



**STRENGTHENING ACCESS TO LAND
IN PLURAL TENURE SYSTEMS**

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Cover photo: Returnees from Khartoum living as squatters on the edge of town with no access to land - Guayjok, Warrap State, South Sudan.

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GLOSSARY AND ABBREVIATIONS

Boma	Administrative unit in South Sudan below Payam
CEq	Central Equatoria
CPA	Comprehensive Peace Agreement
GoSS	Government of South Sudan
ICLA	Information Counseling and Legal Assistance
ICSS	Interim Constitution of South Sudan
NBeG	Northern Bahr el Ghazal
NRC	Norwegian Refugee Council
Payam	Administrative unit in South Sudan below County
SPLM/A	Sudan People's Liberation Movement/Army
SSP	South Sudanese Pound (1SSP = approx. 2.5 USD)
TCSS	Transitional Constitution of South Sudan
Usufruct	The right of use/enjoyment of property/land



EXECUTIVE SUMMARY

Understanding the dynamics of customary ownership and control of land is essential to strengthening tenure and access to land in pluralistic states. Customary traditions of land tenure emphasize moderate use, restoration, and community health and prosperity, but are vulnerable to elite capture. As in other conflict-affected countries land has defined the history of South Sudan - it was at the heart of the war, as people sought to secure their lands and natural resources from appropriation and alienation.¹ Now as South Sudan strives for stability and development land is both a keystone to livelihoods and economic growth and a tinderbox for future conflagration. Despite its importance little has been written on customary land law in South Sudan and its contemporary status vis-à-vis developing formal land tenure systems. This study presents an initial foray and examines more general barriers to access to land in plural tenure systems, through a South Sudan lens. The study demonstrates that displaced women, returnees and other vulnerable populations are consistently subjected to corrupt practices and are unaware of their rights both within and beyond the customary systems. Most often it is the grey area between customary and statutory, or the transition from one to the other that is used to take land from the vulnerable. The study suggests seven categories of recommendations to address these growing areas of inequity: *1. Community Legal Education and Information Dissemination, 2. Monitoring of Allocation and Disputes, 3. Advocacy with Government and Customary Officials, 4. Legal Assistance to Navigate between Systems, 5. Strategic Litigation, 6. Support to Strengthen and Professionalize Customary Justice Systems, 7. Heightened Focus on Women's Rights.*

¹ See. Odhiambo, Michael O. Analysis of Land Tenure Systems under Customary Law in Southern Sudan, FAO/CLSC, 2007





BACKGROUND

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

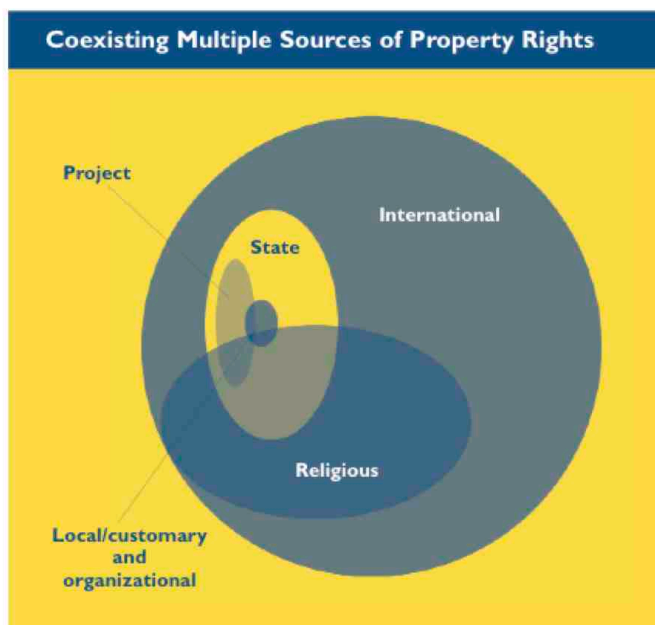
educated in African societies.² The West’s insistence on its view of proper governance and legal systems has straitjacketed African constitutional debates by circumscribing the possibility of local, pluralist responses to law and rights. Reality demonstrates that, as Adelman argues, there is “a cleavage between social pluralism and rules which it generates on the one hand,

²E.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



and constitutional pluralism on the other”.³

Customary land tenure is perhaps the most important component of plural legal systems in Africa, including South Sudan. Most land on the continent remains under customary tenure. 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. South Sudan gained independence on July 9, 2011. After almost fifty years of conflict it 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



CAPRI Land Policy Brief, 2006

³ Adelman, Sammy, "Constitutionalism, Pluralism and Democracy in Africa" *Journal of Legal Pluralism*: 73-88, 1998

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 plan 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.*

* DeWitt, 2001

resource use is crucial for ensuring peace and promoting prosperity and democracy.

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. 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 often favors the rights of first occupants and those who initially invest

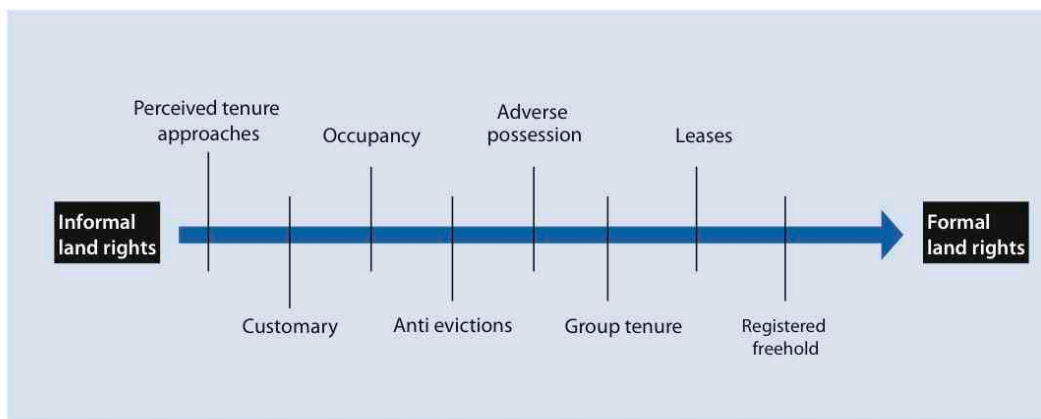


labor to clear the land, but they may also have mechanisms for latecomers to enter the system.

- 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.
- Customary tenure is a “living institution” and evolves over time in response to changes in the institutional, economic and physical environment.⁴

Continuum/range of land rights



⁴ Borrowed largely from Freudenberger, Mark. *The Future of Customary Tenure*, USAID Issue Brief, 2010





RESULTS

South Sudanese access land primarily through the customary system. The purpose of the study was to examine this dynamic further by documenting current practices in customary land allocation and dispute resolution and the process of shifting legal orders and its effect on vulnerable populations access to land. The study combined literature review of customary traditions of land tenure with field observations and data collection in three states of South Sudan – Northern Bahr el Ghazal (NBeG), Warrap and Central

Equatoria (CEq). The results presented here can better inform land policy in South Sudan, but also provide guidance to strengthening land tenure in plural legal systems around the world.

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

- Focus groups with community groups and citizens, including legal aid 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.
- Interviews with international and local NGO staff to determine current thematic foci, programmatic approaches relating to land, and challenges for working with targeted populations and customary institutions.

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.

The results reveal a complex, dynamic, constantly evolving state of plural land tenure systems. Traditional systems of land tenure have changed throughout South Sudan 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.

Customary Law in South Sudan

South Sudan is home to about sixty-five tribes, each with countless sub-tribes and clans.⁵ Latent tribal conflicts, enflamed by a half century of civil war and

⁵ According to UNOCHA Sudan sources, 2009

associated in-fighting, are still common, especially over access to land and resources. The current legal system, 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 use and family 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.⁶ 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.

Since the end of the civil war in 2005 statutory or “formal” laws have started to replace customary laws, primarily in urban areas.⁷ In practice, most towns or

⁶ 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.

⁷ Although in many former garrison towns in the South sharia law was also present, if not predominant during the war.



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 that administer them as incompetent and corrupt. Yet surveys of South Sudanese reveal a greater amount of trust in the customary system.⁸

Customary courts in South Sudan have also shown an amazing degree of cross-jurisdictional flexibility. The sheer number of South Sudanese IDPs has necessitated it. 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.

The customary courts of South Sudan have also developed considerable flexibility in subject matter jurisdiction. 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

⁸ 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)

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 Sudanese citizens to access to justice.

Statutory Land Law

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 Constitution⁹, 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.' (ch 2, §8) It also set 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

⁹ 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, July 9, 2011 to guide the country until a final Constitution is completed.



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. (§11)

The Land Act cemented the rights of traditional authorities “within a specific community... [to]... allocate customary land rights for residential, agricultural, forestry, and grazing purposes.” (ch. 5, §15). Traditional authorities can allocate land subject to consultation with the community and must inform the County Land Authority or Payam Land Council. 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.*
- (§16)

Section 13 explicitly provides the right of women to own land in South Sudan, in keeping with the Constitution. Subsection 4 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.

The Land act also requires the government to consult local communities and consider their views in decisions about community land (ch. IX, §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

‘[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’ (ch X, §67).

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 undermined provisions on community consultation and women’s land rights.

Customary Land Tenure

There are three general types of land in South Sudan: public, 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.

Chiefs are overwhelmingly responsible for the administration of justice throughout the 10 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. Tenure systems secure the rights of all community members to access and use the land, but protect its collective interests from outsiders.

The authority of chiefs and customary land tenure is still strong across most of Northern Bahr el Ghazal, Warrap and Central Equatoria States, 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 in NBeG 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 tenure 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 with regards to land.

Customary land ownership is fairly uniform across Dinka, Bari, Nuer and other South Sudan tribes. Land is considered common property with no individual ownership, but strong usufructuary rights. 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. Thus, easements and rights of passage predominate. Agricultural land is typically split apart from residences, although this is somewhat different for more sedentary, farming tribes in southern 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). 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 chiefs on a case-by-case basis.¹⁰

Customary land is typically divided between residence and agriculture purposes. Most agricultural activity whether livestock grazing or farming occurs on land set apart from the village. This land is less regulated by the chiefs and generally open to all community members. 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 - trees, access to water (both riparian and subsurface) and some mineral rights.¹¹ As with all customarily-held land use rights are regulated by the community and cannot be sold to another directly. Returnees, according to most chiefs,

¹⁰ There seemed to be differing opinions on this matter in NBeG and Warrap states 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).

¹¹ Customary practices of mineral ownership and use have since largely been superseded by the Land Act of 2009 that vests all subsurface ownership in the State.



do not have to seek permission or be allocated land for agricultural purposes, unlike residential plots.

In some communities, there are special people charged with responsibility over land. The Shilluk in Upper Nile State are a monarchy and thus land is owned and vested in the King, who then exercises his powers over it through his 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. 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.¹²

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 the Annex). 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 while 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 Central Equatoria, 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.¹³ 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.

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. ...Further study, observation of court practices, and

¹² Supra note 4.

¹³ Id.



ascertainment of customary law in relation to land is needed to understand the full spectrum of customary approaches.

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 land once registered and titled, with equivalent rights of alienability. The study showed that 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 team encountered a number of communities, returnees and others that 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 that 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 the surveying fee of 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. 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 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.

The large IDP returnee community of Mayen Gumel in Kuajok was evicted from 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 bush. 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 Aweil has grown government officials are reclaiming land given to returnees but without 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 that were eventually chased away by government officials 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 land 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. The government, NGOs and the international community can play a larger role in monitoring these investments to ensure whole villages are not displaced or their agricultural land expropriated without compensation.

Women's Land Rights

Women have an uncertain right to land under South Sudan law.¹⁴ The Constitution and Land Act assert that women can own land, while most customary law does not recognize woman property ownership. 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.

¹⁴ 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 daughters, or her new husband should she remarry.



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 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. Once she is allocated land by her husband, she has control over the land and its produce.¹⁵ Otherwise women have no direct right to acquire land.

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 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, as a result of the war, displacement and even the HIV/AIDS pandemic. There are many households which are headed by women and many women that do not have male guardians through whom they can access land. This reality has forced some communities such as the

¹⁵ Id.

Customary tenure systems often have 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 Limutu 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 (presented in *The Future of Customary Tenure*, USAID Issue Brief, 2010)

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, women are now allowed to cultivate land, due to the large numbers of male community members deaths 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.¹⁶

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

¹⁶ Id.



of property, primarily because the husband and/or husband's family must pay bride wealth¹⁷ 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 study I 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,

¹⁷ Bride wealth is basically the opposite of a dowry, where the bride's family pays the husband's family.

such as those at Referendum Estate 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.

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

In Juba, it is easier for women to own land. According to discussions with community members, 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 whether returnee women will lose their land to their husband's family if they re-marry. Although, some suggested that a woman that owns/occupies land would command a higher bride wealth.



Access to Land for Returnees

Chiefs have adapted well to the challenge of returnee populations. In both NBeG and Warrap State chiefs typically form a community committee (sometimes, confusingly, called a “community land surveyor”) to resolve disputes where returnees claim family land now occupied by another. 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, that 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 that can testify on their behalf as rightful, longtime owners of the land. The Committees ultimately inform the chiefs’ decision.

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.¹⁸ 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.

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.¹⁹ 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”.²⁰

Many returnees relocate to NBeG, Warrap and CEq 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

¹⁸ Supra note 16 [should be note 15?]

¹⁹ Id.

²⁰ Id.



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 agriculture 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, Wangjok in Aweil East, and Mayen Gumel settlement in Kuajok, Warrap are examples of large land allocation efforts gone awry.

Not all return as part of a convoy. Individual returnees have been filtering into NBeG, Warrap and CEq through various means. Those that choose to return to their home of origin approach the local chief either to be allocated land or to reoccupy their original family land. Chief intervention is not 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. Local sub-chiefs or clan elders handle most cases. More difficult cases are taken to the Executive or Paramount chief as needed.

Returnees will also go to local chiefs for allocation of land when they want to resettle in a different area or if they have no family land to return to. 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 Central Equatoria, particularly around Juba. Bari chiefs continually deny allocation of customary land to non-Bari's.

Two scenarios were encountered in NBeG and Warrap State (both Dinka) where there seemed to be slightly conflicting customary approaches to resolving disputes over returnee access to land:

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 customary adverse possession, of sorts. 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 rights to the land because he 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.

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 (as discussed above). 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.

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.²¹ Bari chiefs in Central Equatoria regularly charge fees or “appreciation” for allocating land, depending on the quality/size of the

land and often the ethnicity of the requester. Chiefs around Juba allocate land almost exclusively to fellow Baris. Many of the chiefs use land fees to increase their income and stature in the community. 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 CEq State Ministry of Physical Infrastructure.

Land Disputes

In theory most land disputes are handled according to customary law and 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 form the community land committees that resolve surveying disputes and they hear disputes over customary land use.

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

²¹ 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.



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.²²

Settlement of customary land disputes originates with the chiefs at the customary courts starting at the boma level and moving up to payam and county courts. Disputes that cannot be resolved 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.

According to customary law chiefs establish a community committee (sometimes called a “community land surveyor”) to resolve disputes involving returnees that claim family land occupied by another. The chiefs appoint people from the community to serve on the committee that know the history of the area. 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 themselves, in practice, handle surveyed/statutory land cases for smaller or easier disputes. More complicated cases or cases they cannot solve get 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 he agrees enforces their 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 few larger disputes between returnee communities and hosts or the government, in which the chiefs were largely unable to be of assistance:

1. In Apada, near Aweil Town, the government helped settle a community of returnees (estimated 24,000 households) on land only to threaten to take it back a year later. The land is currently being surveyed but the government has not involved the community who the fears it will be given to others. The government says the land is where they want to put Aweil University and that they are making good alternative arrangements for the returnees.
2. Near Wanyjok in Aweil East there is an ongoing dispute between the host community and a group of returnees that were settled nearby. The original settlement was 1,500 houses but only 700 remain. The chiefs have been involved in mediating the disputes and allocating land to returnees so that they can move elsewhere.

²² See NPA and other reports on “land grabbing” by foreign investors in partnership with government authorities and local power brokers.



3. 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 and that all the chiefs were kicked off of the survey committee.

Land Grabbing and Other Challenges

Customary systems of justice and land tenure have been compromised by decades of war and today are losing authority in many 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 are inherently excluding of non-tribal members, the allocation and resolution of disputes involving outsiders often favors 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 that 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 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.²³

The Land Act established land authorities at the local (county), state and national level. Many of these bodies have not yet been formed, or only consist of one officer. At the local level, payam administrators further decide and implement land policy in support of the county land authority. Chiefs are supposed to refer cases and defer to county authorities on land issues that regard town land, but in practice 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 range of disputes handled by the chiefs as regards both customary land and government/privately owned land.

²³ Such as the large land deal facilitated by chiefs in Lainya county without consulting the community (Deng, David 2011)



Use of eminent domain²⁴ 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 ch. IX, §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.²⁵

A fundamental principle of Southern 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 belongs 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 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: 22). 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

²⁴ Eminent domain is a legal action by the state to expropriate land or property for public use, with compensation.

²⁵ 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)



sidelined in decision-making concerning community land allocation to outsiders.

David Deng of South Sudan Law Society, 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.²⁶ The government and investor often neglect consultations with communities. 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.²⁷ 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.²⁸ There are also reports of agreements that have been entered into without involving the affected communities at all.

²⁶ For more information on land grabbing problems in South Sudan, see: David Deng, "Land Belongs to the Community: Demystifying the 'global land grab' in Southern Sudan", Land Deal Politics Initiatives, Working Paper 4, 2011. (from which this subsection borrows heavily from); Oakland Institute, Understanding Land Investments Deals in Africa – South Sudan, <available at: <http://www.oaklandinstitute.org/understanding-land-investment-deals-africa-south-sudan> >; David Deng, The New Frontier: A baseline survey of large-scale land-based investment in Southern Sudan, Norwegian People's Aid, March, 2011 <available at www.npaid.org>

²⁷ See Deng, p. 10

²⁸ Id.





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. Based on observations and discussions throughout the course of the study the following are recommendations for improved programming and targeted interventions that can complement existing efforts:

1. *Community Legal Education and Information Dissemination on Land Rights.* Community education on land rights within and between the customary and statutory systems is the single most important activity that can be conducted. 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, can empower more people to ensure their land rights are recognized and land-related institutions are



transparent. Volunteer community-based paralegals can serve as local trainers and educational resources on the laws and regulations for local people, as monitors of local chiefs/courts, and as local advocates.

2. Monitoring of Allocation and Disputes. Monitoring of the allocation of plots, the surveying/ titling process and dispute resolutions at customary and statutory courts is needed to prevent elite capture and undermining of land reform efforts. A similar fate as other countries that attempted land reform without sufficient community-based mechanisms (see land reform in the Philippines in the late '90s) could easily befall South Sudan as it tries to transition customary land into government and individual ownership. Many cases straddle both customary and statutory systems and require interventions tailored to each situation. The customary justice system of most tribes in South Sudan is vulnerable to corruption by Paramount or Executive chiefs that usurp more power or act independently. This often occurs through outside influence either by government or private investors in land. NGOs and other local legal aid actors should actively monitor the customary consultation process in targeted regions of NBeG, Warrap and CEq. In addition, South Sudan should explore policy mechanisms for creation of an Ombudsman office at the State level for investigation and protection of community and vulnerable populations' land rights.

3. Legal Assistance to Navigate between Systems. Many people are stuck in between the customary and statutory system with no recourse. Community land is

surveyed and titled and those that cannot pay are kicked off. Communities need greater understanding of government regulations, what surveyors are allowed to do and what they aren't, and a recourse for challenging the work of surveyors and county land authority/MOPI decisions. NGOs should be supported to conduct community awareness campaigns and bring individual cases to court (including through outside counsel) to challenge corrupt surveying/titling.

4. Local, Regional and National Advocacy. Inequitable practices exist at the local payam and boma level, including unequal use and allocation of grazing and cultivating land, but often go unnoticed or unreported. Local committees or chiefs at the payam level will give priority for allocation of land and better pasture/farming land to those they know while returnees from other areas are left without land. Local NGOs and citizens' groups can play a role in talking to executive chiefs or county authorities to ensure all are allocated equally and facilitating the review of these cases by ECs or other officials higher up. 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 because some customary policies (such as refusing to recognize women's land rights) are in direct conflict with statutory/constitutional rights. In these instances citizens need to be informed of their rights and how to



appeal their case to the county land authority or court.²⁹

5. Strategic Litigation. There is currently a gap in public-interest lawyers playing a proactive role assisting strategic cases to reach the formal court system, particularly for cases against illegal policy or corrupt government officials. Support should be provided to litigation-focused NGOs or individual lawyers to represent clients in statutory proceedings and encourage the review of customary principles and statutory malfeasance with the aim of establishing precedent on important area of conflicts of laws, such as women's rights to inheritance of land. This applies to both removal of customary cases that have a statutory/constitutional conflict, or for cases that originate from surveying, titling or other statutory law conflicts. 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.

6. Support to Strengthen and Professionalize Customary Justice Systems. The customary justice system is unjustly excluded from 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. Local chief forums can help provide training and

²⁹ This would likely involve a more complex legal analysis and strategic case that involves establishing precedent on where customary practices are in counter to the Land Act and/or Constitution.

education on land issues and dispute resolution, but also to serve as a forum to air grievances with 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. Monitoring the customary system and chief hierarchy can identify systematic breakdowns caused when individual chiefs retain too much power and break from the community consultation model. And act unilaterally on investment and other deals. Advocacy efforts both within and beyond the chief system can improve accountability. In cases where lower chiefs are abusing their power and not consulting the community, the Paramount and Executive chiefs should be informed. In cases where higher chiefs are involved the county/state authorities (including judiciary) or State Council of Traditional Authorities should be involved.

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. The COTA should be supported to strengthen its ability to receive, review and decide on higher level cases of corruption in the chief system in each state, particularly with regards to land use, allocation and sale. 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 customary and statutory system often undermine the customary systems 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.

7. Heightened Focus on Women's Rights. Women's rights to land can be supported more aggressively, including through paralegal/legal aid projects, particularly those run by local NGOS. Volunteer women paralegals could be trained in various communities to observe and report on cases in the community. Individual violation of women's rights can be tougher to identify. International partners should assist in advocacy efforts for an exemption of payment of fees for surveying and titling for women, families and other

vulnerable groups. Local organizations should be supported to provide 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. As a means to begin encouraging reform of harmful practices against women, especially regarding inheritance, cases that violate women's rights to land should be appealed from local courts and the customary system to the formal justice system. Likewise, local organizations can play a leading role in informing and protecting vulnerable women and families from predatory practices during the formal provision of title and the surveying of lands.



ANNEX

CUSTOMARY LAW PROVISIONS³⁰

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 beyond the owner’s control does not deprive him of his title. *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.”

F. DENG:

³⁰ 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)



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.”

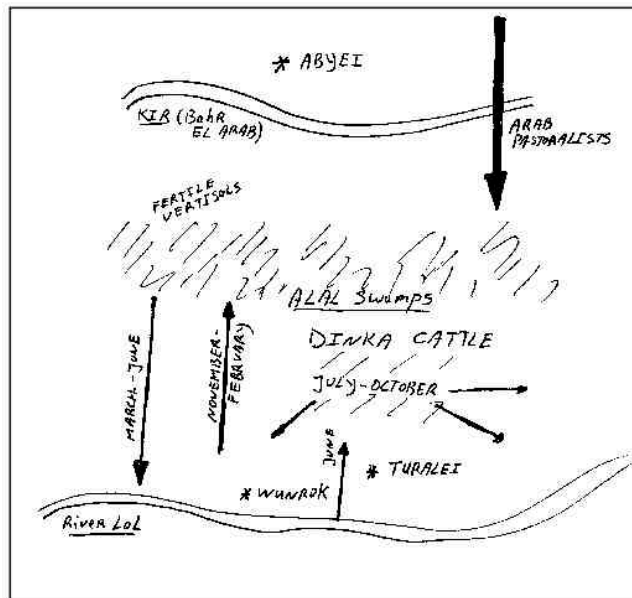


DINKA LAND USE EXAMPLE³¹

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 ingenious 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.



³¹ de Wit, Paul. *Legality and legitimacy: A study of the access to land, pasture and water*. IGAD Partner Forum Working Group, FAO, Rome, 2001



METHODOLOGY

In-country research took place over a three-week period (November 30- December 18), with approximately five days each in the regions of Northern Bahr al Ghazal, Warrap and Central Equatoria. 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. Field-based information was gathered using the following methodologies:

- Focus groups with community groups and citizens, including legal aid 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.
- Interviews with NGO legal aid staff to determine current thematic foci, programmatic approaches relating to land, and challenges for working with targeted populations and customary institutions.
- Direct observation of 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.



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