NORWEGIAN
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CUSTOMARY LAW AND LAND RIGHTS IN SOUTH SUDAN

Information, Counseling and Legal Assistance (ICLA) Project

South Sudan

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GLOSSARY AND ABBREVIATIONS

Boma	Administrative unit in South Sudan under Payam administration
CES	Central Equatoria State
CPA	Comprehensive Peace Agreement
GoSS	Government of South Sudan
ICLA	Information, Counseling and Legal Assistance
ICSS	Interim Constitution of South Sudan
MoPI	Ministry of Physical Infrastructure
LPOs	Land and Property Officers
NBeG	Northern Bahr el Ghazal
NRC	Norwegian Refugee Council
Payam	Administrative unit in South Sudan under County administration
S.	Section (provision contained in an Act)
SPLM/A	Sudan People's Liberation Movement/Army
SSP	South Sudanese Pound (1 SSP = approx. 3.5 USD)
TCSS	Transitional Constitution of South Sudan

DISCLAIMER

The contents of this report do not necessarily represent the policies of NRC. The author is responsible for any errors or omissions.

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EXECUTIVE SUMMARY

Customary ownership and control of land is an essential component of any consideration of land tenure and access in South Sudan and Africa in general. Customary traditions of land tenure emphasize moderate use, restoration, and community health and prosperity. Returnees to South Sudan access land primarily through the customary system. Yet, many returnees are subjected to corrupt practices or are simply unaware of their rights both within and beyond the customary systems. Displaced women are particularly vulnerable.

The following study combines literature review of customary traditions of land tenure with a three-week field study in three states of South Sudan: Northern Bahr el Ghazal, Warrap and Central Equatoria. The purpose of the study is to document current practices in customary land allocation and dispute resolution to inform NRC programming that supports returnee and other vulnerable populations to access land and gain greater control over their land. The study revealed a complex, dynamic, constantly evolving state of plural land tenure systems. Traditional systems of land tenure have changed in many parts of the study area due to increased pressure on land and the interests of the government in owning and controlling greater areas of land. Surveying and titling efforts have interrupted traditional patterns of land use and created opportunities for both rent-seeking and inequitable distribution of land, with a disproportionate number of the victims being returnees or women. The study suggests eight categories of recommendations for how NRC can tailor its programming to address these growing areas of inequality:

1. *Community legal education and information dissemination*
2. *Monitoring of allocation and disputes resolution*
3. *Advocacy with local officials*
4. *Advocacy with senior officials at national level*
5. *Legal assistance to navigate between systems*
6. *Strategic litigation*
7. *Support to strengthen and professionalize customary justice systems*
8. *Heighten focus on women's rights*

1. OBJECTIVES

General Objective

Understand the effect of customary law and customary justice systems on land allocation, use, ownership and the resolution of land disputes.

Specific Objectives

- Enhance the general understanding of customary law and practice as it relates to land in South Sudan;
- Identify the protection implications of customary practices for vulnerable groups, in particular women; and
- Identify entry points and inform programmatic approaches to land under NRC's ICLA project.

2. METHODOLOGY

Research methodology combined desk study and literature review with field-based observations through interviews, ICLA client focus groups and court observation over a two-month period, starting 23 November 2011. Deskwork examined customary principles of land across the tribes of South Sudan, but focusing more on the Dinka and Bari – the two main tribes in the project area. Recent and past research in Africa and elsewhere was also analyzed to delineate the dynamics between customary and statutory-based systems of land tenure, including analysis of the new South Sudan land legislation. Literature review also included broader reviews of legal pluralism and post-conflict customary justice efforts, with a focus on South Sudan and customary land law programming in other countries in Africa.

In-country research took place over a three-week period (30 November to 18 December), with approximately five days in each of the targeted regions of Northern Bahr el Ghazal (NBeG), Warrap and Central Equatoria (CES).

Information was gathered using three methodologies, to ensure triangulation and more accurate information:

- Focus groups with community groups and citizens, including ICLA clients in displaced communities, on major land issues affecting their communities and the role of customary law and chiefs in affecting access to land;
- Interviews with chiefs and government officials, especially local Land Administration authorities, on land-related issues and the relationship between formal and customary institutions; and
- Interviews with ICLA staff to determine current thematic foci, programmatic approaches relating to land, and challenges for working with targeted populations and customary institutions.

Field work attempted to directly observe customary courts in each region to determine user composition and the range of issues covered by the courts. Time was, however, too limited to observe an adequate range of cases and employ local enumerators to document. A more extensive court observation study would be beneficial.

Research focused on qualitative measurements of the use of customary law and justice systems in affecting land tenure, rather than attempting quantitative measurements such as the percentage of users of customary systems, or the frequency of land cases at customary courts.

Some state-specific comments on research methodology:

Northern Bahr el Ghazal: Chiefs in Aweil Town, East and West Counties were interviewed and focus groups conducted with women returnees from Khartoum, ICLA clients, and other community beneficiaries and returnee populations. Interviews were also held with a number of payam, county and state authorities and in-depth discussions with ICLA Land and Property Officers.

Warrap: Chiefs and government officials were interviewed in Gogrial, Alek and Kwajok in Warrap State. Ad hoc focus groups were held with returnees on the outskirts of Kwajok and with community members around Alek. Discussions with ICLA Land and Property Officers (LPOs) were also very helpful.

Central Equatoria: Interviews were held with chiefs, the CES State Director of Housing and focus groups conducted with a number of ICLA clients. Land issues were also discussed with a number of NGO and international project staff.

A full list of interviewees and research activities is listed in Annex IV.

3. BACKGROUND AND LITERATURE REVIEW

Customary Law and Legal Pluralism in Africa

Legal pluralism has a mixed history in Africa. While recognized as important to the cultural history of many countries, multilateral agencies and investment firms have long promoted legal monism – single, unified systems that provide foreign investors with a more familiar legal platform. This emphasis on developing foreign monist legal systems at the expense of familiar indigenous systems has been identified as a factor in the disenfranchisement of the poor, rural and less educated in African societies.[1] The West's insistence on its view of proper governance and legal systems has straitjacked African constitutional debates by circumscribing the possibility of local, pluralist responses to law and rights.

African legal pluralism has much of its origins in the colonial experience, where two co-existing

[1] *E.g.,* Lauren Benton (1994) "Beyond Legal Pluralism: Towards a New Approach to Law in the Informal Sector"; McAuslan, Patrick *"Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?" from* Land Rights for African Development: From Knowledge to Action*, ed. Esther Mwangi, CAPRi Policy Briefs, available at:* http://www.capri.cgiar.org/pdf/brief_land-04.pdf.

systems of law were encouraged – one for colonial rule and access to land and natural resources and one for the colonized. Early approaches to legal pluralism favored this dual system where each system runs parallel to one another with only limited, prescribed interaction.[2]

More modern legal pluralist approaches advocated by many scholars and practitioners treat legal pluralism as "an empirical state of affairs in society."[3] Thus, any socially pluralist society inevitably contains elements of legal pluralisms that result from development and enforcement of locally accepted social norms. In other words, legal pluralism is a synonym for cultural pluralism. In multi-cultural societies the law, even in its strictest sense, is dynamic – "improvising, selecting, appropriating, denying, and contesting normative ideas from a host of sources."[4] The persistence of common law jurisprudence in the U.S. is an example of this. Decentralized adjudication in the common law history represents the need for a constant legal dynamic that adapts to localized norms and in the process debates,analyzes and shapes the law as needed. In the end, the process of creating law is as important as the law itself.

The importance of diverse social fields in creating laws that reflect norms is no more evident than in African societies, where people are divided into tribal, cultural, religious groups and along rural and urban lines. African states would appear then to manifest the most legally pluralistic systems. Reality demonstrates that this is not necessarily the case. Adelman argues that there is "a cleavage between social pluralism and rules which it generates on the one hand, and constitutional pluralism on the other."[5]

Mozambique's history in failing to incorporate traditional authorities into a pluralist, national system offers particular lessons for South Sudan and the rest of the continent. The long civil war in Mozambique was exacerbated by the segregation of traditional leaders from the ruling structure. After independence, the ruling party Frelimo (Front for the Liberation of Mozambique) largely sought to eliminate the rule of traditional authorities as a remnant of the colonial legacy. Under the previous colonial administration traditional authorities had served as local administrators. In its attempts to create a supra-ethnic state and national culture it replaced traditional authorities at the local level with popular courts, base-level party cells and *grupos dinamizadores* ("dynamizing groups") under the 1975 Constitution.[6] There were no resources to deploy these new administrative structures and as a result the traditional authorities continued to rule under different forms - many ending up in the new structures as judges of the popular courts.[7] The void of functioning local structures coupled with the political polarization of the traditional authorities facilitated the rise of Renamo (Mozambican National Resistance), eventually leading to the bloody civil war of the 1980s.

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[2] Griffiths, Anne, "Legal Pluralism in Botswana: Women's Access to Law", *Journal of Legal Pluralism*: 123-137, 133, 1998.

[3] *E.g.,* Griffiths, John*,* "What is Legal pluralism*?" Journal of Legal Pluralism and Unofficial Law*, 24: 1-55, 1986.

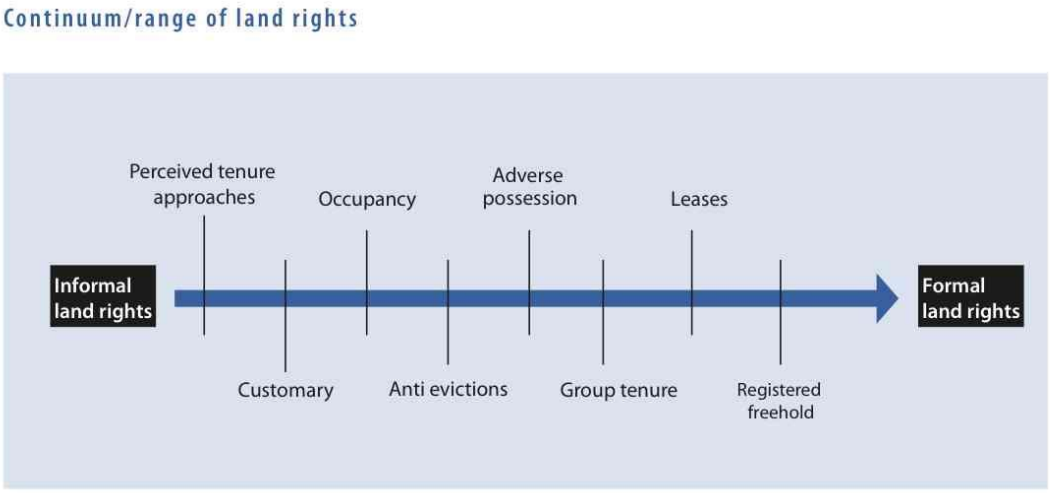
[4] Greenhouse, Carol J., "Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman", *Journal of Legal Pluralism*, 61-72, 1998.

[5] Adelman, Sammy, "Constitutionalism, Pluralism and Democracy in Africa" *Journal of Legal Pluralism*: 73-88, 1998.

[6] De Sousa Santos, Boaventura, "The Heterogeneous State and Legal Pluralism in Mozambique", *Law & Society Review*, Vol. 40, No. 1: 39-76, 2006.

[7] Id.

Customary Land Tenure



UN HABITAT, 2009

Customary land tenure is perhaps the most important component of plural legal systems in Africa. Most land on the continent remains under customary tenure systems. Its use and dispossession is closely linked to culture and community identity. Yet, it is under increasing pressure from governments and outside investors for large-scale agriculture and resource extraction.

Customary tenure systems are unique to the locality in which they operate and are often difficult to generalize. The following are characteristics found in some but not all parts of the continent, including South Sudan. Many of the characteristics of customary land tenure were crafted over centuries to address issues such as seasonal variation in resource supply and demand and to respond to specific needs of particular socioeconomic groups. They can involve complicated arrangements to deal with competing resource user groups.

- Customary tenure systems gain their legitimacy from the trust a community places in the people and institutions that govern the system;
- Customary tenure mirrors the cultural and social values of the community;

Customary tenure reflects the particular needs of the local community, often leading to significant complexity.

In the Rumbek area of Sudan, Agar and Gok Dinka communities manage three agro-ecologies: the uplands, the floodplain, and the river. These groups rely on all three land types for their livelihood, which combines cattle herding with food crops. The boundaries of their territories run perpendicular to the river to ensure access to all three ecologies. Homesteads are spread around the uplands, where people grow crops during the rainy season. Cattle mainly use the flood plain and the riverbanks for grazing in different seasons. Once food crops are harvested, cattle move to the uplands and graze on stubble. Even the river is divided into sections, and specific fishing rights are accorded to each community. Outsiders are allowed to use resources, but only after gaining permission from the, traditional authorities (De Witt 2001).

- Customary tenure often favors the rights of first occupants and those who initially invest labor to clear the land, but they may also have mechanisms for latecomers to enter the system;
- Customary tenure may differentiate rights between community members and those considered to be outsiders;
- Customary tenure frequently disaggregates rights to resources found in a particular space, allowing multiple uses and users of resources found in the territory;
- The complex, differentiated tenure rules found in customary systems often protect the interests of disadvantaged, vulnerable and minority populations;
- Customary tenure often makes provision for collective (as opposed to individual) ownership or management of space; and
- Customary tenure is a "living institution" and evolves over time in response to changes in the institutional, economic and physical environment.[8]

Customary Justice in South Sudan

South Sudan gained independence on 9 July 2011. After almost fifty years of conflict the country has a long path toward sustainable growth and democratic, responsive governance. The process of forming a national government that represents and is accountable to the people remains a difficult and long-term task that continues in earnest throughout the new nation. Equitable access to and distribution of land, along with a cohesive legal framework for governing land and resource use, is crucial for ensuring peace and promoting prosperity and democracy.

South Sudan is home to about sixty-five tribes and countless sub-tribes and clans within each.[9] Latent tribal conflicts, enflamed by a half century of civil war and associated in-fighting, are still common, especially over access to land and resources. The current legal system of South Sudan, including that which governs land, is best characterized as a complex interlocking system of plural legal orders based on varying and often conflicting origins of custom, tribal law, statutes, and *ad hoc* practice. Customary or tribal law governs important issues such as land and family in a largely unadulterated form in the rural, mono-ethnic regions of the South. Its jurisdiction and influence is diminished with variation by formal laws and institutions in the cities and state capitals.

Customary justice system structures are similar across South Sudan. Elders or clansman exist at a meta-family unit level, followed by boma sub-chiefs, payam executive chiefs, and county-level paramount chiefs.[10] Disputes that cannot be handled at the family level move up the chain. At each successive level more chiefs are consulted and contribute to the decision-making process. At the county level, paramount chiefs typically sit at the head of a panel of 3-10 executive chiefs from the various payams and bomas. The various tribes, including the primary subjects of this study, the Dinka and Bari, have variations in court procedures. Some require that cases be heard a certain number of times at the lower level before being brought to the executive or paramount chief.

[8] Borrowed largely from Freudenberger, Mark. *The Future of Customary Tenure*, USAID Issue Brief, 2010.
[9] According to UNOCHA Sudan sources, 2009.
[10] Payam is the administrative unit below the county in South Sudan. Boma is the unit below payam. Boma loosely translates to village and payam to district.

Customary laws vary more than procedures from tribe to tribe. Land ownership, however, is fairly uniform. Land is considered common property with no individual ownership, but strong usufructuary rights pass down through generations. Land cannot be sold by an individual and the community, through the chiefs, regulates its use to conform to the common good. Thus easements, right of passage, and moderation/sustainable use are enforced. Agricultural land is typically split apart from residences, although this is somewhat different for more sedentary, farming tribes in South Sudan (such as the Bari and Azande) when compared to more pastoralist tribes that depend on seasonal use for access to water (such as the Dinka, Nuer and Murle). The chiefs also regulate land and resource conflicts centered around agricultural use. Conflicts between tribes have traditionally been settled through chief councils.

Since the end of the civil war in 2005 statutory or "formal" laws have started to replace customary laws, primarily in urban areas.[11] In practice, most towns or cities have developed semi-parallel systems of statutory and customary law that work in complement and conflict with each other. Attempts are made at defining subject matter jurisdiction, but often to no avail. Instead, individual chiefs often adjudicate in customary courts how they see fit rather than abiding by set policies of removal and appeal based on jurisdictional limitations. In rural areas the effects of the statutory system are less pronounced - jurisdiction on all subjects remains squarely in the hands of the chiefdom hierarchy.

The legal profession and statutory system often deride the customary courts and chiefs who administer them as incompetent and corrupt. Yet surveys of South Sudanese reveal a greater amount of trust in the customary system.[12] As experienced in numerous developing countries, the formal judicial system is an institution little understood by the majority of citizens and whose powers of judgment are seen as biased and/or capricious.[13] One of the major struggles of developing country judiciaries is to create an institution that is accountable, transparent and trusted by a majority of its citizens. Rule of law theorists highlight the importance of transparent judicial mechanisms to the overall security and economic development of countries.[14]

The customary court system in South Sudan, despite the decades of government oppression, has managed to achieve this goal on its own. Transparency and accountability in the courts is high, while court decisions are generally believed to be fair.[15] A look into the operation of the customary courts reveals a structure that places a premium on transparency and community participation. Customary courts are held in public places. Large trees and open buildings form the courtroom. Dispute processes are held as a public forum with large numbers of community members present to observe (and comment). Judgments are rendered after lengthy arguments from the participants and between the chiefs – who are normally in a panel of up to seven. Lawyers are prohibited. The

[11] Although in many former garrison towns in the South (except those in the Equatorias) sharia law was also present, if not predominant during the war.

[12] See. Draft 2006 UNDP/UNMIS *Rule of Law Community Perception Survey Report for Southern Sudan*, 28 July 2006 (available from the UNDP South Sudan office).

[13] E.g., William Prillaman (2000) *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law.*

[14] E.g., Richard Messick (1999) "Judicial Reform and Economic Development: A Survey of the Issues."

[15] See. International Rescue Committee/UNDP *First Field Report on Customary Court Observations*, 15 November 2006; Draft 2006 UNDP/UNMIS *Rule of Law Community Perception Survey Report for Southern Sudan*, 28 July 2006.

chiefs act as both advocate and arbiter, the community as public opinion. Chiefs are typically revered as the custodians of the complex oral legal history of tribes and clans. Yet chiefs who continually advocate for unfair decisions lose credibility among their community and constituents. Chiefs without credibility lose prominence on the court panel.

Customary courts in South Sudan have also shown an amazing degree of cross-jurisdictional flexibility especially with reference to cases involving IDPs and returnees in South Sudan. Chiefs from different tribes regularly convene in the same customary court to adjudicate cases between members of different tribes. When a defendant appears from a tribe that does not have representation on the panel the case is suspended and a chief from the appropriate tribe summoned to help adjudicate at a later date.

Subject matter jurisdiction has also developed considerable flexibility in the customary courts of South Sudan. As a trusted institution, customary courts receive disputes in all areas of law. While most customary law cases center on family law in its many forms (including adultery, divorce, inheritance and child custody), customary courts also adjudicate criminal, contract, land and property and traditional disputes such as hexes. Even if a case is not directly covered under the tribe's customary law the chiefs will often adapt customary norms of fairness to the dispute at hand. As they presently exist, customary courts are the entry point for a majority of South Sudanese citizens to access to justice.

Customary Land Tenure in South Sudan

Land is one of the most complex issues faced by South Sudan. It is critical to livelihoods and development. It has defined the history of the country and was at the heart of the three decade struggle, as people sought, through the SPLM/A to secure their lands and natural resources from appropriation and alienation.[16]

CAPRi Land Policy Brief, 2006

There are three general types of land in South Sudan: pubilc, private and community. Private land is owned by individuals typically in freehold (full-fledged ownership) or leasehold (for a specified duration of time – 30 yrs, etc). Public land is owned by the government, typically in freehold. Community land is owned in common by the local community with regulation by local tribal/clan leadership according to customary law. In areas where there is a monarchy such as the Shilluk in Malakal, land is owned and vested in the King, who then exercises his powers over it through his

[16] See. Odhiambo, Michael O. Analysis of Land Tenure Systems under Customary Law in Southern Sudan, FAO/CLSC, 2007.

chiefs and clan leaders. The land cannot be sold or given as a gift to a non-member of the community except by the King. Otherwise, in all communities, rules for access and use of land are established by customary law and administered, interpreted and enforced by community leaders such as chiefs, clan leaders and elders who collectively protect the land from outsiders and secure the rights of individuals to access and use the land.

In some communities, there are special people charged with responsibility over land. Among the Kakwa in Yei, these include the landlord, the rain maker and the owner of the hunting ground. The chief and elders make decisions about allocation of land, but the process is not complete until it has been blessed by the landlord. In the case of hunting grounds in the forest, every person who kills an animal in a forest is bound to give the two front legs to the hunting ground owner, as he is the custodian of the hunting ground on behalf of the community.[17]

Even land that appears unoccupied may in fact be designated for seasonal use by people and livestock. Many communities practice shifting cultivation, and an area that looks like bush may actually be a field left fallow for a few years (sometimes up to a decade or more) until it is ready to be planted again (example of Dinka land use patterns in Annex II).

The right to land in the community derives from membership of the community through a common ancestry. All members of a community are entitled to land for purposes of deriving a livelihood whether as a farmer or herder, although the community retains control of land and resources meant for common use such as water holes and cattle camps. There are four principal ways of accessing land under customary law, namely allocation, inheritance, gift, and purchase (or exchange of cows or other livestock). Of the four, inheritance is by far the most common way in which people gain access to land. Men inherit the land from their fathers as daughters are supposed to marry and acquire rights to land through their husbands. However, a daughter whose marriage fails and returns home is entitled to land from her parents or brothers if the parents have died.

Land can also be given as a gift, for instance to an in-law or to an outsider who with good intentions requests a piece of land to settle on and cultivate. In some areas such as Tore Payam in Yei County in CES, an outsider who wishes to be allocated land has to associate himself with a particular chief, who will 'sponsor' his application to the elders and will take responsibility for his good conduct within the community.[18] Finally land can be bought in certain, limited circumstances, although this is easier when the seller and the buyer are members of the same clan; and is otherwise more common in urban areas and where land markets have developed based on titles and formal, statutory law.

Chiefs are overwhelmingly responsible for the administration of justice throughout the ten states, and the customary court system handles the vast majority of disputes, according to customary law. Customary law largely embraces reconciliation and community harmony as principal tenets. Customary justice institutions remain a strong force in the justice sector of South Sudan, particularly in vast, rural segments of the country where the state has little reach. They are well-adapted to handling local disputes over land that arise from returning populations - emphasizing win-win

[17] Id.
[18] Id.

resolutions as much as possible.

Formal Law and Legislation

Customary law has long governed land ownership and use in the vast majority of South Sudan. Seeking to modernize administration of land and resources, address legal uncertainties, and provide a legal foundation for ideas on land and resource governance espoused in the CPA and Constitution,[19] the Southern Sudan Legislative Assembly passed three key pieces of legislation in 2009: the Land Act, the Local Government Act (LGA), and the Investment Promotion Act. The most pertinent to community land, the Land Act reinforces government recognition of customary land tenure: 'Customary land rights including those held in common shall have equal force and effect in law with freehold or leasehold rights' (S. 8 (6)). It also sets, in S. 11(2)broad parameters for defining community land, to include:

(a) Land lawfully registered in the name of group representatives under section 57 of this Act or any other law for the time being in force;
(b) Land lawfully held, managed or used by specific community as community forests, cultivation, grazing areas, shrines and any other purposes recognized by Law;
(c) Land lawfully transferred to a specific community by any process of law; and
(d) Any other land declared to be community land by law.

It also cements the rights of traditional authorities "within a specific community… [to]… allocate customary land rights for residential, agricultural, forestry, and grazing purposes" (S15 (1)). Traditional authorities can allocate land subject to consultation with the community and must inform the County Land Authority or Payam Land Council. S. 16 (1) stipulated that an allocated customary right to land can be cancelled by Traditional Authorities on behalf of the community if:

(a) The holder of the right fails to observe any condition or restriction attached to the right under customary law and practices, this Act and regulations;
(b) The land is being used predominantly for a purpose not sanctioned under customary law and practices; or
(c) On any other ground as may be prescribed by customary practices, this Act or any other law.

Section 13 explicitly provides the right of women to own land in South Sudan, in keeping with the Constitution. Subsection four also establishes women's right of inheritance of land:

> Women shall have the right to own and inherit land together with any surviving legal heir or heirs of the deceased as stipulated in Article 20(5) of the Constitution.

[19] South Sudan has had various Constitutions since the signing of the CPA in 2005. The Interim Constitution (ICSS) came into effect in 2005 to guide the region through the interim period leading up to the referendum of self-determination in January 2011.The Transitional Constitution (TCSS) was drafted after the South voted for independence and came into effect on independence day, 9 July 2011, to guide the country until a final Constitution is completed.

The Land Act also requires the government to consult local communities and consider their views in decisions about community land (S. 63(3)). In addition to consulting the communities that own the land in question, the Land Act also requires that government officials and company representatives consult pastoralist groups with secondary rights of access before making any decision that would affect their grazing rights. According to S. 67 (2):

> '[N]o person shall without permission ... carry out any activity on the communal grazing land which may prevent or restrict the residents of the traditional communities concerned from exercising their grazing rights'.

Despite the degree of legal recognition provided by the Land Act and Constitution a lack of clear implementing policies and regulations and judicial interpretation of provisions has undermined many of the provisions. A general lack of enforcement mechanisms at the community level (including awareness of the Act) further undermines provisions on community consultation and women's land rights.

Land Grabbing and Other Challenges[20]

Use of eminent domain[21] is a problem for community-owned land in South Sudan. The government has the ability to expropriate land for use as long as investment activity 'reflect[s] an important interest for the community' and 'contribute[s] economically and socially to the development of the local community' (Land Act S.63). There is some debate (both in South Sudan and comparatively) as to whether 'public use' requirements of eminent domain include allocation for economic development by private interests.[22]

A fundamental principle of the South Sudan customary land tenure systems is that 'land is owned by the community' in its collective capacity and that decisions about land must be reached through consensus decision-making processes in the community. Indeed this theme of community ownership of land permeates all of South Sudan's land issues. The phrase 'land belongs to the community' can be traced to public statements of the late SPLM/A leader Dr. John Garang who, throughout the 22-year civil war, used it to rally support for the SPLM/A. The CPA and ICSS, while not explicitly recognizing the concept of land belonging to the community, have implicitly endorsed it with recognition of customary law.

Government methods for deciding the boundaries of community land are still undefined. Arguments in favor of community land ownership were taken up by the South Sudan Land Commission (SSLC) in developing South Sudan's first regional land policy. In February 2011, after a lengthy consultative process that involved a series of workshops in each of the ten states, the SSLC and its international partners formally handed over a draft land policy to the GoSS Ministry of Legal Affairs. The draft land policy seeks to articulate the broad goals of land administration in South

[20] For more information on land grabbing problems in South Sudan, see: David Deng, "Land Belongs to the Community: Demystifing the 'global land grab' in Southern Sudan," Land Deal Politics Initiatives, Working Paper 4, 2011 (from which this subsection borrows heavily).

[21] Eminent domain is a legal action by the state to expropriate land or property for public use, with compensation.

[22] See *Kelo v. City of New London*, U.S. Supreme Court, 2005 (affirming legality of government expropriation of land for use in private development scheme).

Sudan moving into post-referendum period. It emphasizes access to land as a 'social right', a feature of customary land tenure systems that allows community members to access land irrespective of wealth or economic status. It argues:

> In some jurisdictions, community land used in common — for forest products, grazing and water supply — has been alienated by central and state level authorities for public use or for sale or lease to private investors without taking account of the ownership interests of communities in the land and its associated natural resources. This has occurred despite the fact that historically and customarily communal land has fallen under the ownership of communities, and its use has been regulated by traditional or other community-level authorities.

The policy statement makes clear that land ownership is vested in communities and communities, not government, should be the primary parties that enter into agreements with investors (SSLC 2011): Although the draft policy must still pass through the Council of Ministers and Legislative Assembly before it comes into force, the policy prescriptions show continued support for community land ownership in some sectors of society. However, despite the normative influence of the 'land belongs to the community' principle, many rural communities are still sidelined in decision-making concerning community land allocation to outsiders.

David Deng, Norwegian People's Aid, the Oakland Institute and others have exposed a number of poor practices with regards to community consultation on large investments, in particular, that are emblematic of the treatment of community land ownership. Consultations with communities are often neglected by the government and investor. Typically agreements are reached and the community is informed, if at all, as a formality at the end of the process after the details of the arrangement have already been finalized. For example, the three forest concessions that are currently active undertook stakeholder engagement activities only after their concession agreements had been negotiated with the government. A government official may have a discussion with a local chief and a handful of community leaders and consider that to be sufficient consultation, even if the rest of the community is not involved. There are also reports of agreements that have been entered into without involving the affected communities at all.

Returnee Access to Land

Under customary law in most of South Sudan when a person leaves his home for however long a time, with the *intention* of returning, he does not lose his right to the land. Upon returning, he is entitled to reclaim the land and use it as before. Thus, as long as a returnee comes back to his original land and community, there is no dispute about his entitlement to the land he left behind. Any person who assumes the use of the land of such person during his absence is bound to surrender it upon the return of the person.[23] Elders assert that as long as the traditional system is allowed to function, such disputes will be settled easily as the customary law is clear about the entitlement of individuals to the land of their ancestors.

[23] Supra note 16.

Returnees are expected to follow certain procedures. In most Dinka communities, returnees are expected to present themselves to the chief and formally request to get their land back, even if there is no dispute.[24] The chief will intervene if there is a dispute.

The problematic cases primarily originate from those who return to places other than their original homes. This may arise because someone does not want to return to his original home, or because of insecurity in some areas, such as Jonglei and disputed areas along the border where whole villages have migrated to more secure areas and have yet to return. Such returnees have to go through the same procedure as any other outsider seeking land, and are free to acquire land as long as they satisfy the elders that they are genuine. As Chief Anoon Akol of Baidit Payam observed, there should be no problem about any South Sudanese returnee being allocated land anywhere in South Sudan "because, after all, South Sudan belongs to all her people."[25]

Customary tenure systems often had provisions to ensure the tenure rights of women and poor people. As the statistics below demonstrate, these rights have been progressively eroded in many communities.

In Kenya, 24 out of 40 orphans interviewed in Kakamega, Katundu, and Limuru districts reported their property had been taken by their close relatives.

In Namibia, 41% of widows and orphans lost farm equipment, 44% lost cattle, and 28% lost small livestock.

In Uganda, in one district office, 90% of the cases of intra-family conflict involved women's land rights and 70% of these involved threats of eviction.

In Zambia, 30% of widows lost more than 50% of their land after their husbands died. Seventy-nine percent of orphans in Kakolo community in Kitwe district reported their property had been taken by grandparents, uncles, and aunts.

In Zimbabwe, 53% of boy orphans and 47% of girl orphans in Manicaland and Chilmanimani districts were displaced after their parents had died (FAO, IFAD, World Bank 2009).

Women's Land Rights

Women's rights to land in South Sudan have an uncertain legal status. Customary law does not recognize a woman's right to land and property ownership.[26] The Constitution and Land Act assert that women can own land. However, neither customary nor formal institutions enforce women's land ownership. Widows, single mothers and other women without husbands or families are regularly denied ownership and control over land and are resettled or charged fees under both formal and customary law mechanisms with little to no recourse.

In almost all tribes in South Sudan a woman is part of the household of her parents before marriage and has the same rights to occupy and use the land as the rest of the family. When she marries, she gains access to land at her marital home on the strength of the marriage and she can use the land of the husband in the same way she had the right to use and occupy the land of her father.[27] The only case in which a woman has the right to

[24] Id.
[25] Id.
[26] There are exceptions to this under certain circumstances in many tribes. According to Dinka law a widow or only woman child of a family will be allowed to keep the land of her family, but does not "own" it in a traditional sense. She is allowed to pass it down to her children, but the land will convey to her son over her daughers, or her new husband should she remarry.
[27] Id.

acquire land independently from her parental family or her husband is when she is identified as vulnerable individual by the chief of the community. This is often the case with widow single heads of household with children of school age. In these cases, women are allocated land and have the right to defend any encroachment on their land. Other than in these types of cases, acquisition of land by women remains a big challenge in South Sudan.

Conflict and displacement has, however, complicated this traditional arrangement and for the large part exacerbated the situation for women. Conflict has changed the fundamental structure of contemporary society in South Sudan, requiring many women to support families by themselves. They are often severely handicapped in trying to do so, as they have no or limited access to land and when they are given land it tends to be of lower quality.

Both men and women are often ignorant of women's rights to land under the Constitution and Land Act. Government officials and chiefs often fail to grasp the growing need to change perceptions and practices with regards to land ownership. Elders, men and even some women continue to strongly defend customary laws that state that women have no direct rights to land, whether at their place of birth or at their place of marriage. But the situation on the ground is fast changing, influenced by factors such as war, displacement and the HIV/AIDS pandemic. There are many households which are headed by women and many women who do not have male guardians through whom they can access land. This reality has forced some communities such as the Acholi and the Madi to allow women to hold land directly for cultivation, even though the right is still pegged to the existence of a male relationship within the community. Among the Parii in Eastern Equatoria, women are now allowed to cultivate land, due to the large numbers of male community members dying from HIV/AIDS. In Yei, there is a by-law that requires the signatures of both the husband and the wife before the sale of land can be sanctioned, even though the husband is the owner of the land.[28]

The African Union recently issued a clarion call to ensure that women's rights are adequately protected under African tenure systems.

"Better and more productive use of land requires that the land rights of women be strengthened through a variety of mechanisms including the enactment of legislation that allows women to enforce documented claims to land within and outside marriage. This should come hand in hand with equal rights for women to inherit and bequeath land, co-ownership of registered land by spouses and the promotion of women's participation in land administration structures. To ensure full enjoyment of land rights, these measures must be part of an ideology that removes issues regarding the land rights of women from the private sphere of marriage and family, and places them in the public domain of human rights" (African Union 2009).

4. FIELD-BASED STUDY

The author of this study spent over two weeks in the three states of Northern Bahr el Ghazal, Warrap and Central Equatoria conducting interviews with chiefs, various government officials, ICLA clients, returnees and other community members. Returnee communities, displaced villages, customary courts and land administration offices were visited to build greater depth into the

[28] Id.

analysis conducted during the literature review. Little has been written on customary land law in South Sudan and its contemporary status vis-à-vis developing formal land tenure systems. The results gleaned from this time in the field and presented below are unique among the current literature.

Customary Land Law in Practice

The authority of chiefs and customary land tenure is still strong across most of NBeG, Warrap and CES, but less so in Juba and other urban areas. The chief system is a hierarchical structure of authority that extends from the county to the clan and family level. A paramount chief at the county level typically works with a number of executive chiefs at the payam level and various sub-chiefs, clan elders and family headsman at lower levels. There are 49 executive chiefs in Aweil East County alone. While the paramount chief has considerable authority, all decisions are made through a consultative process with other chiefs and local leaders. Chiefs typically sit in a panel, with executive and paramount chiefs weighing in on a range of issues, including land allocation and disputes. Customary decisions emphasize restorative justice and espouse community consultation. Powerful chiefs have, however, eroded these traditional practices in some areas. New GoSS and state-level public authorities, particularly in urban centers, have also reduced the authority and importance of the chief system.

In regard to land, chiefs have adapted well to the challenge of returnee populations. In both states of NBeG and Warrap chiefs typically form a community committee (sometimes, confusingly, called a 'community land surveyor') to resolve disputes, often involving returnees who claim family land now occupied by others. In keeping with restorative traditions, the chiefs will allocate land to the losing party in the dispute. The committees are composed of elders from the community, appointed by the chiefs who know the history of the area and can verify claims of family inheritance to land. Disputants are encouraged to bring witnesses to the committee and customary court who can testify on their behalf as rightful, longtime owners of the land. The committees ultimately inform the chiefs' decision.

Customary land ownership under Dinka law is similar to that of Bari, Nuer and other tribes in South Sudan. There is no absolute freehold ownership. Instead, families have an usufructuary right that passes down through the family and cannot be sold to another. Families often bury their relatives on their property, so the generational connection to a piece of land is strong. The chiefs protect this bond. Nevertheless, all land is considered owned by the community and the chiefs regulate its equitable use to ensure community harmony and prosperity. Communities, through the chiefs, can ultimately remove someone from their land if they do not abide by community norms, as determined by the community and chief on a case-by-case basis.[29]

Customary land is typically divided into residential or agricultural land. Most agricultural activity whether livestock grazing or farming occurs on land apart from the community or village. This land is less regulated by the chiefs and generally available to all community members. This is particularly

[29] There seemed to be differing opinions on this matter in NBeG and Warrap with regards to Dinka customary law. Some chiefs maintained that the community has this power, particularly as it relates to land occupied by outsiders (including returnees).

relevant to returnees. According to most chiefs, unlike in the case of residential plots returnees do not have to seek permission or be allocated land for agricultural purposes. In addition, it is generally accepted practice in rural areas that if you clear unoccupied, bush land you gain the right to use it. Right of use includes resource use such as trees or access to water, however the Land Act of 2009 vests all subsurface ownership (such as mineral resources) in the State. All customarily-held land use rights are regulated by the community and cannot be sold to another directly.

Disputes occasionally occur over customary land use for agriculture purposes. Cattle grazing and cultivation often conflict within and between tribes. Chiefs have a limited role in coordinating land use to avoid conflicts, but become deeply involved in settling disputes and ensuring reparations. Common disputes include determining fault and compensating farmers for destruction by cattle herds. Chiefs play an important role in communicating with and directing cattle camp bosses to move herds to different locations and provide compensation for destruction. Chiefs also mediate disputes over access to grazing land and waterholes between clans and across tribes. The customary system for regulating resource use and access has functioned for centuries but is under increasing strain by the proliferation of arms and conflicting new sources of authority, such as warlords, outside investors, and government agencies.[30]

As with other areas of customary law, practices with regard to land are somewhat flexible and can vary from payam to payam and evolve and adapt to new situations. Customary law across South Sudan is an oral tradition, thus it can be difficult to ascertain any set practice even within tribes and sub-clans. Two scenarios were encountered in NBeG and Warrap (both predominantly Dinka) where there seemed to be slightly conflicting customary approaches:

1. A few cases involved a returnee claiming land currently inhabited by another where the current inhabitant had made substantial improvements, such as a permanent building. In some instances it was determined that the rightful, returnee owner should reclaim the land and that the current inhabitant would be compensated with land elsewhere. In other cases, compensation included additional money for the houses and other improvements made to the property. Some chiefs also considered a determination of 'good faith' occupation by the current inhabitant. If the person occupied the land in a good faith belief that the owner would not return than they should be compensated for the improvements.

2. Related to the above scenario, some chiefs seemed to consider the length and degree of occupation by the current inhabitant – a sort of customary adverse possession. There was no set time period of occupation but rather a spectrum of considerations that included years, use of land, improvements made and whether the inhabitant and/or family is a good neighbor and the community approves of their continued occupancy. In one case, a current inhabitant retained a right to the land because they had occupied it for 27 years and it would be harder to compensate them for improvements than to resettle the returnee to a neighboring plot.

[30] See NPA and other reports on 'land grabbing' by foreign investors in partnership with government authorities and local power brokers.

Further study, observation of court practices, and ascertainment of customary law in relation to land is needed to understand the full spectrum of customary approaches.

Access to Land for Returnees

Many returnees relocate to NBeG, Warrap and CES as part of government or international-sponsored/run relocation programs. These populations typically arrive en masse and are met with a dedicated plan for relocation and allocation of land (most plans, are however, ill-conceived or never executed). Land for relocation is usually obtained through some combination of government expropriation/purchase and community donation. Chiefs are often involved in this negotiation process and will request compensation from the government if community land is involved. Compensation usually consists of public services such as schools, hand pumps or electricity. Monetary compensation for use of community land is rare. Community land for returnee populations is normally located next to existing communities and sometimes implies relocation of adjacent agricultural land. The existing or 'host' community has to be consulted and agree to the relocation as it implies an increase in the local population, additional strain on local resources, and likely a larger distance to agricultural plots and grazing land.

Due to inadequate community consultation, or even despite consultation, multiple land-related conflicts were observed. In parts of NBeG and Warrap, large returnee communities were given land but then forced to relocate a year or so later. In other areas, returnees were relocated near host communities, but conflicts over resources led many to settle individually elsewhere. Apada in Aweil Town, Wanyjok in Aweil East, and Mayen Gumel settlement in Kwajok are examples of large land allocation efforts gone awry (discussed in depth below).

Not all return as part of a convoy. Individual returnees have been filtering into NBeG, Warrap and CES through various means. Those who choose to return to their home of origin approach the chief either to be allocated land or to reoccupy their original family land. No chief intervention is necessary if no one occupies the original land. If there is an occupant, the land is normally returned to the original family, provided local elders recognize their rightful ownership and/or they can prove they used to live there. Most cases are handled by local sub-chiefs or clan elders. More difficult cases are taken to the executive or paramount chief as needed.

Returnees often go to local chiefs for allocation of land if they have no family land to return to or want to resettle in a different area. Chiefs in NBeG and Warrap indicated little problem in identifying available land for allocation to returnees. Chiefs said they occasionally convince users/owners of large plots to give some land to returnees. They are equally willing to provide land to outsiders. There is considerably more pressure on land ownership in CES, particularly around Juba. Bari chiefs continually deny allocation of customary land to non-Baris.

There is no customary fee for allocation of land (residential or agricultural) by chiefs in NBeG and Warrap. Chiefs reiterated this time and time again. Practice seems to support their claims, except when customary land transitions to surveyed, titled individual plots (discussed in detail below). Chiefs indicated a willingness to provide land so that more people and businesses would relocate and bring investment to their areas. Allocation of customarily held land in urban areas also seemed to be free, except that many areas are now surveyed and controlled by the government.

Fees are another matter in CES. Bari chiefs regularly charge fees depending on the quality/size of the land and often the ethnicity of the requester. Customary systems of land allocation have been influenced and largely replaced in the Juba area by statutory requirements, including the charges for different classes of land.[31] Community members and returnees complained of chiefs requiring over 3,000 SSP for use of a small plot of residential land on the outskirts of Juba. Registration and titling is a separate process done through the CES State Ministry of Physical Infrastructure.

Women's Rights to Land

Traditionally in Dinka and Bari cultures women do not own land. Instead land passes down through the male side of the family. A wife is often considered as a type of property, primarily because the husband and/or husband's family must pay bride wealth[32] to the wife's family to finalize a marriage. The woman then becomes a part of the husband's family. A divorce results in the woman returning to her birth family and a reimbursement of the bride wealth to the husband's family (with consideration for the length of the marriage). Under this customary system of marriage and family law, it is not typical for a woman to own land separately. However, these customs have had to adapt to changing cultural norms and uprooted family and social relationships as a result of the war and displacement.

Because most land is considered used, not owned by the individual, its alienability to individuals has often been less important than its retention within the family unit. Thus, the concept of ownership by a woman individually, not associated with a family (her original or husband's), is often not understood and resisted. As more and more women return from Khartoum and other places as widows, single mothers, or without their husband or his family, customary leaders have had to adapt their practices. Increasingly chiefs will grant returnee women with children a piece of land for residence and agricultural purposes regardless of whether they have a husband. During the research visits the author spoke with many single mothers who own and use customarily held property in the same fashion as if married. They have, however, often faced greater barriers in gaining their rights. Chiefs will grant land to a mother, but often reluctantly and as a last consideration. Many women, such as those at Referendum State outside of Nyamlel in Aweil West County have secured land through government resettlement programs. They will supposedly be given papers showing their ownership, but the type and security of this ownership is uncertain. NRC can play a role in ensuring this and ensuring that the paper title is actually registered and gives them a right of alienability and a right to pass the land down to their daughters.

Women do not always have their interests fully represented in the customary courts. The courts, particularly Dinka, are dominated by men and can be a hostile environment for women. It was noted by many that women would not receive as favorable judgment as men in similar cases. In one case a woman paid for a plot of customary land, but was then later forcibly removed by the seller.

[31] Classes of land or residential plots in Juba seem to derive from administrative categorization of land for its relative value based on size and proximity to public services. Chiefs have loosely adopted this categorization to impose higher fees for land of a greater class.

[32] Bride wealth is basically the opposite of a dowry, where the bride's family pays the husband's family.

The chiefs granted her the land back and punished the seller, but did not require that her money from the sale be returned, even though the sale of community land is counter to customary law.

In Juba, it is easier for women to own land. According to discussions with ICLA beneficiaries, community leaders and government officials, Bari chiefs have been relatively progressive with regards to women's rights. Nevertheless, most land is now obtained through market transactions, including through the chiefs for community land. If you have money, you can buy land, regardless of gender. It was not observed directly, but there is still much concern about the inheritance of land owned/occupied by women to their children (especially daughters). Many questions also remain regarding whether returnee women will lose their land to their husband's family if they re-marry. Some suggested that a woman who owns/occupies land would command a higher bride wealth.

Challenges Faced by the Customary System

Customary systems of justice and land tenure have been compromised by decades of war and today are losing authority in many urban areas. They have also proven to be prone to corruption and elite capture by powerful local and national figures. In many instances individual chiefs at the paramount or executive level have abused their position to bypass the chief hierarchy and make land use and investment decisions unilaterally. Common complaints over the course of the study cited inequitable practices that benefitted a chief's immediate relatives over other community members. Returnees commonly felt that some received better plots of land or quicker settlement because they were related to certain chiefs. As customary systems inherently exclude non-tribe members, the allocation of land to and resolution of disputes involving outsiders often favors members of the tribe, even when contrary to statutory provisions or human rights principles. Bari chiefs in Juba, for example, have control over much of the land but refuse to allocate it to non-Baris who have relocated to Juba, unless they pay exorbitant sums.

During interviews with community members there were multiple accounts of chiefs abusing their power over land use for personal gain from investments and land purchases. Customary law requires community consultation in land use, particularly as it relates to outsiders. This principle was also enshrined in the Land Act with regards to investments on community land. However, as seen in the reports mentioned earlier chiefs have facilitated multiple large land deals by ostensibly claiming to represent the community, when in fact they had not consulted the community and stood to gain individually.[33]

The Land Act established land authorities at the local (county and payam), state and national level. Many of these bodies have not yet been formed, or only consist of one officer. Chiefs are supposed to refer cases and defer to county authorities on land issues that regard town land, but in practice they do not. Many of the chiefs interviewed during the study adopted a tone of deference to the state, while others admitted that they have not changed their practices with regards to land and only rarely refer cases to the government. This practice pertains to returnees as well. Chiefs often allocate land for returnees and resolve disputes between host communities and returnees, even if they publicly say otherwise. Further study and direct observation is needed to understand the full

[33] Such as the large land deal facilitated by chiefs in Lainya county without consulting the community (Deng, David 2011).

range of disputes handled by the chiefs as regards both customary land and government/privately owned land.

Interface of Customary and Statutory Systems

Land tenure, land allocation and resource dispute resolution in the customary system is increasingly subjected to new statutory provisions, local land policy, foreign investment, and government authorities. The process of transitioning customary land ownership/use to statutory ownership and regulation proved to be the most contentious issue observed during the course of the study. Customary land that is surveyed eventually becomes freehold[34] land once registered and titled, with equivalent rights of alienability. Marginalized populations are systematically taken advantage of and excluded from exercising their rights during this process.

The surveying and titling process of customary land was particularly problematic. The author encountered a number of communities, returnees and others who had lost their land during the surveying and titling of customary land. Chiefs indicated a lack of inclusion and consultation by government officials in both expropriation of land for government use and the transfer of communal land to individual ownership.

Surveyors and government officials were regularly accused of corruption or rent seeking in providing surveying services and titles to land. Surveyed plots are often purchased by wealthy businessmen and government officials, displacing residents who could not afford the surveying or titling fees. In many cases, surveyors were accused of selling valuable plots to the highest bidder when the occupant would not or could not pay the surveyor's fee.

While a surveying fee ranging from 30 to 60 SSP in NBeG and Warrap does not seem entirely prohibitive, it can be a steep price for people struggling to survive. Titling fees are additional, up to 300 SSP and more. As a result women, returnees and other vulnerable populations without the financial means to pay the surveyors were in essence evicted from their land when registration/title was given to another.

Community survey committees are supposed to be established in each boma/payam where community land will be surveyed and converted into individual ownership. The committees help inform the community about the survey and oversee the work of the surveyors. The local payam administrator chairs the committee and chiefs and other local leaders sit on the committee. However, in many areas, the chiefs were not included, or included in name only. Multiple chiefs and community members said this led to a lack of review of surveyor practices and the selling of land to outsiders.

The committees are also the primary recourse for bringing complaints about survey work. Multiple accounts from interviews indicated that the committees were not responsive to complaints, especially when chiefs and local leaders were not included. As part of the committees, chiefs can be

[34] It should be noted that whilst the Land Act mentions the freehold tenure system (section 7 (2)), the TCSS does not (section 170).

an important resource for resolving disputes. Their knowledge of the history of land use in the area and ability to allocate customary land can help produce amicable results.

Members of the large returnee community of Mayen Gumel in Kwajok were kicked off the land they were given for resettlement a year after return. They were not consulted or compensated and had no representation on the local land committee. Most have moved further into the rural areas. Similar stories were found in Maper and Apada communities around Aweil town. Whole communities were relocated or are under threat of relocation from land they settled upon return. As the town of Aweil has expanded government officials are insisting on using land on which returnees settled without proper consultation or compensation and largely for private purposes (i.e. not eminent domain). Chiefs and other community leaders have been purposely excluded from decision-making. In Maper, one chief recounted the plight of an orphanage that was required to pay 520 SSP to the surveyor for a plot of land. The orphanage could not afford it and the land was sold to someone from outside the community. Similar stories were recounted of single mothers and widows who were eventually chased away by the Ministry after they refused to vacate.

The Ministry of Physical Infrastructure at the state level has ultimate responsibility for surveying and titling land. Most respondents during the survey felt there was inadequate community participation and review of the practices of the Ministry. Individuals felt powerless to challenge the Ministry on the results of the survey and titling process. Chiefs also seemed unwilling to take up individual eviction cases caused by surveying.

Agricultural land is not typically surveyed, except for large-scale investments such as the old Aweil rice scheme on the outskirts of Aweil Town. Thus, most agricultural land remains under the control of local chiefs. As South Sudan attempts to modernize and attract outside investors the transfer of land from customary to private ownership will come under increasing pressure.

Land Disputes

In theory most land disputes are handled according to customary law and mechanisms for dispute resolution that emphasize restorative justice. In practice, land disputes are often more complicated, as they increasingly involve a mix of both customary and statutory systems. Chiefs are supposed to be involved in land decisions under both statutory and customary regimes. They compose the community land committees that resolve surveying disputes and they hear disputes over customary land use. They allocate land as an alternative resolution under both systems.

Settlement of customary land disputes is conducted by chiefs at the customary courts starting at the boma level and moving up to payam and county. Disputes that cannot be handled at each level are passed up to the higher court. Chiefs handle all disputes relating to customary land, but refer cases on surveyed land to the formal judiciary at the county court level. In practice, many chiefs hear cases related to surveyed land as well, as they often intersect areas governed by customary law, such as family law and inheritance, and because the formal justice system is largely absent or dysfunctional at the local level.

As mentioned, according to customary law, chiefs establish a community committee (sometimes called a ‘community land surveyor’) to resolve disputes involving returnees who claim family land

occupied by another. The chiefs appoint people from the community who know the history of the area to serve on the committee. The committees help inform the chiefs' decision. Most cases resolved by chiefs involve allocating land elsewhere, either to the returnee or current occupant.

In addition to customary land disputes, chiefs will, in practice, often handle surveyed/statutory land cases for smaller or easier disputes themselves. More complicated cases or cases they cannot solve are referred to the land authority. The land authority is then supposed to work with chiefs (according to the Land Act) to resolve the disputes with the assistance of a local committee of leaders. The land authority is advised by the committee and if it agrees, it will enforce the committee's decision. Disputants can appeal the land authority's decision to the county judge.

Chiefs customarily handle all individual land disputes in their villages. New county land authorities and county courts, when in existence, have usurped dispute resolution for surveyed land in larger towns. During the course of the research there were a number of disputes between returnee communities and host community or the government itself, in which the chiefs were largely unable to be of assistance.

In Apada, near Aweil Town, the government helped settle a community of returnees (estimated 24,000 households) in a 'transit site' and allocated land nearby for permanent settlement. The land is currently being surveyed but the government has not involved the community and as a result there are mixed sentiments amongst the returnee population about whether to move to the new site or insist on staying in the transit site. The government says they have plans to build the Aweil University on the land of the transit site and that they are making proper alternative arrangements for the returnees.

Near Wanyjok in Aweil East there are ongoing land disputes between the host community and a group of returnees who settled on communal land. The chiefs have been involved in mediating the disputes and allocating land to returnees so that they can move elsewhere.

The Maper community outside of Aweil Town settled on customary land upon return. The Aweil Town government is now surveying the land and selling it to the highest bidder. Much of the community has been relocated as a result. Chiefs and other leaders said they are not able to confront the government. All the chiefs were kicked off of the survey committee.

In what is referred to as the Munuki case, payam authorities in a county in CES agreed to allocate land to the returnees but, following a surveying exercise, instead allocated the land to government officials and businessmen. This triggered several land disputes and authorities are now threatening to forcefully evict the original occupants.

Regional Differences

Northern Bahr el Ghazal

NBeG, particularly Aweil Town and the counties of Aweil West and Aweil East, has witnessed the influx of a large number of returnees. Issues of land allocation and disputes over land occur frequently, but seem to be concentrated in urban/peri-urban areas and where government land

surveying is being carried out. Chiefs and communities are generally confident in the customary justice system's ability to allocate land to returnees and handle disputes between returnees and current landholders. The main barriers to access to land seem to occur at the interface of customary and statutory law – when customarily controlled lands are surveyed and ownership over the surveyed plot registered and finalized by government officials. In this process, returnees and other disadvantaged populations are systematically denied both possession and actual ownership.

There does not seem to be great pressure on land in NBeG, except in areas of high return such as Aweil East county and Aweil Town. Land is predominantly customarily controlled with chiefs maintaining traditional use practices and dispute resolution based on restoration. Only town land is individually owned and now increasingly surveyed, except for limited agricultural land such as the Aweil rice scheme, which is government land. It seems that the process of surveying land created the most disputes. As investment and pressure for resources increases, this interface between customary and individual/state ownership will become an even greater issue.

Warrap

Land issues and Dinka customary law were similar between Warrap and NBeG. There is not much pressure on land, so chiefs are able to resolve disputes and handle returnees' disputes by finding mutually amicable solutions. Chiefs handle land allocation for individual returnees by removing people from family land originally owned by the returnees, when ownership can be proven, and/or finding alternative space in the host community for the returnee or removed squatter. Land disputes were most common in urban areas where host communities felt pressure on their land by returnees, or where surveying and titling pushed returnees or other vulnerable populations off land.

The capital, Kwajok, had a number of instances of members of communities being pushed off land. Members of the community of Mayen Gumel were removed from good agricultural land on the outskirts of Kwajok. The chiefs complained that they were not on the survey committee as they were supposed to be and that surveyors and government officials were selling land to the highest bidder. The author also encountered a returnee family squatting under a tree waiting to be given land by the government to no avail. The Warrap state government reportedly indicated that it will not allocate further land for returnees.

Central Equatoria

Customary land tenure and disputes over land are considerably different in Juba and Central Equatoria. The considerable pressure and value on land in Juba has created a robust market that has altered many of the traditional Bari practices of land. That said, the Bari are less pastoralist and more sedentary farmers. As a result, they have customary elements that place a value on smaller plots worked more intensively by families.

It appears that much of the land around Juba is still controlled by Bari chiefs, but that they are selling it for a rate much higher than is normal. Customary land is still considered communal. The price being paid is an "appreciation" to the chief and to the community for the land. Appreciation can be more than 3,000 SSP. Chiefs around Juba allocate land almost exclusively to fellow Baris.

Many of the chiefs are using land prices to increase their income and stature in the community. Officials at the CES Ministry of Planning and Infrastructure expressed frustration at having to cooperate with local traditional authorities to get community input and to request allocation of land for public purposes. In many areas, individual chiefs have more power than they are supposed to and allocate land and resource concessions to people as if they were sovereigns. They also indicated that returnees were impeding public planning efforts by squatting, thereby blocking roads and service provision.

5. RECOMMENDATIONS

There are a number of challenges encountered when trying to strengthen land tenure and use rights through the customary system, not least of which is the interface and transition between customary ownership and regulation and freehold statutory-based tenure systems. The NRC ICLA program can strengthen its work across the spectrum of informal - formal property rights to ensure both returnee and other vulnerable populations' access to and use of land. Based on observations throughout the course of the study and from discussions with ICLA staff, the following are recommendations for improved programming and targeted interventions that can complement existing efforts:

Community legal education and information dissemination on land rights

1. Community education on land rights within and between the customary and statutory systems is the single most important activity that NRC can continue to conduct. Increasing community knowledge on the differences between customary land and formal land, particularly the process of surveying and titling customary land and the standards by which surveyors and other government officials should abide, the programme can empower more people to ensure their land rights are recognized and land-related institutions are transparent. It also raises awareness of the services available through the ICLA program.

2. Further to community education and advocacy aims, ICLA could train more volunteer community-based paralegals to serve as local trainers and extensions of local ICLA staff. These community volunteers could serve as an educational resource on laws and regulations for local people, as monitors of local chiefs/courts, as a resource for ICLA staff that visit their towns for follow up, and as local advocates.

Monitoring of allocation and disputes

3. Monitoring by ICLA LPOs of the allocation of plots, surveying/titling process and dispute resolutions at both the customary and statutory courts should continue and perhaps be intensified. Elite capture has undermined land reform efforts in many countries when there were not sufficient community-based mechanisms for receiving and resolving abuses (land reform in the Philippines in the late 1990s is a good example). A similar fate could easily befall South Sudan as it tries to transition customary land into government and individual ownership.

4. Monitoring efforts should (and do) reveal a number of conflicts and legal cases. ICLA should develop a comprehensive strategy for handling these conflicts that pursues a full gamut of interventions, from individual counseling to high-level advocacy. There is not always a clean divide between customary and statutory cases. Many straddle both and will require interventions tailored to each situation.

5. The customary justice system in most tribes in South Sudan is based on a network of chiefs and community elders who are consulted on issues of land use and ownership. This system is vulnerable to corruption by paramount or executive chiefs who usurp power or act independently. This often occurs through outside influence either by government or private investors in land. NRC should actively monitor the customary consultation process in targeted regions of NBeG, Warrap and CES. NRC can identify areas where the customary system is breaking down and help provide an alternative recourse for those affected by its dysfunction. LPOs and other ICLA staff could record and review cases as they come through the courts, perhaps in consultation with customary court clerks who record the cases, if present.

Advocacy with local officials

6. Inequitable practices exist at the local payam and boma level but often go unnoticed or unreported. Often local committees or chiefs at the payam level will give priority for allocation of land to those they know. Returnees from other areas will often be left without land. LPOs can play a role in talking to executive chiefs or county authorities to ensure all are allocated equally.

7. Equitable use and allocation of grazing and cultivating land is also a local level issue that can severely affect returnees, especially those not from the host community. At a local level, they are sometimes excluded from the better pasture or farming land by sub-chiefs and communities. LPOs can facilitate the review of these cases by executive chiefs or other officials higher up.

Advocacy or appeal to senior officials

8. In some instances, land and resource cases need to be removed from the chiefs and customary system due to poor/corrupt practices. This normally implies a complete breakdown of the customary consultation system with no recourse internally, or is because some customary policies (such as refusing to recognize women's land rights) are in direct conflict with statutory/constitutional rights. LPOs should be cognizant of these cases and help inform people of their rights and how to appeal their case[35] to the county land authority or county court. NRC can play an important role in advocating for greater transparency and identifying systematic deficiencies that need to be addressed at a higher policy level.

[35] This would likely involve a more complex legal analysis and strategic case that involves establising precedent on where customary practices are in counter to the Land Act and/or Constitution.

Legal Assistance to Navigate between Systems

9. Many people are stuck in between the customary and statutory system with no recourse. Community land is surveyed and titled and those who cannot pay are kicked off. Communities need greater understanding of government regulations, what surveyors are allowed to do and what they are not and what possible recourse is available for challenging the work of surveyors and county land authority/MoPI decisions. ICLA should conduct community awareness campaigns and bring individual cases to court (including through outside counsel) to challenge corrupt surveying/titling.

10. Apparently claims to family land by returnees who left from 1983 onwards had to be made by 16 February 2012. Although the deadline has expired, it is unclear how strictly this will be applied and therefore LPOs should conduct a public education and registration campaigns in high return areas.

Strategic Litigation

11. The ICLA program could take a more proactive role in assisting strategic cases to reach the formal court system, particularly for cases against illegal policy or corrupt government officials. ICLA could hire outside attorneys to represent clients in statutory proceedings and encourage the review of customary principles with the aim of establishing precedent on important areas involving conflicts of laws, such as women's rights to inheritance of land. This applies to both customary cases that have a statutory/constitutional conflict, or for cases that originate from surveying, titling or other statutory law conflicts. This option could have a positive impact in curbing disputes and corrupt practices arising out of the surveying of customary land.

12. Establishing jurisprudence through strategic legal cases on important legal questions such as what constitutes 'community consultation' or on women's rights to inheritance of land under customary and statutory law would be an important contribution to closing loopholes and increasing enforcement of Constitutional and Land Act provisions.

Support to Strengthen and Professionalize Customary Justice Systems

13. The customary justice system is often excluded in the formal process of surveying and titling land. It is important to monitor this interface, as it appears to be where most major conflicts occur. ICLA could help convene local chief forums in each county of operation to provide training and education on land issues and dispute resolution and also to serve as a forum to air grievances in relation to land problems, address how land transitions from customarily controlled to government administered, discuss how chiefs and the community should be involved in the surveying process, build advocacy efforts for reforms to surveying practices, and present opportunities for dialogue between communities and government officials.

14. LPOs should monitor the customary system and chief hierarchy more broadly for systematic breakdowns caused when individual chiefs retain too much power and break from the

community consultation model. This has been seen more frequently in parts of Central Equatoria where chiefs have acted unilaterally without community consultation on investment and other deals. ICLA should support LPOs with advocacy efforts both within and beyond the chief system, depending on the nature of the corruption.

15. In cases where lower chiefs are abusing their power and not consulting the community, the Paramount and Executive chiefs can be informed. In cases where higher chiefs are involved the county/state authorities (including judiciary) or State Council of Traditional Authorities should be involved. ICLA can take a role, in concert with government officials or attorneys, to challenge corrupt chiefs.

16. The State Council of Traditional Authorities (or COTA) is a necessary institution for accountability of the customary system. Research did not reveal how active it is in all States of South Sudan, but it was often mentioned in Juba. More investigation is needed on its actual legal status, mandate, and operations in the ten states. ICLA should work with the COTA to strengthen its ability to receive, review and decide on higher level cases of corruption in the chief system in each state, particularly with regard to land use, allocation and sale.

17. The COTA is also a potential resource and ally in holding land authorities and other government actors accountable in respecting customary land tenure and ensuring community consultation. Conflicts between the customary and statutory system often undermine the customary system's role. The COTA can help establish local land consultative bodies for chiefs/payams that also serve as a tool for monitoring land related decisions and advocating with local officials for greater inclusion.

Heightened Focus on Women's Rights

18. Train more women as LPOs and/or community volunteer paralegals. Thee is a gender imbalance among ICLA land and property staff in some locations. Volunteer women paralegals could be trained in various communities to observe and report to the LPOs on cases they hear of.

19. Women's rights to land can be supported more aggressively. LPOs should focus on identifying women who have been discriminated against, both in terms of customary and statutory land rights, including access to agricultural (farming) land. Individual violation of women's rights can be tougher to identify. NRC should advocate for an exemption of payment of fees for surveying and titling for women, families and other vulnerable groups.

20. LPOs should follow up on government and customary land allocation schemes to widows and single mothers (such as Referendum Estate in Aweil West) to ensure that title documents are actually conveyed and that title stays with the women even after remarriage.

21. It would be worthwhile for ICLA to help remove cases that violate women's rights from the customary system to the formal justice system as a means of beginning to encourage

reform of harmful practices against women, especially regarding inheritance.

22. Likewise, the formal provision of title and the surveying of lands discriminate against women. Women are often less informed of their rights when customary land transitions to statutory land. LPOs can play a leading role in informing and protecting vulnerable women and families.

ANNEX I

CUSTOMARY LAW PROVISIONS[36]

The following excerpts pertain to Dinka customary traditions with regards to land. They are from Francis Deng, Deng Biong and John Wuol Makec:

J. WUOL MAKEC:

"Any temporary dispossession or displacement of the owner from his land through the act of an invading enemy or by other events which are <u>beyond the owner´s control does not deprive him of his title.</u> *If a landowner, in case of voluntarily abandonment of his homestead and land, makes it clear that it is his intention to return (by planting fruit trees for instance) and retain the title, reasonable steps must be taken to ensure that he will resume the occupation of the land.*

No one, however, can be allowed to exercise the right of excluding others forever or for an indefinite period *from abandoned land when the right of ownership of an individual over his land is not absolute but restricted."*

"The absolute ownership of lands is held by the community."

" since ownership of the whole land is vested in the community or tribe, it is impossible that a private person can simultaneously be entitled to acquire the ownership of it."
"if the individual is entitled to maintain indefinite exclusive rights over the abandoned lands.. and if this is done by everybody, there will be very serious physical conflicts.
All these factors lead to the conclusion that an individual enjoys only possessory rights, which he loses as soon as he abandons the residence*."*

D. BIONG:

"Continuous and an uninterrupted occupation of land give the occupant a right over that piece of land. If it happened that, ***he/she had abandoned it temporarily that does not affect his ownership****. If someone occupies or utilizes it for a short period of time, that would be allowed on the understanding that the original occupant* ***can terminate his presumed permission anytime*** *and resume his occupation/ownership of that plot.*
"If the property which has been transferred….has been destroyed or has perished or got damaged (or injured) ***the true owner is entitled to recover damages*** *against the person who made the wrongful transfer or acquired possession from him.*
The title of any property which has been transferred to another by way of gift or donation is not traceable provided that the giver or the donor had a better title against anyone else at the time of the transfer to the donee.
The owner is entitled to trace his property into hands of anyone who acquires possession in good faith or bad faith from anyone who has no title to it."

[36] Quoted from: Nucci, Domenico. *Land and Property Study in Sudan: Study on Arbitration, Mediation and Conciliation of Land and Property Rights*. Project OSRO/SUD/409/HCR, NRC/UNHCR/FAO (2004)

F. DENG:

The*: "right of the individual member of the tribal community over his residential land is so strong that even if he abandons it, it must be kept unoccupied unless he gives consent to a relative to take it over.*
Even if someone else be allowed to use the unoccupied land in the absence of the owner, on return it must be surrendered to him*."*

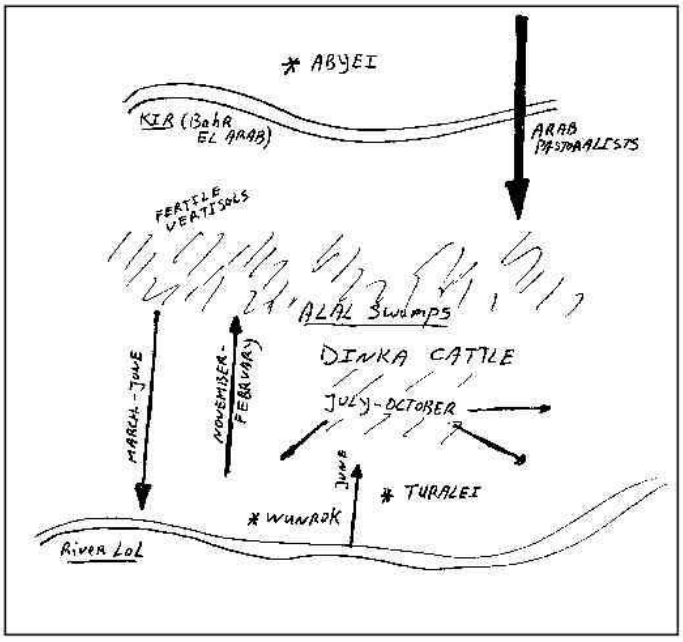
ANNEX II

DINKA LAND USE EXAMPLE[37]

Box 8: The transhumance pattern of Twic Dinka

The figure below illustrates the transhumance pattern of the Bahr El Gazal Twic Dinka, south of Abyei. The major settlements of Turalei (county capital) and Wunrok are close to the Lol River on higher grounds, which are mainly natural levees. It is on these lands close to the homesteads that the peasants have their agricultural fields. The latter are distributed over four soil types, including sandy levee soils, massive clay soils, vertisols and swamp soils. An ingenuous system of land use on these different soils has been developed, mainly based on a subtle interplay with the soil water balance.

Most of the Dinka combine farming with livestock raising and fishing. During the rainy season, cattle stay close to the fields where they are used as animal traction. After harvest cattle are herded onto agricultural fields and graze on stubble. In the Turalei area, the less fertile massive clay soil is more abundant than the vertisol and needs regular application of fertilizer. This is achieved by leaving the cattle on these soils, often against payment. From November onwards, the cattle are moved north to the Alal swamps and remain there until February/March. When these semi-permanent swamps dry out, the cattle are driven south to the River Lol, which permanently has water.



[37] de Wit, Paul. *Legality and legitimacy: A study of the access to land, pasture and water*. IGAD Partner Forum Working Group, FAO, Rome, 2001

ANNEX III

RESEARCH TIMELINE

November 23	Begin literature review and logistical arrangements for research
November 27	Travel from NYC to Nairobi
December 3	Travel from Nairobi to Juba; discussions with Programme Manager, ICLA staff
December 4	Discussion and interviews with chiefs and ICLA clients
December 5	Travel to Aweil; meetings with Aweil-based ICLA staff
December 6-8	Research in Aweil; interviews with chiefs and local officials; Focus groups with ICLA clients and community members; observations of customary courts
December 9	Travel to Alek, Warrap State; meetings with Warrap-based ICLA staff
December 10-13	Research in Alek, interviews with chiefs and local officials; Focus groups with ICLA clients and community members; observations of customary courts
December 13	Travel from Alek to Wau and Juba; de-briefings with ICLA staff, project coordinators
December 14	Flight to Juba
December 15-18	Observations at Bari customary courts (Kator, Lainya, etc); interviews with CES officials and chiefs; Focus groups with ICLA clients and other community members; Meetings with NGOs and other development programs;
December 18	Travel to Nairobi and New York City
December 19-January 30	Final report writing

ANNEX IV

FIELD INTERVIEWS

Northern Bahr el Ghazal

- Chiefs from Wedweil and surrounding villages
- William Deng, Wedweil Payam Authority
- State MoPI/County representative
- Dior Dior, Executive Chief, Nyamlel
- Other chiefs from Nyamlel and surrounding villages
- Community members from Nyamlel
- Focus group with women in Referendum State outside of Nyamlel
- Aweil East County Land Authority
- Lawyer from the State MoPI
- Kuol Kuol regional customary court and Executive Chief (Wanyjok)
- Wanyjok clients/returnees
- Wanyjok chiefs
- Maduany village chiefs (near Aweil Town)
- Maper chiefs (near Aweil Town)
- Clients and returnees in Maper
- Focus group with Apada community near Aweil Town
- Uchela Abel, Land Administrator
- Discussions with ICLA Aweil LPOs and Project Coordinator

Warrap

- Ajak, Atur, Paramount Chief Gogrial town
    - Neighboring village chiefs
- Kwajok returnee chiefs
- Large returnee settlement in Mayen Gumel in Kwajok
- Returnees from Khartoum in Kwajok
- Alek Payam administrator
- Alek chiefs
- Alek community members/returnees
- Discussions with ICLA Alek LPOs and Project Coordinator

Central Equatoria

- NRC workshop in Juba
    - discussions with chiefs and other participants
- Lewis Gore George, Director General of Housing, CES State MoPI
- Deputy Director of Land, MoPI
- Focus group with ICLA clients

- Discussions with ICLA Juba LPOs and Project Coordinator
- Edmund Yakani, CEPO
- Casie Copeland, PACT
- Tidiane Ngaido, ARD USAID Project
- David Deng, South Sudan Law Society
- Bari chiefs

ANNEX V

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