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Customary Protection? Chiefs' courts as public authority in UN Protection of Civilian sites in South Sudan

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Abstract

Justice and security depend upon community action in South Sudan, even where civilians are under international protection. In this paper, we look inside the United Nations Mission in South Sudan (UNMISS) Protection of Civilians (PoC) sites at the functioning of customary courts in this unique context. We find that the courts are more than a mechanism for community dispute resolution, they are also integral to the invigoration of local norms and structures for protection. This self-reliance is understandable, given that UNMISS has failed to protect people outside and inside the PoCs, and is mired in a legal and administrative quagmire within the sites. In South Sudan, chiefs' courts have generally been associated with the pursuit of legitimate authority and accessible justice, but they are also the purveyors of norms that reproduce gender and generational inequalities and license certain abuses. Based on qualitative research and 395 court observations in the Juba and Bentiu POCs between July 2015 and July 2016,¹ we find that this duality persists even amid displacement and under humanitarian governance. The courts punish criminality, violence and breaches of custom, often in ways that oppress women and youth, yet their judgements, whether mediation or punishment, are concerned with making social and moral order, as illustrated by our detailed descriptions of a sample of cases. In interaction with UNMISS, new forums, actors and practices of justice are emerging; chiefly authority and ideas about the customary are adapting and thriving. We conclude that the regeneration of the courts in the sites is a response to a practical need for justice forums, but is fundamentally associated with the constitution of public authority and community among people affected by atrocity, conflict and profound uncertainty.

¹ This paper draws substantially on the work and insights of the observers based in the UNMISS PoCs in Bentiu and Juba, including Patrick, Nhial, Andrew, Peter, and William, and additional insights from the PoC3 Juba team leader Gatwech Wal Jany as well as on ethnographic and documentary research. We are hugely grateful to all of the court observers for their efforts and rich contributions. We also thank South Sudanese human rights lawyer Godfrey Victor Bulla; Taban Romano of South Sudan Law Society; Edmund Yakani of Community Empowerment for Progress Organisation; women's rights activist Angelina Daniel Seeka, and Justice Geri Raimondo Legge who all made important contributions to the research development, design or implementation, as well as Tiernan Mennen, Alex de Waal, and Justice Africa staff, including Hannah Logan, Flora McCrone and Jimmy Awamy. The analysis in this paper, and any errors or omissions, are entirely the responsibility of its authors.

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Customary Protection? Chiefs' Courts as Public Authority in United Nations Protection of Civilians Sites, South Sudan

Introduction

The United Nations Mission in South Sudan (UNMISS) Protection of Civilian sites (PoCs) set precedents in humanitarian protection by hosting some 200,000 civilians across South Sudan since 15 December 2013.² UNMISS saved lives by opening its bases to people fleeing atrocities, albeit only a fraction of those affected by a conflict that has claimed and estimated 50,000 lives, and left 1.7 million internally displaced.³ The mission has faced complex humanitarian, legal and administrative challenges in the PoC sites and is responsible for both innovations, and manifest failures in protection. While many of the achievements and failings of UNMISS and its humanitarian partners have been evaluated,⁴ there has been limited attention to the ways in which local community actors seek to regulate life, prevent violence and provide protection within the PoCs.⁵ This paper offers insights of relevance to peacekeeping and humanitarian protection reform. It also strengthens the evidence that civic initiatives by displaced people aimed at limiting violence or promoting justice in conflict-affected regions merit recognition and judicious support.⁶

We examine the initiatives of people living in PoC sites – functionally, internally displaced people (IDPs),⁷ to invigorate their own authority structures and security and justice mechanisms. In particular, we focus upon the practices of customary chiefs' courts. Based on extensive documentation of court processes and ethnographic research, we consider the role of chiefs' courts within the PoCs their procedures, and the judgements they deliver. In doing this, we contribute to understanding the everyday provisions of justice and security in conflict-affected, fragile settings. Our findings also have implications for assessments of humanitarian protection during the crisis, and for understanding modes of local governance in South Sudan.

Conflict-ridden regions are not simply 'fragile states' but sites of plural, sometimes competing, public authorities that command some legitimacy, or 'a minimum of voluntary compliance' (Lund, 2006). Analysing the actors and processes that wield public authority is essential where the state lacks purchase or reach. The everyday

² The numbers in the POC sites have fluctuated but averaged around 180,000 since December 2013 with some people leaving and others arriving over time. The most recent (August 2016) estimate is 195,494 including 94,827 in Bentiu, 32,719 in Malakal, 38,084 in Juba UN House, 2,585 in Juba Tomping, 2,004 in Bor, 700 in Melut and 219 in Wau, in Western Bahr El Ghazal adjusted area 24,356 (UNMISS, 2016). Our report focuses on the two largest, Bentiu and Juba UN House (PoC3).

³ The data for internal displacement is authoritative, from the IMDC as of 31 December 2015. However, the estimates of the number of dead are come from a UN official (Reuters, 2 March 2016), and there is a lack of clarity about the total number of deaths, especially given that these figures do not take account of a recent upsurge in fighting.

⁴ UNMISS has failed to respond to several violent attacks within and near to the PoCs, see South Sudan Protection Cluster, 2016; MSF 2016; Human Rights Watch 2016; Arenson, 2016.

⁵ With the exception of Justice Africa, 2016 and Arenson, 2016.

⁶ See Purkey, 2014; Holzer, 2014; McConnachie, 2014, Riach and James 2016. These refer to refugee camps in diverse contexts, but are also relevant to IDPs. Such initiatives are all the more important to acknowledge given the risks that refugee and IDP camps can become sites of military re-organization and political control (eg. Lischer, 2006; Weissman, 2008: 3).

⁷ The United Nations has deliberately avoided the terminology 'IDPs' in favour of 'PoCs'.

forms of governance should not be underestimated because they do not fit standard institutional categories and ‘resist unequivocal situation in either state or society’ (Lund, 2006: 689), indeed this indeterminacy may be an opportunity for power and legitimacy. Additionally, while public authorities are generally counter-posed to the state in conceptual terms,⁸ in reality they also proliferate in displaced communities and can reveal the scope or limits of emergent forms of ‘humanitarian governance’ and global governmentality.⁹

Public authority may take ‘constructive and corrosive forms’ (Meagher, 2012: 1073): authorities frequently draw legitimacy from traditional beliefs, and display ‘embeddedness’, while also engaging in predation or violence (ibid). But the legitimacy of public authority also relies upon public goods provision (Hoffman and Kirk, 2013: 9). Rather than classifying particular authorities, chiefs, church leaders or militia groups along a spectrum, we should anticipate contradictions and changes and be prepared to examine their evolving relations to citizens or powerful national or global actors empirically (Macdonald and Allen, 2015). In contrast to the impression of coherence, autonomy and fixity associated with the ‘state effect’ (Mitchell, 1991), public authority is plastic and contingent, with a tendency to ‘wax and wane’, remaining constantly in formation (Lund, 2006). There is also an implicit – and often overlooked – prospect for negotiation or resistance in relations of ‘compliance’; even ‘domination’ is generally quietly contested, and ‘subordination may be deployed ... for purposes of manipulation and concealment’ (Scott, 1990: 3).¹⁰ Public authority is plural and thus especially negotiable and mutable: loyalties may be transferred. Moreover, whether it manifests as a ‘protection racket’ or ‘legitimate protector’¹¹, or combines elements of both, its existence is relevant to the question of how to operationalize the protection of civilians and pursue peace.

‘Protection of civilians’ in conflict arenas tends to be conceptualized as a task for international peacekeepers (Levine, 2013), responding to events, potentially with the use of force. But investigations of practice have produced calls for recognition of ‘civilian agency’ (Baines and Paddon, 2012); and for deeper engagement with local social actors to establish hybrid structures of prevention and response: for ‘systems of protection that deflect threats of violence, intercede in crises and mitigate harm’ (Levine, 2013: 2). Moreover, long-term protection depends on the establishment of political communities, social contracts and legitimate authorities. Seen in this frame, the proliferation of local forms of public authority relates to popular efforts to forge social contracts and constrain those exercising political power, even in the midst of war and protracted crises. The challenge for international protection actors then becomes how to relate to these existing authorities and how to differentiate, at

⁸ See Hoffman and Kirk, 2013 for a comprehensive analysis of the concept and related debates and Macdonald and Allen, 2015, on its relevance to experiences of justice.

⁹ This refers to the swathe of interventions aimed at saving lives and minimizing suffering but also designed to govern and to transform political order at the global margins. See Barnett 2013; Duffield 2002.

¹⁰ Although little examined in theorizations of public authority, this is apparent from particular cases (see Leonardi, 2013).

¹¹ See Tilly cited in Kaldor, 2014: 65 on the ambiguity of protection. Kaldor also makes the case that legitimate political authority is central to protection globally.

particular moments, between ‘predators’ and ‘protectors’, and between the logics of governance they deploy.¹²

The people in the UNMISS PoCs are seeking international protection from a hostile military associated with the government (Sudan People’s Liberation Army-In Government, SPLA-IG), and from its conflict with the military forces of the SPLA-In Opposition (SPLA-IO). Their predicament is defined by a dependency on UNMISS, coupled with an awareness of the limitations of the force and a desperate fear of the fractured and violent armed forces associated with the Juba government, the SPLA-IO, or both (Stimson Centre, 2014; Arenson, 2016: 49).

Meanwhile, UNMISS has taken on some of the characteristics of a governing authority, although its powers are constrained by its mandate and Status of Forces Agreement (SOFA) with the Government of South Sudan. The UN was not prepared for a governing role, either legally, or in terms of policy and resources. But at the outset of the war, UN officers interpreted their responsibilities to include providing immediate protection to civilians in imminent danger, and opened the gates of their camps to scores of thousands of people seeking sanctuary. Despite being unprepared for this human flood, UNMISS has managed to accommodate thousands of people at bases that were designed and built for the entirely different purpose of supporting the mission’s own personnel and operations. Of necessity, the UN has adapted its response over time (see Arenson, 2016). Humanitarian agencies also have leading roles in the management of the sites and have taken over the delivery of food, medicine, water, education and other necessities, as well as contributing to protection services such as psychosocial support and sexual violence prevention and response, and to physical protection.¹³ Less obviously, local actors have made important contributions to the provision of justice and security, either in collaboration with UNMISS, or through autonomous initiatives.

It is understandable that residents of the camps would turn to their own community leaders to establish mechanisms for protection. Despite having a mandate and strategy for civilian protection, the limits on UNMISS’s capacity were laid bare by atrocities, including massacres of Nuer residents of Juba in December 2013 and, among other atrocities, by subsequent massacres of civilians in Bor, Bentiu and Malakal, targeting Dinka, Nuer and Shilluk. Many of the people in the PoCs are survivors of these massacres or of other attacks against civilians including rape and sexual violence, abductions, and detention. There has been unrelenting violence against civilians in this conflict; the UN High Commissioner for Human Rights has listed ‘gross violations and abuses of international human rights, serious violations of international humanitarian law and other international crimes’ (UNHCHR, 2016). There have also been attacks upon humanitarian workers (Human Rights Watch, 2016). As yet, there has been no significant national or international initiative to bring those responsible to justice, despite commitments made in the Agreement on the Resolution of the Conflict in South Sudan of August 2015.

¹² Levine, 2013, fn. 40 emphasises relevance of Anderson’s ‘do no harm’ differentiation between connectors and dividers, however the challenge of evaluation remains. See de Waal, 2016 on the logic of the political marketplace, and alternatives of public mutuality and moral populism.

¹³ In particular Non-Violent Peaceforce has contributed to physical protection.

UNMISS cannot protect the vast majority of civilians who live outside of the PoCs. Indeed, the mission's authority and military capacity are not even robust within the PoCs. This was demonstrated by a series of violent incursions into the sites, which were ostensibly protected by UN troops and perimeter defences. The mission's 'glaring failure' (MSF, 2016: 2) to respond effectively to fighting in the Malakal PoC in 17-18 February, in which more than 25 people were killed and some 120 were injured, confirmed that, despite more than two years of experience in the PoCs, the mission was still neither sufficiently prepared nor motivated to respond to violence within the base or in its vicinity (Arenson, 2016: 32). Additionally, UNMISS has been plagued by concerns that former combatants sometimes seek protection in the site, and while some may effectively become civilians, others may simply take temporary respite before returning to fight (ibid: 58; CIVIC, 2015: 13). Meanwhile, as in any other camp setting, there are regular incidents arising from domestic and interpersonal violence, criminality, and inter-communal tensions (UNSC, 2015b; Justice Africa, 2016). The UN civilian police service (UNPOL) has responsibilities for policing within the PoCs, but it was not designed for the scale or nature of the task, possessed only limited legal authority for arrest and detention, and confronted an array of unexpected challenges, leading to improvised responses.

In these circumstances, PoC residents have pursued a familiar strategy, turning to customary authority. The most resilient and popular forms of public authority are generally local in South Sudan, not least because historically the people of this territory have been subject to a succession of predatory rulers in the guise of the state (Rolandsen and Daly, 2016: 9). People routinely turn to an array of community level authorities for support, including to shield them from the 'violent kleptocracy' (de Waal, 2014) of government.¹⁴ In particular, chiefs have had leading roles in the regulation of social life at local levels, and also in 'contracting' or 'brokering' relations between people and government (Leonardi, 2013).

Courts are the centrepiece of the exercise of chiefly authority. The courts and their procedures were an innovation of the Anglo-Egyptian Condominium government at the beginning of the 20th Century but they claim authority from pre-existing concepts and practices of justice. They come in 60 potential varieties,¹⁵ but have remained the main form of justice provision, especially in rural contexts where statutory law has hardly penetrated. Both the courts, and the laws they apply have functioned and evolved through decades of war and social upheaval, in different contexts, with varying interpretations and degrees of authority and rigidity (Leonardi et al, 2010). During previous experiences of wartime migration, displaced communities recreated the customary law to provide community regulation and create a link to home communities.

The democratic credentials of chiefs are questionable, and they have frequently been criticized for human rights abuses and discrimination against youth and women (Hoehne, 2008: 3). Nevertheless, they have often been a source of civil authority. Even members of the SPLA identified the chiefs as responsible for having held

¹⁴ For instance militia groups, community development organisations, prophets, community police (see Pendle, 2015).

¹⁵ There is no official estimate of the number. As Mennen (2012: 10) notes, there are over 65 tribes in South Sudan and each tribe has 'variations in court procedures'. However, typically sources estimate that there are over 50 varieties of customary court e.g. (see Jok et al, 2004: 13).

together the ‘social fabric’ during its decades of conflict with the Government of Sudan (cited in Leonardi, 2013: 2). Chiefs’ courts are often the sole functioning justice mechanism at community level and are deemed to have a crucial role in the management of conflict. They have been found to yield both ‘structural benefits’ and ‘harms’, including ‘chronic miscarriages of justice for violence against women’ (Mennen, 2010: 218). Yet, their forms, impacts and political significance can alter as they adapt to changing regimes. We therefore need to examine their everyday workings in particular locations and periods.

In this paper, we examine the practices of customary courts in the unique context of the PoCs. We explain the customary legal system as manifest in the POCs and explore how particular cases are handled, including adultery, gender-based violence, assault and crimes related to the war. We do not seek to evaluate whether the courts deliver justice according local definitions or international human rights norms, although the material does provide insights on this.¹⁶ Instead, we are interested in how chiefs constitute public authority; their role in producing narratives of moral community, and in preventing, or setting limits upon violence. We also explore the flexibility of the courts, and whether and how they are adapting to their new context. We first establish the context, explaining our approach and tracing the historical significance of customary authorities and their status during the present conflict. Next, we explain the problem of insecurity in the PoCs and UNMISS approach to protection. We then proceed to discuss our findings concerning the characteristics and practices of customary authority in the PoCs. Finally we identify the contributions of chiefs’ courts to ideas and practices of protection, providing detailed case reports from a selection of incidents and court cases.

Researching Justice in Conflict: Ethical and Methodological Considerations

This paper focuses on one strand of findings from a research project to examine the everyday practices of justice, and their relationship to the logics of governance during the conflict, for the *Justice and Security Research Programme*.¹⁷ The approach was based on engaging affected populations in setting research priorities and agendas, employing collaborative action and political ethnography methodologies. The ethical principles underpinning the research include a concern with sharing power and resources with participants during the research processes, and building in concerns about justice and change.¹⁸ The research was developed in collaboration with South Sudanese lawyers, activists and paralegals, and shaped by their experiences of injustices within the system, and the lack of publicly available records of court proceedings.¹⁹ It seeks to provide insight into how the justice is being interpreted and

¹⁶ However, the research project was undertaken in collaboration with local activists committed to improving justice and human rights with the intention that the findings can be useful to support this work (see below).

¹⁷ The Justice and Security Research Programme (JSRP) is an international research consortium, based at the London School of Economics, with funding with the UK Department for International Development (DFID). The archive is currently under development and will be made available publicly in due course.

¹⁸ See Gergen, 2014; Centre for Social Justice and Community Action, 2012.

¹⁹ Indeed customary courts often do not have clerks, so there is also a lack of records in the courts themselves.

delivered following policy reforms and amid ongoing political turbulence and to provide documentation of use to legal activists as well as academics.²⁰

The main activity of the project is the systematic observation and recording of cases in local courts, both statutory and customary. This aims to compile the most extensive record of the proceedings of courts available thus far, which can form the basis of an envisaged comprehensive recording of court cases across South Sudan, and can be used to educate and inform South Sudanese citizens and all those involved in the justice system, as well as providing material for research.

The project encompassed a year of court observations of statutory and customary courts in nine localities (July 2015-July 2016), as well as participant observation and documentary research. Most of the observations were recorded by local researchers who were already working as volunteer paralegals. The court observers were given guidance on documentation and ethics and risks. The court observations were all anonymized to exclude names of participants in courts cases in order to minimize risk and potential harm. The processes observed were all public processes which the observers were able to attend freely, but relevant authorities were informed and consent obtained where appropriate.

This paper is a preliminary assessment of materials gathered by a team of local researchers in Juba PoC3 and Bentiu PoC. They documented the majority of the court observations and also participated in training and discussion forums. It draws examples from a batch of 395 reports gathered between July 2015 and July 2016, and from participant observation in civil society forums, interviews, informal discussion, and observation of Community Watch Groups, courts, chiefs and paralegals, as well as telephone and email exchanges.²¹ Our approach focuses on experiences of the courts at the level of community actors. While we also draw upon documentary sources including reports from UNMISS, humanitarian actors, and news reports, we do not seek the views or experiences of other actors directly. We anticipate that there may be minor inaccuracies in the records of some court reports due to translation or mistakes in recording, yet the number of the reports and the fact that they provide a substantial record of events, rather than relying the memories and perceptions of interviewees given after the fact, makes these a reliable source.

²⁰ A group of 21 South Sudanese court observers took a leading role in creating the research archive. This paper draws on the work and insights of the observers based in the UNMISS PoCs in Juba and Bentiu, including Patrick, Nhial, Andrew, Peter, William, and additional insights from the PoC3 Juba team leader Gatwech Wal Jany. We are hugely grateful to all of the court observers for their efforts and rich contributions. We also thank South Sudanese human rights lawyer Godfrey Victor Bulla; Taban Romano of South Sudan Law Society; Edmund Yakani of Community Empowerment for Progress Organisation; women's rights activist Angelina Daniel Seeka, Justice Geri Raimondo Legge who all made important contributions to the research development, design or implementation, as well as Tiernan Mennen, Alex de Waal, and Justice Africa staff, including Hannah Logan, Flora McCrone and Jimmy Awamy. The analysis in this paper, and any errors or omissions, are entirely the responsibility of its authors.

²¹ The majority of cases are from Juba; the sample from Bentiu was 57 over a shorter period. The findings are also based on participant observation during Naomi Pendle's fieldwork in the Bentiu site in 2014 and Rachel Ibreck's participant observation in Juba PoC3 sites and court observer forums in Juba in July 2015 and January 2016. The analysis also draws on Pendle's research in the western Nuer in 2012-14.

The PoCs were selected as a neatly-bounded case, in both space and time, allowing for close investigation of how customary authority relates to protection. This case has both intrinsic and heuristic value²²: we seek to understand the practices of customary justice in a highly particular context, but also to gain further insights into relations between justice and public authority in conflict settings. The PoCs are especially interesting partly because, for various reasons, they are not a conducive environment for the customary system to flourish. In post-independence South Sudan the courts have derived authority from the Constitution and the Local Government Act, 2009,²³ both of which recognize traditional authority. Yet, camp residents are fearful of references to the South Sudanese state due to its association with the Juba-based government.²⁴ Nor can the customary leaders command the direct support of any other external political or military actor, such as the SPLA-IO. UNMISS does not acknowledge the courts officially and has promoted its own policies and procedures for dealing with justice within the camps, at least on paper if not consistently in practice (see below).

Importantly, there are opportunities for people in the PoCs to resist the imposition of customary authority. They explicitly sought the ‘protection’ of UN security forces and are surrounded by humanitarian actors and activities, including competing peacebuilding and human rights initiatives and norms. As such they are exposed to new ideas, including relating to women’s rights and youth education, and to the social flux of an intense urban context. Youths in particular, are seizing opportunities for new freedoms, for instance through the formation of gangs (popularly labelled ‘niggers’) whose discourses and dress emulate urban gangs in the USA (see Justice Africa, 2016: 56).

Relatedly, we cannot speak of a settled and bounded community in the camp, although the majority of residents are Nuer. In a general sense, communities are never prior and stable categories for analysis, since collective identities are constantly made and remade in public discourses, rituals and processes of social interaction (Nagel, 1994). But in this context, conceptions of community are being articulated and (re)formed amid intense social disruption. ‘The community’ in the PoC is only recent in origin, and there are social cleavages within it. The PoC community was also conceived as temporary, although it was established almost three years ago and there is still no foreseeable prospect of return for most people. Moreover, since the advent of government in Southern Sudan, Nuer communities have also had significantly different experiences of government. Since the 1980s, Nuer political and military leaders fought on every side of the fragmented political landscape, and have dragged their home communities into competing forms of government and rebel governance. This has also meant that legal authority and Nuer laws have been adapted in interaction with different regimes.

Customary authorities therefore cannot simply emerge as ‘traditional’, they are evidently a response to the current predicament and involve engagements in a process of community-making. Accounts of law and judgements by the chiefs’ courts

²² This point is informed by Stake’s (1995) criteria for case selection.

²³ This sets out the role, structures and jurisdiction of customary courts.

²⁴ For instance, in 2014 South Sudan Law Society found it was not able to use its own vehicle to visit the camp due to hostility from residents. SSLS is a civil society organisation, but camp residents reacted negatively to the connotations of the name displayed on the vehicle.

generate common sense not only about who constitutes ‘the community’, but also about the relative status of different groups and genders within it. This is not new in the context of South Sudan where communities have experienced regular rounds of displacement during war, but the particularities of the PoC context, under the authority of an international peacekeeping force, are in many ways unprecedented.

The people of the PoCs in Juba and Bentiu overwhelmingly self-define as Nuer in ethnicity, but the Nuer group encompasses heterogeneity in regional, clan and section identities, with vastly different experiences of wealth, education and experiences of urban or rural living. There are also residents of from other ethnic groups in the sites, and more newcomers and changes to the social make-up of the PoCs following each local upsurge in fighting. Indeed, in such a crowded and inhospitable environment, people are caught in a distinct form of social turmoil. They are exposed to new ideas and practices in what are becoming quasi-permanent, urban centres. They are also detached from some former roles and relationships, while their agency in this new setting is profoundly constrained. We might therefore expect contestation of pre-existing notions of community and custom, and over the locus of authority. The establishment of a community system of governance must therefore be regarded as a feat of accomplishment, rather than a given. Our findings suggest it depends largely upon the roles of chiefly authority and courts.

Key findings

Customary authority prevails in a context of displacement and social turmoil within the UNMISS PoCs. People continue to look to their community for protection, even when they are surrounded by international actors dedicated to this end. We find that customary courts are a crucial community-led mechanism for justice and security within the PoCs. More than a forum for minor dispute resolution or inter-personal ‘mediation’, they exercise discursive power in constitution of identities, norms and ideas about moral order, while regulating social behaviour, including violence. They reflect the desire for legitimate civil authority, capable of conflict prevention, and display their commitment to this aim, generally with punitive judgements and moralizing against violence and infractions of social norms. But they also reproduce discriminatory practices, undermining the rights of women and girls to equality before the law and in marital and family relations and enmeshing young men in dependent relations to their kinship elders, through bride wealth payments or ‘elopement’ and adultery fines.

Local leaders rapidly assembled customary chiefs’ courts in the Juba UN House and Bentiu PoCs and these have functioned on a routine basis ever since, with typically close to fifteen court hearings per week. Our court reports demonstrate this steady practice of court hearings,²⁵ and the fact that court hearings are often held within a matter of days of a complaint. The courts are generally held publicly under a tree by a panel of up to sixteen chiefs. As well as the parties to the case, there are always people from the community in attendance, often more than fifteen. The courts collect fees and issue substantial fines and punishments and their decisions are usually accepted and taken seriously by all the parties. This power of customary authority is

²⁵ We gathered 338 in Juba over the period of a year, averaging 7 per week, across a range of courts, capturing around half of the estimated total number of cases.

apparent in the payment of court fees, and acceptance of decisions imposing high fines and sentences of imprisonment, although the capacity of courts to implement these immediately is limited.

In contrast, the contributions of the chiefs' courts are not officially acknowledged by UNMISS, although they and their humanitarian partners are certainly aware of their existence and roles in justice and security within the camp (South Sudan Protection Cluster, 2014).²⁶ UNMISS has engaged indirectly with customary authority and encouraged community leadership as a means to fill protection gaps – the mission has provided training and guidelines for the Community Watch Group, as a volunteer police force, and for a dispute resolution mechanism to settle minor cases – the Informal Mediation and Dispute Resolution Mechanism (IMDRM), among other structures.

The boundaries between UN initiatives and customary authorities are fuzzy or opaque. The IMDRMs are mostly eclipsed by pre-existing chiefs' courts, although some court hearings are labelled as such; in Bentiu, an IMDRM operates with the full authority and jurisdiction of a chiefs' court. We see some awareness of UNMISS guidelines, and the emergence of new court panels, including representation from women. As with chiefs' courts in the past, their legitimacy rests on an ambiguous, hybrid and dynamic combination of support from the community and (tacit) support from UNMISS, as the overarching authority. Notably, chiefly authority is also connected to other institutions that reinforce Nuer customs as a source of protection. In Juba PoC3 this also includes a security force, the N4, a force named based on its representation of the four greater Nuer areas across South Sudan - Greater Akobo, Greater Fangak, Greater Nasir and Greater Bentiu, with over 250 members.²⁷ Across the different courts and security actors in the site, there are commitments to community ownership and ideas of the customary.

Crucially, the chiefs derive authority amongst the PoC residents not through reference to a political or military actor, but rather through invoking a shared attachment to a territorial homeland, Nuerland, composed of counties represented by a chief through a process of selection based on 'home' communities. The courts are involved in the construction of a strong ascriptive identity and relations of trust. They are not just recognizing a common Nuer community, but actively forging it through 'bonding' and also 'bridging'.²⁸ Regardless of the litigants' Nuer community, history or background, they fall under the jurisdiction of the same Nuer court. Collaborations between chiefs from different Nuer sections cement the idea of a common Nuer identity. Chiefs narrate customary laws as if they were a fixed set of principles that constitute Nuer tradition. In this manner, the courts conjure an imagined shared morality, law and moral community, contrasting with the realities of historical

²⁶ See comments from UNMISS officials, cited in Justice Africa, 2016: 18. See also UNSC 2015c and discussion below.

²⁷ Each of the 16 counties have representatives, and there are some women members. The members are aged between 18 and 40 years.

²⁸ Putnam uses bonding and bridging to differentiate between different forms of social capital, the former referring to inward-looking or potentially exclusionary groups based, such as those based on ethnicity or kinship, the latter inclusive social networks engaged in consensus building between groups of diverse interests, expanding relations of trust. But he also notes that both may be present simultaneously (Putnam, 2000: 21-23).

experience across the Nuerlands. They present law as a consistent guide to morality and imply continuity with an (imagined) more stable, peaceful, and homogenous past.

At the same time, chiefs and their courts are adapting to their new context. Court judgements may both draw on recollections of Nuer law, and reflect new legal and moral sources in the PoCs, occasionally including concerns about human rights. On occasion, members of other ethnic groups in the PoC sites are involved in cases in Nuer courts, and appear to be given consideration and equal treatment in the deliberations. The chiefs recognize UNMISS's governing authority within the camp, and this affects both which cases they handle and occasionally the pronouncements they make. UNPOL does not intervene in monitoring or regulating the daily practices of the courts but has insisted that they should not handle the most serious cases involving rape or murder, and these are mostly dealt with by UNPOL. Another marker of the UN's influence has been in undermining the role of the chiefs as the chief 'brokers' between government and the community. The members of the Community Watch Group, and paralegals trained by human rights organisations have taken over some of the responsibilities for mediating and negotiating on cases. UNPOL routinely liaises with the Community Watch Group which holds its own court hearings, and refers some cases to the chiefs. Yet the chiefs retain their higher status, as exemplified in their power to rule on complaints of misconduct raised against other community representatives, including members of the CWG.

The courts are forums in which the relevance to the Nuer community of competing claims of authority (from UNMISS and its humanitarian partners) and new norms are being worked out. On occasion they become opportunities for deliberation and contestation – and potential re-workings of the moral community. We see that in some cases, the law has proved capable of flexibility to changing circumstances. But in others, some chiefs or parties may use the courts strategically to combat changing moral norms. Often, their judgements are accepted by the parties and appear to meet with community approval but there are also examples of contestation and demands for change. These practices reinforce existing arguments that the courts are flexible mechanisms with scope for engagement and reform.

Chiefs' courts are the central pillar of customary protection, although their approach is often inequitable or even oppressive. As found in other studies of customary justice, court decisions reproduce inequalities between elders and youth and, in particular, assert the power of families and communities over women. In this sense, they contribute to their vulnerability, and mirroring power relations and violence in the conflict itself. But the research shows that we should not make generalisations about the practices of courts or content of law, it is worth looking in depth and detail at judgements. While these may be regarded as inconsistencies, they may also be opportunities and evidence of change. There is substantial evidence that chiefs are involved in setting limits on violence; customary authority has been crucial in halting fighting and punishing perpetrators as well as forging and fostering social relations among people affected by conflict. Chiefs operate largely on a voluntary basis, displaying commitments to the public interest and social welfare. The courts stand opposed to the widespread militarization outside the PoCs and the ongoing threat of violence within them. The experiences of customary authority in this context contain valuable lessons about the meaning of protection in a general sense; and about the potential and limitations of protection in UN peace missions in particular.

Customary Authority: Variations and Continuities

Chiefs' courts have been the dominant justice forum across the terrain that is now South Sudan since the 1930s. They are associated with the establishment of native administration in the colonial era and with the changing relations between government and people since. The role of the chiefs has been richly explored in different periods and localities, revealing adaptations and important continuities (Leonardi, 2013). Similarly, although the customary laws cited in courts belong to the different 'traditions' of over sixty ethnic groups, there are also many commonalities between them (Mennen, 2008; Deng, 2010). The chiefs' courts and the law rely on the fiction of continuity with normative traditions that predate colonialism, but have evolved from a complex intermingling of local, national and international influences, having been continually refashioned to satisfy political and social pressures, shifting ethical foundations and the demands of daily life.

Increasingly, there have been efforts to codify and harmonize customs, for instance some courts reference a set of written codes (such as the Dinka laws of Wath Alel or the Nuer laws of Fangak). But judgements also depend upon oral situational interpretations. 'Courts interpret the applicability of rules to each case according to its particular context and their evaluation of a litigant's character and speech' (Leonardi et al, 2010: 28). Chiefs have been able to creatively interpret these legal codes in response to circumstances and moral demands. Citizens have also sought to use their arguments in the public arena of the courts to push for change (ibid: 118).

In contrast to the variation and flexibility in the power of courts and the substance of customary law, the intermediary function of chiefs is consistent. Their legitimacy rests upon an offer of 'protection' from alien powers and governments: 'dealing' with governments (foreign and Sudanese) on behalf of the people (Leonardi, 2013). Chiefs have served as 'interpreters and interlocutors who people turn to in order to 'contract' government and 'render it more predictable' (Leonardi 2013: 2-3). They have straddled the spheres of the government and 'home' communities, acting as a means for the centre to govern but also as a forum to contest or manage central government's rule as expressed at the local level.

Since their creation, chiefs have used the courts as a way to avoid or set limits upon violence: there is a 'strong perception that the courts are the principal means of avoiding violent outcomes of disputes.' (Leonardi et al, 2010: 30). People have engaged with courts in pursuit of protection, social regulation and security, even when other legal forums are available (such as statutory courts). In turn, local government authorities have held customary courts accountable for insecurity when they fail to settle cases. The courts are a means to maintain order and 'prevent disputes from escalating into armed conflicts between different families, clans and communities' (Santschi, 2014: 49).

From colonial to post-colonial authority

The Anglo-Egyptian Condominium Government established chiefs' courts in Southern Sudan in the early twentieth century as institutions of native administration, designed to promote security and extend government (Johnson 1986; Leonardi et al 2010). The 1931 Chiefs' Courts Ordinance cemented the relationship between chiefs'

courts and influenced the codification and interpretation of law. Oversight of the courts became a key duty of District Commissioners. Chiefs combined executive and judicial authority in a ‘clenched fist’ (see Mamdani 1996). This could be a formula for local despotism, provided that the chief served his colonial masters sufficiently well. But chiefs had to live among their constituents, who had means of pressuring or circumventing those who did not conform to the community’s precepts of chieftaincy.

The civil war between the Anyanya rebels and the government in the 1960s and early 1970s brought new challenges to the chiefs’ courts and a reconfiguration of authority, especially for groups who fled as refugees from the war. In the early 1970s, the central government attempted to replace native administration with a new hierarchy of elected councils. These elected councils operated as a top-down, authoritarian system (Leonardi 2013: 150). Some chiefs were co-opted by them and others opposed them, but the chieftaincy remained part of local government and influential in government and community relations.

Governing through war and displacement

Warring parties have sought to employ the authority of established chiefs, pulling them away from the community. During the SPLA-Government of Sudan (GoS) wars of the 1980s and 1990s, both parties attempted to make use of chiefs both to mobilize combatants and keep order in territories that they controlled. In SPLA-controlled areas, commanders relied on chiefs to provide order and regulation via the chiefs’ courts. Chiefs also mobilized food and soldiers for the SPLA. Chiefs also often played a significant role in food distributions for the large-scale, international humanitarian operations. To some extent, chiefly legitimacy was undermined by militarization and the employment of chiefs in the service of the SPLA and other southern opposition movements who tended to use chiefs to ‘extract resources... [and] recruits’, and to brutally kill them if they failed (Hutchinson, n.d.: 17). On the other hand, there was also pressure from government, and sometimes interference in the chief’s selection.²⁹ However, the authority of chiefs could also be cemented by powerful, military backing and access to resources; their potential to burden communities also gave them bargaining power to deal with military forces and also bring protection for people and property (Leonardi 2013: 166). In the 1990s, the SPLM attempted to construct more formal civil authority, while retaining the local essence of the chieftaincy. The SPLA Penal Code explicitly stated that, ‘The provisions of this law shall not prejudice the application of the existing customary laws and practices prevailing in each area’ (SPLA Penal Code, Section 6).

Across the Nuerlands, experiences of government varied considerably, as did chiefs responses. New iterations of chiefly authority emerged. In the western Nuer in the 1980s, the SPLA leadership (including Riek Machar) attempted to reform the substantive content of the customary law to increase gun control. Blood wealth compensation was doubled for bullet victims. The SPLA also increased the number of courts to facilitate people’s access to their chiefs (Hutchinson 1996: 147-149). In the late 1980s and early 1990s in the western Nuer, Riek Machar (and briefly his

²⁹ See Hutchinson, 1996, 271-278 for a description of the election of a chief in 1981 and the point that in that period chiefs felt vulnerable to removal by the commissioner.

British wife Emma McCune) attempted to reform, codify and harmonize the law of the western Nuer, an initiative sometimes referred to as the ‘White Book’.

Conflict and war-induced migration have shaped chiefly authority, the courts and law. Nuer communities have developed a variety of legal codes and legal authorities in contexts of displacement or uncertainty. Southern Sudanese communities in Khartoum (Sudan) and Kakuma (Kenya) during the 1990s recreated courts that resembled the customary chiefs’ courts of their homelands. Sometimes the power of chiefs’ courts has been eroded, partly because of the tendency of warring parties or people in IDP camps to appoint their own new chiefs, leading to ‘proliferation’ (Hoehne, 2008: 17). There are also important examples of the empowerment of chiefs and of their role in limiting military authority and in conflict-resolution. The most celebrated peace and reconciliation initiative in this period began with the coming together of thirty-five Dinka and Nuer chiefs in Wunlit in 1999 (Wunlit, 1999).

Reforms after the CPA

Since the 2005 Comprehensive Peace Agreement (CPA), the Government of Southern Sudan (GoSS, 2005-11), which seamlessly transitioned into the independent Government of the Republic of South Sudan (2011-present), has incorporated customary law into South Sudan’s institutional arrangements. GoSS has reimagined customary law as a meta-ethical legal foundation and an alternative to Sharia or other global ideologies. As the then Chief Justice described, ‘Customary law is a manifestation of our customs, social norms, beliefs and practices. It embodies much of what we fought for these past twenty years. It is self-evident that customary law will underpin our society, its legal institutions and laws for the future’ (Then Chief Justice Ambrose Riny Thiik, as quoted by Deng (2010: 13). On these terms, customary laws are viewed as distinctively South Sudanese (as opposed to the Sudanese laws informed by Sharia) and are a basis for a shared identity. However, there has been no clear statement and little debate about what common values the diverse customary laws of South Sudan might offer.

GoSS’s incorporation of the customary courts into the institutions of the state provides legal authority for government to intervene and limit the jurisdiction of these courts,³⁰ and some state and county governments have made efforts to undermine the authority of individual chiefs. But when chiefs have lost local legitimacy, communities have sought alternative authorities, such as Nuer prophets, to administer customary law.³¹ Generally, strong ties and accountability to communities has been maintained. Indeed, chiefs depend directly on the support of communities: they are not on the central government payroll and typically receive inconsistent payments from local revenue, including court fees’. Moreover, selection is determined by the community, even if the precise rules for the succession of chiefs still vary considerably from place to place (Santschi, 2014: 45) Chiefs are either appointed by

³⁰ In particular the Judiciary Act 2008, section 16, states that the ‘The President of the Supreme Court shall by warrants establish County and Payam Courts’. However its application and meaning was controversial and has not been systematically interpreted.

³¹ This is a finding from Naomi Pendle’s doctoral research in the western Nuer from 2012 – 2014.

communities on a hereditary basis or selected on the basis of public deliberation and voting.³²

The Effects of Conflict after December 2013

The eruption of civil war in December 2013 does not appear to have undermined the importance of the customary courts. They mostly continued their work, as is apparent from our court observation research. If anything they may have become more salient, given the collapse of statutory courts in some areas within the war zone. Of course, chiefs are not outside of politics - individuals have different political affiliations and may have other roles within their community³³ or seek to exert influence as a collective in the political sphere.³⁴ And the role of chiefs in maintaining social order and standing for the community has sometimes cost them their lives.³⁵ Chiefs' courts have risen to the demands of changed political circumstances, but been subject to new interventions or threats.

Chiefly authority has been undermined by the military and government in some instances. The declining power of the chiefs over the Dinka community police *Titweng* and the rising influence of the SPLA-IG is a crucial part of explaining the dynamics of the current conflict, since these local forces were brought to Juba and harnessed by SPLA-IG commanders and had a leading role in the atrocities of December 2013 (see Pendle, 2015). Similarly, in Mayom County, Unity state, the authority of chiefs was found to be diminishing partly due to government interference (Small Arms Survey, 2014: 4). More generally, some chiefs in conflict zones have been implicated in handing over children as recruits to fighting forces, according to UNICEF (UN Radio, 2015).

Elsewhere, chiefs have had roles in restraining military authority. For example, in 2014 the SPLA-IO created a customary appeals court in Ler made up of senior chiefs from all counties under their control.³⁶ The court heard appeals from customary courts across southern Unity and was active in trying to end long-standing feuds to keep the peace in these SPLA-IO areas. Meanwhile, the governor of Sobat has made an important attempt to harness chiefly authority to regulate military actors, seeking to 'bring the White Army under control through the chiefs'.³⁷ This endeavour sought to return these notoriously fierce fighting forces to a role of community security provision among the eastern Nuer – and was said to have yielded benefits by June 2015 (Young, 2016: 33). Such initiatives underline the potential of chiefs to regulate

³² In some instances, the position became very competitive and candidates spent considerable amounts of money and slaughtering cattle to entice voters during their campaigns.

³³ For instance, there are chiefs within the ranks of the White Army (Young, 2016).

³⁴ The statement from Nuer chiefs rejecting Taban Deng's leadership of SPLM-IO is a clear example (*The Insider*, 30 August 2015).

³⁵ This also applies in areas which were outside the war zone at the time. For instance, in September 2013, the paramount chief of Nimule, Eastern Equatoria, was shot dead. Several other paramount chiefs have also been killed including the paramount chief of Wau County, Western Bahr el Ghazal was killed in May 2015 (Radio Tamazuj, 11 May 2015).

³⁶ Interview with western Nuer Chief, Ganyliel (former Unity State), November 2014.

³⁷ The White Army are a military force responsible for mass atrocities against civilians in the current and previous wars – they are said to be animated by a demand for revenge following the killings of Nuer in Juba (Young, 2016) and have played crucial roles in the conflict.

violence, exert civil authority over military forces and thus contribute to the protection of civilians.

Insecurity at Protection of Civilian Sites

Although they fled there for safety, people inside the PoC sites remain vulnerable to violence and criminality. The everyday forms of insecurity associated with urbanization processes arise alongside conflict-related threats of perimeter breaches and abductions, rape and killings. The problems are sharply illustrated in UNMISS's reports to the United Nations Security Council (UNSC). In total by September 2015 UNMISS recorded 2,900 security incidents at these sites (UNSC, 2015c). In the three-month period from April to June 2016 alone, there were 398 incidents (UNSC, 2016). These ranged across a wide spectrum from killings, sexual violence, crime and attacks against UN and humanitarian personnel and included issues such as inter-communal fighting, theft, gang violence, and domestic violence (UNSC, 2015b; see also UNMISS HRD, 2015: 16).

A series of violent incursions into the PoCs exposed the limitations of UNMISS' protection capabilities. The perception of UNMISS as a 'soft target' pre-dated the December 2013 crisis and was confirmed during an attack on the Bor PoC in April 2014, in which 47 civilians were killed and at least 100 injured (Arenson, 2016: 34). Despite this and subsequent perimeter breaches, preparedness had not improved when the Malakal PoC was attacked in February 2016, leaving more than 25 dead and 120 injured.³⁸ UNMISS's response in Malakal was hesitant and deeply flawed, both in terms of prevention and crisis response. Regrettably, it did not react to warnings that weapons were being smuggled into the site before the incident, and when the violence started it did not respond to contain it, taking an estimated 16 hours before engaging the armed forces attacking civilians within the camp (MSF, 2016: 25).

Not only have there been attacks upon the PoC but there also routine episodes of violence within and in the vicinity of the PoCs, and these have spiked with the spread and intensity of the conflict in different localities. Each PoC is also a distinct security environment, as is evident from experiences in our two research sites.

Insecurity in Bentiu

Bentiu is the largest PoC site, hosting over 94,000 people in August 2016.³⁹ The first group of IDPs fled from urban centre of Bentiu in December 2013. During 2014, as government forces and violent conflict moved south in former Unity State, larger numbers came to the POC from these rural areas further south. People ran to the site after witnessing some of the most intense fighting and massacres of the war.⁴⁰ Many of these new residents had no previous experience of urban living and had previously relied on subsistence farming and herding. Having reached the camp, they remained isolated within a zone of live conflict, with ongoing fighting sometimes audible.

³⁸ The estimates of numbers differ in other sources, see MSF's report that community leaders reported up to 65 deaths (2016: 17).

³⁹ At its peak it hosted nearly 200,000 residents.

⁴⁰ See Radio Tamazuj, 1 May 2014, for context including on the appalling Bentiu massacre of April 2014.

Conditions were poor and in 2014, the camp, located on the site of a swamp, was submerged with floodwater that mixed with sewage. This flooding was a pervading conundrum for the humanitarian community in 2014. It took over a year before the infrastructure was improved to reduce flooding. The UN and aid agencies also found it logistically difficult to supply Bentiu with food, partly because it remained close to an actively contested frontline. At certain times of the year, all food had to be flown in by helicopter and rations were often significantly lower than in Juba.

There have been improvements to the humanitarian conditions within the Bentiu PoC and at the time of writing there is relative calm in the conflict. Yet, the security of the site is precarious and residents believe rumours of nearby preparations for war. Former Unity State has seen some of the most serious atrocities committed in South Sudan over the past three years. The SPLA-IG and the SPLA-IO have contested the area around the town which is strategically located near the Unity oil fields (Small Arms Survey, 2016).⁴¹ Divisions in Unity State are complex, revolving around shifting allegiances of political leaders (Small Arms Survey, 2016), and while the state has seen polarization between Nuer and Dinka residents and targeting on the basis of ethnic identity, there are also deep intra-Nuer cleavages that are reminiscent of divisions of the Nuer civil war of the 1990s. Military and political leaders from this state can be found on every side of the messy political landscape of confused loyalties. Indeed, in April-May 2015, thousands of civilians fled to the site after killings, beatings and rapes committed by government forces and allied militia from the Bul Nuer in central Unity (Human Rights Watch, 2015). Taban Deng (former Unity State governor)'s confusing claim to leadership of the SPLA-IO and move to cooperation with the SPLA-IG has also reawakened old divisions.

The threats to people in the Bentiu PoC site and surrounding area have peaked and subsided at different moments in the conflict, although its residents have consistently been disturbed by the close proximity of SPLA-IG forces. UNMISS HRD reported a spike in January-February 2015, with '28 civilians abducted and 35 raped' near Bentiu PoC site. On 9 February, one youth was killed in fighting; on 24 March, a hand grenade exploded inside the protection site, injuring 10 people (UNSC, 2015b). On 7 May 2015, there was an incident of intercommunal violence,⁴² followed by the invasion of a group of armed civilians and soldiers, who were eventually confronted by UNMISS forces and fled (Arenson, 2016: 33). In October 2015, four civilians and a child were said to have been wounded by gunfire from SPLA-IG soldiers outside the site (Wangdunkonmedia, 10 October 2015). And although at various times since the August 2015 peace agreement, safe movement between the Bentiu POC and the government-controlled town has been possible, it has often been fraught with risks.

⁴¹ While the government has mostly retained these, SPLA-IO has launched several bids to take control (Sudan Tribune, 5 July 2015).

⁴² Leek Nuer were said to have attacked Bul Nuer traders in anger at atrocities committed by other members of their clan in southern Rubkona county. Seven youths were then reported to have left the site (Arenson, 2016: 33).

Insecurity in UN House Juba (PoC3)

As of August 2016, UN House Juba (PoC3) currently had over 38,000 residents, mostly Nuer. The initial occupants of PoC3 were survivors of the December 2013 massacres of Nuer in Juba; later some residents of Bentiu and Malakal PoCs also moved to the Juba PoC as it was seen to be safer. The situation in UN House Juba (PoC3) has, until recently, been less volatile – between December 2013 and July 2016, there was little physical fighting in Juba itself. However, the residents of the camp include people from Unity and other areas of intense fighting, and even those people who were living in Juba prior to the conflict, often trace family connections back to these highly contested areas. Moreover, when fighting erupted again in July 2016 it was in close proximity to the UNMISS base. This prompted a further influx of people into the PoC, including people from a variety of ethnic groups affected by an upsurge in the conflict in Juba town.

Even while Juba remained outside of the war zone, there were several attacks upon and within the PoC, resulting in loss of life and injuries. Among the most serious of these was a battle between IDPs after inter-communal tensions within the camp flared up on 8-11 May 2015. First, hundreds of men armed with sticks and rudimentary weapons fought each other at Juba PoC1, then the fighting then spread to PoC3, resulting in the deaths of at least one person and some 32 injuries (Radio Tamazuj, 12 May 2015, see below).⁴³ Similarly, on 19 March 2016 fighting once again broke out in PoC1, leaving one dead and up to 50 injured and resulting in displacements to PoC3. The incident was said to have involved a clash between two Nuer sections (Wangdunkonmedia, 21 March 2016; CEPO, 2016). There were also a number of threats to IDPs from the perimeter and in the surrounding areas of the camp: On 22 May SPLA soldiers abducted and allegedly tortured four IDPs outside the camp; one of them was later found dead (UNMISS HRD, 2015: 18). On 25 August 2015, local media reported an attack by ‘unknown gunmen’ who shot into the camp and wounded three people.

The situation at the Juba site deteriorated sharply after 8 July 2016, due to fighting between SPLA-IG and SPLA-IO forces in Juba and a series of attacks on civilians. PoC1 in Juba was hit by five shells; two Chinese peacekeepers were killed, an estimated 12 civilians were killed and other residents fled. PoC3 was also affected by shelling, in which a young boy was killed and several other IDPs were injured (Human Rights Watch, 2016). Thousands of people fled to the camps from Juba Town, leading to shortages in food and water, blocked toilets, and other problems associated with overcrowding.

Amid the crisis in the camp, some residents felt they had no choice but to go outside in search of food, exposing them to further violations in the days that followed. Several women and girls were raped. A teenage girl recounted the dilemmas and suffering they endured. She explained that her sister was ill and her family was hungry, so she went to the market on 18 July to get food and medicine but was captured by SPLA-IG soldiers: ‘I was raped inside the shop by five soldiers with different ages, some around twenty years, thirty years and forty years old ... I was

⁴³ These incidents were also detailed in reports from court observers, and during participant observation in Juba PoC3, July 2015.

unable to walk alone but the rapist were holding my hands until we reached main roads where they dropped me on the ground near to main road where I was found by two old women, who were holding my hands until they brought me to PoC'.⁴⁴ In the immediate aftermath of the renewed fighting on 8 July, UNMISS Human Rights and Women Protection Adviser documented over 100 instances of sexual violence and rape against unarmed civilians (UNMISS Spokesperson, 2016), more than twenty of the victims came from the PoC, two IDP women died from their injuries; and, in at least one case, UN peacekeepers were in sight of the assault and failed to respond (Patinkin, 2016).

Social conditions in the PoCs

The people in the PoCs have experienced successive traumatic episodes and huge social disruption. Many are survivors of extreme violence, including massacres and rape: a recent survey found that 96.9% of residents in Bentiu PoC and 97.6% in Juba PoC reported that their household had been victim of one or more violent crimes in the past five years, most of them conflict related between 2013 and 2015 (Deng and Willems, 2016: 3). They have been displaced from their homes and have lost relatives in these and previous conflicts, while their education and livelihoods have also been negatively affected. Families have been torn apart during the conflict and many have also lost their assets, such as land (see Deng et al, 2015: 16). Rural dwellers that entered the camps had been capable of self-sufficiency on small farms at home, but in the PoCs they had no space to farm. The previously urban population was also largely stripped of their employment and work. Even those who did not work themselves, had relied on the salaries of relatives that had now been lost as they could not freely move and work in Juba. They all became almost entirely dependent on external assistance for survival. All of these factors might fuel interpersonal conflict and domestic violence.

This may not be the first experience of displacement for many, and the IDPs are developing coping strategies, often with the support of UNMISS and humanitarian agencies, and seizing new opportunities available in the camps. Although conditions in the PoCs are generally 'cramped and crowded' and often do not meet humanitarian standards (Arenson, 2016: 39), IDPs have made creative efforts to establish new lives and livelihoods, including with support from humanitarian agencies and IDPs. Traders and aid agencies contributed to the development of economies built around food aid and small-scale entrepreneurship. Residents have been creative in finding ways to make money. By early 2014, the Bentiu PoC boasted a large market, including furniture and electronics for sale. Traders in Juba PoC have imported goods from surrounding markets. Some people have also used the PoCs as a base to pursue livelihoods in the town during the day, while returning to the camps at night.⁴⁵

Yet local agency has not always been constructive, and violent actors and activities have at times infiltrated, or emerged within the camps. Sometimes these tensions might relate to political actors, allegiances and identities among the IDPs, including those linked to the dynamics of the conflict. Contestations have emerged around

⁴⁴ Interviewed by a member of the court observer team, Juba PoC3, 26 July 2016.

⁴⁵ For instance, some black market Forex traders in Juba town lived in the PoCS, bringing a monetary income into the camp.

leadership within the camp itself, and relationships with humanitarian providers and political developments outside the camps.⁴⁶ There are also routine problems of criminality, domestic disputes, and high rates of mental illness to contend with.⁴⁷ In consequence, as well as robust protection from external threats, protection responses demand justice and security mechanisms within the camp capable of preventing and handling conflicts at the level of individuals, families, between international actors and IDPs, and between people from different political, regional, ethnic or clan identities.

There are a range of authorities involved in protection responses within the camps, sometimes collaborating and at other times acting independently of one another. These can be grouped into four categories: UNMISS agencies; humanitarian agencies; hybrid authorities established by UNMISS and occupied by IDPs; and customary authorities. This plurality of national, international and local institutions forms a contested regime of governance, law and order. The contributions of humanitarian actors involved in the South Sudan Protection Cluster should be acknowledged, ranging from documentation and information sharing, to activities aimed at combatting gender-based violence, and physical protection.⁴⁸ Humanitarians also bring with them powerful ideas of human rights standards and humanitarian law, shared with PoC residents through workshops and projects. But UNMISS is the overarching authority, and it is important to explain some of the details of its mandate and the restrictions upon it since they provide the structure within which customary authorities became necessary, and have flourished.⁴⁹

International Protection Responses

UNMISS is responsible for protection of both the IDPs and humanitarian actors within the PoCs. The mission was established in 2011, at South Sudan's independence, and had a mandate to support peace, security and development, and to protect civilians. It initially prioritized statebuilding (Arenson 2016: x), but after the civil war broke out, in 2014, the Chapter VII mandate was renewed and redefined to prioritize the protection of civilians. The mandate specifies a responsibility to protect civilians from physical violence and to deter violence as well as to 'maintain public safety and security within and of UNMISS protection of civilians sites.' In August 2016, the Security Council extended the UNMISS mandate until 15 December 2016, and authorized UNMISS to use 'all necessary means to carry out its tasks'. At this time, the mission had 13,058 uniformed personnel, mostly troops but including 1,157 police, plus over 2000 international and local civilian personnel (UNMISS, n.d.). Although UNMISS's has wider protection responsibilities and aims to extend these

⁴⁶ See for instance the dispute within the Lou Nuer Youth Association (Wangdunkonmedia, 17 July 2015); see also Justice Africa, 2016: 46-48 and Arenson, 2016: 54-57 for discussions of political and leadership tensions.

⁴⁷ 46% of IDPs described symptoms consistent with post-traumatic stress disorder in a recent survey (Deng et al, 2015: 23).

⁴⁸ It produces regular reports and updates, South Sudan Protection Cluster, see Humanitarianresponse.info, n.d.

⁴⁹ International responses merit examination in their own right in setting precedents for peacekeepers and humanitarian agencies, but these have already been discussed and those that relate to the community are of most significance here.

further (UNSC, 2015c), the PoC sites have become a dominant focus for its resources and personnel since December 2013.⁵⁰

UNMISS's protection role within the PoCs has been both enabled and constrained by its agreement (SOFA) with the Government of the Republic of South Sudan (GRSS). The mission has the power to regulate entry to the PoCs, including from government actors; its premises are 'inviolable and subject to the exclusive control and authority of the United Nations' (UNMISS SOFA, 2011: 6). These conditions created the opportunity for the establishment of PoCs. The mission also has the power to police its premises, to arrest members of its own forces, and to detain other persons on its premises. However, other persons taken into custody on UNMISS premises are to be 'delivered immediately' to the Government (UNMISS SOFA, 2011, 9-10).

Crucially, UNMISS lacks the legal authority required to undertake 'executive policing.' UN civilian police have an advisory and training role only. The UN cannot prosecute criminals, and the South Sudanese state nominally retains sovereignty over the PoCs, even if South Sudanese law cannot be enforced within the sites without the mission's consent (Stern, 2015: 11). UNMISS also has obligations under international law. In the prevailing circumstances where people are seeking sanctuary from forces associated with the Juba government, the handover of suspects to the government could conflict with human rights obligations (ibid) and the principle of non-refoulement (Arenson, 2016: 51). These conditions render the PoCs unique, quasi extra-territorial spaces, presenting legal dilemmas. Meanwhile, on a practical level, the problem was compounded by the fact that UNPOL is responsible for security within the sites, but was not prepared for such a task and did not have sufficient personnel, as a recent review acknowledged (UNSC 2015c: 10).⁵¹ But even if the numbers are increased to the level recommended in the review, this cannot resolve the array of legal and human rights challenges that UNMISS confronts.

UNMISS has developed policies and practices over time aimed at improving safety and security in the PoCs, including 'holding facilities' for detentions; a handover assessment committee to determine if an individual can be handed over to the government; and a practice of excluding offenders from the camps. The UN's own reports acknowledge that their responses are not in accord with international standards (UNSC, 2015c: 8); other sources find the system 'unsatisfactory' (Stern, 2015: 15), opaque, and at worst in contravention of international human rights principles.⁵² Detention in the 'holding facilities', for instance, risks becoming indefinite (Stern, 2015: 15), as there is no immediate prospect of closing the PoCs. Handovers to the government are problematic, not only because of severe problems within the administration of justice, but also the retention of the death penalty and the risks of ethnic targeting related to the conflict – risks which also apply to expulsion.⁵³ The

⁵⁰ Arenson, 2016 discusses debates within UNMISS on this issue, while other reports including UNSC 2015c give attention to its wider performance, which merits further review, however we are only interested in conduct within the PoC here.

⁵¹ Justice Africa (2016: 21) lists the ratios of UNPOL to residents of Juba as 1:302 and Bentiu as 1:595 on 6 September 2015.

⁵² See Stern, 2015; Justice Africa, 2016. Note that UNPOL officers and UNMISS staff have recognised many of these issues and expressed frustrations (see Justice Africa 2016). Arenson, 2016 explains additional complexities relating to the mandate and relations with humanitarian partners.

⁵³ There was an attempt by UNMISS to establish guarantees regarding handover with the government but the proposals were rejected by the Ministry of Justice (Stern, 2015: 11)

problems are apparent in the figures published on security incidents. In a three month period, UNMISS reported 410 security incidents, and 22 UNPOL staff injured during their security work; this led to 63 detentions, and nine expulsions (which in general are ‘isolated’ (UNSC, 2015b). This reveals both the pressures UNPOL are under, and the need to respond to the issue of detainee rights. The report on the review of UNMISS’s mandate recommended boosting UNPOL forces, providing corrections services to manage the holding facilities and judicial advisory expertise to follow up on cases handed over to the government (UNSC 2015c: 15).

In the meantime, facing limited resources and legal constraints, UNMISS has turned to the displaced community itself for policing roles, emergency responses and to handle the majority of cases arising from security incidents related to IDPs.⁵⁴ To some extent this is an explicit approach, and in line with UN guidelines and UNMISS strategy. The Department of Peacekeeping Operations guidelines recommend ‘a community-based approach’ involving consultation, empowerment and support for ‘the mechanisms and community-based organisations they have established to ensure their own protection’ (DPKO, 2015: 7). Although UNMISS’s initial guidelines for PoCs only referred to local leaders in passing, envisaging them as a source of information in planning (UNMISS, 2012: 19), by the time its mandate was due for review in 2015, UNMISS was clear that it saw value in engagement with ‘traditional leaders’ in initiatives towards conflict transformation – ‘to strengthen their role as arbiters and mediators within dialogue processes’ (UNSC, 2015c: 10-11).⁵⁵

UNMISS has directly involved the community in efforts to promote the rule of law within the camps. Firstly, UNPOL has encouraged ‘community policing’ by volunteers. It provided guidelines for Community Watch Group to police the sites, together with some training and minimal support. UNPOL liaises with the CWG on cases but the CWG operate also independently. There are apparent differences of opinion about the CWGs, with some members of UNPOL judging that they have contributed to reducing crime rates (Arenson, 2016: 52) and some humanitarians expressing concern about abuses of power (Stern, 2015: 16; Justice Africa, 2016: 23).

UNMISS has also tried to shape the development of judicial authority within the camps through a reformed version of a chiefs’ court, with narrowed jurisdiction and powers, producing the concept of an Informal Mediation and Dispute Resolution Mechanism (IMDRM). The idea was that a group of selected community elders would hear civil cases and determine how to restore unity between affected parties. They would tackle cases related to social conflicts like petty theft, but not be involved in more serious crimes like murder, rape or assault, and would not issue fines or punishments. The intention was to ‘prevent the escalation of and mitigate disputes’.⁵⁶ They should include representation of women on the panel, and avoid sexual or gender-based violence cases to avoid conflict with UN standards. (Stern, 2015: 12). Human rights trainers also continue to be involved in low-key efforts to invigorate the

⁵⁴ Note that cases involving UNMISS and humanitarian actors are handled differently and are not examined in this paper. See Arenson 2016, appendices for insights into these.

⁵⁵ These and other reports also emphasize the need for a ‘gender perspective’ and attention to violence against women, although they do not reckon with the tensions between this and a community-based approach.

⁵⁶ This is stated on an UNPOL form designed to refer cases to the IMDRM, and given to the CWG in Juba PoC3, 11 Jan. 2016.

IMDRM and transform the ‘traditional’ system.⁵⁷ There are IMDRM hearings in Bentiu, but the IMDRM has not replaced customary courts or transformed their practices, and many people are not aware of their existence.⁵⁸ Communities in different PoCs have interpreted the IMDRM guidelines and training in their own ways, while continuing to pursue customary practices. Some PoC residents have assumed the IMDRM is the UN name for their chiefs’ courts.

UNMISS Human Rights Division has been critical of customary courts outside the PoCs for acting beyond constitutional limitations during the conflict, and imposing cultural norms that violate the rights of women and girls; it reported that courts are ‘adjudicating on cases beyond their jurisdiction, violating fair trial standards, and imposing illegal fines and sentences in contravention of national laws and international human rights principles’ (UNMISS HRD, 2015: 30).⁵⁹ Humanitarian agencies working in the PoCs are also concerned about the risks of harm from the customary courts, arguing for the need to monitor their practice to ‘make sure that community and customary punishments are fair, do not place individuals at more harm and are undertaken with the consent of all parties’ (South Sudan Protection Cluster 2014). The IMDRM initiative might be interpreted as an attempt to constrain and influence customary authority, and there have been separate initiatives by NGOs, PACT and South Sudan Law Society (SSLS) to improve access to justice by providing paralegal support to the parties and documenting court proceedings. However, for the most part, both UNMISS and the humanitarian agencies have held back from interference in the courts and apparently taken a pragmatic view that traditional leaders might ‘help to reduce violence’ in the camps (ibid).

The prevalence of customary authority within the camps needs to be understood against this background: UNMISS and its partners seem to accept that chiefs and community actors can contribute to establishing order within the camps, yet they avoid direct engagement with, and acknowledgment of the work of the customary courts. Their seeming wilful blindness reflects a legal bind. On one hand, the UN is not in a position to formally recognize and support a system of customary courts without the consent of the sovereign government. On the other hand, the legality of the courts would seem to be supported by their location on South Sudanese territory and their status with the constitution and Local Government Act, 2009.⁶⁰ Like all South Sudanese communities, the people of the PoC have rights to appoint chiefs and bring their cases to customary courts, while chiefs have the authority to interpret and apply customary law. But the question of how law is applied and the implications for the community relate directly to the possibilities of equal protection for all, and

⁵⁷ At a training in March 2015 in Bentiu, traditional leaders, civil society representatives, women and members of the IMDRM discussed how ‘traditional’ practices could be applied to disputes in the protection site and were advised on conflict management by UNMISS Civil Affairs officer who ‘stressed the need to find common ground between customary law, the country’s Transitional Constitution and protection site ground rules’ (UNMISS News, 2015).

⁵⁸ See Justice Africa, (2016: 28) for details of an IMDRM court in Bentiu and for the recognition that these proceedings resembled customary courts and many people in the sites had never heard of IMDRM.

⁵⁹ It emphasizes that they have a mediation function but not ‘explicit authority’ to impose confinement (UNMISS HRD, 2015).

⁶⁰ It could be argued that this status is conditional due to a provision in the Judiciary Act, see fn. 29, yet there is a lack of clarity, furthermore the situation is confounded by the practical existence of the courts.

therefore also to UNMISS's mandate. This produces a delicate situation and the need for close understanding of the role of the chiefs and practices of the courts.

Customary Responses

Customary chiefs are routinely involved in handling complex and significant cases, despite the reservations of UNMISS and humanitarian organisations. They are a prominent form of public authority within the PoC sites, but they also interact with the multiple layers of community governance that exist within the PoCs, which vary in their constitution and nomenclature in different sites (see Arenson, 2016: 54; Justice Africa 2016: 32-33). The chiefs are subordinate to a local governing body – the Camp Management Committee in Juba PoC3 or the Community High Committee in Bentiu – which works at the interface with UNMISS and the humanitarian agencies.⁶¹ They work directly with or alongside other community structures: the Community Watch Groups, and zones and block leaders. But the chiefs are also distinct from the hybrid leadership structures fostered by UNMISS, even if they cooperate closely with them in practice.

The establishment of chiefly authorities has been common practice for Nuer communities as they have moved to urban areas or into exile over the years. Chiefs are generally selected to represent their 'home' communities (rather than for instance their neighbourhood groups within the camp).⁶² The fact that representation is tied to identity does not preclude some flexibility to accommodate newcomers from other ethnic groups where necessary. The customary structures in PoC3, for instance, were reformed following the influx of IDPs from other communities in Juba when fighting erupted in July 2016. The CMC originally included a representative from each of the four 'greater' areas, namely Fangak, Nasir, Bentiu and Akobo. Each area had a chairman and a five-person executive. Chiefs were then selected at county level, to represent the sixteen counties within the four greater areas, under the authority of a single Paramount Chief. In August 2016, following an influx of new IDPs, the structure was expanded to include a seventeenth county in order to allow for the representation of the Shilluk, while there were ongoing discussions regarding the establishment of a Mundari chieftancy. By September 2016 there were nineteen chiefs, including representatives of the Mundari and Chollo groups.⁶³

As explained above, chiefs have always had connections upwards to government, and downwards to community and draw authority from their role as intermediaries. In the PoCs, the upwards connections to the UN and humanitarian regime are more tenuous than their previous constitutional ties with the Government of South Sudan. Their license to hold court hearings in the sites is partly secured by their relationship to an UNMISS-authorized governing body, such as the Camp Management Committee; from the practices of the CWGs; and from the notion of the IMDRM. But their capacity to make judgements and win compliance relies largely upon the moral

⁶¹ The CMC is elected and has six month term limits with rotations to ensure the representation of people from different regions.

⁶² This ran counter to UNMISS's concerns that representation should be associated with locations within the camp (Arenson, 2016: 54).

⁶³ These updates are based on a telephone conversation with JSRP court observer in PoC3, 31 August 2016; email with JSRP court observer, 27 September 2016.

authority derived from their relationship with the community. This is based upon both powerful notions of tradition and a careful selection process.

Many of the chiefs in the PoCs were only recently appointed to their positions (after fleeing to the POCs), although some also were reappointed, having held the position before they fled to the sites.⁶⁴ These new appointments are based on voting, as described in the case of Juba PoC3, people participate in chieftancy elections for a particular area or county, either as a candidate or as a voter, on the basis of their origins in a particular locality, defined by their ability to trace descent through the father. Other important criteria for candidates include: knowledge of the customs, language and traditions of the Nuer, a good reputation for honesty, impartiality, trustworthiness, social confidence, and no known involvement with witchcraft. The intention is that the appointment of chiefs should be ‘based on social and general consensus.’

The customary system is consistently shaped by concerns about social relations, from the election stage through to court hearings. The selection process depends upon both gathering views from the community, and assessments of what is fair in terms of the wider balance of authority within the camp. Community meetings are held to decide upon the selection and any member of the community may ‘challenge or give advice’. The likelihood of victory depends on various considerations, including the overall balance of representation – for instance if a particular clan from one of the areas has strong representation on the CMC, then the chieftancy might be allocated to another clan from that area. If there is competition within a clan, one candidate might be encouraged to take a position at clan level while the other stands for election at county level).

In contrast to the lack of term limits in the village, the chieftancy in the PoC conforms to the term limits of six months, (as is also the case for the CMC), although some chiefs who ‘perform very well’ have been in post since 2014. Chiefs who are found to be corrupt, or responsible for a crime, can be removed or advised to resign; ideally, community members write letters of complaint to demand suspension or dismissal. The relationship between chiefs and their people is also maintained through to the court process itself, where they are responsible for hearing the cases of members of their community in courts at county level.⁶⁵ When the parties come from two different counties, then the case may be referred to the A court, while appeal cases are referred to a High Court headed by the Paramount Chief.

The legitimacy of chiefs depends upon notions of customary law, referencing concepts including the ‘White Book’.⁶⁶ It also depends upon representation and consent, and the practice of the courts in ‘solving’ cases. But the chiefs can further draw upon two forms of policing for support. Firstly, the CWG, associated with

⁶⁴ We find much more complexity and variation between chiefs than Arenson 2016: 53 which states that chiefs ‘held their position before the crisis.’

⁶⁵ This applies even if family relations have been disrupted, and people of different counties may be living together, if people either bring a case to court, or are accused of a crime or transgression, then the chief from the home county of their father will hear the case.

⁶⁶ In 2014, when members of the Bentiu POC customary court were asked to describe the source of the customary laws they used, they referenced the ‘White Book’ of Nuer laws codified by Riek Machar in the 1990s.

UNMISS, and secondly an emergency response force, the N4, which is appointed by and embedded within the customary system. The N4 comprise a balanced group of young volunteers selected from each of the four greater areas, and under the authority of four chairmen, one representing each of Greater Bentiu, Greater Fangak, Greater Akobo, and Greater Nassir. While the CWG is appointed by the zonal and block leaders, the N4 is appointed by customary authorities. The N4 tends to be activated in emergencies to halt fighting; it ‘includes 200 members from all sections of Eastern and Western Nile Nuer... expected to remain neutral and respond to any violent incidents in the camp.’ (Radio Tamazuj, 24 March 2016; also see above, n. 26). In parallel to the CWG, the N4 is also empowered to make decisions on disputes and can ‘hold its own court’.⁶⁷

As such, there are some innovations in how chiefs operate in the PoCs. Their authority has diminished in importance in comparison with the rise of various other forms of leadership and new ‘brokers’, but they remain significant within the community structures. Their authority and legitimacy relies upon their relationship to home communities, in this case at regional, county and clan level; and to beliefs in shared histories and customs. Their accountability to the people depends upon a process of selection, term limits, and the possibility of removal. These chiefs do not have the colonial era ‘clenched fist’ of power, rather they are local judiciaries appointed by their communities for the purposes of making decisions on moral conduct and preventing and resolving disputes.

There are no women chiefs, but women do sit on court panels in the Juba and Bentiu PoCs on a voluntary basis. In the customary A court, there is an expectation that five women members might participate, in particular to sit in for absent chiefs, but in practice only a smaller number of two or three are likely to be involved. Nevertheless, this is a significant change from Nuer chiefs’ courts outside of the PoC that had no male chiefs. Plus, three women have been included on the Community High Committee in Bentiu (which sits above chiefly authority in the hierarchy of the camps). There are also female members of the Community Watch Group and the N4. The influence of women is bound to be constrained by the gender inequalities and discrimination pervading Nuer society, which are in turn reinforced by the conduct of customary authorities (see Mennen, 2010 and below). Yet, the appearance of women as court members is a radical departure and challenge to previous gender assumptions.

Customary courts are suspended between the premise of a timeless Nuer custom, and the reality of their displacement in an urbanized setting under the auspices of UNMISS, exposed to actors, norms and practices associated with globalization. They may lack the status and respect they have commanded in other contexts, yet, on a day-to-day basis, they are the main judicial forum in the sites. Since customary law is itself a fluid concept, based on oral and situated interpretations, there is scope for the chiefs and the other court panels that apply the law to innovate and interpret their role.

⁶⁷ This account of the structures is based upon consultation with paralegals responsible for court observation in the camps, in particular a series of email and telephone exchanges with correspondence with the team leader of the court observers in Juba, between July and 10 September 2016). It was also noted that because the N4 has been involved in resolving crisis situations, it appears to have gained status in UNMISS eyes as an authority within the camp to be labelled the Community Emergency Response Team (CERT).

Only by examining particular cases can we better appreciate how the courts contribute to either undermining or promoting protection.

Making Order: Customary Justice in Practice

We have recorded 395 cases from the PoC sites over the course of a year. These cases range from highly sensitive issues relating to violent disputes and gender-based violence, to minor arguments between or even within families. They include many cases of ‘elopement’⁶⁸, theft, adultery, divorce, assault and unusual cases relating to businesses inside and outside the PoCs or disputes over the sale of plots within the PoCs.⁶⁹ We present a selection from this pool of cases in order to convey the breadth of the issues handled by the customary system, the process of court cases, and the kinds of judgements they produce, with a focus on those most relevant to protection from violence and insecurity. These are not representative cases, indeed some are precedent-setting and selected on that basis.

We first look at cases dealing with violent conflict between groups. We show that, amid a lack of alternative solutions, customary leaders are occasionally involved in reckoning with serious incidents of fighting and murder, although the UN has restricted their authority. Additionally, we highlight cases that reveal that the chiefs’ courts have an accountability function in disciplining security actors or other community authorities. Next we identify a series of cases that show how courts seek to either sanction perpetrators of revenge or seek to prevent revenge, setting limits on violence within the community and punishing perpetrators. Many of the cases presented to the customary system relate to family matters such as divorce, adultery or the relationships or pregnancies of unmarried girls. We look at how the courts treat such reports and how the judgements relate to concerns about social order in the camps. Finally, we consider cases that show how the courts are adapting to the demands of their new context, incorporating new ideas.

Before examining particular cases, we should note the sometimes confusing references to an array of court processes, settings and panels. Under the heading of ‘customary’, some reports reference the IMDRM directly; others reference hearings by eleven male and five female administrative leaders as judges at UN house in Juba PoC, or even by the Community High Committee in Bentiu. There are also court hearings by the N4⁷⁰ or the Community Watch Group. The numbers of panel members varies as does their composition, with some including two or three women and ranging from four up to seventeen chiefs.⁷¹ Often, the reports are labelled as A, B or C court hearings, with panels of around nine chiefs, and they are generally held

⁶⁸ This refers to cases where young men and women have started relationships without marriage or the payment of dowry.

⁶⁹ This is a preliminary extract from the data which will be subject to further analysis in subsequent papers to identify tendencies or inconsistencies within judgements inside the PoCs and comparisons with results from other localities and periods.

⁷⁰ One of these references a severe instance of corporal punishment administered by the N4 and justified by their court as ‘White Army Law’. This case suggests a need for follow ups and further examination of the practices of these courts.

⁷¹ At the time of writing the number of chiefs had been increased to 19 and the ‘B court’ comprising members of the camp management committee, nuer council of elders, zonal and block leaders was dissolved as their term of 6 months office was completed (email report from JSRP court observer, 27 September 2016).

outside under a large tree. These different courts may handle different types of cases and provide a range of judgements, and we will examine the composition of the courts and seek to discern distinctive patterns, but at this stage we do not distinguish between them in the analysis and a preliminary reading suggests the tendencies and functions of the courts are similar.

The various courts in the PoCs all draw upon notions of customary law and practices of chiefs' courts and are perceived by judges and participants alike to be associated with Nuer 'traditional' justice. Relatedly, there have been active efforts by chiefs in the PoCs to create new common standards for judgements, exemplified in their recent decision to reduce the dowry payment to a maximum of 15 cows if there is disagreement between the parties, thus revising a decision in Pangak in 2013 of 25 cows, in an effort to facilitate agreements about marriage while taking account of the circumstances in the PoCs (Radio Tamazuj, 24 September 2016).

There are several commonalities in the functioning of the courts, some are usual features of customary courts in general, while others are simply shared within the PoCs. Firstly, they all collect fees, with the lowest at 100 SSP and the highest at 1000 SSP, but averaging around 200 SSP⁷² and generally cases take a matter of a few days after a complaint is made to reach the courts – justice is prompt and cheap. Secondly cases are heard by a panel of judges, and neither the plaintiff nor the defendant has representation, although they may bring witnesses. The court fees could be seen as a form of taxation for the service provided and a further illustration of the relation of governance between chiefs and people.⁷³ Secondly, they routinely issue fines and punishments, including detentions. It is apparent that these fines, whether they are imposed in monetary or cattle terms, are accepted in principle but it also understood that if they cannot be paid immediately they must be settled later.⁷⁴ Similarly, courts cannot always implement the prison sentences that they issue within the camp, despite the UN holding facilities, partly because the UN does not recognize some of the offences. In some cases, the sentences may be fulfilled through a form of house arrest: the expectation is that the moral authority of the courts and chiefs, together with pressure from families, communities and local security actors will be sufficient to keep people under sentence out of social circulation. In other cases, the judgement specifies that the person will do a form of community service, reporting to the Community Watch Group to do 'activities' for the specified period. We also infer that the harsh penalties also serve a symbolic function as condemnation of crimes and transgressions, regardless of their full implementation.

⁷² Fines and fees are given in South Sudanese Pounds. The SSP lost more than half of its value during the research period and averaged around 18 SSP against the dollar on the official exchange rate (see rates on Trading Economics, 2016).

⁷³ Based on the definition that taxation is the '*obligation to contribute resources (money, goods or labour) to a public authority in return for services and goods*' and that it is a marker of both the recognition of the authority of the ruler, and the citizenship of the ruled. (Vlassenroot and Hoffmann, n.d.: 2-3).

⁷⁴ There have even been occasional reports of home communities exchanging cattle on the basis of decisions taken within the PoCs, but in most cases it is understood that these transactions will take place later. Arenson, 2016: 51 describes how extended families will seek to raise the funds but where they are unable to do so a record is kept by the chief of the 'deferred compensation' on the expectation it will be settled later.

This takes us to a fourth shared aspect of the court practices in the constitution of identity, not much commented upon elsewhere, but apparent from our observations of repeated processes and judgements. Even in the most minor matters, the courts involve lengthy explanations by the parties and long responses on the issues from the judges, cases can last from one to six hours and they are attended by large groups of people with an interest in the case, and bystanders. These prolonged open discussions on moral behaviour are repeated day after day, often with similar concerns and outcomes. The courts are engaged in thorough narration of moral political community and reinforcing a hierarchy of relations between people and the public authorities within the sites. In this way, they are contributing to the construction of Nuer identities, and a particular kind of social order.

Customary Authorities: Dealing with Violence

There have been multiple killings, murders and rapes inside the PoCs and in the vicinity, relating to the IDPs. Justice remains a distant prospect in these most severe cases, as with war related crimes committed outside the camps (see Willems and Deng, 2016). The chiefs recognize that such cases cannot be dealt with by the customary system and must be referred to UNPOL for consideration for handover. But as time passes, and suspects remain in holding facilities without judgement or compensation, the anger of affected families can erupt into pressure upon the community representatives including members of the Community Watch Group, paralegals or chiefs. They have little capacity to act, and have sometimes respond by mediating or ‘brokering’ – raising the issue with UNPOL, explaining the situation to the community and providing reassurance that: ‘some cases cannot be resolved now because of the situation we are in, but when things get better, they will be resolved... when the time comes’ (court observers’ forum, January 2016).

However, the customary system also has an important role in efforts to halt inter-communal fighting within the PoC sites, and UNPOL has relied upon such interventions in several cases. The example of a battle between IDPs from the Haak, Dok and Bul Nuer sections in the Juba PoCs 2015 illustrates this point. Over three days from 8-11 May, there were clashes in Juba PoC1 and then PoC3, as hundreds of youths armed with sticks and metal bars aligned themselves with the parties, on the basis of their section membership.⁷⁵ UNPOL made efforts to intervene but was not able to bring the fighters under control; according to one observer, they were confident that although UNPOL was armed, it would not shoot. The clashes eventually halted after the customary leaders mobilised the N4 security force (see above), which expelled some of the fighters from the camp, while they began efforts to find a mediated solution.⁷⁶ This case was not a success for either UNMISS or customary protection, given that it resulted in at least one death, 32 injuries and the flight of some 3,500 Bul Nuer from the PoC (see Radio Tamazuj, 12 May 2015). Yet

⁷⁵ The fighting was sparked by the impregnation of an unmarried girl from the Haak Nuer by a member of the Bul Nuer, and the refusal of the man responsible to pay the dowry. But the tensions were said to have been exacerbated by the fact that these section divisions mirrored conflict allegiances, as leading Bul Nuer aligned with the SPLA-IG. This is also supported by the fact that just a day earlier there was an attack on Bul Nuer traders in Bentiu PoC, ostensibly in revenge for atrocities committed in southern Rubkona county (Arenson, 2016: 33).

⁷⁶ This was explained during a meeting with paralegals at PoC3, July 2015.

without the intervention of the N4 the fighting might have claimed more lives, and customary authorities made subsequent efforts to mediate on the issue, leading to the return of some of the people excluded.

The N4 acted informally and on community-based authority in May 2015, yet over time it seems to have gained recognition from other authorities. When fighting broke out inside the Juba PoCs in March 2016, UNMISS provided a room for the N4 to do the mediation. The N4 and CWG planned to undertake an investigation to identify those responsible and to hand them over to the UN for action. Community leaders declared a curfew and the N4 policed the site at night with the warning that ‘anyone found loitering between those hours will be taken to the holding facility until morning. If that person is found with a harmful weapon like a panga or knife, they will be beaten with fifty lashes and the weapon confiscated.’ After this violent ‘brawl’, humanitarians and journalists noted the formation of a new ‘Community Emergency Management Team or N4’, suggesting it had the status of a community-led security organization, along similar lines to the CWG (see Radio Tamazuj, 24 March 2016). Reports in early April 2016, confirmed it remained active.⁷⁷

Another, more recent incident suggests the strengthening of the community-based approach to security problems. The N4 responded to an attempt to provoke conflict between the Nuer and newly arrived Mundari community on 19 July 2016. The case involved a group of Nuer men who had gone outside the PoC to a nearby local brewery. During a drunken brawl one of their number was killed. The group said to be implicated in this death sought to place the blame elsewhere, returning to the PoC to accuse members of the Mundari community of responsibility for the murder: ‘they began quarrelling and singing war song as they were marching toward where Mundari new arrivals were accommodated by the camp management committee while saying loudly that they were going to fight Mundari because they have killed our lovely brother Mr. M[...] who had not yet married’. By then they had gathered supporters and a group of around forty and began attacking market traders, including a butcher. In this instance, the N4 and community watch group were mobilised on the orders of the Camp Management Committee. They came with their sticks and ‘some surrendered and others ran away due fear of the N4’. The response of the N4 and the CWG was to arrest about twenty perpetrators and to ‘seriously beat them until they apologize’, which led to the admission that one of Nuer fighters number was responsible for the murder at the brewery, but they sought to cover up because of fear that it ‘may bring fighting between the Nuer of Leer county of Unity state.’⁷⁸

The role of the chiefs

The expectation of UNMISS is that cases of murder should not be brought to customary courts. Murder had been removed from the chiefs’ jurisdiction by statutory provisions after the CPA, but chiefs’ courts had previously had jurisdiction over homicide in some circumstances. Still, in the PoCs, the chiefs have important roles in handling related issues, often out of a concern to prevent revenge cases (see below). In the case of the assault on the Mundari butcher described above, a solution

⁷⁷ The N4 intervened in a fight between three young men, involving machetes: one man was supported by his aunts fighting with two metal bars but the N4 was said to have prevented the fight from escalating by arresting all the supporters (See appendix 2 for photo of the N4).

⁷⁸ This account is based on an email report from JSRP court observer, 2 September 2016.

from the chiefs was sought. The chiefs were involved in deliberations with Mundari elders to discuss compensation in order to keep the peace between the communities. The chiefs acted as representatives of individuals in their communities. Meanwhile the suspect accused of beating the Mundari victim was ordered to be held under 'traditional detention' by the Leer community chief who would then be held responsible if he failed to go to court to face customary justice (paralegal email, 2 Sept. 2016). Such a case is unusual, more commonly, chiefly authority is employed in mediation following bouts of violence within the camps and is connected to the broader community authorities that respond to security threats. Relatedly, there are indications that the N4 and CWG continue to draw authority from their relations to this customary system, a point substantiated by ability of chiefly authorities to hold these groups to account if members of the community complain about their conduct.

Holding authorities to account

While there can be no doubt of the need for the community to be involved in governance within the camps, the N4 or the CWG, or other may themselves be the subject of complaints on occasion. In the cases discussed above, we see that the community police sometimes administer beatings to fighters or suspects. In itself this is concerning from a human rights perspective. On occasion, it also leads to further tensions and complaints from IDPs, and a court case ensues. Here we present details of attempts by the courts to hold members of these two groups to account, while also maintaining customary authority.

Case 1: Fining members of the N4

On 24 February 2016, a 22-year-old man accused a member of the N4, aged 34, of beating him up and taking his smart phone. The case was heard in A court by a panel of eight chiefs. The complainant described how he was walking to the primary school about 8pm at night to do some studying as he is in secondary school and has no light at home. But on the way he met four men from the N4 who began to 'beat him without asking' until he was 'rolling on the ground'. One of them also took his smart phone from his pocket. The student immediately complained to the leader of the N4, but received no response. He then took the case straight to the Community Watch Group and it was heard a week later.

The accused member of the N4 rejected the charges claiming that they had in fact rescued the boy from a group who was chasing him. He said: 'We were expecting him to appreciate us... but instead he accused us of stealing his phone which is not true.' In reaching their verdict court members referred to the South Sudan Police Service Act on the basis the N4 should be working to arrest people committing crimes. They judged that the N4 member should be responsible for paying for the lost smartphone of the student on the basis that they should have responded when he complained to them initially and that they also failed to arrest the person responsible for the theft. The accused was fined 1500 SSP and 150 in court fees.

This was a careful judgement which did not reach a conclusion on the material facts of the N4 member, but found him responsible for the loss of the smart phone

whichever version of the facts was accepted. It also did not demonstrate concern about the beating. This case shows that the courts are willing to take a stand on behalf of people against the security forces.

Yet it was not well received and the participants and others present were divided in their opinions, to the extent that the chiefs threatened that if the 'N4 refused to pay for the phone they will be forwarded to the spiritual leader'.⁷⁹

Case 2: Judgement against violence by the Community Watch Group (CWG)

In this case, brought to the court in Juba PoC3, the CWG sought to use the courts to approve their mistreatment and beating of two women suspects. However, this abuse of their authority was criticised by the chiefs. The ruling established limits on the CWG conduct, by failing to prosecute two men who had fought back to stop them beating their wives.

On 8 October 2015, members of the CWG brought a case against two men who had fought them. The day before, the wives of these men had gone outside the gates of the PoC to sell a bag of sorghum. At the time, the CWG had been looking for a man accused of stealing a bag of sorghum. They went to the gates of the PoC to see if he was selling the sorghum outside the gates. One of the CWG mistook the two women for the wives of the man. Suspecting that the women were selling stolen grain on behalf of their husband, the CWG apprehended the two women and took them to the CWG compound. In the compound, they started investigating and beating them as suspects. But they had mistaken the women's identities. When the actual husbands of the two women heard what was happening, they rushed to the CWG compound. They saw their wives had been beaten and started fighting with the CWG members.

The case was heard by a panel of two women and six men. They ruled that the husbands had the right to fight the CWG members and that the CWG should not have beaten the women without full knowledge of the facts. The parties accepted the ruling. No fees or fines were given, but the court did publically criticize the behaviour of the CWG.

The failure of the court to fine the CWG shows some hesitancy in confronting abuses by those involved in customary protection. In this sense, the chiefs upheld the authority of the CWG. However, by striking down the attempt of its members to prosecute the camp residents who challenged their misconduct, they also demonstrated that such conduct was not acceptable.

⁷⁹ See below for a discussion of the spiritual authorities within the camps, referred to in other cases as 'magicians' or *Ji thucni*.

Case 3: A paralegal's critique of a chief

When a chief is accused of misconduct it presents a direct threat to the authority and legitimacy of the courts. In this case, we see how a paralegal aware of a human rights violation perpetrated by one of the chiefs became subject to inquiry by the customary authorities. The chief was reported to UNPOL for having ordered a beating.⁸⁰ The paralegal later found himself before a court panel, being interrogated for his behaviour.

In September 2016, a head chief of a customary court in the PoC accused a paralegal of reporting him to the UN Police for violating human rights. The case was brought to the Camp Management Committee and four male members of the committee heard the case. Eighteen people attended the proceedings. The accusation related to a ruling of the head chief on 25 August 2015. The head chief had passed a judgment against a woman who was seven months pregnant. The chief ordered a member of the Community Watch Group to beat the woman. The CWG member beat the woman on the legs. The paralegal was present during the judgement and beating. As a result of her injuries the pregnant woman was admitted to hospital. When she recovered, she asked the UN Police to investigate the ruling of the chief. The chief then complained to the Camp Management Committee that it had been the paralegal that had told the UN Police that he had ordered the beating of the woman. The chief said that he no longer wanted the paralegal to attend his court or even live in the PoC.

The Camp Management Committee stated that the question was about whether traditional laws or human rights laws should be given priority in the chief's court. The Committee advised the chief not to apply physical punishment in his customary court. No fines or fees were given. The paralegal was encouraged to continue his work and to keep attending the courts.

We therefore see that the courts do not simply act in alliance with chiefly authority and they show potential to regulate the conduct of chiefs, albeit without questioning the hierarchy in the customary system. The case here was between the chief and paralegal. There is no information in our records to confirm whether the woman affected by the beating brought her case against the chief to court or whether UNPOL responded to her complaint.

Case 4: Protecting an NGO car

It is unusual for chiefs to acknowledge their lack of authority over a case or capacity to rule on the issues presented before the court. However, the following case is interesting as an example to show that it is possible for chiefs to declare themselves incapable of resolving certain issues.

⁸⁰ This event in itself indicates a hierarchical relationship in which the CWG are subject to demands from chiefs.

On 23 August 2015, a paralegal from Pact brought a case against four, Kenyan NRC workers. The NRC staff had been constructing Hope Primary School in POC3. They drove into the PoC with materials for the school's construction. The number plate on their car was the number plate from Northern Bahr el-Ghazal State (SSNBS). The CWG were informed of the number plate. They came, beat the four NGO workers and took them to the CWG compound. Some of the PoC residents tried to burn the car. Immediately UNPOL came and took the four Kenyans to UN House.

The judges in this case referred the matter to UNPOL. They said they could not judge on it because they could not control the situation in this case because of the anger of the PoC residents. They all accepted that they should be taken to UN House. The court observer made no mention of discussion of the behaviour of the CWG.

The angry response to the number plate reveals the heightened tensions that simmer within the camp and relate both to political allegiances and to experiences of extreme suffering and loss among the residents. The number plate was, in the minds of the residents, a symbol of affinity with the Kiir government, since Northern Bahr el Ghazal is seen to be its heartland. But the case also indicates limits to the authority of the chiefs' courts, especially when their rulings might run against popular sentiment.

Preventing cycles of violence

Nuer moral frameworks can be interpreted as dictating a duty of revenge in response to homicide. This notion has served as a mobilizing discourse authorizing violence and atrocities in the war which has been defined by 'cycles of more revenge and counter revenge' (Jok, 2014: 18). When customary courts were first initiated in South Sudan in the early twentieth century, a priority for the courts then was to make illegal self-help justice in order to enforce the authority of their own judgements. In the following cases we see chiefs' courts asserting the principle that the offer of judicial redress is preferable to the pursuit of revenge.

Case 1: Punishing the perpetrator of a revenge attack

On 14 June 2016, a young man brought a case to the court against an elderly man in the Bentiu PoC. The young man had been walking along a path in the POC when he passed by the elderly man. The elderly man had sprung up and attacked him with a stick and a knife. The elderly man did not dispute the facts but justified them by describing how one of his relatives had been killed last December by one of the young man's relatives. He was seeking revenge. Before the attack, the elderly man had been playing dominos with two friends. They had advised him not to attack the young man as they thought his youthful strength would over-power their friend.

The court judges rebuked the elderly man for taking the law into his own hands and for seeking revenge. 'We came here [the PoC] for

protection and not to kill each other.’ They said that as an elder the man should have advised the young man and not attacked him. The case should have been brought to the court. They fined the elderly man three cows and sent him to prison for six months. His two friends were also fined 1000 SSP each for not stopping the attack. The court also praised the young man and his parents for bringing the case to the court and for not responding by fighting. The parties accepted the judgements of the court.

In this case, the court was eager to punish the elderly man’s attempts at self-help justice and his choice not to seek judicial redress. The other two defendants were punished for failing to stop him taking the law into his own hands.

Case 2: Judging crimes committed in war

The PoC sites include people from different localities and identities who may have victimized by fighters on either side of the current conflict. Yet for the most part war crimes committed outside do not reach the courts inside the PoCs, although the courts frequently have to deal with issues arising from the displacement and break up of families. In the following case, they were asked to respond directly to sexual violence committed in the war – the abduction and rape of a young girl. The fact that the parties brought a case of such gravity to the courts and that they accepted the outcome testifies to the courts’ significance. But the chiefs’ judgement is cautious and concerned with the implications for security within the PoC site. They sought to resolve most pressing issue of returning the girl to her family, while deferring judgement on the violations, aside from a moral condemnation.

On 9 June 2016, this case came to the Nuer customary court in the Bentiu POC. The case was opened by the parents of an eighteen year-old-girl against a 29 year old man.

On 17 May 2015, government soldiers and pro-government forces had attacked a cattle camp near Koch. Young men from Mayom were amongst these forces, including the 29 year old man now in the Bentiu court. During this attack on the cattle camp, the forces had killed elders and youth, looted property, and raped women and girls. The eighteen-year-old girl had been in the cattle camp at the time. She had been raped by the 29-year-old and had seen him and his friends kill her relatives. The man had then forcibly taken by her as his wife. With no opportunity to run away or call for help, to save her life the girl submitted to being his wife and lived as his wife for a year.

During this year, the man moved to Bentiu and took the girl with him as his wife. While in Bentiu, the girl learned that her parents had fled to the PoC for protection and were safely living there. She told her ‘husband’ and persuaded him to allow her to visit them for two days. She found her parents in the PoC and asked for their protection. They welcomed her home and promised to protect her from her captor. When she did not return, the man came from

Bentiu town to the PoC to find her and demand her return. The parents refused but persuaded the man to take the case to the court.

In reaching their verdict, the court referred to Nuer customary law. They judged that the girl was not the wife of the man as no bride price had been exchanged with her parents. Therefore, she was free to remain with her parents. The court was also explicit that abduction was not acceptable behaviour.

The question arose of whether the man should be punished for the abduction of the girl. The court followed the girl's father's suggestion that 'the time has not yet come for accountability for what has happened in Unity State'. The court observer also noted that this prevented irritating tensions between the Nuer communities in the PoC and Bentiu town. The parties peacefully accepted the judgement.

The fact that this case was peacefully brought to the courts – and that private attempts to seek revenge were avoided – indicates public confidence in the system.

Case 3: Punishment for a violent attack

The following case provides another example of punitive measures issued by a customary court on a case of violent assault, without question of its jurisdiction. It shows that the courts can respond swiftly and effectively to set limits upon violence in the PoCs.

On 7 September 2015 a case was brought to C court in the Juba PoC and heard by a panel of 11 judges. Three men in their twenties were accused of beating a nineteen-year-old man almost to the point of death 'because of a misunderstanding'. The fight had taken place at night, and knives, sticks and pangas were used. The men were said to be known to the security authorities to be 'often found walking in the camp and carrying out criminal activity.' The community watch group had intervened to stop the fighting and brought the parties to court within a matter of hours.

The facts of the case were not disputed and the case was settled within 55 minutes. The defendants were all ordered to pay a fine, which together totalled 1500 SSP, in order to replace the victim's damaged phone. Between them, they were also fined 500 SSP for treatment and a total of 2600 SSP in court fees. The court was explicit that the act committed by the three men was not acceptable and cannot continue in the camp. It passed heavy fines in order to deter the defendants from committing further crimes. It was noted that 'punishments were not given as UNPOL was present and they do not allow beatings or corporeal punishments.' The outcome was welcomed by all except the third defendant who maintained his innocence.

Case 4: Preventing family feuding

Several of the serious incidents of inter-communal violence within the camp had their origins in perceived breaches of norms relating to relationships between young men and women.⁸¹ If a young girl becomes pregnant before marriage, it is likely that her brothers will take action on the issue. From their perspective, this is a crisis since the family is potentially losing out on the prospect of a good bride wealth settlement in cattle, with implications for their own ability to marry in the future. Such a case is not simply personal, but a volatile threat to social relations within the community.

On 8 July 2015 a case was brought to the B court to be heard by a panel of sixteen chiefs. It concerned a young girl who was not married but was found to be two months pregnant. The case was brought to court by the father of the girl against a 25-year-old man said to be the father of the child. The seriousness of the case was indicated by the fact that the Community Watch Group was also in attendance together with the zone leader and members of UNPOL. The proceedings were messy in the beginning as the girl's family, especially her brothers, wanted to fight the man. The fighting was controlled by the CWG, and then the clan chief opened the hearing. The case took three hours to be settled but the decision was uncontested. The judges determined to impose a fine of 5000 SSP to be paid to the girl's family and 1000 SSP to the court. The fines were the equivalent of one cow for the court and 5000 SSP for the family. It was decided that when the girl delivers then the man responsible will be asked by the court whether he is going to marry the girl – if not, all five cows will be taken. If he marries her, more cows will be needed for an ordinary marriage before the court.

This case illustrates the rights families are deemed to have over women's bodies in the customary system. Until bride wealth has been paid, the father is considered to be the 'owner of the girl' and indeed of her eventual offspring. Failure to conform to the social norms relating to marriage and procreation is a source of tension and disputes within families and between them and other extended families or even clans. In imposing the fine, the court was punishing the man responsible, but was also seeking to prevent the brothers from responding with violence, and was successful in this regard.

Case 5: Compensation for loss of a child

In this case, we see an illustration of the tensions that frequently arise within the PoCs concerning access to water. There are several court cases relating to women fighting at the water point and of injuries resulting from this. But in this case, the fight was thought of have had even more serious consequences, leading to the death of a baby. The decision of the court was not based upon direct evidence of this, but upon a concern for the welfare of the woman and for the tensions that this loss might produce for social relations.

⁸¹ See Arenson, 2016: 52 and the discussion of insecurity above.

On 17 November 2015, a case was brought to the A court in Juba PoC3, with a panel of 11 male chiefs present. The case was brought by a young Nuer woman against another woman of around the same age, relating to an incident which had occurred some nine months previously. The woman accused her neighbour of responsibility for the loss of her child. She explained how the two women had fought at the water point. She was pregnant at the time but did not report the incident to the police or courts. However, when her baby girl was born she was found to have a broken backbone and she died soon afterwards. The woman was convinced that this death was a result of the fight and she demanded that her neighbour should be punished. The defendant responded that she was not aware of the pregnancy at the time of the fight as it was not visible. The court ruled that five cows should be paid by the defendant to the plaintiff in compensation for the death of the child, despite acknowledging that the cause of the child's death was not clear. The court observer described tensions surrounding the court and that 'security was poor.' This atmosphere informed the decision of the judges. They based their decision on personal opinions and on the 'need to bring down the tense situation between the two families since the child died.' The defendant commented quietly to the observer that she was not happy with the decision because the causes of the death of the child were not properly established by the judges. She felt they rushed to a conclusion.

This case is a reminder of the structural violence of everyday life in South Sudan, which even manifests within the PoCs, despite the presence of humanitarian agencies. A fight over access to basic needs brings the threat of conflict over a human loss, and the chiefs courts are left to reckon with the consequent trauma, despair and anger.

Case 3: Adjudicating on rape charges

UNMISS has been clear that cases of rape are to be handled by UNPOL; however these cases and the surrounding issues may still reach customary courts. In part this is linked to the pressure from families to resolve cases and to move towards a process involving compensation. In one case described the Community Watch Group, they and the paralegals faced regular demands from the family of a girl raped to take action on the issue through a customary process, as their anger was rising, while the rapist was detained by UNPOL in a holding cell without clarity about when he would be brought to court. The following case was brought to court before being taken to UNPOL. It is extremely serious, yet it was handled by the A court in Juba PoC3, with a panel of seventeen judges and more than forty people in attendance.

In May 2016, a middle aged Nuer woman brought a case against a young man, accusing him of raping her child. She brought the case to court immediately after the incident was discovered. The woman stated that her daughter was under age and was being raped by the defendant and was now likely to die. She had decided to refer the case to UNPOL. The defendant apparently admitted responsibility: he promised that he would marry the young girl and that would pay

‘everything needed’ to her mother. The court decided that the man should be sentenced to jail for six years and would pay compensation for treatment of 10,000 SSP and a fine of 5000 SSP. The perpetrator immediately gave 5000 SSP however he complained that he should not face imprisonment or the rest of the fines. Witnesses to the proceedings rejected his complaints and supported the judgement.

This judgement might be seen as consistent with the South Sudan Penal Code Act of 2008, section 1, 247 on rape which states that the perpetrator ‘shall be sentenced to imprisonment for a term not exceeding fourteen years and may also be liable to a fine.’ Whatever the flaws in the Act itself, the sentence of six years also seems light given that the violation was also committed against an underage girl and was clearly of extreme severity – in her mother’s view it had placed her at risk of death. Clearly the courts were reaching beyond their jurisdiction in ruling on the case. Yet we also need to contextualize this ruling in light of the broader problem of access to justice within the sites and indeed in South Sudan more generally. It is not unknown for customary courts to handle such cases and in this instance they were acting in light of delays and tensions arising in previous such cases. While compensation was already changing hands in the case, there was no clarity about the implementation of the rest of the judgement, since the case was to be handed over to UNPOL.

Tolerating violence against women

It has long been clear that Nuer customary laws entrench gender inequality and discrimination and can give license to abuses (Mennen, 2008). While women bringing cases for divorce or against their partners for domestic violence may expect to have their case heard sympathetically and at length, they may also expect to be returned to their husband and his family. Cases are heard on an individual basis and with attention to circumstance but on the whole they fall in favour of husbands and against women’s rights.

Case 1: Refusing divorce after domestic violence in Bentiu PoC

Nuer courts have often been found to uphold the husband’s rights over his wife and not necessarily criticise him for beating her if no significant harm was done.⁸² In Nuer customary law as is commonly explained by the community, assuming the bride wealth has been paid, she is now under the husband’s, not the father’s authority.

On 1 February 2016, in the Bentiu court, a woman opened a case claiming that her husband had beaten her. After being beaten she had run away from her husband’s house to her aunt’s house. She had taken their nine-month old child with them. Her husband came searching for her and asked to be forgiven. However, as she had returned to her father’s family (her aunt) she said she could not return to her husband without her father’s permission. Yet, her father remained angry with the husband and demanded him to open a court case to settle the matter there. In the court, she pleaded not

⁸² This is based on Naomi Pendle’s ethnographic research in the western Nuer in 2012 and 2013.

to be sent back to her husband as she claimed: he often accused her of adultery (which she claimed was not true); he often beat her; he often accused her of wanting to run away to Khartoum; and he often insulted her. The father criticised the husband for not taking the time to get to know him well, and only knowing his wife's mother. The court ruled in favour of the husband and told the wife to return to him. The chiefs stated that, 'It is normal that two partners can quarrel'. They also took some time to advise the husband that he should get to know his wife's father better so that there is no quarrel between them. Both parties appeared to respect the ruling of the court. Other participants in attendance agreed that the judges had acted appropriately in briefing the parties on the issues and in their decision. Yet they also advised the accused man that 'he must respect his wife and share with her a better life, not an unfaithful life'.

This case upholds Nuer customary law as it was being applied in rural areas of Unity State before 2013 and pays no heed to human rights norms promoted by UNMISS and humanitarian actors in the PoCs. There is a concern here that the relationship should be restored between the families. The father actively sought the court as an answer to the disagreement and although they favoured the husband over him he appears to accept the courts authority. Ultimately, the court protected the institution of marriage – an institution that plays a key role in both gender and generational hierarchies of power.

Case 2: Refusing divorce after domestic violence in Juba PoC

A very similar case was heard in the Juba PoC3 in a C Court hearing with nine chiefs present. Once again there was no account taken of the woman's complaint that she has suffered domestic abuse and her request for divorce was rejected. However, the case also confirmed that the chiefs are aware that their position would be condemned by human rights actors within the PoC, even if they choose not to observe the new norms.

On 29 July 2015, a woman brought a case against her husband for divorce, accusing him of being abusive and irresponsible for not supporting her. She said he did not take care of the basic needs of the family and that the relationship became 'boiling' when her husband married a new wife in 2012. The man was called to the court by the chiefs to respond. The head chief first invited the woman to explain the problem. She said her husband had been abusing her, physically beating her, and lacking giving basic support. She said she is tired of her husband and wants to start a new life. The husband was then invited to respond. He argued that there was normal fighting between him and his wife because she has been misbehaving. In relation to the lack of support, he said he used to divide anything he got between the two wives. He insisted that there is no proper reason for them to divorce. During the trial all the chiefs keep on advising the women that wife beating is normal since it is a way of 'disciplining the women in our custom as Nuer'. In

closing, the head chief declared that the panel had found no proper reason for a divorce and that the woman should go back to your home with your husband. The chief then advised the husband of the danger of physical fighting or beating and reminded him of human rights issues that violence is no longer entertained by human rights actors.

Case 3: Punishing elopement but ignoring violence

There are numerous cases relating to adultery⁸³ and 'elopement' being brought to the customary courts in the PoCs. Underpinning them is are complex social relations that sustain a concept of women as property, cemented through the payment of bride wealth, and produce a related concern about her sexual behaviour before and during marriage. If a girl becomes pregnant before marriage, her family may lose out on the bride wealth payment. This is especially of concern to brothers who might use this payment to support their own marriages. In the following case we see that the crime of elopement is given consideration while the beatings a woman suffered as a result of her brother's anger at the issue were neither raised directly as an issue by the woman, nor addressed by the judges. This case, brought to the A court in Juba PoC3, is also significant in illustrating the ways in which the conduct of men is regulated, an issue that especially effects youths who may become involved in casual relationships with girls, and may be penalized by the courts as a result.

On 18 April 2016, a young woman brought a case against a middle-aged man describing him as her 'illegal husband'. The case was heard by a panel of seventeen chiefs and more than eighty people were in attendance. The woman explained that she had been made pregnant by her illegal husband but he refused to marry her. She said she had been beaten by her brothers because she had become pregnant. The judges asked when she had become pregnant and she explained that it was in March 2016. The defended acknowledged his status as an 'illegal husband' but he denied making the girl pregnant claiming that he had only met her on the 15th of the previous month and that this did not match with the time of her pregnancy. He questioned why she did not inform him of the pregnancy and said it was his right to 'dislike an unwanted woman.' After three hours of hearing the case, the response of the chiefs was to uphold the woman's claim. They determined that the defendant was at fault and sentenced him to a detention of fourteen days, a fine of 2000 SSP and ordering compensation of 10,000 SSP to be awarded to the brothers of the girl. The defendant complained that the court was using 'illegal laws.' But witnesses in the audience stood behind the decision suggesting that the court committee had made proper efforts to investigate the issue. The woman and her family also accepted the decision.

⁸³ Adultery is deemed a crime not only in customary but also in statutory law, under the Penal Code Act 2008 which deems it punishable by a prison term of up to two years and also allows for a fine.

Despite having brought the case herself, we see that the compensation for the pregnancy was awarded to the woman's family. Although the judgement was in her favour, there was no apparent attempt to deal with the issue that the woman had suffered beatings at the hands of her brothers. Indeed, somewhat indirectly, their behaviour was effectively rewarded by the decision.

Case 4: Refusing divorce after domestic violence and intolerable behaviour

A woman brought this case to court in Juba PoC3 after suffering intolerable abuse over a period of three years. Once she raised the case, it took only three days to come to court and the hearing lasted four hours, with fees of 100 SSP and an audience of over 30 people. The case was heard by an A court panel of nine male chiefs. Yet the judgement trapped the woman in her abusive marriage and did nothing to sanction the man's behaviour.

On 3 November 2015, a woman aged twenty-eight took her middle-aged husband to court. She recounted how she had married her husband in 2010, and since the couple had had a child, who later died from an illness. She explained that she brought the case because she had been 'mistreated and beaten up', and that her husband was also a heavy drinker whose behaviour was 'intolerable'. She had decided to divorce him on these grounds. However, the chiefs did not grant her the divorce. They responded that these did not constitute reasonable grounds, according to Nuer law. The woman rejected the decision, responding that it was not 'based on fairness or justice' but upon 'outdated traditional rules that do not respect the rights of women.' Upon further questioning from the observer, one of the judges insisted that the decision was correct because divorce is 'very sensitive in Nuer culture' and it is not easy for judges to grant it.

There are two separate and related issues here, since the decision prevents the woman from escaping a violent situation through divorce, and there is also a failure to deal with a perpetrator of violence. We should also note a challenge that the courts face. Divorce relates not only to the rights of individuals but to the families involved in the marriage, which involves 'a binding of families and kinship networks' (Deng, 2013: 49), with ties are cemented through large dowry payments. There was no mention of the perspective of the families in this case, so we may assume they did not articulate support for the woman's divorce petition. The violence was domestic, and posed a threat to an individual, however there were also potential risks attached to granting a divorce without the consent of the related parties. The fact that the woman brought the case and asserted her rights publicly is also important. In many ways, the treatment of women in cases of domestic violence brought to courts in the PoC is consistent with findings outside the PoCs (see Mennen, 2008), but in this context, we also find strong evidence of change.

Integrating rights with custom

Court cases are also seeing the playing out of a contest of norms between Nuer beliefs and customs, and alternative projections of modernity, humanity and law by UNMISS

and its humanitarian partners in the PoCs. The former usually prevail and it is only on rare occasions that we see customary courts directly incorporating human rights norms. Yet within customary law are some practices and ideas concerned with the rights and needs of women and children that can be drawn upon. We see creative responses from customary judges in marrying these existing norms and new prescriptions, illustrating the possibilities of reinterpretation, depending on the context, issue and approach of the panel. There are examples of women and youths challenging existing norms and seeking (generally unsuccessfully) to use the space of the courts to transform these and of communities voicing opposition to judgements.

Case 1: Accepting a woman's demand for support after an abortion

Aid workers expressed concern about a rising numbers of unsafe abortions in the PoCs during their first year (Radio Tamazuj, 12 September 2014), but by 2015 it appears that women were taking up new opportunities in health care within the sites. In the case below, a woman had an abortion and then brought her boyfriend to court to demand that he pay for further treatment, the chiefs responded to her request in a way that might not have been expected, given that Nuer customary law is generally strict in imposing sanctions on relationships outside of marriage. Also unusual was the fact that the woman who brought the case was not Nuer, although the man was.

On 6 November 2015, a Moru woman brought a case against a male Nuer she accused of impregnating her outside of marriage. When she had found out she was pregnant, she sought medication to induce an abortion, which she received. She did not inform the man of her decision to abort. The following day she brought the case to court demanding that now that the child was aborted he should pay for her to 'wash her stomach' (*laak waath*)⁸⁴ in order that she can be healthy again. The man protested asking her why she had not told him and arguing that he did not agree with her decision.

The customary court included a panel of three women and four men. The case was talked out for an hour and a half, with contributions from all parties. Eventually the court ruled that the man should be fined 500 SSP for the 'washing of the stomach' together with court fees. Both participants accepted the outcome although the man verbalised his complaint that she should have informed him rather going ahead 'to kill the child'.

The outcome of this court case appears to be a radical affirmation of women's rights to: chose to have an abortion; to claim compensation from the man; and her right to bring a case to court on the matter. While abortions have been available in South Sudan, it was more easily accessible in the PoC. Therefore, there was a lack of established Nuer law in relation to the exact facts of this case, although the broader principles of Nuer law would have previously tended away from protecting these women's rights. Yet, in this case, the chiefs' interpreted pre-existing law to create an

⁸⁴ It is unclear what this procedure refers to, yet informants suggest that it is a treatment typically given after abortions or miscarriages.

outcome that was not opposed to gender equality and seemed to lean toward a humanitarian concern. The fact that the woman brought the case to court and openly admitted having an extra-marital relationship is also significant.

Also, in Nuer customary courts in the post CPA era, the compensation would not usually be paid to the woman but to her family for a loss of reputation for the family and the loss of future bride wealth. However, if the ‘washing of the stomach’ is seen as benefiting future fertility, this will also restore wealth to the family by restoring some of the bride wealth to the woman.

Case 2: Rejecting claims of witchcraft

Nuer concepts of justice have their roots in spiritual considerations and although colonial administrators employed customary courts as a means of secularizing justice, this project met with resistance and was never fully accomplished (Johnson, 1996: 72 -77). There are occasional references to witchcraft in cases recorded in the sites. *Ji thucni* (magicians) are spiritual leaders active in both the Bentiu and Juba POCs. Not all chiefs will work with these *ji thucni*, yet, some chiefs, when they are unable to settle cases, will send the parties to these *ji thucni* in hope that their spiritual power will help discern the facts or justice in the case. For example, on 15 December 2015, a woman brought a case before the A customary court in the Juba PoC accusing another woman of fighting with her family and stealing 10,000 SSP. The defendant denied that she had taken the money. The court ruled that the defendant had two weeks to bring 2000 SSP which would be used to pay *ji thucni* to discern which of the parties was lying.

However, we see in the following case that the courts can also take a firm line on accusations of witchcraft, responding with a secular, evidence-based approach.

On 2 April 2016, a case was brought to B court in Juba PoC3 to be heard by a panel of 8 judges, all of them men. More than forty people attended. The case was brought by a 27-year-old woman who claimed that another woman had ‘devil eyes’. She accused the woman of telling her to cover her baby because one of their neighbours had ‘devil eyes’. The mother had decided not to cover her baby because it was too hot but then the child had become sick. She believed that the accused woman was somehow responsible and that she might be the person with ‘devil eyes’ herself. The accused rejected the claim saying: ‘This woman wants to spoil my reputations. I don't have devil eyes as she has been talking about. What I know is that, when I found her baby left naked lying on the ground, I did advise her to cover the baby for the sake of its health.’ Two witnesses confirmed this account and also that the mother then covered her baby. One of the witnesses stated: ‘These women are our neighbours if they could listen to our advice, they shouldn't be here today!’ The court questioned the complainant asking her for proof but she was unable to provide anything further than to restate her suspicions. The court ruled against the complainant ‘opening a baseless case’ against someone she should have ‘appreciated’ and

was warned not to do so again. The judgement was accepted by the parties and court fees of 150 SSP were paid.

Case 3: Granting divorce to victim of domestic violence

In this case, a woman brought a case against her husband, accusing him of repeated violent assaults and demanding a divorce. The agreement of the parents on a divorce is often questioned in such cases and in this instance the parents were present and consented to the divorce. While the husband demanded a return of his dowry, it is notable that no judgement was made by the court on this issue. Instead, the woman was granted a divorce and the man was sentenced including a fine, imprisonment and compensation. This is an important case to suggest that women subjected to violence has the possibility of gaining both a divorce and punishment of the perpetrator and some compensation, at least with the support of her family. Meanwhile men cannot necessarily expect the return of their dowry in such cases.

On 7 May 2016, a young married woman brought a case against her middle-aged husband. She accused him of ‘beating her seriously’ until ‘she was about to die due to beating’ and she had to leave. The case had been taken to the police. It was heard by a panel of seventeen judges composed of 12 men and five women at A court level. The case took four days to reach the court and fees of 200 SSP were charged. The woman asked for a legal divorce from a person who ‘wanted to kill her for nothing’. The parents of the woman were present, and confirmed their agreement to the divorce, pointing out that they had already forgiven the husband three times ‘but he didn’t consider the forgiveness’. The defendant denied these accusations, but accepted that he did beat his wife this time because she was ‘stubborn with another man who came to his home.’ The defendant insisted that his parents-in-law must repay the dowry of about forty cows, but said he would not ask for the ‘money he has been using in the UNMISS camp’ back. The judges ruled ‘based on existing laws and previous cases’ that the divorce between the woman and her husband should be granted due to ‘misbehaviour from the husband’. The husband was given a sentence of imprisonment, a fine of 1000 SSP, and was told to compensate the woman another 1000 SSP. The defendant complained that he should not have to pay compensation when he was ‘beating his own wife, not someone else’s’ but witnesses and the judges insisted that this was fair.

This judgement in this case contrasts with other judgements imposed on women how have sought divorce after domestic violence, discussed above. It may differ in significant details and nuances relevant to custom, including the role of the family. Yet it is also an important record of the possibility of both divorce and punishment of a perpetrator, and can serve as a precedent for other cases. Notably a case on 20 June 2016 suggests that this may already be setting a standard, since a man held responsible for beating a wife who was four months pregnant and causing an abortion was similarly sentenced to imprisonment for twenty-four hours plus the same level of

1000 SSP fine and compensation. Again, the parents agreed and the divorce was granted without mention of dowry.

Case 4: Enabling young girl to divorce an elderly man chosen by her parents

As we have seen, customary courts in the PoCs have rejected women's attempt to gain a divorce, even when she has brought a complaint of gender-based violence. Yet there are occasional cases to show that this rigid position can be undermined within the PoC setting.

On 10 July 2015, an eighteen-year-old girl brought a case to the Community Watch Group court, in which the full panel of sixteen chiefs was sitting. She complained that she had been given to an old man in marriage against her wishes. She had married him because of pressure from her relatives but could no longer abide by her relatives' decisions. She had therefore left the old man and was seeking a divorce. The girl's relatives opposed her actions, saying that they were not happy with their daughter for running away from the husband they had chosen for her. However, her husband, aged forty, responded that he accepted her decision and demanded the return of the bride wealth. The chiefs determined that the rights of the girl must be respected and she should be given the right to divorce the old man. In their judgement they referred to the Universal Declaration of Human Rights 1948. They also advised the relatives to respect the girl's rights including the right to found a family of choice in Article 15 of South Sudanese Bill of Rights.

This case stands out as an example that the customary courts can respond to uphold the rights of women and that the chiefs are aware of human rights norms and South Sudanese law and can take these into consideration in their decision. One factor which is not clear in this case is when the marriage occurred, and this may also have shaped the evaluation of the chiefs, since the girl was quite close to the age of consent. It is notable that no fines were set and the court fees were low (the girl was charged 100 SSP to open the case). Whatever the reasons for this decision, it also sets a precedent which might be cited in future similar court hearings.

Conclusion

The chiefs' courts are the lynchpin of a robust structure of customary authority largely beyond the purview of international actors. They are part of a local protection system aimed at preventing conflicts or halting them when they do break out. Members of the courts are presented with relentless dilemmas arising from conditions of trauma, despair and dislocation and seek to find ways to prevent these erupting into violence. They condemn fighting, criminality and perceived moral transgressions, punishing the perpetrators, and issuing compensation and moral guidance aimed at repairing social relations and mitigating harms. But they also reproduce gender and generational inequalities, and license certain abuses. Some customary chiefs have complained about a decline in their power in the context of displacement (Arenson, 2016: 52). Yet our research suggests that chiefs' courts have adapted and thrived in the PoCs, despite

the ambivalence of UNMISS. The courts provide an approximation of order in this ambiguous legal and security environment.

We find that communities are determined to provide their own forms of justice and security under a distinctive form of international protection. The customary system is reinventing itself to meet the demands of new circumstances. If customary courts are necessary and functional in the adverse context of the PoCs, we must consider this a marker of their wider value. Customary courts have been used by the state government in South Sudan, but their historical status and legal independence has enabled them to be recreated in the PoC context, where state-level government is effectively absent, and they exist in proximity to a unique form of UN governance. They display some resistance to – and clear tensions with – the norms of a humanitarian regime, but they have also made some accommodations. They are a vital public authority, resting largely upon the negotiated consent of the community and with mechanisms for downwards accountability to members of their constituency.

Chiefly authority has proven extraordinarily tenacious in the context of a protracted crisis. Significantly, chiefs root their authority by association with historical counties and regions, despite the fact that these localities are being contested and redefined in the conflict. They thus actively imagine a pre- and post-war period, drawing a continuity between the past, present and an envisaged future return. The chiefs are one among several community and international authorities with roles in justice and security in the PoC sites, but they are at the forefront of defining and imposing ideas about custom, identity, and social and moral order.

Customary law is not a monolith, and the customary justice system in the PoCs is not simply a transplanted version of previous practices. The actors, procedures and substantive content of the law are developing towards the construction of a common legal and moral Nuer community. While laws substance and legal authorities varies across the Nuerlands, inside the PoC joint courts bring together chiefs from different regions.

From the responses to the judgements by parties in the case and the audiences, it appears that the chiefs often reflect prevailing social attitudes, particularly among elders, and contribute to reinforcing them. But the chiefs are also involved in re-negotiating as well as articulating Nuer values. The procedures in the courts in the PoCs retain something of the original notion of arbitration in pre-colonial Nuer justice, which obliged all participants to talk the matter out at length, and for all to have ‘their full say’ in attempts to reach a negotiated consensus (Johnson, 1986: 60-62). They involve lengthy deliberations and pronouncements from the members of the court panel which include opportunities for interpretation. They engage in order-making in the present and fostering shared values for the future. In this sense the courts exercise discursive power in the constitution of identities, places and norms.

Through their rulings, the courts envisage a common Nuer law and invoke a conception of community that reaches across the Nuerlands, with implications that have yet to be examined. We do not seek to make evaluations of this ‘customary law’ based on the relatively small selection of cases discussed in this paper, but our body of court observations provides evidence that will be useful to discern its contours, including regularities and inconsistencies. Indeed, as evidence of practice, the archive

of court observations might also be a source for concrete (and therefore reasoned) discussions of the various ways in which courts uphold or violate rights, ideally encouraging more nuanced answers to the pressing questions of how ‘justice may be advanced’ (Sen, 2009) and protection may be achieved, within the PoCs and in South Sudan more generally.⁸⁵

UNMISS has found itself in a curious position of coexistence with the authorities of the customary system, and in frequent reliance upon them to manage violence, criminality and potentially destabilizing infractions against a customary social code. Camp residents turn to the chiefs to try to avoid communal fighting, and to the courts to resolve conflicts; there is no other effective mechanism for this task. The courts also sometimes act to restrain other community authorities, such as members of the Community Watch Group or N4, if they are accused of abuses. Yet the courts themselves sometimes contravene and are often in tension with international human rights norms. The responses of the customary courts in the PoCs help us to better understand the challenges and possibilities for marrying local and international norms and local mechanisms for conflict resolution.

While implicitly relying upon customary courts, UNMISS has also encouraged community initiatives, through some training for the Community Watch Groups and guidelines for an IMDRM. Despite the informality and impermanence of these arrangements, the situation recalls the colonial era’s ‘native administration’. Inadvertently, inequalities and regressive practices are sustained, while local intermediaries work to provide order ‘on the cheap’. UNMISS and humanitarian actors have made several efforts to improve and reform practice – and the constraints and difficulties facing them are well known. Yet more could certainly be done to monitor the courts, promoting social accountability, and to support the efforts of the community members committed to their improvement.⁸⁶ Concerns have been raised that some community actors engage in tax collection and are becoming extractive.⁸⁷ But it is worth considering that the international resources for governance are monopolized by the UN and humanitarian organisations, while the customary system relies largely on voluntary commitments, mostly ‘taxes’ are drawn from people for services, in the form of fees paid to bring their case to court.

Above all, chiefs’ courts in the PoCs illustrate the efforts of displaced communities to develop their own mechanisms for ‘access to justice for all’;⁸⁸ such local agency is necessary for peacebuilding in South Sudan. The power of the courts relies on their

⁸⁵ See Macdonald and Allen, 2015 for a discussion of the wider challenge of social accountability in conflict affected societies, and the relevance of Sen’s arguments. This also resonates with previous calls for sensitivity in effecting change to avoid undermining the value and legitimacy of the courts, and a recognition that ‘change must be a self-propelled process of improvement from within, rather than an imposition from without. (Deng 2006).

⁸⁶ These include paralegals and chiefs involved in our research and members of the Community Watch Group. Among other concerns, the CWG pointed out that did not even have a proper book for keeping records of complaints safely (interview, July 2015). They need practical resources to carry out their work, and could also benefit from investment in training and to promote community dialogues based on the evidence from court observations. Previous efforts made by civil society organisations such as SSSL and PACT have been important contributions and there is a need to build on these.

⁸⁷ See Arenson, 2016, 52. The concern relates principally to ‘taxes’ paid to the CWG.

⁸⁸ This phrase is repeatedly used by court observers in commenting on the reasons behind the case and decisions.

commitment to seeking just outcomes, and capacity to generate voluntary compliance based on evocations of a shared identity, morality and custom. The court cases are records of the processes and ideas through which chiefs generate legitimacy and pursue social order iteratively. We conclude that the role of these customary authorities in protection is closely linked to their representation of an enduring moral community and of legal continuity and certainty, despite the realities of fragmentation, change and uncertainty.

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Appendix 1: Sample court report from Bentiu

COURT OBSERVATION REPORT

Initials of researcher:	Report number: 18.	Location of court: IMDRM, Bentiu POC {Block 6 sector 4}	
Date: 14th Jan 2016.	Start time: 09:19 am.	End time: 01:30 afternoon.	
Type of court: Nuer Customary law - <u>Elopement of a woman by the another man.</u>			
Composition of the court: <i>Number and roles of judges/members of the court panel:</i> There are six (6) members in the court (the composition of :4. male and 2 female.)	<i>How many women?</i> 2 <i>members</i> <i>How many men?</i> 4 members	<i>Language spoken and social identity e.g. Ethnic group, clan</i> Nuer	<i>Other characteristics and relations of note:</i>
Description of surroundings: <i>e.g. where is the court being held? At the community high committee sector (4) block (6)</i> <i>How many people are attending? They are forty-five (45) Male42, female [3], middle age youth.</i>			
Participants details:	Identity of the person bringing the case to the court. The husband.	Identity of the accused: The man eloped his wife.	
Nature of the case summary: <i>E.g. Why is the case being brought?</i> The case was brought to court in order to prevent the quarrel, to avoid the fighting between two parties. <i>How long has it taken to come to court?</i> It had taken three days.			

Who brought the case to court and how?

The husband brought the case to the court, because his wife was eloped by another man who did not marry her.

Were the police or another security agency or local authority involved?

They were not involved, because the case was brought directly to the court.

Description of Proceedings:

The man who came to open the case in the court said that his wife had been eloped by another man who wanted to take her as his wife. Yet, he was married to her and had two children with her.

He came to the court to represent the case to the judges. He wanted his wife to return back home.

The wife had disappeared for two days. The husband asked the women who were always with his wife where she was. One of them said that your wife was been eloped by a man whom I know. She said that he has a shop at the market.

The man who was accused of taking the wife initially denied it. But the wife's friend insisted that he had taken the woman with him and hidden her in a place only he knows.

The judges decided the man had taken the wife even though he denied it. The judges found evidence and witnesses who had seen it happen. The case was then adjourned for more witnesses to be called.

The man who was accused of taking the wife was from a county whose people had supported the government during the South Sudan crisis since 2013. The husband accused the man by saying, "The government of your county has been taking all our cattle and now you are also taking our wives."

He said that he wants the court to bring his wife back to his home.

The judge asked the man who had eloped the woman about their relationship. In the end, the man said that he had done such an act.

The court members Judging the case:

The judges decided that it is the right of husband, and that the man must bring back the wife to his husband. The court fined the man with seven head of cattle and two female cows for the judges. This was in accordance with nuer customary law. They were saying that case was forbidden by community inside the poc.

Judgement/outcome:

Did the judgement refer to existing laws, to previous cases, or to personal opinions, what reasons were given for the judgement?

It referred to the nuer customary law. The reason was to avoid a fight and solve the case within community in the camp.

<p>Opinions on the outcome: <i>e.g. Did participants accept the outcome?</i> Yes, they accepted the court settled the case and it was referred to some cases that usually happened in the camp. The participants commented on what the judges had decided. And they advised the man that for what he had done, he must pay the fine according to the demand that the judge decided.</p>
<p>Costs of the case: <i>note details of any court fees, or costs involved in bringing or settling the case e.g. fines. Include details of the payment to and from and the amount where possible.</i> Costs associated with courts: 100ssp was paid to the court from the person who brought the case to the court. Costs associated with other parties: none. The man was fined the man with seven head of cattle and two female cows for the judges. Other costs: 60 SSP for opening case. They were paid for opening the case to the community watch group who have responsibilities for security inside the poc.</p>

Appendix 2: Photographs from Juba PoC3

Customary court in session



Chiefs



Crowd observing a court hearing



Community Watch Group meeting with JSRP observer team coordinator



N4/ Community Emergency Response Team reacting to an outbreak of fighting



Photo credits: Gatwech Wal.



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