



# Challenges of Accountability

An Assessment of Dispute Resolution Processes in Rural South Sudan

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Photos: David K. Deng

This report presents findings from an assessment that the South Sudan Law Society (SSLS) conducted on the accessibility of local justice systems across six rural counties of South Sudan. The assessment included a comprehensive household survey that examined the legal needs of populations residing in the six counties and the legal services that are available to service those needs and numerous interviews with local justice service providers and users.

David K. Deng is the author. Victor Bol provided research assistance.

The views contained in this paper are those of the author alone. They do not necessarily reflect the views of the SSLS, Pact, or their donors.

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## About the South Sudan Law Society (SSLS)

The South Sudan Law Society (SSLS) is a civil society organization based in Juba. Its mission is to strive for justice in society and respect for human rights and the rule of law in South Sudan. The SSLS manages projects in a number of areas, including legal aid, community paralegal training, human rights awareness-raising and capacity-building for legal professionals, traditional authorities and government institutions.

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# Table of Contents

About the South Sudan Law Society (SSLS).....	ii
Acknowledgements .....	ii
Tables .....	v
Figures .....	v
Acronyms.....	viii
Map of South Sudan .....	ix
Executive Summary.....	1
Recommendations .....	3
To the Government of South Sudan.....	3
To Legal Aid and Rule of Law Institutions .....	6
To the United Nations Mission in South Sudan (UNMISS) and the Donor Community.....	8
Chapter One: <b>Project Overview and Context</b> .....	11
1.1 Introduction.....	11
1.2 Project Overview .....	14
1.3 Methodological Note .....	15
1.4 Sample Characteristics .....	16
Chapter Two: <b>Landscape of Justice in South Sudan</b> .....	18
2.1 Legal Pluralism in South Sudan .....	18
2.2 Challenges to Expanding Government Authority in Rural Areas.....	19
2.3 Strengths and Weaknesses of Customary Courts.....	21
2.4 Blood Compensation and Extra-judicial Settlements of Homicide Cases.....	26
2.5 Efforts to Expand State Presence and Better Regulate Customary Courts .....	27
2.6 Special Courts, Mobile Judges and Other Ad Hoc Responses .....	29

2.7	Enforcement Gaps at the Payam and Boma Levels .....	30
2.8	‘The Prison Is Empty’ .....	35
Chapter Three: <b>Challenges of Accountability</b> .....		37
3.1	Inter-communal Violence and the Effect of Historical Grievances .....	37
3.2	Cattle Raiding, Abduction and Trans-boundary Crime .....	41
3.3	Gender Discrimination in Statutory and Customary Justice .....	47
3.4	Penalizing Resistance to Forced Marriage Under Customary Law .....	50
3.5	The Pressure to Resolve Marital Disputes within Close Social Networks .....	52
3.6	Catering to Patriarchal Interests in Rape Cases .....	55
3.7	Girl Child Compensation .....	58
3.8	Excessive Use of Criminal Sanctions in Relation to Unpaid Debt.....	59
Chapter Four: <b>User Choices and Perceptions</b> .....		64
4.1	Accountability Gaps and the Accessibility of Complaint Mechanisms .....	64
4.2	Trends in the Use of Formal and Informal Complaint Mechanisms .....	70
4.3	Hypothetical Disputes and Preferred Complaint Mechanisms .....	77
4.4	User Perceptions of Procedural Fairness and Outcome Satisfaction.....	84
Chapter Five: <b>A System in Flux</b> .....		88
5.1	Blood Compensation and Capital Punishment in Murder Cases.....	88
5.2	Attitudes on Adultery and an Approach to Reform.....	96
Concluding Remarks.....		101
Annex I – Description of Project Areas .....		104
Annex II – Glossary.....		113

## Tables

Table 1: Overview of Sample Population

Table 2: Sample Characteristics

Table 3: Time to Resolution for Physical Assault by Complaint Mechanism

Table 4: Time to Resolution for Theft by Complaint Mechanism

Table 5: Time to Resolution for Homicide by Complaint Mechanism

Table 6: First Forum Preferences

Table 7: Requests for Divorce by County

Table 8: Dispute Trajectories for Spousal Neglect

Table 9: Dispute Trajectories for Rape

Table 10: Dispute Trajectories for Adultery

Table 11: Dispute Trajectories for Homicide

Table 12: Dispute Trajectories for Theft

Table 13: Dispute Trajectories for Abduction

Table 14: Dispute Trajectories for Physical Assault

Table 15: First Assistance Preference for Physical Assault Hypo

Table 16: Dispute Trajectories for Physical Assault Hypo

Table 17: First Assistance Preference for Domestic Violence Hypo

Table 18: Dispute Trajectories for Domestic Violence Hypo

Table 19: First Assistance Preference for Adultery Hypo

Table 20: Dispute Trajectories for Adultery Hypo

Table 21: Dispute Trajectories for Murder Hypo

Table 22: First Assistance Preference for Murder Hypo

# Figures

Figure 1: Time to Resolution for Theft, Physical Assault, Homicide and Rape Cases

Figure 2: Homicide Rates by County

Figure 3: Was the Killing Intentional?

Figure 4: Perpetrator Profiles for Homicide

Figure 5: Dispute Incidence Rates

Figure 6: Types of Stolen Items

Figure 7: Theft Rates by County

Figure 8: Abduction Rates by County

Figure 9: Perpetrator Profiles for Abduction

Figure 10: Perpetrators of Abduction in Akobo and Pibor

Figure 11: Rates of Forced Marriage by County

Figure 12: Did the Household Member Request a Divorce?

Figure 13: Reasons for Asking for a Divorce

Figure 14: Rates of Rape by County

Figure 15: Was Your Household Member Imprisoned for Debt?

Figure 16: Debt Dispute Rates by County

Figure 17: Imprisonment for Debt by County

Figure 18: Should Debtors be Punished?

Figure 19: Preferred Punishments for Unpaid Debt

Figure 20: Ability to Access Complaint Mechanisms

Figure 21: Access to Complaint Mechanisms for Homicide, Theft and Abduction at the County Level

Figure 22: Access to Complaint Mechanism by Types of Perpetrator for Homicide, Theft, and Abduction

Figure 23: Preferred Complaint Mechanisms for Spousal Neglect, Rape and Adultery

Figure 24: Preferred Complaint Mechanisms for Homicide, Abduction, Theft and Physical Assault

Figure 25: Preferred Complaint Mechanisms for Physical Assault Hypo

Figure 26: Preferred Complaint Mechanisms for Physical Assault Hypothetical in Renk

Figure 12: Preferred Complaint Mechanisms for Domestic Violence Hypo

Figure 28: Preferred Complaint Mechanisms for Adultery Hypo

Figure 29: Preferred Complaint Mechanisms for Murder Hypo

Figure 30: Perceived Fairness of Process

Figure 31: Satisfaction with Outcome

Figure 32: Satisfaction with How Local Institutions Manage Local Violence

Figure 33: Satisfaction with How Local Institutions Manage Non-local Violence

Figure 34: Satisfaction with Local Police Managing Local Violence

Figure 35: Satisfaction with Local Police for Non-local Violence

Figure 36: Do You Support the Death Penalty?

Figure 37: Support for the Death Penalty by County

Figure 38: Support for the Death Penalty by Ethnicity

Figure 39: Support for the Death Penalty by Age Range

Figure 40: Preferred Remedy for Murder

Figure 41: Reasons for Choosing Execution

Figure 42: Reasons for Choosing Compensation

Figure 43: Opinions on Punishing Male Adulterers

Figure 44: Opinions on Punishing Female Adulterers

Figure 45: Opinions on Punishing Male Adulterers by County

Figure 46: Opinions on Punishing Female Adulterers by County

Figure 47: Preferred Punishments for Male Adultery

Figure 48: Preferred Punishments for Female Adultery



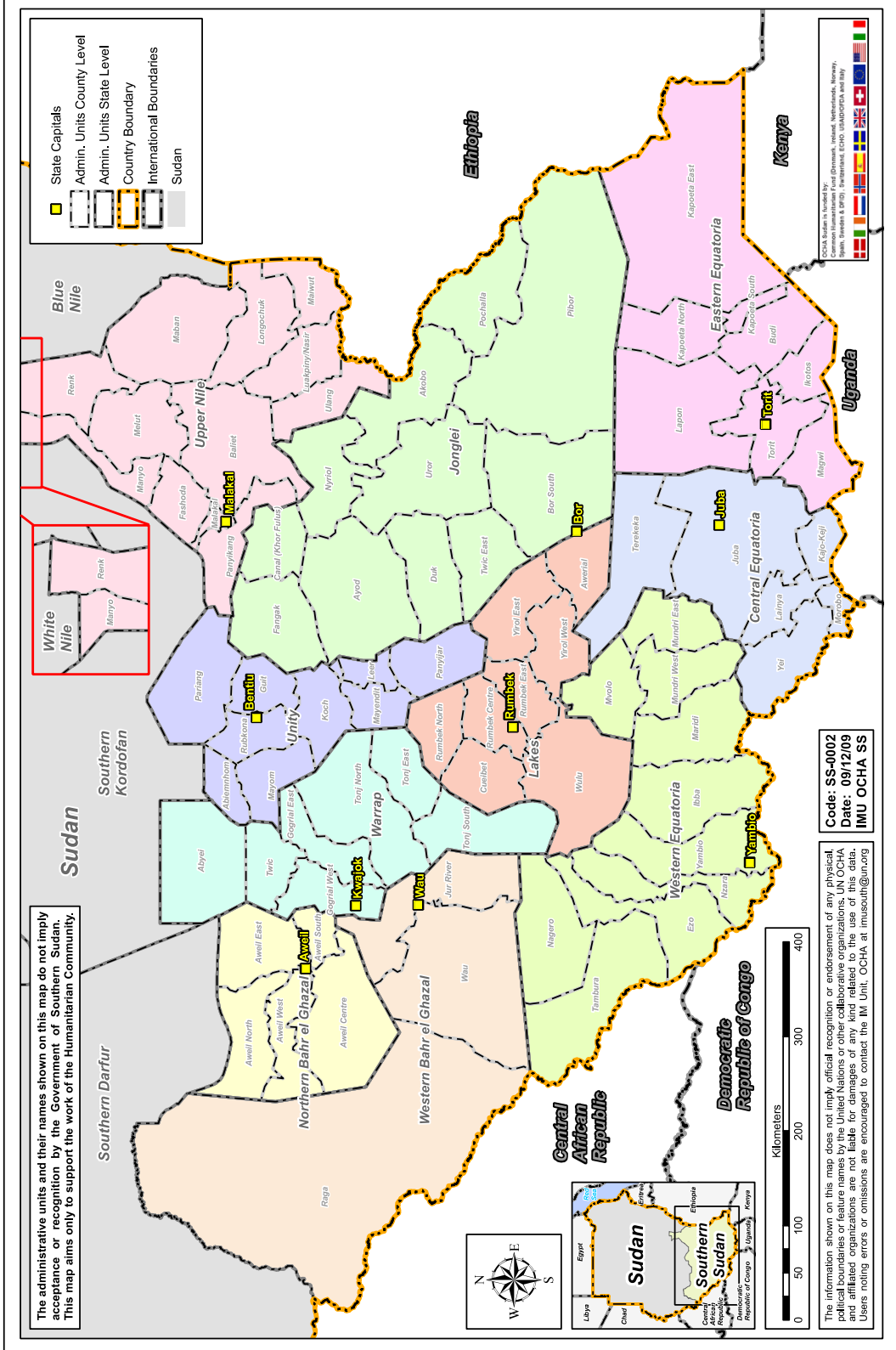
# Acronyms

CPA.....	Comprehensive Peace Agreement
EA.....	Enumeration Area
EES.....	Eastern Equatoria State
GoSS.....	Government of Southern Sudan (pre-independence)
ICG.....	International Crisis Group
ICSS.....	Interim Constitution of Southern Sudan
IDP.....	Internally Displaced Person
INL.....	International Bureau of Narcotics and Law Enforcement
Isis-WICCE.....	Isis-Women’s International Cross-Cultural Exchange
J4P.....	Justice for the Poor Program at the World Bank
JIU.....	Joint Integrated Units
LRA.....	Lord’s Resistance Army
NBS.....	South Sudan National Bureau of Statistics
OLS.....	Operation Lifeline Sudan
RVI.....	Rift Valley Institute
SAF.....	Sudan Armed Forces
SAS.....	Small Arms Survey
SCBC.....	Sudan Catholic Bishops’ Conference
SIHA.....	Strategic Initiative for Women in the Horn of Africa
SPLM/A.....	Sudan People’s Liberation Movement and Army
SSLS.....	South Sudan Law Society
SSCCSE.....	South Sudan Center for Census, Statistics and Evaluation
UNICEF.....	United Nations International Children’s Emergency Fund
UNMISS.....	United Nations Mission in South Sudan
USIP.....	United States Institute of Peace

# Map of South Sudan



## Counties of Southern Sudan - representative



## Executive Summary

Since the signing of the CPA in 2005 and independence in 2011, South Sudan has struggled to establish fair and effective governance and rule of law institutions. In recent years, prosecutors and magistrates have been deployed to some rural areas. State legal advisers and judiciaries have begun to monitor customary courts and encourage chiefs to adhere to jurisdictional limitations. Several independent and locally driven initiatives have sought to improve justice services for rural populations, for example, by incorporating women into customary court structures and addressing the historical legacy of conflict through various forms of reparation.

Local justice systems—comprised of a diverse set of dispute resolution processes at the county level and below—have been a key target of reform efforts.<sup>1</sup> Residents of rural areas have access to a range of mechanisms to resolve their disputes including: adjudication in customary or statutory courts; submission of formal complaints to police, prosecutors and county commissioners; mediation services provided by local government officials, traditional authorities, or families, friends and neighbors; and various interventions by civil society actors, including peace-building initiatives and legal aid.

Despite the gradual reforms, however, fundamental problems of accountability remain. Key challenges arise in terms of investigating and prosecuting perpetrators of violence and ensuring that governance institutions respect, protect and fulfill the rights provided for in the Transitional Constitution and other sources of law. South Sudan has not yet established a justice system that affords predictable and reliable legal protection for the poor and marginalized and meets the basic requirements for justice for its people. To develop such a justice system, the Government of South Sudan must overcome a number of challenges, including widespread impunity for inter-communal and politically motivated violence and pervasive injustices in the customary and statutory courts.

### *Impunity for Inter-communal and Politically Motivated Violence*

Inter-communal violence is among the most intractable problems confronting the justice system. In recent years, violent conflict has resulted in the deaths of thousands of people in rural areas. The perpetrators of this violence are able to kill innocent people, loot livestock, destroy property, abduct women and children and commit acts of sexual violence with impunity. Political interests, such as armed rebellions against the state and government counter-insurgency campaigns, often contribute to this violence and heighten the scale and intensity of conflicts.

South Sudan's justice system has not developed workable solutions to securing accountability for perpetrators of inter-communal violence. The difficulty of investigating and prosecuting these acts is compounded when the perpetrators have easy access to internal administrative boundaries and soft international borders. Not only can they evade

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<sup>1</sup> Local government in South Sudan is comprised of the boma, payam, and county administrations. The boma and payam level roughly correspond to the district and village levels, respectively.

capture by escaping across county lines or into neighboring countries, but they can also use cross-border trade to secure weapons and supplies.

The government's current approach to combating inter-communal violence combines political solutions, such as peace conferences and blanket amnesties, with harsh military interventions, such as forced disarmament campaigns and organized attacks against armed groups. This approach has at best provided short-term solutions to the problem of inter-communal violence; at worst, it has contributed to ongoing cycles of conflict.

Improving justice services for rural populations is an integral part of the solution. By increasing accountability for violent crimes through public prosecutions and trials, the government can ease the burden of response on political and military institutions. Legal interventions are an appropriate entry point for reforms because they are not implicated in conflict systems in the same manner as political and military institutions. A justice-based approach would prioritize long-term and sustainable solutions based on the fair and transparent application of the rule of law. When residents of rural areas see justice being done, it limits the likelihood of reprisal attacks and contributes to stability in rural areas.

#### *Pervasive Injustices in Customary and Statutory Courts*

Rural populations in South Sudan use local justice systems to resolve a wide range of criminal and civil disputes. However, the manner in which local justice systems define punishable misconduct and their treatment of various groups sometimes imposes unfair costs on disadvantaged parties.

The circumstances in which local justice systems discriminate against women and children are well documented. For example, some courts recognize a cause of action for families who want to force their daughters to marry men selected by the families. Rarely do girls rely on courts to enforce statutory prohibitions on forced marriage. Families sometimes use courts to pressure young women to marry their rapists so as to avoid the stigma that society attaches to rape victims and secure bridewealth payments for the family. Local justice systems rarely prosecute domestic violence unless a woman's life is at risk. When women retaliate, injuring or killing their abusive husbands, they are often punished with harsh prison sentences that do not take into consideration the mitigating factor of abuse. Discriminatory practices such as these discourage women from reporting abuses and reinforce patriarchal power structures that undermine women and children's statutory and constitutional rights.

The challenges of accountability described in this report present fundamental obstacles to the creation of a fair and efficient justice system. Overcoming these obstacles will require the sustained effort of the government and citizens of South Sudan and their international partners. There are several areas in which targeted reforms and interventions by government policy-makers and their international partners could help to strengthen local justice systems.

# Recommendations

## To the Government of South Sudan:

### *On Improving Access to Justice in Rural Areas*

1. **Expand, extend and strengthen justice services and programming to the payam levels to ensure more complete geographical coverage of rural areas.**

Research data shows wide divergences in the strengths of justice institutions in the county seat versus those in the outlying payams. Within the county seat, there is typically a strong police presence, criminal matters can be efficiently investigated and customary judges have less trouble enforcing their decisions. In more remote parts of counties, local institutions have less capacity to investigate, prosecute and enforce legal decisions. When people in rural areas do not have confidence in the ability of their local leaders to resolve their disputes, they are more likely to resort to self-help solutions, such as revenge killings. It is therefore important to cover each payam in a given county in a systematic and context-specific manner.

2. **Make increased use of special courts and mobile judges in rural areas.**

South Sudanese law allows the Chief Justice of the Supreme Court to create special courts “presided over by a High Court Judge...[and] assisted by two assessors for the trial of tribal or sectional conflicts and disputes involving capital offences.”<sup>2</sup> Such courts have already been used to address specific conflicts in Lakes and Jonglei states. The existing special courts should be subject to further study in order to better understand their strengths and weaknesses and to ensure that judges have the capacity to handle the scale and complexity of the crimes that take place in the context of large-scale inter-communal violence. Steps should also be taken to ensure that the procedures and outcomes in special courts are compliant with South Sudanese and international legal standards. Increasing use of special courts and mobile judges in rural areas would extend justice services to underserved areas and address conflicts before they become intractable.

3. **Develop incentives to encourage judges to maintain a sustained presence in rural areas.**

The shortage of statutory court judges in rural areas undermines the effectiveness of local justice systems and restricts justice options for rural populations. In order to discourage the tendency of judges to remain in Juba and other more developed areas, the Judiciary could explore various employment incentives and disincentives. For example, the Judiciary could assign judges to serve in their home areas, rather than sending them to other areas, as has been done in many of

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<sup>2</sup> Government of South Sudan, Code of Criminal Procedure Act, ch. II, § 16 (2008).

the counties assessed in this report. Judges who are serving in their home areas may be more likely to remain at their assigned posts for longer periods of time. The Judiciary could also consider various forms of monetary incentives to encourage judges to remain at rural posts for longer periods of time.

### On Legal Reform

#### **4. Develop a Legal Aid Act with the goal of creating an enabling environment for legal aid in South Sudan.**

The prevailing model of legal aid in the country seeks to provide legal services only in the most serious of criminal cases. In a typical legal aid case, the government or one of its international partners will provide funds to hire a private lawyer to represent a client accused of having committed a capital offense. This model of legal aid may be effective at providing a high quality of legal services to a very small number of clients, but each case comes at a high cost and this model cannot sufficiently address the vast need for legal aid in South Sudan. It is therefore important that the Ministry of Justice take the lead on revising the government's legal aid strategy and develop a Legal Aid Act which takes into account available funding and human resources from the Government of South Sudan and international partners.

#### **5. Clarify the role of paralegals in South Sudan.**

In South Sudan, paralegals perform important functions in lobbying for reforms in local justice systems, channeling cases to appropriate forums and mediating minor disputes that arise within their home areas. However, they do not have legal capacity to represent clients in statutory courts.

The government is making efforts to standardize the licensing of community paralegals, which may give them capacity to represent criminal defendants in minor matters. In developing these regulations, licensing should be made optional, not mandatory, so as not to impede the important functions that non-licensed community paralegals perform outside of the formal system. Mandatory licensing would reduce the number of community paralegals in remote areas and decrease the number of women, many of who are not able to leave family duties to travel to Juba for trainings and licensing. Therefore, it is critical that the roles of unlicensed community paralegals working outside the formal system are clarified in any forthcoming regulations.

In addition to advocacy in statutory courts, community paralegals could also be encouraged to speak out on behalf of people's constitutional and statutory rights in customary courts as an additional form of oversight.

6. **Develop a Family Law Act that provides a statutory alternative to marriages under customary law.**

A Family Law Act, based on research that identifies pressing issues, should be designed to give meaning to the rights in the Transitional Constitution and the Child Act and should lay out clear procedures for combatting practices that harm women and children, such as forced marriage, abduction, denial of inheritance rights, the circumstances in which individuals may apply for a divorce and the distribution of property upon divorce.

7. **Develop a Gender-based Violence Act to establish and strengthen mechanisms that protect women and girls from violence.**

A gender-based violence law could explicitly prohibit the most egregious and widespread forms of gender-based violence by defining and prohibiting domestic violence, including marital rape, establishing criminal sanctions for parties that practice or facilitate girl child compensation and setting the minimum marital age at 18. Institutional mechanisms, such as a Task Force on gender-based violence or an alternative mechanism, should be established to ensure proper implementation of the law and allow the many women and girls across South Sudan demanding protection of their rights to voice their concerns.

*On Enhanced Support for Military Justice Services*

8. **Expand training on South Sudanese laws, human rights and humanitarian law at the sub-national level for officers and enlisted men.**

The SPLA's transition from a guerilla movement to a professional army will take many years to complete. Basic training in relevant standards and codes of conduct is indispensable to this transition. In order to build a military culture that fully respects civilian institutions and encourages military personnel to abide by domestic and international law, institutional and capacity building activities must reach every level of the military hierarchy, not just the national leaders.

9. **Ensure Judge Advocates are deployed at Divisional Headquarters and below and accompany any significant deployment of troops. Develop incentives for legal professionals to serve in the military justice system.**

The deployment and legal empowerment of Judge Advocates would represent a major step forward for military justice in South Sudan. Including Judge Advocates in all significant deployments of troops ensures that the rights of both civilians and accused soldiers are protected. The SPLA's Military Justice Directorate should be properly resourced to enable its functioning and to attract qualified lawyers. To encourage legal professionals to pursue a career in military justice, incentives such as scholarships and career placement services could be

made available to people who serve in the military justice system for a set period of time.

## **To Legal Aid and Rule of Law Institutions:**

### *On Improving Access to Justice for Disadvantaged Populations*

#### **10. Support victims of sexual assault to file cases against perpetrators.**

In many countries, state prosecutors are responsible for supervising the investigation and prosecution of crimes such as sexual assault and rape. However, in South Sudan, private attorneys acting on behalf of their clients can litigate cases and request both criminal penalties and civil remedies. This provides opportunities for legal aid provision in cases of sexual violence. Legal aid attorneys could support women whose rape claims are not taken forward by either the police or prosecutors to file cases against individuals who assaulted them. Attorneys defending women charged with physically assaulting or killing their spouses or other family members in response to gender-based violence should also use past experiences of domestic violence to argue for mitigating circumstances and reduced sentences. Government support for initiatives such as these could be strengthened by developing clear policy objectives and implementing legislation for government efforts to combat sexual violence in South Sudan.

#### **11. Explore alternative sentences to imprisonment for people who are unable to pay their debts.**

The application of criminal sanctions to civil wrongs, such as imprisonment for debt, is inappropriate and risks alienating local populations and delegitimizing the local justice system. Legal aid organization should advocate for alternative sentencing options. Such options may include the attachment of non-essential property to satisfy debts, mandatory community service, behavioral health programs, suspended sentences and delayed adjudications. These alternatives are often less costly than extended imprisonment and are more likely to lead to reformative outcomes for culpable parties.

### *On Better Resolution of Murder Cases*

#### **12. Develop a strategy for providing criminal defense for individuals accused of capital offenses.**

According to the Transitional Constitution of South Sudan, any person who is accused of a crime punishable by death must have access to legal advice and representation. In South Sudan, where most people accused of murder cannot



afford a lawyer, a legal aid program is the only viable means to ensuring this right.

There are a few basic strategies that organizations providing legal aid, whether government or non-governmental, could adopt in addressing capital offenses. First, when there is an unassailable case against the defendant, the attorney could make an effort to encourage the victim's family to opt for compensation and a prison term in lieu of the death penalty. Second, for those already convicted, the attorney could first try to contest questionable decisions in the court in which they are delivered prior to appealing to a higher level court. Third, attorneys could systematically appeal the death row convictions in the courts of appeals in Juba, Malakal and Rumbek. Such efforts could be done in coordination with the Department of Legal Aid and Human Rights in the Ministry of Justice. Fifth, legal aid providers could select certain cases to appeal to the Supreme Court, with a view to eventually obtaining a ruling on the unconstitutionality of the death penalty. Sixth, for cases in which the time period for appeals has lapsed, the attorney could try to develop a well-reasoned argument for why the time period should be extended to allow for an appeal. These strategies would serve to address the most serious of the challenges presented by the use of capital punishment.

13. **Be willing to negotiate blood compensation as a customary matter alongside courtroom trials, when necessary.**

South Sudanese law recognizes homicide as both a criminal matter and a civil (or customary) matter, in which the victim's family can be paid compensation for their loss in the form of cattle. Compensation agreements are traditionally negotiated in customary courts, however, the government has recently begun to limit customary courts' jurisdiction over homicide cases, restricting them from negotiating compensation agreements.

A long-term solution to addressing the high rates of homicide in South Sudan requires the involvement of statutory courts whose decisions are enforced by a capable police force. Both the state and the public have an interest in seeing murder punished with criminal sanctions since remedies that are purely civil in nature can fail to deter individuals from committing premeditated killings. Furthermore, many chiefs lack the expertise to adjudicate homicide cases in accordance with statutory standards and the power to enforce sanctions on unruly parties.

Given these challenges, in the short term, chiefs could be permitted to immediately negotiate blood compensation awards while the accused remains in police custody awaiting trial. This would help ensure stability in the aftermath of a homicide and ease the burden on statutory courts.<sup>3</sup> If chiefs are completely

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<sup>3</sup> It may also be necessary to take steps to ensure that the accused's payment of compensation does not prejudice subsequent trials in statutory court.

barred from intervening in homicides—as they have recently been in many areas—the families of the homicide victim may be left waiting for months or years before the murderer is sentenced in the statutory courts. In some cases, during this wait for justice, victims’ families take the law into their own hands and kill members of the accused’s family as revenge for their loss. These cycles of violence can continue indefinitely and are often at the root of larger conflicts.

## **To the United Nations Mission in South Sudan (UNMISS) and the Donor Community:**

### *On Incorporating Justice and Accountability as a Benchmark to the End of UNMISS’s Mission in South Sudan*

14. **Integrate justice and accountability into UNMISS strategies as integral elements of conflict reduction, protection of civilians and stabilization in South Sudan and as a necessary benchmark to the end of UNMISS’s mission.**

Despite nearly two years in South Sudan, UNMISS has no actionable justice and accountability strategy and has devoted insufficient attention to the government of South Sudan’s efforts to investigate and prosecute those responsible for violence. UNMISS provides significant and high-level support for short-term, political settlement of disputes, typically through peace conferences or peace processes. Nearly all such efforts end with agreements, often highly specific, on the need for accountability and enhanced justice services. UNMISS should move beyond operating in a ‘crisis response’ mode—in other words, only providing support to high-profile, limited-impact efforts—and become more strategic in linking short-term conflict mitigation support with long-term support for improvements in justice and accountability. This type of strategic action would better enable UNMISS to support South Sudanese peace actors and to deter and hold accountable perpetrators of violence against civilians.

### *On Strengthening Donor Support to the Justice Sector*

15. **Integrate support to the justice sector with conflict reduction programming.**

Justice and peace are intimately intertwined and cannot be easily separated from one another. For the past eight years, peace has been prioritized and blanket amnesties and impunity have been the norm. This has helped to bring people into peace processes that otherwise might have resorted to violent tactics and to establish the foundations of governance in the country. However, an approach that prioritizes peace at all costs is not sustainable in the long term. The donor community should support the government of South Sudan to begin the transition towards increased accountability for inter-communal and political violence. The first step in this regard is to better understand the links between conflict and

justice and to carefully incorporate elements of support to the justice sector into conflict reduction programming.

16. **Ensure programming is conflict sensitive and appropriate to the context in rural South Sudan.**

Conflict sensitive programming requires a thorough understanding of the complex socio-political dynamics that underpin violence in South Sudan. In order to generate this understanding, the donor community should invest time and resources into pre-programming research and analysis, including drawing from existing sources of information. These tasks require people and institutions that have experience with cutting-edge research techniques, an in-depth knowledge of South Sudan and its history and practical experience working in pluralist legal systems.

17. **Prioritize reform at regional, state, county and payam levels to prevent further center-periphery imbalances.**

Decades of conflict in Sudan have demonstrated the danger of pursuing grossly unequal development paths for different regions. Under the administration of the Government of Sudan, South Sudan faced decades of discrimination and marginalization in a national order that denigrated Southern Sudanese identities and forced assimilation into a national identity that did not reflect the diverse realities of the country. South Sudan cannot afford to replicate that mistake. The donor community should therefore focus its programming in an effort to develop all regions equitably and in a manner that is responsive to the particular needs of local populations. A greater focus on programming in rural areas is indispensable to this approach.

18. **Coordinate efforts with key counterparts in the government of South Sudan, civil society and with other donors.**

The South Sudan Development Plan was a first step in setting a framework for donor coordination. However, donors could do much more to improve coordination of support to the justice sector. To ensure justice is improved for all South Sudanese, coordination should not be limited to the national level but also state and local levels to ensure funding is targeted to areas most in need. Donor coordination should also take into consideration the risks implementing partners face when coordinating with UNMISS, given that it is a military actor and sometimes unpopular with South Sudanese.

**19. Consider the impact of donor portfolios among judicial, legislative, and executive branches of state and national governments.**

Nearly all donors in South Sudan grant a disproportionate amount of support to Executive branch actors as compared to the Judicial or Legislative branches. The national level also receives a disproportionate share of resources when compared to the state and local levels. Donor support should be cognizant that the Judicial and Legislative branches are often less developed or less politically powerful, particularly at the sub-national level. The Government of South Sudan is in the process of transitioning from a one-party centralized system to a multi-party federal government. To limit the potential for donor support to contribute to a centralization of power in the Executive, donors should evaluate individual and overall portfolios to ensure that funding is in line with their stated priorities.

# Chapter One

## *Project Overview and Context*

### **1.1 Introduction**

Since pre-colonial times, local justice systems have been the primary means by which South Sudanese have sought to resolve their disputes. Local justice systems cover a broad array of formal and informal complaint mechanisms, ranging from mediation by family, friends and neighbors to adjudication by chiefs and statutory court judges. They can often be distinguished from the more formal state Judiciary by the emphasis that they place on restoring social relationships through a process of negotiation and settlement, as opposed to clearly deciding in favor of one party over the other.<sup>4</sup>

In the early twentieth century, the British colonial empire asserted its control over Sudan through the system of indirect rule.<sup>5</sup> Local justice systems incorporated new structures, became more formalized, and began to assert the powers of the colonial authority.<sup>6</sup> Criminal sanctions became available to chiefs and other traditional authorities for the first time, as the colonial administration built prisons in rural areas and authorized senior chiefs, under the supervision of government judges, to sentence people to death by hanging for capital offenses.<sup>7</sup> Statutory courts applying an amalgam of common law,

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<sup>4</sup> Francis Deng recounts a popular case that illustrates the alien nature of adversarial court procedures to the Dinka. Frustrated by the bizarre behavior of a hired attorney speaking solely in favor of the accused, one of the Dinka witnesses in the courtroom exclaimed, “The way you are talking, you must have been bribed.” According to Deng, the justice among the Dinka requires anyone involved in the settlement of a dispute to balance the opposing positions in an effort to reconcile them. FRANCIS M. DENG, *CUSTOMARY LAW IN THE MODERN WORLD: THE CROSSFIRE OF SUDAN’S WAR OF IDENTITIES* 25 (2009) [hereinafter DENG, *CUSTOMARY LAW*]; see also CHERRY LEONARDI ET AL., UNITED STATES INSTITUTE OF PEACE (USIP) AND THE RIFT VALLEY INSTITUTE (RVI), *LOCAL JUSTICE IN SOUTHERN SUDAN* 27-29 (2010).

<sup>5</sup> According to Douglas Johnson, indirect rule as it applied to Sudan had two main goals: (1) it was intended to keep costs down and administrative organization simple by allowing the Sudanese to manage ‘non-essentials’ on their own and (2) it had an evolutionary aim to develop native institutions through “the inevitability of gradualness,” shedding what was “evil and barbarous,” but nurturing those aspects which administrators deemed locally valuable. Douglas Johnson, *Judicial Regulation and Administrative Control: Customary Law and the Nuer, 1898-1954*, 27 *JOURNAL OF AFRICAN HISTORY* 67–68 (1986).

<sup>6</sup> The manner in which the existing customary systems related to the systems imposed by British indirect rule varied across the country. In Abyei, for example, the pre-existing chiefly lineages assumed the role of government chiefs. See generally, FRANCIS M. DENG, *THE MAN CALLED DENG MAJOK: A BIOGRAPHY OF POWER, POLYGYNY AND CHANGE* (1986). Yet when the Murle of Pibor County discovered how the system of indirect rule worked, they reportedly put forward their most incompetent men as their official chiefs and proceeded to ignore these chiefs as they tried to implement their duties. JONATHAN ARENSEN, *MURLE POLITICAL SYSTEMS AND AGE-SETS* 7, available at <http://www.cmi.no/file/1964-Murle.pdf>.

<sup>7</sup> According to Sharon Hutchinson, “During the 1930s and 1940s court presidents [senior government chiefs] were sometimes pressured into imposing the death sentence on individual Nuer who had been charged under the Sudan Penal Code with ‘culpable homicide amounting to murder’. In such cases, the individual chiefs involved did not see themselves as personally responsible for such killings: They were merely deferring to the will of the government or the toruok (‘foreigners’).” SHARON E. HUTCHINSON,

statutory law and customary law were also established in urban areas, providing additional options for complainants seeking justice for perceived wrongdoings.

Two successive civil wars (1955-72 and 1983-2005) brought further changes to local justice systems in South Sudan. During the second civil war, the Sudan People's Liberation Army (SPLA) and other armed groups took over many judicial functions at a local level, undermining the role of traditional authorities in dispute resolution and rendering them subordinate to political and military interests. Yet, despite the social upheaval and shifting politics that accompanied the wars, customary law as applied by chiefs and other local leaders remained the primary means by which South Sudanese sought to resolve their disputes.

Local justice systems offered several advantages in the wartime context. Throughout South Sudan's history, no central authority had ever successfully extended its sovereignty into the rural peripheries of the country. Indirect rule through local justice systems was seen as an efficient method of maintaining social cohesion in these ungoverned spaces. Furthermore, since the judicial decisions of traditional authorities were based on people's customs and social norms, they often enjoyed greater acceptance among local populations than rules passed by a faraway central authority or by the various armed groups that operated in South Sudan during the war.

Since the end of the second civil war in 2005 and South Sudan's independence in 2011, the Government of South Sudan has continued to rely heavily on local justice systems for maintaining social order in the country. The SPLA's transition away from the exercise of judicial functions, while not fully complete, was a significant step in the establishment of civilian governance in rural areas of South Sudan. This transition has been more gradual in some rural areas as many wartime commanders are now Governors and County Commissioners and continue to govern with a military mindset.

As part of the reform process, the Southern Sudan Legislative Assembly passed the Local Government Act in 2009. The Local Government Act empowers traditional authorities, who preside over customary courts at the county, payam and boma levels of local government, to play a dual role as judges and local administrators.<sup>8</sup> These traditional authorities have both state and non-state characteristics—they sometimes receive salaries from the state and are answerable to County Commissioners. However, traditional authorities are also seen as the custodians of community law and custom, which is largely outside the control of the state.<sup>9</sup>

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NUER DILEMMAS: COPING WITH MONEY, WAR, AND THE STATE 108-09 (1996) [hereinafter HUTCHINSON, NUER DILEMMAS].

<sup>8</sup> Government of South Sudan, Local Government Act, ch. 10, § 98(2) (2009). The SPLM/A first introduced these local governance structures following the 1994 National Convention in Chukudum. *See generally*, OYSTEIN H. ROLANDSEN, GUERRILLA GOVERNMENT: POLITICAL CHANGES IN THE SOUTHERN SUDAN DURING THE 1990S (2005).

<sup>9</sup> As Martina Santschi notes, similar dynamics were apparent during the war as well, "During the war the SPLA/M as well as the Sudanese government relied on chiefs who found themselves in a challenging role wedged in between the armed forces (of both parties to the conflict) and the communities. Apart from collecting taxes and acting as judges for customary law courts, chiefs also had to supply the SPLA with

Despite the reforms that the government has tried to introduce in recent years, numerous problems of access to justice remain. Statutory court judges and government prosecutors have restricted the jurisdiction of customary courts without providing alternatives for populations residing in rural areas where there are no judges. The lack of an effective police force, particularly at the payam and boma levels of local government, makes it difficult for chiefs to enforce judicial decisions, and logistical difficulties, such as lack of transportation to state courts, that justice service providers and disputing parties encounter when maneuvering through state hierarchies sometimes leads to long delays in judicial processes and unlawfully extended detentions in rural areas.

There are also more fundamental problems of accountability that arise. While local justice systems regularly receive and resolve certain types of disputes, especially those relating to marital issues and sexual crimes, the manner in which they define the misconduct often imposes unfair costs on women and children and serves to reinforce patriarchal power structures in local societies. Furthermore, existing justice services have been almost completely unable to pursue accountability for the inter-communal violence that has taken the lives of thousands in the postwar period. Efforts to investigate and prosecute criminal activity are particularly complicated when perpetrators evade capture by crossing county administrative boundaries and international borders or when they are protected by communities and political leaders who are unwilling to turn them over for prosecution. Until the new nation finds a way to bridge these accountability gaps, people will continue to take the law into their own hands through revenge killings and other self-help measures. Those with less negotiating power in local societies will be forced to bear the costs of other people's misconduct.

This report provides an assessment of local justice systems in six rural counties across three states: Budi and Ikotos counties in Eastern Equatoria State; Akobo and Pibor counties in Jonglei State; and Nasir and Renk counties in Upper Nile State. Chapter One provides relevant background information, including an overview of the *Access to Justice in South Sudan Program*. Chapter Two delves deeper into the landscape of justice in South Sudan by outlining the problems confronting local justice systems and recent attempts at reform. Chapter Three details certain challenges of accountability that arise in relation to inter-communal homicides, trans-boundary cattle theft and abductions, gender discrimination in customary justice, and excessive use of criminal sanctions in relation to unpaid debt. Chapter Four provides additional information about the choices that people make when navigating local justice systems, their preferred complaint mechanisms when confronted with different types of disputes and their perceptions of procedural fairness and outcome satisfaction with different complaint mechanisms. The conclusion summarizes the most important findings and outlines certain targeted reforms that can help to strengthen local justice systems in the current context.

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food and new recruits.” Martina Santschi, *Between Community and Government: Traditional authorities in post-conflict Southern Sudan*, 15 TSANTSA 109 (2010).

## 1.2 Project Overview

In 2011, Pact, the South Sudan Law Society (SSLS) and several other partner organizations began implementing the *Access to Justice in South Sudan Program*, funded by the United States Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL). The goal of the program was to increase citizens' access to justice in six rural counties. Program activities were centered on a series of legal aid clinics established in five of the six counties—Budi, Ikotos, Akobo, Nasir, and Renk—with the goal of providing free legal services to people who would otherwise be unable to afford them. These legal services consisted mainly of legal advice, mediation and legal representation in statutory courts. The legal aid staff also conducted trainings with local justice service providers and monitored the activities of justice institutions at the local and state levels.

Such services have never before been available to South Sudanese. By providing free legal services through a staff of full-time, in-house lawyers, the *Access to Justice in South Sudan Program* seeks to tackle many of the systemic problems in the justice system with better coordination and low cost interventions. Some of the issues the program has targeted include: unlawful detention and extended remand periods, more appropriate use of civil remedies and criminal punishments by judges and traditional authorities, the provision of legal defense for all people accused of a capital offense, and the protection of women and girls from sexual violence.

The program also included a research component consisting of an assessment of local justice systems in the six rural counties. The purpose of the assessment was to provide an empirical basis for understanding the current reality of legal needs of rural populations, the range and effectiveness of justice services available to serve those needs and to identify priorities for reform.<sup>10</sup> Due to the geographic limitations, the assessment did not aim to provide a representative picture of rural justice systems across South Sudan. Rather, its goal was to generate highly specific data about the justice systems in these six counties.

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<sup>10</sup> Relatively little is known about local justice systems in South Sudan. A number of studies have been conducted on the traditional justice systems of certain ethnic groups and how specific customary norms relate to the political, social, and economic processes found in certain areas. *See e.g.*, FRANCIS M. DENG, TRADITION AND MODERNIZATION: A CHALLENGE FOR LAW AMONG THE DINKA OF THE SUDAN (1972); FRANCIS M. DENG, CUSTOMARY LAW, *supra* note 4; ALEU AKECHAK JOK *ET AL.*, WORLD VISION INTERNATIONAL AND THE SOUTH SUDAN SECRETARIAT OF LEGAL AND CONSTITUTIONAL AFFAIRS, A STUDY OF CUSTOMARY LAW IN CONTEMPORARY SOUTH SUDAN (2004) [hereinafter ALEU AKECHAK JOK *ET AL.*, A STUDY OF CUSTOMARY LAW]; JOHN WUOL MAKEC, THE CUSTOMARY LAW OF THE DINKA PEOPLE OF SUDAN (1988); DENG BIONG MIJAK, UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), THE TRADITIONAL SYSTEMS OF JUSTICE AND PEACE IN ABYEI (2004). Researchers have devoted less attention to studying how local justice systems function in practice and their effectiveness in servicing the legal needs of rural populations. Several important studies in recent years have begun to fill this gap in the literature. *See e.g.*, LEONARDI *ET AL.*, LOCAL JUSTICE, *supra* note 4; TIERNAN MENNEN, HAKI, COMBATING GENDER-BASED VIOLENCE IN THE CUSTOMARY COURTS OF SOUTH SUDAN (2011); Government of South Sudan, Ministry of Gender, Child and Social Welfare *et al.*, *Gender-Based Violence and Protection Concerns in South Sudan* (n.d.) [hereinafter Ministry of Gender, *Gender-based Violence*].



### 1.3 Methodological Note

The assessment used complementary quantitative and qualitative techniques. This approach allowed us to gather general data about populations in the six counties and to concretize that data through highly specific information on complaint mechanisms in each county.

#### Quantitative research

In March and April 2012, with the assistance of the South Sudan National Bureau of Statistics (NBS), a household survey was undertaken to gauge people’s perceptions and experiences with the justice system in rural areas of South Sudan. The goal of the survey was to gather baseline information about people’s experiences with the justice system, their perceptions of how well the system served them based on such experiences and their opinions about justice. The NBS developed a sample of 1,520 randomly selected households in the six counties (see Table 1).

**Table 1: Overview of Sample Population**

County	Population	Males	Females	HHs	Total 18+	% 18+	% of Sample	# of HHs in Sample	EAs
<b>Renk</b>	137,751	73,969	63,782	22,491	78,782	57%	17%	270	27
<b>Nasir</b>	210,002	115,641	94,361	29,030	113,081	54%	25%	380	38
<b>Akobo</b>	136,210	75,314	60,896	17,713	76,493	56%	17%	260	26
<b>Pibor</b>	148,475	76,018	72,457	22,741	80,466	54%	18%	270	27
<b>Budi</b>	99,199	50,103	49,096	16,773	54,634	55%	12%	180	18
<b>Ikotos</b>	84,649	42,106	42,543	16,521	47,112	56%	10%	160	16
<b>Totals</b>	816,286	433,151	383,135	125,269	450,568	55%	100%	1520	152

These 1,520 households were distributed across 152 census enumeration areas (EAs).<sup>11</sup> EAs are predetermined sets of data categorized according to geographical area that the NBS generated during the 2008 national census.<sup>12</sup> Teams of enumerators interviewed ten households in each EA: two households in the middle of the EA and two households each in the north, south, east and west of the EA.<sup>13</sup> Two respondents were interviewed per household: the household head provided general information about the household and its members and a second randomly selected respondent over the age of 18 provided information about their opinions on justice and the household’s experiences with the justice system.<sup>14</sup> While this approach had an in-built disadvantage in that the randomly

<sup>11</sup> Three questionnaires were misplaced en route back from Pibor, leaving a sample size of 1,517 households.

<sup>12</sup> Prior to independence, the NBS was called the South Sudan Center for Census, Statistics and Evaluation (SSCCSE).

<sup>13</sup> The South Sudan National Bureau of Statistics (NBS) generated detailed maps of each enumeration area (EA) which enumerators used to identify respondent households. The first household in each pair was selected randomly and the second household was selected by skipping three households from the first.

<sup>14</sup> Enumerators used a Kish grid to randomly select the individual respondent. The household head and the individual respondent were both interviewed separately. This approach provided for approximately 3,040 respondents total.

selected individual respondent was not necessarily the household member that experienced the dispute, the methodology generated statistically significant data on a range of disputes in a reasonably efficient manner and without overrepresenting the views and experiences of the household head.

The two questionnaires used in conducting the interviews were adapted from a model developed by the World Bank’s Justice for the Poor Program (J4P) in Indonesia.<sup>15</sup> The Household Questionnaire gathered basic information about the household and its members. The Individual Respondent Questionnaire asked respondents for their opinions on how to punish certain types of misconduct, their preferred complaint mechanisms for resolving different types of disputes and their levels of satisfaction with local institutions. Individual respondents were asked detailed questions about the incidence of ten different types of disputes in the household, the complaint mechanisms that people used in seeking justice for the perceived wrongs and their views of and experiences with those complaint mechanisms. The ten disputes focused on were: forced marriage, spousal neglect, debt, theft, physical assault, abduction, homicide, premarital sex, adultery and rape.

Qualitative research

The qualitative research was the main vehicle through which researchers sought to understand how and why people make certain types decisions in navigating local justice systems and to ensure the data was situated in the appropriate historical, cultural and political context. The techniques used included: a literature review covering both primary and secondary source material; field visits to observe justice institutions at the county level, including prisons, customary courts, statutory courts, and police detention facilities; semi-structured interviews with state and local government officials, police and prison services, traditional authorities, detainees and users of various complaint mechanisms; and interviews in areas beyond the six target counties to provide comparisons and link local experiences with state and national institutions and processes.

**1.4 Sample Characteristics**

On the whole, the sample population was largely representative of South Sudanese society. However, some idiosyncrasies of rural populations become evident in the county level data, such as the homogeneity of ethnic groups in some counties, the diversity of ethnic groups in others and the prevalence of pastoralists in certain areas (see Table 2).

**Table 2: Sample Characteristics**

Characteristics	Description
Urbanicity	The six counties were selected, in part, due to the unique insights they offered into rural justice systems. However, it should be noted that several of the EAs in these counties are designated as urban areas. <sup>16</sup> Overall, 14.5

<sup>15</sup> See KRISTEN HIMELEIN *ET AL.*, WORLD BANK, SURVEYING JUSTICE: A PRACTICAL GUIDE TO HOUSEHOLD SURVEYS (2010).

<sup>16</sup> Some of the EAs that the NBS designates as urban areas are in fact relatively small towns that are county headquarters.

	percent of the sample population resided in urban EAs. The sample population ranged from 100 percent rural in Budi and Ikotos to 52 percent urban in Renk.
<b>Gender Distribution</b>	The gender distribution of the sample slightly favored females, with women representing 53.5 percent of individual respondents the sample (n = 812). While this contrasts somewhat with the findings of the 2008 census, which found that men outnumbered women at the national, state and county levels, it can be partially explained by the fact that we conducted our survey during the dry season, when many young men would be taking their cattle herds out to pasture. <sup>17</sup>
<b>Age Ranges</b>	The majority of individual respondents fell in the 18 to 33-year-old age range. According to the 2010 census, more than 50 percent of the population in South Sudan is younger than 20-years-old. <sup>18</sup>
<b>Ethnicity</b>	The sample also reflects the diversity of ethnic groups residing in these six counties. <sup>19</sup> The Nuer are by far the largest ethnic group in the sample (44 percent, n = 663), mainly due to the large populations of Lou Nuer in Akobo and Jikany Nuer in Nasir. <sup>20</sup> At the county level, the most ethnically diverse populations can be found in Budi, Ikotos and Renk. The ethnic diversity in Budi and Ikotos are typical of Eastern Equatoria, which is home to a large number of minority ethnic groups. The diversity in Renk, on the other hand, is a function of its large urban population.
<b>Education</b>	The majority of respondents did not have any formal education (67.4 percent), though a considerable number of individual respondents did have primary school (16.3 percent) or secondary school (13.9 percent) education. At the county level, Renk and Budi stood out as those having the most highly educated populations. When asked whether they were able to read and write in English or Arabic, 31 percent of respondents answered, 'yes'. However, when those respondents were asked to read a simple sentence in English or Arabic, only 68.1 percent of those who said they were able to read were able to read the whole sentence. These results are consistent with the low literacy levels in South Sudan. <sup>21</sup>
<b>Livelihoods</b>	Finally, in terms of livelihoods, most respondents said that they worked as either 'farmers' (37.5 percent) or 'cow or goat herders' (18.5 percent). There were also a large number of people who identified their livelihoods as 'other' (9.7 percent) or as 'civil servants' (6.5 percent).

<sup>17</sup> The 2008 census found that women comprised only 48 percent of South Sudan's population. Government of Southern Sudan (GoSS), *Statistical Yearbook for Southern Sudan 15* (2010) [hereinafter GoSS, Statistical Yearbook].

<sup>18</sup> *Id.*, 9.

<sup>19</sup> Individual respondents overwhelmingly identified as South Sudanese, though the sample included 15 respondents from Sudan, Uganda and other African countries.

<sup>20</sup> It should be noted that this ethnic distribution clearly does not reflect the national population, in which Dinka are the most populous ethnic group in the country.

<sup>21</sup> According to the NBS, 72 percent of people above age six cannot read or write. GoSS, Statistical Yearbook, *supra* note 17, 48.

## Chapter Two

### *Landscape of Justice in South Sudan*

Local justice systems in South Sudan encompass a variety of formal and informal mechanisms, ranging from mediation within close social networks to adjudication in customary and statutory courts. For the most part, the more formal mechanisms tend to have a limited reach in rural areas and the bulk of disputes are handled by mediation or through the customary courts.

While local justice systems demonstrate a degree of accessibility and efficiency, they also suffer from several gaps that undermine their ability to provide effective justice services. For example, courts face major enforcement gaps in rural areas, particularly at the payam and boma levels of local government. Ambiguities in the relationship between the statutory and customary systems undermine the enforcement of judicial outcomes. Lines of appeal are not clearly defined and statutes of limitations are not consistently enforced, allowing disputing parties to pursue litigation indefinitely in many different forums.

Government actors have made efforts in recent years to better oversee the functioning of customary courts and to clarify their relationship to the statutory system. However, the justice sector suffers from under-resourcing and a general lack of transparency, and many government actors do not have the necessary expertise to oversee South Sudan's complex judicial systems. Given these constraints, restrictions that government actors place on customary courts in circumstances where the statutory system does not provide a viable alternative, whether due to limited physical presence or capacity, inevitably results in accountability gaps. This is particularly apparent with regard to homicide cases and disputes involving parties that wield political or military power.

#### **2.1 Legal Pluralism in South Sudan**

South Sudan has a pluralist legal system that incorporates parallel systems of statutory and customary courts.<sup>22</sup> The 2008 Judiciary Act structures the statutory courts in a single hierarchy, starting with the Supreme Court at the national level, followed by three regional courts of appeals, and high courts in the capitals of each of the ten states.<sup>23</sup> The high courts have original jurisdiction for all capital offenses, including homicide cases.<sup>24</sup> At the local government level, the Judiciary Act envisages county courts and payam courts in all of the counties and payams. However, only a fraction of county courts have been established and there is not yet a single payam-level statutory court in South

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<sup>22</sup> Statutory courts have jurisdiction over most crimes and civil suits above a certain amount of money, which the law has removed from the jurisdiction of customary courts. They also have appellate jurisdiction over customary courts.

<sup>23</sup> The regional courts of appeals are located in Juba, Malakal and Rumbek.

<sup>24</sup> Code of Criminal Procedure Act, ch. II, § 12 (2008).

Sudan.<sup>25</sup> County courts are presided over by first- and second-class judges, also known as magistrates.<sup>26</sup>

When the Government of Southern Sudan was established in 2005, it incorporated a decentralized Judiciary in which high courts and county magistrates fell under the control of state governments.<sup>27</sup> However, during the interim period there were several occasions when Governors and County Commissioners threatened and even physically assaulted judges whose rulings were contrary to their executive interests. Senior judges began to complain that decentralization was compromising the independence of the Judiciary. To remedy the problem, the Transitional Constitution centralized the Judiciary and placed it under the administration of the Chief Justice of the Supreme Court after independence.<sup>28</sup>

## **2.2 Challenges to Expanding Government Authority in Rural Areas**

These policies of decentralization and centralization were meant to clarify the separation of powers between the Executive and the Judiciary and are indicative of the Judiciary's resilience in the face of political interference. However, these policies have had limited effect on the accessibility of statutory courts in rural areas. Three of the counties in the project area—Budi, Ikotos and Pibor—still do not have any statutory courts. In Budi and Ikotos, matters requiring formal adjudication are sent to the statutory courts in Torit and Kapoeta.

The inaccessibility of these courts to populations in Budi and Ikotos leads to severe logistical challenges for justice institutions in the area. The police and prosecutors' offices do not have reliable means of transport and accused criminals can be held in detention for months awaiting transfer to the statutory courts. Once the accused arrive in court, hearings can be further delayed awaiting the appearance of necessary parties, such as witnesses and complainants, who are often unwilling to incur the high costs associated with travel from rural areas. It is not uncommon for accused parties to languish for years in prison in Torit or Kapoeta while their hearings are repeatedly adjourned pending the appearance of necessary parties.

Pibor offers an even more extreme example of these challenges. Pibor is approximately 180 kilometers from Bor, the capital of Jonglei state, where the high court sits. Travel is difficult in the best of times, and during the eight-month rainy season transport by road is

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<sup>25</sup> Part of the problem can be traced to a lack of judges. The Judiciary has not hired any new judges since it was created in 2005. In January 2012, the Judiciary reportedly began a recruitment process to hire more than 100 additional judges. At this writing, however, the process had not concluded. *See* HUMAN RIGHTS WATCH, PRISON IS NOT FOR ME: ARBITRARY DETENTION IN SOUTH SUDAN 93 (2012).

<sup>26</sup> The terms 'magistrate' and 'county court judge' are used interchangeably throughout this paper. According to the Code of Criminal Procedure, first-class magistrates can sentence people to a maximum of seven years in prison and issue fines not exceeding 5,000 Sudanese pounds. Second-class magistrates can sentence people to a maximum of three years in prison and 2,500 Sudanese pounds. Code of Criminal Procedure Act, ch. II, § 13-14.

<sup>27</sup> Interim Constitution of Southern Sudan, pt. 7, § 132(2); *Id.*, Schedule C, § 7.

<sup>28</sup> Transitional Constitution of the Republic of South Sudan (TCRSS), pt. 7, § 122(8) (2011).

impossible. There is no statutory court judge or prosecutor based in Pibor.<sup>29</sup> As a result, the customary court system handles the vast majority of disputes, including most instances of homicide. Unlike the statutory system, the customary system is not empowered to handle cases involving the SPLA. Without statutory judges and judge advocates to hold soldiers to account, most crimes committed by the thousands of soldiers stationed in Pibor—whether the crimes are military or civilian in nature—go largely unpunished.

In Nasir, Akobo and Renk, statutory courts have been established with differing degrees of effectiveness. There are magistrate courts in Nasir and Akobo, but the judges do not maintain a sustained presence in the counties and most cases are channeled to the customary courts.<sup>30</sup> The reluctance of judges and prosecutors to live in rural areas creates additional challenges for local justice systems. Renk, on the other hand, has a well-established statutory court system that coexists alongside the customary system. However, as discussed in more detail in Section 2.5 below, considerable tensions have arisen between the two justice systems in recent years.

### **Constraints on Investigatory and Prosecutorial Services in Rural Areas**

On February 17, 2012, a vehicle carrying a group of Kenyans recruited to work at a construction site in Chukudum came under attack on the road from Camp 15, a military base in the northern part of Budi county. Three of the Kenyans were killed and four others injured.<sup>31</sup> The police and military organized investigations and a local resident eventually turned himself in to police. The man reportedly confessed to having killed the Kenyans and engaging in other crimes in the area. The state prosecutor then called two local chiefs to his office to take their witness statements. According to the prosecutor:

When I asked the chiefs, “What’s your name? How old are you? What’s your tribe?” the chiefs were disappointed. They said, “These people are harassing us.” I told him, “No. This is important. We must take your name. Even if my father comes before me I must ask him, ‘What’s your name?’” ... This is a normal procedure.

Despite prosecutor’s explanation, the two chiefs left and all subsequent attempts to locate them failed. Due to the lack of witnesses to corroborate the confession, the accused remained in prison. Since he had reportedly admitted guilt, the state was not willing to release him, even though the statutory period of pretrial detention had expired.

This story illustrates some of the difficulties of investigating and prosecuting homicide cases in rural areas. Residents are often unfamiliar with the formal processes of prosecutorial investigation and statutory court hearings. Complainants and witnesses often feel intimidated or disrespected by judicial processes. When coupled with the high costs of travel and accommodation in urban areas, these feelings of alienation can cause necessary parties to miss court hearings, leading to excessive delays in trial.<sup>32</sup>

<sup>29</sup> Jonglei has only four judges (two High Court judges and two Magistrates) for its eleven counties; eight prosecutors in Bor; two Magistrates and a prosecutor in Akobo; and one Magistrate and a prosecutor in Twic East. UNMISS, INCIDENTS OF INTER-COMMUNAL VIOLENCE IN JONGLEI 30 (2012) [hereinafter UNMISS, INCIDENTS OF INTER-COMMUNAL VIOLENCE].

<sup>30</sup> An international organization provided support that enabled the judge to travel to Nasir towards the end of 2012, but for the first few months of 2013 he did not maintain a presence in the county.

<sup>31</sup> *South Sudan probes killing of Kenyan workers in Eastern Equatoria*, SUDAN TRIBUNE, Feb. 20, 2012; Peter Lokale Nakimangole, *Assailants Kill 3 Kenyans Along Ngarich-Chukudum Road*, GURTONG TRUST, Feb. 19, 2012. The place where the attack took place already had a reputation as a particularly dangerous section of the road. One year earlier, two Catholic priests from the diocese of Torit had come under attack at that same location.

<sup>32</sup> Many judges also require a complainant to be present in order for criminal prosecutions to proceed. This can raise certain complications, especially when the crime was committed by one family member against another and the victim is not willing to bring charges against the accused.

Local justice systems also face problems of witness protection. Chiefs that cooperate with police and prosecutors can be subject to harassment and beatings by the relatives of accused criminals. In a 2008 report, Small Arms Survey (SAS) observed that chiefs were hesitant to turn criminals in to the authorities, for fear of retaliation. SAS received reports of chiefs being attacked and shot; in some cases chiefs even actively cooperated with the criminals.<sup>33</sup>

These limitations have serious implications for security in rural areas. Delays in the justice system can invite revenge killings from the families of deceased murder victims as impatient family members take the law into their own hands. In one incident, a legal aid attorney came across a group of young men with *pangas* (machetes) chasing another youth down the road in the center of Chukudum. When they caught the youth, the attorney asked them what happened. They replied that the young man had killed one of their relatives so they were now going to kill him. With systems that are unable to deliver justice services in a credible and efficient manner, this type of response is not uncommon among rural populations.

### **2.3 Strengths and Weaknesses of Customary Courts**

Since statutory courts have not yet been established in many counties, customary courts often act as the court of first instance for both civil and criminal disputes in rural areas.<sup>34</sup> Customary courts, presided over by chiefs or panels of chiefs, are established at the county, payam and boma levels of local government. Hearings are typically held under trees and are open to the public. The 2009 Local Government Act restricts the jurisdiction of customary courts to “customary disputes,” for which judgments are to be rendered “in accordance with the customs, traditions, norms and ethics” of the populations residing in their jurisdictions.<sup>35</sup> Criminal matters lie outside the jurisdiction of customary courts, unless the case has a “customary interface” and has been referred by a competent statutory court. In practice, however, many traditional authorities do not adhere to these jurisdictional limitations and customary courts can hear a range of criminal disputes, including homicide.<sup>36</sup>

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<sup>33</sup> SMALL ARMS SURVEY (SAS), SUDAN ISSUE BRIEF, HUMAN BASELINE SECURITY ASSESSMENT (HBSA), SYMPTOMS AND CAUSES: INSECURITY AND UNDERDEVELOPMENT IN EASTERN EQUATORIA, 8 (Apr. 2010) [hereinafter SAS, SYMPTOMS AND CAUSES].

<sup>34</sup> Under common law, civil wrongs typically require a monetary remedy while criminal wrongs are punished with criminal sanctions, such as fines and prison sentences.

<sup>35</sup> Government of South Sudan, Local Government Act, ch. X, § 98(2).

<sup>36</sup> In at least one case, a customary court has sentenced an accused murderer to death. 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.

### Town Bench Courts and Rural Customary Courts

In addition to county-, payam- and boma-level customary courts, some areas also have town bench courts situated in the county headquarters.<sup>37</sup> Judges in town bench courts tend to be more literate than rural chiefs and are often selected from among the urban population, though they are commonly referred to as chiefs.<sup>38</sup> While town bench courts are technically customary courts, they usually have a closer relationship with local magistrates, prosecutors and police than the rural customary courts. As a result, they are often the preferred complaint mechanism for more complicated disputes, such as those involving business matters, people from different ethnic groups, or situations in which compensation cannot be agreed between the parties.

As the chairperson of the town bench court in Nasir explains, the court mostly handles disputes involving thefts and physical assaults:

We get many cases of theft. This is a big problem in Nasir town. A person will be sent to us by the police with a letter. If the case is bigger with large compensation we send it to the Commissioner. Adultery issues are given to the chiefs. Also family issues are for chiefs so we do not deal with them.<sup>39</sup>

Litigants can appeal decisions of the town bench court to the magistrate, if he is present, or to the County Commissioner. There are also reports of people making complaints directly to County Commissioners. While the Commissioner is an executive officer and does not have the legal authority to adjudicate disputes or regulate the functioning of customary or statutory courts, individuals and groups sometimes take their disputes directly to him when they do not feel as though they can receive a fair hearing in the customary courts, if they anticipate problems in enforcing judgments on the opposing party, or if their cases are “political” in nature.<sup>40</sup> As an Ethiopian trader in Nasir explained:

Yes, my people sometimes complain of the proceedings [in the town bench court]. There are pressures from the outside. Different people can come and give their opinion and judgment and this is influencing the decision of the judge in this court. We do not feel often free to talk, so I have to take this role and speak my mind. Sometimes the language is also moving from Arabic to Nuer so it is difficult to follow. We are paying translators to come with us.

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<sup>37</sup> The customary court systems vary across the six counties. Both Ikotos and Budi have customary courts presided over by local chiefs at the county, payam and boma levels. There are no town bench courts in Ikotos and Budi and most cases are processed at the payam-level court and in the county seat. Akobo, Pibor, Nasir and Renk, have town bench courts that adjudicate the bulk of disputes in the county headquarters.

<sup>38</sup> LEONARDI *ET AL.*, *LOCAL JUSTICE*, *supra* note 4, 22.

<sup>39</sup> According to the chairperson, the town bench court in Nasir typically hears about five or six cases a day.

<sup>40</sup> The authority to adjudicate disputes and regulate the statutory and customary courts is not among the powers of County Commissioners listed in the Local Government Act. *See* Local Government Act, ch. VI, § 52. The Local Government Act calls for the creation of a Customary Law Council at the county level to regulate the activities of customary courts. To our knowledge, none of the six counties assessed has yet created this council. *See* Local Government Act, ch. X, §§ 95, 96.



The ambiguity of these overlapping lines of authority between the rural customary courts, town bench courts and the County Commissioner gives rise to a degree of unpredictability for court users. One can never be certain if a final judgment has been rendered or if the losing party will resurrect the dispute in a different forum. This problem is also encountered in statutory systems, where statutes of limitations and time periods for appeals are not consistently followed. The referral of more difficult cases to Commissioners, many of whom are former members of the SPLA and are still able to exert influence over the security forces, is indicative of efforts by complainants to secure justice in an environment where the security sector continues to exert a degree of dominance over civilian institutions.

### *Strengths of the Customary System*

These concerns notwithstanding, customary courts (including both rural customary courts and town bench courts) have a number of noteworthy strengths. They are able to process cases fairly quickly and at relatively low cost, they are geographically accessible to rural populations and, since their decisions are often based on local norms, they are culturally familiar to rural populations.<sup>41</sup> Customary courts are also durable and better equipped to function in areas prone to insecurity. For example, in August 2012, there was considerable insecurity in several rural payams of Akobo County. In response, payam chiefs relocated their courts to the relative safety of the county headquarters, where they held hearings under trees in a clearing next to the police headquarters. Litigants could come to the county headquarters to submit cases and some even moved closer to town to pursue their legal complaints on a daily basis. After the insecurity subsided, the chiefs simply returned to their home areas and continued their work.

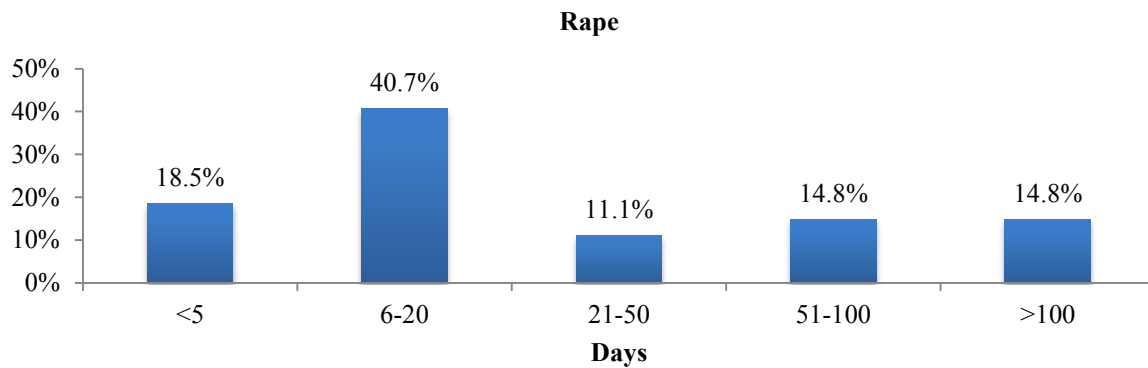
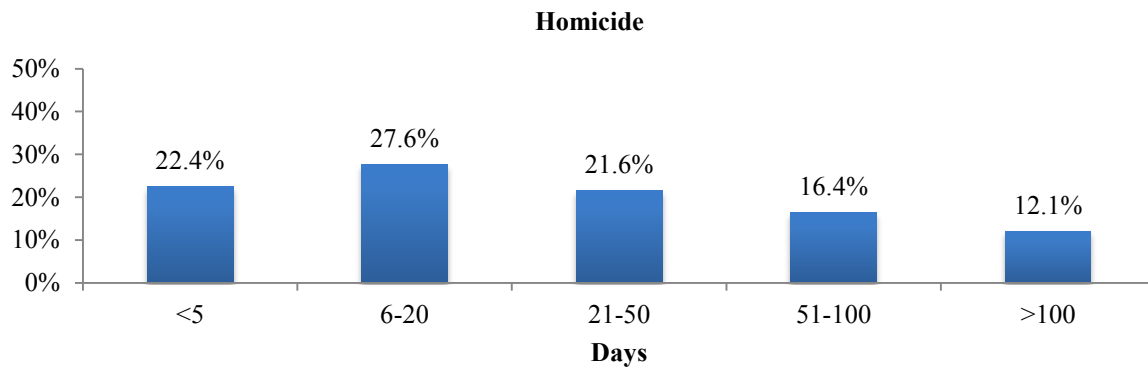
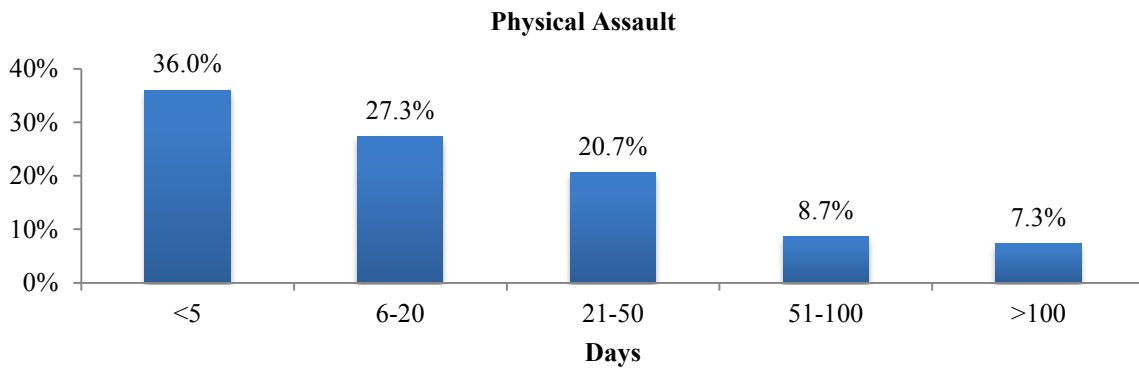
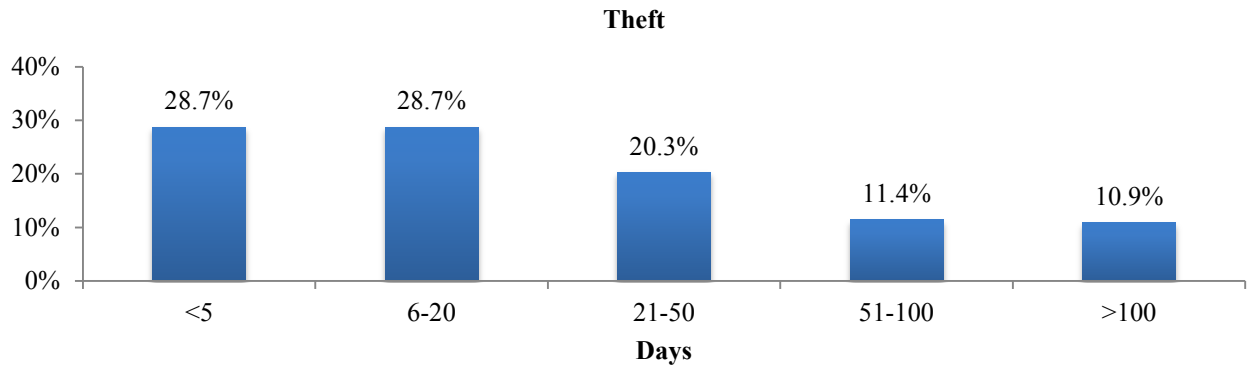
Perhaps the greatest strength of customary courts is their efficiency in disposing of cases. They operate at low cost, barring the occasional imposition of high court user fees, and because they do not require complicated litigation by legal professionals, they are able to resolve cases relatively quickly. The survey gathered data on the time to resolution of four types of dispute: theft, physical assault, homicide and rape. In cases of theft, physical assault, homicide and rape the mean resolution rate was less than 20 days (see Figure 1).<sup>42</sup>

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<sup>41</sup> In most counties, chiefs at the county level and payam level are paid salaries by the government, while lower level chiefs only collect small court fees for their service. In Budi and Ikotos, it costs 40 South Sudanese pounds (SSP) to open a case in the executive chief's court (payam level court). In Nasir, there are both court fees (around 30 SSP) and fees to file cases with the police (between 10 and 30 SSP). When this assessment was conducted, four SSP was roughly equivalent to one US Dollar.

<sup>42</sup> Perhaps not surprisingly, homicide cases took the longest with only 50 percent of disputes resolved in less than 20 days.

**Figure 1: Time to Resolution for Theft, Physical Assault, Homicide and Rape Cases**



\*Time to resolution looks simply at the length of the resolution process, not whether the result is just or fair. Respondents were asked how long their household member had been pursuing their claim in a particular forum. The data includes a few cases in which the dispute had not yet been resolved by the time of the interview.

Disaggregating the data to identify which forums resolve disputes most quickly shows statutory courts to be less efficient than other avenues for dispute resolution. For example, in cases of physical assaults and thefts, ‘chiefs’ and ‘friends, family and neighbors’ were able to resolve cases most quickly with the vast majority resolved within 20 days. Physical assault and theft cases brought to statutory courts and local government officials took significantly longer to resolve (see Table 3 and Table 4).

**Table 3: Time to Resolution for Physical Assault by Complaint Mechanism**

		Family, friends, neighbors	Chief	Clan headman	Statutory court	Police	Local gov't official
Days	<20	88%	78%	83%	33%	58%	33%
	21-50	6%	11%	17%	33%	38%	28%
	51-100	-	11%	-	8%	4%	17%
	>100	6%	-	-	25%	-	22%

**Table 4: Time to Resolution for Theft by Complaint Mechanism**

		Family, friends, neighbors	Chief	Clan headman	Statutory court	Police	Local gov't official
Days	<20	75%	72%	38%	60%	69%	38%
	21-50	17%	14%	63%	30%	22%	16%
	51-100	-	10%	-	-	4%	13%
	>100	8%	3%	-	10%	4%	33%

Consistent with the challenges described by nearly all interviewees, chiefs were noticeably less efficient at resolving homicide cases. However, they still resolved cases more quickly than both statutory courts and local government officials (see Table 5). Overall, homicides prove challenging not only in terms of time to resolution, but also in terms of fairness of process and outcome, enforcement of judicial decisions and achieving solutions that prevent further violence and revenge killings.

**Table 5: Time to Resolution for Homicide by Complaint Mechanism**

		Family, friends, neighbors	Chief	Clan headman	Statutory court	Police	Local gov't official
Days	<20	80%	56%	33%	40%	64%	42%
	21-50	20%	25%	33%	0%	29%	21%
	51-100	-	19%	-	40%	-	13%
	>100	-	-	33%	20%	7%	25%

Several factors contribute to the length of time it takes for statutory courts or local government officials to resolve disputes: local government officials and statutory courts tend to receive the more complicated and contentious disputes; judges often do not maintain a continuous presence in rural areas and it takes time for them to travel to areas where they are needed; and statutory courts tend to have more complex requirements and processes. Understanding the relative efficiency of customary courts and other more informal forms of mediation helps to shed light on the important services they provide in rural areas.

## **2.4 Blood Compensation and Extra-judicial Settlements of Homicide Cases**

Blood compensation is a traditional remedy for homicide under customary law. It involves the payment of a certain number of cattle to the family of the deceased in order to compensate them for their loss. In some cases, women or girls may be provided to the family of the deceased in lieu of cattle. The precise rituals that accompany blood compensation payments vary between different ethnic and tribal groups, but the underlying rationale is that it allows people to better manage fragile social relationships in the wake of a killing by providing the family of the deceased with a sense of restitution and remedy. However, blood compensation and the associated practice of girl child compensation can also force women into unwanted marriages, send girl children to live with families where they experience significant prejudice and hardship and fail to deter premeditated murders committed by people who are able and willing to pay compensation.

Blood compensation payments vary by area. In most places, blood compensation mirrors the amount of cattle that is typically paid in bridewealth, the idea being that a male relative of the deceased can marry a woman using the compensation award. For example, in Akobo, compensation for intentional homicide is 50 cows, 10 of which are paid as a fine to the government. Some groups also distinguish between killings that take place during inter-clan fighting, revenge attacks and accidents, each requiring a different amount of compensation.

Compensation for homicide has a long history in South Sudan and is often practiced outside of government structures. As a Lou Nuer executive chief in Akobo explains:

In the past, when a person committed murder, there was no [formal] procedure. There was only compensation. The relatives of the deceased could bring him to court and tell him, "If you have 50 cows, then you pay." Then there is something called revenge. The relatives of the deceased can go and kill the murderer or his relatives. If both of them are taken to court, then you can make both sides pay compensation. The one who kills and the one who revenges can both pay.

South Sudanese law does not sanction the negotiation of blood compensation settlements outside of statutory courts. According to the Penal Code Act, the family of the deceased and the perpetrator are meant to negotiate the blood compensation award in the high court after the judge has delivered a guilty verdict—combining criminal and civil penalties into

one process.<sup>43</sup> If the family of the deceased opts for blood compensation, the judge can then sentence the accused to a term of imprisonment not exceeding 10 years. However, given the limited reach of the statutory court system, many chiefs continue to settle homicide cases between willing parties locally, without involving statutory courts.

Local government officials can also adjudicate homicide cases, particularly in the absence of prosecutors and judges. County Commissioners and local police officers draw on principles of customary and statutory law and use existing resources to find practical solutions to managing homicides in rural areas. According to the acting Police Commissioner in Nasir:

In case of a murder that has happened and the person kills someone, in the absence of the judge, we ask the case to go to the Malakal high court. In a situation where the killing is an accident and the family of the deceased will accept compensation from the family of the person that did the killing, then that can be easily dealt with by us. We will take the person who has killed and put them in prison for their protection. When the compensation is paid we will keep this man for some time until it is okay for them to go out.

...This is our problem. In Nasir there are two types of killing. One is when someone is killed in fighting or raiding between the clans and it was nobody's fault. The other is revenge killings. There are many [revenge killings], and this is a very serious offence. In the first matter, we can deal with this if the judge is not here. In the second we must wait until the judge can come, or we will ask for the case to go to Malakal. In the time being we just keep these people in prison.

While the adjudication of murder cases lies outside the jurisdiction of police, County Commissioners and customary courts, it is a widespread and highly valued service among rural South Sudanese. It reduces the potential for revenge killings and provides restitution, especially in the absence of a viable statutory system. The main challenge for local justice systems is twofold. First, the justice system must develop ways of securing both civil and criminal liability for homicides. Reform efforts would need to balance a number of concerns, including: the interests of the state and the relations of the deceased in seeing the guilty party held accountable; the importance of maintaining harmony within the community; the need to promote solutions that limit the potential for revenge killings; and disincentivizing premeditated murders by people who are willing to pay compensation awards. Second, the justice system must ensure that compensation awards do not impose penalties on innocent third parties, specifically women and girls. These challenges are made all the more complex by the ambiguity between criminal and civil punishments in South Sudanese law and custom and local preferences for blood compensation as a means of preventing revenge killings.

## **2.5 Efforts to Expand State Presence and Better Regulate Customary Courts**

Customary courts have an uneasy relationship with the formal system on several fronts. Whereas statutory courts lie firmly within the national Judiciary, customary courts fall under the Ministry of Local Government at the state level, an Executive institution. This

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<sup>43</sup> Government of South Sudan, Penal Code Act, ch. XVI, § 206 (2008).

mixture of centralized statutory courts and decentralized customary courts serves to widen the gulf between the two systems. Chiefs also play both executive and judicial roles, which raises separation of powers issues.<sup>44</sup> Furthermore, Ministries of Local Government are often under resourced and do not have the expertise to monitor and regulate the legal aspects of customary courts.

There has been a strong push from state governments in recent years to force chiefs to adhere to their jurisdictional limitations, particularly in instances of homicide. The Ministry of Justice has appointed legal advisors in each of the ten states and many of the counties. These legal advisors offer legal counsel to state and local governments and help police to investigate and prosecute criminal activity in statutory courts. The prosecutors have arrest powers and, together with the police, play a key role as local gatekeepers, deciding which accused parties are to be prosecuted and which are to be freed. Technically speaking, decisions of the county-level prosecutors can be appealed to their superiors in the state capitals. In practice, however, the difficulty of traveling to far away urban areas and rural residents' unfamiliarity with formal legal processes means that most complainants have little recourse if they are dissatisfied with the prosecutor's decision.

In many parts of South Sudan, local prosecutors have been working to remove homicide cases from customary courts. In Ikotos, for example, the county prosecutor toured each of the payams and instructed chiefs that they must refer all murder cases to the high court in Torit. A payam chief was reportedly arrested for failing to follow these instructions.

### Undermining Chiefs or Enforcing National Law?

In Renk County, the local government and the Judiciary have made even more of a concerted effort to restrict the jurisdiction of town bench courts and customary courts. There are three statutory courts in Renk town, a Dinka paramount chief's court, and chiefs' courts for the many different ethnic groups that reside in Renk. The paramount chief sits at the top of the customary court hierarchy and can receive appeals from decisions at the payam level, as well as appeals involving non-Dinkas.

Shortly after independence, the Renk County Commissioner, with the support of the high court judge, suspended all customary courts from operating for about six months. When they restarted, chiefs were told that their decisions could no longer be appealed to the paramount chief but only to the statutory courts. The Commissioner was concerned that the increasing number of ethnically-defined customary courts was exacerbating tribalist sentiments, a concern echoed in interviews with civilians and government officials in Renk. The Commissioner also felt it was inappropriate for non-Dinka litigants to appeal cases to a Dinka paramount chief.

These actions have generated substantial tension between the local government and the Dinka chiefs. According to an attorney in Renk:

Now the new *umdas* [payam chiefs] are complaining. They say the system before the independence was better than after independence. Before they could appeal to the paramount chief. But now all their instructions are given by the court. They complain that the court only gives them few cases. They say when they punish someone, the court overturns their decision. It is becoming a problem between the chiefs and the court.

<sup>44</sup> Chiefs also have both state and non-state characteristics. In some areas, they are both salaried public employees and part of the traditional authority hierarchy within their communities. In other areas, a distinction is sometimes drawn between "government chiefs," which are considered to be agents of the government, and chiefs that receive greater recognition from the community.

The recent reforms in Renk's local justice system illustrate the fast pace of change in the transitional context. The paramount chieftancy has been in place since the colonial era. It has survived the deprivations of war and the changes of government in the postwar period. Many people in Renk's justice system see no reason to change to a new and unfamiliar system whose values of individual rights and criminal sanction are not shared by their people. However, other actors in the local government and Judiciary—including many educated people—view a neutral, non-tribal system, based on the laws of South Sudan as necessary to promote social harmony and development

As these examples demonstrate, local justice systems in South Sudan remain in a state of flux. For some justice actors, such as the chairperson of the town bench court in Nasir, the changes are positive:

Lots of changes are happening. Before we were not in government and now we are part of it. Initially there were no laws but now we have them, such as the Local Government Act. Now we are able to direct our people properly. There were no judges before and chiefs were the ones giving justice and they were benefitting you see. Now we benefit South Sudan.

For others, such as the *umdas* in Renk, the changes seem arbitrary and counterproductive. It will take several years for reforms to take root in local justice systems. It is therefore important that local governance institutions adopt clearly articulated policies of reform that can remain consistent across successive administrations and are sensitive to the values represented in current systems. For reforms to be effective, they must be evidence-based, developed through consultative processes with local stakeholders, and, to the extent possible, built upon consensus decisions among local populations.

## **2.6 Special Courts, Mobile Judges and Other Ad Hoc Responses**

Levels of insecurity and conflict vary greatly throughout South Sudan, but the three states of Eastern Equatoria, Jonglei and Upper Nile contain some of the most insecure areas in the country. The government has had some success in curtailing politically motivated violence in Eastern Equatoria in recent years through negotiations and military interventions against groups such as the Lord's Resistance Army (LRA) and other non-state armed actors. However, political insurgencies remain a fundamental problem in Jonglei and Upper Nile and all three states experience high levels of lawlessness and inter-communal conflict.

In addition to political and military responses, the government has experimented with several judicial approaches in recent years. For example, the Chief Justice of the Supreme Court recently established a special court to resolve a dispute between two Dinka clans in Bor County, Jonglei State.<sup>45</sup> In Lakes State, four special courts were established to prosecute cattle thefts and inter-sectional and inter-clan conflicts among Dinka and Atuot

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<sup>45</sup> The special court is comprised of individuals from different states as well as payam chiefs from the areas in question. Its decisions can be appealed to the court of appeals in Malakal. *Special Courts Formed to Deal with Inter-Communal Conflict in Jonglei State*, GURTONG TRUST, Feb. 4, 2013, available at <http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/9412/Special-Courts-Formed-To-Deal-With-Inter-Communal-Conflict-in-Jonglei-State.aspx>. There has also been resistance to these special courts by some local leaders. See Jacob Achiek Jok, *Deer Rejects Formation of Special Court to Solve Conflict with Koch*, GURTONG TRUST, Feb. 9, 2013, available at <http://www.gurtong.net/ECM/Editorial/tabid/124/ID/9501/Default.aspx>.

populations.<sup>46</sup> The Judiciary has also deployed mobile judges to certain regions. For example, mobile judges were sent to Akobo 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. However, the government has not sustained the practice.

### Securing the Future by Resolving Past Injustices

Local actors in South Sudan have begun to experiment with different approaches to resolving past grievances. For example, the County Commissioner in Nasir has committed to providing collective compensation to groups for any deaths, cattle thefts and abductions arising from incidents that occurred after 2011. At the same time, he is trying to address pre-2011 cases involving inter-clan fighting among the Jikany and inter-sectional fighting between the Jikany and the Lou.

The manner in which the Commissioner is approaching this issue is causing a great deal of controversy. After so many years, the facts of who killed whom and for what reason have become unclear and subject to debate. People also fear paying compensation will make it seem as though they are admitting guilt and could make them a target for revenge killings. There is also some question about the Commissioner's methodology and whether the endeavor has a clear timeline. To the extent that people do not feel that justice is being done, there is a chance that the Commissioner's initiative will not succeed in settling these decades-old disputes. Yet, at the same time, the fact that he is going to such great lengths to try to resolve them, and expending so much political capital in the process, highlights the importance he attaches to addressing past grievances as a way of reducing the potential for future conflicts.

## 2.7 Enforcement Gaps at the Payam and Boma Levels

Rural areas in South Sudan are confronted with numerous enforcement gaps. Limited police presence in rural areas, inadequate justice services for crimes and abuses committed by military personnel and the militarization of rural communities all pose fundamental challenges to local justice actors.

### Policing Gaps

Eight years after the signing of the CPA and the end of the civil war, the police service has yet to fully establish itself in rural areas. According to past estimates from senior police officers, there should be at least 2,000 police officers in every state, with around 120 officers deployed in each county.<sup>47</sup> In practice, however, police tend to stay close to urban centers due to the lack of accommodation, food, transport and security in rural areas.

In January 2012, for example, the Ikotos County Commissioner reported that there were approximately 100 police in the county. The vast majority of those police were stationed either at the county headquarters or had been sent to the state capital in Torit. Only eight

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<sup>46</sup> Gabriel Mayom, *Special Courts to Hear Cattle Raiders Cases in Lakes State*, GURTONG TRUST, Sep. 26, 2012, available at

<http://www.gurtong.net/ECM/Editorial/tabid/124/ctl/ArticleView/mid/519/articleId/7891/Special-Courts-To-Hear-Cattle-Raiders-Cases-In-Lakes-State.aspx>.

<sup>47</sup> SAS, SYMPTOMS AND CAUSES, *supra* note 33, 9.



police were stationed at the payam level and four of the six payams did not have any police presence. The situation is much the same in other rural areas.<sup>48</sup> A civil society representative working in Nasir explained that the police do not maintain a consistent presence in areas prone to insecurity:

When we went to Dinkar payam we noticed that there was not a single policeman. It was a time when there was a lot of cattle raiding between the clans around Dinkar payam... People came at night to raid and some people were injured. I cannot say how many cows were taken but people said many. Police were deployed to the payams to try and provide some security but until this day they do not stay in the payams. Now, they are all here [in Nasir town].<sup>49</sup>

Corruption and abuse of power, often associated with alcoholism, is also a systemic problem in the police service.<sup>50</sup> People often complain that for small bribes, the police will release suspects from custody.<sup>51</sup> As Clement Ochan wrote in 2007: “Criminals [in Ikotos] are well aware that if they are caught, they will be able to bribe their way to freedom.”<sup>52</sup> Ochan also documented numerous allegations of torture. According to an Ikotos resident interviewed by Ochan:

If a person committed a crime in the villages and he ran away, the police normally come and round up the villagers and torture the innocent civilians. They demand that the villagers show the person who committed the crime... Even if you are falsely accused, instead of interrogating you in a good way, they beat you up before interrogation.<sup>53</sup>

The limited police presence at the payam and boma levels of local government and the unprofessional conduct of some members of the police service poses fundamental challenges to local justice systems. Given the negligible police presence in many rural areas, most crimes at the payam level are reported to chiefs, not to the police. In a 2007 survey, 59 percent of respondents in Torit, Magwi and Ikotos counties in Eastern Equatoria state said they would report a crime to traditional authorities first and 16 percent would inform the nearest family member. Only 11 percent of respondents said that they would report a crime to the police first.<sup>54</sup>

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<sup>48</sup> In some counties, the SPLA has deployed in areas with no police or with an inadequate number of police and has taken on policing functions.

<sup>49</sup> The acting Police Commissioner in Nasir said that each payam had approximately 20 to 50 police officers except Wanding, where there were no police stationed because the area was still occupied by SPLA soldiers.

<sup>50</sup> In a 2008 study, SAS found that, “Cooperation between chiefs and police is often fraught with problems, as police officers are perceived to be incompetent or corrupt, even setting suspects free in exchange for small bribes.” SAS, SYMPTOMS AND CAUSES, *supra* note 33, 8.

<sup>51</sup> SAS reported a range of allegations against the police: “[W]hen police are trucked in to respond to a specific security threat, respondents suggested that certain villages receive preferential coverage and others none, depending on local connections to high-level commanders or politicians. In other cases, residents claimed that unjustified force and punishments are applied.” *Id.*, 9.

<sup>52</sup> CLEMENT OCHAN, FEINSTEIN INTERNATIONAL CENTER, TUFTS UNIVERSITY, RESPONDING TO VIOLENCE IN IKOTOS COUNTY, SOUTH SUDAN: GOVERNMENT AND LOCAL EFFORTS TO RESTORE ORDER 21 (2007) [hereinafter OCHAN, RESPONDING TO VIOLENCE IN IKOTOS].

<sup>53</sup> *Id.*

<sup>54</sup> SAS, SYMPTOMS AND CAUSES, *supra* note 33, 8.

### SPLA Deployments in Rural Areas

The reluctance of some police officers to stay in insecure locations where communities are often better armed than the police is understandable. As a prosecutor in Eastern Equatoria remarked in relation to criminal activity in Budi: “To them, the police are nothing. We don’t send the police. We always send the army, because they can chase the police. They’ve got arms.”<sup>55</sup> Even the SPLA sometimes finds it difficult to deal with heavily armed local populations in rural areas. A representative of Eastern Equatoria state government recounted a story illustrating the difficulties that the SPLA encounters in combating insecurity in Budi:

The case of Budi is so complicated. About four or five months ago, some of the Buya came and raided cattle in the army garrison. They came very early in the morning and they took the cattle and they left. Of course, the army, when they got up, they were annoyed and they started running [after the culprits]. These people [the Buya cattle-rustlers], they knew that the army would follow them, so they made an ambush. They chased the army back until the garrison. They killed one driver and one officer was shot and wounded from behind.

So when this happened, we called to Juba and there was a mobilization of the army. The commander of the area came here and people decided to go with a very big force composed of police, fire brigade, prison and the army. But when they went to the mountain of the Buya, they found that it was not easy. These people [the Buya] have many mountains. They’ve got caves. They can really cause havoc for the army. So people decided not to continue and said they would leave it for another time.

So this area around Camp 15, for us, it is very important. Now it’s a bit quiet. But there was a time like last year and the year before, when we didn’t move. Budi is a difficult place. It is a very tough place.

The SPLA is often called upon to undertake policing functions in situations that are deemed to be beyond the capacity of the police. The SPLA, originally founded as a guerilla movement to fight the Government of Sudan, has proven ill-equipped to undertake policing functions. SPLA units, for example, often rely on local communities to feed them while deployed. This can give rise to a perception among local populations that unwelcome soldiers are “stealing” their limited provisions.<sup>56</sup>

Local justice systems encounter particular difficulties in securing accountability for abuses or crimes committed by SPLA forces deployed in rural areas. The SPLA Act requires that soldiers who commit crimes against civilians be tried in civilian courts.<sup>57</sup> While this legislative requirement is a positive step towards accountability, the absence of statutory courts and the limited protection for judges means that in practice, the SPLA continues to police itself. The task is made all the more difficult as most senior SPLA

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<sup>55</sup> This finding is supported by focus groups that the SAS conducted in 2008, in which interviewees said that the police “are often too weak or easily overpowered by local armed communities.” *Id.*, 9.

<sup>56</sup> Examples of unpopular campaigns are civilian disarmament or counter-insurgency; campaigns for which both the objectives and the tactics often engender hostility from local communities.

<sup>57</sup> Government of South Sudan, Sudan People’s Liberation Army (SPLA) Act, ch. VI, § 37(4) (2009) (stating that “Whenever a military personnel commits an offence against a civilian or civilian property, the civil court shall assume jurisdiction over such an offence).

officers at the sub-national level have not received training on national laws and have few judge advocates at their disposal to support military justice services. The lack of an effective military justice system has implications both in terms of SPLA crimes against civilians and for crimes that soldiers commit among themselves. Due to the lack of effective solutions, soldiers are often allowed to commit criminal acts with impunity.

In Akobo town, a special court has been established to deal with cases involving soldiers. The special court hears almost all cases involving military personnel, even serious crimes such as rape. However its punishments are usually limited to small fines. Even this limited amount of accountability is only possible because most soldiers based in Akobo are from the same ethnic group as the community; such a solution would be unlikely to succeed in most other settings. The limited success of the special court in Akobo highlights the need to consider alternative accountability mechanisms for crimes committed by soldiers in rural areas in the absence of well-protected statutory courts. Reform efforts could also include legal training for the SPLA leadership at the sub-national level and the strengthening of judge advocates.

#### *Rural Population's Choices of Complaint Mechanism*

Reflective of these challenges, survey data shows that rural South Sudanese are most likely to submit disputes to chiefs, family members or neighbors, while the police figure prominently as the second or third places to which people submitted their complaints. An exception can be found in the case of abductions. Rural South Sudanese generally assume abductions to be committed by neighboring tribes. However, friends, relatives and local chiefs—the main actors in rural justice systems—have little power over neighboring tribes. As discussed further in Chapter Three, most households that have had a family member abducted do not seek redress through the justice system. Those that do complain often submit their complaints to local government officials and civil society organizations, perhaps reflecting the influence that these institutions have beyond their immediate area (see Table 6).

**Table 6: First Forum Preferences**

<b>Spousal Neglect</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Other family/friends/neighbors	40.8%	40
Spouse	25.5%	25
Clan headman	12.2%	12

<b>Theft</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Other family/friends/neighbors	20.8%	42
Police	18.8%	38
Chief	17.3%	35

<b>Physical Assault</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Other family/friends/neighbors	27.0%	43
Chief	17.6%	28
Local government official	13.2%	21
Self-help	13.2%	21

<b>Abduction</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Local government official	30.6%	15
Civil society	20.4%	10
Other family/friends/neighbors	16.3%	8

<b>Homicide</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Chief	23.4%	29
Police	14.5%	18
Other family/friends/neighbors	14.5%	18
Local government official	16.9%	21

<b>Adultery</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Chief	32.9%	25
Spouse	19.7%	15
Other family/friends/neighbors	14.5%	11

<b>Rape</b>		
<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
Other family/friends/neighbors	38.2%	13
Local government official	20.6%	7
Chief	11.8%	4
Police	11.8%	4

*Armed Civilians and Conflicts of Interest among Chiefs*

Given the lack of police presence in some areas, chiefs at the payam and boma levels can find it difficult or impossible to enforce decisions against unruly parties. According to the paramount chief in Budi:

The cases are not being solved down there [at the payam level]. Only here in the town, where the chief is still strong, people can use the system sometimes. But generally down there, there are no cases. People are still owning guns. They even beat the chiefs. When you try to fine them, they say, “You come and we’ll see. You come and see me in my home. Just try to take these cows.”

Similar dynamics are reported in Nasir. Some payams in Nasir have as many as three or four head chiefs, each representing between six to ten bomas. According to a local civil society representative, cases can move back and forth across the payams and bomas with different chiefs making contradictory decisions: “Chiefs are arguing with each other. There is sometimes no communication between them... When cases are crossing boma and payams different chiefs are making decisions and it is difficult sometimes to keep track.” The prevalence of guns also raises enforcement problems for chiefs at the payam level, though in Nasir town itself people usually do not move openly with their weapons. According to the civil society representative:

The greatest issue is intimidation during a case. People just come with their families and force some chiefs to make a decision in their favor. Also, if people refuse to pay compensation and are strong, then the chief can do nothing.

People from minority ethnic groups and economic migrants are particularly vulnerable. For example, an Ethiopian trader in Nasir cited accountability for wrongdoing, mostly associated with petty theft and fighting, to be an issue of concern for economic migrants from Ethiopia. According to the trader:

If something happens in town the people in security here often fail to follow up even if they get the right information. They say it is out of their control. There was somebody who stole some *ouzo* [a licorice flavored spirit] from the market of a shop that belonged to an Ethiopian. The man who stole was South Sudanese and he was somehow connected to the security people in the fire brigade and just ran away. We went to the police in the market and asked them to chase the man but they did not go. We are developing a report to give to the Police Commissioner, as we are not happy. But it is difficult when people are connected like this. This is why we are sleeping where we work, this is not normal for us but we have to protect our shops just because we cannot be without our income. But I have to say that the problems are small. Even the fighting when people are drinking can be handled.

The reform of police services at the payam and boma levels, improving access to justice for victims of crimes committed by soldiers and providing security for justice sector actors must be prioritized if the government is going to improve access to justice for rural populations. Police should work closely with payam and boma chiefs to legitimize their presence in local societies and build relationships with the communities they serve. Training programs and other civil society initiatives can help to facilitate this process by ensuring that their activities are conducted at the payam level and not just in the county headquarters. Likewise, training and defense support to the SPLA should be focused on the divisional level and below to ensure such efforts achieve tangible impact.

## **2.8 ‘The Prison Is Empty’**

Prisons face similar resource constraints as police, though since they have less interaction with civilian populations, the prison services have not engendered the same degree of resentment. Most of the counties have prisons that house roughly 20 to 40 prisoners, though in Renk the prison holds more than 100 prisoners. Some prisoners stay in the prison full-time and others are permitted to move freely during the day, only coming back

to the prison to sleep in their cells at night. Prisoners may also be released on bail, if they have a reliable person that is willing to provide a guaranty on their behalf.<sup>58</sup>

Most prison facilities in South Sudan are in a severe state of disrepair and escapes are commonplace. The entire prison population in Budi reportedly escaped in early 2012 because they were not being provided with enough food. In Nasir, there are no water facilities in the prison compound and inmates sometimes escape when being escorted to the boreholes in town. Since they do not have uniforms for the inmates, it can be difficult for police to recapture people who have escaped. According to a social worker in Ikotos:

The police and prison have a small cell where these culprits are kept, but they find some of the culprits normally run away because the thing is not well established. They [the prisoners] can burrow a hole at night and when the prison guards go out the following day they will find that the prison is empty. It has happened several times. ...It was going to cause a lot of injury and people killed because those people [the prisoners] ran away in different directions indiscriminately. It has happened many times in the last three years.

As bad as the situation is in the county headquarters, it is far worse at the payam level. Detention facilities are virtually non-existent and the authorities must suffice with tying suspects to trees or detaining them in facilities that were not designed to accommodate detainees.<sup>59</sup>

In the face of these challenges, some individual actors are struggling to put in place systems to better manage the use of prisons in rural areas. The director of prisons in Nasir, for example, developed a form for chiefs to use in sentencing people to prison terms. The form documents the nature of the crime, the forum to which the case was referred, any special needs of the prisoner and the period of detention. According to the director, he sometimes refuses to take certain prisoners and sends the cases back to chiefs for review:

Before a case is brought we have procedures to follow and must be supported, but this is not happening here. Chiefs are arresting people and bringing people to prisons. Under the Prisons Act we are supposed to detain someone for only seven days until their case is dealt with. There is sometimes no review of cases at all. Sometimes the accused will be left for one month or more and no one will come for him. Sometimes, we will just release him... We are not a hotel. We cannot just keep people here. There is no space. How can we manage this?

The misuse of criminal sanctions such as incarceration is a central problem in local justice systems. Any reforms to local justice system should clarify the distinction between disputes that can be resolved through payment of compensation only and those that require criminal punishment, such as incarceration.

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<sup>58</sup> To release a prisoner on bail, the authorities require someone to provide a guaranty on their behalf, such that if a complainant wants to open a case in the future, the guarantor is responsible for ensuring that the accused submits his/herself to police custody. The authorities require the guarantor to be someone who is known to be trustworthy, often a government employee, with a national ID, telephone number and permanent residence.

<sup>59</sup> Nasir County is an exception. It has four prisons at the payam level each of which can house up to 15 detainees. The smaller ones do not have separate space for women, so sometimes they cannot accept female detainees.

## Chapter Three

### *Challenges of Accountability*

South Sudan has undergone significant changes in recent years. The influx of governmental and non-governmental actors into rural areas after the end of the war has helped to develop institutions, provide security and improve access to justice for rural populations. However, certain types of legal problems continue to confound the justice system. For example, existing complaint mechanisms are almost completely unable to hold perpetrators of inter-communal violence, government actors who commit crimes or armed groups that commit acts of violence against the state to account. Individuals and groups are able to commit numerous acts of murder, robbery, sexual violence and abduction with impunity. These accountability gaps become more pronounced when the crimes are committed across county administrative lines and when the perpetrators have easy access to soft international borders.<sup>60</sup>

In addition to these problems of accessibility, there are also problems associated with the manner in which local justice systems resolve certain types of disputes. These problems arise when courts impose unfair or discriminatory decisions on innocent parties, such as forcing girls to marry men against their will, forcing rape victims to marry their rapists, exchanging girls as compensation for homicides, or incarcerating people for indefinite periods of time when they are not able to repay their debts.

#### **3.1 Inter-communal Violence and the Effect of Historical Grievances**

Homicides perpetrated across ethnic lines are among the most intractable issues that confront local justice systems, particularly when they occur in the context of large-scale violence. Inter-communal violence manifests at various levels in South Sudan: it can involve inter-tribal conflict, such as the violence between the Buya and Didinga in Budi or the Lou Nuer, Dinka Bor and Murle in Jonglei; inter-sectional conflict, such as the chronic fighting between the Lou Nuer of Akobo and Jikany Nuer of Nasir; or inter-clan conflict, such as the violence among the clans of Dinka Abaliang in Renk or among the sub-groups of Lango in Ikotos. The executive chief in Chukudum described the dynamics of ethnic violence in Budi:

Raiding is everywhere here. People are coming from this way, that way, that way, to this side. Where there are cows, there must be raiding. Toposa are coming to the other side there, and this

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<sup>60</sup> For more information on border management in South Sudan, see ANNETTE WEBER, FRIEDRICH-EBERT-STIFTUNG, BOUNDARIES WITH ISSUES: SOFT BORDER MANAGEMENT AS A SOLUTION? (Jan. 2012), available at <http://library.fes.de/pdf-files/iez/08869.pdf>; CHRISTOPHER MILNER, CONCORDIS INT'L, CROSSING THE LINE: TRANSHUMANCE IN TRANSITION ALONG THE SUDAN - SOUTH SUDAN BORDER, EXECUTIVE SUMMARY (Jan. 2013), available at <http://concordis-international.org/wp-content/uploads/2013/01/Crossing-the-Line-Executive-Summary-Jan-2013.pdf>; Agreement between the Republic of the Sudan and the Republic of South Sudan on Border Issues (Sep. 27, 2012), available at <http://www.smallarmssurveysudan.org/fileadmin/docs/Agreement-on-Border-Issues-September-2012.pdf>.

neighbor of ours, Logir, here to this side. ...It is a kind of revenge. When you kill a woman, they will come and kill a woman. When you slaughter a small boy, they will come and slaughter a boy. If they have driven cows, you will go and drive cows.

Common to these different forms of violence is the almost complete inability of the justice system to hold the perpetrators to account.<sup>61</sup> Several thousand civilians, including women and children, have been killed or abducted and had their property destroyed as a result of inter-communal violence and cattle raiding in Jonglei state in recent years. Nonetheless, the perpetrators of these crimes have enjoyed almost total impunity in terms of criminal justice, even though the President has publicly acknowledged that politicians and local leaders are playing a role in supporting the violence.<sup>62</sup>

Several factors contribute to the intractability of these disputes. The disputing parties are typically strangers and may be less willing to negotiate customary compensation awards. Suspects may be harbored and protected by armed groups in rural areas or they can escape across county administrative lines or international borders. As county administrative boundaries continue to fragment along ethnic lines, the task of prosecuting inter-communal crimes is becoming more difficult. In urban areas, panels of chiefs are sometimes convened to adjudicate disputes involving people from different ethnic groups, but few comparable mechanisms exist for large-scale inter-communal violence in rural areas.<sup>63</sup> Furthermore, it is often not clear which government institutions—the Judiciary, state Governors, local government officials, police, or the SPLA—have primary responsibility for managing the violence.

Another important characteristic of inter-communal homicide is the role historical grievances play in perpetuating the violence. Historical grievances—which may stem from any number of sources, including atrocities committed during the war, colonial-era land disputes, or even longstanding feuds between individual families—are sometimes used as justifications to dehumanize entire groups of people and can heighten the scale and intensity of inter-communal conflicts, as well as conflicts between rural communities and government actors. Frustrations associated with a lack of accountability for past wrongs can accrue for many years before people decide to take their revenge. The executive director in Akobo described the dynamics of inter-clan fighting among the Lou Nuer:

*Interviewer:* Is there any major trouble from within, between the clans of Lou Nuer?

*Executive Director:* Yeah, there is this internal fighting. It is caused by revenge. If someone's relatives are killed by one of the other family, they can look for someone very tall and handsome, like you. They can even wait for 30 years. If that family has no person equivalent to the other

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<sup>61</sup> According to UNMISS, “[G]iven the gravity, scale and breadth of the crimes being committed in Jonglei, the formal justice system does not currently for the most part have the capacity to meaningfully investigate, prosecute, adjudicate or defend accused persons.” UNMISS, INCIDENTS OF INTER-COMMUNAL VIOLENCE, *supra* note 29, 32.

<sup>62</sup> *Id.*, 28.

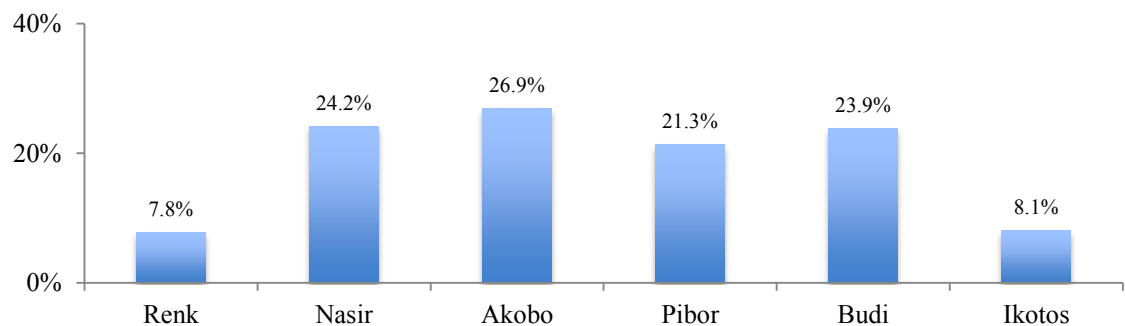
<sup>63</sup> DENG, CUSTOMARY LAW, *supra* note 4, 135 (stating that feuds between those who were in different tribes were rarely settled through the payment of blood compensation, but those between local lineages or groups were usually settled).



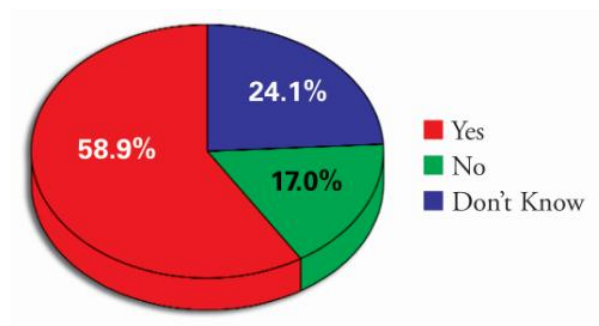
person [that was killed], they can wait. You can be killed because of your qualifications. You are an educated person. Otherwise, you are handsome. You are a fighter. Otherwise, you are the only son in the family. You are a priest. You are a lone man within the family that has wealth. So those are the reasons they see. They don't kill anyhow. They are targeting people.

Survey data showed a remarkably high rate of homicides across the six counties. Nearly 20 percent of households in the sample reported having one or more household members killed within the last two years.<sup>64</sup> The figures at the county level shed additional light on the scale of the problem. Twenty-seven percent of households in Akobo, 24 percent of households in Nasir and Budi and 21 percent of households in Pibor reported that one household member or more had been killed in the last two years (see Figure 2).<sup>65</sup> Individual respondents said that the majority of killings (58.9 percent) were intentional, although a quarter of respondents did not know whether the killing was intentional or not, so the murder rates may be significantly higher than the data suggests (see Figure 3). These findings are consistent with the high levels of inter-communal violence that these four counties have experienced in recent years.

**Figure 2: Homicide Rates by County**



**Figure 3: Was the Killing Intentional?**

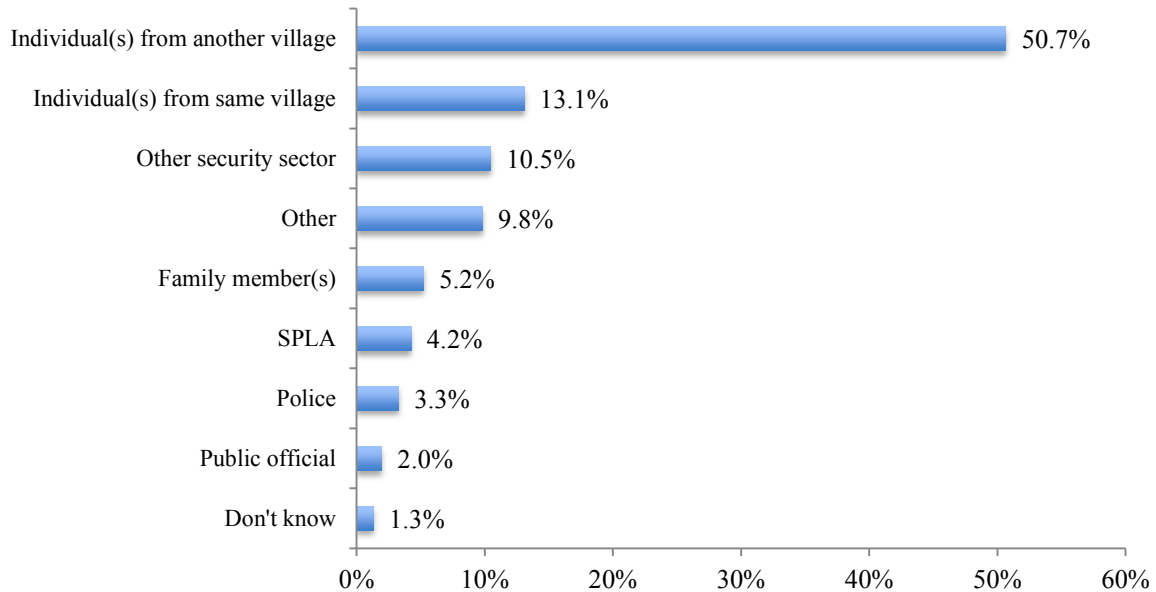


<sup>64</sup> A 'household' is defined as a place where a group of people eat and sleep together on a regular basis. The survey was restricted to private homes and did not include any public facilities such as hospitals or prisons.

<sup>65</sup> Note that the survey's definition of 'homicide' included both unintentional and intentional killings.

Respondents indicated that ‘Individuals from other villages’ were responsible for half of all homicides in the project areas. This finding was mirrored at the county level, which is consistent with reports of high levels of inter-tribal, inter-sectional and inter-clan fighting in these areas (see Figure 4). Respondents attributed 18 percent of homicides to the police, SPLA, or other security sector actors, further evidence of the substantial accountability gap relating to crimes by security sector personnel.

**Figure 4: Perpetrator Profiles for Homicide**



The government’s current approach to managing political and inter-communal conflicts usually involves a combination of political solutions, such as peace and reconciliation conferences or blanket amnesties and military solutions, such as forced disarmament campaigns or military assaults against politicized armed groups.<sup>66</sup> Occasionally, the Judiciary will also establish ad hoc complaint mechanisms, such as special courts or mobile judges, to deal with specific acts of inter-communal violence, though none so far have been established to deal with violence committed by government actors. These types of solutions, while a necessary component of any multifaceted approach to resolving complex conflicts, tend to be short-lived, unsustainable and lacking in accountability. The absence of viable justice options creates an environment in which individuals and groups sometimes feel that the only way to deter other groups from harming them is to engage in revenge attacks, often in escalating cycles. The violence that results contributes to the high levels of lawlessness and insecurity in many rural areas.

By incorporating an element of public accountability into the current approach, the government and its international partners can relieve the burden on political and military

<sup>66</sup> See John Ashworth and Maura Ryan, “One Nation from Every Tribe, Tongue, and People”: The Church and Strategic Peacebuilding in South Sudan, 10 J. OF CATHOLIC SCHOOL THOUGHT 47-67 (2013).

institutions, which are ill-suited to lead on this form of accountability and are often an integral part of conflict systems. Increased public accountability can also reduce incentives for individuals and groups to engage in violence. Any such legal solutions must be well coordinated between statutory courts and traditional authorities. The combination of criminal sanctions and customary remedies takes advantage of the efficiency of customary courts and their ability to quickly get the parties talking to one another and the interest in holding perpetrators of inter-communal homicide accountable for their crimes. Police and prosecutors must also work closely with traditional authorities to investigate wrongdoing and apprehend suspects for trial.

### **3.2 Cattle Raiding, Abduction and Trans-boundary Crime**

Many of the concerns associated with inter-communal homicides also arise in relation to cattle raiding and abductions. The justice system's inability to investigate and prosecute these crimes gives rise to large accountability gaps in rural areas. Not only can suspects evade capture by crossing into neighboring counties or across international borders, but armed groups can also generate revenue and secure weapons and supplies through cross-border trade. Cows, gold and other commodities can provide currencies for cross-border exchanges in the informal market.<sup>67</sup>

#### *Petty Theft, Cattle Raiding and Cross-border Trade*

Theft arises in two main forms in rural areas of South Sudan: petty theft, involving what are usually small amounts of money or goods and cattle or livestock raiding, which can range from the theft of a few heads of cattle to the looting of entire herds numbering in the thousands. In some instances, heavy weaponry and violence against civilians has been used during cattle raids.<sup>68</sup> Generally speaking, petty theft that relies on secrecy and deceit carries a heavy social stigma in South Sudan. According to Cherry Leonardi *et al.*:

Above all other crimes or offenses, petty, repeated theft—with the exception of certain kinds of cattle stealing—is widely seen to be a deeply antisocial and unrespectable activity, punishable by flogging and imprisonment. This is the nearest thing to a purely criminal case in terms of how the courts handle it, seemingly because thieves so lower their own status that they are removed from normal social relations, thus precluding a payment of compensation, which implies a certain equality and reciprocity of relations.<sup>69</sup>

Cattle raiding, on the other hand, is often conducted in the open and is deeply intertwined with local social, economic and political processes.<sup>70</sup> Young men take part in violent raids on neighboring groups in order to capture cattle to use for bridewealth payments, to

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<sup>67</sup> Anne Walraet, *Governance, violence and the struggle for economic regulation in South Sudan: the case of Budi County (Eastern Equatoria)*, 21 AFRIKA FOCUS 53 (2008) [hereinafter Walraet, *Governance, violence and the struggle for economic regulation*].

<sup>68</sup> South Sudan has the largest number of cattle per capita. *South Sudan leads world in livestock wealth*, SUDAN TRIB., Jan. 25, 2013, available at <http://www.sudantribune.com/spip.php?article45286>.

<sup>69</sup> LEONARDI ET AL., LOCAL JUSTICE, *supra* note 4, 38.

<sup>70</sup> *Id.*

prove their strength in battle and to assert their manhood.<sup>71</sup> When they return home, they are often greeted with songs extolling their fighting prowess. In this sense, cattle theft enjoys a degree of social acceptance among many pastoralist groups. This acceptance, however, is beginning to change due to the realities of the current context, particularly the increased intensity of raiding, the rising death tolls during cattle raids and the heavily militarized nature of local populations. This concept of cattle raiding as a “traditional” activity is also contradicted by the motivations of political and military leaders who sometimes manipulate conflicts (and those involved in conflicts) in self-interested attempts to garner support from local constituencies and benefit from the post-war consolidation of power. When viewed through the lens of these current realities, cattle raiding becomes less about “tradition” and more about power and political positioning.

While cattle theft is a relatively common occurrence, the motives that drive perpetrators are poorly understood. Traditionally, cattle were used for marriage or other customary practices, such as compensation for homicide or adultery. During the second civil war, this began to change. Along with other commodities such as gold and alcohol, cattle increasingly became important forms of currency in cross-border trade.<sup>72</sup>

The increasing significance of the cattle trade may have created additional incentives for individuals and armed groups to engage in large-scale cattle theft. Individuals and groups can bring their cattle to nearby markets in Ethiopia, Kenya or Uganda and exchange them for various goods and supplies, including small arms.<sup>73</sup> Anne Walraet explains how the SPLA profited from this form of cross-border trade in Budi during the war:

Once the border is crossed, the cattle are walked to the nearby livestock market at Agoro [in Uganda], where they are sold and the business cycle enters its next phase: that of the trade in commodities back to Sudan... Some of the products for export to Sudan are readily available at the Agoro market itself: necessities such as soap, salt, manufactured goods and (second-hand) clothes. Others are procured further south in Uganda, such as (mostly illegally brewed) alcohol (“Lira-Lira” and “Kasese-Kasese”). Also weapons and ammunition are available at a market adjacent to the cattle auction.<sup>74</sup>

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<sup>71</sup> Walraet, *Governance, violence and the struggle for economic regulation*, *supra* note 67, 58-59.

<sup>72</sup> According to Anne Walraet, the monetisation of cattle for livelihood or commercial purposes has for a long time remained a marginal activity in South Sudan. It was only in emergency situations, such as drought, that cattle were brought into the money economy or bartered for grain. In general, cattle—not money—are regarded as wealth. More recently, however, cattle trading has been on the rise and has subsequently changed the foundations of wealth. *See* Walraet, *Governance, violence and the struggle for economic regulation*, *supra* note 67.

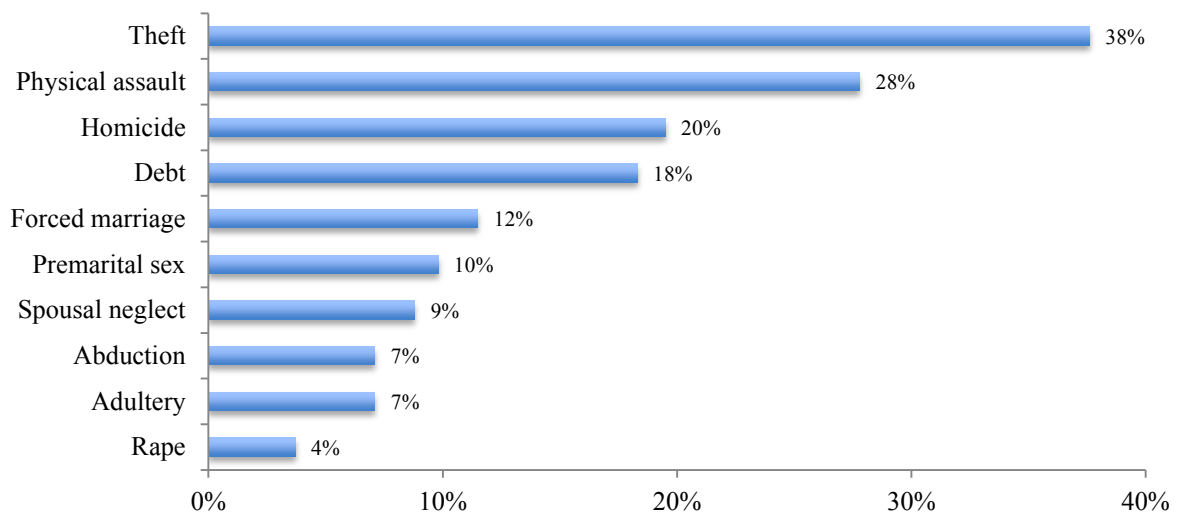
<sup>73</sup> According to SAS, “In Lou Nuer areas, an old Kalashnikov-pattern assault rifle costs two or three cows, and a new one goes for three or four cows. PKM-type machine guns cost 10 cows. Ammunition typically sells for 3–5 South Sudanese Pounds (SSP) per cartridge, the equivalent of about USD 0.75–1.00. One cow can be worth 200–500 rounds, depending on the size of the cow. In Murle areas prices are similar. A Kalashnikov goes for SSP 2,000–3,000, or three to four cows, and usually comes with a fully loaded magazine.” Small Arms Survey (SAS), Human Baseline Security Assessment (HSBA), *My Neighbor, My Enemy: Inter-tribal Violence in Jonglei*, 21 SUDAN ISSUE BRIEF 4 (Oct. 2012), available at [http://www.smallarmssurveysudan.org/fileadmin/docs/issue-briefs/HSBA-IB21-Inter-tribal\\_violence\\_in\\_Jonglei.pdf](http://www.smallarmssurveysudan.org/fileadmin/docs/issue-briefs/HSBA-IB21-Inter-tribal_violence_in_Jonglei.pdf).

<sup>74</sup> Walraet, *Governance, violence and the struggle for economic regulation*, *supra* note 67, citing DARLINGTON AKABWAI AND PRISCILLAR E. ATEYO, FEINSTEIN INT’L CENTER, *THE SCRAMBLE FOR CATTLE, POWER AND GUNS IN KARAMOJA* (2007).

Similar dynamics have been reported on the Ethiopian border as well, which has been a transit route for small arms into South Sudan since the colonial period.<sup>75</sup> Due to the length of the border, the remoteness of the terrain, the proliferation of weaponry and conflicts in neighboring countries, arms smuggling across South Sudan’s international borders is notoriously difficult to contain.

The survey data showed theft—including both petty theft and cattle and livestock theft—to be the most common dispute across the six counties.<sup>76</sup> Thirty-eight percent of households (n = 571) had experienced one or more thefts in the past two years (see Figure 5).

**Figure 5: Dispute Incidence Rates**



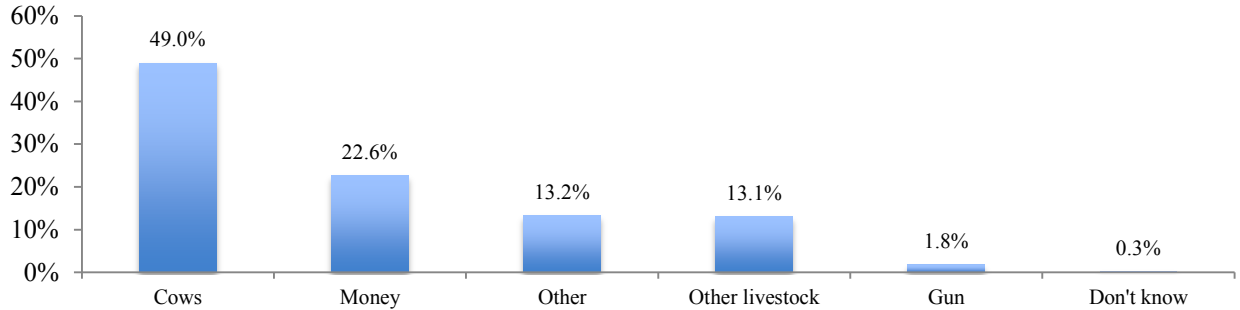
Most of the incidents of theft (62.1 percent) involved the stealing of cows or other livestock (see Figure 6). The rates of theft were especially high in Akobo, where 63.1 percent of households claimed to have experienced a theft in the past two years (see Figure 7).

<sup>75</sup> According to Sharon Hutchinson: “The eastern Gaajak Nuer were active importers and distributors of firearms since the early 1910s, purchasing successively more powerful models along the Ethiopian frontier and exchanging these for cattle with their brothers further west as well as with Shilluk, Dinka, Nuba, and even Baggara Arab communities. As early as 1912, the British reported a burgeoning Gaajak ivory/Oromo gun trade with well-established meeting points and routes of traffic.” HUTCHINSON, NUER DILEMMAS, *supra* note 7, 111; *see also*, SAS, *My Neighbor, My Enemy*, *supra* note 73, 4 (stating that traders ferry small arms and ammunition from other states within South Sudan as well as its neighbors, most notably Ethiopia, across Jonglei’s borders to town centers).

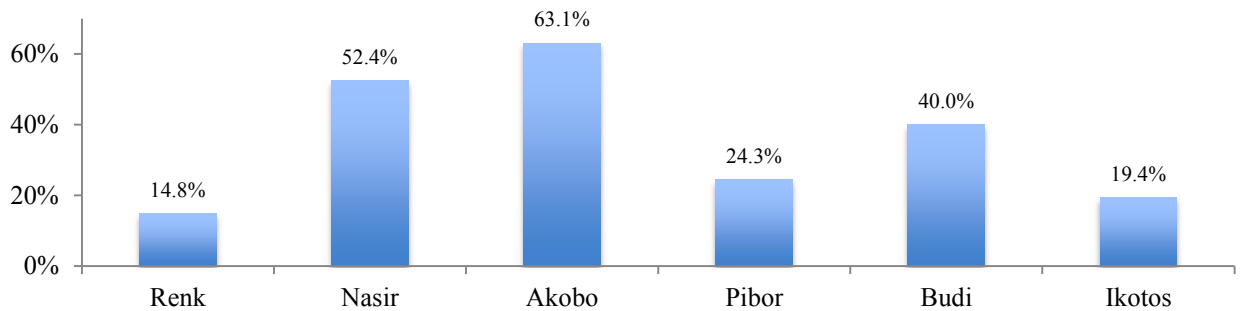
<sup>76</sup> The survey question asked individual respondents whether anyone in the household had something stolen from them in the past two years. In our pretests of the survey, it was apparent that victims of cattle raids viewed the stealing of their cattle as theft, so there was no concern of underreporting due to differing perceptions of what constitutes theft.

Figure 7 According to respondents, 81 percent (n = 160) of these incidents involved the theft of cattle or other livestock. Respondents in Pibor and Nasir also reported high rates of cattle theft.

**Figure 6: Types of Stolen Items**



**Figure 7: Theft Rates by County**



The high rates of cattle theft are a function of the large number of pastoralists in Akobo, Nasir and Budi and the frequent raids between communities of the same ethnic group, as well as trans-boundary cattle raids between different ethnic groups. Respondents in Akobo, Nasir and Budi indicated that ‘Individuals from another village’ were responsible for most thefts.<sup>77</sup> These findings are consistent with qualitative data. Respondents in Renk and Ikotos, on the other hand, reported that ‘Individuals from the same village’ were responsible for most thefts, suggesting that cattle raiding in these areas is much more localized.<sup>78</sup>

<sup>77</sup> Sixty-six percent of respondents in Akobo (n = 114), 44 percent of respondents in Nasir (n = 104) and 32 percent of respondents in Budi (n = 24) reported that the perpetrators were ‘Individual(s) from another village’. An abnormally large percentage of perpetrators were identified as ‘Other’ (27.6 percent) in Budi. It is not clear to whom these responses are referring. The list of options was sufficiently large that it should have covered most responses.

<sup>78</sup> Thirty-six percent of respondents in Renk (n = 13) and 42 percent of respondents in Ikotos (n = 14) reported that the perpetrators were ‘Individual(s) from the same village’.

### Abduction and Inter-communal Violence

Abduction in South Sudan covers a wide range of practices, including human trafficking for the purposes of economic or sexual exploitation, the abduction of women and children in order to expand family size and generate income through bridewealth payments, kidnapping and the taking of captives during war or raids. Historically, abduction was associated with the slave trade in South Sudan. Numerous instances of slavery were also documented during the civil war, when northern-allied militias would take Southern Sudanese women and children and sell them into forced labor in northern Sudan.<sup>79</sup> Abductions in South Sudan in the post-CPA period are commonly associated with inter-communal violence.<sup>80</sup> The crime is particularly pronounced in Jonglei State.<sup>81</sup>

To a certain extent, inter-communal violence in Jonglei has its roots in events that transpired during the civil war. There was a perception among the Murle that the SPLA was a tribal movement led by the Murle's historical rivals, the Dinka and Nuer. After one of their leaders was executed by the SPLA in the early years of the war, many Murle allied themselves with Khartoum and began to organize militias in opposition to the SPLM/A. Ethnic divisions were also apparent in the 1991 split within the SPLA, in which a number of senior Nuer and Shilluk commanders defected from the SPLA and formed their own rebel movements. This history explains some of the political marginalization that Murle have experienced in the postwar period, as well as the ongoing violence among ethnic groups in Jonglei. This legacy of inter-communal conflict in Jonglei makes it difficult for local justice systems to negotiate settlements for abductions committed across ethnic lines.

Abductions are painful experiences for communities and individuals, but they have also become a highly politicized and complicated issue. The return of abducted children is a way for chiefs or local officials to curry favor with state and national actors and demonstrate their commitment to peace. This politicization of abduction limits national, state and local justice actors' abilities to prevent future abduction and to ensure the best outcomes for abducted women and children. Additionally, peace conferences regularly reach resolutions calling for the return of abducted women and children, but these resolutions are made with little or no consultation with the abducted women and children themselves. In fact, many abductees prefer to stay where they are. Abducted children sometimes do not remember their family or place of origin and can be subject to long periods in government custody prior to return and abducted women can face uncertainty in their position within their community upon return.

Abduction rates reported in Akobo and Pibor were the highest of surveyed areas, with 18.1 percent of households in Akobo and 9.7 percent of households in Pibor reporting

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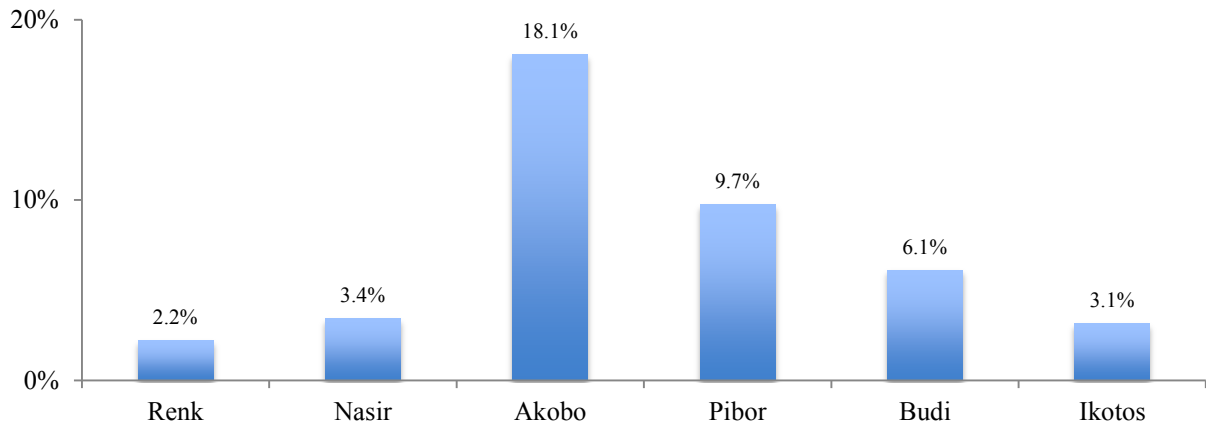
<sup>79</sup> See JOK MADUT JOK, *WAR AND SLAVERY IN SUDAN* (2004).

<sup>80</sup> Oystein H. Rolandsen and Ingrid Marie Breidlid, *A Critical Analysis of Cultural Explanations for the Violence in Jonglei State, South Sudan*, 1 *CONFLICT TRENDS* 50 (2012), available at [http://www.accord.org.za/downloads/ct/ACCORD\\_Conflict\\_Trends\\_2012\\_1.pdf](http://www.accord.org.za/downloads/ct/ACCORD_Conflict_Trends_2012_1.pdf).

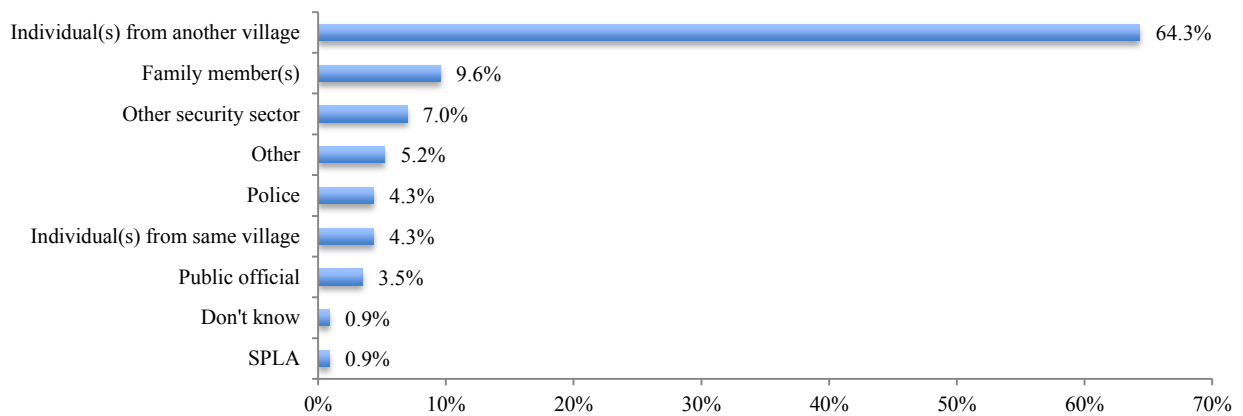
<sup>81</sup> The practice is often associated with the Murle of Pibor, but the Lou Nuer, Jikany Nuer and Bor Dinka have also been known to abduct people in the context of inter-communal violence in Jonglei.

one or more abductions in the last two years (see Figure 8). Overall, respondents overwhelmingly identified the perpetrators of abductions as ‘Individual(s) from another village’ (see Figure 9). These findings are consistent with qualitative data that abductions in Jonglei cross ethnic and administrative boundaries.<sup>82</sup>

**Figure 8: Abduction Rates by County**



**Figure 9: Perpetrator Profiles for Abduction**



Eighty-six percent of respondents in Akobo thought their household member was abducted by ‘Individual(s) from another village’ while respondents in Pibor reported a much more diverse group of perpetrators (see Figure 10).<sup>83</sup> In Pibor, 36.3 percent of

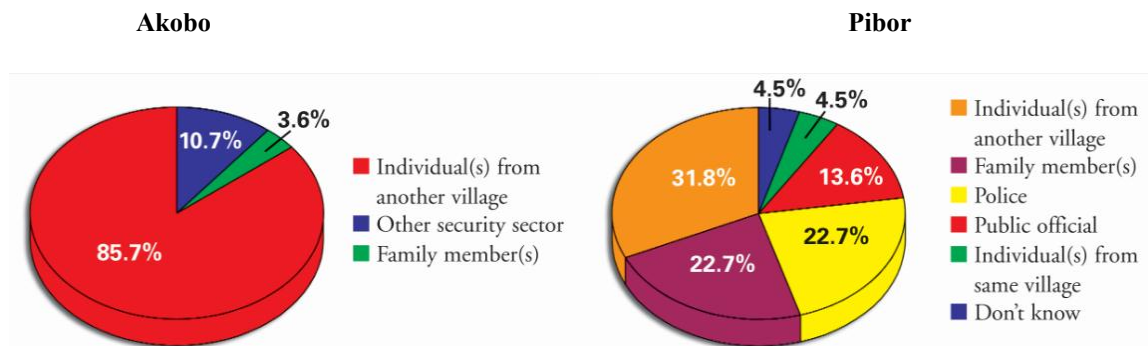
<sup>82</sup> As noted above, the crime of abduction is often associated with the Murle of Pibor. The motivations for abductions among the Murle and other tribes are poorly understood. There is a widely circulated rumor that Murle women are sterile and that the Murle abduct other people’s children because they cannot produce children of their own. Jon Arensen cites past incidents in which Arab militia introduced venereal diseases that left some Murle women sterile and the World Health Organization (WHO) intervened and subsequent generations of Murle women have not encountered problems producing children. See JONATHAN ARENSEN, CONTEMPORARY ISSUES FACING THE MURLE (n.d.), available at <http://www.cmi.no/file/1964-Murle.pdf>.

<sup>83</sup> The diversity of perpetrators in Pibor may also point to complexities in identifying the perpetrators. According to Rolandsen and Breidliid, for example, the youth who participate in ad hoc raiding parties may



abductions are thought to be by government and security actors. This finding is consistent with qualitative data indicating the high levels of impunity enjoyed by government actors in Pibor. The dynamics of abductions are not uniform across South Sudan and reforms would require a nuanced and context-driven approach to be effective.

**Figure 10: Perpetrators of Abduction in Akobo and Pibor**



As noted above, ethnically charged rhetoric and dehumanizing language targeting entire communities often accompanies inter-communal violence in Jonglei. In this context, social and cultural norms do little to disincentivize abduction and human trafficking between warring groups. When coupled with a lack of viable justice options, long-standing feuds often lead to cycles of violence in which crimes such as abduction, homicide, sexual violence and theft abound.

### **3.3 Gender Discrimination in Statutory and Customary Justice**

The manner in which local justice systems settle marital disputes and sexual crimes often serves to reinforce patriarchal power structures at the expense of women’s and girls’ rights.<sup>84</sup> Part of the problem may be traced to the strong tendency of statutory courts to either refer marital disputes to town bench courts or customary courts where discriminatory practices may be applied or to apply the discriminatory laws themselves. Section 6 of the 2007 Code of Civil Procedure Act allows for the application of custom to a wide range of family disputes:

Where a suit or other proceeding in a Civil Court raises a question regarding succession, inheritance, legacies, gifts, marriage, divorce, or family relations, the rule for decision of such question shall be:

- (a) Any custom applicable to the parties concerned; provided that, it is not contrary to justice, equity or good conscience and has not been by this, or any other enactment, altered or

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also be current and former members of militias, rebel groups and official military units. Organized criminal gangs conducting raids for profit may also form a part of the complex conflict dynamics. Rolandsen and Breidlid, *A Critical Analysis*, *supra* note 80, 54.

<sup>84</sup> See STRATEGIC INITIATIVE FOR WOMEN IN THE HORN OF AFRICA (SIHA), *FALLING THROUGH THE CRACKS: REFLECTIONS ON CUSTOMARY LAW AND THE IMPRISONMENT OF WOMEN IN SOUTH SUDAN* (Dec. 2012) (illustrating the ways in which the often ambiguous legal frameworks of customary law perpetuate violence and discrimination against women and how, when it comes to women’s human rights, these are patriarchal institutions that contribute to gender-based violence and the victimization of women and young girls in South Sudan) [hereinafter SIHA, *FALLING THROUGH THE CRACKS*].

- abolished or has not been declared void by the decision of a competent Court; or,
- (b) The Sharia Law in cases where the parties are Muslims except so far as it has been modified by such custom as is above referred to.<sup>85</sup>

Customary practices related to marital disputes and sexual crimes include forced marriage and traditional remedies for rape, which require the girl to marry her rapist if he is willing and able to make bridewealth payments to her family. Though in isolated cases, judges may deem these customary practices to be ‘contrary to justice, equity or good conscience,’ more often the case is decided in favor of the party seeking to apply the customary rule. Constitutional and statutory protections, such as the prohibition on forced and early marriage in the Transitional Constitution and the 2008 Child Act, are rarely invoked in practice.<sup>86</sup> As a result, male wrongdoers in marital disputes and sexual crimes are often allowed to avoid prosecution and criminal sanction. Accountability gaps associated with gender discrimination are particularly pronounced in rural areas, where custom and tradition continue to play strong roles in defining misconduct and allocating blame.

That being said, certain innovations have taken place in recent years that give women and girls greater rights in customary proceedings. In Pibor, a recent County Commissioner appointed a woman to the town court.<sup>87</sup> There are no statutory courts in Pibor, and nearly all serious cases are heard by the town court. Male and female interviewees both responded positively to the appointment. As one chief said, “It is good that there is a woman now because she can talk to the other women and can know their hearts. Before it was only men and there were things the women do not tell us.”

Another local innovation can be found among the Shilluk in Upper Nile. The Shilluk have a *reth* (divine king) who is their highest legal authority. Traditionally, women are not allowed to speak in the *reth*’s court. However, the *reth* recently appointed a woman to his court who is charged with representing women; she is the only woman allowed to speak and the *reth* seeks her council in cases involving women. Policies such as these, which enable women to have a voice in customary courts, are vitally important and can help to improve processes and outcomes for women in customary systems. Supporting such reforms while introducing other solutions such as paralegals and legal aid clinics for women and girls can help reduce discriminatory practices in local justice systems.

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<sup>85</sup> Code of Civil Procedure Act, ch. I, § 6 (2007). Francis Deng notes the controversy that has historically accompanied the use of the repugnancy clause in Sudan: “[T]he qualification which requires conformity to ‘justice, equity and good conscience’ or to ‘justice, morality and order’ implies not only control over local custom, but also the relegation of customary law to a lower status than statutory law or Islamic law.” DENG, CUSTOMARY LAW, *supra* note 4, 31.

<sup>86</sup> See TCRSS, pt. 2, § 15 (stating that, “Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry”); Child Act, ch. II, § 23(1) (stating that, “Every child has the right to be protected from early marriage, forced circumcision, scarification, tattooing, piercing, tooth removal or any other cultural rite, custom or traditional practice that is likely to negatively affect the child’s life, health, welfare, dignity or physical, emotional, psychological, mental and intellectual development”).

<sup>87</sup> Complicating matters further, the highest court in Pibor is called the High Court, even though it is a customary court, not a statutory court.

## Marriage in South Sudan

Disputes between married partners and within families must be understood within the broader context of marriage in South Sudan. There is a great diversity of practices when it comes to marriage, but certain similarities can be cautiously drawn across society as a whole. First, husbands typically play a dominant role within the marriage. As Orly Stern explains in *Hope, Pain and Patience*:

The roles and positions of both men and women within a marriage are clearly defined and strictly enforced: men are the heads of households, holding positions of authority within their families; women are subservient to their husbands, with their roles focused on the home and the rearing of children. ...In practice, the system often leaves women extremely vulnerable, with little recourse in cases of abuse or when husbands fail in their duties of support and protection.<sup>88</sup>

A 2011 survey on gender-based violence by the Ministry of Gender, Child and Social Welfare, found that more than 60 percent of men “strongly agreed” with the statements, “women are subordinate and need to be directed and disciplined,” and “it is a man’s traditional right to punish and discipline women for wrong-doing.”<sup>89</sup> Women were largely in agreement with men. Seventy percent of women “strongly agreed” or “somewhat agreed” that, “men as heads of family must control their family.”

A second common feature of marriage in the South Sudanese context is the manner in which it shapes social relations. Marriage in South Sudan is not only a coming together of two individuals, but also a binding of families and kinship networks.<sup>90</sup> The emphasis placed on the broader social implications of marriage gives rise to a situation in which families exert additional influence over who their family members may marry. This can have both positive and negative implications for women, in that women may have access to advice and support from family members, but their ability to influence partner selection and to flee abusive relationships is restricted.

A third feature concerns the economic importance of marriage for South Sudanese families. As mentioned above, when a man marries a woman his family must pay bridewealth, often in the form of cows or other livestock, to the family of the woman. Bridewealth payments can be anywhere from a few goats to 50 cows or more.<sup>91</sup> As a South Sudanese woman quoted in *Hope, Pain and Patience* characterized it: “Lives are structured around cows, marriage and children: cows give you marriage, marriage gives you children. Therefore there is a circle.”<sup>92</sup> The marriage is not considered finalized until the bridewealth is paid in full, which may take several years. These large sums create

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<sup>88</sup> Orly Stern, ‘*This is how marriage happens sometimes*’, in FRIEDERIKE BUBENZER AND ORLY STERN (EDS.), *HOPE, PAIN AND PATIENCE: THE LIVES OF WOMEN IN SOUTH SUDAN 1* (2011) [hereinafter Stern, ‘*This is how marriage happens*’].

<sup>89</sup> Ministry of Gender *et al.*, *Gender-Based*, *supra* note 10.

<sup>90</sup> Stanislava Benesova, *Southern Sudanese Women in the Diaspora*, *OSPREY JOURNAL OF IDEAS AND INQUIRY* (2004), available at <http://digitalcommons.unf.edu/>.

<sup>91</sup> While marriages for most people do not exceed 50 cows, some bridewealth payments may reach 200 cows or more.

<sup>92</sup> Stern, ‘*This is how marriage happens*’, *supra* note 88, 4.

economic incentives for families to accumulate cattle wealth so that they can afford marriages for their sons.<sup>93</sup>

### **Bridewealth as a Political Tool**

One tactic employed as part of the Unity State government's counterinsurgency strategy during conflict in Mayom in early 2011 illustrates the importance placed on marriage and the exchange of cattle to cement social relations. While the SPLA was engaged in combat with an armed group, the Governor issued an order divorcing those who had taken up arms against the state from their wives. The counterinsurgency campaign also involved violence against civilians and the burning of thousands of homes, but nearly two years after the conclusion of the campaign, civilians in Mayom describe the divorces as some of the most painful of their experiences of that period.<sup>94</sup> One reason for this perception is that many of the divorces remain unsettled: cattle and women were taken back by their respective families, children were separated from parents, grievances were created between families and clans, and two years later many still feel their lives and community have not fully recovered.

### **3.4 Penalizing Resistance to Forced Marriage Under Customary Law**

Forced and early marriages are a common feature of South Sudanese society, particularly in rural areas.<sup>95</sup> In addition to forced and early marriages, men in South Sudan often have more than one wife and wealthy and powerful men often have dozens of wives. According to the United Nations Children Fund (UNICEF), 39 percent of South Sudanese girls aged 15 to 19 and 7.3 percent of girls under age 15 are married.<sup>96</sup> This reflects a common belief in many South Sudanese communities that girls are ready for marriage at the onset of menstruation.<sup>97</sup> According to a high-ranking government official quoted in a study by the United States Institute of Peace (USIP): "Once girls reach puberty, potential husbands come and apply [to marry them]. If the girl is found with a boyfriend, her family can kill her. If she is impregnated by a boyfriend, she can be beaten to death."<sup>98</sup>

Both the Transitional Constitution and the 2008 Child Act contain provisions outlawing forced and early marriage, Article 15 of the Transitional Constitution states:

<sup>93</sup> Stephanie Beswick, 'We are bought like clothes': *The war over polygyny and levirate marriage in South Sudan*, 8 *NORTHEAST AFRICAN STUDIES* 35-62 (2001).

<sup>94</sup> AMNESTY INTERNATIONAL, *SOUTH SUDAN: OVERSHADOWED CONFLICT ARMS SUPPLIES FUEL VIOLATIONS IN MAYOM COUNTY, UNITY STATE* (2012).

<sup>95</sup> Forced and early marriages are closely linked concepts. An argument can be made that early marriages are necessarily forced marriages because it is not possible for a girl who is not of marriageable age to consent to a marriage.

<sup>96</sup> UNICEF, *Children in South Sudan*, (n.d.) available at [http://www.unicef.org/esaro/Children\\_in\\_Sudan\\_summary\\_sheet\\_final.pdf](http://www.unicef.org/esaro/Children_in_Sudan_summary_sheet_final.pdf); see also *South Sudan's Ticking Youth Time-Bomb*, VOICE OF AMERICA NEWS, Apr. 7, 2011 (reporting that the 2008 South Sudan census estimated that two in five girls marry before age eighteen and 11 percent marry before age fifteen).

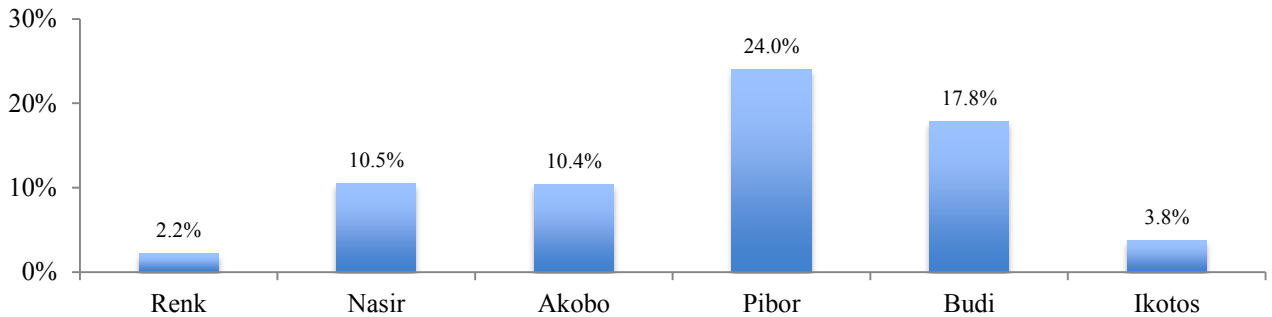
<sup>97</sup> Ating Benson Okello, *Eligible for marriage at the onset of menstruation*, THE NILES (May 21, 2012), available at <http://www.theniles.org/articles/?id=1170>. Nuer customary law sets the marriageable age of girls at age 15.

<sup>98</sup> MARC SOMMERS AND STEPHANIE SCHWARTZ, UNITED STATES INSTITUTE OF PEACE (USIP), SPECIAL REPORT, *DOWRY AND DIVISION: YOUTH AND STATE BUILDING IN SOUTH SUDAN* 5 (Nov. 2011) [hereinafter SOMMERS AND SCHWARTZ, *DOWRY AND DIVISION*], available at [http://www.usip.org/files/resources/SR\\_295.pdf](http://www.usip.org/files/resources/SR_295.pdf).

Every person of marriageable age shall have the right to marry a person of the opposite sex and to found a family according to their respective family laws, and no marriage shall be entered into without the free and full consent of the man and woman intending to marry.<sup>99</sup>

Article 26 of the Child Act contains a similar provision, which states that every female child has the right to be protected from forced and early marriage and calls on all levels of government and society to adopt measures to “ensure that child marriage and other harmful cultural and social practices are abolished.”<sup>100</sup> Unfortunately, these legal protections are rarely available in practice and since the country does not yet have a family law that would provide a uniform statutory basis for marriage, the vast majority of marital disputes are decided by local justice systems in accordance with local customary laws.<sup>101</sup>

**Figure 11: Rates of Forced Marriage by County**



Survey data confirmed the high prevalence of forced marriages in the six counties. The highest rates of forced marriage were seen in Pibor, where 24 percent of households reported one or more forced marriages in the last two years (see Figure 11).

Pibor is the most remote of the six counties that we examined, and these high rates of forced marriage may indicate the strong role that custom and tradition continue to play in Murle society.

<sup>99</sup> TCRSS, pt. II, § 15.

<sup>100</sup> Child Act, ch. II, § 26 (stating that “no female child shall be expelled from school due to pregnancy or motherhood or hindered from continuing her education after one year of lactation”).

<sup>101</sup> Even the definition of what constitutes a ‘forced’ or ‘early’ marriage in South Sudanese law is ambiguous. The Transitional Constitution reserves the right to found a family to people “of marriageable age” but it does not expressly define a minimum age for marriage. Nor does the Child Act. The chairperson of the Human Rights Commission has called for legislation prohibiting the marriage of girls age 16 and below, but such legislation has not yet been drafted. *South Sudan Human Rights Commission Condemns Forced Marriages*, SUDAN TRIBUNE (Mar. 8, 2011), available at <http://www.sudantribune.com/South-Sudan-s-human-rights,38222>.

### **3.5 The Pressure to Resolve Marital Disputes within Close Social Networks**

When confronted with disputes relating to spousal neglect, local justice systems often pressure the couple to try to resolve their issues within their close social networks, where the influence of male patriarchies tends to be the strongest. This can result in the imposition of unfair or discriminatory customary practices on women and girls, who typically wield less negotiating power within the context of the family. According to Leonard *et al.*:

It is apparent ...that men frequently have the upper hand, in court cases, through their potentially closer relationships with chiefs and judges; in marriage systems, which vest rights over women in their parents or husband's family; and in inheritance systems, which largely exclude women unless they are widows. The courts are also overwhelmingly male arenas.<sup>102</sup>

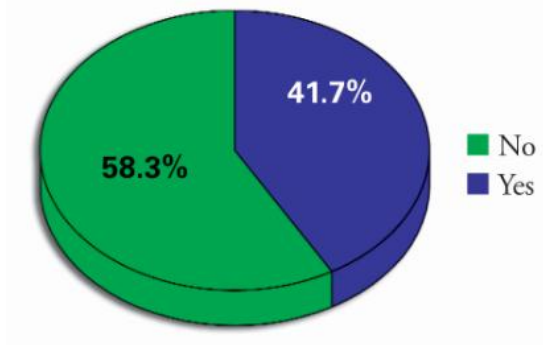
Women may also be disinclined to resort to public dispute resolution processes such as statutory or customary courts out of fear of provoking violent reactions from their husbands or because they cannot afford the court fees.

For the purposes of the household survey, spousal neglect includes marital disputes that did not necessarily involve violent assaults. Examples of spousal neglect claims that often arise in customary courts include men who do not support their wives and children or women who refuse to cook for their husbands. While only 8.8 percent of households in the sample reported a problem with spousal neglect in the past two years, 41.7 percent of the household members who complained about spousal neglect asked for a divorce from their spouse (see Figure 12). In the majority of cases (73.2 percent), the household head or his or her spouse requested the divorce, but in a significant minority of cases (18.5 percent) the sons or daughters of the household head were the ones requesting the divorce. Of those household members that asked for a divorce, 46.2 percent of individual respondents said that the reason was that their spouse 'drinks too much' (see Figure 13). High rates of alcohol abuse are common throughout South Sudan and are often associated with criminality and security sector abuses.

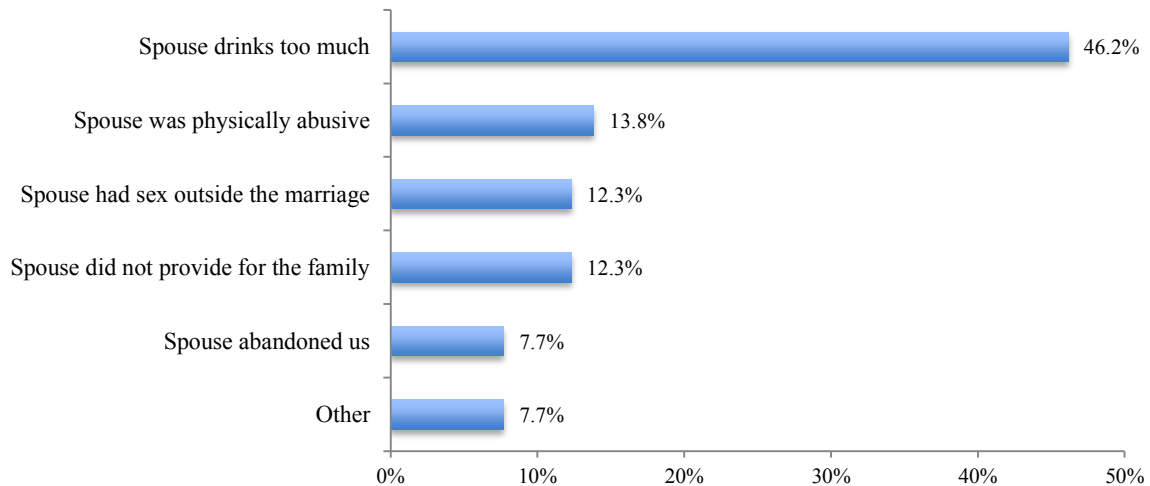
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<sup>102</sup> The quote continues: "Yet women nevertheless seem confident that they will be heard and judged fairly in the courts, and female litigants often speak with considerable force." LEONARDI ET AL., LOCAL JUSTICE, *supra* note 4, 41; *see also* Chan Reec Madut, *Customary Law from the Perspective of Human Rights* (2005) (unpublished paper) (stating that husbands or male relatives tend to be domineering in their attitude vis-à-vis women and customs do not seem to provide sufficient protection of their rights) [hereinafter Madut, *Customary Law*], *cited in* DENG, CUSTOMARY LAW, *supra* note 4, 43.

**Figure 12: Did the Household Member Request a Divorce?**



**Figure 13: Reasons for Asking for a Divorce**



There is a general consensus in the literature that both customary courts and statutory courts rarely grant divorces. Chan Reec Madut, the current chief justice of the Supreme Court, observes that women in South Sudan have found it increasingly difficult to divorce even cruel husbands unless the wife's life is overtly threatened. He says that families are disinclined to approve divorces both because they will lose bridewealth and because they prefer to maintain the social relations created by marriage.<sup>103</sup> According to Leonardi *et al.*, courts sometimes deliberately delay cases involving requested divorces to allow time for the aggrieved spouse to calm down and reconsider the request.<sup>104</sup> Leonardi *et al.* also documented cases of women being put in prison between court hearings, apparently to intimidate them into withdrawing their request for divorce.

In a recent report, the Strategic Initiative for Women in the Horn of Africa (SIHA) points to the implications that divorce has for women. Divorced women are put in a very vulnerable position both socially and economically. They are often rejected by both their

<sup>103</sup> Madut, *Customary Law*, *supra* note 102.

<sup>104</sup> LEONARDI *ET AL.*, *LOCAL JUSTICE*, *supra* note 4, 40.

husband's family and their birth families and put at increased risk of poverty and landlessness. Depending on the local customs, divorce can also result in a loss of custody of children for the mother.<sup>105</sup> As a result, women may not view divorce as a viable option, even if they are stuck in abusive and unhappy marriages. In fact, SIHA reported cases in which women viewed admissions of adultery as a means of freeing themselves from unhappy marriages. After the women confessed to adultery, their husbands would take them to court and the woman would often be imprisoned. The women would spend between six and nine months in prison and pay a fine, but when they were freed they would leave their husbands. They saw this as an attractive alternative in situations where divorces were not possible.<sup>106</sup>

Despite this, survey data suggests that at least among those populations complaining of spousal neglect, requests for divorce may not be an altogether uncommon occurrence. According to a civil society representative in Nasir:

If police or chief catch adultery straight away then the man and woman will be arrested. Police may then report this to the head-chief or sub-chief of the payam where the people come from. The chief will wait for the husband to come back and he must decide in our culture to accept or reject his wife. The family can intervene first if the husband is around. In the absence of a husband, the chief will decide.

The cultural practices of the Jikany Nuer may partially explain the relatively large number of divorce requests in Nasir, where respondents indicated that 74.2 percent of their household members who experienced a problem relating to spousal neglect requested a divorce (see Table 7).

**Table 7: Requests for Divorce by County**

	Yes		No	
	Pct.	No.	Pct.	No.
<b>Renk</b>	10.0%	1	90.0%	9
<b>Nasir</b>	74.2%	23	25.8%	8
<b>Pibor</b>	47.8%	11	52.2%	12
<b>Akobo</b>	47.3%	9	52.6%	10
<b>Ikotos</b>	20.0%	3	80.0%	12
<b>Budi</b>	23.5%	8	76.5%	26

The prevalence of divorce requests in spousal neglect cases may also reflect changing norms in the postwar period. Contrary to what Justice Reec and other interviewees reported, Leonardi *et al.* observed that women seem to be increasingly successful at arguing for divorce or the enforcement of marital obligations upon their husbands, in part due to their exposure to different legal and social environments while living as IDPs and

<sup>105</sup> SIHA, FALLING THROUGH THE CRACKS, *supra* note 84, xii. Rules governing custody of children in divorce cases or in the event of the death of the husband vary among different ethnic groups. For example, in Nuer and Dinka customary law, the husband usually pays a certain number of cows to the woman's family and in return is permitted to keep the children. Among the Murle, however, several interviewees claimed that the mother has the primary claim for custody over the children.

<sup>106</sup> *Id.*, xii.



refugees during the war.<sup>107</sup> Women that remained in South Sudan during the war are also increasingly vocal in advocating for their rights. Since they sacrificed greatly to support the struggle, they say that they should also reap the benefits of independence. If policy-makers can further substantiate changing norms such as these and support women's right to extricate themselves from unwanted or abusive relationships, they may be able to reduce the acceptance of discriminatory norms. This could be done through legislative reforms that provide statutory alternatives to customary rules governing marriage as well as legal aid programs that help women submit and defend complaints of spousal neglect and domestic violence in customary and statutory courts.

### **3.6 Catering to Patriarchal Interests in Rape Cases**

The manner in which South Sudanese law defines rape reflects its patriarchal leanings. The following excerpt from the 2008 Penal Code provides a vivid example. According to section 247 states:

- (1) Whoever has sexual intercourse or carnal intercourse with another person, against his or her will or without his or her consent, commits the offence of rape, and upon conviction, shall be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine.
- (2) A consent given by a man or woman below the age of eighteen years shall not be deemed to be consent within the meaning of subsection (1), above.
- (3) Sexual intercourse by a married couple is not rape, within the meaning of this section.<sup>108</sup>

The rape exception for married couples in Subsection (3) suggests that men are permitted to forcibly rape their wives and there is no minimum age for sexual consent among married couples.<sup>109</sup> This provision effectively legalizes both marital rape and early marriage.

Local justice systems also include practices that discriminate against rape victims. A girl who has been raped is often stigmatized by society, which can affect her ability to marry and the amount of bridewealth that she can generate for her family. Customary court judges will sometimes force the girl to marry her rapist as a way to avoid this social stigma and maximize her potential bridewealth. According to a South Sudanese woman interviewed in *Hope, Pain and Patience*, men are even known to rape a woman so that she will be forced to marry them, knowing that their crime will reduce the amount of bridewealth that her family can ask for:

A man spots a girl coming from the river. A group of men then capture her [and the first man] has sex with her against her will. As soon as they have had sex, then they are considered to be husband and wife. He then sends a message to the family saying 'don't search for the girl, she is now my

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<sup>107</sup> According to Leonardi *et al.*, "The powerful cultural imperative to try to maintain and restore relations actually gives women considerable room to express their grievances in both private and public arenas." LEONARDI ET AL., LOCAL JUSTICE, *supra* note 4, 41.

<sup>108</sup> Penal Code Act, ch. XVIII, § 247.

<sup>109</sup> Some customary laws have different rules, in this regard. Fangak Law, for example, prohibits sexual activity with girls who are younger than age 16.

wife.’ She will then be returned to the family with cows, and will then be considered to be married.<sup>110</sup>

Responses to sexual violence against women and girls are determined in part by their bridewealth value and the social relations that are at stake. Customary courts typically view rape as an issue that demands social reparation, rather than justice for harm done to the individual. Customary courts sometimes view a mature woman who is raped to be unworthy of compensation or the pursuit of justice, while the rape of an unmarried young woman is considered to be a greater crime. The response does not necessarily look primarily to the harm done to the woman in question, but rather the harm to the family as a result of her diminished bridewealth.<sup>111</sup>

In addition to incidents of rape associated with courtship and marriage, sexual violence is also a common feature of conflict in South Sudan. Prior to Sudan’s independence from British colonial rule in 1956, and the successive civil wars that began shortly thereafter, the rape of women in the context of armed conflict was thought to be relatively rare in South Sudan.<sup>112</sup> In fact, customary rules of war for Nilotic tribes expressly forbade any form of violence against women. According to Michael Makuei, then Attorney General for the Government of Southern Sudan:

[I]n our rules of war, you don’t kill a vulnerable person; you don’t kill a person who is disarmed; you don’t kill a woman; you don’t kill a child. This is something that is in our custom. But the conventions come and tell us, “Don’t do this, it is against the convention and should be done like this.” And yet we already have them in our own customary law, except that we were made to believe that we don’t have them because we have not recorded them.<sup>113</sup>

To the extent that traditional rules of war prohibit violence against women and children during armed conflicts, practices changed during the second civil war and sexual violence became far more pronounced.<sup>114</sup> The legacy of rape as a weapon of war can be seen in a 2007 survey on psychosocial trauma in Juba County, in which 41.9 percent of women reported that they had witnessed the rape of other women.<sup>115</sup> Sexual violence has also been associated with inter-communal conflicts in the post-CPA period.

Despite the evidence that rape and other forms of sexual violence continue to be a critical area of concern, the reported incidence rates in the six counties were lower than expected. Of the 160 households interviewed in Ikotos, for example, not a single incident of rape

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<sup>110</sup> See FRIEDERIKE BUBENZER AND ORLY STERN (EDS.), *HOPE, PAIN AND PATIENCE: THE LIVES OF WOMEN IN SOUTH SUDAN 1* (2011).

<sup>111</sup> SIHA, *FALLING THROUGH THE CRACKS*, *supra* note 84, xii-xiii.

<sup>112</sup> CATHY GROENENDIJK AND JOLIEN VELDWIJK, CONFIDENT CHILDREN OUT OF CONFLICT (CCC), ‘BEHIND THE PAPYRUS AND MABAATI’: SEXUAL EXPLOITATION AND ABUSE IN JUBA, SOUTH SUDAN (Aug., 2011).

<sup>113</sup> DENG, *CUSTOMARY LAW*, *supra* note 4, 240-41.

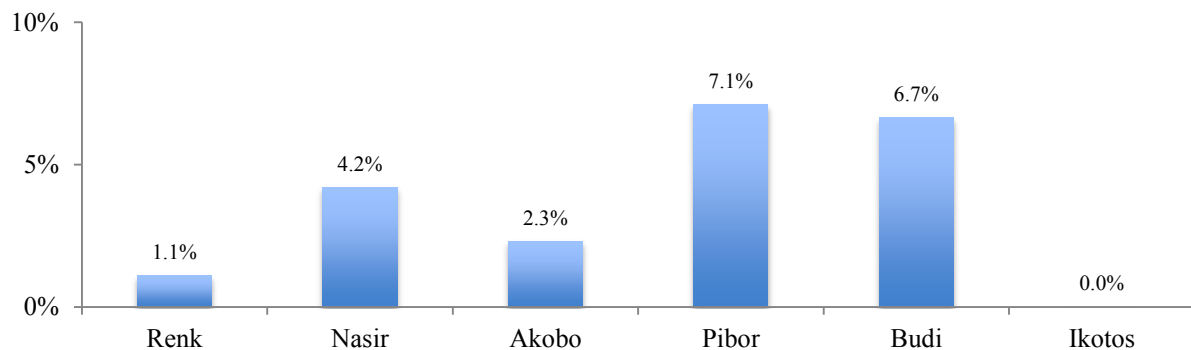
<sup>114</sup> According to Human Rights Watch, all sides made use of rape as a weapon of war in the 22-year conflict. HUMAN RIGHTS WATCH (HRW), *SUDAN: SLAVES, STREET CHILDREN AND CHILD SOLDIERS* (1995), available at <http://www.unhcr.org/refworld/docid/3ae6a8264.html>.

<sup>115</sup> ISIS-WOMEN’S INTERNATIONAL CROSS-CULTURAL EXCHANGE (ISIS-WICCE), *WOMEN’S EXPERIENCES DURING ARMED CONFLICT IN SOUTHERN SUDAN, 1983- 2005: THE CASE OF JUBA COUNTY, CENTRAL EQUATORIA STATE* (2007), available at [http://www.isis.or.ug/index.php?option=com\\_docman&task=doc\\_details&gid=115&Itemid=89](http://www.isis.or.ug/index.php?option=com_docman&task=doc_details&gid=115&Itemid=89).

was reported as having occurred over the last two years (see Figure 14). Other surveys in South Sudan found a similar appearance of underreporting, perhaps due to the stigma attached to rape and reporting rape in many local societies.<sup>116</sup> Some studies, this one included, also use a high proportion of male researchers, which may further discourage women from openly discussing their experiences.

Pibor had the highest incidence rates for rape, with 7.1 percent of households experiencing one or more incidents of rape in the past two years (Figure 14). These figures likely reflect sexual violence associated with the heavy inter-communal fighting that has plagued Pibor in recent years, as well as sexual violence associated with the SPLA's 2012 disarmament campaign. Doctors Without Borders, which has been working in Pibor County since 2005, received its first ever rape cases in late 2012 when their clinic received 26 cases of sexual violence associated the SPLA's disarmament campaign. Interviews indicate that beyond disarmament-related violence, rape has also occurred in a variety of other contexts in Pibor during the past two years.<sup>117</sup>

**Figure 14: Rates of Rape by County**



In other common law countries, government prosecutors would typically be responsible for prosecuting rape cases and private attorneys would only be involved if the victim was seeking a civil remedy. But in South Sudan, courts often allow private attorneys to prosecute criminal cases against alleged wrongdoers. This opens possibilities for addressing unprosecuted instances of rape through legal aid programs that are carefully coordinated with government actors to ensure that public prosecutions are not inadvertently obstructed. By providing legal representation to women and girls whose rape claims are ignored by actors in local justice systems, legal aid programs can begin to fill the accountability gaps that exist with respect to sexual violence and prevent further injustice, such as forcing women to marry their rapists against their will. Legal aid programs alone will not be able to change prevailing social norms that discourage women and girls from speaking publicly about their experiences with rape, but increasing perpetrator accountability for the crime can be one component of a larger strategy to combat sexual violence in South Sudan. Such initiatives can be buttressed by government

<sup>116</sup> See Ministry of Gender, *Gender-based Violence*, *supra* note 10.

<sup>117</sup> MEDECINS SANS FRONTIERES, SOUTH SUDAN'S HIDDEN CRISIS HOW VIOLENCE AGAINST CIVILIANS IS DEVASTATING COMMUNITIES AND PREVENTING ACCESS TO LIFESAVING HEALTH CARE IN JONGLEI (2012).

policy and legislation that expands the government's approach to combating sexual violence.

### **3.7 Girl Child Compensation**

As mentioned in Chapter Two, a common remedy for homicide under customary law is for the perpetrator and his or her family to compensate the victim's family for their loss through the payment of a certain amount of cattle. This remedy is in line with customary law's focus on restorative justice and the lack of police and prison services in rural parts of South Sudan. However, complications can arise when perpetrators and their families cannot afford the compensation payment. In such circumstances, customary courts will sometimes allow perpetrators' families to give one of their daughters to the family of the homicide victim, a practice known as "girl child compensation."<sup>118</sup> According to a social worker in Eastern Equatoria State where the practice is common, the procedure is as follows:

When someone is killed, the girl will be told to go to those people [the victim's family]. Then there is a ritual always performed. They will come to the court. Things will be documented, that from today onward, such a girl by name so-and-so is delivered to such a clan because the relative killed the relative of that deceased. So the girl will be given over. Then it depends on how the girl will feel like. There are those who will say, "No, I have a boyfriend. I cannot be compensated." Then they will report to the boyfriend. Then that man will give cows and that will be given for compensation [to the murder victim's family].

For girls who are unable to avoid the arrangement through marriage to their boyfriends, being given over to the family of the deceased murder victim is often a traumatic experience. The girl is a constant reminder to the victim's family of the wrong that was done to them and their loved one. According to the social worker:

If it is a small girl, she will not complain. You know how children behave. She may not know that she has been compensated. But after a couple years she will come and realize. The relatives of the deceased will also start behaving to her in a bad way. They will say, "Now that our relative is killed, you must stay with us." When the child is still young, they will make her to stay by force. If the girl refuses, they will say, "If you want to go, let your parents bring our brother back to life first."

Numerous girls have reportedly fled to Uganda, Kenya or elsewhere in South Sudan to avoid being given as compensation. When girls flee, it can sometimes expose their birth families to reprisals from the families of the deceased murder victims and place the girls in precarious situations. A prosecutor in Eastern Equatoria recounted a story about a girl who fled a compensation arrangement:

[The girl] was paid as blood compensation, so she ran. She came to the main road and from there she escaped. Now her grandmother, whom she was staying with, she also had to escape, because they [the family of the deceased] were going to kill her. So we had to provide protection for these people. ...The girl is now being taken care of by the Ministry of Social Development.

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<sup>118</sup> Of the six counties targeted in the survey, the qualitative research found girl child compensation to be most prevalent in Budi and Ikotos in Eastern Equatoria. The survey did not include questions relating to girl child compensation.

Several interviewees indicated that girl child compensation continues to be practiced in their counties, both through informal agreements between families as well as in customary courts. In a recent case reported to a legal aid clinic in Eastern Equatoria, a young girl was killed after ingesting a container of her grandmother's home brewed alcohol. Her father, who had married into the grandmother's family, demanded that side of the family provide a girl child in compensation for the death blamed on the grandmother. The matter was handled entirely within the family, demonstrating the difficulty in establishing policies to successfully eradicate the practice.

Government and civil society actors have launched campaigns to eradicate the practice, but they face stiff opposition from some sectors of society. The social worker in Ikotos is among the local actors advocating against the practice:

When the bill of rights of children [the 2008 Child Act] came out I decided to intervene by sending my staff to go and attend courts. So that thing [girl child compensation] has come to a standstill until now. I even one time quarreled with the paramount chief, I said, "Should you continue with that habit, I will imprison you by opening a case against you." So this thing has subsided down. It is something that is the order of the day here. Especially payams like Chapal and Cherekol, even Ikotos here. Those people whose relatives were killed during the war, they are still following up the compensation of their relatives.

Although residents of Eastern Equatoria are beginning to recognize the need to abolish the practice, a local paramount chief suggests that were he to prohibit the practice families would be unhappy and would go behind his back to arrange girl child compensation. The underlying reason for the ongoing acceptance of the practice may be related more to expediency by a weak justice system than to cultural conservatism. From that perspective, efforts to strengthen the justice system by improving linkages to statutory courts in urban areas, providing security for chiefs at the payam level and improved enforcement of cattle compensation agreements may help to reduce instances of girl child compensation.

### **3.8 Excessive Use of Criminal Sanctions in Relation to Unpaid Debt**

Legal problems associated with unpaid debt raise several concerns related to the ability of local justice systems to distinguish between civil and criminal matters. Customary courts and statutory courts often treat the failure to pay a debt as a criminal matter, even when the circumstances might suggest that a civil suit under the law of contract might be more appropriate.<sup>119</sup> For example, a dispute arose in a rural area when a friend of a local NGO employee entrusted him with a large sum of money to hold on his behalf while he traveled to Juba. The NGO failed to transfer funds to the county office for several months and the employee proceeded to spend his friend's money in order to make up the difference. When the friend returned and found that the money was gone, he opened a

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<sup>119</sup> In most legal systems, disputes over unpaid debts are managed under the law of contracts, unless some sort of fraud or other criminal misconduct is involved. The Government of Southern Sudan passed a Contract Act in 2008 which does not stipulate any criminal sanctions for breach of contract.

case against the employee with the police. After litigating the matter unsuccessfully in the town bench court, the complainant opened another case in the magistrate's court.

Despite the fact that matters involving this amount of money were outside the jurisdiction of a magistrate's court, and that the breach of an oral contract is not a criminal matter, the magistrate nonetheless sentenced the employee to four years in prison and demanded that he pay back the debt.<sup>120</sup> After several months in prison, the employee sold a business he owned and received a sum from the NGO and was able to back the debt in full plus a five percent fine. Still, the judge refused to release him. The employee wrote appeals to the nearest high court in Bor and to the court of appeals in Malakal, but at the time of writing, the prison sentence has not been overturned.<sup>121</sup> According to the employee:

I already paid the money. I don't have any problem. If they sentenced me to four years because I wasn't able to pay this money, I would have no problem. But because I already paid, I wrote the appeal to Bor. ...I wrote that I have already paid this amount to the owner. Now I am free with that complainant. My remaining problems are with the government. I cannot accept being put in prison for four years, because I already paid the money.

Aside from business-related matters such as these, many disputes over unpaid debt in rural areas also relate to incomplete bridewealth payments.<sup>122</sup> Among many groups in South Sudan, the groom and his family make bridewealth payments in a series of steps: the first payment may allow the man to court the woman, the second payment allows her to live with him at his home and the final payment finalizes the union. If a groom fails to make these payments in a timely manner, he runs the risk of having the bride's family open a case against him in court. Due to the lack of alternative remedies, such as suspended sentences or attaching the property of the debtor to satisfy the debt, customary court judges will sometimes ask for debtors to be imprisoned 'until they pay.' In some cases, friends or family members may be incarcerated 'in place' of the debtor. This misuse of criminal sanctions can lead to indefinite incarceration for people who do not have the means to pay their debts or are simply related to debtors and may constitute a violation of international human rights law.<sup>123</sup>

Approximately 18 percent of households in the sample (n = 277) experienced a problem paying back a debt in the last two years. One-third of these households (n = 90) claimed that one or more household members had been imprisoned within the last two years for failure to pay back a debt (see Figure 15). At the county level, the dispute rates ranged from a high of 30 percent in Pibor to a low of 8.7 percent in Ikotos (see Figure 16).

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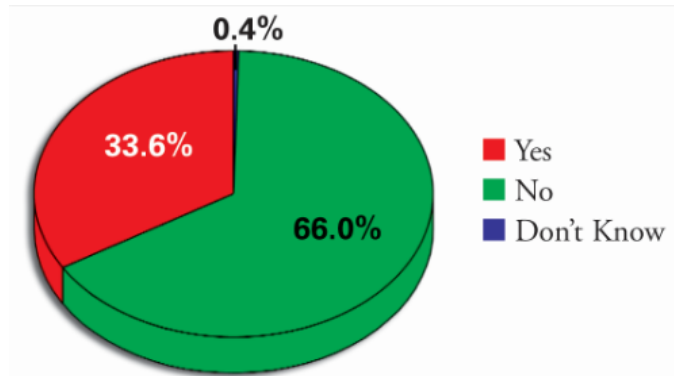
<sup>120</sup> According to the accused, the magistrate did not ask him what his salary was or whether he had any assets that he could sell to pay for the debt.

<sup>121</sup> The NGO employee had been in prison for eight months when the interview took place.

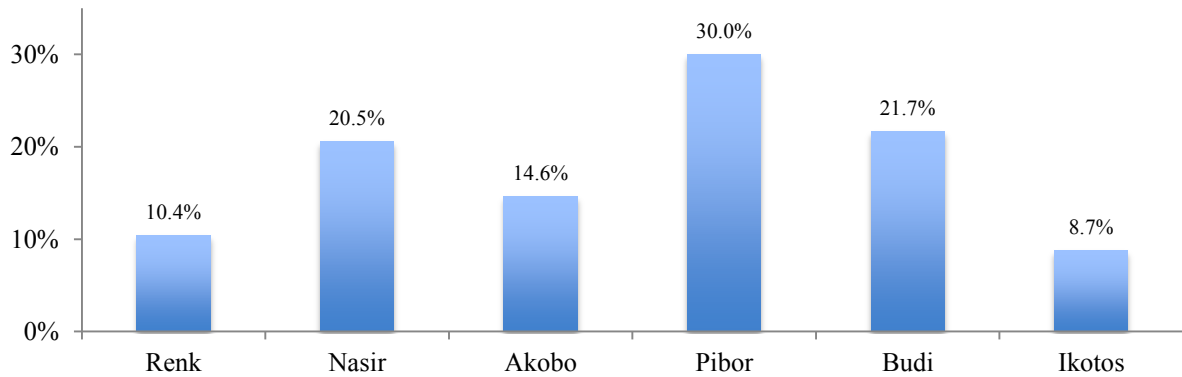
<sup>122</sup> See SOMMERS AND SCHWARTZ, DOWRY AND DIVISION, *supra* note 98. The precise number of cattle or other livestock that a groom's family must pay to the bride's family varies among groups in South Sudan and is often the subject of lengthy negotiations between the families. Bridewealth can range from a few heads of cattle to 50 or more.

<sup>123</sup> See PRISON IS NOT FOR ME, *supra* note 25.

**Figure 15: Was Your Household Member Imprisoned for Debt?**

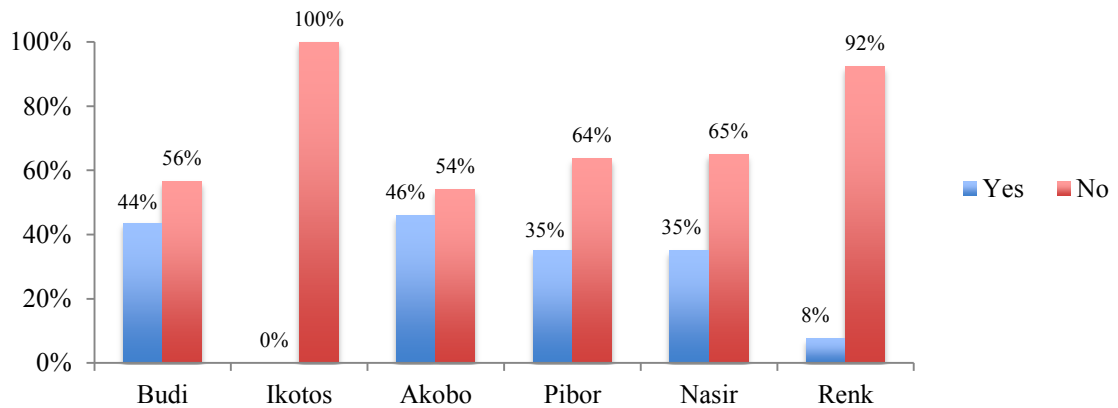


**Figure 16: Debt Dispute Rates by County**



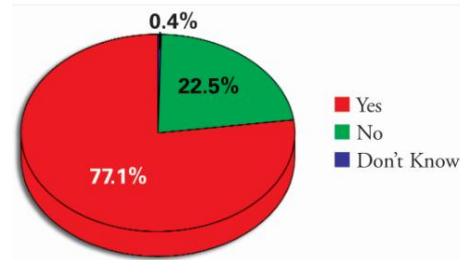
The highest rates of imprisonment for debt were found in Budi and Akobo, followed by Pibor and Nasir (see Figure 17). To the extent that these disputes relate to incomplete bridewealth payments, the large populations of pastoralists in these counties may partially explain the prevalence of problems relating to debt.

**Figure 17: Imprisonment for Debt by County**



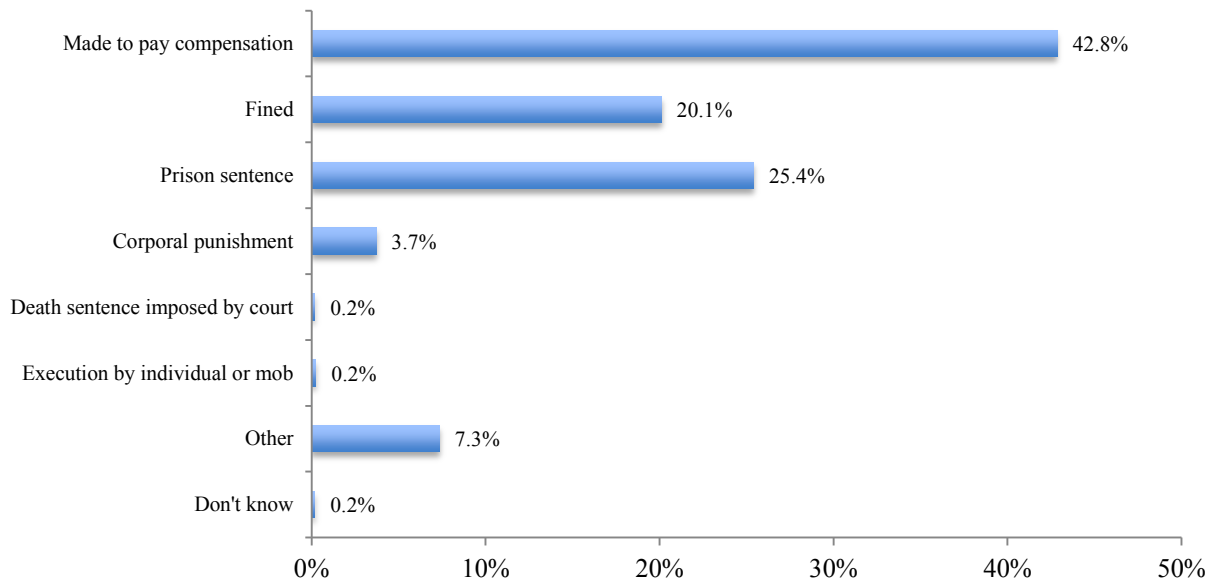
When asked whether people who are unable to pay back debts they owe to someone else should be punished, 77.1 percent of respondents (n = 1159) said, ‘Yes’ (see Figure 18).

**Figure 18: Should Debtors be Punished?**



The most preferred punishment for unpaid debt was rather self-explanatory and consistent with a civil remedy. Forty-three percent of respondents felt as though the debtor should be made to compensate (or repay) his or her creditor (see Figure 19). However, a quarter of respondents thought that the debtor should be imprisoned. The fact that so many people were comfortable with applying criminal sanctions in these circumstances shows the thin line between civil and criminal matters in local justice systems.

**Figure 19: Preferred Punishments for Unpaid Debt**



\* Individual respondents were asked whether they thought someone who was unable to pay a debt should be punished. Those who answered ‘yes’ were then asked how they thought the individual should be punished. The respondent was allowed to respond openly and the enumerators selected the response that best matched the open answer from a list of coded responses.

The excessive use of criminal sanctions such as imprisonment and fines exacerbates other inequities in local justice systems. Imprisonment for debt disproportionately affects the poorest, many of whom are women, in local societies and those without access to social protection mechanisms. Widows, orphans, divorcees and the elderly are most likely to be



impacted. If local justice systems were able to administer alternative sentences, such as mandatory community service, behavioral health programs, suspended sentences and delayed adjudications, it could save costs and lead to more sustainable and reformatory outcomes for individuals who enter the system. These types of programs require close coordination between judges, chiefs and other justice service providers, and could be incorporated into existing legal aid programs in South Sudan. In determining whether alternative sanctions are appropriate, justice service providers should examine such factors as the type and severity of the crime, the age of the defendant, the defendant's criminal history, the impact of the crime on victims and the sincerity of the defendant's remorse.

# Chapter Four

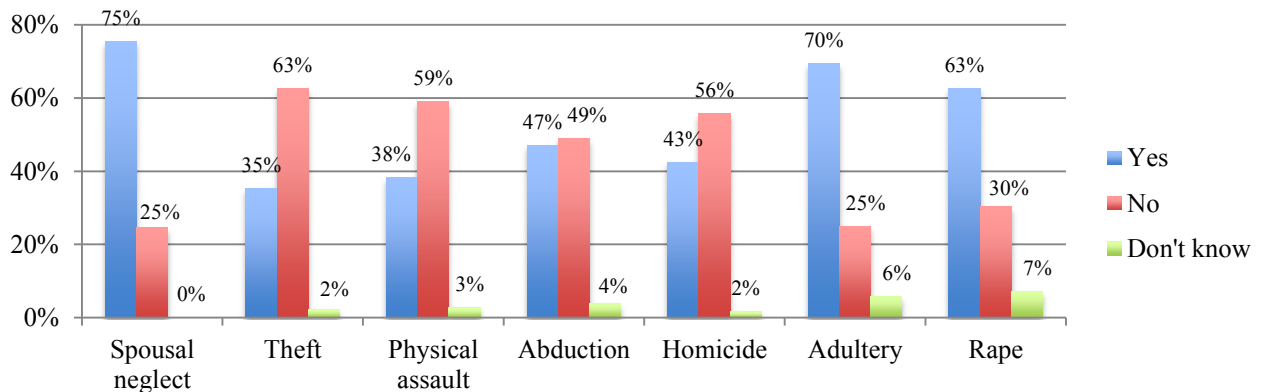
## User Choices and Perceptions

The choices that people make in navigating local justice systems and their perceptions of what constitutes ‘justice’ shed further light on the challenges of accountability discussed in the preceding chapter. The survey data demonstrates that complaint mechanisms for marital disputes and sexual crimes are accessible in most cases while there is an absence of effective justice options for disputes associated with inter-communal violence and trans-boundary crime. Respondents tended to use informal complaint mechanisms for marital disputes and sexual crimes while referring homicide, theft and physical assault cases to more formal mechanisms. Chiefs play a role in trying to resolve almost every type of dispute and may play the role of adjudicator, mediator, witness or advisor, depending on the specific circumstances in question.

### 4.1 Accountability Gaps and the Accessibility of Complaint Mechanisms

The accountability gaps discussed in this report arise in two main forms: either the existing complaint mechanisms are unable to investigate, prosecute and enforce decisions related to the crimes, or else the local justice system is able to process the dispute but the manner in which the dispute is resolved imposes unfair or discriminatory decisions on third parties. Despite these serious shortcomings, survey findings suggest that local justice systems receive and resolve a range of disputes. According to respondents, households that experienced marital disputes and sexual crimes were more likely to complain to someone about the incident than households that experienced theft, physical assault, homicide or abduction (see Figure 20).

**Figure 20: Ability to Access Complaint Mechanisms**



\*This question simply asked whether or not the household members that experienced the problem in question complained to anyone about the incident, i.e. whether or not they accessed a complaint mechanism. This question did not address whether people were able to access justice via a particular complaint mechanism. The reasons for not complaining to anyone could be linked to either the unavailability of complaint mechanisms or the ineffectiveness of available complaint mechanisms. These issues were addressed in a follow-up question.

People’s experiences in accessing complaint mechanisms vary depending on the type of dispute, the identity of the perpetrator and the perceived effectiveness of specific justice

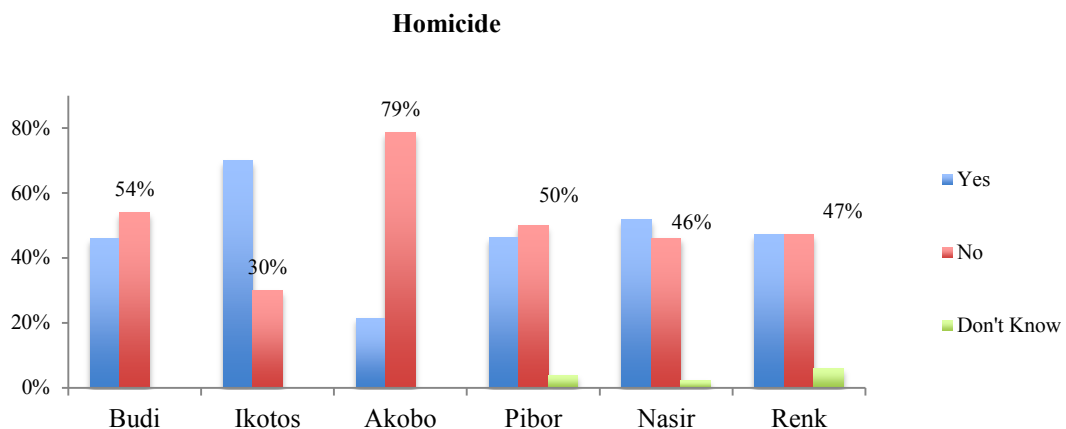
mechanisms. In relation to marital disputes and sexual crimes, for example, the wrongdoers are more likely to be people that the victims know and with whom they have regular interactions. It is therefore easier to identify the opposing party and ensure that he or she appears at the court hearing or mediation. In family disputes, the parties may also have a mutual interest in resolving their differences.

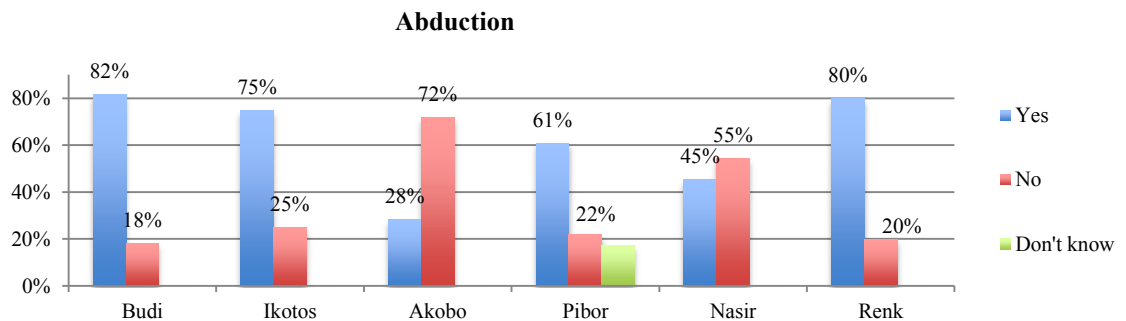
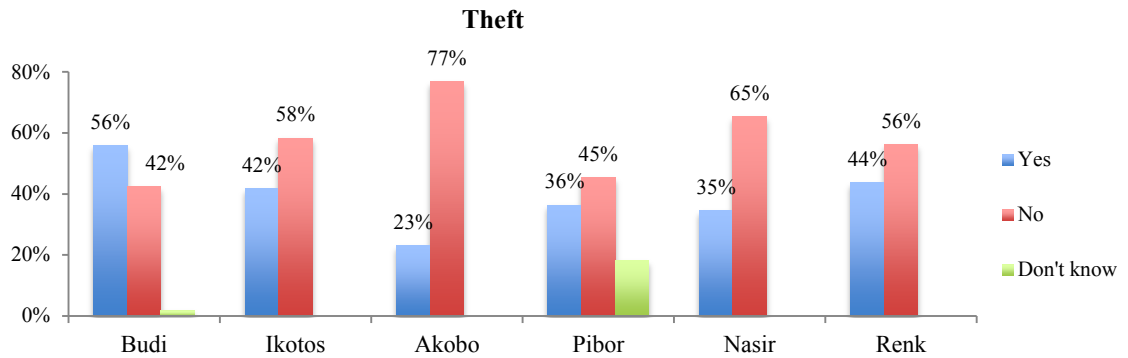
Government representatives and traditional authorities consistently identify disputes relating to theft, physical assault, abduction or homicide to be the most difficult to resolve. Victims or their families are less likely to know the identity of the perpetrator, a household member may be killed by unknown assailants, a child may go missing without his or her family knowing who is responsible and successful thieves do not get caught. In these circumstances, the household may not know who to complain to since the perpetrator was never identified. People may also choose to not complain to anyone about these incidents because they do not have confidence in the ability of local justice actors to investigate and prosecute the perpetrators.

The most cited reason household members did not complain to anyone about their legal problems was that, ‘There was no one who could resolve it.’ The second most cited reason was that the complainant ‘Did not know who to go to.’ For rural populations confronted with certain types of disputes there is often no accessible and effective justice option.

The inaccessibility of complaint mechanisms for disputes relating to inter-communal homicide, trans-boundary theft and abduction was especially apparent at the county-level. For example, the majority of complainants in Akobo did not complain to anyone about their homicide, theft or abduction cases (see Figure 21).

**Figure 21: Access to Complaint Mechanisms for Homicide, Theft and Abduction at the County Level**

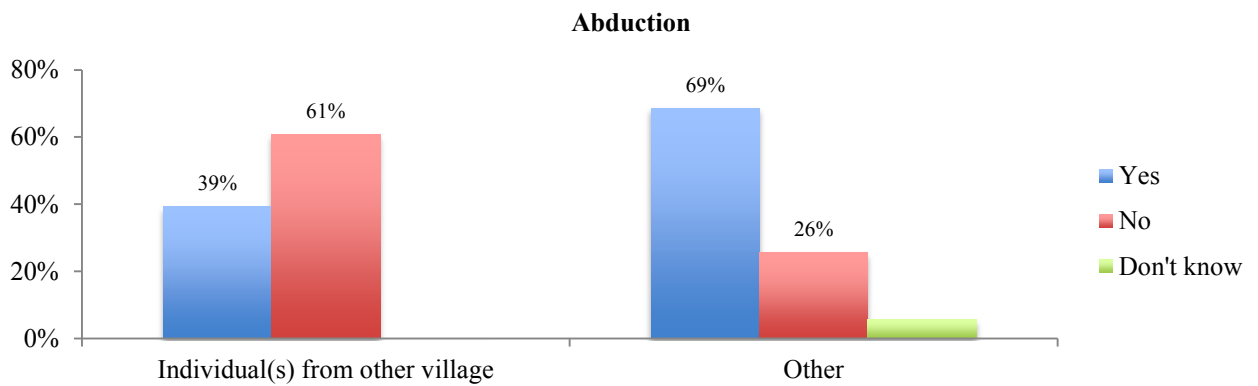
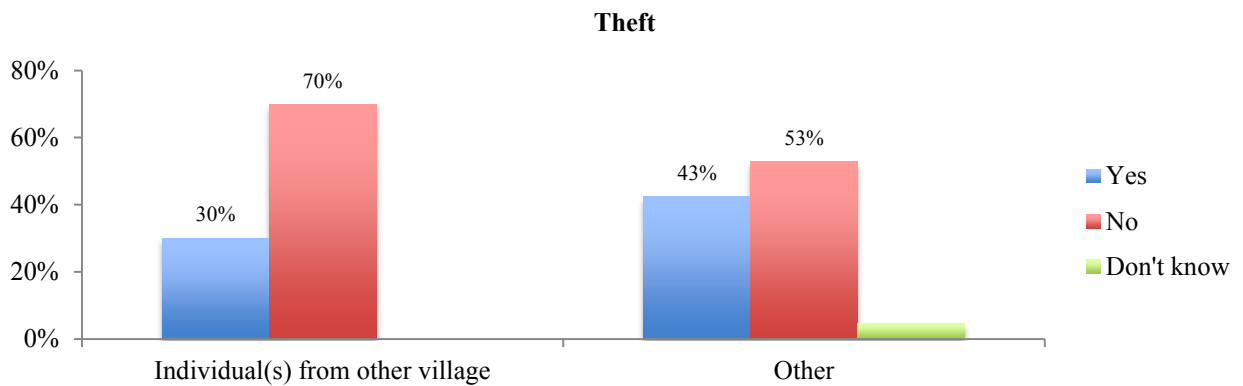
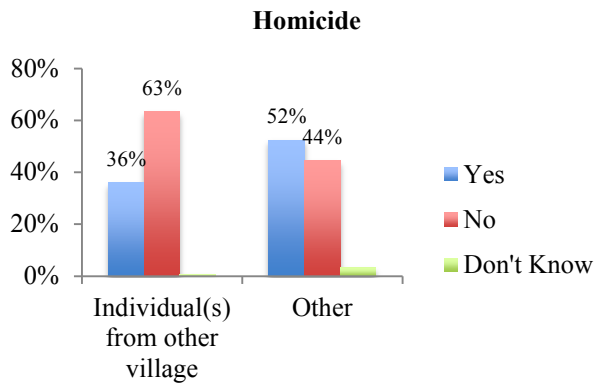




Respondents in Akobo overwhelmingly said that their household members did not complain to anyone about their experiences because, ‘There was no one who could resolve it.’<sup>124</sup> This response was even more pronounced for instances in which the perpetrator was identified as ‘Individual(s) from another village’ (see Figure 22). In relation to each of the three types of disputes, respondents indicated that their household members were less likely to complain to anyone when the perpetrator was, ‘Individual(s) from other village’.

<sup>124</sup> Seventy-four percent of respondent households in Akobo who did not complain to anyone about their household member being killed, 60 percent of households that did not complain about their household member being abducted, and 71 percent of households that did not complain about their experiences with theft, said that their reason for not complaining was that, ‘There was no one who could resolve it’.

**Figure 22: Access to Complaint Mechanism by Types of Perpetrator for Homicide, Theft, and Abduction**



\* Respondents that were not able to identify the perpetrator or who did not answer the question were not included among the perpetrators identified as 'Other' in these figures.

One outlier was adultery.<sup>125</sup> Qualitative interviews demonstrate a wide range of perceptions of what constitutes adultery. While the penal code defines adultery to include any instance in which a married person has sex with someone other than their spouse(s), many customary legal systems do not view adultery committed by married men and

<sup>125</sup> Interviewers asked whether any married member of the household had sex with someone other than their spouse in the last two years and whether any member of the household complained about the incident. The data does not identify which household member complained about the adultery.

unmarried women as an offense, particularly since it can eventually lead to marriage in polygamous societies.

Although 70 percent of households complained to someone about their experiences with adultery, the top two reasons for not complaining were, 'Don't know' and 'Other'. To the extent that married women do not complain about adultery committed by their husbands, it may be because they are not aware that it is a crime under the penal code or are discouraged from doing so by local norms. Nonetheless, the fact that respondents did not point to an absence of justice services as the reason why their household member did not complain to anyone suggests that respondents believe that forums exist where they may raise issues related to adultery.

*Distinguishing Access to Complaint Mechanisms from Access to Justice*

While a considerable number of households complained to someone about their legal problems, simply being able to access a complaint mechanism does not guarantee a just outcome. In domestic disputes, the maintenance of the family unit is usually a high priority in determining appropriate settlements in both formal and informal complaint mechanisms. Women are sometimes coerced to remain in unhappy and violent marriages due to pressure exerted by local justice systems and kinship networks. Other women grapple with their own sense of obligation to abide by customary practices.

The lack of clear appeal processes between customary courts and statutory courts also gives rise to certain miscarriages of justice that disproportionately affect females. Because complainants can bring the same case in different forums, women often find themselves subject to multiple courts and authorities for the same case. For example, cases have been documented in which after a woman's application for divorce has been granted by one court, her former husband or family member has appealed to a second court. These second courts do not always recognize divorces granted in other courts, leaving women in precarious situations. Another tactic divorced husbands have used is to file complaints of adultery against their ex-wives to invalidate divorces that have been approved in other courts. In these circumstances, women who believed they were embarking upon new, legitimate relationships were suddenly subject to trials for adultery and the time and expense of further court proceedings.<sup>126</sup>

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<sup>126</sup> SIHA, FALLING THROUGH THE CRACKS, *supra* note 84, xvi.

## Inheritance Under Customary Law and the Downside of Forum Shopping<sup>127</sup>

Sarah had three children with her husband, an SPLA captain.<sup>128</sup> He was killed before completing the bridewealth payment to Sarah's family. After his death, Sarah's in-laws told her she must go live with her brother-in-law in a neighboring country. This is a common practice in South Sudan known as widow inheritance or levirate marriage. However, when Sarah arrived in the neighboring country, her brother-in-law refused to take her into his house, saying that if he were to do so, his current wife would leave him. Sarah then returned to South Sudan, where she remarried and had another two children.

In 2002, Sarah's brother-in-law opened a case at the head chief's court (a payam-level court), demanding custody of all five of Sarah's children. Since her marriage to her first husband had never been formally terminated, the brother-in-law argued that all five of Sarah's children belonged to the family of her deceased husband. The chief ruled that he would not give custody of the two children Sarah had with her current husband to the brother-in-law. However, the chief said that if the brother-in-law paid the remainder of the bridewealth within one month he could claim custody over the children Sarah had with her deceased husband, otherwise any claim that he had to the children would expire.

The brother-in-law did not pay the remaining bridewealth, losing his claim to the children. In the intervening years, Sarah's oldest daughter gained a reputation as one of the most beautiful girls in the county. She had almost reached secondary school and had a bright future ahead of her. In 2011, the brother-in-law again attempted to win custody of the children, hoping to capitalize on the sizeable bridewealth payment the family would receive when she eventually got married.

This time the brother-in-law brought the case to the paramount chief's court (a county-level court), which overturned the earlier decision and decided in favor of the brother-in-law. The chief ruled that Sarah must give custody of all five of her children and a shop built during her first marriage to her brother-in-law. Sarah contested the decision, asserting that it was she who raised the children and paid their school fees and that the brother had refused her when she first went to him at his home in the neighboring country.

At great expense to herself, and with the assistance of a legal aid attorney, Sarah appealed the decision at the county court in the state capital. After hearing the parties' arguments, the judge declared that if the brother-in-law were to pay the outstanding bridewealth in a reasonable amount of time, he could lay claim to the three children Sarah had with her deceased husband in accordance with customary law. The shop, however, was to remain with Sarah as she built and operated it, thus it was her own personal property. The brother in law did not pay the remaining bridewealth and Sarah retained custody of her children.

While Sarah managed to maintain custody of her children and ownership of her property, it was a costly and mixed victory. During the court hearings, no reference was made to Child Act, which requires the 'best interests of the child' to be the primary factor in determining child custody disputes, or the Transitional Constitution, which states, "Women shall have the right to own property and share in the estates of their deceased husbands together with any surviving legal heir of the deceased."<sup>129</sup> No one, except Sarah, argued that the customary rules that were dispositive of the case were against justice, equity or good conscience. Instead, discriminatory customs were allowed to trump Sarah's statutory and constitutional rights, and, if Sarah's brother-in-law had paid the remaining bridewealth, she may very well have lost custody of her children.

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<sup>127</sup> Forum shopping is when a complainant attempts to have his or her action tried in a court or jurisdiction where he or she expects to receive the most favorable judgment.

<sup>128</sup> This story uses a pseudonym in order to protect the identity of the woman involved.

<sup>129</sup> TCRSS, pt. II, Art. 16(5).

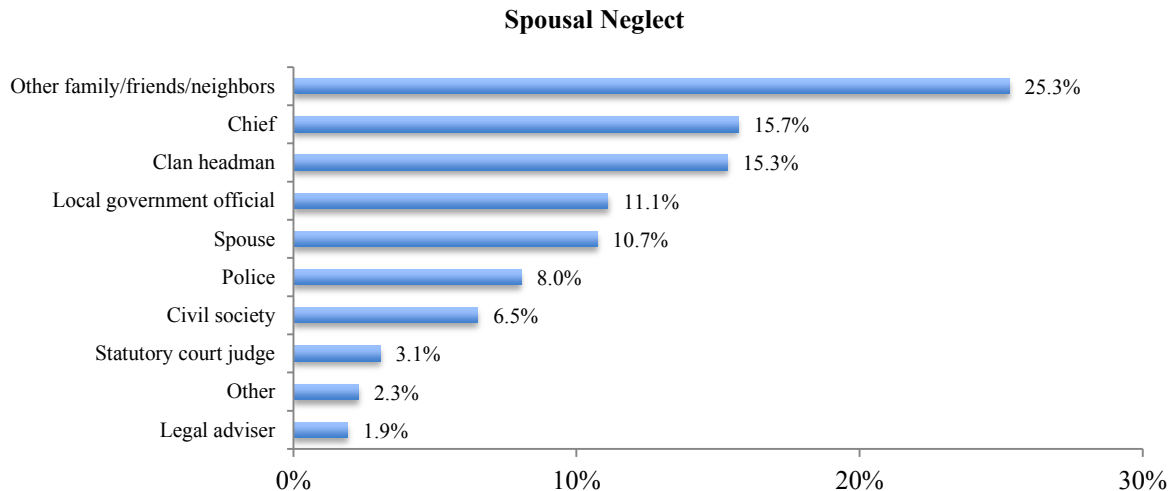
## 4.2 Trends in the Use of Formal and Informal Complaint Mechanisms

The complainants' choice of forum also affects the manner in which accountability gaps manifest for different types of disputes. Unlike other countries, where most criminal acts are considered crimes against the state and prosecutions can proceed even in the absence of complaining parties, criminal prosecutions in South Sudan are not possible unless a complainant is present. This gives the complaining party an advantage in terms of forum selection. Generally speaking, complainants tended to use more informal complaint mechanisms for dealing with their marital disputes and sexual crimes and more formal complaint mechanisms for dealing with instances of homicide, theft, abduction and physical assault. When more than one forum was used, most cases progressed from more informal complaint mechanisms to more formal complaint mechanisms.

### Spousal Neglect, Rape and Adultery

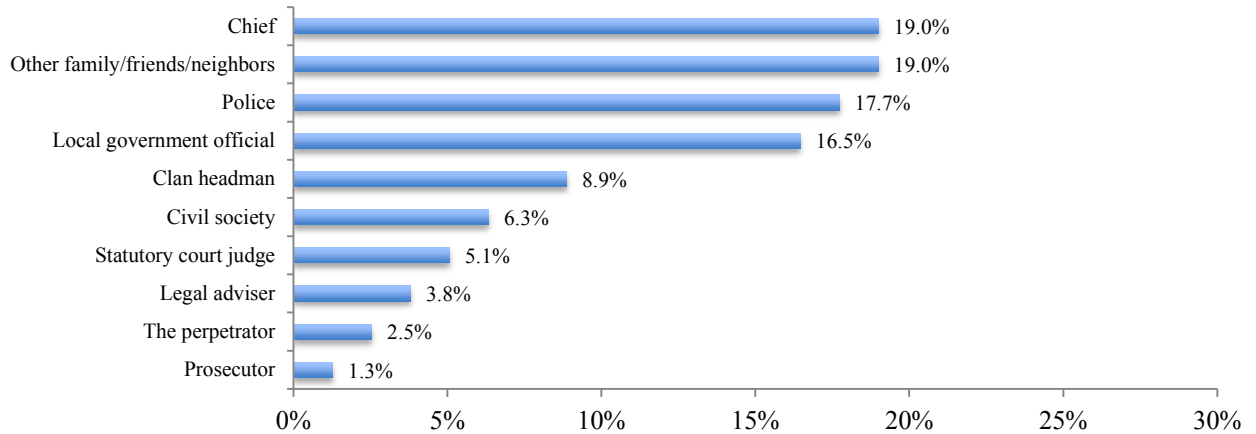
Most people used more informal complaint mechanisms to resolve their marital disputes and sexual crimes. The preferred complaint mechanisms for spousal neglect and rape were 'other family, friends, neighbors' and the 'chief'. Similarly, for adultery the most preferred complaint mechanism was the 'chief' (see Figure 23). While informal complaint mechanisms are generally more accessible for marital disputes and sexual crimes, customary law is usually the basis for a ruling in these cases and women can sometimes be pressured into accepting unfair or discriminatory settlements.

**Figure 23: Preferred Complaint Mechanisms for Spousal Neglect, Rape and Adultery**

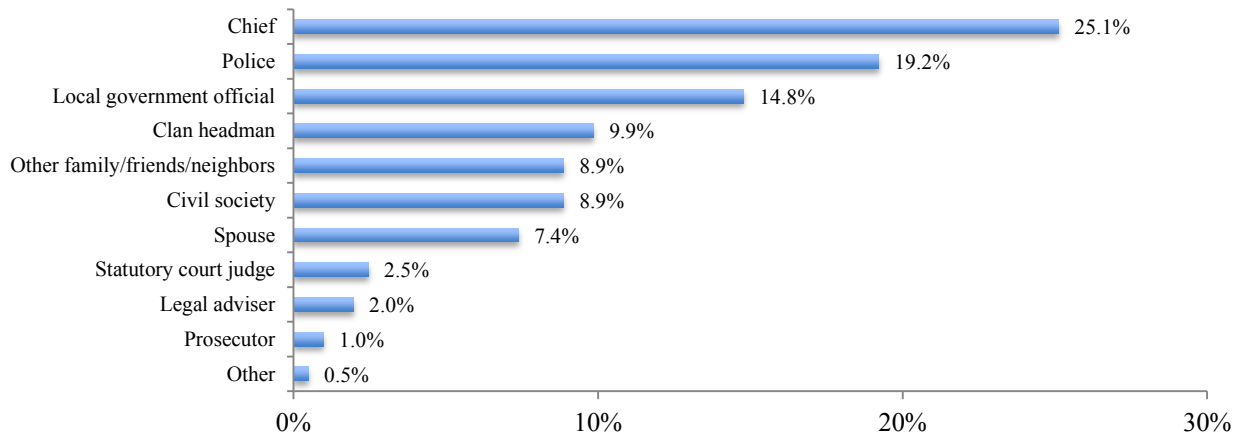




### Rape



### Adultery



\*The existing complaint mechanisms across the six counties are not as uniform as the coded responses suggest. For example, among the Murle in Pibor, age-sets play an important role in resolving certain types of grievances. The list of 21 complaint mechanisms that we included in the questionnaire tried to balance the diversity of complaint mechanisms in the six counties against the need to use a common vocabulary in each county.

These findings were also reflected in the dispute trajectories (i.e. the forums people went to first, second, third, and so on for addressing their complaints). According to respondents, the vast majority of household members (17 percent, n = 17) only complained to ‘other family, friends and neighbors’ about their problems with spousal neglect (see Table 8).

**Table 8: Dispute Trajectories for Spousal Neglect**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Family/friends/neighbors</b>	17.4%	17
<b>Spouse</b>	4.1%	4
<b>Spouse → Family/friends/neighbors → Clan headman</b>	3.1%	3
<b>Family/friends/neighbors → Clan headman</b>	3.1%	3
<b>Police</b>	3.1%	3

\* These tables list the percentage and number of households that used the specified complaint mechanisms in the specified order when trying to resolve their disputes. The percentages represent the percentage of the households that complained to someone about their problems and not the percentage of the households that experienced the problem.

Similar to dispute trajectories for spousal neglect, the most common response for households in which one or more people had been raped in the last two years was to complain to ‘other family, friends, or neighbors’ (28 percent, n = 10) (see Table 9).

**Table 9: Dispute Trajectories for Rape**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Family/friends/neighbors</b>	27.8%	10
<b>Police</b>	11.2%	4
<b>Chief</b>	8.4%	3

The dispute trajectories for incidents of adultery centered on the more informal complaint mechanisms, although the police played more of a pronounced role in processing adultery cases than spousal neglect cases. Police acted either as final arbiters or places to which people submitted complaints prior to adjudications in customary courts (see Table 10).

**Table 10: Dispute Trajectories for Adultery**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Chief → Police</b>	12.2%	10
<b>Chief</b>	9.8%	8
<b>Don’t know</b>	7.3%	6
<b>Family/friends/neighbors</b>	4.9%	4
<b>Police</b>	3.7%	3

*Bias towards the Complainant and Discrimination against Women*

Aside from overtly discriminatory customary practices, the tendency of customary courts to decide in favor of the complainant also has implications for women’s ability to access justice. By ruling in favor of a complainant, chiefs are able to secure payments in the form of fines against the accused in addition to court fees. If the chief rules in favor of the accused, they are only able to obtain payments in form of court fees. This system gives chiefs a financial interest in ruling in favor of complainants. When coupled with the advantages that complainants have in terms of selecting the forum that most suits their

purposes, local justice systems can be biased against defendant parties. This partiality towards the complainant often results in women being given a lengthy imprisonment, a hefty fine, or both, and in some cases results in women having to return to their marriages.<sup>130</sup> Given the barriers women face in bringing complaints- the pressure to resolve cases within the family, lack of funds for court fees, and, in some cases, being unable to present a case without a male relative- complainant bias represents another form of discrimination against women.

Local justice systems also have other ways of pressuring women to remain in unhappy marriages. One woman interviewed described her attempts to resolve her marital problems. The woman's complaints were based on her husband failing to give her money to buy food for the family. These accusations angered the husband and he would regularly beat the woman. The woman's first attempt to resolve her problem was to ask her friends and neighbors to sit down and talk to the man. According to the woman, the neighbors came several times to try to talk things through with the couple, but still the man failed to provide food for the family. After one particularly bad beating, the woman submitted a complaint to the police, but the police sent her back home to resolve the issue with her husband. When again the husband beat the woman, this time threatening to kill her, the woman returned to the police, who this time referred her to the executive chief's court. According to the woman:

Woman: When we went to court, the chiefs said, "Right now, we cannot do anything to your husband. You go back home, let him prepare what you need, and if he fails to understand we will talk to him. If he still also fails to understand, you call the father and the relatives so that they come to solve the problem."

Interviewer: So did the chiefs demand that he give you food? What was the decision from the court?

Woman: They did not even give anything.

Interviewer: And how satisfied are you with the decision from the court?

Woman: I held my words. The chief advised me to go back home and stay with my family.

In a separate case in an executive chief's court (payam-level), a woman brought a complaint because her husband was regularly getting drunk and beating her. According to the woman, he once even woke up in the night and urinated on their children. The man had not yet completed the bridewealth payments and the woman asked for a divorce, but the chiefs did not grant her request. The chiefs spent several days trying to convince the woman to go back to her husband and when the woman refused, the chiefs referred the case to the police, presumably in an attempt to intimidate the woman into dropping her request.<sup>131</sup> The police said this was not a matter for them to resolve and sent the woman back to court. The executive chief then ruled that the matter was outside of his jurisdiction and referred the case to the paramount chief's court.

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<sup>130</sup> SIHA, FALLING THROUGH THE CRACKS, *supra* note 84, xiv.

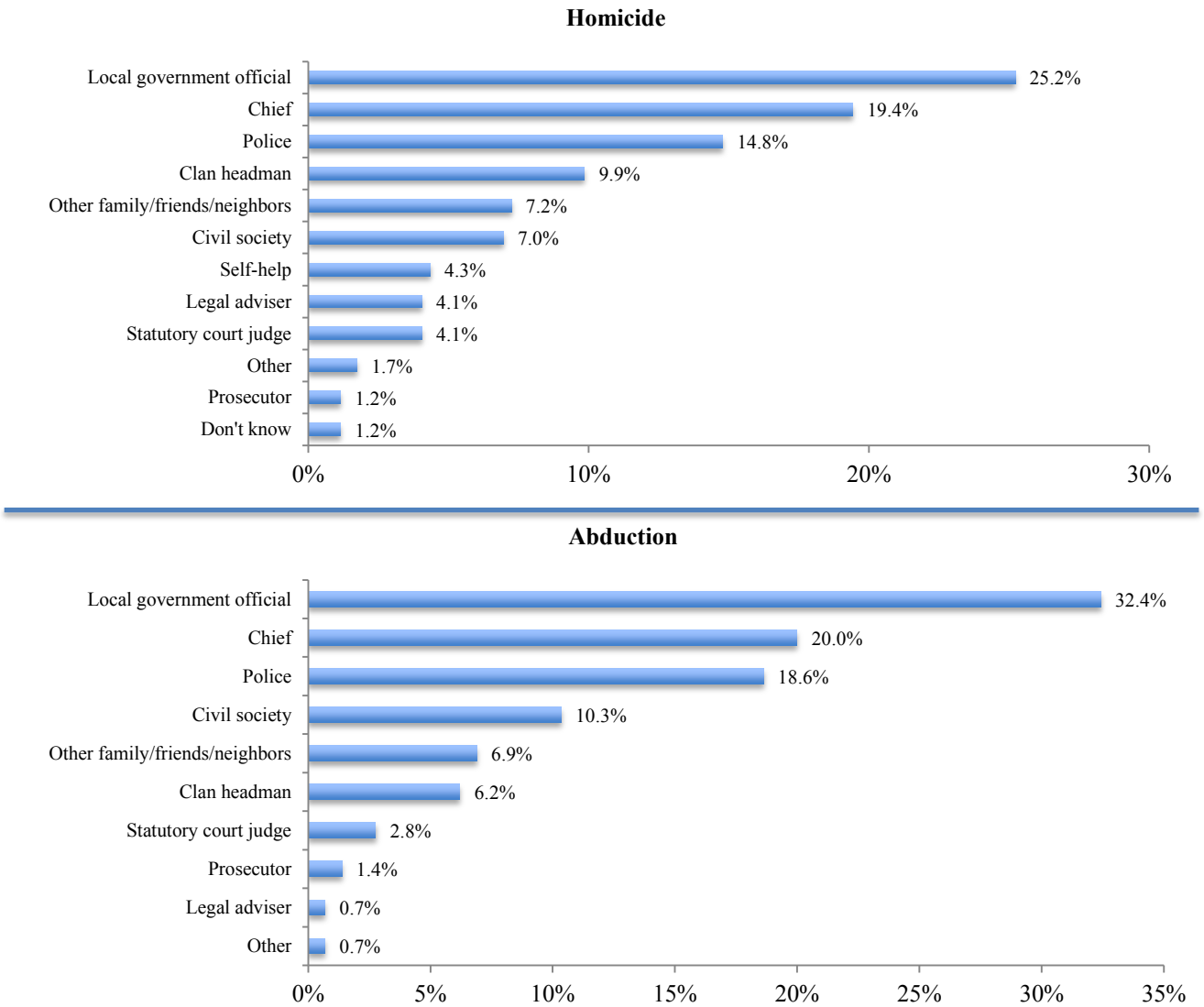
<sup>131</sup> SIHA documented cases in which incarceration was used as a tool to coerce women to change their mind and deter them from seeking a divorce. *Id.*, xiv.

The final outcome in these two cases is not yet known, but the manner in which the local justice system pressured these women to resolve their disputes with their husbands, without any sanctions for their husbands' violence, demonstrates the permissive attitude towards domestic violence in South Sudan and the importance that local justice systems often attach to maintaining the family unit at all costs.

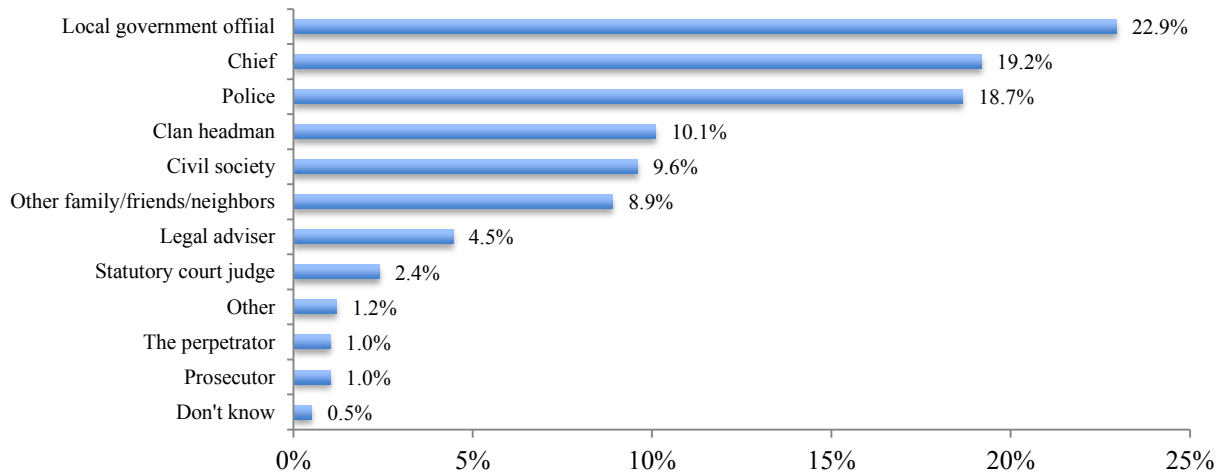
Homicide, Theft, Abduction and Physical Assault

Unlike marital disputes and sexual crimes, people who have been victimized by homicide, theft, abduction and physical assault, tended to seek out more formal complaint mechanisms, such as local government officials and police (see Figure 24).

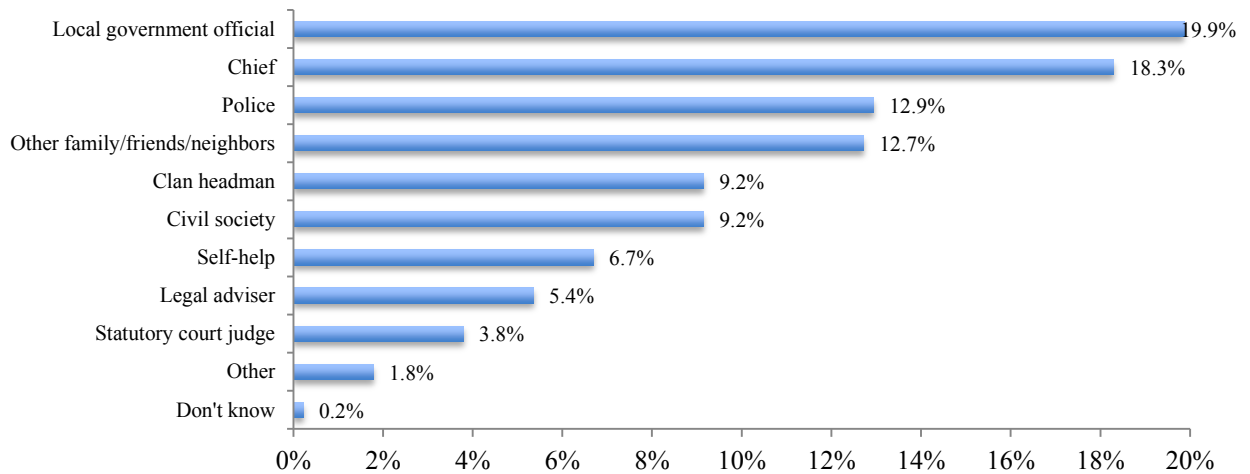
**Figure 24: Preferred Complaint Mechanisms for Homicide, Abduction, Theft and Physical Assault**



### Theft



### Physical Assault



\*The term legal adviser is used when the household member complained to either a prosecutor or advocate.

The three most common dispute trajectories for households that experienced one or more homicides in the last two years were to either complain to the chief (8 percent, n = 10), pursue self-help solutions against the perpetrator directly (4 percent, n = 5) or to complain to the police (4 percent, n = 5) (see Table 11).

**Table 11: Dispute Trajectories for Homicide**

Dispute Trajectory	Pct.	No.
Chief	7.9%	10
Self-help	4.0%	5
Police	4.0%	5
Police → Other	3.2%	4

Similarly, police play a far more prominent role in addressing cases of theft than in marital disputes or sexual crimes. Most disputes relating to theft began and ended with the ‘police’ (8 percent, n = 16), the ‘chief’ (6 percent, n = 11) or ‘family, friends and neighbors’ (5 percent, n = 9) (see Table 12).

**Table 12: Dispute Trajectories for Theft**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Police</b>	7.9%	16
<b>Chief</b>	5.5%	11
<b>Family/friends/neighbors</b>	4.5%	9

\* Due to the large diversity of dispute trajectories for theft, we only listed those dispute trajectories that were used by three or more households.

Many respondents characterized the places to where their household members complained about abduction as ‘Other’ (see Table Table 1313). The list of possible complaint mechanisms included more than 20 possible responses and should have covered most actors at the local level. Findings such as this suggest more research is needed into the precise dynamics of abductions at the local level.

**Table 13: Dispute Trajectories for Abduction**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Other</b>	14.3%	7
<b>Local government official → Chief → Police</b>	8.2%	4
<b>Chief</b>	8.2%	4
<b>Family/friends/neighbors → Chief → Police → Other</b>	4.1%	2
<b>Family/friends/neighbors → Clan headman → Chief → Police</b>	4.1%	2

The dispute trajectories for physical assault show a diverse range of actors (see Table 14). This is due in part to the many different circumstances in which physical assaults arise, including fights between individuals, domestic violence and large-scale inter-communal violence.

**Table 14: Dispute Trajectories for Physical Assault**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Family/friends/neighbors</b>	9.3%	15
<b>Chief → Police</b>	5.5%	9
<b>Self-help</b>	4.3%	7
<b>Other</b>	3.1%	5
<b>Self-help → Family/friends/neighbors</b>	3.7%	6

For all seven dispute types surveyed—spousal neglect, rape, adultery, homicide, theft, abduction and physical assault—the most common dispute trajectories showed a progression from more informal complaint mechanisms towards more formal ones. For example, complaints to friends, family and neighbors were often followed by complaints to clan headman or chief, which in turn were followed by complaints to police or statutory court judges. However, in some dispute trajectories police played a role at the beginning, often investigating and documenting incidents before referring the parties to the customary courts. What is striking about these findings is how rarely complainants appealed to statutory courts to resolve their problems compared to the significant role chiefs play in mediating and adjudicating in almost all disputes. This highlights the danger of restricting the chiefs’ jurisdiction in situations where statutory courts would be unable to fill the resultant justice gap.

### **4.3 Hypothetical Disputes and Preferred Complaint Mechanisms**

The survey generated a set of comparative hypothetical data in order to better understand the validity of responses, test different research methodologies, and control for elements of cultural bias in the questionnaire. Respondents were asked to whom they would bring their complaint in the context of four hypothetical disputes:

- (i) Your brother is beaten by a group of youths;
- (ii) A female friend of yours is beaten badly by her husband and requests your assistance;
- (iii) Your spouse is having sex with someone outside of the marriage; and
- (iv) Your spouse is murdered.

These hypotheticals provided data regarding dispute trajectories and preferred complaint mechanisms for the entire sample population, not just that subset of the population that actually experienced the dispute in question. The responses to the hypotheticals were largely in accordance with what household members used in practice. They reflect the diversity of local justice systems in South Sudan, people’s preferences for different complaint mechanisms in relation to different types of disputes, and the involvement of the institution of the chief in almost all types of disputes. However, certain noteworthy differences are apparent.

#### *Physical Assault*

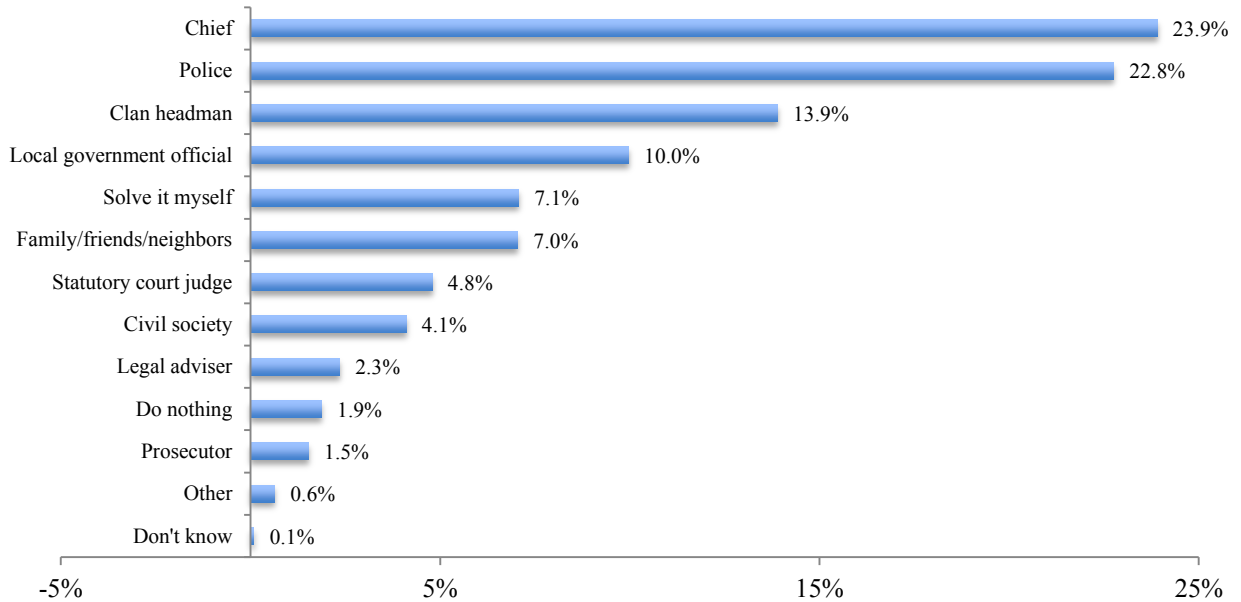
For the hypothetical involving the beating of someone’s brother by a group of youths, respondents expressed preferences for complaint mechanisms that largely matched users’ actual choices when seeking justice for physical assault. Most respondents said that they would first complain to the clan headman if they were to experience such a dispute (see Table 15).

**Table 15: First Assistance Preference for Physical Assault Hypothetical**

Complaint Mechanism	Pct.	No.
Clan headman	33.2%	326
Solve it myself	23.5%	231
Chief	20.9%	205

The chief was also the most preferred complaint mechanism overall, whether or not followed by police and clan headman (see Figure 25).<sup>132</sup>

**Figure 25: Preferred Complaint Mechanisms for Physical Assault Hypothetical**

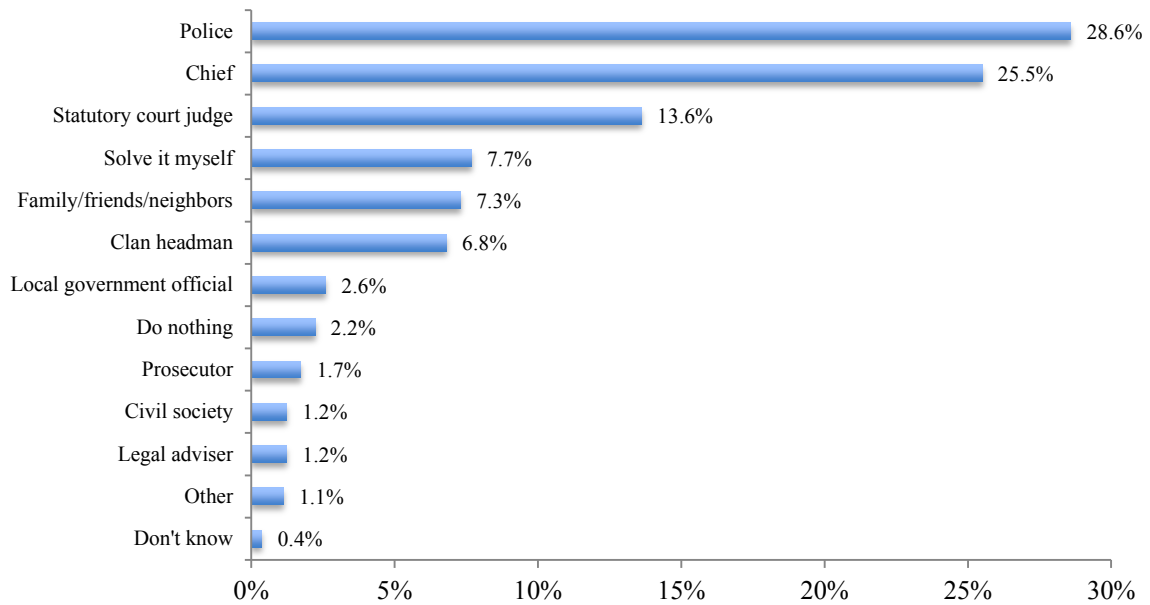


The choices did not differ significantly when disaggregated by gender; chiefs, police and clan headmen were the top choices for both men and women. However, at the county level, in Renk the third most preferred complaint mechanism was statutory court judges. This likely reflects the greater accessibility of statutory court judges in Renk and may also be related to attempts by statutory courts in Renk to limit the jurisdiction of customary courts as discussed in Section 2.5 (see Figure 26).

<sup>132</sup> Local government was the fourth most preferred mechanism in the hypothetical but the most preferred mechanism in relation to actual fights. This may be explained by the fact that many of the actual disputes were perpetrated by ‘Individual(s) from other villages’ and the hypothetical did not stipulate whether the assault is related to inter-tribal or inter-clan conflict.



**Figure 26: Preferred Complaint Mechanisms for Physical Assault Hypothetical in Renk**



The most common dispute trajectory went from the clan headman to the chief to the police (see Table 16). This progression towards more formal complaint mechanisms was also seen in the dispute trajectories for the actual disputes discussed in section 4.2. However, in this hypothetical, people said they would submit complaints in statutory courts far more often than they did in practice. This finding suggests that respondents might appeal to statutory courts more often if they were more accessible to populations in rural areas. Respondents to the hypotheticals also may not be familiar with the difficulties associated with prosecuting crimes in faraway urban areas or the difficulty of arranging hearings in locally based statutory courts when the judges do not maintain a sustained presence in the county. The dispute trajectories also display the dual role of chiefs as gatekeepers, deciding which cases may proceed to adjudication in customary and statutory courts, and as final arbiters of criminal matters.

**Table 16: Dispute Trajectories for Physical Assault Hypothetical**

Dispute Trajectory	Pct.	No.
Clan headman → Chief → Police	10.2%	154
Police → Chief → Don't know	2.8%	42
Police → Chief → Statutory court	2.8%	42
Police → Clan headman → Chief	2.7%	41
Chief → Police → Statutory court	2.6%	39

\* In each of these hypotheticals, we asked respondent to whom they would first bring their complaint, if that person was unsuccessful at resolving the dispute, to whom they would go next and, if that second person was unsuccessful, to whom would they go third.

Domestic Violence

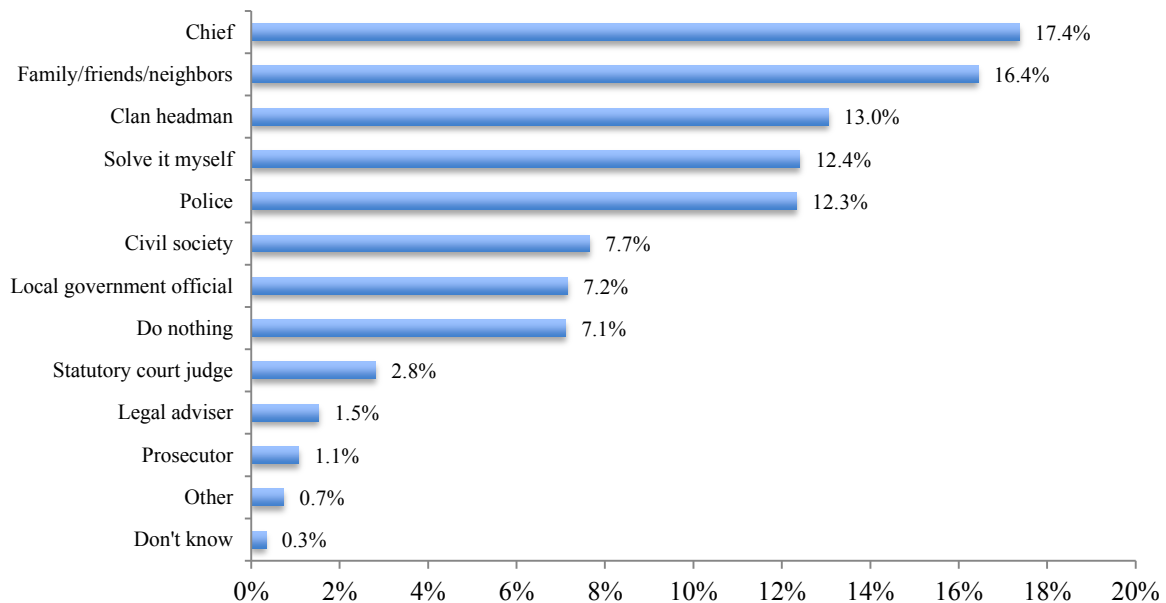
The preferred complaint mechanisms for the hypothetical case in which a female friend is experiencing spousal abuse reflect the reality that marital disputes, no matter how violent, tend to be primarily mediated by complaint mechanisms that are closer to the household level.<sup>133</sup> Most respondents said that if they were confronted with this situation, they would first try to resolve the issue themselves (see Table 17).

**Table 17: First Assistance Preference for Domestic Violence Hypothetical**

Complaint Mechanism	Pct.	No.
Solve it myself	44.2%	429
Clan headman	15.1%	146
Chief	14.4%	140

Overall, the three most preferred complaint mechanisms were: the chief, ‘family, friends and neighbors’ and the clan headman (see Figure 27). Both men and women indicated similar preferences.

**Figure 12: Preferred Complaint Mechanisms for Domestic Violence Hypothetical**



The data at the county level further supports the view that marital disputes are primarily mediated within the context of close social networks or not at all. Many respondents in Budi (23 percent), Ikotos (16 percent) and Akobo (16 percent) said they would try to

<sup>133</sup> There was no exact corollary to spousal abuse in the data about actual disputes. We instructed enumerators to treat domestic violence as fights in which the fight was with a ‘Family member(s)’. Spousal neglect covered such issues: as a husband’s failure to provide for the family, a wife’s refusal to cook for her husband, and other forms of non-violent mistreatment.

resolve the problem themselves, while the most popular response in Renk (20 percent) was to ‘Do nothing’.

The perception that domestic violence is not a crime for which police are typically involved was apparent in the dispute trajectories as well (see Table 18). The fourth most common response was to ‘Do nothing’ if a female friend is beaten badly by her husband and requests assistance.

**Table 18: Dispute Trajectories for Domestic Violence Hypothetical**

<b>Dispute Trajectory</b>	<b>Pct.</b>	<b>No.</b>
<b>Family/friends/neighbors → Clan headman → Chief</b>	5.2%	79
<b>Solve it myself → Family/friends/neighbors → Chief</b>	4.9%	74
<b>Solve it myself → Family/friends/neighbors → Clan headman</b>	4.8%	72
<b>Do nothing → Do nothing → Do nothing</b>	3.8%	58

### Adultery

The issue of adultery is an exception to the rule that marital disputes are handled by complaint mechanisms that are close to the family unit. Most respondents said that if their spouse were sleeping with someone outside of the marriage, they would first bring their complaint to the chief (see Table 19).

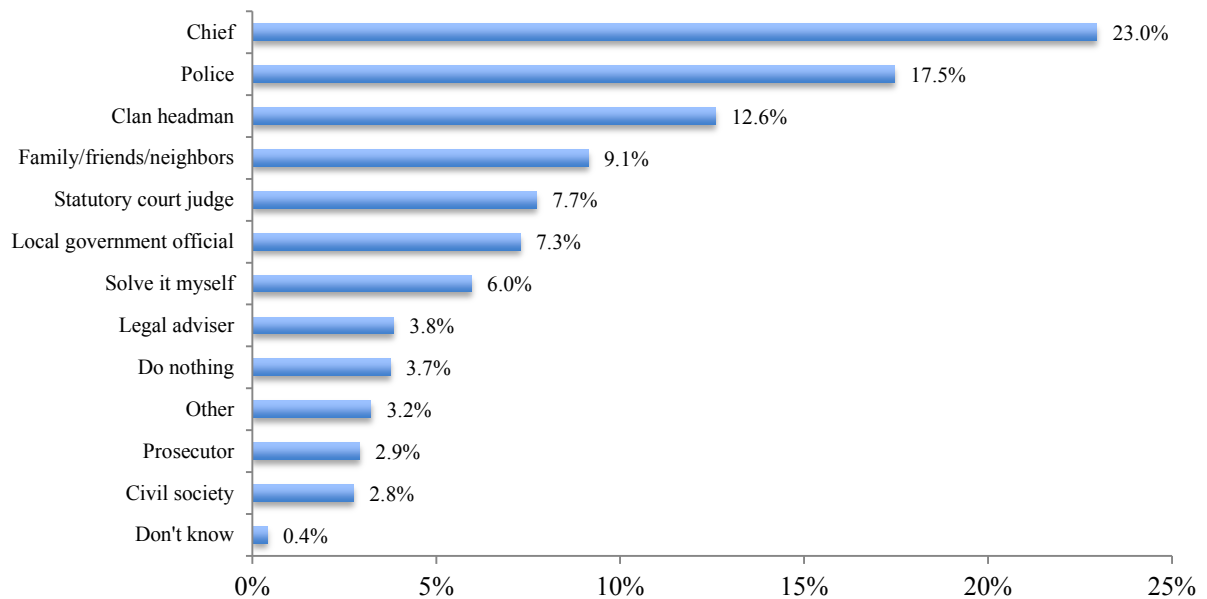
**Table 19: First Assistance Preference for Adultery Hypothetical**

<b>Complaint Mechanism</b>	<b>Pct.</b>	<b>No.</b>
<b>Chief</b>	32.8%	310
<b>Clan headman</b>	28.0%	265
<b>Solve it myself</b>	16.3%	154

The chief was also the most preferred complaint mechanism overall, but 17 percent of respondents (n = 736) said that they would bring their complaint to the police (see Figure 28).<sup>134</sup>

<sup>134</sup> Male and female respondents voiced identical preferences for complaint mechanisms in relation to adultery.

**Figure 28: Preferred Complaint Mechanisms for Adultery Hypothetical**



Other noteworthy findings at the county level are the preferences that people in Renk expressed for statutory courts (18 percent), again reflecting the accessibility of statutory courts in Renk compared to other counties. Family, friends and neighbors were also highly preferred complaint mechanisms for adultery in Budi (12 percent) and Ikotos (17 percent).

Unlike attitudes towards domestic violence, the criminalization of adultery under South Sudanese statutory and customary law is apparent in the dispute trajectories, in which respondents expressed greater willingness to pursue their claims in more formal forums, such as police and statutory courts (see Table 20).

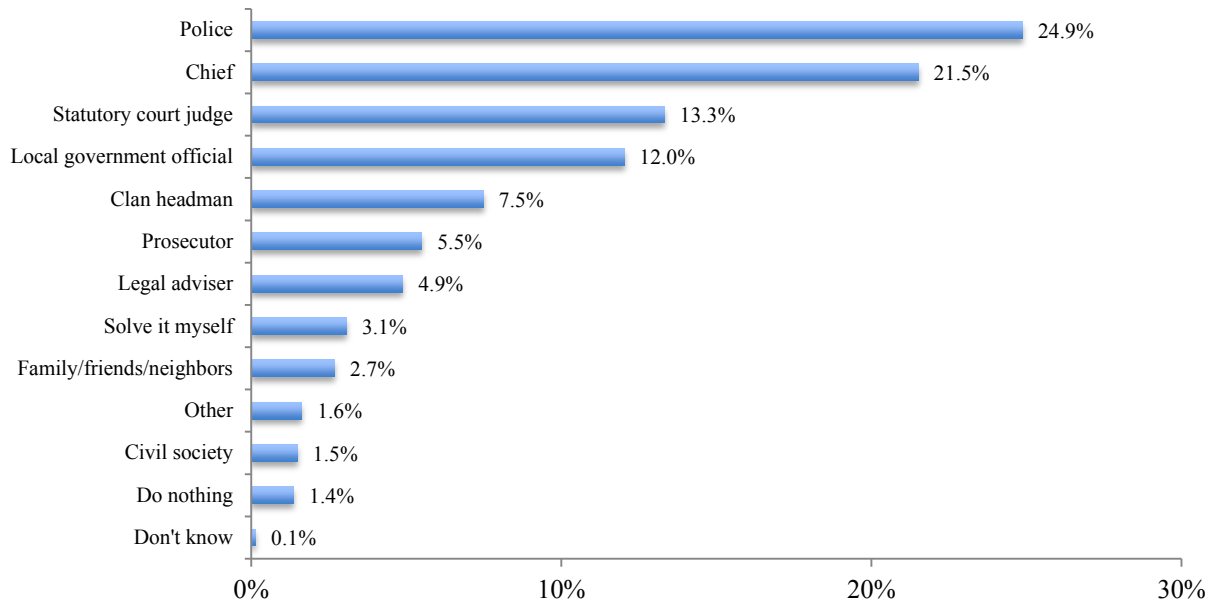
**Table 20: Dispute Trajectories for Adultery Hypothetical**

Dispute Trajectory	Pct.	No.
Chief → Police → Statutory court	7.0%	106
Family/friends/neighbors → Clan headman → Chief	5.7%	87
Clan headman → Chief → Police	4.0%	60
No response → No response → No response	3.0%	45
Police → Chief → Statutory court	2.8%	43

*Murder*

The main dispute for which people have a general preference for adjudication by state authorities is homicide. When asked to whom they would complain if their spouse was murdered, 25 percent of respondents said they would complain to the police, 13 percent of respondents said they would complain to statutory courts, and 12 percent of respondents said they would complain to local government officials (see Figure 29).

**Figure 29: Preferred Complaint Mechanisms for Murder Hypothetical**



Statutory courts were the preferred final arbiters of homicide disputes (see Table 21).

**Table 21: Dispute Trajectories for Murder Hypothetical**

Dispute Trajectory	Pct.	No.
Chief → Police → Statutory court	7.8%	118
Police → Chief → Statutory court	6.8%	103
Clan headman → Chief → Police	3.6%	55
Police → Chief → Local government official	3.0%	46

However, chiefs and clan headmen also figure prominently as the initial place to which people stated they would submit their complaints (see Table 22).

**Table 22: First Assistance Preference for Murder Hypothetical**

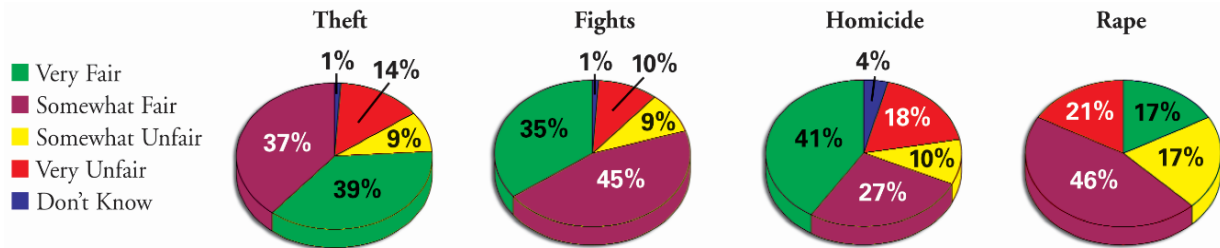
Complaint Mechanism	Pct.	No.
Chief	44.6%	353
Clan headman	22.3%	176
Local government official	14.3%	113

This highlights the important role that traditional authorities play in resolving the civil aspects of homicide and the danger of completely removing these matters from their jurisdiction.

#### 4.4 User Perceptions of Procedural Fairness and Outcome Satisfaction

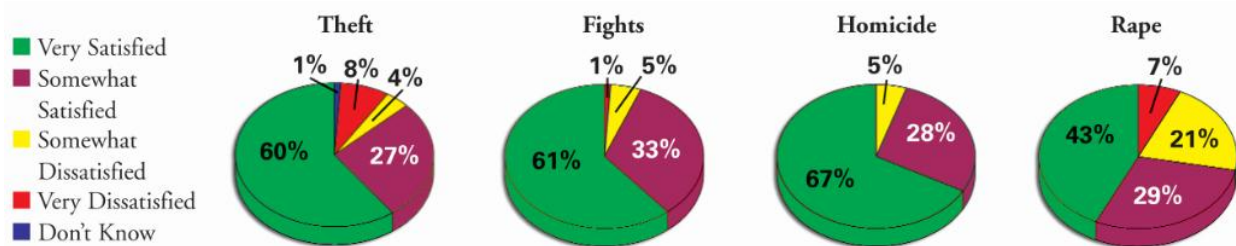
Survey data shows that residents of the six counties view their local justice systems to be reasonably fair in terms of both the process and the outcome, though the perceptions of fairness with the process were significantly more ambivalent in relation to rape cases, in which 37.5 percent of respondents thought the process was either very unfair or somewhat unfair (see Figure 30).

**Figure 30: Perceived Fairness of Process**



Those respondents whose cases had concluded perceived the final decision to be fairer than the process might have suggested. Once again, respondents whose household members were raped voiced the highest levels of dissatisfaction with the outcome. Twenty-eight percent of respondents said they were either ‘Very dissatisfied’ or ‘Somewhat dissatisfied’ with the final decision in their rape cases (see Figure 31).

**Figure 31: Satisfaction with Outcome**



In order to cross-check respondent answers regarding their perceptions of the process and outcome, respondents were asked if they would return to the same forum if confronted with a similar problem in the future. Similar to the results regarding the perceived fairness of the process, these results point to higher levels of dissatisfaction with the manner in which local justice systems treat rape and homicide cases.<sup>135</sup> These results are affected by the shortage of justice services in many rural areas. Complainants have

<sup>135</sup> Sixty-seven percent of respondents said they would return to the same forum for theft cases and 63 percent of respondents said they would return to the same forum for physical assaults, whereas only 50 percent of respondents said they would return to the same forum for homicide and 56 percent of respondents said they would return to the same forum for rape.

limited options when it comes to forum selection, especially in their ability to achieve an enforceable outcome.

### *Satisfaction with How Local Institutions Manage Violence*

Survey data suggests that respondents have fairly high levels of satisfaction with how local justice institutions managed both local violence and non-local violence (see Figure 32 and Figure 33). To a certain extent, the high levels of satisfaction may point to improvements in local justice systems since the signing of the CPA in 2005. Much of rural South Sudan had little or no formal governance structure at the local level during the war. Chiefs and traditional authorities were left to negotiate relationships between various warring factions and heavily armed groups within their own communities without the support of state institutions and continue to play a significant role in local and non-local dispute resolution. The relatively high levels of satisfaction may therefore be a byproduct of positive changes that people have perceived since the end of the war.

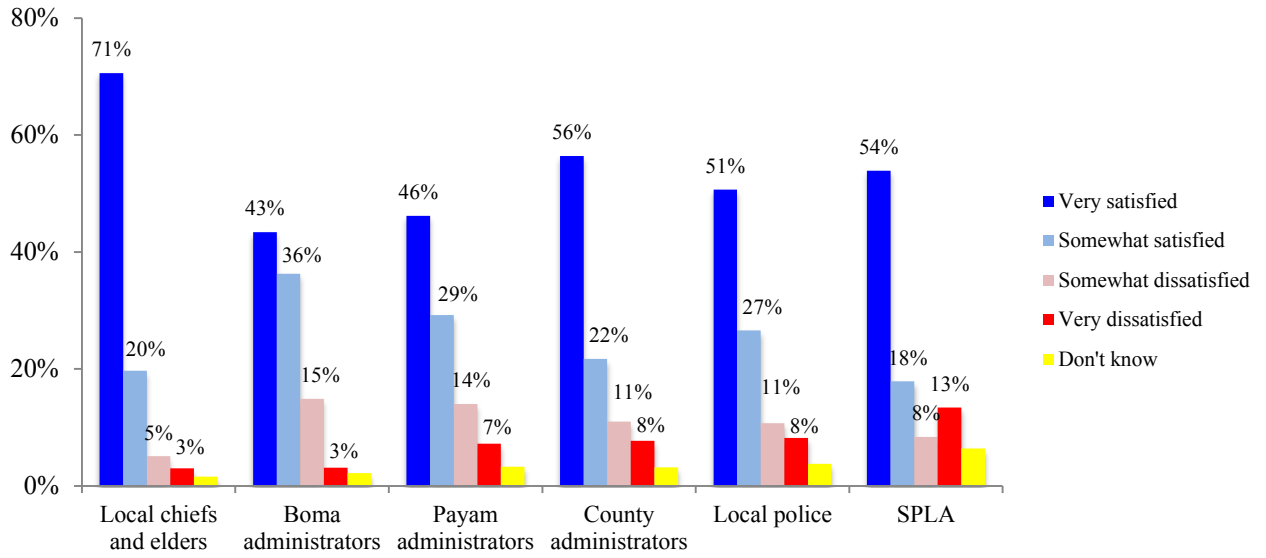
Qualitative interviews, however, demonstrated much more nuanced views on how local institutions manage violence. Residents of the six counties raised questions about both the capacity of local institutions and their methods of violence management. This discrepancy suggests that the survey question may be flawed in gauging perceptions in the context of rural South Sudan. In other countries transitioning from authoritarian governance structures, researchers found a tendency for the interviewer to be treated as a representative of a state agency and part of the dominant power system. Respondents in such circumstances are often afraid to reveal any opinions that might in some way incriminate them or lead to retribution from the state.<sup>136</sup> The survey question may also be somewhat simplistic in that it may not adequately address the complex realities of violence in South Sudan and a more nuanced set of questions may be a more effective methodology.

These reservations aside, the data does shed light on certain differences between local justice actors and among the counties. Respondents expressed the highest levels of satisfaction with the manner in which local chiefs and elders managed violence between individuals in their village. Seventy-one percent of respondents were very satisfied with their chief and elders in this regard (see Figure 32). There was less satisfaction with local government officials, perhaps because local government officials in many of these counties are far removed from rural populations or are not viewed as impartial.

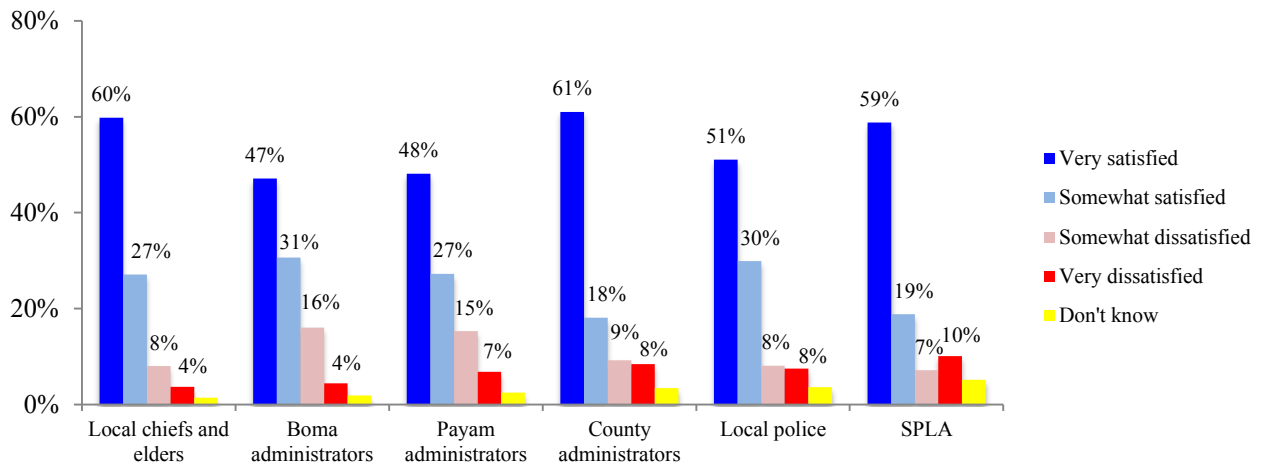
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<sup>136</sup> Matt Henn, *Opinion Polling in Central and Eastern Europe under Communism*, 33 JOURNAL OF CONTEMPORARY HISTORY 229-40, 237 (1998).

**Figure 32: Satisfaction with How Local Institutions Manage Local Violence**



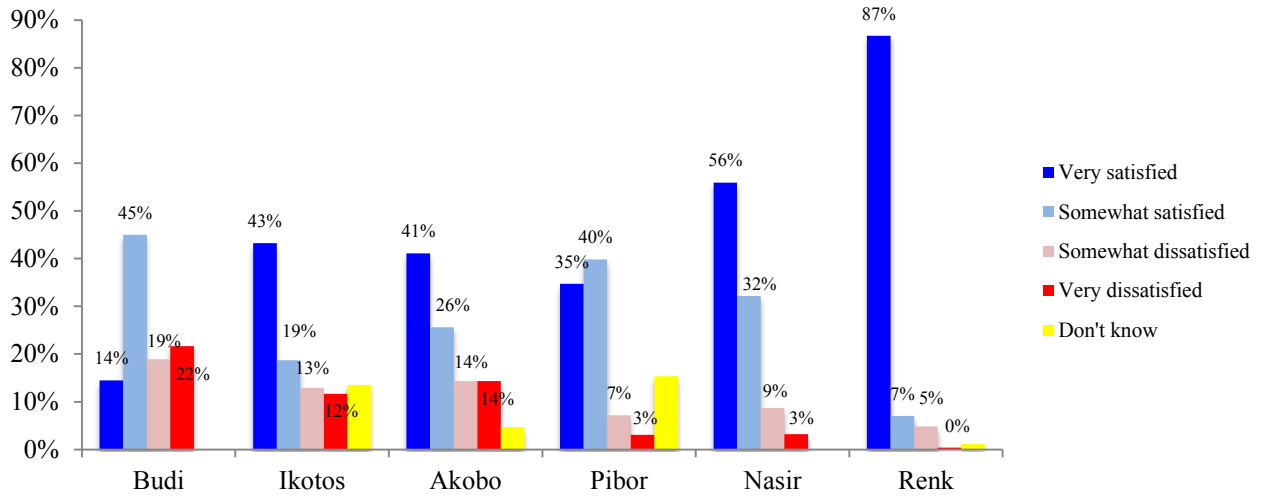
**Figure 33: Satisfaction with How Local Institutions Manage Non-local Violence**



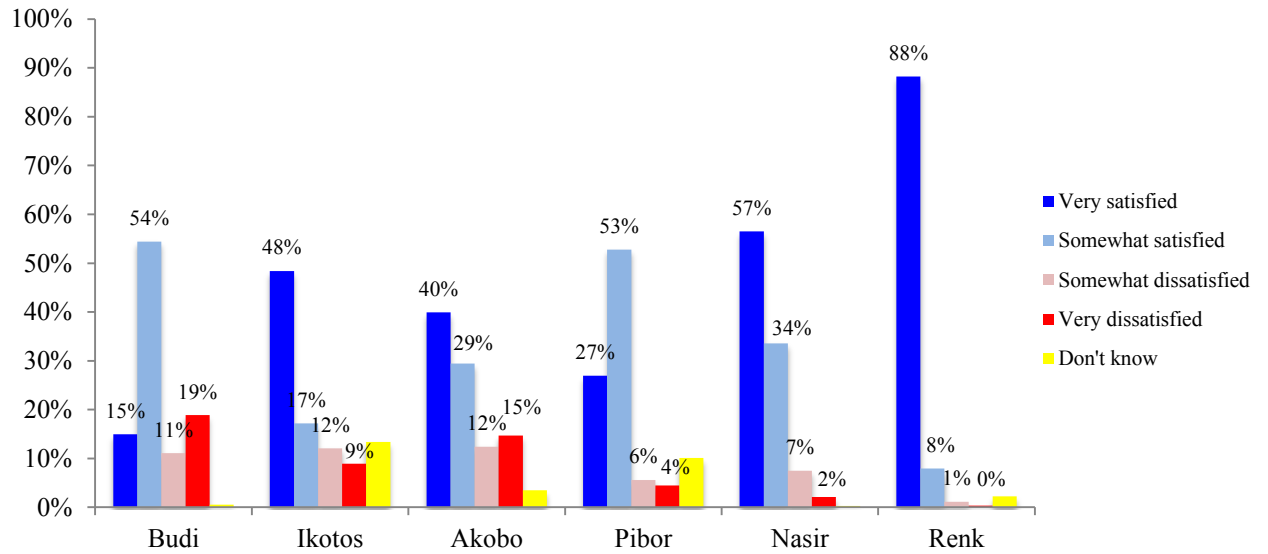
The results were somewhat more varied at the county level. For example, respondents in Budi expressed high levels of dissatisfaction with how the SPLA managed violence between individuals in their village. Thirty-three percent of respondents were ‘Very dissatisfied’ with the SPLA in this regard. These responses are not surprising as there is a long history of conflict between local populations in Budi and the SPLA. Respondents in Budi and Pibor also expressed some ambivalence regarding the performance of local police (see Figure 34 and Figure 35).



**Figure 34: Satisfaction with Local Police Managing Local Violence**



**Figure 35: Satisfaction with Local Police for Non-local Violence**



## Chapter Five

### *A System in Flux*

South Sudan has undergone major changes in recent years and the justice system remains in a state of flux. This chapter focuses on the justice system's treatment of capital punishment and adultery and citizens' views and preferences with respect to capital punishment and adultery. These issues are important in their own right and also serve as examples of areas in which the justice system has struggled to come to terms with cultural change and the legacy of war.

#### **5.1 Blood Compensation and Capital Punishment in Murder Cases**

Since the colonial authority first introduced capital punishment in the early part of the twentieth century, the practice has been associated with government power and legitimacy in Sudan.<sup>137</sup> In addition to its use as a deterrent to violent crime, the right to sentence a murderer to death was seen as a demonstration of sovereignty for the national government and many of the armed groups that proliferated during the war.<sup>138</sup>

Executions in South Sudan were often public events. As the paramount chief in Budi recalled: "During the time of the SPLA, when you were caught killing a man, a firing squad was carried out. This was a very good system. It stopped a lot of crime." To a certain extent, this acceptance of capital punishment and the belief in its deterrent effect has carried over into the postwar period. A prosecutor in Eastern Equatoria state explained why he thought the death penalty was still a necessary deterrent in the postwar context:

You know, it is too early to abolish [the death penalty]. I remember one day I was with a colleague discussing this issue. He was telling me that during the colonial era, around the area of Yirol, those of the Aliap and the Atuot, the people were very wild. Any small thing and you were killed. And it became very difficult for the British to control this situation. What they did was to say, "Now, anybody who commits murder in first degree, they will be hanged in public." And they kept doing that for a number of years. Nowadays, these areas are very quiet, by the way. If there are killings happening there, they are specific cases, but not like the big cases happening here [in Eastern Equatoria]. You know, I am of a human rights background. So for me, [the death penalty] is very inhumane. It is very bad. But then when you see people, they don't understand, because it is not in their mentality, there is no other choice.

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<sup>137</sup> As Sharon Hutchinson observed in relation to the Nuer of Greater Upper Nile region: "Ever since the imposition of British colonial rule, the "government" had claimed the "right" to impose "capital punishment" or otherwise eliminate individuals who seriously challenged its monopolistic claims on the legitimate use of force. And increasingly this "right" was acknowledged by Nuer themselves." HUTCHINSON, *NUER DILEMMAS*, *supra* note 7, 108.

<sup>138</sup> According to Monyluak Alor Kuol, an advocate in Juba who served as a judge in SPLM/A controlled areas during the war, the reckless use of arms in homicides and the harsh punishments of military justice fueled the practice of capital punishment during the war. Kuol reports two cases in which the killing of chiefs resulted in a sentence of death by firing squad. MONYLUAK ALOR KUOL, *THE ANTHROPOLOGY OF LAW AND ISSUES OF JUSTICE IN SOUTHERN SUDAN TODAY* (2000), *cited in* DENG, *CUSTOMARY LAW*, *supra* note 4, 136.

While the death penalty continues to enjoy the support of a vocal segment of South Sudanese society, a number of voices in opposition to the practice have surfaced in recent years. In 2012, the Comboni missionaries in South Sudan wrote a letter to the Sudan Catholic Bishops' Conference (SCBC) petitioning the bishops of the two Sudans to take concrete steps towards the abolition of the death penalty in the South. They asked the bishops to write to the president requesting that he put in place a moratorium on capital punishment, and to request that the Constitutional Review Committee abolish the practice in the forthcoming Permanent Constitution.<sup>139</sup>

Other individuals and groups have argued that the death penalty is incompatible with the customs and traditions of the people of South Sudan. The death penalty does not exist in customary law. As noted in Section 2.4, the customary remedy for homicide involves the payment of blood compensation to the family of the deceased. Blood compensation is a remedy designed to restore relationships and limit the potential for revenge killings, rather than to exact retribution and maximize deterrence by taking the wrongdoer's life. According to Michael Makuei, who at the time was serving as Attorney General in the Government of Southern Sudan:

There is a strong cultural bias against capital punishment... In our customs, capital punishment never existed... To avoid vengeance, it was decided that people should be compensated... With the introduction of statutory laws came the idea of sentencing the offender to death.<sup>140</sup>

Opponents of capital punishment have received international support from countries concerned that the execution of people who have not had access to legal representation constitutes a violation of international human rights law. On October 10, 2012, the World Day Against the Death Penalty, the Government of France and the EU echoed the Comboni Missionaries' call for a moratorium on the death penalty:

France recognizes the South Sudanese historical and social context which will make the abolition of the death penalty challenging. Such a decision will require great leadership and significant public advocacy. In the interim, given the widely recognized challenges of ensuring the right to a fair trial in South Sudan, France calls for an immediate moratorium on the death penalty in South Sudan.<sup>141</sup>

This pressure from South Sudanese civil society and the government's international partners led to a key victory for opponents of capital punishment in South Sudan. On December 20, 2012, the Government of South Sudan, along with 110 other nations, voted in favor of a United Nations General Assembly resolution calling on countries that use capital punishment to place a moratorium on judicial executions with a view to abolishing the death penalty.<sup>142</sup> The resolution called on countries to respect international

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<sup>139</sup> *South Sudan – Capital Injustice*, CHURCHES, Nov. 2012, available at

<http://www.southworld.net/newtest/index.php/component/k2/item/324-south-sudan-capital-injustice>.

<sup>140</sup> DENG, CUSTOMARY LAW, *supra* note 4, 136.

<sup>141</sup> Letter from the European Union to the Government of South Sudan via the French Embassy in Juba, *Today is World Day Against the Death Penalty*, Oct. 12, 2012, available at <http://www.sudantribune.com/spip.php?article44188>.

<sup>142</sup> *South Sudan: Heed Global Call to End Death Penalty*, HUMAN RIGHTS WATCH, Dec. 20, 2012, available at <http://www.hrw.org/news/2012/12/20/south-sudan-heed-global-call-end-death-penalty>

standards regarding fair trial rights and to make available relevant information about their use of the death penalty to contribute to informed and transparent debates. This was a welcome step forward and brings the country that much closer to a complete abolition of the death penalty. However, since the signing of the resolution, government officials have not yet made any public statement on how it will change the manner in which capital punishment is currently being administered in South Sudan.<sup>143</sup>

### *Procedural Aspects of Judicial Executions in South Sudanese Law*

As noted in Chapter Two, high courts have exclusive jurisdiction over capital offenses. After the court finds an individual guilty of murder, the relatives of the deceased are given the option to choose whether they would prefer to have the perpetrator put to death or to accept blood compensation. If blood compensation is accepted, the judge sentences the perpetrator to a prison sentence of no more than ten years.<sup>144</sup> According to the acting police commissioner in Nasir:

Acting Police Commissioner: If the family of the deceased says no compensation then this man can be killed [hanged] automatically. If compensation is paid, we can still keep him for three or four years.

Interviewer: So if the family refuses then the sentence is automatically a death penalty?

Acting Police Commissioner: Yes, this is a way we can stop people doing this sort of revenge killing. But, some chiefs can deal with it by compensation.

People convicted of murder in the high court have two weeks in which to appeal their death sentence to the one of the three regional courts of appeals. In practice, given the under-developed justice institutions in rural areas and the logistical difficulties associated with travel from rural areas to the regional courts of appeals, judges are often flexible on the time period for appeal and will accept appeals submitted after the time period has expired if the attorney gives a sufficient reason for the delay.

If the court of appeals reaffirms the death sentence or if the individuals fail to file an appeal on time, the matter proceeds to the Supreme Court for confirmation. According to an official in the Ministry of Justice, the Supreme Court subjects death sentences that come directly from the high courts to a high degree of scrutiny, whereas sentences that pass through the courts of appeals are almost always confirmed. If the Supreme Court confirms the death sentence, the sentence then proceeds to the President for approval. If the President endorses the death warrant, the sentence is carried out at a gallows in one of the three regional centers of Juba, Wau and Malakal.

There are a number of concerns with the manner in which judicial executions are administered in South Sudan. The first concerns the lack of legal aid in the country.

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<sup>143</sup> See David Deng and Elizabeth Ashamu, *Potential Paths Towards Ending Capital Punishment in South Sudan*, SUDAN TRIB., Sep. 14, 2012 (discussing various options for pursuing a moratorium and abolition of the death penalty in South Sudan), available at <http://www.sudantribune.com/spip.php?article43895>.

<sup>144</sup> Penal Code Act, ch. XVI, § 206.

Although a Directorate of Human Rights and Legal Aid has been established in the Ministry of Justice, it is poorly financed and only seeks to provide legal representation in the most serious of capital offenses. Since being established in 2005, the Directorate has only provided legal aid in six cases. The Directorate only provides legal aid when a judge or accused appeal to the Ministry for a legal aid attorney; the vast majority of South Sudanese are unaware they have this right. Almost no one on death row is able to afford a private attorney or is provided legal aid by the state. Without legal counsel, they are often unable to challenge evidence, to call and prepare witnesses and to file appeals. Many convictions are also secured through confessions. Given the prevalence of torture and corruption in the police and prison services, the legal validity of many of these confessions could be contested if the accused had access to legal representation.

Equally concerning is the lack of transparency in the judicial sector. The justice institutions involved with the administration of capital punishment, including the Judiciary, the Ministry of Justice and the Ministry of the Interior, are either unwilling or unable to provide statistics on the numbers of people on death row and the numbers of people executed.<sup>145</sup> The Judiciary still does not have a functioning court reporting system so outside observers cannot even determine the circumstances in which the death penalty is being applied. UNMISS personnel monitor prisons and maintain statistics about the numbers of people on death row and the frequency with which they file appeals, however their data is often inaccurate and, due in part to the political risks involved, they are often reluctant to share this information with third parties. This lack of transparency makes it very difficult to evaluate the manner in which the government administers judicial executions.

### *The Myth of a Retributive Society in South Sudan*

Despite the anecdotal evidence that South Sudanese view capital punishment as a necessary deterrent in the postwar context, survey data suggests that opinions among populations residing in rural areas are mixed on this issue. When asked whether they support the use of the death penalty for people who have been convicted of intentional murder, 54.8 percent of respondents (n = 832) said ‘No’ (see Figure 36).<sup>146</sup> To offer some comparison, in the United States, one of the few industrialized countries that regularly administer judicial executions, a majority of people support the death penalty—as much as 60 percent, according to some polls.<sup>147</sup>

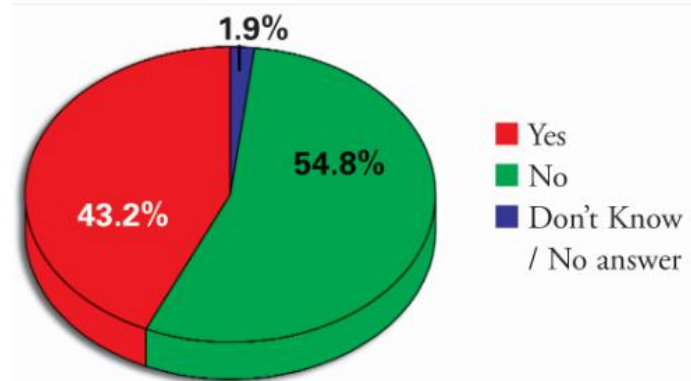
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<sup>145</sup> According to estimates, approximately 200 prisoners were on death row as of September 2012 and at least eight people were executed in the first 13 months of independence in Juba and Wau. There is no publicly available information on the number of people who have been executed in Upper Nile. See Deng and Ashamu, *Potential Paths*, *supra* note 143.

<sup>146</sup> Women were more opposed to capital punishment than men. Sixty percent of women and 52 percent of men said that they did not support the use of the death penalty for serious crimes such as intentional murder.

<sup>147</sup> Lydia Saad, *U.S. Death Penalty Support Stable at 63%*, GALLUP POLITICS, Jan. 9, 2013 (stating that Americans' support for the death penalty as punishment for murder has plateaued in the low 60s in recent years, after several years in which support was diminishing), *available at* [www.gallup.com/poll/159770/death-penalty-support-stable.aspx](http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx).

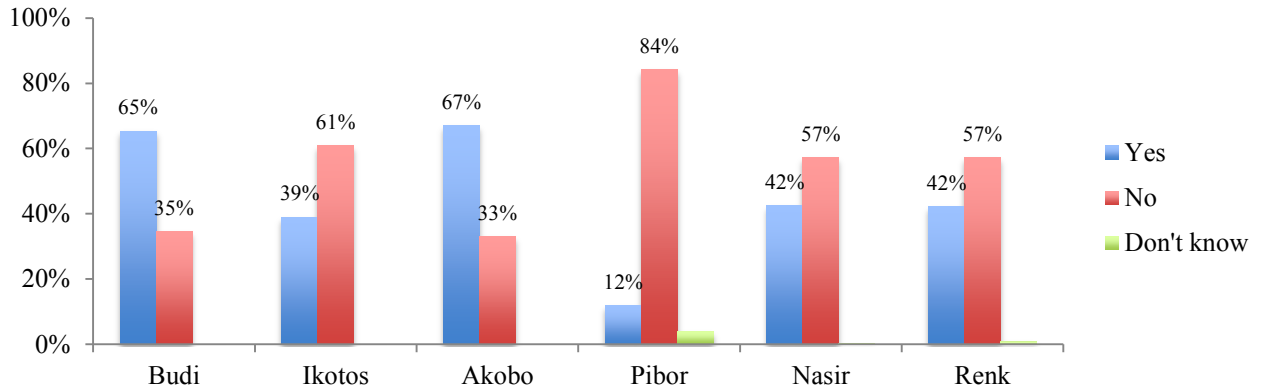
**Figure 36: Do You Support the Death Penalty?**



While overall, the majority of South Sudanese surveyed were opposed to capital punishment, opinions were considerably more varied at the county level. In Budi and Akobo, two counties that have experienced high levels of insecurity and inter-communal conflict in recent years, the majority of respondents were in favor of the death penalty (see Figure 37). Sixty-seven percent of the population in Akobo and 65 percent of the population in Budi supported the use of the death penalty for people convicted of murder. The high support for capital punishment in these areas may reflect frustrations associated with the dilemmas of accountability discussed in Chapter Three, in that residents of these areas may view harsher criminal punishments as a means of curtailing inter-communal violence, cattle theft and abductions.

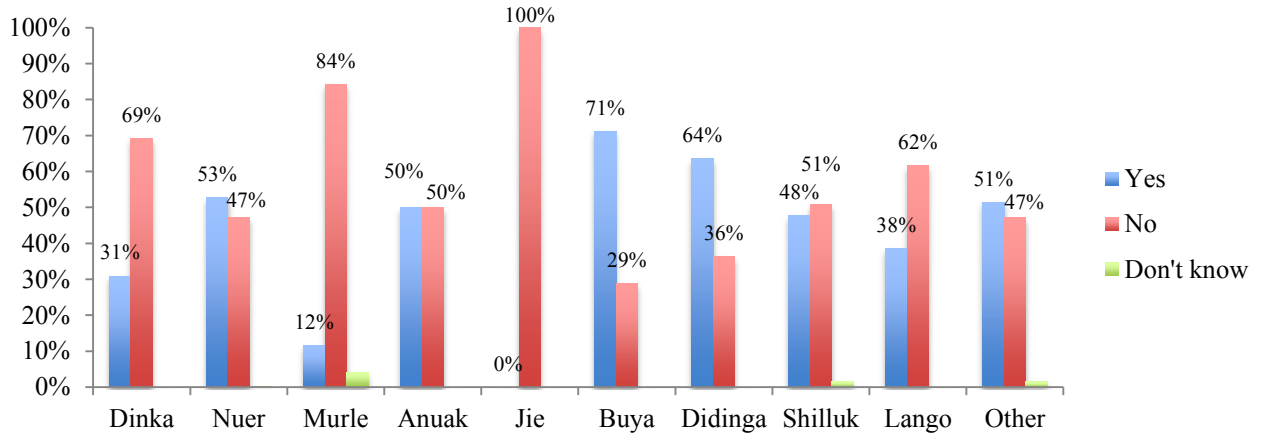
However, in Pibor, another county that has experienced high levels of conflict, 84 percent of respondents said that they did not support the death penalty (see Figure 37). There may be several reasons for this sharp difference. First, the Murle are a minority ethnic group with far less political power than some of their neighbors. Frustration with their current political situation, coupled with historical grievances, such as the SPLA's execution of Murle leaders in Ethiopia and the massacre of Murle civilians during the early years of the war, gives rise to a very real fear of persecution among many Murle. Their opposition to the death penalty may therefore be attributed, at least in part, to a distrust of the state. However, as mentioned above, Pibor is also among the most remote of the six counties and their opposition to the death penalty may also point to the important role that tradition and custom continue to play in Murle life, in that capital punishment is not traditionally sanctioned under customary law and may still be viewed as contrary to the Murle value system.

**Figure 37: Support for the Death Penalty by County**



Disaggregating the data by ethnicity confirms many of the observations above. The most support for the death penalty can be seen among the Nuer, Buya and Didinga ethnic groups, whereas the other ethnic groups seem more evenly divided (see Figure 38).<sup>148</sup>

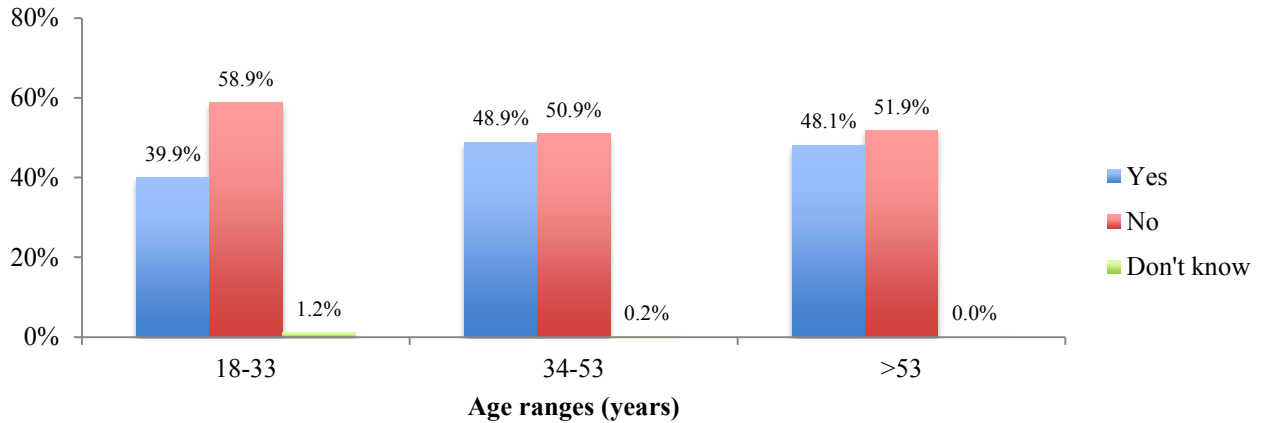
**Figure 38: Support for the Death Penalty by Ethnicity**



The data also suggests that younger people are more likely to oppose the death penalty, which may point to shifting attitudes on this issue in the postwar generation (see Figure 39).

<sup>148</sup> Only nine respondents identified as Jie and 12 identified as Anyuak, so these results should not be considered representative of these ethnic groups as a whole.

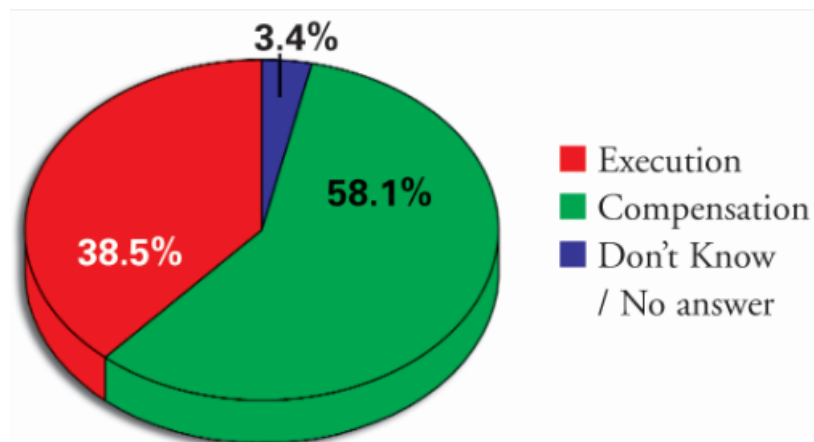
**Figure 39: Support for the Death Penalty by Age Range**



Compensation versus Execution

In order to determine respondent preferences for compensation versus punitive sanctions in relation to homicide, respondents were asked the following hypothetical question: ‘If someone murdered your family member and you were given the opportunity to choose between compensation and having the person executed, which would you most likely choose?’<sup>149</sup> Fifty-eight percent of respondents (n = 882) said they would choose compensation and only 38.5 percent of respondents (n = 584) said they would choose execution (see Figure 40). These results held at the county level as well, where a sizeable majority of respondents in every county except for Akobo said they would choose compensation rather than execution.<sup>150</sup> This corroborates the overall findings that the majority of rural South Sudanese living in these areas prefer compensation to capital punishment.

**Figure 40: Preferred Remedy for Murder**



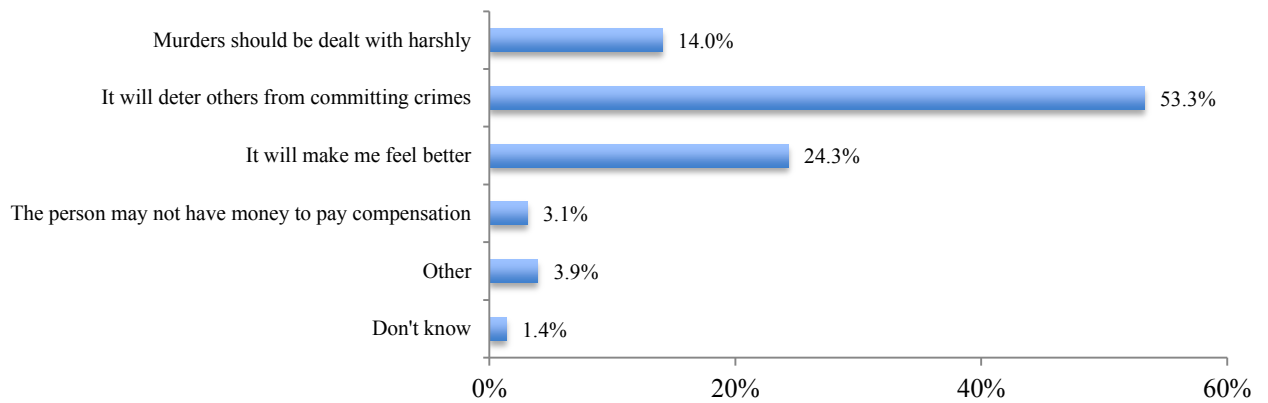
<sup>149</sup> Enumerators were told not to read the list of possible responses. Rather they allowed the respondent to answer freely and coded their response according to a list that was provided in the questionnaire.

<sup>150</sup> In Akobo, 51 percent of respondents said they would choose execution and 49 percent of respondents said they would choose compensation.



For those respondents who said they would choose execution, the most often cited rationale was deterrence. Fifty-three percent of respondents said they would choose execution because, ‘It will deter others from committing crimes’ (see Figure 41). The second and third most frequent responses are more closely aligned with the goals of revenge and retribution. Twenty-four percent of respondents said they would choose execution because, ‘It will make me feel better’ and 14 percent said they would choose execution because, ‘Murderers should be dealt with harshly’.<sup>151</sup> These findings reflect the high levels of frustration that many South Sudanese feel with the lack of accountability for homicides committed in rural areas and the harsh retributive sentiments that took root in many local societies during the war.

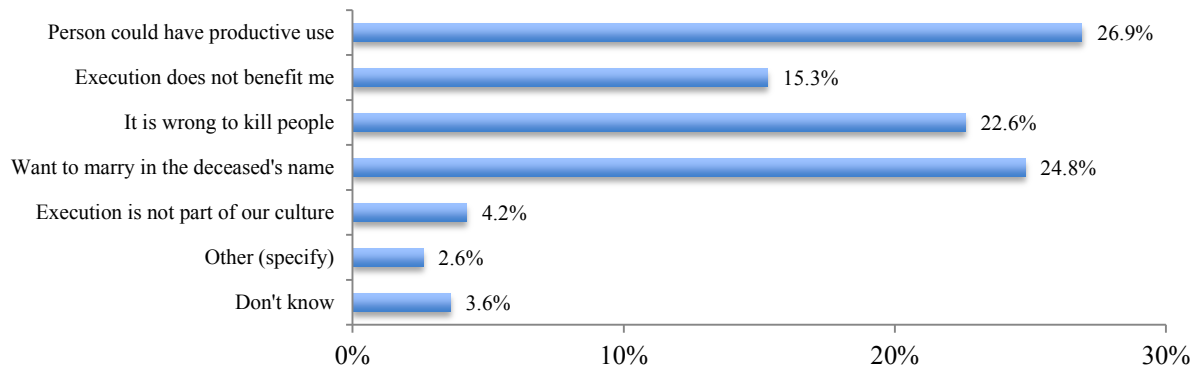
**Figure 41: Reasons for Choosing Execution**



For those who said they would choose compensation, their reasoning tended to be a bit more nuanced. The first and the third most often cited reasons were fairly straightforward. Twenty-seven percent of respondents said they would choose compensation because the person could have a productive use in society and 23 percent of respondents said they would choose compensation because, ‘It is wrong to kill people.’ However, the second most often cited response was that they would choose compensation because, ‘[They] want to marry in the deceased’s name’ (see Figure 42). This finding highlights the continuing importance of customary law in shaping people’s attitudes towards justice. As mentioned above, the customary law remedy of compensation is designed so that one of the deceased’s relatives can marry a woman and have children in his name.

<sup>151</sup> Similarly, at the county level, deterrence was the most often cited rationale, except in Pibor and Ikotos where the revenge rationale, i.e. ‘It will make me feel better’, was the most frequent response.

**Figure 42: Reasons for Choosing Compensation**



The most appropriate remedy for homicide in rural areas probably combines some aspects of the customary remedies and criminal sanctions. As mentioned in the previous chapter, chiefs are able to begin negotiating blood compensation fairly quickly, which can help to reduce the likelihood of revenge killings, but the state also has an interest in seeing perpetrators held accountable through criminal sanctions. Effective and consistent criminal sanction is frequently lacking in current approaches to addressing homicide in rural areas.

## **5.2 Attitudes on Adultery and an Approach to Reform**

The manner in which people view the crime of adultery also reflects certain discriminatory attitudes that pervade South Sudanese society. The 2008 Penal Code criminalizes adultery for both married men and married women. It states:

Whoever has consensual sexual intercourse with a man or woman who is and whom he or she has reason to believe to be the spouse of another person, commits the offence of adultery, and shall be addressed in accordance with the customs and traditions of the aggrieved party and in lieu of that and upon conviction, shall be sentenced to imprisonment for a term not exceeding two years or with a fine or with both.<sup>152</sup>

In practice, however, married men who have sex with women outside marriage are rarely, if ever, charged with adultery. This may reflect the fact that relationships between married men and unmarried women can be legitimized through marriage in polygamous societies.

In the past, customary law viewed adultery as an offense committed by men who sleep with other men's wives. The men would be required to pay compensation to the husband, but the women were not punished.<sup>153</sup> This perception of adultery as a male offense has changed somewhat in recent times, perhaps due to the influence of Islamic shari'a law, which views adultery as a crime committed by both married women and the men with

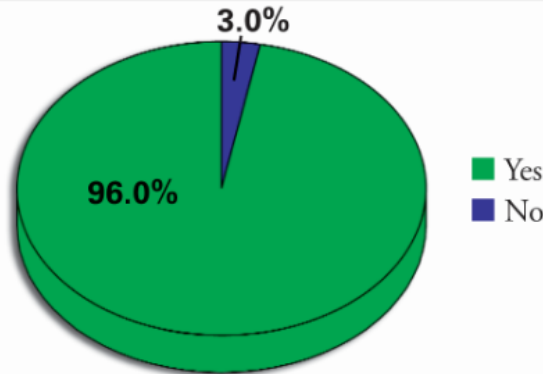
<sup>152</sup> Penal Code Act, ch. XIX, § 266.

<sup>153</sup> DENG, CUSTOMARY LAW, *supra* note 4, 44.

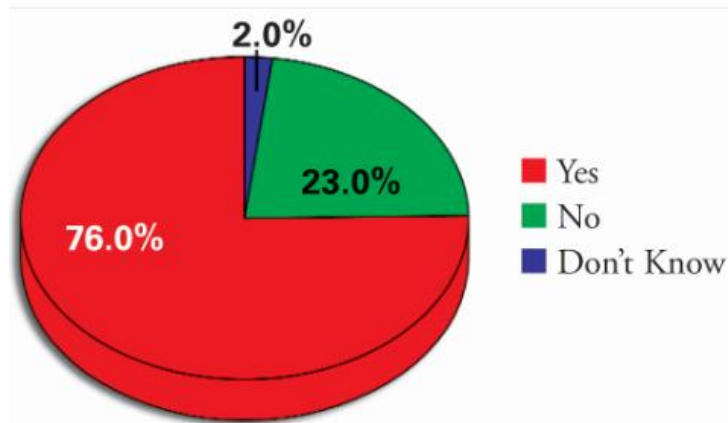
whom they have sex.<sup>154</sup> Female adulterers in South Sudan are now increasingly being punished with criminal sanctions, including imprisonment and corporal punishment.

Survey findings illustrate these changing beliefs and practices. Ninety-six percent of respondents thought that men who sleep with other men’s spouses should be punished, whereas only 76 percent of respondents thought that married women who sleep with someone other than their spouses should be punished (see Figure 43 and Figure 44). Disaggregating responses by gender does not show any significant differences in opinions on this issue.<sup>155</sup>

**Figure 43: Opinions on Punishing Male Adulterers**



**Figure 44: Opinions on Punishing Female Adulterers**

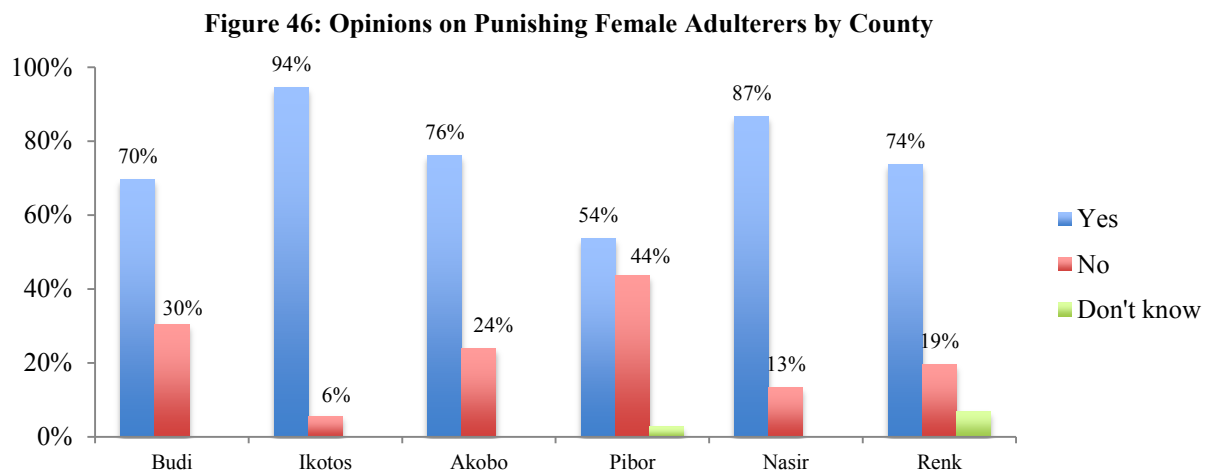
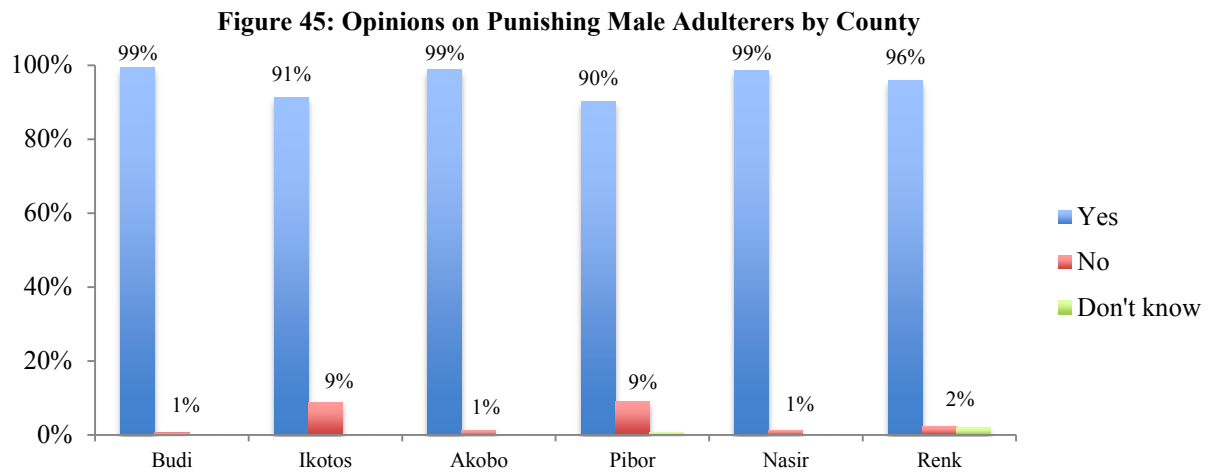


At the county level, the most opposition to the idea of punishing female adulterers was found in Pibor. Forty-four percent of respondents in Pibor said that female adulterers

<sup>154</sup> For example, Islamic *hudud* penalties, which are included in Sudanese criminal law though rarely enforced, allow the statute to amputate people’s hands for theft, stone people to death for committing adultery and flog people for distributing or consuming alcohol. *See id.*, 10.

<sup>155</sup> Ninety-six percent of men and woman thought that men who sleep with other men’s spouses should be punished. Twenty-one percent of men and 24 percent of women thought that married women who sleep with someone other than their spouse should be punished.

should not be punished (see Figure 46). Perhaps due to the relative isolation of much of Pibor County, Murle customary laws on adultery may have been less affected by external influences.



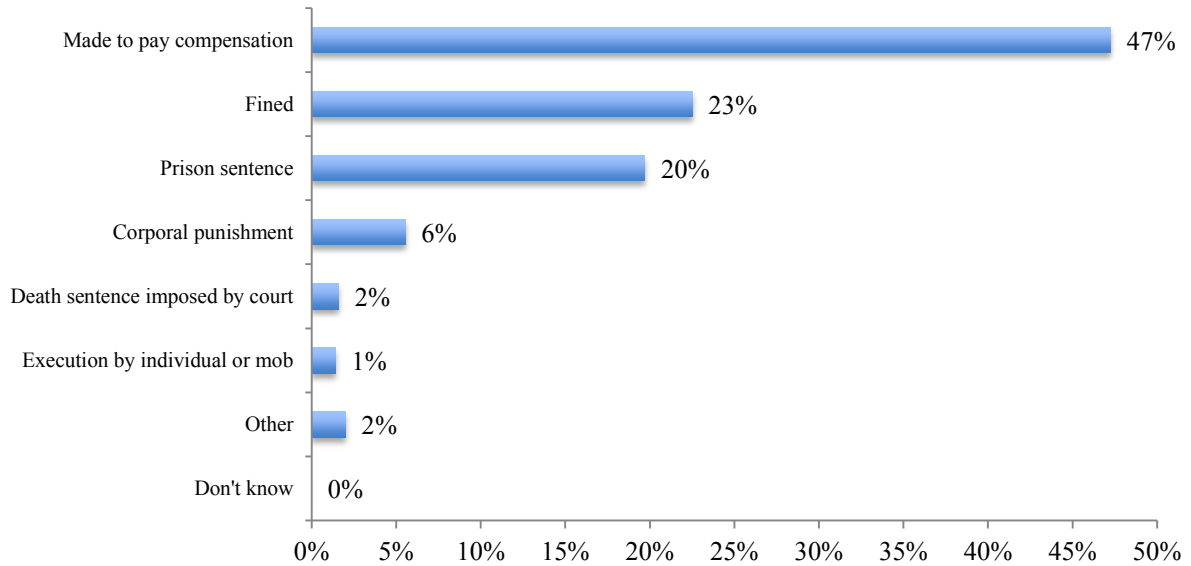
The preferred punishments for adultery also reflect the customary rule that requires male offenders to pay compensation to the husband, as well as the increasing use of criminal sanctions against female offenders. Customary courts traditionally obtain evidence of adultery by forcing women to confess to the crime. If they do not do so willingly, women can be coerced through threats of violence or corporal punishment. Men are not asked to confess. According to the late Peter Nyot Kok, a South Sudanese lawyer and academic, women have begun to protest against this approach to obtaining evidence:

And they put the case on the basis of equality. They want that rule also applied to men. Let the men be asked to confess, “Have you slept with other women?” Of course, it was not applied on the men. Women took that as a case of discrimination, “Look what is required of us, while the same thing is not required of men.” In Rumbek, it was actually abolished. So people no longer require women to confess.<sup>156</sup>

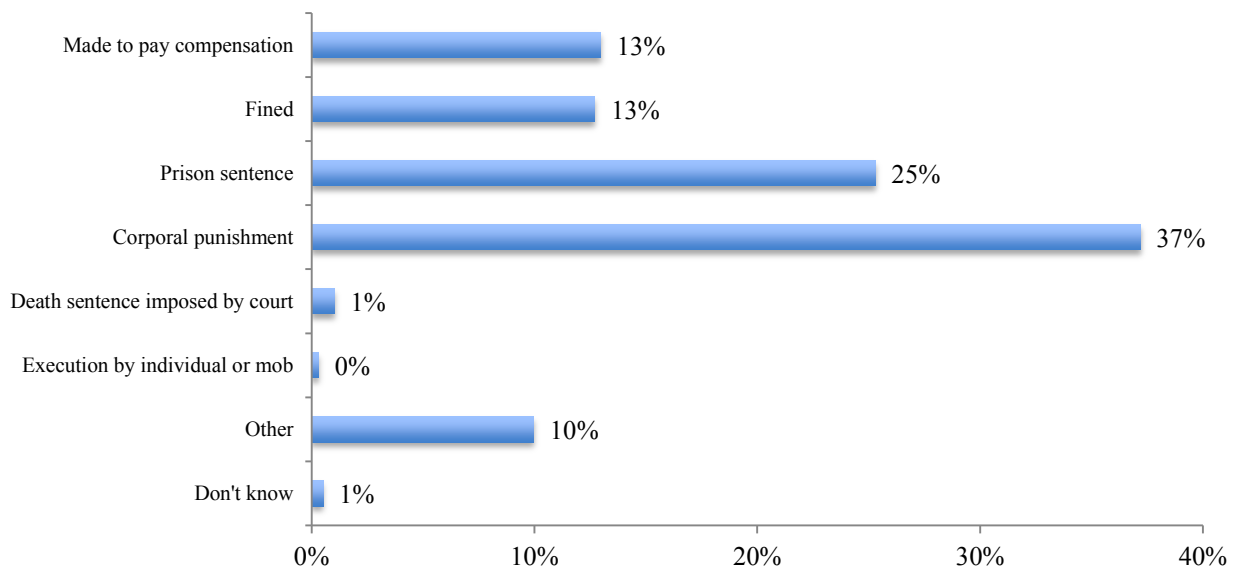
<sup>156</sup> DENG, CUSTOMARY LAW, *supra* note 4, 44.

Despite these calls for reform from some parts of the country, survey data suggested that populations in the six counties were comfortable with civil remedies being applied to male adulterers and criminal sanctions being applied to female adulterers. Forty-seven percent of respondents thought that male adulterers should be ‘made to pay compensation’ to the aggrieved husband (see Figure 47), 37 percent of respondents thought that female adulterers should be subject to corporal punishment, and 25 percent of respondent thought that female adulterers should be given a prison sentence (see Figure 48).

**Figure 47: Preferred Punishments for Male Adultery**



**Figure 48: Preferred Punishments for Female Adultery**



Though there are calls for the reform of discriminatory customary practices from women's groups and customary institutions, there is also a countervailing position that says any changes to customary law must be gradual and must come from within local societies. The tensions between these two positions have led to some controversy over the appropriate approach to the reform of discriminatory customary norms. According to Aleu Akechak Jok *et al.*:

There is no doubt the current status and role of women and children in southern Sudanese society must and will change. There are however, considerable questions concerning how best to bring these changes about. Much of southern Sudanese customary law has evolved to deal with personal issues of family, marriage, children and wealth. To attempt to impose revolutionary change in human and individual human rights, particularly those of women, would come in direct conflict with most customary law systems and impact upon the very foundations of the majority of southern Sudanese tribal societies. The consensus amongst southern Sudanese leaders is change must come from within and at a pace that does not threaten to destabilize a society already under pressure from a myriad of external and internal sources.<sup>157</sup>

While reforms must be carefully designed so as not to further destabilize customary systems, an approach that is overly cautious risks inaction. Cultural change is a dynamic process in which contestations for power among various groups in society often give rise to a degree of social instability and, at the same time, often lead to progress that benefits all members of society. Culture is not static in South Sudan and to silence the voices of South Sudanese women who are suffering at the hands of a justice system dominated by patriarchal interests could strangle the reform process, to the detriment of both South Sudanese men and women. Stifling reform also has implications for social cohesion, in that subjecting such a large segment of the population to unfair and discriminatory practices can undermine the strength of social bonds throughout society. In the words of the former Deputy Chief Justice of the Supreme Court, Bullen Paancol:

Women are known to have suffered in the past, even in Europe and America. Now, women are claiming their rights... We Sudanese must recognize that women must be brought up to equality with men. This should be the position of the law in my view. We should abrogate, modernize, or otherwise reform those areas of the law that seem to discriminate against women.<sup>158</sup>

It is only through the steady application of principles of non-discrimination backed by state power that the Government of South Sudan and its citizens can gradually change customary norms that subjugate women. While in the short-term such an initiative may provoke resistance from certain segments of society that benefit from the status quo, in the long-term it will result in stronger families and healthier relationships.

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<sup>157</sup> ALEU AKECHAK JOK *ET AL.*, A STUDY OF CUSTOMARY LAW, *supra* note 10, 8.

<sup>158</sup> DENG, CUSTOMARY LAW, *supra* note 4, 44.

## Concluding Remarks

Eight years after the end of the war and two years since independence, governance structures in South Sudan remain in a state of flux. Ambiguities in the relationships between institutions at the central, state and local levels continue to present fundamental challenges to building good governance and the rule of law, but the current transitional period also offers a number of opportunities. Power has not yet fully consolidated, bureaucracies have not become fully entrenched and people are open to new and innovative approaches. Policy-makers can take advantage of this opportunity to enact targeted and evidence-based reforms that bring benefits to populations that are otherwise marginalized and without access to social protection mechanisms. Among the public sectors most in need of urgent attention is the justice sector.

In county headquarters and surrounding payams, rural populations have access to an array of complaint mechanisms, ranging from mediation by friends, families and neighbors to adjudication in customary and statutory courts. These complaint mechanisms are able to process disputes at low cost and without significant administrative burden. However, in remote parts of the county far away from the relative security of the county seat, complaint mechanisms are much less accessible. Chronic insecurity at the payam and boma levels of government undermines local justice systems and renders chiefs susceptible to intimidation and assault by unruly parties. Areas where local residents are well armed and the police presence is thin have particularly weak local justice systems. As a result, lawlessness and conflict often go unchecked in remote areas.

The accountability gaps that arise in local justice systems can also cause people to adopt expedient solutions to difficult criminal law problems. One example can be seen in the manner in which customary courts allow homicides to be resolved at the local level through mediated solutions among willing parties. On the one hand, this approach can be seen as an efficient means of minimizing the potential for revenge killings and outbreaks of violence. On the other hand, resolving homicides as though they are purely civil matters contributes to an atmosphere of impunity, since perpetrators are left to go free without criminal sanction. The practice of girl child compensation is one example of how mediated solutions can place disproportionate burdens on the poor and vulnerable in society.

Justice sector reform in South Sudan must overcome a host of challenges. There are a number of disputes that neither the formal state justice system nor the more informal local justice system is able to resolve. Since the end of the war in 2005, large-scale inter-communal violence has proliferated in South Sudan. The perpetrators of this violence are able to kill, rape, abduct and loot with impunity. The existing complaint mechanisms are not able to provide justice for victims and their families. This causes individuals and groups to take matters into their own hands to punish the wrongdoers through reprisal attacks. Cycles of revenge killings have led to escalating violence in some rural areas.

Criminal investigations and prosecutions become even more difficult when the perpetrators have access to soft international borders and internal administrative

boundaries. Not only can they escape across borders to avoid capture by security personnel, but armed groups can also use cross-border trade to generate revenue and buy weapons and supplies. More effective coordination among local administrators across internal and external boundaries is necessary to address this justice gap.

Historical grievances associated with events that took place during the war are an ongoing source of instability in many rural areas. Blood feuds can last for decades among groups in South Sudan, and people's desire for revenge and retribution contributes to the volatility of many contemporary conflicts. Some local leaders have begun experimenting with isolated initiatives to settle these past grievances, and the government and its international partners should draw lessons from these attempts, but until people's historical grievances are addressed in a more visible and meaningful manner, they will continue to be sources of instability and conflict.

In addition to impunity for perpetrators of violent crime, there are a number of injustices that pervade the justice system itself. Customary courts are able to process many types of marital disputes and sexual crimes, but the manner in which they resolve these issues often serves to reinforce patriarchal power structures and does not adequately protect the rights of marginalized populations. Gender discrimination is a key concern in customary courts. Causes of action for crimes such as forced marriage, adultery and rape sometimes allow families to use the courts to force girls into unwanted marriages, enable domestic abuse and sexual violence and reinforce men's control over family wealth and property in contravention of statutory and constitutional law.

Many of these systems and principles are deeply embedded within social, political and economic processes in South Sudan, but the state should not shirk its responsibility to its citizens by channeling marital disputes and sexual crimes into male-dominated customary courts without providing access to a statutorily-based alternative. In this respect, the process of developing a family law that proscribes applicable standards for priority issues—such as the circumstances under which divorces may be granted in customary and statutory courts, the right of widows and their children to inherit property from their deceased husbands and the mandatory prosecution of perpetrators of domestic violence—should be expedited.

There is an urgent need for more specialized and focused research in order to better understand how local justice systems handle specific types of disputes and to explore the most appropriate approaches to reform. Some of the outstanding questions include:

- How can the government reform local justice systems to bring them in line with international human rights standards, while at the same time strengthening their enforcement capacity and increasing the types of remedies that are at their disposal?
- How do policy-makers balance the low cost and efficiency of customary courts against the lack of procedural safeguards and the discriminatory application of criminal punishments against those with less negotiating power in local societies?



- The Judiciary has not made public a single judicial opinion since it was established in 2005; how can the government and its international partners improve information flow and transparency in the justice system?
- What reforms are needed to strengthen the ability of local justice systems to seek accountability against criminal actors that wield political or military power?
- What are the implications of the increasing number of counties and the drawing of administrative boundaries on local justice systems?
- What are the different mechanisms by which historical grievances manifest in contemporary conflicts?
- What are the different ways in which illicit cross-border trade in the informal market affects conflict dynamics?

The challenges of accountability described in this report present obstacles to the creation of a fair and efficient justice system. A number of civil society organizations have begun to explore different models of legal aid in rural areas of South Sudan, but these efforts alone are not sufficient to address the myriad of concerns in local justice systems. Overcoming the obstacles to justice will require the sustained effort of the government and citizens of South Sudan as well as international partners.

## Annex I – Description of Project Areas

The six counties covered in this assessment may not necessarily be representative of the country as a whole, but they nonetheless demonstrate the diversity of rural areas in South Sudan. They include some of the most developed rural areas, and some of the least developed areas; groups that are on the political margins and groups that wield considerable power in government; peoples that are highly influenced by Arab-Islamic culture and peoples that have been largely isolated from external cultural influences.

There are also a number of common factors across the six counties. First, most of the counties, with the possible exception of Renk, have experienced large amounts of inter-communal violence in recent years, much of it crossing county administrative boundaries. As the findings show, the existing justice services are unable to manage these types of conflict-related crimes and the prevailing solutions are often short-term and political in nature.<sup>159</sup>

Second, all six counties lie on international borders. Budi and Ikotos share a border with Uganda; Akobo, Nasir and Pibor share a border with Ethiopia; and Renk shares a border with Sudan. Many of these can be described as ‘soft’ borders, which allow for the free movement of people and goods. These are also borders which neither South Sudan nor neighboring countries are able to effectively police.<sup>160</sup> The ease with which people move across internal and external boundaries generates a number of cross-border dynamics that are relevant to people’s ability to access justice, such as the escape of criminals and armed groups across international borders, the control of cross-border trade and the advantages that it offers to armed groups, arms smuggling and the implications of international conflict with Sudan. The government’s ability to manage these issues will be central in efforts to extend sovereignty to rural areas.

Lastly, all six counties are struggling with historical grievances that often have their roots in the wartime context. The foundational documents of South Sudan, including the CPA, Interim Constitution and Transitional Constitution, all highlight the importance of peace and reconciliation in the postwar period, but conversations about a national strategy to pursue accountability for atrocities committed during the war have proven to be deeply political and subject to a host of challenges.<sup>161</sup> In lieu of decisive action by the central

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<sup>159</sup> In a report on inter-communal conflict in Jonglei, the United Nations Mission in South Sudan (UNMISS) found: “While reconciliation processes and mediation may be an essential part of peace efforts to resolve inter-communal violence, the absence of any accountability mechanism has undoubtedly contributed to the increasingly brutal cycles of violence.” UNMISS, INCIDENTS OF INTER-COMMUNAL VIOLENCE, *supra* note 29, 28.

<sup>160</sup> See generally, DOUGLAS JOHNSON, RIFT VALLEY INSTITUTE (RVI), WHEN BOUNDARIES BECOME BORDERS: THE IMPACT OF BOUNDARY-MAKING IN SOUTHERN SUDAN’S FRONTIER ZONES (2010) [hereinafter JOHNSON, WHEN BOUNDARIES BECOME BORDERS].

<sup>161</sup> Comprehensive Peace Agreement, ch. II, pt. I, § 1.7 (2005) (stating that the “Parties agree to initiate a comprehensive process of national reconciliation and healing throughout the country as part of the peace building process); Interim Constitution of Southern Sudan, pt. III, ch. I, § 39(2)(b) (2011); Transitional Constitution of the Republic of South Sudan, pt. 3, ch. 1, § 36(2)(b) (stating that “All levels of government shall... initiate a comprehensive process of national reconciliation and healing that shall promote national

government, various local actors have begun to experiment with different approaches to resolving these issues on their own. In that sense, counties can act as ‘laboratories of experimentation,’ from which the government may gain insights into the opportunities and challenges associated with transitional justice in the South Sudanese context, as well as the problems that can arise when historical grievances are left unresolved.

Budi County, Eastern Equatoria State

Budi lies along the Ugandan border, close to the border with Kenya.<sup>162</sup> It has been a strategic base for the Sudan People’s Liberation Movement and Army (SPLM/A) ever since the Sudan Armed Forces (SAF) chased the rebel movement away from Torit in 1992.<sup>163</sup> The mountainous terrain of the Didinga Hills provided protection for the SPLM/A and its proximity to the border allowed easy access to incoming relief aid from the Kenyan supply town of Lokichoggio. The location also enabled SPLA officers and civilians to generate income through cross-border trade in various commodities, including cows, gold and small arms.<sup>164</sup>

The heavy military presence in Budi during the war generated friction between the SPLA and the local Buya and Didinga communities. According to Anne Walraet, some of the resentment can be traced to the SPLA’s forceful takeover of the cross-border trade.<sup>165</sup> Many Didinga who served in the SPLA also complained of what they saw as the Dinka-domination of the army. Local grievances reached a climax in 1999, when one of the top Didinga officers, Peter Lorot, missed a promotion that was given to a rival Dinka. Lorot responded by killing his rival and seeking refuge in the mountains. Approximately 16,000 Didinga civilians joined him.<sup>166</sup> The Didinga forces harassed the SPLA until 2006, when they were reintegrated into the SPLA.

In addition to the tensions with the SPLA, inter-communal violence is also common among the various groups residing in Budi and the neighboring areas. A particularly egregious incident occurred in 2007, when a group of heavily armed Toposa attacked a

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harmony, unity and peaceful co-existence among all people in Southern Sudan”). The government recently announced plans to begin a national reconciliation process, though it has led to considerable political tension. See *South Sudan’s Kiir withdraws executive powers from VP Machar*, SUDAN TRIB., Apr. 15, 2013, available at [http://www.sudantribune.com/spip.php?iframe&page=imprimable&id\\_article=46237](http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=46237).

<sup>162</sup> The county takes its name from the two main ethnic groups residing in the area: the Buya and Didinga (hence the name Bu-Di).

<sup>163</sup> The SPLM/A held two important conferences in Budi during the war: the first national convention in Chukudum in 1994, where, for the first time, the movement officially recognized the need for civilian governance structures independent from the SPLA and the 1996 conference in New Cush along the Ugandan border, in which the SPLM/A established the Civil Authority for the New Sudan (CANS), reaffirming its commitment to establish a decentralized civilian governance system. Despite these promising first steps, the SPLM/A has been largely unsuccessful at implementing the policies of decentralization endorsed in Chukudum and New Cush. See DOUGLAS JOHNSON, *THE ROOT CAUSES OF SUDAN’S CIVIL WARS*, INTERNATIONAL AFRICAN INSTITUTE, INDIANA UNIVERSITY PRESS (2003).

<sup>164</sup> Walraet, *Governance, violence and the struggle for economic regulation*, *supra* note 67, 56.

<sup>165</sup> *Id.*, 56, 58.

<sup>166</sup> *Id.*, 57.

Didinga village called Lauro.<sup>167</sup> The Toposa massacred 54 Didinga—48 of them women and children—and stole 400 goats and 400 heads of cattle.<sup>168</sup> A 2008 report from the Small Arms Survey (SAS) suggested that the attacks might have been an attempt to displace the Didinga and gain access to local pastures and gold fields, or else to punish the Didinga for their refusal to join a new political alliance between the Toposa and Buya.<sup>169</sup> An official investigation into the incident found that members of the SPLA and the Government of Southern Sudan may have benefited from the cattle thefts and used their influence to undermine efforts to prosecute the perpetrators.<sup>170</sup> Reports at the time also pointed to possible involvement by Khartoum.<sup>171</sup>

The ‘Lauro Massacre,’ as it became known, marked a period of increased tensions between the Buya and Didinga. In recent years, the Buya have even begun to lobby for their own county, separate from the Didinga.<sup>172</sup> The combination of fierce rivalries and heavily armed communities present an extremely complex political landscape for local justice institutions.

### *Ikotos County, Eastern Equatoria State*

Ikotos lies to the southwest of Budi. It was part of Torit until 2004, when it was made into a separate county.<sup>173</sup> The main ethnic group residing in the area is the Lango.<sup>174</sup> Ikotos saw relatively little fighting during the civil war, but when the SPLA entered the area in the mid-1980s, many Lango civilians were displaced to internally displaced person (IDP) camps in Torit, Juba and Khartoum, and refugee camps in Uganda and Kenya.<sup>175</sup> During the war, Ikotos hosted a flourishing blackmarket trade in small arms and ammunition. The trade was centered in Loguru market on the Ugandan border, just 19 kilometers from Ikotos town.<sup>176</sup> Loguru market was officially closed by the SPLM/A in 2003.<sup>177</sup>

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<sup>167</sup> The Toposas used a 12.7mm heavy machine gun, PKM general-purpose machine guns, Kalashnikovs, and G3 rifles, suggesting outside support. CLAIRE MCEVOY AND RYAN MURRAY, SMALL ARMS SURVEY (SAS), GAUGING FEAR AND INSECURITY: PERSPECTIVES ON ARMED VIOLENCE IN EASTERN EQUATORIA AND TURKANA NORTH 37 (2008) [hereinafter MCEVOY AND MURRAY, GAUGING FEAR].

<sup>168</sup> MAREIKE SCHOMERUS, SMALL ARMS SURVEY (SAS), VIOLENT LEGACIES: INSECURITY IN SUDAN’S CENTRAL AND EASTERN EQUATORIA 37-38 (2008) [hereinafter SCHOMERUS, VIOLENT LEGACIES].

<sup>169</sup> MCEVOY AND MURRAY, GAUGING FEAR, *supra* note 167, 24.

<sup>170</sup> SCHOMERUS, VIOLENT LEGACIES, *supra* note 168, 33.

<sup>171</sup> Walraet, *Governance, violence and the struggle for economic regulation*, *supra* note 67, 66.

<sup>172</sup> *Id.*, 64. The proliferation of counties and other administrative units in recent years will also affect customary court systems and new positions will open up for chiefs and other local government officials. However, to the extent that these new administrative units are based on ethnic identity, the drawing of new territories could serve to reify identities and widen the gulf between groups. It also fails to take into the account the dynamics of migration and changes in identity that take place over time. This criticism is sometimes attached to the decision to adopt the colonial administrative boundaries after Sudan’s independence in 1956. See ROLANDSEN, GUERRILLA GOVERNMENT, *supra* note 8, 22.

<sup>173</sup> OCHAN, RESPONDING TO VIOLENCE IN IKOTOS, *supra* note 52, 6.

<sup>174</sup> The Lango are comprised of six distinct sub-tribes: Lokwa, Dongotona, Ketebo, Logir, Lorwama and Imatong.

<sup>175</sup> OCHAN, RESPONDING TO VIOLENCE IN IKOTOS, *supra* note 52, 6.

<sup>176</sup> SCHOMERUS, VIOLENT LEGACIES, *supra* note 168, 50.

<sup>177</sup> SAS, SYMPTOMS AND CAUSES, *supra* note 33, 7.

Like Budi, Ikotos suffers from banditry, cattle-raiding and chronic violence. Large numbers of small arms in the civilian population contribute to the insecurity. According to a 2009 household survey by the Small Arms Survey (SAS), 63 percent of households admitted to owning at least one gun and one-third of respondents reported an incident of crime or armed violence against one of their household members in the last year—47 percent of these crimes were reported as killings.<sup>178</sup>

Though the security situation has improved somewhat in recent years, Ikotos had a reputation as an insecure location for much of the interim period. Some of this violence had political overtones. On August 20, 2007, for example, an estimated 48 people were killed in fighting between the Dongotono and the Logir sub-clans in Chorokol village. Five hundred nineteen heads of cattle were reportedly driven away, a number of children were killed, and 19 women were raped.<sup>179</sup> A parliamentary investigation at the time criticized the Ikotos County Commissioner, under the direction of the state Governor, for downplaying the conflict in Chorokol and not deploying military force quickly enough to arrest the perpetrators. “Our leaders at present are the integral part of the problem,” the report stated. “Until we begin to see Governorship as a stewardship bestowed by the people and consider leadership as a privilege, not a right, Eastern Equatoria state’s nightmare continues.”<sup>180</sup>

#### Akobo County, Jonglei State

Akobo, which is primarily comprised of Lou Nuer and Anyuak, was among the first rural councils established by the British colonial authorities. The location of the county headquarters has a strategic advantage in that it lies on high ground and is within walking distance of the Ethiopian border.

A general distinction can be drawn between Akobo East where the county headquarters are located and Akobo West, which borders the neighboring counties of Pibor and Urur. The two administrative centers are located about 180 kilometers from one another and all correspondence with Akobo West is done through satellite phones and radio communication. Local governance institutions in Akobo West are also less developed than those in Akobo East. As a result, the major security threats are usually encountered among populations residing in the west.

Justice issues in Akobo revolve around chronic fighting among the clans of Lou Nuer and between the Lou Nuer and surrounding groups, including the Murle of Pibor and the Jikany Nuer of Nasir. The inter-communal violence among these groups often crosses county administrative lines and has escalated dramatically since the signing of the CPA in 2005. Some analysts trace the increased violence to a series of coercive civilian disarmament campaigns that the SPLA administered between 2005 and 2008. The first

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<sup>178</sup> Interviews conducted by SAS suggested that at least every male community member over 20 years of age owned a gun in Ikotos, with some households having as many as eight to nine guns. *Id.* 6.

<sup>179</sup> MCEVOY AND MURRAY, GAUGING FEAR, *supra* note 167, 24.

<sup>180</sup> *Id.*, 25.

campaign met with stiff resistance from heavily armed Lou Nuer youth. By the end of the campaign, 3,000 guns had been collected and 1,600 Lou Nuer and SPLA soldiers were killed—approximately one death for every two weapons seized.<sup>181</sup>

These disarmament campaigns did little to reduce levels of violence in Akobo. According to a report on inter-communal violence in Jonglei state by UNMISS, local populations were able to rearm with little difficulty by looting stores of weapons that had been collected in the disarmament exercise. They were also able to access the armories of the Joint Integrated Units (JIU) in neighboring Upper Nile state during periods of insecurity in Malakal in 2008.<sup>182</sup> A series of raids and retaliatory attacks began soon thereafter, culminating in August 2011, when Murle raids on the Nuer reportedly resulted in the death of 640 people, kidnapping of 208 children, and displacement of 26,800 people, in just a matter of days. The August 2011 attacks were in retaliation for Dinka and Nuer raids on the Murle in June 2011, in which more than 400 people were killed and thousands of heads of cattle were stolen.<sup>183</sup>

In March 2012, while this assessment was being conducted, the SPLA began another disarmament campaign in Akobo. This time, a concurrent campaign was carried out in Pibor. Although local and international organizations documented a number of human rights abuses in relation to the disarmament exercise in Pibor, people in Akobo were largely satisfied with the manner in which the disarmament was conducted.<sup>184</sup> However, the security situation in Akobo has deteriorated in recent months. In February 2013, Murle militias under the command of a former politician-turned-rebel named David Yau Yau attacked a village located about 100 kilometers northwest of the county headquarters, killing more than 100 civilians, abducting an unspecified number of children and stealing thousands of heads of cattle.<sup>185</sup> Akobo residents complained that the disarmament process left them vulnerable to attack and blamed the government for failing to protect its citizens.<sup>186</sup>

### *Pibor County, Jonglei State*

With a land area of 33,273 square kilometers, Pibor is among the largest counties in South Sudan.<sup>187</sup> It is also among the most remote areas of the country. During the eight-month rainy season, travel by road to Pibor is virtually impossible. As a result, customary

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<sup>181</sup> RICHARD GARFIELD, SMALL ARMS SURVEY (SAS), VIOLENCE AND VICTIMIZATION AFTER CIVILIAN DISARMAMENT: THE CASE OF JONGLEI (2007).

<sup>182</sup> UNMISS, INCIDENTS OF INTER-COMMUNAL VIOLENCE, *supra* note 29, 6.

<sup>183</sup> Josh Kron, *Death Toll Passes 600 from Raid in South Sudan*, N.Y. TIMES, Aug. 22, 2011, available at <http://www.nytimes.com/2011/08/23/world/africa/23sudan.html>.

<sup>184</sup> According to the executive director, the disarmament process reduced levels of violence in Akobo to the extent that during the first three months of the process not a single homicide was reported to the county seat.

<sup>185</sup> *Jonglei: Hundreds feared dead or missing in Akobo county attack*, SUDAN TRIB., Feb. 10, 2013, available at <http://www.sudantribune.com/spip.php?article45461>.

<sup>186</sup> *Lou-Nuer chief criticise Juba for not protecting civilians*, SUDAN TRIB., Feb. 19, 2013, available at <http://www.sudantribune.com/spip.php?article45574>.

<sup>187</sup> GoSS, Statistical Yearbook, *supra* note 17, 12.

institutions provide most of the justice services for local populations without much support from formal state institutions.

The three main ethnic groups that reside in Pibor are the Murle, Jie, and Suri, the Murle being the largest of the three.<sup>188</sup> The Murle are an acephalous society that do not have any clear hierarchy of leadership. According to Jonathan Arensen, the main cohesive factor holding Murle society together is a highly functional age-set system, comprised of well-defined groups of men based on age.<sup>189</sup> Men rise to prominent positions in age sets based on their popularity and ability. Arensen says that the most important position is that of a talented fighter whom the Murle call, *eet ci oronto* (“the man who owns the war”).<sup>190</sup>

In the past, Murle chiefs had some influence over the age set system through their perceived power to bless and curse. This influence is thought to be waning in recent years. The lack of effective social controls over the age set system may be a factor in the dramatic increase of inter-communal violence between the Murle, Lou Nuer and Dinka. In December 2012, in the aftermath of a series of escalating raids and counter raids between the Murle and the Lou, an army of six to eight thousand Lou Nuer launched an organized attack on Pibor town.<sup>191</sup> Local officials claim that more than 3,000 people were killed, including a disproportionate number of women, children and the elderly, but UNMISS investigations were only able to verify a fraction of those deaths.<sup>192</sup> To date, there has been little or no accountability for the perpetrators of these atrocities.

In an effort to contain the violence in this part of Jonglei, the SPLA began a forceful disarmament campaign in Pibor in March 2012. Amnesty International and Human Rights Watch documented a range of human rights abuses associated with this disarmament campaign, including incidents of soldiers shooting at civilians, subjecting them to beatings, tying them up with rope, and submerging their heads in water to extract information about the location of weapons.<sup>193</sup> The security situation deteriorated further

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<sup>188</sup> Most Murle are pastoralists, but the highland Murle living near the Ethiopian border are primarily agriculturalists. According to Jonathan Arensen, the Murle were the last tribe pacified by the British in 1912. ARENSEN, CONTEMPORARY ISSUES FACING THE MURLE, *supra* note 82.

<sup>189</sup> ARENSEN, MURLE POLITICAL SYSTEMS AND AGE-SETS, *supra* note 6.

<sup>190</sup> *Id.*

<sup>191</sup> A Nuer prophet named Dak Kueth Deng took a leading role in mobilizing the Lou Nuer youths in these attacks. Dak Kueth and his followers have had several deadly encounters with SPLA forces, but they have largely avoided capture and disarmament by crossing into Ethiopia. See *SPLA attack tribal leader on Ethiopian border, five soldiers killed*, SUDAN TRIB., Dec. 19, 2012, available at <http://www.sudantribune.com/spip.php?article44914>; *Jonglei “magician” influential in inter-ethnic conflict*, SUDAN TRIB., Apr. 10, 2012, available at <http://www.sudantribune.com/spip.php?article42180>; *S. Sudan’s Machar calls on Jonglei spiritual leader to peacefully disarm*, SUDAN TRIB., Mar. 24, 2012, available at <http://www.sudantribune.com/spip.php?article42006>.

<sup>192</sup> UNMISS investigations found that at least 612 Murle had been killed, including at least 88 women and 88 children. Eyewitnesses reported a further 294 deaths of non-family members. In addition, more than 370 people were unaccounted for after the attacks, including at least 42 children, some of whom were believed to have been abducted. Local officials dispute UNMISS’ death toll and assert thousands were killed in the attacks and that UNMISS failed to undertake its investigation in a timely manner. UNMISS, INCIDENTS OF INTER-COMMUNAL VIOLENCE, *supra* note 29, 12.

<sup>193</sup> *South Sudan: End Abuses by Disarmament Forces in Jonglei*, HUMAN RIGHTS WATCH, Aug. 23, 2012, available at <http://www.hrw.org/news/2012/08/23/south-sudan-end-abuses-disarmament-forces-jonglei>;

in April 2012, when David Yau Yau, a former rebel who had previously signed a peace deal with the government, again took to the bush to lead an insurgency in Pibor. Yau Yau launched his initial rebellion in 2010, when he lost an election campaign to represent Gumuruk-Boma constituency in the Jonglei State Legislative Assembly.<sup>194</sup> He was then granted an amnesty by President Salva Kiir and rejoined the SPLM/A. Yau Yau again rebelled in April 2012 following the reports of abuses committed in the context of the disarmament campaign.<sup>195</sup>

This sequence of amnesties followed by rebellions followed by amnesties has been repeated time and again in postwar South Sudanese politics. While political appeasements have provided short-term solutions in terms of bringing potential spoilers into the peace-building process, in the long-term the lack of accountability serves to incentivize politically motivated violence.

### Nasir County, Upper Nile State

Nasir lies along the Sobat River and is mostly occupied by the Jikany Nuer. With a population of 210,000, Nasir is the most populous of the six counties studied.<sup>196</sup> During the war, Nasir was a key hub for Operation Lifeline Sudan (OLS), a major humanitarian effort coordinated by the United Nations that delivered services to the South from 1989 to 1997. It is also a prominent transit point for goods and services coming into South Sudan from Ethiopia.

From the early 1990s until the end of the civil war in 2005, the Jikany Nuer and the Lou Nuer were in regular conflict with one another. The root causes of the conflict were varied, and included food insecurity, the increased return of Nuer populations from Ethiopia to South Sudan, and disputes over land and other natural resources. Lou Nuer youths seasonally migrate into Jikany territories to access pasture and water for their livestock, where they come into conflict with Jikany residents. The violence was exacerbated by the deprivations of war and certain political fractures that the SPLA went through in the early-1990s. A cross-border land dispute that involved Nuer populations in Ethiopia was also an on-going source of tension.<sup>197</sup>

After the signing of the CPA in 2005, the relationship between the Jikany and the Lou

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AMNESTY INT'L, LETHAL DISARMAMENT: ABUSES RELATED TO CIVILIAN DISARMAMENT IN PIBOR COUNTY, JONGLEI STATE (2012), available at <http://www.cmi.no/file/2144-AI-South-Sudan-Lethal-Disarmament.pdf>.

<sup>194</sup> SMALL ARMS SURVEY (SAS), HUMAN BASELINE SECURITY ASSESSMENT, DAVID YAUYAU REBELLION, JONGLEI STATE (Feb. 2011), available at <http://www.sudantribune.com/IMG/pdf/HSBA-Armed-Groups-Yauyau.pdf>.

<sup>195</sup> *South Sudan David Yau Yau defects for the second time*, SUDAN TRIB., Apr. 9, 2012, available at <http://www.sudantribune.com/South-Sudan-David-Yau-Yau-defects,42170>.

<sup>196</sup> GoSS, Statistical Yearbook, *supra* note 17, 11.

<sup>197</sup> INT'L CRISIS GROUP (ICG), JONGLEI'S TRIBAL CONFLICTS: COUNTERING INSECURITY IN SOUTH SUDAN (Dec. 23, 2009) [hereinafter ICG, JONGLEI'S TRIBAL CONFLICTS], available at [http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Jongleis%20Tribal%20Conflicts%20Countering%20Insecurity%20in%20South%20Sudan.pdf](http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/sudan/Jongleis%20Tribal%20Conflicts%20Countering%20Insecurity%20in%20South%20Sudan.pdf)



temporarily improved, before deteriorating again in 2009.<sup>198</sup> A longstanding land dispute between the Jikany and Lou was at the heart of the initial skirmishes. A group of Lou had reportedly occupied an area called Wanding payam during the war. In January 2009, after a series of consultations, the administration of Wanding was transferred from Jonglei to Upper Nile and many of the Lou were asked to leave. Later that year, a group of Lou Nuer staged an attack on a village called Torkeij in Nasir, allegedly as revenge for violence associated the land dispute and other crimes perpetrated between the two groups.<sup>199</sup> Seventy-one people were killed and more than 50 injured, many of them women and children. The violence culminated in a June 2009 Jikany attack on a World Food Program (WFP) convoy that was reportedly taking food to at-risk Lou groups in Akobo.<sup>200</sup> An estimated 119 people were killed, including 30 Jikany Nuer and 89 SPLA soldiers. Sixteen boats were looted, and five destroyed.

### Renk County, Upper Nile State

Renk lies along the Nile River on the border between Sudan and South Sudan and is the most developed of the six counties in the project area. Although Renk town is a diverse urban area and has residents from a number of South Sudanese ethnic groups as well as a rather large number of Sudanese, the payams outside of town are almost entirely occupied by the Dinka Abialang.<sup>201</sup> As historian Douglas Johnson writes in *When Boundaries Become Borders*:

Renk ...has long been an intersection of northern-based commerce and northern-financed pump irrigation agricultural schemes along the Nile. There has thus been a long period of interaction between the Abialang Dinka and Northern Sudanese merchants and administrators. Many (if not most) of the Abialang are bilingual in Dinka and Arabic; many are also Muslim.<sup>202</sup>

Another distinguishing factor of Renk are the large-scale mechanized farming schemes that expanded into parts of Upper Nile State in the 1970s. There are currently nearly 500,000 hectares of mechanized farming schemes that have been established in Renk, Manyo and Melut counties.<sup>203</sup>

These farms have been the scene of a simmering international conflict between Sudan and South Sudan in recent months. In August 2012, SPLA spokesperson Phillip Aguer

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<sup>198</sup> Violent conflict killed an estimated 2,500 people and displaced 350,000 people in 2009. For a time, the death toll in South Sudan surpassed that of Darfur. *Id.*

<sup>199</sup> According to the ICG, in the months preceding the attack on Torkeij there were a series of cattle thefts between the Jikany and the Lou, a Jikany trader was murdered in Akobo and abductions of Lou children were reported. ICG, JONGLEI'S TRIBAL CONFLICTS, *supra* note 197, 7.

<sup>200</sup> There were also rumors that the boats were carrying weapons and supplies to the Lou Nuer youth. See ICG, JONGLEI'S TRIBAL CONFLICTS, *supra* note 197.

<sup>201</sup> The Abialang occupy the northernmost point of the Padang Dinka belt, which stretches westwards to Abyei and southwards into Upper Nile and Jonglei states.

<sup>202</sup> JOHNSON, WHEN BOUNDARIES BECOME BORDERS, *supra* note 160, 69-70.

<sup>203</sup> DAVID K. DENG, NORWEGIAN PEOPLE'S AID (NPA), THE NEW FRONTIER: A BASELINE SURVEY OF LARGE-SCALE LAND-BASED INVESTMENT IN SOUTH SUDAN 18 (2011), *available at* <http://www.commercialpressuresonland.org/research-papers/new-frontier-baseline-survey-large-scale-investment-southern-sudan>.

reported that a group of 80 mercenaries accompanied by Sudan Armed Forces (SAF) occupied a farm in Renk, about 20 kilometers south of the border with Sudan.<sup>204</sup> This occupation followed on the heels of other attack that killed several civilians and SPLA soldiers. According to Aguer, the SPLA did not respond militarily after the initial battles. On December 3, 2012, the Sudan Armed Forces (SAF) reportedly attacked Um-Dolwich agricultural scheme in Renk. Government representatives said that four SPLA soldiers were killed, one was missing in action and another was taken prisoner.<sup>205</sup> These skirmishes reflect the heightened tensions between the two governments in the wake of South Sudan's independence. Renk's border with Sudan is also one of several border areas that are in dispute between the governments of Sudan and South Sudan.<sup>206</sup>

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<sup>204</sup> Elizabeth Janaina, *Sudanese mercenaries occupy Renk farm*, SUDAN CATHOLIC RADIO, Aug. 30, 2012, available at <http://www.mail-archive.com/southsudankob@googlegroups.com/msg06333.html>; S. Sudan Governor: warmongering Sudan attacked Upper Nile agricultural project, SUDAN TRIB., Aug. 19, 2012, available at <http://www.sudantribune.com/spip.php?article43624>.

<sup>205</sup> Letter dated 8 December 2011 from the Acting Permanent Representative of the Republic of South Sudan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/763, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sudan%20S%202011%20763.pdf>.

<sup>206</sup> JOHNSON, WHEN BOUNDARIES BECOME BORDERS, *supra* note 160, 68-74.

## Annex II – GLOSSARY

<i>Abduction</i>	Forcible taking of a person against their will. Covers a range of practices, including human trafficking for the purposes of economic or sexual exploitation, the abduction of women and children in order to expand family size and generate income through bridewealth payments, kidnapping, and the taking of captives during war. In some areas of South Sudan abduction is associated with large scale inter-communal violence.
<i>Access to justice</i>	Ability of a complainant to have his or her complaint or dispute addressed by a third-party with a minimum degree of fairness and efficiency in process, outcome, and enforcement.
<i>Accountability gap</i>	A systemic failure to punish wrongdoers for their wrongs and obtain redress for victims.
<i>Adultery</i>	For survey purposes, adultery occurs when a married woman has sexual relations with someone other than her husband. Adultery is a crime in South Sudan. Married men who have sex with unmarried woman are rarely charged with adultery, in part because the relationship can lead to marriage in South Sudan's polygamous society. However, they are often required to marry the woman or make a payment to the woman's family in compensation for woman's family's loss of potential bridewealth not for the crime of adultery.
<i>Ad hoc complaint mechanisms</i>	Justice services that are created to address a particular issue of concern. Examples include special courts and mobile courts or government officials visiting rural areas for the purpose of resolving certain disputes.
<i>Assistance preference</i>	For survey purposes, assistance preferences refer to people's preferences for the type of third-party dispute resolution they prefer. The survey looked at both people's actual choices and the choices that they think they would make if confronted with a particular type of dispute.

<b><i>Blood compensation</i></b>	A practice under customary law by which the family or relations of a person accused of committing homicide pay compensation, often in cattle and occasionally in girl children, to the family of the deceased.
<b><i>Capital punishment</i></b>	Death by hanging for committing capital offenses, such as murder or treason.
<b><i>Civil remedy</i></b>	Legal action designed to address a civil wrong, such as a breach of contract or a harm caused by negligence, by providing a remedy to the victim. Examples of civil remedies include compensation, damages, or injunctions.
<b><i>Complaint mechanisms</i></b>	Formal and informal dispute resolution processes and institutions.
<b><i>Criminal penalty</i></b>	Punishment designed to sanction people convicted of a crime, via a penalty administered by the state. Examples include fines, prison sentences, and the death penalty.
<b><i>Customary law</i></b>	A body of mostly unwritten rules and practices that through long usage and general acceptance are used to structure social relations within and between communities. Customary law varies throughout South Sudan.
<b><i>Customary courts</i></b>	A system of courts at the local level that are presided over by chiefs or other traditional authorities. Disputes brought to customary courts are mediated and adjudicated primarily by that community's customary laws. This includes customary courts at the county, payam, and boma levels as well as town bench courts.
<b><i>Debt</i></b>	Obligation owed from one party (debtor) to another party (creditor) by virtue of assets that the creditor granted to the debtor. Debts in South Sudan typically come in the form of money, cattle, or other livestock
<b><i>Dispute incidence</i></b>	For survey purposes, the number of times that a household member experienced a particular crime or dispute in the last two years.

<b><i>Dispute trajectory</i></b>	The sequence in which people utilize different dispute resolution processes (courts, mediation by family, etc.) when seeking justice for perceived wrongs.
<b><i>Enforcement gap</i></b>	A systemic obstacle to the enforcement of decisions from rule of law and governance institution.
<b><i>Enumeration areas</i></b>	Relatively small geographical subunits in South Sudan that the National Bureau of Statistics (NBS) uses to organize the national census and other data collection activities.
<b><i>Extra-judicial settlement</i></b>	Resolution to a dispute that is reached outside of customary or statutory courts.
<b><i>Forced marriage</i></b>	Coercing a male or female, often a younger person, to marry someone against their will. Often accompanied by violence, threats of violence, or threats to expel the unwilling, and often underage, party from the household.
<b><i>Forum shopping</i></b>	Attempts by a complainant to have his or her dispute tried in a particular court or jurisdiction where he or she expects to receive the most favorable judgment. In South Sudan this includes the decision to take disputes to courts that would rely on customary law or a court that may rely on statutory law.
<b><i>Girl child compensation</i></b>	Customary practice by which a person who has committed a homicide transfers custody over a girl relative to the family of the deceased to compensate them for their lost family member.
<b><i>Homicide</i></b>	Act of a human killing another human, whether intentionally or unintentionally.
<b><i>Household member</i></b>	A person who regularly lives and eats at a particular residence.
<b><i>Magistrate</i></b>	Alternate term for a judge in a county-level statutory court.
<b><i>Mobile judges</i></b>	Statutory court judges that are deployed to areas where statutory courts are weak or non-existent to

adjudicate disputes, remaining in a particular area for a limited period of time.

***Murder***

Crime in which a human intentionally and unlawfully kills another human with premeditation.

***Legal pluralism***

Existence of multiple and overlapping systems of law within the same legal order.

***Local justice systems***

Diverse array of formal and informal dispute resolution processes that exist at the local level. Includes both statutory and customary courts and informal mediation and other non-institutional mechanisms.

***Physical assault***

For survey purposes, physical assault is synonymous with fighting, and may or may not include a weapon.

***Premarital sex***

For survey purposes, covers problems relating to sex before marriage. Some customary law systems criminalize premarital sex, particularly if a pregnancy ensues.

***Rape (forcible)***

Act of forcing someone to engage in sexual intercourse against her or his will.

***Rape (marital)***

Act of forcing a marital partner to engage in sexual intercourse against her or his will. Marital rape is not a crime under South Sudan's 2008 Penal Code Act.

***Rape (statutory)***

Sex in which one person is below the statutorily prescribed age required to legally consent to the behavior. In South Sudan, minors below age 18 are not considered to have the legal capacity to consent to sexual intercourse. The 2008 Penal Code Act exempts married couples from this restriction.

***Special courts***

Courts established by the President of the Supreme Court to address particular issues of concern in a particular area. Judges may be legal professionals or traditional authorities. Special courts have been established to adjudicate cattle raiding incidents in Lakes State and a land dispute in Jonglei.

***Spousal neglect***

For survey purposes, spousal neglect includes marital disputes that did not necessarily involve violent assaults. Examples of spousal neglect claims that often arise in customary courts include men who do not support their wives and children or women who refuse to cook for their husbands.

***Statutory law***

Rules and principles that are derived from the Transitional Constitution and legislation passed by the National Legislative Assembly as well as other past legislative bodies.

***Theft***

Unlawful taking of another person's property without that person's consent. The main forms of theft in South Sudan are petty theft and cattle theft.

***Time to resolution***

For survey purposes, time to resolution reflects the amount of time that it took for a particular forum to mediate, adjudicate or otherwise process a particular dispute. It does not necessarily mean that the dispute was ultimately resolved by that forum; some disputes were left unresolved while others were brought to different forums.

***Town bench court***

Customary court typically based in the county administrative headquarters. Tends to handle a more complicated class of cases than that which are addressed in customary courts at the payam and boma levels. In some areas they are colloquially referred to as a High Court.