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ASCERTAINMENT OF CUSTOMARY LAWS IN SOUTH SUDAN

DISCUSSION PAPER



INTRODUCTION

The debate on the relationship between customary law and State-made laws in post independent dispensations has been replicated in South Sudan. This debate often becomes complex by the difficulty in discerning the content of customary law. This is largely because customary law is often unwritten, resides with the elders and is passed on from one generation to another through oral tradition.

Efforts have been made to record customary law in various forms,¹ amidst doubts raised by “customary law purists” regarding the efficacy of recording customary law in written form.² It is usually contended that the codification of customary law leads to its dilution as it deprives communities of their role of shaping it.³ Without seeking to rebut this school of thought, it is important to note that the codification of customary law has been undertaken in a number of African countries with little resistance from customary law purists.⁴

Questions relating to harmonization, the place and role of customary law in South Sudan’s post-independence legal pluralist environment is bound to keep the ascertainment debate alive. While South Sudan’s Transitional Constitution 2011, embraces international legal norms, thereby signalling an intention to become part of the international community, the same Constitution and various legislation, equally provide an underlying intent of the people of South Sudan to be governed by their customs and traditions.⁵ This creates serious implications for the harmonization of customary law and State laws, in that formal courts are under a positive duty to apply customary law within the realm of the statutory provisions that they apply.

In 2012, UNDP in partnership with the Government of the Republic of South Sudan (GRSS), commissioned an ascertainment study of the customary laws of 14 ethnic groups in South Sudan. The ascertainment of customary law caters for “accessibility of customary law”, an important asset to a legal pluralist system that requires the harmonization of the customary laws of more than sixty ethnic groups in a complex web of interaction among various customs as well as with statutory law and the Transitional Constitution. Customary law remains firmly ingrained in every facet of social interaction and has served communities timelessly in the resolution of conflict. While several questions may arise for analysis regarding the ascertainment study, two observations are significant for discussion. First is the critical value

1 The restatement of customary law was set up by the School of Oriental and African Studies at the University of London in 1959 to record African customary laws and was led by Professor Anthony Allot.

2 David Pimentel, “Rule of law ownership without cultural imperialism? Reinforcing customary justice through collateral review in Southern Sudan,” 2 *Hague Journal on the Rule of Law* (2012) 1, 20; Cherry Leonardi et al, “The politics of customary law ascertainment in South Sudan” 63 *Journal of Legal Pluralism* (2011) 1, 8.

3 Ibid.

4 For example restatement and ascertainment projects were conducted in Kenya, Malawi, Ghana, Nigeria, Botswana and Namibia. Ascertainment studies were also conducted in the Bahr el Ghazal, Equatoria and Upper Nile regions in the then southern Sudan.

5 For instance article 5(c) of the Transitional Constitution provides that “customs and traditions of the people” are a source of legislation. Section 6(i) of the Code of Criminal Procedure Act provides for the recognition and enforcement of voluntary reconciliatory agreements between the accused and victim in criminal matters. Section 206(b) of the Penal Code Act provides for reduction of death penalty to imprisonment not exceeding 10 years upon payment of customary blood compensation. Section 247(3) of the Penal Code Act excludes sexual intercourse between husband and wife from the ambit of rape. Section 6 of the Civil Procedure Code provides that any proceedings, certain issues including family matters will be determined by the customs of the parties, so long as they are not contrary to justice, equity or good conscience. Section 6 of the Penal Code Act courts may determine customary laws and practices prevailing in specific areas.

of the ascertainment study to the process of harmonizing customary and the formal legal systems and the opportunities it presents for aligning customary law with human rights norms. Second is the relevance of the ascertainment study to the resolution of conflict. These two observations can be considered the most relevant surrounding any debate of the ascertainment study, considering South Sudan's nascent legal system and conflict prone situation.

THE ASCERTAINMENT STUDY

The ascertainment study is the result of a UNDP-GRSS sponsored customary law strategy which was designed to provide mechanisms for the harmonization of customary law and the formal justice systems. Consequently, the customary laws of 14 communities⁶ were recorded and validated for relevance and accuracy. The ascertainment of the customary laws of a further 10 communities is on-going.⁷

The objectives of the study are to:

- a. Document customary law practices, bearing in mind that such practices may have changed or been adapted over time through decades of conflict;
- b. Harmonize the different customary laws of various ethnic groups so as to have in place a coherent customary law regime in South Sudan;
- c. Propose and recommend reforms necessary for achieving a customary law regime which is in line with internationally recognized standards of justice, rule of law, and human rights, including women's rights.

In an attempt to provide for certainty in customary law, a community owned codification process was proposed wherein customary law is "self-stated" by the communities and recorded in writing. Self-ascertainment avoids the outside restatement of customary law as a product of State-driven rule of law reform but ensures its documentation by indigenous societies in a manner recognizable and acceptable by them. More importantly, it presents opportunities to promote the rule of law and human rights standards as recognized by the communities themselves.

COMMENTS ON THE ASCERTAINMENT STUDY

1. *Harmonization of customary and formal laws*

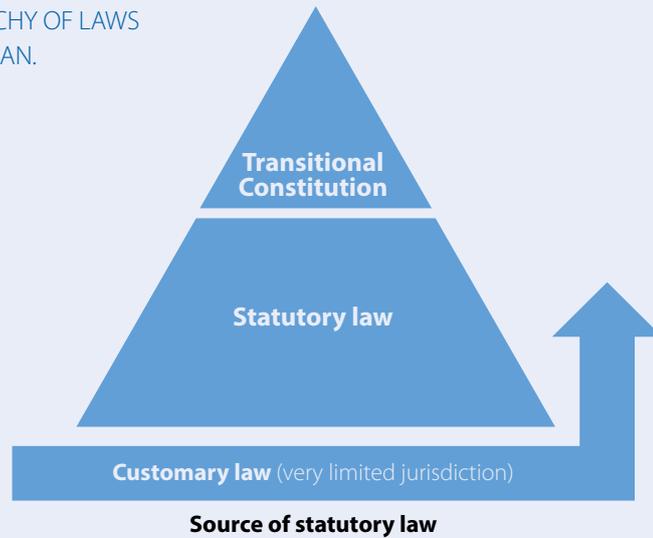
The reception of colonial laws into indigenous legal systems and the enactment of constitutions and legislations by post-colonial governments, essentially means that different legal systems must co-exist. This conflation of systems underscores an inevitable unease between State power and indigenous legal systems. This debate is usually strongest during the early post-independence period, during which traditional authorities often seek to reclaim their place as arbiters of justice, while State structures seek to establish or consolidate governance structures including formal judicial systems. Though the Transitional Constitution of South Sudan places emphasis on customs and traditions,⁸ customary courts remain subordinate to the formal courts and have very limited jurisdiction as is the norm in

6 Azande, Toposa, Lopit, Lango, Lotuko, Jur-bel, Avukaya, Moru, Ndogo, Mundaru, Wadi, Balanda Bivri, Baka and Bongo.

7 Jur, Wetu, Balanda, Mundu, Bongo, Madi, Acholi, Lokoya, Bari and Kakwa.

8 Articles 5(c), 33, 36(3) (2), and 122(1) of Transitional Constitution.

**FIG 1: HIERARCHY OF LAWS
IN SOUTH SUDAN.**



modern judiciaries. While customary courts have restricted jurisdiction and the formal courts are empowered to determine most cases, the harmonization question is still bogged by two issues.

First, is the interaction among the customary laws of various ethnic groups and the resolution of their competing inconsistencies. The severe restriction of the jurisdiction of customary courts and the concurrent transfer of their powers to formal courts does not resolve the question of conflict of law amongst customary laws. The fact that the jurisdiction of customary courts is very restrictive alienates traditional leaders from their judicial roles. The erosion of the judicial powers of traditional leaders has resulted in their advocacy for the restoration of their powers to settle all cases in their communities in the face of what they consider an abrogation of their powers by formal courts.

Further, the multi-cultural make-up of South Sudan denotes that courts will often be called upon to determine the applicable customary law, when confronted with disputes where two or more customs interact. The determination of the applicable customary law is a very complex matter which requires a "conflict of laws"⁹ system that is uniformly applied. The ascertainment study produces the text of substantive and procedural customary laws. This provides considerable resources in the rationalization of, and application of the applicable customary law, once this is determined. The determination of the applicable customary law can follow a formula based on the relationship between the law and the facts which gave rise to the dispute. Consequently, the applicable customary law may be the law of the place where the crime or transaction occurred, the law of the seat of the court, the law selected by the parties to the dispute or the conduct of the parties among other things.¹⁰

⁹ The determination of which of a number of competing customary laws should apply.

¹⁰ It may be inferred from the conduct of the parties that they intended to be bound by the customary laws of a particular ethnic group. The Chiefs' Courts Ordinance enacted by the British colonial Government in 1931 provided for the setting up of special courts to determine matter where a party was subject to the jurisdiction of one chief and the other party to another chief. It is submitted that this system is burdensome.

Second, questions relating to the interaction of customary laws and values with the demands of a formal legal system governed by human rights standards are bound to arise. Consequently, the courts will be called upon to rationalize the efficacy of customary practices in light of modern and constitutional values. This is to be expected in modern democracies where all laws, including customary law, should be consistent with the constitution. One can argue that the Local Government Act of South Sudan 2009, provides the answer in clearly identifying human rights values that must not be circumvented by customary law. These values include gender equality¹¹ and the rights of children.¹² Very significantly, some ethnic groups proposed reforms during the ascertainment studies. This demonstrates an awareness of emerging social norms within ethnic groups, and their intent to align certain customary practices with human rights values through modification. Some of these demands for reform are founded on human utility, such as the suggestion to find alternate mediums for bride wealth other than cows, so as to facilitate inter marriage between non-pastoralist communities, (such agrarian communities) who do not own cattle, with pastoralist communities who ordinarily demand cattle as bride wealth. Other reform proposals arise from acknowledgements by the communities that certain practices are inconsistent with human rights values. These proposed reforms sometimes provide durable alternatives. For instance, the Lango ethnic group states that the giving away of girl children in compensation for murder is a violation of their right to human dignity as it reduces them to mere objects. Instead, they recommend that the practice be abolished entirely, or in the alternative, that her bride wealth be transferred to the family of the deceased at the time of her marriage. Other practices singled out for reform include the placing of padlocks on the doors of persons who elope on condition of payment of a certain amount for the removal of each padlock;¹³ the beating or killing of alleged witches;¹⁴ and the claiming of refund of school fees by the parents of brides.¹⁵

Reforms emanating from within communities are sustainable, and possibilities for change remain open due to the flexible nature of customary law. The ascertainment studies bring to the fore the desire for self-reform which has a potential of creating pathways for the process of harmonization and compliance with the demands of the Transitional Constitution of South Sudan.

2. Opportunities for conflict resolution

Post independent South Sudan has been bogged down by conflict at various levels of social and political interaction, ranging from inter-communal conflict, inter-ethnic conflict¹⁶ to political conflict. These conflicts are manifested by revenge killings, cattle rustling, abduction of women and children and other forms of communal violence, and armed rebellion.

11 Section 109 and 110 of the Local Government Act.

12 Section 111 of the Local Government Act. These rights include the right to life, survival and development; the right to a name and nationality; the right to be cared for by his or her parents or legal guardian; the right not to be subjected to exploitation; the right not to be subjected to harmful cultural practices.

13 The communities note that not only does this practice interfere with the right of woman to select her spouse, it is purely a commercial arrangement which further undermines the status of women.

14 The communities argue that this practice violates due process of persons who are punished or killed on mere suspicions.

15 The reasoning of the communities is that it is the duty of parents to educate their children.

16 See David Deng "Challenges of Accountability: An Assessment of Dispute Resolution Processes in Rural South Sudan" 2013, 37.

Ethnicity has fuelled violence at various layers of community and political engagement. It is not surprising, therefore, that the December 2013 crisis took an ethnic dimension. An understanding of the ease with which conflict is “ethnicized” lies in the ascertainment study. However, this does not detract from the historical discord among major ethnic groups which have been a catalyst for conflict. The ascertainment study shows a general communal mistrust for outsiders. This follows a pattern of blame on outsiders for the contamination and variation of communal values. Most communities tend to blame outsiders for introducing vices and crime into their communities. A general practice of verification of the background and character of outsiders before being accepted into communities is systemized. For instance, where the allocation of land to an outsider is under consideration his/her origin is to be traced and verified to establish good character. This practice is similar to the widespread African practice of background verification of persons and forming impressions before ascribing acceptance of individuals to their family ties.

The underlying suspicion for outsiders provides some insight into causes of conflict. However, comparison of the practices of various ethnic groups ascertained, provides an opportunity for clarifying the misconceptions of ethnic differences. While the ascertainment study illustrates that societies often internalize inter-cultural comparisons of their customary laws by over-emphasizing their differences, the study also provides an opportunity to examine the commonalities in the customary laws of the various ethnic groups. A review of the study reveals that customary laws exist in continuums rather than as distinct and isolated entities. Several common themes of customary practices run through the customary practices and laws of most ethnic groups, with variations relating to the details of implementation. For instance, modalities of entering marriage (contracting marriage by formal negotiations for payment of bride wealth, marriage after pregnancy and marriage resulting from elopement) are similar among most ethnic groups, as is the medium of exchange in relation to bride wealth. The variations generally reside in the quantum of exchange. The grounds for divorce are very similar,¹⁷ so are the rules of inheritance and several other customary practices.

The study provides evidence of cross fertilization of customs. As societies interact through migration, commerce and social ties, customary practices integrate. The ascertainment study provides several examples of customary practices that were introduced into communities through interaction with other ethnic groups as well as the influence of modernization on customs. Evidence of similarities should be mapped out and discussed, and should form the basis for inter-ethnic dialogue on peace and reconciliation. An example of such mapping illustrating commonalities and variations in customary laws is provided on page 8.

¹⁷ Common grounds for divorce among ethnic groups include excessive drinking by the husband, neglect of the family by the husband, wife beating without good reason, inability to father children, repeated and willful disobedience of the lawful orders of the husband by the wife, inability of the wife to bear children and repeated acts of adultery by the wife.

Ethnic group (grouping)	TOPOSA Eastern Equatoria State (NILOTIC)	LOTUKO Eastern Equatoria State (NILOTIC)	BONGO Western Bahr el Ghazal State (BANTU)	NDOGO Western Bahr el Ghazal State (BANTU)	MUNDARI Central Equatoria State (NILOTIC)	AVUKAYA Western Equatoria State (BANTU)	JUR-BEL Lakes State (BANTU)
Marriage procedures	<ul style="list-style-type: none"> ◆ Choice of spouses. ◆ Elopement leads to marriage. ◆ Arranged marriage by parents. ◆ Pregnancy leads to marriage. 	<ul style="list-style-type: none"> ◆ Abduction leads to marriage. ◆ Elopement leads to marriage. ◆ Arranged marriage by parents. 	<ul style="list-style-type: none"> ◆ Marriage by barter. ◆ Elopement leads to marriage. ◆ Arranged marriage by parents. ◆ Pregnancy leads to marriage. 	<ul style="list-style-type: none"> ◆ Marriage by barter. ◆ Arranged marriage by parents. ◆ Pregnancy leads to marriage. ◆ Elopement leads to marriage. 	<ul style="list-style-type: none"> ◆ Choice of the spouses. ◆ Pregnancy leads to marriage. ◆ Elopement. 	<ul style="list-style-type: none"> ◆ Choice of spouses. ◆ Pregnancy leads to marriage. 	<ul style="list-style-type: none"> ◆ Marriage by barter. ◆ Arranged marriage by parents. ◆ Pregnancy leads to marriage. ◆ Elopement leads to marriage.
Dowry	<ul style="list-style-type: none"> ◆ Dowry is required. ◆ Hundreds of cows depending on paternal uncles and step mothers of the bride 	<ul style="list-style-type: none"> ◆ Dowry is required. ◆ Dowry is paid in cows (20, 16 or 13 depending on clan) and goats (80, or 120 depending on clan). ◆ Elopement attracts fine (kasarubet) which is 6 to 8 goats or 1 bull. 	<ul style="list-style-type: none"> ◆ Dowry is required. ◆ Dowry is paid in spears, shotguns hoes, food and elephant tusks. 	<ul style="list-style-type: none"> ◆ Dowry is required. ◆ Dowry is paid in hoes, simsim, honey, wild meat. ◆ Elopement attracts payment of a trespass fee. 	<ul style="list-style-type: none"> ◆ Dowry is required (12 cows and 3 bulls). However, this may increase to as much as 60 depending on the available competition for the bride. ◆ Pre-marital pregnancy attracts a fine. 	<ul style="list-style-type: none"> ◆ Dowry is required. ◆ Dowry is paid in hoes, iron bars, arrows and spear. This medium has been replaced by payment of money. 	<ul style="list-style-type: none"> ◆ Dowry is required. ◆ Elopement is resolved by payment of compensation.
Wife inheritance	<ul style="list-style-type: none"> ◆ Wife inheritance exists but the wife selects from among her brother in-laws. 	<ul style="list-style-type: none"> ◆ Wife inheritance exists but the wife selects from among her brother in-laws or the deceased husband. 	<ul style="list-style-type: none"> ◆ Wife inheritance exists but the wife selects from among her brother in-laws. 	<ul style="list-style-type: none"> ◆ Wife inheritance exists but the wife selects from among her brother in-laws. Her eldest step-son may inherit her. 	<ul style="list-style-type: none"> ◆ Wife inheritance exists but the wife selects from her brother in-laws. 	<ul style="list-style-type: none"> ◆ Wife inheritance exists but the wife selects from among her brother in-laws or close male relatives of the husband. 	<ul style="list-style-type: none"> ◆ The clan of elders selects one of the brothers of the deceased to inherit the widow.

Thematic area

<p>Inheritance of property</p>	<ul style="list-style-type: none"> ◆ Properties inherited by the sons. 	<ul style="list-style-type: none"> ◆ Properties inherited by the first son. 	<ul style="list-style-type: none"> ◆ Properties are inherited by the sons. 	<ul style="list-style-type: none"> ◆ Properties are inherited by the male relatives such as sons and brothers of the deceased. 	<ul style="list-style-type: none"> ◆ Properties are inherited by the first son.
<p>Adultery</p>	<ul style="list-style-type: none"> ◆ Only a wife is considered to commit adultery. ◆ The male participant is required to pay 7 cows to the husband of the woman. ◆ Any child born out of the adulterous relationship belongs to the husband. 	<ul style="list-style-type: none"> ◆ Only a wife is considered to commit adultery. ◆ The male participant pays 2 cows to the husband of the woman. ◆ Any child born out of the adulterous relationship belongs to the husband. 	<ul style="list-style-type: none"> ◆ Properties inherited by the first son. ◆ Only a wife is considered to commit adultery. ◆ Previously, the male participant detained in the house of the chief for a number of months where he performed manual labour. Compensation is paid to the husband of the adulterer. A fine is paid to the court. 	<ul style="list-style-type: none"> ◆ Only a wife is considered to commit adultery. ◆ Adultery may lead to divorce. ◆ Where the male participant is married – imprisonment for 1 year and payment of 3 cows, 1 bull and 1 goat (Kasur beid) to the husband as compensation. ◆ Where the male participant is unmarried – 6 months imprisonment or payment of 3 cows and a bull per month, over a period of 6 months. 	<ul style="list-style-type: none"> ◆ Only a wife is considered to commit adultery. ◆ The male participant pays the equivalent of the dowry to the husband in principle. However, payment is actually made to the brother and father of the woman, as it is an insult to the man to receive such money. ◆ The male participant is imprisoned in the chief's house for 3-6 months where he perform hard labour. ◆ Any child resulting from the adulterous relationship belongs to the husband.

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Ethnic group (grouping)	TOPOSA Eastern Equatoria State (NILOTIC)	LOTUKO Eastern Equatoria State (NILOTIC)	BONGO Western Bahr el Ghazal State (BANTU)	NDOGO Western Bahr el Ghazal State (BANTU)	MUNDARI Central Equatoria State (NILOTIC)	AVUKAYA Western Equatoria State (BANTU)	JUR-BEL Lakes State (BANTU)
Killing	<ul style="list-style-type: none"> ◆ Intentional and unintentional killing are recognized. ◆ Remedy for intentional killing: the offender is killed by a member of the deceased family. ◆ Compensation for unintentional killing: the perpetrator is required to hand over a girl child to the family of the deceased and pay the funeral expenses of the deceased. ◆ Compensation for unintentional killing: 32 goats and cleansing ritual 	<ul style="list-style-type: none"> ◆ Intentional and accidental killing are recognized. ◆ Remedy for intentional killing: the offender is killed by a member of the deceased family. ◆ Compensation for unintentional killing: the perpetrator is required to hand over a girl child to the family of the deceased and pay the funeral expenses of the deceased. 	<ul style="list-style-type: none"> ◆ Direct killing is the taking of another's life through physical violence. ◆ Indirect killing is the taking of another's life through witchcraft. ◆ Accidental killing is recognized. ◆ Remedy for killing: the offender is killed in retribution, or the family of the offender provides the family of the victim with a young girl. ◆ In the case of killing by witchcraft, the family of the victim seeks the intervention of witchcraft to kill or harm the offender. 	<ul style="list-style-type: none"> ◆ Killing is the taking of another person's life. ◆ Remedy: the family of the offender is required to hand over a girl child to the family of the deceased. ◆ The families of the offender and victim take blood oath to refrain from revenge. 	<ul style="list-style-type: none"> ◆ Intentional and unintentional killing are recognized. ◆ Intentional murder is often referred to the formal justice system. However, the customary courts sometimes require the payment of blood money. ◆ Unintentional killing attracts blood compensation of 30 cattle to the family of the deceased, payment of 6 cattle for the funeral services provision of a bull for peace making. 	<ul style="list-style-type: none"> ◆ Intentional and unintentional killing are recognized. ◆ Killing by witchcraft is intentional. ◆ Intentional killing is referred to the formal justice system except in the case of killing by witchcraft. ◆ The remedy for unintentional killing is payment of blood money to the family of the deceased. The offender pays for the funeral expenses of the deceased. ◆ An animal is slaughtered as a peace ritual. 	<ul style="list-style-type: none"> ◆ Intentional and unintentional killing are recognized. ◆ Remedy: a child is given to the family of the deceased where both sides are from the Jur-bel ethnic group. ◆ Compensation in the form of 31 cows are paid where one of the parties is another ethnic group.

Thematic area

South Sudan has legal structures for the resolution of inter-ethnic conflict through traditional leaders. In this regard, Councils of Traditional Authority Leaders (COTALs) exist at national and state level. The COTALs are the custodians of the customs and traditions of the people. Their roles include facilitating dialogue with all levels of government on matters of customary law; intervening and resolving inter-ethnic disputes by applying customary and traditional conflict resolution mechanisms; and fostering peace building and resolution of conflicts through mediation and other conciliatory mechanisms. One should not oversimplify the potential role of the COTALs. The present context of massive poverty, absence of social services and livelihood opportunities, militarization and proliferation of arms, competition for grazing and water resources, competition for land rights and lack of extension of State authority undermine durable peace. However, conflicts often tend to take ethnic dimensions, and the mapping in figure 2 above, illustrates general commonalities that underlie customary laws, which may form the initial basis for dialogue. These commonalities can form the foundation for communities to identify the wider social and economic inter-connectedness that underlie their common survival and development.

Importantly, the ascertainment study presents various methods of settling disputes such as the payment of compensation and providing manual labour. Thus, the embedding of a common appreciation of the commonalities of ethnicity in the mind sets of communities may serve to create a common platform on which dialogue on peace and reconciliation may proceed. These commonalities, as well as the dispute resolution mechanisms that are recorded by the ascertainment study, should form an integral part of nation-wide inter-communal dialogue.



CONCLUSION

The ascertainment of customary laws provides opportunities to strengthen traditional institutions (such as COTALs and customary courts), align customary practices with human rights values and enhance the harmonization of customary laws and State enacted laws. Valuable opportunities for harmonization stem from the fact that the study clarifies customary laws, and thus avoids bias in application, and creates a sense of ownership on the part of the people and their traditional leaders. Making customary law relevant in a modern State with constitutional values means that customary law should adapt to a changing and increasingly globalized world. For rule of law purposes, in particular, it is essential that customary law is consistent with prevailing norms of human rights. "If customary law is to be part of the solution, rather than part of the problem, some of its rough edges in application must be sanded smooth."¹⁸

The ascertainment study further provides opportunities to leverage social values that have sustained communities and indigenous mechanisms of reconciliation known to resolve conflicts at the grassroots level of engagement. The study underscores knowledge of these mechanisms and should support a credible transitional justice process that includes broad-based, consultative truth-seeking and reparation initiatives that ensures that victims' voices are heard, and that the root causes of recent violence are identified and addressed.

¹⁸ David Pimentel, "Rule of law ownership without cultural imperialism? Reinforcing customary justice through collateral review in Southern Sudan," *2 Hague Journal on the Rule of Law* (2012) 1, 18.



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