

## ABSTRACT

# Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in South Sudan

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Rule of Law reform efforts in underdeveloped areas face daunting challenges: (1) the stigma of imperialism when Western-style institutions are imposed, (2) the unwillingness of local communities to embrace the reforms, and (3) a severe shortage of resources—human, physical, and financial.

At the same time, some of these underdeveloped and postconflict societies have highly functional customary law institutions (in Africa, *e.g.*, a tribal chief applying a customary law handed down by oral tradition). These systems enjoy public confidence and function on very limited budgets—often providing prompt and accessible dispute resolution in the community. Unfortunately these indigenous systems do not always adhere to minimum standards of justice and human rights.

In response, Rule of Law reformers in such communities are now working to codify customary law, and/or create rights of appeal from the customary courts. These misguided efforts serve only to deprive the tribal communities of ownership of and control over their law. The reformers have failed to learn the lessons of colonialism, and threaten to perpetrate a new imperialism.

Instead, customary adjudication should be subject only to collateral review. Statutory courts should defer fully to customary law adjudicators on the principles and application of customary law, and review their decisions only for compliance with minimum standards of justice and human rights (ideally those recognized in the local constitution and international human rights instruments the country has ratified).

Collateral review dignifies customary adjudication by respecting the customary courts' determinations of law, while providing a safety net for those whose fundamental rights may be violated in customary court process. This approach eschews the cultural imperialism inherent in so many rule of law reforms, relying on the more appropriate, and ultimately more effective, indigenous systems to build the rule of law in a way that the local populations will recognize, respect and, hopefully, embrace.

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RULE OF LAW REFORM WITHOUT CULTURAL  
IMPERIALISM?  
REINFORCING CUSTOMARY JUSTICE THROUGH  
COLLATERAL REVIEW IN SOUTH SUDAN

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INTRODUCTION

The challenge of establishing the rule of law, especially in underdeveloped and post-conflict societies, is complex and multi-faceted. The desirability of such projects is usually assumed, as reflected in reports of Justice Anthony Kennedy's remarks at Stanford University's 2009 commencement, which included the observation that "more than half the world's population lives 'outside the law,'" and that the new graduates should work to "spread American principles of justice, especially in places that resist them."<sup>1</sup> The imperialistic tone of the latter injunction is deeply problematic for the rule of law enterprise, however, as attempts to import foreign (usually Western) legal concepts and structures can be a bitter reminder of the colonial history of many of these societies. Accordingly, in any project to promote the rule of law abroad, rhetoric like that attributed to Justice Kennedy must be studiously avoided, as the local cultural and political sensitivities are carefully accommodated.<sup>2</sup> Using South Sudan as a

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<sup>1</sup> Adam Gorlick, *Justice Kennedy to Class of '09: Spread freedom and the rule of law*, STANFORD REPORT, June 14, 2009, <http://news.stanford.edu/news/2009/june17/kennedy-061709.html> (last visited July 3, 2009). In fairness to Justice Kennedy, it should be noted that this particular phrase cannot be found in the text of his speech. *Text of Justice Kennedy's 2009 Commencement Address*, [http://news.stanford.edu/news/2009/june17/kennedy\\_text-061709.html](http://news.stanford.edu/news/2009/june17/kennedy_text-061709.html) (last visited, July 6, 2009). The person reporting on the speech appears to inject a degree of jingoism not fairly attributable to Justice Kennedy.

<sup>2</sup> These issues, now arising in the context of international rule of law initiatives, are by no means new. Virtually identical issues have been grappled with for centuries by colonial powers. Balances needed to be struck between local autonomy, particularly the retention of local standards and mechanisms for justice, and the imposition of such systems by the

case in point, however, we can derive a practical and principled approach designed to keep vital cultural institutions in place and, at the same time, leverage the region's legal and judicial resources to promote the rule of law in general.

More specifically, in South Sudan, the balance can be struck in favor of formal recognition of the customary courts: lay adjudication by tribal elders under unwritten principles of customary law. These are important and largely irreplaceable institutions in South Sudanese tribal societies, and they cannot be casually swept aside. At the same time, statutory courts should be given power of collateral review of customary court decisions, not to second-guess the interpretation and application of customary law itself, but as a check on possible violations of larger principles of natural justice and human rights, principles Sudan is already committed to follow under international treaties and conventions. This limited review of customary court decisions strikes an appropriate balance between respecting local cultural institutions and implementing higher rule of law standards in that society.<sup>3</sup> And in that compromise, we see a model for other rule of law efforts: an archetype for the delicate yet critical balancing of competing interests—cultural respect and rule of law reform—as well as the way ahead, in post-conflict transitional justice efforts the world over.

## I. RULE OF LAW CHALLENGES

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colonizer. *See, generally*, MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (Heinemann 1998). In Africa, the French tended to impose their own systems of justice, whereas British were more inclined to allow the indigenous dispute-resolution mechanisms to continue, attempting to capture or co-opt these local institutions to further their colonial objectives. Michael Crowder, *Indirect Rule: French and British Style*, 34 AFRICA: JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE 197, 199 (1964). It is highly instructive that the British model appeared to be far more effective in serving the general rule of law goals of stability, predictability, etc. *Id.* Unfortunately, much of the modern rule of law literature seems to treat issues of colonialism as irrelevant ancient history, *i.e.* it ignores them. Yet in that history lie important lessons for rule of law efforts today in what are often post-colonial societies.

<sup>3</sup> *Cf.* Penal Reform International, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS (2000), <http://www.gsdr.org/docs/open/SSAJ4.pdf>. This study of the role of customary courts in African countries advocates a large degree of separation from non/customary or non/traditional venues. In particular, the study warns against the dangers of formal state coercion, incorporation, or adoption of customary court structures, personnel, and even rulings. The current essay reflects a similar priority to maintain the autonomy importance of customary courts, but proposes, *infra*, a method of collateral review of rulings and remedies in an effort to promote the rule of law.

*A. The Importance of Cultural Sensitivity*

The problems inherent in building the rule of law in such post-conflict societies have been explored in great detail elsewhere.<sup>4</sup> Among the core problems, however, is the dissonance inherent in the *imposition* of rule of law institutions and rule of law principles born of foreign cultures on an unwilling or unready society.<sup>5</sup> As the Americans rushed into Iraq to introduce the freedoms inherent in Western-style democracy, some watchers were surprised to find that American-style justice and other aspects of American political culture were not readily embraced in Baghdad.<sup>6</sup> Indeed, any attempt to export concepts of institutional justice from Western powers—particularly those countries that dominate the UN power structure—can be characterized as a type of cultural imperialism, a particularly sensitive issue in post-colonial societies.<sup>7</sup> The checkered history of Western powers’ attempts to “civilize” the “savages” around the world and across the centuries should make us all uncomfortable with any exercise of cultural imperialism.<sup>8</sup>

Accordingly, the sensitivity issue is not just a matter of courtesy. Serious and legitimate concerns can be raised about whether the cultural values that underlie American justice, or that of other Western powers, are appropriate or even relevant in another culture. For example, the American criminal justice system is highly oriented toward retributive justice and toward harsh penalties for crimes, including the death penalty which we continue to embrace in most states. The last three decades have witnessed strong pushes to limit judges’ discretion in sentencing, to impose mandatory minimums and “three-strikes” legislation, all designed to ensure that heavy

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<sup>4</sup> For an excellent overview of these issues in a closely related context, see JANE STROMSETH, DAVID WIPPMAN, AND ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (Cambridge Univ. Press, 2006).

<sup>5</sup> Hiram E. Chodash, *The Eighteenth Camel: Mediating Mediation Reform in India*, 9 GERMAN L.J. 251, 274-275 (2008).

<sup>6</sup> See NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (Princeton University Press, 2004) and Jedediah Purdy, *The Ethics of Empire, Again*, 93 CAL. L. REV. 1773 (2005).

<sup>7</sup> An example here may be found in the ADR literature. See Laura Nader and Elisabetta Grande, *Current Illusions and Delusions about Conflict Management — In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573 (2002) (“Ideological Baggage renders unreflective imposition of ADR incompatible with the best interests of African communities.”); see also John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 429, 451 (2003).

<sup>8</sup> See generally BERNARD COHN, *COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA* at 3-15, 57-75 (1996).

penalties are exacted for criminal violations.<sup>9</sup> In contrast, concepts of restorative justice, which focus on healing, both as to crime victims and society as a whole, may play a large role in non-Western legal systems.<sup>10</sup> These principles get only scant attention, if any at all, in traditional Anglo-American jurisprudence, but there can be little question that they should be preserved in cultures that have defined and embraced justice on such terms.<sup>11</sup>

One may go so far as to argue that rule of law reform is imperialistic *per se*. That is, any effort to import higher standards for justice, human rights, or the rule of law necessarily tramples local custom in favor of foreign priorities.<sup>12</sup> Nonetheless, protection of principles of justice and human rights requires *some* intervention; otherwise human rights violations will remain unchecked wherever such abuses have become customary.

### 1. Deferring to Local Culture in the Post-Colonial State

In post-colonial states, including most African states, the cultural sensitivity issue is complicated by the lingering influence of colonial power. Respecting the existing local legal culture and tradition alone is not sufficient as the colonial powers that dominated such societies over the last 100-200 years heavily influenced that culture.<sup>13</sup> Therefore, if well-meaning

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<sup>9</sup> See Paul J. Hofer and Mark H. Allenbaugh, *The Reason Behind The Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

<sup>10</sup> See Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349 (2005).

<sup>11</sup> See Gerhard Casper, *Rule of Law? Whose Law?*, CENTER FOR DEMOCRACY, DEVELOPMENT, AND THE RULE OF LAW — STANFORD INSTITUTE FOR INTERNATIONAL STUDIES, 11 (2004), available at [http://iis-db.stanford.edu/pubs/20677/Rule\\_of\\_Law.pdf](http://iis-db.stanford.edu/pubs/20677/Rule_of_Law.pdf) (last visited June 19, 2009) (“While this view of the matter [cultural relativism and accompanying critiques] has some rhetorical force, it does not provide a magic formula that enables us to put aside the fact that many people in the world of, let us say, Islam or parts of Asia or Africa follow ethical and legal rules that are often profoundly different from, for instance, the Western emphasis on individual autonomy, the right to develop one’s personality freely.”).

<sup>12</sup> Some have suggested that the whole concept of international rule of law reform is indefensible because, as neutral as it sounds, it is merely a benign name for the resurgence of colonialism in the late-20<sup>th</sup> and early 21<sup>st</sup> century. See, e.g., Anthony Okafo, *You Say Judicial Independence, I Say Cultural Independence: The Importance of Culture in South Sudan Judicial Reform* (unpublished manuscript 2009) (on file with the author).

<sup>13</sup> Both Chanock and Crowder, *supra* note 2, illustrate that what we see as indigenous or traditional have been filtered through colonial processes and discourses. Furthermore, the forms and actors placed in charge of these courts, for instance, themselves benefited from, and were elevated by, British intervention. Both French and British methods of

rule of law reformers attempt to co-opt and reinforce the existing legal culture, they may be merely reifying the colonial legacy.<sup>14</sup> The caution is worth noting: cultural sensitivity is not always served by deference to existing legal principles and systems in the post-colonial state. But the persistence of colonial influence is hardly a justification for replacing functioning customary law systems with rule of law institutions developed outside of the African continent.<sup>15</sup>

At the same time, it is not feasible to try to restore a post-colonial society to its pre-colonial state. Even if it were desirable to try to “undo” the colonial legacy, including the customary laws that reflect colonial influence, the society has already evolved and reacted to that influence, as well as a great many other influences over the same historical period, and can no longer be the society it was beforehand.<sup>16</sup> Generations have passed, and with them the memory of cultural norms that may have prevailed before

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control helped create colonial societies that reflected their own particular European/colonial assumptions. It is an appropriate caution that we not over-romanticize the customary law as presently practiced as an embodiment of the pure ideals of the noble savage. The present customary law apparently already reflects significant colonial influence; nonetheless, it is what the indigenous communities know and use at the present time. See also Leila Chirayath, Caroline Sage and Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, 8 (July 2005) available at [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf) (“Sally Falk Moore argues that the British revision of indigenous judicial systems in Africa was fundamentally hypocritical: on the one hand, they sought to preserve custom by recognizing customary institutions, and on the other, ‘they were to be a vehicle for remolding the native system ‘into lines consonant with modern ideas and higher standards.’” For example, indirect rule often distorted “native” authority by strategically assigning duties to certain individuals and fundamentally altering the pre-existing balance of power.” (citing Moore, note 16, *infra*)).

<sup>14</sup> Professor Sally Merry and other anthropologists argue that customary law “was made, not found,” and that “it was a response to the colonial situation itself.” Sally Engle Merry, *From Law and Colonialism to Law and Globalization: Martin Chanock. Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*, 28 *LAW & SOC. INQUIRY* 569, 572 (2003) (setting forth Chanock’s argument on the subject, see CHANOCK, note 2, *supra*). Interpreting Chanock, Merry identifies a clear fault of customary law in that “if this customary law, forged by the unequal power relationships of the colonial era, is made the basis of a new unified African legal system, it will bring these inequalities into the legal system of the modern state.” *Id.* at 575.

<sup>15</sup> Indeed, Merry concedes that “the modern state is built on its own system of legal inequalities, which it both reflects and reproduces.” *Id.* Importation of those systems, therefore, would only substitute another culture’s inequalities for the local ones.

<sup>16</sup> Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running “Their Own” Native Courts*, 26 *LAW & SOC’Y REV.* 16 (1992) (“[T]he colonials’ effort to insert their model of a court into a complex and little understood African setting was not without enduring results.”).

colonization.<sup>17</sup>

Accordingly, demonstrating cultural sensitivity in rule of law reform may not be as simple as deferring to local practices and institutions. A more sophisticated sorting of practices and institutions may be in order, keeping in mind the legacy of the former colonists and occupiers. In this process it may be possible, at least to a limited degree, to determine which features of the present legal culture are valued in that society and important to retain, and which constitute the destructive or divisive detritus of colonialism better jettisoned in the reform process.

But cultural sensitivity is not just a principle of ethics; it is also a pragmatic concern for the success of the rule of law reform initiative. In any society—post-colonial, post-conflict, or otherwise—the rule of law requires a judicial system that engenders and enjoys public confidence and trust.<sup>18</sup> Where local legal institutions enjoy public confidence, therefore, there is often far more to be lost than gained by scuttling them, particularly if it is only to replace them with other foreign-looking institutions exported from the West. Although it is important to be mindful and wary of colonial history and its legacy, cultural sensitivity will generally militate in favor of deference to existing systems and principles.

## 2. The Limits of Cultural Sensitivity

But the issue is not as simple as respecting and preserving local culture—even the valued and cherished aspects of it—in that society’s approach to justice and the rule of law. Not all systems of justice, and not all systems of cultural values share equal legitimacy.<sup>19</sup> One may not excuse

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<sup>17</sup> One cannot return a post-colonial state to its pre-colonial culture any more than one can atone for a child’s dysfunctional upbringing by returning the adult to primary school for a “do over.” The emotionally scarred adult may need therapy to overcome the legacy of abuse he has suffered, but the process cannot start by returning to the pre-abuse situation, and pretending that the abuse never happened. The fact of the abuse and its impact must be acknowledged, and the future must be charted with a full understanding of the past—however painful or difficult that past has been. Similarly, post-colonial society has grown up under these colonial influences, for worse or for better, and any rule of law reform must recognize the impact of the same.

<sup>18</sup> Alabama Chief Justice Sue Bell Cobb stated it simply: “All the court system has is the public’s respect...If we lose the respect, we don’t have anything.” (quoted in John Schwartz, *Uncertainty in Law Circles Over New Rules for Judges*, N.Y. Times, June 10, 2009, at A20, available at <http://www.nytimes.com/2009/06/10/us/10judges.html> (last visited June 10, 2009)).

<sup>19</sup> Certain injustices and inhumane practices should be condemned and eliminated, no matter how “time-honored” or otherwise entrenched in local culture. On the other hand,

wholesale human rights violations, extreme examples of which might include slavery and human sacrifice,<sup>20</sup> even if these practices were defining elements of an indigenous society's local culture. If minorities, or women, or children, or political prisoners are being victimized by injustice in a society, it is neither respectful nor defensible to look the other way in the name of cultural sensitivity. Tolerance of cultural differences need not, and must not, require the acceptance of practices that violate the most fundamental principles of human rights and dignity.<sup>21</sup>

For those who are trying to promote the rule of law world-wide, in the genuine belief that the world will be a better place under the rule of law, it is necessary to draw a line. What local cultural concepts, constructs, and practices can be retained without undermining the pursuit of the rule of law in general? What aspects of the rule of law—as practiced in those nations providing resources and assistance—are appropriate for implementation in a culture that may have no history or tradition with them?<sup>22</sup>

### *B. The Problem of Public Confidence*

The cultural sensitivity issues carry over directly into issues of public confidence. A foreign-looking legal system imposed on a post-conflict society is unlikely to inspire great public confidence. The public is likely to expect their judiciary and other rule of law institutions to reflect the traditional concepts of justice that are time-honored in that society.<sup>23</sup> And

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the minimum requirements of justice and human rights do not require embracing all aspects of Anglo-American legal cultures, which include genuinely idiosyncratic features, be they substantive (*e.g.* the death penalty), procedural (*e.g.* plea bargaining), or cosmetic (*e.g.* black robes and grey wigs).

<sup>20</sup> Human sacrifice is distinguished from capital punishment because it suggests the killing of an innocent for the benefit—usually spiritual—of the society as a whole. Capital punishment, in contrast, applied only against the guilty, is a form of retributive justice, and far easier to justify in terms of both retribution and deterrence. That said, much of the world would view even capital punishment as a human rights violation. *See, e.g.*, International Covenant on Civil and Political Rights, Second Optional Protocol (July 11, 1991) (condemning capital punishment as a human rights violation).

<sup>21</sup> *See* Casper, note 11 *supra* at 13 (“Given the overwhelming international agreement, virtual consensus, concerning fundamental rights and rule of law, we should assume that the burden of proof has shifted to those countries that would deny the rule of law in principle.”).

<sup>22</sup> *Id.* at 6. (“The quest for the rule of law is relatively open-ended and neither needs to be nor should be acontextual. This proposition will strike those as unpersuasive who think of the rule of law as rule of *the* law, *i.e.*, law that is universal in nature.” (emphasis in original)).

<sup>23</sup> Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Façade?*, 95 AM. J. INT’L L. 32, 36-37 (2001).

even if the rule of law institutions have not been revered or trusted in the past, such as when the conflict involved the overthrow of a corrupt regime whose institutions were also corrupt, such trust will not necessarily come any more quickly to a new and unfamiliar legal regime.<sup>24</sup> Quite the contrary, suspicion of the unfamiliar may exacerbate persisting suspicions of whether justice is attainable in a society that has never had the rule of law.

### C. The Problem of Limited Resources

Most post-conflict societies have the remnants of a justice system, the successor of whatever functioned in that society either before or during the conflict itself.<sup>25</sup> There may be courthouses and judicial personnel in place, for example, as well as police forces and prisons, but it would be unusual to find such institutions functioning as effectively as they should or as they might. They may be plagued by inefficiency, corruption, or simple failure to adhere to high standards of justice and human rights.<sup>26</sup> As already noted, public confidence in such institutions may be low.<sup>27</sup> It is tempting in such circumstances to want to sweep the weak or failing institutions aside and try to replace them with a new system, with an entirely new set of expectations and principles, reflective of the ideals of the rule of law as the rule of law reformer sees them.<sup>28</sup> However, as already noted, the demands of cultural sensitivity suggest that one should not be too quick to act on this impulse.<sup>29</sup>

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<sup>24</sup> Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64 (2001). (highlighting different public reactions to various levels of courts).

<sup>25</sup> Ghani and Lockhart talk about the 'sovereignty gap' to describe between the "de jure sovereignty that the international system affords such states and their *de facto* capabilities to serve their populations and act as responsible members of the international community." ASHRAF GHANI and CLARE LOCKHART, *FIXING FAILED STATES: A FRAMEWORK FOR REBUILDING A FRACTURED WORLD*, (Oxford University Press, 2008) at 3-4.

<sup>26</sup> See, e.g., International Crisis Group, *Courting Disaster: The Misrule of Law in Bosnia and Herzegovina*, ICG Balkans Report No. 127, 25 March 2002.

<sup>27</sup> Widner, *supra* note 24 at 65 ("Many postconflict settings are marked by additional concerns. Courts may be understaffed or lack resources. Limited access and delay often result, rendering the judiciary weak or delegitimizing it altogether. Moreover, national courts may not [be] able to provide the kinds of services central to the restoration of order. One may have to look both to indigenous methods of dispute resolution and to international forums.")

<sup>28</sup> In certain circumstances, such as endemic corruption, more sweeping reforms may be warranted. See, e.g. David Pimentel, *Restructuring the Courts: In Search of Basic Principles for the Judiciary or Post-Conflict Bosnia and Herzegovina*, 9 CHI. J. INT'L L. 107, 111-112 (2008).

<sup>29</sup> See also Stromseth, *supra* note 4 at 1-3, 9-10 (cautioning against the "new

An even more compelling and immediate barrier to such innovation, however, is the lack of resources.<sup>30</sup> The resource deficit is not limited to the obvious issue of budget, buildings, facilities and equipment. Even if donors come forward with money—which often happens in the most war-torn areas—where can we find the personnel qualified and untainted by the prior regime to run these new rule of law institutions, adhering to higher standards than have ever been known in this society?<sup>31</sup> They are unlikely to be readily available, if they exist at all. The pragmatic truth, unfortunately, is that you have to work with what you have.<sup>32</sup>

## II. SOUTH SUDAN AS A CASE IN POINT

The fundamental question posed is whether, and how, rule of law can best be strengthened in a society where the existing institutions have broken down, or at least failed to deliver that ideal.<sup>33</sup> Because it is difficult to generalize on such issues—every situation will include special circumstances that can or should be taken into account—it is most useful to consider the question in the context of one example, a post-conflict case-in-point. Here, it is instructive to consider the challenges faced by the rule of law community in South Sudan.

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imperialism” and adding: “The good news is that the international community is finally beginning to have a sense of ‘best practices,’ an increasingly nuanced understanding of what works and what doesn’t in post-conflict settings. ... Perhaps most critically of all, we know from past failures that there is no ‘one size fits all’ template for rebuilding the rule of law in post-conflict settings: to be successful, programs to rebuild the rule of law must respect and respond to the unique cultural characteristics and needs of each post-intervention society.”).

<sup>30</sup> Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12 J. CONFLICT & SECURITY L. 65, 70-71 (2007).

<sup>31</sup> *Supra* note 27. In South Sudan, as discussed *infra*, there was hope that qualified and talented people who had fled the region, with their families, might be persuaded to return to assume leadership posts in the post-conflict regime. Justice Ruben Madol is one example, who returned from Australia to become a justice of the new South Sudan Supreme Court. But given the hardships of life in South Sudan, and the uncertain future, this is a hard sell. Even Justice Madol, as of 2006, had left his family in Australia. Meetings with Justice Madol over the summer of 2006.

<sup>32</sup> See Christina Jones-Pauly and Stephanie Elbern, ACCESS TO JUSTICE: ROLE OF COURT ADMINISTRATORS AND LAY ADJUDICATORS IN AFRICAN AND ISLAMIC CONTEXTS at xi (Kluwer Law International, 2002).

<sup>33</sup> *The Role of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies*, [http://www.usip.org/ruleoflaw/projects/customary\\_law.html](http://www.usip.org/ruleoflaw/projects/customary_law.html) (“In post-conflict societies, the formal justice system is generally weak, may lack legitimacy, and often serves only a small portion of the population.”).

The Government of South Sudan (GoSS) came into being in January 2005 with the signing of the Comprehensive Peace Agreement (CPA)<sup>34</sup> with the northern Sudanese Khartoum government.<sup>35</sup> The Sudan People's Liberation Army (SPLA) had fought long and hard for independence from the repressive Islamic regime of Omar al Bashir, a regime that, following a decades-long pattern in Sudan,<sup>36</sup> imposed Shari'a law and Arabic language on the country's southern regions.<sup>37</sup> This was the primary source of conflict—as the north, its population primarily ethnic Arab and Muslim, forced its Islamic regime on the tribes of the South, which were primarily Christian (or traditional African religion), and who resented the imposition of religious and cultural institutions that may be viewed as Middle-Eastern on the tribal communities sub-Saharan Africa in South Sudan.<sup>38</sup>

The tribes of South Sudan felt a greater kinship with their southern neighbors, Kenya and Uganda—both former British colonies, with English

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<sup>34</sup> The Comprehensive Peace Agreement Between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, available at <http://www.unmis.org/english/documents/cpa-en.pdf> (last visited June 8, 2009).

<sup>35</sup> Central Intelligence Agency, The 2009 World Factbook: Sudan, <https://www.cia.gov/library/publications/the-world-factbook/geos/SU.html> (last visited June 8, 2009) (“Government Type: Government of National Unity (GNU) - the National Congress Party (NCP) and Sudan People's Liberation Movement (SPLM) formed a power-sharing government under the 2005 Comprehensive Peace Agreement (CPA).”).

<sup>36</sup> United States Library of Congress, Federal Research Division, “Chapter 4: Southern and Western Sudan”, *Sudan: A Country Study*, <http://lcweb2.loc.gov/frd/cs/sdtoc.html> (last visited June 8, 2009) (Path: Chapter 4; Southern and Western Sudan) (“When Nimeiri imposed the sharia on the whole country one month later, further inflaming attitudes among non-Muslims in the south, the SPLM rebellion, coordinated by its newly formed military arm, the Sudanese People's Liberation Army (SPLA) turned into a full-scale civil war.”).

<sup>37</sup> Chris Hedges, *Sudan Presses Its Campaign to Impose Islamic Law on Non-Muslims*, N.Y. TIMES, June 1, 1992, at A6, available at <http://www.nytimes.com/1992/06/01/world/sudan-presses-its-campaign-to-impose-islamic-law-on-non-muslims.html> (last visited June 6, 2009) (“The government of Lieut. Gen. Omar Hassan al-Bashir, who led the coup in 1989 that brought the military to power, has purged the military, the civil service, the judiciary and the educational system of thousands of non-Muslims. Students must now pass examinations in Islamic studies and in Arabic, which is dominant in the Islamic world but which most Sudanese from the south do not understand.”).

<sup>38</sup> DOUGLAS HAMILTON JOHNSON, THE ROOT CAUSES OF SUDAN'S CIVIL WARS at 75 (2003). (“To the extent that the divide was territorial, identifying those who lived with state boundaries and those who lay beyond them, it also came to be perceived as racial. Those fully participating with the state increasingly identified themselves with Arab lineages, while at the same time identifying those who lived outside the state not only as unbelievers, but as slaves, or as enslavable.”).

as an official language, and with significant Christian communities—than they felt with their countrymen to the north.<sup>39</sup> Centuries of an Arab-operated slave trade in South Sudan, shut down by the British in the 19<sup>th</sup> century, only exacerbated tensions and distrust in the region.<sup>40</sup> More recent exploitation of southern oil fields for the exclusive benefit of Khartoum’s privileged class further fed the resentment in the south, strengthening the SPLA’s cause.<sup>41</sup>

Upon the signing of the CPA in 2005, United Nations peacekeepers were brought into Sudan to oversee the implementation of the Agreement itself: a compromise which stopped short of giving South Sudan full independence but conferred regional autonomy for a period of six years.<sup>42</sup> Oil revenues would be split evenly between the Khartoum government and GoSS over that six-year period, after which a referendum on independence would be conducted in the south.<sup>43</sup>

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<sup>39</sup> Central Intelligence Agency, *The 2009 World Factbook: Kenya*, <https://www.cia.gov/library/publications/the-world-factbook/geos/KE.html> (last visited June 17, 2009) (“KENYA: Religions: Protestant 45%, Roman Catholic 33%, Muslim 10%, indigenous beliefs 10%, other 2%. Note: a large majority of Kenyans are Christian, but estimates for the percentage of the population that adheres to Islam or indigenous beliefs vary widely”); Central Intelligence Agency, *The 2009 World Factbook: Uganda*, <https://www.cia.gov/library/publications/the-world-factbook/geos/UG.html> (last visited June 17, 2009) (“UGANDA: Religions: Roman Catholic 41.9%, Protestant 42% (Anglican 35.9%, Pentecostal 4.6%, Seventh Day Adventist 1.5%), Muslim 12.1%, other 3.1%, none 0.9% (2002 census)”).

<sup>40</sup> Ellen Knickmeyer, *Darfur Slaughter Rooted in Arab-African Slavery*, SEATTLE TIMES, July 2, 2004, [http://seattletimes.nwsourc.com/html/nationworld/2001970382\\_slavery02.html](http://seattletimes.nwsourc.com/html/nationworld/2001970382_slavery02.html) (last visited June 8, 2009).

<sup>41</sup> *Sudan Oil Attacks ‘To Continue’*, BBC NEWS, Mar. 26, 2002, <http://news.bbc.co.uk/2/hi/business/1894648.stm> (last visited June 8, 2009) (“Oil exports, which began in 1999, added a new dimension to the civil war launched by the SPLA in 1983 to press southern demands for greater autonomy. Khartoum has used the oil revenues to sustain its war effort.”).

<sup>42</sup> Warren Hoge, *10,000 Peacekeepers Sought by US for Southern Sudan*, N.Y. TIMES, Feb. 15, 2005, <http://query.nytimes.com/gst/fullpage.html?res=950DE0DE123AF936A25751C0A9639C8B63> (last visited June 8, 2009) (“The United States circulated a draft Security Council resolution on Monday that would send 10,000 peacekeepers to southern Sudan to enforce a new peace treaty there but would avoid mention of where war crimes suspects in the violent western Darfur region of the country should be tried.”); CPA, note 34 *supra*.

<sup>43</sup> CPA, note 34 *supra*; Emily Wax, *Sudan Leader: World Must Pressure Darfur Rebels*, WASH. POST, Mar. 22, 2005, at A1, <http://www.washingtonpost.com/wp-dyn/articles/A55249-2005Mar21.html> (last visited June 8, 2009) (“Under the accord, which was backed by the Bush administration, the south will have a six-year period of self-rule, then vote on whether to remain part of Sudan.”).

GoSS officials, including members of their newly appointed Supreme Court, faced the challenge of establishing rule of law norms and institutions in South Sudan. The pre-existing formal court structure, set up to apply Shari'a law,<sup>44</sup> symbolized everything the SPLA had fought against. Accordingly, GoSS's priorities for the justice sector involved starting from scratch with an entirely new legal and judicial system. They wanted a common-law system akin to what Kenya and Uganda have.<sup>45</sup>

But the reality of life in South Sudan is such that a formal court system can serve only a small percentage of the population. In an area of over one million square kilometers (400,000 square miles, an area roughly twice the size of Texas), Southern Sudan has a population of over 10 million.<sup>46</sup> In all this area, and among all these people, there are no more than 4 miles of paved roads; and the dirt roads, even those few that have been cleared of landmines, are still impassable during the rainy season.<sup>47</sup> Per capita gross

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<sup>44</sup> United States Library of Congress, Federal Research Division, *Sudan: A Country Study*, <http://lcweb2.loc.gov/frd/cs/sdtoc.html> (Path: Chapter 4: The Courts) (last visited June 8, 2009) ("Prior to Nimeiri's consolidation of the court system in 1980, the judiciary consisted of two separate divisions: the Civil Division headed by the chief justice and the Sharia Division headed by the chief qadi. The civil courts considered all criminal and most civil cases. The sharia courts, comprising religious judges trained in Islamic law, adjudicated for Muslims matters of personal status, such as inheritance, marriage, divorce, and family relations. The 1980 executive order consolidating civil and sharia courts created a single High Court of Appeal to replace both the former Supreme Court and the Office of Chief Qadi. Initially, judges were required to apply civil and sharia law as if they were a single code of law. Since 1983, however, the High Court of Appeal, as well as all lower courts, were required to apply Islamic law exclusively.").

<sup>45</sup> Both Kenya and Uganda have common-law systems based largely on the British system. Indeed, both were British colonies. There may be some irony that the newly autonomous GoSS would choose a legal system so largely reflective of a colonial-era imposition; yet there are compelling reasons to embrace a legal system that conforms with the systems of political allies and trading partners.

<sup>46</sup> David de Chand, *The Right of Self-Determination: A Legal and Political Right for South Sudan*: "South Sudan is the area of Sudan below the 13th parallel and comprises of Bahr-el-Ghazel, Equatoria and Upper Nile regions which is about 400,000 square miles . . . . South Sudan has a kaleidoscopic population of more than 10 million of which major ethnic groups are the Dinka, the Nuer, the Azande, the Bari-speaking, the Otuho-speaking, the Toposa-speaking, Luo-speaking, the Muru-speaking and the Maban-speaking (Chai)." [http://www.africa.upenn.edu/Articles\\_Gen/de\\_chand.html](http://www.africa.upenn.edu/Articles_Gen/de_chand.html); the population is less than half that of Texas, but with *no* large or urban centers in the country (the largest city, known as "Juba town," had an estimated resident population of 163,000 in 2005), the population is widely scattered. Juba Assessment: Town Planning and Administration (Creative Associates Int'l, for USAID, Nov. 2005) at 13, available at <http://www.southsudanmaps.org/Resources/Juba%20Assessment%20Report.pdf>.

<sup>47</sup> *WFP appeals for funds for demining and road repairs in South Sudan*, WORLD

income in the country is less than \$90 per year.<sup>48</sup> There are no functioning telephone lines, and electricity and running water are largely unavailable. As a result of this utter absence of infrastructure, the result of a brutal combination of extreme poverty and war damage, the prospects for establishing efficient, responsive, and effective rule of law institutions (primarily police, courts, and corrections) in South Sudan are bleak.

In such an environment, how are legal disputes settled? How is crime policed?

Overwhelmingly, dispute resolution is handled within the tribal communities under principles of “customary law.”<sup>49</sup> Even when Shari’a courts were in place, 90% of the legal disputes in South Sudan were handled by customary courts.<sup>50</sup>

While customary law certainly varies in the different tribes,<sup>51</sup> the customary courts function in similar ways. For the most part, the parties bring their dispute to a tribal elder or tribal chief. This respected member of

FOOD PROGRAMME NEWS (February 12, 2004), <http://www.wfp.org/english/?ModuleID=137&Key=1136> (“The total road network is only 7,500 kilometres of main roads, most of which are unusable at least for part of the year, plus 10,000 kilometres of key feeder roads. None are tarmac except for a few kilometers in Juba town.”).

<sup>48</sup> Democracy and Governance in Sudan (USAID), [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/regions/afr/sudan.html](http://www.usaid.gov/our_work/democracy_and_governance/regions/afr/sudan.html).

<sup>49</sup> See Aleu Akechak Jok, Robert A. Leitch, and Carrie Vandewint, *A Study of Customary Law in Contemporary Southern Sudan* (World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs, March 2004) at 6, available at <http://www.gurtong.org/customarylaw.asp>.

<sup>50</sup> *Id.* (“Over 90% of day-to-day criminal and civil cases are executed under customary law.”) See also United States Institute of Peace, *Rule of Law: Country Specific Projects – Sudan* <http://www.usip.org/ruleoflaw/projects/countries/sudan.html#justice> (“A key term of the Comprehensive Peace Agreement (CPA), now enshrined in the Interim National Constitution and the Interim Constitution of South Sudan, is the creation of a federal system, under which the South has autonomy, in inter alia, its judicial system. With the rejection of Shari’a, the assertion of the importance of culture, and the sheer absence of formal justice structures, customary law will play a major role in the Southern Sudan legal system.”). This situation is not unique to Sudan: “In many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law . . . .” Chirayath et al., note 13, *supra* at 3.

<sup>51</sup> *Id.* (“This poses significant challenges as to how to incorporate customary law, given the diversity of at least 60 customary law systems, conflicting value sets, and demographic changes as over 4 million internally displaced persons (IDPs) and refugees return to traditional communities and oil lands.”).

the tribal community can hear the petitions of the parties—unrepresented by counsel—and render a decision reflecting the customary law principles that have been handed down over the generations, usually by oral tradition, within the tribe.<sup>52</sup> In many cases, neither the law nor the decision will be put in writing.<sup>53</sup> While this is part of the customary practice, it is also necessary as the tribal chief (who plays the role of judge) and those who assist may well be illiterate.<sup>54</sup> Public confidence in these courts runs significantly higher than any confidence in the statutory courts.<sup>55</sup> The tribal elders are held in high regard, and their decisions are, for the most part, accepted and followed. The access to customary justice is also good. Filing fees, when charged at all, are very low (a bailiff may collect a nominal fee from litigants immediately before they make their case), the system operates without lawyers, and transportation is not normally an issue as the tribal leaders live in the tribal community they serve.<sup>56</sup>

The operation of customary law in South Sudan is therefore an essential aspect of establishing and maintaining the rule of law there. Even if one wanted to carry out an imperialistic approach—bringing a more “enlightened” legal regime to the area—it is a practical impossibility to

<sup>52</sup> See generally, See ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA note 3 at 21-37.

<sup>53</sup> See CHANOCK, *supra* note 2 for larger discussion. See also ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA note 3 at 134-36 (noting that the lack of writing, so important and defining to customary courts, also limits how much they can be pulled into a state’s embrace and still function).

<sup>54</sup> Literacy rates are very low in the entire area: 15% overall, and probably far below that in the more remote areas. Women’s Commission for Refugee Women and Children, *South Sudan’s Education Challenge*, Nov. 12, 2006, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/YAOI-6VL3AX?OpenDocument&rc=1&emid=ACOS-635PJQ> (“Besides the shortage of basic infrastructure and materials, the number one need cited repeatedly is for more trained teachers. With an adult literacy rate of 15 percent across South Sudan, there is a severe shortage of teachers—and only 6 percent are formally trained.”).

<sup>55</sup> Tiernan Mennen, *Legal Pluralism in Southern Sudan: Can the Rest of Africa Show the Way?* 3 AFRICA POLICY J. at 6 (2007) [http://www.hks.harvard.edu/kssgorg/apj/issues/spring\\_2007\\_issue/pdfs/Tiernan.article.pdf](http://www.hks.harvard.edu/kssgorg/apj/issues/spring_2007_issue/pdfs/Tiernan.article.pdf) (last visited July 6, 2009) (“surveys of southern Sudanese reveal a greater amount of trust in the customary system . . . . Transparency and accountability in the [customary] courts is high, while court decisions are generally believed to be fair. (citations omitted)”). The popular rejection of the Shari’a courts may play a role here; customary courts have undoubtedly been viewed as a culturally appropriate alternative to the statutory Shari’a regime. See also *The Role of Non-state Justice Systems*, *supra* note 33 (“Interesting to contrast (non)local sentiment regarding customary courts: International actors have tended to ignore these customary systems in evaluating and administering post-conflict justice, as they are often inaccessible, controversial, and at times contravene international standards.”).

<sup>56</sup> See ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA note 3, *supra*, at 22.

completely replace the customary court system. The resources and infrastructure simply do not exist. Indeed, when statutory courts were created there by the GoSS in early 2006 there were fewer than 100 applicants for judgeships; almost half the positions created remained vacant for the lack of qualified candidates.<sup>57</sup> That provided less than one statutory judge per 100,000 people. A reasonable complement of judges for such a population would have to be roughly 20 times that.<sup>58</sup>

### III. DRAWING THE LINE / STRIKING THE BALANCE

Those involved in rule of law reform must find a way to retain cultural concepts, constructs, and practices without undermining the pursuit of the rule of law in general. As cultural sensitivity concerns may come into conflict with rule of law objectives, a line must be drawn and a balance must be struck between these competing interests.

Colonial powers, of course, engaged in the same kind of line drawing. The British, for example, accepted customary law except where it was “repugnant to natural justice, equity, and good conscience.”<sup>59</sup> Such a test is inherently offensive today, as it suggests among other things that practitioners of customary law lack “good conscience” and as it implicitly substitutes the cultural conscience of British society for indigenous values.

A better starting point for such line-drawing lies in the international treaties and conventions on human rights.<sup>60</sup> Most of the world’s nations, representing a wide variety of cultures, have been willing to sign on, at least in part, to these agreements. They represent the closest thing presently

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<sup>57</sup> At the initial swearing-in on June 24, 2006, only 49 county court judgeships were filled. <http://www.unmis.org/English/2006Docs/UNBulletin-SouthernSudan-vol13.pdf> (last visited July 6, 2009). As of July 2009, many of those vacancies have been filled, [http://www.gurtong.org/resourcecenter/documents/constitution/Judiciary\\_Structure.asp#CountyCourts](http://www.gurtong.org/resourcecenter/documents/constitution/Judiciary_Structure.asp#CountyCourts) (last visited July 6, 2009) (showing 90 positions filled), although this cannot have been easy.

<sup>58</sup> See e.g. *Restructuring the Courts*, *supra* note 28, where a court restructuring effort in post-war Bosnia, which included a significant scale-back of judges, still prescribed one judgeship for every 5,000 population.

<sup>59</sup> SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND (eds.), *THE IMPOSITION OF LAW* (1979); H. Okoth-Ogendo, “The Imposition of Property Law in Kenya,” at 160; see also Sally Merry, *Legal Pluralism*, 22 *LAW & SOC’Y REV.* 869 at 869 (1988).

<sup>60</sup> See Gerhard Casper, *Rule of Law? Whose Law?*, CENTER FOR DEMOCRACY, DEVELOPMENT, AND THE RULE OF LAW — STANFORD INSTITUTE FOR INTERNATIONAL STUDIES, 13 (2004), [http://iis-db.stanford.edu/pubs/20677/Rule\\_of\\_Law.pdf](http://iis-db.stanford.edu/pubs/20677/Rule_of_Law.pdf) (last visited June 19, 2009) (recognizing virtual consensus internationally on basic principles of human rights).

available to an international and cross-cultural consensus on minimum standards for justice in a society, and Sudan has already signed on to a number of them.<sup>61</sup> Although it was the predecessor Sudanese government, not GoSS, that ratified or signed these covenants and conventions, the Interim Constitution of Southern Sudan explicitly embraces the international treaties ratified by the Republic of Sudan and incorporates these “rights and freedoms” into its Bill of Rights.<sup>62</sup>

Accordingly, it is appropriate for rule of law promotion programs in developing and post-conflict societies to refer to these instruments as benchmarks. The hope of the international aid community—the host of do-gooders who descend upon a post-conflict society—with respect to the rule of law is to create rule of law institutions or reform existing ones to ensure that these minimum standards are met. The situation is better when the subject country has signed onto the international agreements and even easier when those standards have been formally incorporated into the Constitution, as is the case in South Sudan. In the latter situation there is no issue of foreign imposition; the rule of law initiative in that country can avoid the patina of imperialism and colonialism merely helping the country implement and enforce its own Constitutional standards.

But, as already noted, it is impossible to create sufficient statutory courts in South Sudan to ensure that such principles will be enforced. The customary courts of South Sudan must remain a part of the rule of law solution there (1) as a matter of cultural sensitivity, (2) as a matter of public confidence, and (3) as a necessary leveraging of severely limited resources. The line has to be drawn in such a way that includes customary dispute resolution in the larger rule of law strategy.<sup>63</sup>

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<sup>61</sup> *E.g.* International Covenant on Economic, Social and Cultural Rights (accession 18 Mar 1986); International Covenant on Civil and Political Rights (accession 18 Mar 1986); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 4 Jun 1986); Convention on the Rights of the Child (signed 24 Jul 1990); International Convention on the Elimination of All Forms of Racial Discrimination (accession 21 Mar 1977). <http://www1.umn.edu/humanrts/research/ratification-sudan.html>.

<sup>62</sup> INTERIM CONST. OF SOUTHERN SUDAN pt. 2, § 13(3) (2005) (“All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill [of Rights].”) available at <http://www.unmis.org/common/documents/cpa-monitor/Annexes/Annex%20%20-%20Interim%20Constitution%20of%20Southern%20Sudan%20-%20FIXED.pdf> (last visited June 24, 2009).

<sup>63</sup> This contrasts with the more limited vision articulated by the USIP, that customary courts “*may be in a position to play a vital complementary role in providing justice and a non-violent means for resolving disputes during the post-conflict phase.*”

It is a tall order to ask a customary court to adhere to and enforce international standards of justice and human rights, especially when that court applies unwritten law and renders decisions without a formal written disposition. The dilemma is exacerbated by the fact that some cultural practices and time-honored remedies provided in tribal adjudication in South Sudan run afoul of these very standards.

For example, due to the long-standing cultural practice of “bride wealth”—a custom by which a young man wishing to marry must present the bride’s family with a bride price<sup>64</sup>—an unmarried girl has significant economic value.<sup>65</sup> For many families in this incredibly impoverished region, their daughters are their only significant assets, as each carries the promise of future bride wealth. When a tort claim such as wrongful death arises between two families, the tortfeasor may have nothing to compensate the plaintiff with other than his own daughter. Recognizing this, customary courts in South Sudan have historically resorted to this as a remedy: ordering one family to compensate the other by giving them one of their daughters. It is, of course, impossible to reconcile this legal and cultural practice with contemporary standards of human rights. Nonetheless, it is a practice deeply rooted in South Sudanese society.

When customary courts apply remedies such as this, and when they remain entirely unaccountable for such deviations from generally-recognized standards of justice and human rights, standards already incorporated into the GoSS Bill of Rights,<sup>66</sup> what hope is there for

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[http://www.usip.org/ruleoflaw/projects/customary\\_law.html](http://www.usip.org/ruleoflaw/projects/customary_law.html) (emphasis added). This paper argues that the customary courts can and should play, not just a complementary and transitional role, but a vital and permanent role in the justice system, defining and enforcing customary law.

<sup>64</sup> The bride price is almost always tabulated in livestock, ranging from a few goats up to 200 head of cattle, depending on the desirability of the young woman (in the Dinka tribe in particular, tall women, with a gap between their front teeth, are particularly prized) and the means of her suitor.

<sup>65</sup> The author was offered 200 cows for his own teenage daughter (who, incidentally, is neither tall nor gap-toothed), an offer made by his interpreter when he worked in Juba town in the summer and fall of 2006. While the initial offer was taken in jest, the sincerity of the offer was confirmed in subsequent communications to the author. Email messages of February 13, 2009 (“pliz tell her i have not yet forgotten and dropped my desire to marry her and as for you pliz i need her and for your cattle, don’t worry i have grazed as many as 5 and expectant of more”) and October 30, 2008 (“let me hope she has decided to marry so that i will be the luckiest to marry her pliz tell her i am trying to graze more cattle to give to you the father as dowery as the tradition demands here in Sudan”) on file with the author.

<sup>66</sup> See note 62, *supra*.

meaningful rule of law reform in South Sudan? If we cannot live without the customary courts—given their cultural significance, practical impact on societal stability, and indispensability given the unavailability of viable alternatives—we have to find a way to live *with* them.

A. *Alternative Approaches to the Recognition of Customary Law*

1. Who Owns Customary Law?

As we consider the role that customary law and customary court adjudication can play in a modern justice system, some fundamental questions must be considered. Among them, “Who owns customary law?”

Some have advocated codification of customary law, which will make it more transparent and controllable. Once codified, any aspects of it that offend larger principles—such as the awarding of daughters as tort damages—could be easily amended out of the law. If customary law is codified, however, it becomes, for all meaningful purposes, the property of the state. The legislature may adopt such codes, but only the legislature is then fully empowered to amend it. The tribal communities that produced that law, and the tribal elders who apply it, are then deprived of their role in shaping such law; the customary law ceases to be a living law that adapts to suit the community it serves.<sup>67</sup> Indeed, in terms of cultural sensitivity and awareness, codification may be counterproductive. While it recognizes and formalizes a tribal community’s customary law, it does so only by depriving that same community of the ownership of such law.<sup>68</sup>

Chary of codification for this reason, modern reformers have tended to focus on *ascertainment* of customary law.<sup>69</sup> These written documents attempt to describe—but not prescribe—the principles applied, keeping

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<sup>67</sup> It is tempting to make comparisons to the common law here, but that would be misguided. The common law certainly can evolve, but because it is rooted in recorded precedent, it cannot be so responsive to societal and cultural shifts as is customary law. The latter is not written but is retained in the mind and memory of a contemporary person, who attempts to apply it in the present-day world, inevitably bringing contemporary sensibilities and local wisdom to the task.

<sup>68</sup> Codification is not as simple as it seems because of the multiple versions of customary law in practice in the various communities of South Sudan. See USIP website noting the “significant challenges as to how to incorporate customary law, given the diversity of at least 60 customary law systems, conflicting value sets, and demographic changes as over 4 million internally displaced persons (IDPs) and refugees return to traditional communities and oil lands.”

<http://www.usip.org/ruleoflaw/projects/countries/sudan.html> (last visited June 11, 2009).

<sup>69</sup> USIP is involved in a project to ascertain customary law in South Sudan. See *id.*

ownership of the law in the hands of the original sources. However, even this exercise is likely to function as some kind of external restraint on customary law development and application. Once it is written, customary adjudicators can be subjected to second-guessing on the substantive law they apply; statutory courts may feel emboldened to rely on the ascertainment and substitute their own judgment for the customary law adjudicator's. And if the ascertainment does not serve to hinder the continued development, flexibility, and vitality of customary law, the ascertainment will become obsolete and irrelevant as the customary law continues its evolution.

Accordingly, although the Interim Constitution of South Sudan (ICSS) formally recognizes the legitimacy of customary law in South Sudanese society, it is not clear what the statement of formal recognition means.<sup>70</sup> Neither is it clear whether such formal Constitutional recognition is a good or a bad thing for the continued vitality and force of customary law on the ground.

## 2. Keeping Customary Law in the Hands of the Customary Courts

There is nothing terribly new in this idea of deferring to local institutions and lending legitimacy to customary law adjudication.<sup>71</sup> Chanock, in his survey of anthropological research on legal systems in colonial Africa, gives a sense of the British approach in the Congo in the early 20<sup>th</sup> century:

In the setting up of indirect rule . . . ‘the emphasis lay on identifying the true chief so as not to upset the local hierarchy.’ Once a chief had been found and his court established they were set to ‘administering customary law on the assumption that this practice gave official sanction to an indigenous institution.’<sup>72</sup>

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<sup>70</sup> “The ICSS also guarantees a role for traditional authorities and recognises customary laws regarding community land tenure. Articles 174 and 175 guarantee respect for the ‘institution, status and role of traditional authority’, and call upon Southern courts to apply customary law.” Vanessa Jiménez and Tim Murithi, *South Sudan Within a New Sudan*, (Center for Conflict Resolution, April 2006) at 27 [http://ccrweb.ccr.uct.ac.za/fileadmin/template/ccr/pdf/Vol\\_13-SudanFinal\\_211106.pdf](http://ccrweb.ccr.uct.ac.za/fileadmin/template/ccr/pdf/Vol_13-SudanFinal_211106.pdf). It is not entirely clear whether the statutory courts of South Sudan are required to apply customary law, or simply whether the customary courts’ decisions under customary law are recognized as valid, or something else. The complications associated with this provision in the ICSS, however it is interpreted, have yet to be fully explored.

<sup>71</sup> See note 2, *supra*.

<sup>72</sup> CHANOCK, *supra* note 2 at 45 (quoting MACGAFFREY, CUSTOM AND GOVERNMENT IN THE LOWER CONGO).

The approach was based very much on emerging consensus during the 1920s and 1930s that “where possible, it was best for Africans to ‘develop’ their own law and that this, rather than imposition *and codification*, was the healthiest course.”<sup>73</sup> Much of this comes from the fact that law is conceptualized differently in many of these cultures, where the distinction between custom and law is not clear,<sup>74</sup> and where the emphasis may be more on dispute resolution than on legal principles that would dictate particular outcomes.<sup>75</sup>

The lessons here, old lessons from the colonial era, are that customary law can be effective and meaningful in a traditional society only if it continues to be owned and developed and applied in traditional ways. Attempts at codification and even ascertainment, therefore, may end up threatening customary law far more than they strengthen it.

### *B. Education and Training of Tribal Elders/Judges*

Far from reifying, through codification, the customary law, or otherwise insulating it from outside influences, embracing and legitimizing customary law means finding ways to help it adapt in a changing and increasingly globalized world. For rule of law purposes, in particular, we need a customary law that is consistent with prevailing norms of human rights. If we are to live with customary law, some of its rough edges in application must be sanded smooth. But it cannot be done by depriving the tribal community of its law or by substituting statutory decision-makers for tribal chiefs in applying an ascertained law.

A more promising approach is to start with training those who hand down customary court decisions. If customary court judges have an appreciation for the higher principles of law that their decisions must conform to, the community will, ultimately, benefit from better decisions—*i.e.* decisions consistent with international human rights standards, as well as due process standards implicit in establishing the rule of law—at the ground level. The United Nations Development Programme has organized

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<sup>73</sup> *Id.* at 27 (emphasis added).

<sup>74</sup> In imposed legal systems, customs could not be enforced unless they had the status of law: “In the new courts custom became law, indeed it had to if was to be invoked, and the new law was legitimated in terms of it being custom.” *Id.* at 40.

<sup>75</sup> *Id.* at 40 (explaining how British influence on judicial procedure meant that vague claims and dissatisfactions, and political claims between lineages, could not be handled by the new courts; these issues had always been settled through customary dispute resolution, but the formalization of judicial process to reflect that of the colonizer, effectively denied the people a forum for a large portion of their claims.).

some such trainings in South Sudan, with help from the United States Institute of Peace, with remarkably positive results.<sup>76</sup> The South Sudan Human Rights Commission is also in a position to promote understanding of these principles in the tribal communities and particularly among the customary law adjudicators.<sup>77</sup>

### *C. Review by Higher Courts*

And what if the customary law forum gets it wrong and violates a fundamental right? It is tempting to suggest that the problem of noncompliant and unaccountable customary courts should be resolved through the right of appeal. An appellate court is almost always in a position to overturn lower court decisions that violate fundamental rights or otherwise offend principles of justice. The problem is that the appellate court, inevitably some type of statutory court set up by the GoSS, is not privy to the principles of customary law being applied; the appellate judges cannot second-guess the correctness of a lower court ruling if they are not applying the same law.<sup>78</sup> The university-trained statutory judge is not schooled in the customary law and may be completely unaware of the legal rules applied in the customary court's disposition. Ascertainment may help fill this knowledge gap, but, as articulated above, ascertainment may still threaten the ownership and therefore the vitality of customary law.<sup>79</sup> Moreover, there may be no written record of the lower court proceedings or decision for an appellate body to review.<sup>80</sup>

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<sup>76</sup> United States Institute of Peace, *Rule of Law – Country Specific Projects: Sudan* <http://www.usip.org/ruleoflaw/projects/countries/sudan.html#justice> (last visited June 8, 2009) (“In the current phase, USIP is organizing a series of workshops to bring together these chiefs with national police, judges, corrections officials and other relevant criminal justice actors, as well as representatives of Sudanese civil society groups. These workshops are helping to develop better understandings between actors in the various systems of justice, and to begin to lay the groundwork for improved communication and cooperation. The first of these workshops was held in mid-March in Lakes State.”). The author attended one of these trainings in Juba town in late 2006, and was surprised by the openness of tribal chiefs to the concepts and standards of justice and human rights that were introduced there.

<sup>77</sup> INTERIM CONST. OF SOUTHERN SUDAN pt. 9, §§ 149-150 (2005).

<sup>78</sup> See USIP conferences, *id.*, promoting what appears to be a shared governance idea, or at least promoting the benefits of uniformity and similarity.

<sup>79</sup> See *supra* note 69; see also Section III.A. Alternative Approaches to the Recognition of Customary Law, *supra*.

<sup>80</sup> The lack of a record is probably why most systems for appealing customary law decisions call for *de novo* review. See email from Mark Massoud, February 4, 2009, on file with the author (“[D]e novo review is more common in informal and religious-focused legal systems (e.g. local variations of Islamic law.”). Of course, a *de novo* standard completely disregards the decision of the customary court, according no deference to the traditional decision-maker who is closest to the community out of which the conflict arose.

While there have been attempts to establish rights of appeal from customary court decisions,<sup>81</sup> these are inherently problematic. Because the appellate body inevitably applies different law or is left to guess at the customary law applied below, the net effect is to disrupt the rule of law and the societal stability that should follow from it.<sup>82</sup> Legal decisions begin to look arbitrary to the public in such circumstances, and public confidence in judicial decision-making is further undermined.<sup>83</sup>

### 1. Collateral review as an alternative to appeal

A far more effective approach is to establish a mechanism of collateral review of customary court decisions. Statutory courts can be vested with power to review and overturn customary court decisions not on their merits, but rather on the ground that the procedure, outcome, or remedy somehow violated minimum standards of human rights or judicial process guaranteed in the GoSS Constitution.<sup>84</sup> The procedure leaves the customary court to

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<sup>81</sup> *E.g.* Chirayath et al. at 13, note 13, *supra* (“[In Tanzania,] European District Officers, responsible for administrative functions at the district and local levels, held broad powers of review over judges in customary courts. Further, Africans could sometimes appeal judgments in criminal cases to British lower courts. In practice, customary institutions came to occupy a third or ‘shadow’ tier of the colonial judicial system, beneath inferior and superior courts.”).

<sup>82</sup> Consider, for example, the unhappy experience in Tanzania:

In [1963], the government passed the Magistrate Courts Act to incorporate what were formerly native courts into the judiciary. The Minister of Justice appointed lay judges (who became magistrates after a three-month training course) to these institutions, labeling them Primary Courts. Records were to be kept in Tanzania’s national language, Kiswahili. Initially, these judges were not required to consult with locals, but this practice quickly proved problematic, particularly for communities with judges from other parts of the country who were unfamiliar with local practices. The year after their initial appointment, the government passed legislation requiring that lay judges consult with at least two “assessors” drawn from the local pool of village elders. While this partially resolved community concerns, judges still retained ultimate control over rendering judgments. Unsurprisingly, these new institutions were often rejected or avoided by local communities, who established new informal mechanisms of dispute resolution based on traditional practices.

*Id.* at 14 (citations omitted).

<sup>83</sup> GHANI and LOCKHART, note 25 *supra* at 127 (“[The] distrust of the enforcement of formal rules increasingly leads to universe of parallel rules that constitute the actual norms of society.”).

<sup>84</sup> Those countries that formally recognize customary justice have imposed this type of limitation on its applicability. Chirayath et al. at 9, note 13, *supra* (“Most colonial regimes introduced colonial repugnancy clauses thereby recognizing customary law only to the

determine what its law is and how it should be applied, with the statutory court reviewing those decisions only against these external standards.<sup>85</sup>

United States federalism suggests an analogy. Federal courts will not attempt to interpret state law but will defer to a state supreme court on such questions, overturning a state court determination (on, for example, a writ of habeas corpus) only if the state court proceedings or decision violate rights under the federal laws or Constitution. As the United States Supreme Court stated in *Estelle v. McGuire*:

[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.<sup>86</sup>

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extent that it conformed to European legal norms. Similarly, most African constitutions now recognize customary courts only in so far as they do not violate any of the fundamental rights enshrined in state constitutions.”) But an effective and appropriate procedure for enforcing such limitations has, until now, been lacking.

<sup>85</sup> This basic concept is consistent with the approach advocated by Tiernan Mennen in his article on legal pluralism in South Sudan, note 55, *supra*. His approach similarly calls for intervention of a statutory court in a customary law case in a way that preserves the dignity and power of the customary court:

Customary court cases that violate rights enshrined in the constitution should immediately be removed to a constitutional or statutory court. The constitutional court will then rule on the constitutional issue alone and remand the case back to the customary court with guidance on how the judgment needs to change to comply with constitutional provisions. The customary court will issue another ruling in compliance that then becomes incorporated into the jurisprudence of that customary law.

*Id.* at 22. Mennen’s proposal, therefore, is inspired by the worthy concept of a legal pluralism that respects the customary law institutions, but compromises those same institutions with proposals for documentation and clearinghouses. His vision for legal pluralism in South Sudan is ambitious, but may bog down in the complexities of implementation, the mechanics of which appear to be beyond the scope of his article. His proposal does not approach the procedural question of how to effect statutory court review of customary law decisions, for example, instead positing only that “a system of removal and remand needs to be developed from customary to statutory and back.” *Id.*

<sup>86</sup> *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); see also WRIGHT, MILLER, COOPER & AMAR, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 4006 (2007):

Section 25 of the First Judiciary Act [of 1789] provided for Supreme Court review of state court judgments. The procedure was by writ of error directed to the final judgment of the highest state court in which a decision could be had. . . . In 1988 Congress took the final step that established the present jurisdiction to review state judgments, 28 U.S.C.A. § 1257: “(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the

Similarly, statutory courts in South Sudan can be empowered to review customary court determinations, deferring entirely to the customary court on issues of local law, but safeguarding the higher principles of justice. That is, the statutory courts can be empowered to overturn a customary court decision only to the extent it violates principles reflected in a national constitution or in international human rights instruments that the country has signed or ratified.<sup>87</sup>

This collateral review procedure in South Sudan will empower a statutory court to intervene when, for example, a girl is ordered from one family to another. The ruling of tort liability remains unchanged, but the remedy can be struck down as a violation of constitutional principles.<sup>88</sup> This is a far more limited review than a general right of appeal, and it should be a far lighter burden on the few and under-staffed statutory courts.

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Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." . . . Most fundamentally, power was found in the language of Article III itself: the judicial power of the United States, including the appellate power, extends to *all* cases arising under the Constitution and federal laws and treaties.

*See also* Act of September 24, 1789, c. 20, 1 Stat. 73, 85 to 87; *see also* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"); *see also* *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (first case to assert U.S. Supreme Court authority over state courts in issues of federal law).

<sup>87</sup> A similar conceptual approach is advocated for Ethiopia by Donovan and Assefa, although they have not attempted to set out a procedural mechanism for it. Dolores A. Donovan and Getachew Assefa, *Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism*, 51 AM. J. COMP. L. 505, 509-10 (2003) "What is needed in Ethiopia is a coherent, multi-faceted plan of state action designed to support and preserve the existing customary law systems while modifying them to eliminate the worst human rights abuses."). The collateral review procedure advocated here should effect the balanced purposes advocated by Donovan and Assefa.

<sup>88</sup> *See* notes 61 and 62 *supra* (under which the Covenant on the Rights of the Child is incorporated into the GoSS Bill of Rights); INTERIM CONST. OF SOUTHERN SUDAN pt. 2, §§ 21(1)-(4) (2005) ("Rights of the Child (1) Every child has the right: . . . (c) to know and be cared for by his or her parents or legal guardian; . . . (g) not to be subjected to negative and harmful cultural practices which affect his or her health, welfare and dignity; . . . (2) In all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of the child.").

It also maximizes the autonomy of customary courts, which may be vital to maintaining the relevance and effectiveness of those institutions.<sup>89</sup>

The statutory court need not even interpose its own substitute remedy, but may simply remand the case for the customary court to enter a new remedy to vindicate the rights already adjudicated.<sup>90</sup> This too is reflective of practice between the federal and state courts in the United States.<sup>91</sup>

## 2. Procedure for collateral review – Standing

The specific procedure need not be complex; indeed, the simpler the better, given the lack of sophistication of the largely uneducated public and the severe shortage of lawyers. It is vital that the parties to the customary law decision be empowered to seek collateral review. The aggrieved party has undeniable standing to seek redress for the violation of rights. At the same time, however, the aggrieved party may be unaware of this avenue of relief or, perhaps, may not perceive the need for such relief. For example, a parent who has been ordered to give up her child to the plaintiff in a customary court proceeding, while certainly aggrieved by the adverse judgment, will not necessarily see the remedy itself as a violation of her rights or her child's rights. If this parent grew up in that same culture, this

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<sup>89</sup> Efforts at more complete integration of customary courts have proven to be problematic:

Some states have tried to integrate traditional systems into wider legal and regulatory frameworks, often with little success. For example, the Constitution of Ethiopia permits the adjudication of personal and family matters by religious or customary laws and South Africa's 1996 democratic constitution explicitly recognizes customary law. Many other countries in sub-Saharan Africa have also made attempts to recognize customary tenure and customary marriage arrangements within their state laws. Efforts to recognize customary land rights have been made in countries in other regions as well, such as Latin America and South East Asia. It is important to note, however, that in countries where customary systems are formally recognized, in practice these systems generally continue to operate independently of the state system (and/or in uneasy tensions with prevailing religious legal traditions).

Chirayath et al., note 13, *supra* at 3.

<sup>90</sup> Mennen agrees that the customary court should be left to render the final judgment, afterward, and consistent with the statutory court determination. Note 85, *supra*.

<sup>91</sup> See, e.g., the "our federalism" doctrine first articulated in *Younger v. Harris*, 401 U.S. 37 (1971), which provides that "federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its law in its own courts." WRIGHT, MILLER, COOPER & AMAR, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D* § 4251 (2007).

will be perceived as a normal and acceptable remedy, not something to be challenged in statutory court.<sup>92</sup>

While public education on these issues will help to some degree, something more will be needed, at least in the short term. Accordingly, the procedure should also grant standing to some separate entity to raise these issues. The most appropriate institution is the South Sudan Human Right Commission (SSHRC), which is already charged in the Constitution with closely related tasks, including

(a) monitor[ing] the application and enforcement of the rights and freedoms enshrined in this Constitution;

(b) investigat[ing], on its own initiative or on a complaint made by any person or group of persons against any violation of human rights;

\* \* \*

(i) monitor[ing] compliance of all levels of government in Southern Sudan with international and regional human rights treaties and conventions ratified by the Republic of the Sudan;

(j) express[ing] opinion or present[ing] advice to government organs on any issue related to human rights; and

(k) perform[ing] such other function as may be provided by law.<sup>93</sup>

As the SSHRC is already monitoring and investigating human rights violations, it follows naturally to give it a limited power of enforcement as well. As Article 150(1)(k) allows it to “perform such other function as may be provided by law,” a straightforward piece of legislation could empower it to initiate collateral review proceedings of any customary law decision that it believes violate constitutional or international standards of human rights. Of course, the statutory court will ultimately adjudicate the question; the SSHRC would only have the power to raise the question before the court.

At present there are NGOs and UN staff throughout South Sudan monitoring justice and human rights issues. While it would be inappropriate to grant standing to any of these observers, if any one of them notes that a customary court decision has run afoul of constitutional or international standards, they are in a position to call institutional attention to the problem. Any such observer, therefore, could alert the SSHRC, as they presumably already do. Under this new procedure, however, the SSHRC would be empowered not only to investigate and express opinion but to

<sup>92</sup> See Casper, *supra* note 21 (especially his references to “hardwire values into preferences” and building up of “habit capital.”).

<sup>93</sup> INTERIM CONST. OF SOUTHERN SUDAN pt. 9, § 150(1) (2005).

initiate legal action within the judicial system as appropriate.

### 3. Additional benefits of the collateral review procedure

While some might view this collateral review as an infringement of the power of customary courts, the net impact may well be to further strengthen customary law institutions. First, every reversal of a customary court decision will serve to educate the customary court judges (tribal chiefs and elders) as to the international standards that must be complied with. The quality and sensitivity of customary law decisions—at least as they are measured against the international conventions—will necessarily improve as a result of this process.

Even more significant, the collateral review process formally recognizes and legitimizes the customary court decisions. Because the statutory courts will defer to customary adjudication in all cases and on all issues other than those specified for collateral review, the customary courts become a formal and official part of the larger rule of law regime.<sup>94</sup>

Thus the imposition of a collateral review procedure for customary courts can actually strengthen traditional and indigenous rule of law mechanisms. It also clearly establishes ownership of the customary law in the non-state forum that applies it. Far from imperialism or the importation of foreign concepts and procedures, this approach retains and respects the local institution, legitimizing and strengthening its vital role in establishing the rule of law in South Sudan.

## CONCLUSION

The problems and issues South Sudan faces illustrate the competing priorities that will apply anywhere. First, any approach to rule of law reform must be culturally-sensitive, resisting the natural impulse to simply impose rule of law institutions like those of the donor countries. Second is the closely-related concept that any reform effort must inspire public confidence in the courts and other rule of law institutions. The public may

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<sup>94</sup> This is very different than the USIP's vision of customary courts, which is more limited, saying that the customary courts "may be in a position to play a vital complementary role in providing justice and a non-violent means for resolving disputes during the post-conflict phase." [http://www.usip.org/ruleoflaw/projects/customary\\_law.html](http://www.usip.org/ruleoflaw/projects/customary_law.html). The vision of this article is that customary courts should play a central role, not just a complementary one, and on a long-term, even permanent basis, rather than the temporary, transitional role, "during the post-conflict phase" envisioned by USIP. *Id.*

or may not have confidence in existing institutions; knowing and respecting that fact is critical in fashioning appropriate reform initiatives. Third, you have to work with what you have; limited resources will always be a constraint.

In South Sudan, these principles suggest that the customary courts must be retained. They have deep cultural and historical roots and are effective in maintaining a sense of order, stability, and continuity in tribal society. Public confidence in them is high, higher than it would be in any newly-imposed statutory court. And given the enormous population to be served and the dearth of judges qualified to adjudicate in statutory courts, South Sudan lacks the resources to replace the customary courts with any alternative system.

However, in order to keep and strengthen these customary courts as part of a larger and viable rule of law strategy, it is necessary to take certain steps to shore up the protections they can provide. Training of tribal chiefs and tribal elders is important in this effort, but a vital safeguard lies in a system of collateral review of customary court actions. Customary courts can maintain their power, dignity, and cultural value as final arbiters of customary law, but statutory courts can play a similarly vital role safeguarding fundamental principles of justice and human rights, by reviewing customary court decisions for, and only for, violations of those well-defined—and, in the case of South Sudan, Constitutionally-recognized—rights.

It is a balance that must be struck, a line that must be drawn, anywhere rule of law reform efforts are underway. The challenges in South Sudan are acute but not unique, and the balances struck there, respecting local culture while elevating rule of law standards, will be instructive for contemporaneous and future efforts to establish the rule of law elsewhere in the world.