority. Article 167 provides that:

- The institution, status and role of Traditional Authority, according to customary law are recognized under this Constitution;
- Traditional Authority shall function in accordance with this Constitution, the state constitutions and the law;
- The courts shall apply customary law subject to this Constitution and the law.

Section 112 (1) of the 2009 Local Government Act provides that:

- The Traditional Authority shall be an institution of traditional system of governance at the State and Local Government levels which shall:
  - Have semi-autonomous authorities at the State and local government levels;
  - Administer customary law and justice in the customary law courts in accordance with the provisions of this Act and any other applicable law; and
  - Exercise deconcentrated powers in the performance of executive functions at the local government levels within their respective jurisdictions.

Section 121 further provides that:

- The functions and duties of the South Sudan Council of Traditional Authority leaders shall be, but not limited to:
  - Provide a forum for dialogue with all levels of government on matters of custom and traditions of the people of South Sudan;
  - Intervene to resolve inter-tribal disputes by applying customary and traditional conflict resolution mechanisms;
  - Foster peace building and resolution of conflicts through mediation and other conciliatory mechanisms;
  - Advise all levels of Government on matters of traditions and customs of the people of South Sudan.

Under Section 112 (1) (b) of the Local Government Act, it is the role of Traditional Authority leaders to administer customary law and justice in customary law courts. In so doing, they preside over all disputes as chiefs in their respective communities.[19] As such, they are tasked with administering justice to all within their jurisdiction, irrespective of individual social, economic, or political status, race, nationality, gender, age, religion, creed or belief.[20]

South Sudan has a dual judicial system consisting of statutory law courts (mainly in urban areas) and customary law courts (mainly in rural areas) that operate in parallel. Statutory courts follow the principles laid down in the legal statutes, while customary courts rule according to the customary laws of their respective ethnic groups.[21] While the justice structure is often said

19 Government of South Sudan, Local Government Act, 2009, Section 122 (1)(b).
20 Ibid., Section 93.
21 Gabriel Mading Apach and Garang Geng, "An Overview of the Legal System and Legal Research in the Republic of South Sudan," GlobaLex, September 2018, www.nyulawglobal.org/globalex/South_Sudan1.html

to start at the *Payam* [second-lowest level],[22] where customary courts headed by chiefs operate. In some communities, as in the Shilluk, the Zandes, and Pocholla tribes, kings serve as additional arbiters of customary law disputes.[23] Traditional mechanisms are presided over by actors such as councils of elders, youth groups, religious leaders, and traditional leaders commonly known as *chiefs* (including chiefs, sub chiefs, and paramount chiefs). Customary courts are subordinate to statutory courts.

The highest court in the land is the Supreme Court,[24] which handles appeals from the Court of Appeal and has original jurisdiction over constitutional law matters.[25] Supreme Court decisions are final and binding in all courts, including customary courts.[26] South Sudan has three regional Courts of Appeal, in Juba, Rumbek, and Malakal, which hear cases from the state high courts.[27] There are ten High Courts (one per state) with jurisdiction to hear appeals from the lower courts.[28] There is no internal appellate hierarchy among the lower courts, which include the First-Class Magistrate Courts at the county level, the Second-Class Magistrate Courts at the county and Payam level, and the Third-Class Magistrate Court at the Payam level.[29]

The 2009 Local Government Act provides for four levels of customary law courts: town bench courts and customary courts 'A', 'B,' and 'C,' which are to be found at the Boma (lowest or village) level,[30] the Payam level, and the county level.[31] The hierarchy of customary courts is as follows:[32]

- Town bench courts have the same jurisdiction and level as the 'A' Chiefs Courts or 'B' Chiefs and handle administrative cases and customary civil suits. They primarily handle disputes in urban areas.[33]
- 'A' Chiefs Courts (also known as Executive Chiefs Courts) operate at the Boma level and handle family disputes, traditional feuds, and marriage suits. The chief is chairperson of the panel, and sub-chiefs serve as members.[34]
- 'B' Chiefs Courts determine appeals from 'A' courts and are the first court of instance for major customary law disputes and minor public order disputes. They also handle major customary civil marriage suits and divorce, adultery, inheritance, children rights, women's rights and customary land disputes. The head chief chairs the panel, and chiefs serve as members.[35]
- 'C' Chiefs Courts (also known as Paramount Chiefs Courts) operate at the county level. They handle appeals against decisions of 'B' Courts, deal with cross-cultural civil suits, and handle criminal cases of a customary nature that are referred by statutory courts. They are

22 This is the second-lowest government administrative division, below counties.
23 Justice Benjamin Baak Deng, "Traditional Justice Methods and their Possible Impact on Transitional Justice Models in South Sudan," Max Planck Yearbook of United Nations Law Online, 2018, 332.
24 Government of South Sudan, Judiciary Act 2008, art. 10.
25 Ibid. at art. 11.
26 Mading Apach and Geng, "Overview of the Legal System."
27 Ibid.
28 Government of South Sudan, Judiciary Act 2008, Art. 13(4).
29 Mading Apach and Geng, "Overview of the Legal System." Second Class Magistrate Courts are authorized by Section 14 of the Code of Criminal Procedure Act (CCPA) to pass prison sentences of up to three years and fines of up to 2500 SSP. First Class Magistrate Courts, created by Section 13 of the CCPA, can pass sentences of up to seven years and fines of up to 5000 SSP.
30 This is the lowest-level of government administrative division, below Payams.
31 Government of South Sudan, Local Government Act, 2009, Section 97.
32 Minneh Kane, J. Oloka-Onyango, and Abdul Teajn-Cole, "Processing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor," Arusha Conference 'New Frontiers of Social Policy,' 2005.
33 Government of South Sudan, Local Government Act, 2009, Section 102.
34 Ibid. at Section 101.
35 Ibid. at Section 100.

the highest customary court in the county. The paramount chief is chairperson, and head chiefs of B courts serve as members.[36]

Customary courts are the preferred option for resolving disputes, because they are inexpensive and accessible due to the languages used. According to estimates, 80 to 90 percent of disputes are resolved by customary courts.[37] Although customary courts do not have jurisdiction over criminal cases, they tend to adjudicate them because of the inaccessibility of statutory courts.[38]

The law does not set out a clear division between customary and formal state authority. Most disputes are settled through customary dispute resolution mechanisms in the larger family or community without involving any state-sanctioned structures, whether state or chiefs courts. However, when mediation or arbitration by family or clan elders, spiritual leaders, or other respected figures fail, there is a strong expectation to move to court.[39] Further, customary courts generally tend not to differentiate between criminal and civil jurisdictions or between "crimes against the state" and personal transgressions that require individual compensation. Instead, they focus mostly on restorative justice that aims to return balance to the community; therefore, punitive measures are less common.[40] Judges in customary courts play the role not of umpire, as in an adversarial system, but of investigator trying to maintain impartiality.[41]

General Perceptions and Understandings

Interviews conducted for this study found that respondents had a general understanding of the customary justice system in South Sudan. Respondents confirmed that they had an awareness of the country's plural justice system made up of statutory courts, with trained legal personnel like judges and lawyers, and customary courts, presided over by chiefs and community elders.[42] Some interviewees noted that the justice system functions as a loosely governed unitary system that incorporates legal principles and practices from both statutory and customary law. They characterized it as a mix of traditional/cultural law and western, liberal law, with no clear distinction between the principles and procedures of customary law and statutory law.[43]

Respondents spoke about an amalgam of approaches to settling disputes, including traditional justice methods, such as mediation through elders; reconciliatory methods involving group representatives who sit to settle a matter; and spiritual justice, whereby disputes are settled by religious leaders through dialogue, prayer, and mediation within the context of a religious structure like the church.[44] It was explained that the customary justice system allows the exercise of retributive (or punitive) justice and restorative justice, whereby a person who has been wronged

36 Ibid. at Section 99.
37 US Department of State, Bureau of Democracy, Human Rights, and Labor, "South Sudan 2020 Human Rights Report," March 30, 2021, www.state.gov/reports/2020-country-reports-on-human-rights-practices/south-sudan/
38 The SSLS once reported that "in at least one case, a customary court has sentenced an accused murderer to death" and that "due to the lack of oversight and monitoring mechanisms in customary and statutory courts, it is difficult to know precisely how many times customary courts have issued death sentences." See David K. Deng, "Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan," CSRF South Sudan, 2013, 21, www.csrf-southsudan.org/repository/challenges-accountability-assessment-dispute-resolution-processes-rural-south-sudan/
39 Cherry Leonardi et al, "Local Justice in South Sudan," 48.
40 Tiernan Mennen, "Study on the Harmonisation of Customary Laws and the National Legal System in South Sudan," UNDP, 2016, 9, https://land.igad.int/index.php/documents-1/countries/south-sudan/gender-5/997-study-on-the-harmonization-of-customary-laws-and-the-national-legal-system-in-south-sudan-2016/file
41 Baak Deng, "Traditional Justice Methods," 340.
42 KII 08/02/23/030.
43 KII 06/02/23/035.
44 KII 08/02/23/030.

is compensated with the aim of being reinstated to the situation before the harm occurred. This enables the use of traditional cultural practices, such as compensation paid with cows or cleansings/rituals involving the offender.[45]

While customary norms differ per ethnic group, there are commonalities among them.[46] As one respondent noted:

> In my Chollo community, we have a traditional court led by our king and his chiefs. When there is a case, the chiefs have the power to summon, and there is a court hearing. Compensation will be decided. These are the common methods of justice that are currently practiced by many communities but are different with members of the Chollo, that was headed by our king. Therefore, in my community, a case held before the king is considered final. Nobody has the power to appeal the ruling.[47]

Customary justice systems were said to be accessed widely by the population in part due to limited access to the statutory system. They were considered to be more inclusive of communities than the statutory system due to factors such as lower cost, use of local languages, and fewer bureaucratic hurdles. However, many respondents referred to gender differences in the ways that customary systems treat men, boys, women, and girls. To the extent that there are basic principles guiding the customary systems, these include:

- adherence to peaceful resolution of the conflict or dispute;
- respect or amicability;
- understanding of dispute resolution where hearings and interaction of the parties to a case are required, admission or confession is acceptable, listening to witnesses is acceptable, and transparency is necessary; and
- independence and impartiality of the chief or elder.[48]

Many of the jurists interviewed expressed serious concern about customary justice systems having jurisdiction over criminal cases. While customary courts do not have formal jurisdiction to try crimes, including sexual and gender-based violence,[49] this was not the case in practice. As one respondent noted, “In the traditional dispute resolution mechanisms, criminal cases of homicide or murder, adultery, cattle raiding, loss of properties, injuries from fighting, and abduction of women and girls make up to 60 percent of cases.”[50] Another observed:

> When someone murders, he will be required to report to his people, and the elders will sit and mediate the issue. If it fails, the case is brought to us [statutory justice], and we listen to the case. When the person intentionally killed, they are meant to pay 101 cows to the deceased family. If the murder was unintentional, they will pay 51 cows, and the Spear Master will slaughter one of the cows for the people to eat, and the murderer will be sentenced to 5 years’ imprisonment. On payment, the two families or clans will live together peacefully.[51]

45 KII 08/02/23/030.
46 UN Development Programme, “Ascertainment of Customary Laws in South Sudan: In Search of a Working System of Justice for a New Nation,” Discussion Paper, 2016.
47 KII 23/02/23/002.
48 KII 07/02/23.
49 KII 15/02/23/011.
50 KII 13/02/23/005.
51 KII 16/02/23/040.

The general view was that the reality on the ground necessitated that customary courts take on criminal matters because not doing so would result in even worse conflicts.

Limitations and Challenges in Practice

Interviewees provided insights into the perceived limitations and challenges of customary justice systems in practice, especially with regard to handling criminal matters. These included:

Limited infrastructure, training, and enforcement. Respondents complained that the customary-justice system lacked vital court infrastructure, especially court records. Often justice was dispensed under a tree or in an old, dilapidated court building without the capacity to produce written records of the proceedings. This gave opportunities to the chief to make decisions without regard to submissions, making appeals more difficult.[52] Many respondents also noted that, in their experience, chiefs lacked the training and level of education needed to handle a range of matters, particularly criminal matters. In the long term, strong capacity-building programs would be required to equip them with the basic skills needed to handle criminal matters.[53] Customary courts are also said to lack enforcement capacity from the security sector, particularly when confronted with crimes committed by military personnel. Military and security personnel usually ignore orders or directives from customary courts.[54]

Inadequate security and compensation. Some respondents indicated that the challenges facing chiefs included threats from court users who were dissatisfied with decisions. Given the lack of guaranteed safety and security, the chiefs were at times fearful of dispensing justice and felt constrained by possible reprisals. Further, while the chiefs' work gives them status, it is very often performed voluntarily (unpaid), resulting in a lack of motivation. Some chiefs have resorted to levying court fees in order to upkeep their work.[55] As a result, some respondents felt that customary processes tended to make concessions in order to accommodate wealthy and/or influential persons to the disadvantage of the weaker party, especially when payment of fees was involved. One respondent complained that "cases are often handled in favor of the powerful people in the community, and in most cases, justice is in favor of the most influential community or individual."[56] At a broader level, some believed that the poor economic situation in the country means that customary justice depends on who has more influence, money, goats, and cows. They called for clarity from the government with regard to the fee to be paid to customary courts, a monthly amount to be paid to chiefs by the government to meet their needs, and the appointment of people to observe or monitor day-to-day practices in the customary courts.

Politicization of selection of chiefs. The election of traditional chiefs is organized and conducted by the local government through the county commissioners. While people were said to generally trust the chiefs more than the government, when the selection of the chiefs is politicized and influenced by the government through its officials and not based on merit, then public confidence in the customary law system suffers. The appointment of chiefs by the county commissioner does not enjoy sufficient legitimacy among communities at the grassroots level when the selection process is not consultative. "The election of chiefs has only been a male-dominated affair in almost all the counties and states of South Sudan," said one respondent.[57]

52 KII 16/02/23/040.
53 KII 15/02/23/004.
54 KII 11/02/23/036.
55 KII 16/02/83/040.
56 KII 18/02/23/037.
57 KII 01/03/23/038.

Gender discrimination and ill treatment of women. Gender discrimination was cited as a major limitation of the customary justice system, illustrating that reform is long overdue in enhancing protections for women, particularly in addressing sexual and gender-based violence crimes. One respondent, for example, reported that "customary courts tend to be male-dominated spaces, and their approaches to sexual and gender-based violence typically privilege the interests of family members over individual female victims."[58] Another respondent explained that the cause of discrimination is the high level of social and economic importance attached to dowry payment and a husband's consequential rights over his wife.[59] The practice is rooted in gender stereotypes that view women as the property of her family or husband, increasing the likelihood of violence against women and girls.[60]

One male respondent spoke of injustices against women that he witnessed in a case proceeding:

> Under customary justice, a female victim of rape can be blamed in some scenarios. This is observable in the way that the victim is questioned, such as: "Where were you when you were raped? What time of the day or night was it? Why were you out at night?" At the customary courts, a girl would be forcefully married off to the perpetrator on the grounds that the victim is "damaged" and therefore the perpetrator should take the damaged property. Sometimes a victim is rejected or mocked in the process.[61]

Another respondent noted that gender bias in the system is rooted in the way that proceedings are structured, because women are not represented, and the issues are settled by men: "A woman accused of adultery was brought before the court. They wanted her to be beaten [tortured] so that she would tell the men present how many men had slept with her, so that these men could contribute to the fine of seven cows. [Each man accused of adultery is liable to contribute to the fine.] I was very disappointed with the judge [for entertaining this this line of questioning in the hearing]."[62]

According to another respondent:

> In adultery cases, the man will be fined and made to pay the woman's husband 6 cows and 100,000 SSP to the court. In a case of rape or sexual and gender-based violence, the girl is persuaded to marry the man or boy. This is followed by a marriage dowry that usually includes 30–100 cows. However, some women and girls can refuse to marry the perpetrator. In that circumstance, the customary court can order the offender to pay 10 cows and a fine of 100,000 SSP to the court.[63]

Overlap of laws and "forum shopping." The dual system faces the challenge of overlapping laws, because there is no recognizable border between cases handled under the customary justice system and those that should be handled through formal lawsuits.[64] In fact, many interviewees spoke of the experience of "forum shopping," where an individual moves from one customary court to another seeking the best outcome, thus resulting in confusion within the justice system, hierarchy, and jurisdiction. As one respondent observed: "The traditional

58 KII 11/02/23/008.
59 In pastoralist South Sudan, dowry payment often involves a payment by the groom's family to the bride's family in the form of cattle. In agricultural areas of South Sudan, a dowry payment can involve a combination of money, cattle, and other livestock.
60 KII 15/02/23/004.
61 KII 11/02/23/008.
62 KII 09/02/23/007.
63 KII 13/02/23/005.
64 KII 01/03/23/038.

society was easy, but now there are so many administrators, like the Payam administrator, the city council, the chiefs, and many others. The structure is not clear about who is supposed to handle which kind of cases."[65]

Heterogeneous versus homogeneous communities. In homogenous communities, there was a certain sense of confidence in the customary justice system. However, challenges arose in more heterogenous community contexts, where different ethnic groups live together and conflicts arise between individuals from those different communities. In such instances, there may be reluctance to utilize the customary court because one group may fear the imposition of another group's customary law over its own. "The challenges that societies face when practicing customary justice," said one respondent, "are represented in the fact that each society imposes its own customary law on others, and, in return, the other society does not accept those impositions and avoids engaging in conflict resolution, which leads to limited access to achieving justice between the parties."[66] Another noted that mechanisms may be effective at resolving conflict at the community level but not between individuals and the state or individuals and armed groups.[67]

Cultural change. Due to the impact of prolonged war and displacement, populations may have moved away from their communities and crossed borders into other countries. On return, they may seek to practice hybrid cultures and tend to experience erosion of their own culture. With this cultural change, younger individuals may not understand past cultural practices and norms, hence preferring more formal ways of settling disputes.[68] According to one respondent: "Prolonged conflicts in South Sudan have destroyed the traditional leadership system, which guided good morals, cultural values, and the indigenous system of governance that ruled and protected the way of life. It has been replaced with an unfamiliar system of governance."[69] Interviewees noted that urbanization had led to the erosion of culture and weakening customary justice practices. "According to certain traditions, any man who had acquired his wealth through theft or other dishonorable means cannot be accepted easily to marry someone's daughter, but currently these men are being installed as leaders."[70] In essence, traditional sanction has become less effective and is no longer observed. In the past, for example, people feared witchcraft as a means of correcting a wrong.[71]

Contributing to revenge. Some respondents believed that problems with the traditional justice system were fueling a culture of revenge. People dissatisfied with the outcome of their cases, for example, may decide to take matters into their own hands and pursue their own forms of justice through illegal means, particularly by committing revenge killings. As one respondent put it, "Unjust rulings that are not in favor of the victim have a grave impact, because they would be passed on to future generations to take revenge, thus not solving the problem."[72] Another stated, "In the community where we keep animals, someone might say, 'I can kill you, then I pay the cows,' because the chiefs are reaping benefits from any grievance and dispute by charging big penalties—30 percentage—for settling disputes. This encourages crime in communities."[73] Another alluded to the practice of bribing chiefs, which may lead to cases decided in a skewed way, contributing to cycles of revenge and violence.[74]

65 KII 09/02/23/003.
66 KII 23/02/23/002.
67 KII 06/02/23/035.
68 KII 04/02/23/021.
69 KII 13/02/23/020.
70 KII 13/02/23/020.
71 KII 09/02/23/003.
72 KII 20/02/23/017.
73 KII 20/02/23/017.
74 KII 09/02/23/019.

Customary Justice in the Context of Intercommunal Violence and Abuse

Customary Justice Systems and Traditional Authorities

In 2020, sub-national violence accounted for many of the human rights violations documented in the country, according to the Human Rights Division of the UN Mission in South Sudan (UNMISS).[75] At least 5,800 civilians were individually affected by violence, with at least 78 percent affected by intercommunal conflict.[76] Victims were subjected to one of four major internationally recognized forms of individual harm: killing, physical injury, abduction, and conflict-related sexual violence.[77] Further, violence was geographically concentrated in 72 payams (13 percent of the 540 payams in the country).[78] In 2021, at least 3,414 civilians were subjected to such harms,[79] with sub-national violence affecting most of the victims, at about 87 percent. During the first quarter of 2022, intercommunal violence perpetrated by community-based militia groups constituted the primary source of violence affecting civilians, accounting for more than 64 percent of civilian casualties (484 deaths).[80] In the second quarter of 2022, intercommunal violence accounted for 60 percent of civilian casualties.[81]

Intercommunal conflict, including from rape and other forms of sexual violence, is a major cause of concern in South Sudan because of its significant impact on loss of life and serious bodily harm. Historically, the use of traditional weapons of warfare, such as spears and bows and arrows, restricted the number of deaths such that traditional authorities could manage any losses resulting from attacks. Casualties on both sides and the identities of the killers were easily established and reported to the chiefs during peace meetings, and each side would mobilize and pay the required compensation in cattle according to the local custom

75 UNMISS Human Rights Division, "Annual Brief on Violence Affecting Civilians, January–December 2020," 2021, 1, https://unmiss.unmissions.org/sites/default/files/unmiss_annual_brief_violence_against_civilians_2020_final_for_publication.pdf
76 Ibid.
77 Ibid.
78 Ibid.
79 UNMISS Human Rights Division, "Annual Brief on Violence Affecting Civilians, January–December 2021," 2022, 1, https://unmiss.unmissions.org/sites/default/files/unmiss_hrd_annual_brief_2021.pdf
80 UNMISS Human Rights Division, "Brief on the Human Rights Situation in South Sudan, January–March 2022, 1, https://unmiss.unmissions.org/sites/default/files/hrd_quarterly_q1_brief_-_10_may_2022.pdf
81 UNMISS Human Rights Division, "Brief on Violence Affecting Civilians, April–June 2022," 2023, 1, https://unmiss.unmissions.org/sites/default/files/human_rights_quarterly_report_q2_20_july_2022_clean_version_for_coss.pdf

and tradition.[82] But, the nature of intercommunal conflict is evolving; it is now often carried out with military-style tactics and military-grade weapons.[83] It is also connected to national politics and prospects for peace in the country.[84] One important factor driving conflict is the desire for revenge, which seems to thrive where grievances remain unaddressed or where impunity exists.[85]

Customary justice mechanisms were built to address minor kinds of wrongdoing at the local community level; therefore, they do not necessarily have the capacity or authority to address mass human rights violations committed during intercommunal conflict, especially interethnic violence.[86] Most respondents said that customary justice systems were not legally capable of assuming jurisdiction over criminal cases, let alone mass crimes. As one respondent noted: "Customary justice systems are not legally competent courts to address massive and gross human rights violations and crimes under international law. It would require legislative amendments to enable customary courts to do so, with significant attention as to how they treat women and girls."[87] At the same time, interviewees expressed the view that "with necessary adaption, grounded in community perceptions and aspirations, customary justice has the potential to contribute to the realization of some level of peace in South Sudan."[88]

Interviewees gave several examples of instances where customary justice system actors in practice have adapted in order to respond to intercommunal violence that resulted in mass killings and destruction. As one respondent reported:

> When mass killings happen, the elders, youth, women representatives, and religious leaders come together for a seating. They will acknowledge the wrong that occurred. They will condemn what happened, and the two clans will agree on commensurate compensation. For any intentional killing, the accused person will pay 101 cows per life. For non-intentional killing, the payment is 51 cows per life lost. The elders, youths, women representatives, and religious leaders will first consider the total number of causalities from both sides and the payment will be based on the difference. For example, when people from the Leek clan in Rubkona fought with the Bul Clan of Mayom, the loss among the Leeks was 140 persons and for the Bul Clan was 100 in number. Through mediation, it was agreed that the Bul of Mayom should pay for the lives of 40 people. The two communities then underwent rituals, like slaughtering a sacred bull, and the people ate together while praying to gods for forgiveness.[89]

In cases of displacement, when civilians flee to the enemy side, chiefs and elders are expected to provide food, water, medication, and space for temporary housing and after some time provide guidance on resettlement.[90]

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82 Ibid., 231.
83 UNMISS Human Rights Division, "Brief on Human Rights, 2022." "Although violence among tribes and sub-clans is historically rooted in traditional societal practices, particularly in pastoralist societies (such as protecting cattle from attacks), over the years it has taken on an increasingly militarized character, with the involvement of elements of conventional parties (organized armed military forces) to the conflict. Further, political and administrative elites at the local and national levels have contributed to the intensification of violence, including by instigating and/or participating in planning attacks, providing financial and logistical support, and furnishing weapons and ammunition."
84 UNMISS Human Rights Division, "Brief on Violence Affecting Civilians, October–December 2022," 2023, 3, https://unmiss.unmissions.org/sites/default/files/hrd_q4_brief_2022_civcas_final_final_16feb_1.pdf
85 Martin O.L. Agwella, "Localising Peacebuilding in South Sudan? A Case of Transitional Justice and Reconciliation" (Ph.D. diss., University of Bradford, 2018), http://hdl.handle.net/10454/17138
86 KII 02/02/23.
87 KII 15/02/23/004.
88 KII 15/02/23/004.
89 KII 16/02/83/040.
90 KII 16/02/83/040.

One respondent gave a practical example of how customary justice had contributed to peace and reconciliation in Unity State, where cattle raiding has been rampant: "The communities' declaration contained elements of accountability achieved through punishment by paying fines and/or imprisonment as well as restitution in situations where compensation was found to be unviable."[91] The theft of 200 cattle in Parieng led to mediation among three communities:

> The traditional authorities nominated herdsmen to mediate the return of the cows. After investigations were carried out in two communities, the two perpetrators [ring leaders] rejected the findings of the investigation. The herdsmen threatened to take them [ring leaders] to court. The cattle were all found and brought to a 'B' Customary Court, and the two ring leaders were sentenced to 5 years' imprisonment and ordered to pay a fine of 10 cattle, while the stolen cattle were returned to the owners. Hence, the two communities were able to maintain peace.[92]

Customary justice also plays a role in conflicts related to land and other community resources. One respondent recalled an incident in which the Abang and Malual community fought each other over a land dispute that resulted in violence and the killing of one person. A respondent stated: "A committee comprised of chiefs was constituted to resolve the matter. It was amicably resolved, and the communities are currently living as one."[93] Another respondent noted an example from 2015, when the Bari Community fought with the Mundari Community over land: "To reconcile them, the customary chiefs from the two communities met and organized a reconciliation session. The two communities reconciled and paid back what they had destroyed during the conflict. Harmony was restored between the communities."[94] Another respondent reported: "The Nimule intercommunal conflict between the Maadi and Acholi over land and water resources was resolved through ad hoc customary courts in 2021. Similarly, ad hoc courts were again used in Mugali to resolve an issue between the Madi and Dinka."[95]

People-to-People Peace and Reconciliation Processes

Traditional authorities are key players in promoting peace in communities in South Sudan. Over the years, these authorities, particularly chiefs, have made attempts to intervene and end conflict by forming joint intercommunal panels and spearheading peace processes that involve all relevant stakeholders. Through such PPP reconciliation processes, communities have reached several peace agreements, showing the adaptability of customary justice systems for resolving new forms of community disputes. This section outlines several PPP reconciliation processes discussed by respondents during interviews.

Waat Lour Nuer Covenant (1999). In November 1999, Lou Nuer leaders held a People-to-People Peace and Governance Conference in Waat, Sudan under the auspices of the New Sudan Council of Churches (NSCC). Delegates from all districts participated, in addition to Lou from Malakal; Khartoum, Sudan; and foreign countries. The covenant aimed to end all conflict among the Lou Nuer was sealed by the traditional sacrifice of a *Tu-Bor* ("white bull") and coupled with a Christian worship ceremony. The covenant included amnesties for offenses against persons and destruction of property.[96]

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91 KII 02/02/23.
92 KII 16/02/83/040.
93 KII 13/02/83/020.
94 KII 17/02/83/031.
95 KII 08/02/23/033.
96 Waat Lou Nuer Covenant, Waat, Sudan, November 6, 1999, PA-X, Peace Agreement Access Tool (Translation University of Edinburgh), www.peaceagreements.org/viewmasterdocument/1815

Liliir Covenant (2000). Th Liliir Covenant was made between the Anyuak, Dinka, Jie, Kachipo, Murle, and Nuer communities at the East Bank People-to-People Peace and Reconciliation Conference in Liliir in Bor County (Upper Nile), Sudan, in May 2000. The conference opened with a ceremonial sacrifice of a white bull and concluded with the declaration of a joint covenant between the convening ethnic groups. The covenant was sealed with the sacrifice of a white ox, a Christian worship service, and signatures of each of the participating delegates and observers. The agreed-on issues included cessation of hostilities, a blanket amnesty for all offences committed in the past, return of abducted women and children, and regularization of forced marriages under the groups' marriage customs.

Wangkei Declaration (2017).[97] While Dinka communities of the Bul, Leek, Jagey, and Jikany engaged in ongoing conflicts involving cattle raiding, revenge killings, abduction of women and children, and destruction of property, the chiefs and elders of the communities and other leaders gathered to mediate peace. Under the Wangkei Declaration, the communities agreed to be reconciled with one another and live together in peaceful coexistence as one people of Northern Liech in the Unity State.

Marial Bai Agreement (2017).[98] This agreement, resulting from a tristate peace conference with 300 delegates, aimed to end communal violence between pastoralist and farming communities in Tonj, Gogrial, and Wau states. It includes 22 resolutions. The governors of the three states resolved to immediately cease hostilities and conduct comprehensive disarmament. Delegates agreed to form a joint monitoring committee to watch for signs of resurgent violence. The agreement was first reviewed in 2019 to address persistent issues, such as the presence and use of arms, cattle being moved earlier than what was agreed on,[99] and dispute settlement processes. In a bid to minimize tensions and prevent violence, a UN peacekeeping mission supported the deployment of joint integrated police forces in the states, particularly in conflict-prone areas. A Special Mobile Court was also established to quickly try cases that cannot be resolved amicably by the communities. The political leadership of the three states called on their communities to stick to the agreement in the interest of peace and stability.

Ganyliel Resolutions (2018).[100] The Ganyliel Agreement brought peace to the Eastern Lakes State region, following a Joint Peace Committee meeting held by the Dinka communities of Yirol (Lakes State), the Piny (Lakes State – Rumbek), and the Nuer community of Payinjiar. Conflict between these communities had been characterized by violent cattle raids and targeted killings. The meeting was attended by chiefs, church representatives, elders, women, and youth leaders drawn from the three communities. The resulting peace resolution stated that it was designed to "bring reconciliation . . . to the people of these three locations,"[101] and included accountability and reparative measures. They agreed that: any person or group from either side would be held be accountable for any border crime(s); and blood compensation and compensation for properties would be paid to victims for damages resulting from the action of the other community, like returning stolen cattle. When surveyed a year later, more than 80 percent of residents in the area noted that peace continued to hold and attributed the

97 KII 16/02/83/040.
98 UNMISS, "Marial Bai Agreement to Regulate Relations Between Farmers and Pastoralists In Wau Area," December 23, 2016, https://unmiss.unmissions.org/marial-bai-agreement-regulate-relations-between-farmers-and-pastoralists-wau-area
99 Typically, cattle herders should move their cattle in January, after farmers have harvested their crops. Moving cattle before this period risks cattle destroying crops, resulting in conflict. Given that herders are heavily armed and militarized, the conflict no longer has the character of traditional conflict but, rather, one with strong hints of modern conflict, with high death rates and destruction of property. Conflict usually results in revenge killings, thereby perpetuating conflict.
100 Joint Peace Committee Meeting Resolution (Payinjiar, Yirol and Rumbek-Amongpiny), Ganyliel, May 16, 2018, www.peaceagreements.org/viewmasterdocument/2287
101 Ibid.

peace to this agreement.[102] However, structural challenges like the limited resources from the government to advance the livelihoods of youth remained a threat to peace.[103]

Jonglei State and the Greater Pibor Administrative Area: Failure of a PPP Process

Jonglei, an underdeveloped region of South Sudan home to approximately 2 million people, has experienced substantial sub-national conflict. From January 2011 to September 2012, nearly 50 percent of reported conflict incidents and more than 50 percent of conflict-related deaths and displacements in South Sudan happened in Jonglei state. At the time, it comprised what is today the Greater Pibor Administrative Area (GPAA).[104] The largest ethnic groups that reside in this area are the Nuer, Dinka, Murle, and Anuak. The Dinka and Nuer are the two largest ethnic groups in South Sudan and have long held the most senior government positions in South Sudan: the president is typically from the Dinka ethnic group, while the first vice-presidency is Nuer. The Murle is a marginalized minority ethnic group, mostly living in Pibor district (the “lowland” Murle) and the Boma plateau (the “highland” Murle).[105] Conflicts between these communities have resulted in the killing and displacement of thousands of people, despite numerous local peace initiatives by local government actors, nonstate actors, the UN Mission in Sudan, and then later UNMISS.

In December 2011, an estimated 6,000 to 8,000 armed youth from the Lou Nuer’s “White Army” militia marched against the Murle after persistent attacks on Nuer communities that left up to 1,000 people killed.[106] From December 2011 to February 2012, at least 900 people were killed, and some 90,000 people displaced.[107] In 2012, a peace process spearheaded by church leaders and mandated by the government aimed to bring the Lou Nuer and the Murle into dialogue. UNMISS facilitated additional local peace initiatives, culminating in the All-Jonglei Peace Conference in May 2012, where the paramount chiefs of all three communities signed a detailed framework agreement for peace in the presence of the South Sudanese president.[108] However, conflict re-emerged. In late November 2018 and in January 2019, members of the Murle community attacked the Lou Nuer community in Lokomai, Duchan, and Kolabiel villages (Jonglei), killing at least 55 people, injuring 78 others, and stealing an estimated 1,000 cattle,[109] with conflict persisting for months.[110]

In 2020, the region experienced three waves of conflict pitting the Murle against the Dinka Bor and Lou Nuer. An estimated 1,058 people were killed between January and August 2020, including women and children, with massive displacement among the communities totaling almost 170,000.[111] Attacks involved extreme acts of violence, with attackers using both rudimentary and modern weapons: spears, machetes, knives, machine guns (Kalashnikovs), and rocket-propelled grenades. Killings were committed with guns or machetes or by burning people alive.[112]

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102 Selma van Oostwaard, “Security Is Everyone’s Business: Community Security Dialogue in Eastern Lakes, South Sudan,” PAX, June 5, 2019, https://protectionofcivilians.org/news/security-is-everyones-business-community-security-dialogue-in-eastern-lakes-south-sudan/
103 Ibid.
104 Médecins Sans Frontières, “South Sudan at 10: An MSF Record of the Consequences of Violence,” July 21 2021, 21, www.msf.org/south-sudan-10-msf-record-consequences-violence
105 Ibid.
106 Richard B. Rands and Matthew LeRiche, “Security Responses in Jonglei State in the Aftermath of Inter-Ethnic Violence,” Saferworld, 2012.
107 UNMISS, “Incidents of Intercommunal Violence in Jonglei State, Juba,” 2012.
108 Hilde Johnson, South Sudan: *The Untold Story from Independence to The Civil War* (London: IB Tauris, 2016), 115.
109 UN HRCSS, Report of the Commission on Human Rights in South Sudan, January 30, 2020, A/HRC/43/56, para 32.
110 Ibid. at paras 31 and 32.
111 Office of the UN High Commissioner for Human Rights, “Armed Violence Involving Community-Based Militias in Greater Jonglei, January–August 2020,” March 2021, paras 71 and 108.
112 Ibid. at para 68.

A 13-member High-Level Committee led by Vice President Dr. James Wani Igga was established by President Salva Kiir to address the root causes of the violence.[113] In January 2021, the committee held a peace conference in Juba between the Dinka, Murle, and Nuer groups involved in armed violence in Jonglei and GPAA. Participants issued a series of resolutions, including key recommendations on the abduction of women and children, revenge and arbitrary killings, cattle raiding, justice and accountability, security and law enforcement, socioeconomic empowerment and peacebuilding, humanitarian interventions, and relations with neighboring communities.[114] In March 2021, the communities signed an agreement titled Action for Peace, which called for the return of abducted women and children, return of stolen cattle, prosecution of perpetrators of crimes since the commencement of the peace process, establishment of a Traditional Leaders Circuit Court, and formation of a joint interethnic women's peace committee.

Yet, conflict between the communities continued, reaching a crescendo in December 2022 and January 2023, when 638 Murle were killed in an attack against the villages of Gumuruk and Likuangole.[115] The attacks were carried out by Lou Nuer youth and other Nuer groups from Jonglei State. Civilians suffered injuries including gunshots and machete wounds, massive destruction of property, abduction of women and children abduction, sexual and gender-based violations, and theft of cattle (with an estimated value of $30 million USD).[116] Massive displacement affected over 42,000 residents in 14 villages. The attacks, carried out with carried heavy weaponry and artillery, appeared to have been well planned. Although the conflicts in Greater Jonglei have been endemic for years, this new era of fighting reached an altogether different scale, with numerous PPP processes continuing to flounder.[117] Ultimately, the process in Jonglei failed to resolve the conflicts in the region.

Wunlit Peace Conference (1999): Success of a PPP Process

An older initiative sheds light on a more effective PPP. The 1999 Wunlit Peace Conference, formally known as the Dinka-Nuer West Bank Peace and Reconciliation Conference, was convened in the Dinka area of Tonj, in Wunlit village, close to the Nuer territorial border.[118] It is seen as the most successful peace meeting in the history of the two Sudans, an event that epitomized the value of customary justice mechanisms. The conference was initiated after a meeting of Dinka and Nuer Chiefs in Lokichogio, Kenya, in 1998, following eight years of conflict between the Dinka of Bahr Ghazal and Nuer of Western Upper Nile. Participants included church leaders, traditional chiefs, spear masters, elders, women, youth, and representatives of the SPLM and the South Sudan Defence Forces.[119] The resolutions resulting from the conference included cessation of hostilities, amnesty for past crimes, and encouragement of return of the displaced. The conference was able to restore peace between the Nuer and Dinka communities, so it was therefore emulated by other communities.[120]

113 South Sudan Republican Order No. 20/2020, The High-Level Committee on to Address the Security Situation in Jonglei State and Pibor, established June 23, 2020.
114 OHCHR, "Armed Violence."
115 Ceasefire and Transitional Security Arrangements Monitoring and Verification Mechanism, "Violence in Greater Pibor Administrative Area," March 2023, paras 7–13.
116 Ibid.
117 John Young, *South Sudan's Civil War: Violence, Insurgency and Failed Peacemaking* (Zed Books Ltd, London: 2019), 36.
118 Baak Deng, "Traditional Justice Methods," 339.
119 Ibid., 340.
120 John Ryle and Douglas H. Johnson, "What Happened at Wunlit? An Oral History of the 1999 Wunlit Peace Conference," South Sudan Customary Authorities Project and Rift Valley Institute, 2021.

Wunlit's success came about for several reasons. Most critical was the patient preparation of the conference by the NSCC,[121] which was viewed as a neutral, trustworthy peace broker. The conference did not have a strict time limit, which allowed for thorough examination of important issues. The NSCC sought to build trust between the parties by encouraging a meeting between the elders of both communities. Additionally, the elders and chiefs took time to reflect on how their ancestors used to settle disputes. Critically, conference participants fully participated in and helped lead the meeting. Further, the conference encouraged story telling of the horrors and suffering caused by the conflicts and the desire for peace. An acknowledgment meeting was held, allowing community representatives to speak about the horrors of war and its personal impacts. Another important element was symbolism, including the slaughtering of a white bull to signify an agreement.[122] According to one participant, the agreements made at Wunlit contributed to stabilizing the borders and reducing the violence: "Those were the things that were made straight when the meeting was coming to an end. It was agreed that all abducted children would be returned, and stolen cattle would be returned. The border was stable, the Dinka would come and the Nuer would go. That is why there were no more deaths."[123]

Truth telling was at the core of the Wunlit Peace Conference's success:

> The forum followed the traditional format of local courts. Each wronged group was allowed to speak long and fully of its issues as felt by each representative. Those accused were not permitted to speak. There was respectful silence for each speaker. Their stories often matched. Later there is an opportunity for rebuttal, but often there is no rebuttal…Both sides acknowledge the truth of the accusations, but also recognise that they have each suffered in a similar way at the hands of the other. This leads to agreements including practical actions for peace, followed by the signing of a covenant.[124]

The slaughter of a large white bull, known in Dinka as *mabior*, by traditional spiritual leaders of both communities, symbolized peace and an end to the conflict. It also serves a warning that anyone who violates the covenant would go the way of the white bull.[125]

> The way the white bull was killed, people of the church came and had prayers first and then they stepped aside. Then the spiritual leaders from both Nuer and Dinka came in and called all their ancestors and then they killed the white bull. The people of the church were just watching from afar. In this way, peace came between Dinka and Nuer.[126]

121 New Sudan Council of Churches, *Inside Sudan: The Story of People-to-People Peacemaking in Southern Sudan. A Peace of the People, by the People, for the People* (Nairobi, NSCC: 2002).
122 Ibid., 50–1.
123 Ryle and Johnson, "What Happened at Wunlin?," 94.
124 John Ashworth, "The People to People Peace Process," October 16, 2014, www.csrf-southsudan.org/wp-content/uploads/2021/06/people_to_people_v2.pdf
125 *Africa News Service*, "Sudan: Dinka, Nuer Endorse Proposals to End Conflict," March 29, 1999, https://reliefweb.int/report/sudan/sudan-dinka-nuer-endorse-proposals-end-conflict
126 Ryle and Johnson, "What Happened at Wunlit?," 68.

A Hybrid Approach to Customary and Transitional Justice: Challenges and Opportunities

The African Union Transitional Justice Policy provides a broad conceptual framework for approaching customary justice in the context of transitional justice.[127] According to this regional policy, transitional justice refers to policy measures—formal and nonformal/traditional—and institutional mechanisms that societies adopt to create conditions for security and democratic and socioeconomic transformation. It is meant to assist a society in addressing legacies of violent conflict and gross violations of human rights to achieve justice, equality, and dignity, beyond retribution, drawing on traditional justice approaches, while emphasizing reconciliation, community participation, and restitution. African traditional justice mechanisms may include elements such as an acknowledgement of responsibility and the suffering of victims, demonstration of remorse, request for forgiveness, reparation, payment of compensation, and reconciliation. They should inform and be used alongside formal mechanisms, with due regard to the African Charter on Human and Peoples' Rights (adopted in 1981, enacted in 1986) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol, adopted in 2003, enacted in 2005). Further, the AU Transitional Justice Policy proposes that countries:

- Support and respect community-based accountability mechanisms that seek to foster integration and reconciliation;
- Promote communal dispute settlement institutions at appropriate levels for relevant cases, provided a person shall not be compelled to undergo any harmful traditional ritual;
- Explore alternative and non-formal dispute resolution mechanisms where necessary;
- Integrate generic African practices into international norms and standards that would enhance international commitment to end impunity and promote peace, justice and reconciliation;
- Recognize the contribution of positive traditional practices and customary norms in Africa that have proven to be useful complements to criminal prosecutions for certain categories of crimes.[128]

127 African Union, African Union Transitional Justice Policy, adopted February 2019, paras 18 and 57(v).
128 African Union, African Union Transitional Justice Policy, para 57.

As explained, South Sudan has a pluralist legal system that incorporates parallel systems of statutory and customary courts. The statutory courts have jurisdiction over most crimes and civil suits, with an appellate jurisdiction over customary courts. Because statutory courts are not established in many counties, customary courts fill this gap, playing a key role in resolving disputes at the county and payam levels. Customary law is used to restore balance and relationships in the event of conflict between community members, with dialogue, negotiation, and consultations employed before use of sanctions. Truth telling, compensation, restitution, reconciliation, and cleansing are employed as remedies to restore balance and peaceful relations.[129] The challenges that customary courts face include a lack of jurisdiction over crimes, "forum shopping," political interference and lack of independence, and technical and financial capacity constraints that limit their capabilities.[130]

Contexts of intercommunal violence and serious human rights violations present additional challenges for customary justice systems in South Sudan. For example, there are new forms of intercommunal violence involving youth with sophisticated weaponry using military tactics:

> We, the chiefs, have lost our powers now because of availability of guns in the hand of civilians. Now in Amongpiny County (Rumbek East), my duty is only to speak with Gelweng youths (members of local cattle defence militia) while remained seated and to make matters worse, it's up to Gelweng youth to respect me and listen to words or refuse to accept my words. The youth are now armed with guns and should a chief try to tell them the truth, they feel powerful enough to threaten the chief with a gun ready to shoot.[131]

During violent conflict, the shift of power from elder-led traditional systems to armed youth undermines the traditional governance system. It is also evident in traditional leaders' limited technical and financial capacity to resolve complex historical grievances that triggers intercommunal violence. Moreover, disputing parties are now often typically strangers who may be less willing to negotiate customary compensation awards. Sanctions in traditional systems may also be less of a deterrent, especially among armed groups. Lastly, a continued lack of police presence at the local level means that chiefs cannot enforce sanctions.

The cycles of violence that persist in South Sudan are related to grievances at the local level that play out when people in different communities interrelate. This includes the lasting impact of child abduction on individual and community psyches and grievances resulting from loss of life, sexual violence, or cattle raiding (with cattle rearing being the biggest source of livelihood). Such abuses committed by one community against another can create acrimonious relationships and retaliatory actions that tend to perpetuate and escalate violence. This is made worse by the fact that the state is largely absent at the local level, with communities feeling like they are on their own; therefore, they resort to violent confrontation. In the event that they agree to peace processes, the state is again largely absent to ratify and enforce the resulting agreements. Further, the modes of agreement often fail to fully appreciate the level of grievances.[132]

In these contexts, processes involving customary justice need to be adapted to more adequately respond to local grievances and power dynamics. The concept of hybridity emphasizes mixing modern, liberal, and local peacebuilding approaches, to the benefit of agreed-upon versions of peace.[133]

129 Baak Deng, "Traditional Justice Methods," 335–8.
130 Ibid.
131 Ryle and Johnson, "What Happened at Wunlin?," 102.
132 Abraham Awolich, "The Layers of Grievances in the South Sudan Conflict," *Africa Up Close* (blog), Wilson Center, September 21, 2018, https://africaupclose.wilsoncenter.org/the-layers-of-grievances-in-the-south-sudan-conflict/
133 Agwella, "Localising Peacebuilding," 66. See also Hikaru Yamashita, "Peacebuilding and 'Hybrid' Peace," The National Institute for Defense Studies, 2014.

In this regard, there should be exploration of how to deploy conventional and traditional dispute mechanisms in relation to PPP reconciliation processes. Hybridity could enhance ownership, participation, sustainability, and official recognition of PPP reconciliation models spearheaded by traditional authorities. Actors in the conventional justice system can provide support to PPP reconciliation processes by ensuring that skills training, resources, capacity, and knowledge are available.

With such support, PPP processes can explore the potential of adopting more direct transitional justice approaches to strengthen their outcomes. Learning from examples like the Wunlit Peace Process that adopted truth telling, PPP reconciliation processes should allow victims the opportunity to tell their truth in an environment that is not hostile and offers acknowledgement of their experiences. Before holding higher-level conferences, traditional and local leaders should also explore holding grassroots consultations on the nature of the local conflict and the harms suffered. Further, this type of grassroots engagement with affected communities should explore remedies such as restorative and retributive measures as a basis for trust building and accountability. A neutral mediator, like the NSCC at the Wunlit Conference, can assist communities and leaders in framing critical issues of concern and assist the parties in narrowing down their demands towards an agreement. State backing of such processes is critical to reinforce the process and provide a guarantor to the outcome. A lack of state backing is a major cause of the collapse of such processes and resumption of conflict.

Hybridity can also involve the referral of certain violations for prosecution to special courts or special mobile courts. Here, a statute judge (not necessarily a resident of that state) is teamed up with a number of chiefs (also not necessarily from the conflicting groups or parties). The judge sits in court and is assisted by the chiefs, who act as advisors on the customary law aspects of the case. The judge's decision is binding on the parties. The special court is mobile and therefore moves from place to place addressing cases of interethnic conflict, with connections sometimes made between the special court and PPP processes. While the chiefs and elders of conflicting communities can agree to resolve certain matters, a special court sits and resolves a limited number of disputes that remain contentious, such as child abductions or blood compensation for murders.[134]

South Sudan has experimented along these lines. A Special Court was established comprising judges from different states and payam chiefs from the areas in question. Its decisions can be appealed to the court of appeal. Another approach is the use of mobile judges, which the South Sudan judiciary has deployed in certain regions as Special Mobiles Courts. In Lakes State, for example, four special courts were established to prosecute cattle thefts and intersectional and inter-clan conflicts among Dinka and Atuot populations. A decade later in 2021, new special courts were created based on a PPP reconciliation process in November 2020.[135] Special mobile judges were also sent to Akobo, Jonglei, to hear homicide cases that had led to violent inter-clan conflict and abductions. People from Akobo reported high levels of satisfaction with the mobile courts and expressed a desire for them to be used more frequently.[136] However, the government has not sustained the practice.[137]

134 Zejin Yin and Alahayi Nemaya, "Joint Special Mobile Court Resuming Work on Cases Related to Cross-Border Cattle Migration," UNMISS, February 10, 2023, https://unmiss.unmissions.org/joint-special-mobile-court-resuming-work-cases-related-cross-border-cattle-migration. See also Zejin Yin, "Rule of Law Gets a Boost with Joint Special Mobile Court Resuming Operations in Gette," UNMISS, June 28, 2022, https://unmiss.unmissions.org/rule-law-gets-boost-joint-special-mobile-court-resuming-operations-gette

135 Internal Cattle Migration Conference, Airport Hotel, Rubek Lake State, South Sudan, November 17–20, 2020, 2331. See also Michael Daniel, "Lakes State Establishes Special Courts to Tackle Communal Violence," *Eye Radio,* August 29, 2021, www.eyeradio.org/lakes-state-establishes-special-courts-to-tackle-communal-violence/

136 David K. Deng,"Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan," 40.

137 Ibid.

These examples point to the potential adaptation of customary justice systems to respond to gross violations of rights. Special courts and PPP reconciliation processes are not without challenges, however, ranging from limited political support, to fractured communities that remain in conflict, to limited participation of actors who constitute the drivers of the conflict (such as political actors or youth) to limited financial and technical support. Clarity is needed on the utility of these mechanisms to enable achievement of accountability, truth, reconciliation, reparations, and healing. The CTRH could be a strategic actor in bringing such clarity.

Customary Justice within the Transitional Justice Framework (R-ARCSS Chapter V)

Chapter V of the R-ARCSS provides the current governing framework for transitional justice processes in South Sudan. Negotiated as part of the broader R-ARCSS peace agreement, it stipulates the way that transitional justice processes are supposed to unfold. It primarily provides for the establishment of the CTRH, CRA, and the Hybrid Court for South Sudan.[138] All three mechanisms are required to individually promote the common objectives of truth, reconciliation, healing, reparation, and compensation in South Sudan.[139]

The CTRH is intended to be a critical part of the peacebuilding process. It is mandated to spearhead efforts to address legacies of conflict and promote peace and national reconciliation and healing.[140] It is also mandated to lead efforts to facilitate local reconciliation and healing.[141] The CTRH is required to create an accurate record of human rights violations, identify perpetrators wherever possible, and recommend remedies, including compensation and reparation for victims.[142] Most critically, related to customary justice, the CTRH is mandated to:

> Where appropriate, supervise proceedings of traditional dispute resolution, reconciliation and healing mechanisms. In this regard, and without prejudice to traditional justice mechanisms, develop standard operating procedures for the functioning of the latter, in accordance with the principles of natural justice.[143]

An interface between the CTRH and PPP reconciliation processes can be created by invoking these provisions. This would give the CTRH standing to support processes convened between warring communities, with a view to the use of traditional justice systems. PPP reconciliation processes should receive guidance from the CTRH on the ways in which their procedures can draw from those observed in customary justice practices and past PPP reconciliation processes. Such guidance will also need to ensure that traditional justice and dispute resolution processes aim to contribute to truth, reconciliation, healing, compensation, and reparation.[144]

Respondents interviewed for this study suggested that certain cases of serious crimes could be referred to the CTRH by traditional authorities if the cases were properly within its mandate

138 R-ARCSS, art. 5.1.1.
139 Ibid. at art. 5.1.3.
140 Ibid. at art. 5.2.2.1.
141 Ibid. at art. 5.2.2.3.8.
142 Ibid. at art. 5.2.2.3.
143 Ibid. at art. 5.2.2.3.9.
144 Ibid. at art. 5.1.3.

and involved conflicts that had roots in the capital and, therefore, were beyond their capacity. Further, certain matters brought by communities could be referred to traditional authorities by the CTRH, with proper guidance on the best approach for settlement. This would include issues already within their competence, particularly those that are intra- or intercommunal in nature, requiring the application of traditional and customary law. This could be premised on the understanding that it would be more efficient and appropriate for traditional authorities to handle these matters through their courts or PPP reconciliation processes than statutory courts.

Given the complexity and scale of the conflict and resulting grievances in South Sudan, complementarity between the CTRH and local peace and justice processes should be sought. It should be emphasized, however, that the government would still have an important role to play, not only in guaranteeing security and facilitating the transitional justice process, but also in the implementation of negotiated resolutions emerging from the particular PPP reconciliation process.[145] Other important actors in PPP reconciliation models are the religious sector, international and national nongovernmental groups, and international governmental agencies, because they can support the articulation of outcomes and follow up with the government on behalf of communities to ensure implementation of agreements. With that in mind, the CTRH could supervise and offer guidance to traditional justice and dispute resolution mechanisms in the following areas:

Truth telling. The Wunlit Peace Conference demonstrates that an acknowledgment of past harms can be an important element of local peace processes. The CTRH can, therefore, issue guidance to traditional justice mechanisms and by extension subnational peace processes on undertaking truth-telling efforts. In particular, it can urge them to adhere to a victim-centered approach that provides confidentiality and protection measures, where necessary, to vulnerable victims who wish to be heard, along with gender-mainstreaming measures for the protection of women and girls who wish to participate. Memorialization and symbolic rituals to signify reconciliation are also commonplace in traditional and customary practices in South Sudan, as illustrated by the Wunlit Peace Conference and other peace conferences. The CTRH should therefore encourage PPP reconciliation processes to utilize memorialization and traditional rituals to cultivate buy-in from all actors in order to encourage reconciliation of communities.

Reparation. The 2009 South Sudan Local Government Act provides that "adequate compensation shall be awarded to the victims of wrongs."[146] In the South Sudanese customary justice system, an offender may be made to pay compensation to the victim beyond restitution. This compensation represents a form of apology and atonement by the offender to the victim and the community.[147] Reparation or compensation also aligns with South Sudan cultural practices in many communities for unintentional killing.[148] In traditional court processes, it is understood that the payment of compensation is not the responsibility of the offender and his/her family alone; the involvement of the offender's community in paying compensation demonstrates an acknowledgment of guilt, intention to reconcile, and a collective commitment to put an end to impunity and prevent similar incidents from happening again.[149] Another common practice is payment of compensation for property theft or

145 Agwella, "Localising Peacebuilding," 171.
146 Government of South Sudan, Local Government Act, 2009, Section 98 (3)(c).
147 Ntanda Nsereko, "Victims of Crime and their Rights," in *Criminology in Africa*, ed. Tibanfanya Mwene Mushanga (Nairobi, Law Africa Publishing Kenya Ltd: 2004).
148 UN Development Programme, "Customary Laws in South Sudan," 10.
149 Agwella, "Localising Peacebuilding," 171.

property damages (like stolen cattle) and *dia* ("blood compensation") in the case of death. Negotiated through "social partnerships and grassroot networks for peace and dialogue," these practices could potentially provide a suitable mechanism for addressing large-scale abuses and help to overcome the challenge of identifying individual perpetrators who would be responsible for paying compensation by deciding that the community should take up that responsibility.[150]

Reparation can also include restitution, which is a widely recognized traditional practice.[151] The return of stolen property, including cattle, has been a regular practice in South Sudanese peace processes. However, in some communities, the compensation for intentional killing involves arranging the marriage of a girl child in lieu of committing a revenge killing; this would have to be explicitly excluded, given international human rights standards.[152] The CTRH is bound to follow international human rights standards and best practices when recommending reparation for victims.[153]

The CTRH is required to develop guidelines on compensation and reparation, which should be tabled before the Reconstituted Transitional Legislative Assembly for endorsement. These guidelines should be developed with state authorities, traditional authorities, victims, and other stakeholders, especially women, to ensure that they are responsive to the context and victims' rights and needs. Reparation measures and practices would be informed by traditional practices, such as restitution, blood compensation, financial compensation, apology, and, where it can be shown that violations were sanctioned by the central government or state authorities, collective reparation from the state.

Accountability. The CTRH can offer guidance on accountability, including the types of cases that PPP processes can refer to the special courts and special mobile courts, such as those involving rape, mass murder, summary execution, torture, and other serious crimes that a traditional authority does not have jurisdiction over or deem itself legally fit to adjudicate. Moreover, a PPP reconciliation process can refer other types of offences committed in intercommunal conflicts—such as destruction of property and theft of cattle—to traditional authorities and customary courts, which they would have jurisdiction over.

In many local agreements, such as the Waat Lour Nuer Covenant and Liliir Covenant, blanket amnesties were part of the agreed-on resolutions. In most instances, the lack of follow-up accountability measures, even when PPP reconciliation processes recommended them, resulted in a de jure amnesty scenario. Providing amnesty was preferred in addressing the conflicts between the Jikanyi and the Lou Nuer of Akobo, which were resolved through the 1994 Jikany-Lou peace conference,[154] and those between the Dinka of Bahr el Ghazal and the Nuer of Western Upper Nile, which were resolved at the 1999 Wunlit Peace Conference. Given the overwhelming number of casualties resulting from these conflicts, the communities opted for amnesty instead of compensation. In the Africa Union Transitional Justice Policy, amnesties are described as general reprieves for offences.

150 Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* (30): 2008, 6.
151 African Union, African Union Transitional Justice Policy, 2019, paras 65 and 66.
152 South Sudan acceded to the International Covenant on Civil and Political Rights in 2019.
153 Some forms of reparation may be insufficient to satisfy international human rights standards and the laws of South Sudan. For example, blood compensation for killings would have to be coupled with criminal punishment given that they serve different purposes. Criminal sanction would be recommended to punish the individual and reconcile him or her with the state, while traditional payment of compensation is intended to reconcile the affected communities.
154 The African Center for Human Advocacy (ACHA), "A Report on the Jikany/Lou Peace Conference Held at Riang Location, Eastern Upper Nile from 1st to 5th March 2004," ACHA, Nairobi, Kenya, 200, www.peaceagreements.org/masterdocument/2530

Where amnesties are used in transitional justice processes, they should be formulated with the participation and consent of the affected communities, including victims' groups. They should also have regard to victims' right to a remedy, particularly in the form of truth and reparation. Transitional justice processes should not allow "blanket" or unconditional amnesties that prevent investigations, particularly of the most serious crimes.[155] It has been argued that the unconditional issuance of amnesty without any measure of accountability contributes to cycles of violence and revenge. As such, the CTRH should offer guidance to traditional authorities on how amnesties should be issued, to ensure that they adhere to international human rights standards and practice.[156]

155 African Union, African Union Transitional Justice Policy, paras 89 and 90.
156 See generally, Office of the UN High Commissioner for Human Rights, *Rule-Of-Law Tools for Post-Conflict States: Amnesties*, 2009, www.ohchr.org/sites/default/files/Documents/Publications/Amnesties_en.pdf

Conclusion

Ongoing subnational and intercommunal violence and conflict in pockets of South Sudan continue to have a deleterious impact on the lives and livelihoods of local people. Wanton killings, destruction of property, theft of cattle, conflict-related sexual violence, abduction of women and children, forced displacement, and forced starvation are some of the atrocities suffered by communities in conflicts that have for lasted decades. This situation is perpetuated by cycles of revenge and exacerbated by the absence of the central authority to mediate disagreement or enforce the law to hold those responsible to account.

Customary justice systems handle the vast majority of disputes in South Sudan, though they were not designed to handle grievances arising from cycles of intercommunal conflict, atrocities, or historical injustices. Given the general absence of the state at the local level and the inability of customary systems to handle massive violations, traditional authorities have pursued their own unique model of peace and reconciliation, referred to as PPP reconciliation processes. These processes tend to be inclusive, drawing support from external actors, including the state, and often culminating in a conference and negotiated agreement that seeks to restore harmony between the affected communities by incorporating traditional and local approaches.

Despite these local peace processes, conflict still recurs in some areas. Among the reasons for persistent violence is the absence of the central state in affirming local peace agreements and fulfilling its obligations under the agreements, including pursuing criminal prosecutions where required. Further, with exceptions such as the Wunlit Peace Conference, there is an absence of acknowledgment, reparation, or accountability in most PPP reconciliation processes of grave violations of rights suffered by victims, with the participation of victims themselves largely absent. There is also an absence of interventions that guarantee non-repetition, which is a critical part of a peace process, because peace can only be sustained if the drivers of conflict (such as poverty, limited opportunity, and limited state infrastructure) are addressed in areas of development, such as through social services, disarmament of civilians, public-friendly policing, law and order, access to justice, and general and civic education. Finally, there has been silence on gender-based atrocities committed against women and girls and resulting grievances. The mistreatment of women and broader gender discrimination in traditional justice systems remains a cause for great concern, especially regarding crimes like mass rape.

PPP reconciliation processes have the potential to deal with unresolved grievances that drive intercommunal violence at the subnational level. Given the need to adopt transitional justice approaches in these processes, however, technical capacities are glaringly low. External actors like the United Nations have been strategic in supporting PPP reconciliation processes,

resulting in several peace agreements. Its recognition of the power of these processes should be lauded, and more support should be given to the CTRH as it seeks to incorporate goals such as truth, reconciliation, accountability, and reparation into these processes. Given its mandate under Chapter V of the R-ARCSS, the CTRH will have a significant opportunity to support and shape PPP reconciliation processes.

This report highlights the need to pursue the integration of bottom-up and top-down approaches when undertaking PPP reconciliation processes. The bottom-up element should be underpinned by grassroots consultations that can inform any resulting peace conferences or workshops, with any agreement receiving state sanction and support. The top-down element should seek to engage with local processes in a bid to learn and draw from local experiences to inform broader strategies in resolving national conflicts. There is space for such bottom-up and top-down processes to provide guidance, cultivate sustainable capacity, and foster local expertise that can be deployed to consistently support the resolution of inter- and intra-community conflict, including with transitional justice approaches.

Recommendations

Chapter V of the R-ARCSS sets out a transitional justice framework within which there are roles for both formal and customary mechanisms of justice. Given the gaps and risks associated with customary justice practices in South Sudan, especially in the context of intercommunal violence, a transitional justice framework, such as that in the peace agreement and in other relevant contexts, should be seen as an opportunity to clarify and give guidance to these roles. In doing so, it will also be important to take into account that South Sudan's customary justice framework emerged from a colonial divide-and-rule strategy and to therefore use this opportunity to transform it into a tool for building a diverse yet unified South Sudanese identity. The following recommendations are therefore meant to help identify and reduce gaps between the contribution that customary justice is envisioned to make to addressing the past and the way that it currently functions in practice.

To traditional authorities and local leaders:

- In contexts where customary justice practices address intercommunal violence, where appropriate, adopt transitional justice approaches and principles, such as truth telling, victim-centeredness, gender inclusivity, reparation, nonrecurrence, and accountability.
- Undertake grassroots and intercommunal consultation processes in the application of such customary practices, including in the planning of PPP reconciliation conferences and issuance of resolutions, in order to ensure that they are inclusive and victim centered.
- Establish monitoring mechanisms that assess if local peace agreement resolutions that legitimately contribute to transitional justice objectives are implemented beyond the conference, including those involving customary courts.

To civil society:

- Monitor and study customary justice practices, including in PPP reconciliation processes, with a view to documenting and understanding their strengths and weaknesses and enabling the exchange of lessons learned across identity groups and regions.
- Raise awareness among local and traditional leaders, citizens, and state officials on the need to transform customary justice practices, including in PPP reconciliation processes, so that they uphold international human rights norms, including those in the African Charter on Human and People's Rights, as well as gender equality and equity principles.

- Where customary practices are consistent with human rights norms, identify opportunities for them to help to disrupt cycles of conflict, resolve historical grievances, and foster cohesion.
- Provide technical assistance to customary justice practices, including in PPP reconciliation processes, including where appropriate administrative and logistical support, in order to ensure that they are as consistent with transitional justice principles as possible.

To the CTRH:

- Engage at the outset with traditional authorities in defining areas of collaboration and involve other stakeholders, critically state actors, as per article 5.2.2.3.9 of the R-ARCSS.
- Provide guidelines to traditional and customary authorities on transitional justice approaches within the framework of truth, accountability, reconciliation, compensation, reparation, and healing outlined in Chapter V of the R-ARCSS.
- Supervise and, where appropriate, give guidance to customary justice practices, including within PPP reconciliation processes, in order to ensure that they adhere to human rights standards.
- Provide capacity support to traditional actors and other local leaders, including through training and sensitization, to ensure that customary justice and PPP reconciliation processes that adhere to human rights principles are impactful as well.
- Give guidance to traditional authorities on questions of amnesty and prosecution of mass atrocities throughout PPP processes and the referral of appropriate cases to relevant formal/state justice mechanisms.
- As per article 5.2.2.3.6 of the R-ARCSS, investigate the drivers of conflict—including, potentially, traditional authorities and/or practices—and make recommendations to facilitate the contribution that customary justice may make to the non-recurrence of violence.

To the Ministry of Local Government and Ministry of Justice and Constitutional Affairs:

- Give support to the CTRH in its effort to engage with traditional justice processes within the framework of Chapter V of the R-ARCSS.
- Lead national peace and reconciliation efforts and encourage communities to develop complementary PPP reconciliation processes that are inclusive, victim-centered, and rights-based to resolve intercommunal conflict at the local level.
- Identify, document, and potentially endorse local peace agreements, particularly those with transitional justice elements, that are appropriate from a human rights perspective.
- Allocate prosecutors and investigators to interact with customary justice practices, including in PPP processes, and provide complementary judicial accountability by undertaking prosecutions in relevant cases before formal courts set up to handle special matters.
- Spearhead the establishment of the Compensation and Reparations Fund to give reparation and compensation as determined by the traditional justice mechanisms for conflict-affected communities, as per article 5.4 of the R-ARCSS.
- Together with the national government, spearhead establishment of the Special Reconstruction Fund to rebuild conflict-affected areas and construct basic infrastructure in collaboration with traditional justice leaders, as per article 3.2 of the R-ARCSS.

- Spearhead establishment of the Enterprise Development Funds, as per article 4.15 of the R-ARCSS, particularly the Micro, Small and Medium Enterprise Funds, the Women Enterprise Development Fund and Youth Enterprise Development Fund, and together with the traditional justice mechanisms leaders target rural populations including women and youth most affected by conflict for redress.

To state governments:

- Together with the national government, identify and mobilize and allocate funding for PPP reconciliation processes that are appropriate from a human rights and transitional justice standpoint, in order to facilitate their sustained impact.
- Potentially endorse the outcomes of appropriate PPP reconciliation processes to facilitate their contribution to transitional justice.
- Support appropriate PPP reconciliation processes by actively monitoring and overseeing implementation of their resolutions.

To the judiciary:

- Support the efforts of appropriate PPP reconciliation processes when they recommend establishing special courts to provide judicial accountability for relevant cases.
- Establish and adequately resource more courts at the local level, including by employing more judges.
- Establish programs to support capacity building for traditional and customary court officers, to enable them to provide more human rights-based and effective services to local communities.
- Incorporate traditional justice norms and decisions that are seen as accepted by South Sudanese people into the practice and precedents of non-traditional courts.

To international partners/donors such as The Troika (Norway, UK, US), the African Development Bank, and other multilateral financial institutions:

- Support the government of South Sudan to establish the Special Reconstruction Fund, the Enterprise Development Funds, as per article 4.15 of the R-ARCSS, particularly the Micro, Small and Medium Enterprise Funds, the Women Enterprise Development Fund and Youth Enterprise Development Fund to facilitate reconstruction and provision of reparations to the South Sudan populations most affected by the conflict.

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