Customary Justice: From Program Design to Impact Evaluation

Erica Harper

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International Development Law Organization
Organisation Internationale de Droit du Développement

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International Development Law Organization (IDLO)
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Foreword by Deborah Isser, World Bank Justice for the Poor Program

The question of customary justice and its role in promoting the rule of law has emerged as the most promising — and thorny — development in the field of justice reform. The international community — that constellation of governments, donors, agencies, and policy-makers engaged with the rule of law, justice and development — has a patchy track record at best, in engaging with customary systems. Too often dominated by the analytical troika of simplification, essentialization and dichotomization, we risk misunderstanding the dynamics of access to justice and undermining the resilience of the poor and vulnerable. Nevertheless, it is widely accepted that this is an important, even essential, area for a range of endeavors in the fields of justice and rule of law, from promoting state-building and broadening state-society compacts, to providing the basis for the delivery of essential services and economic development.

This eminently practical manual on customary justice is a successful attempt to overcome our past mistakes. In it, Erica Harper places the emphasis on highly empirical, evidence-based analysis. The book shows how contextual research can be synthesized to bring out the inherent complexities of working in legally plural contexts. By avoiding a determinist viewpoint that an institution or system is in need of reform in a particular way, the manual gives us tools to understand justice problems at hand, sensitizes us to contextual complexities, and thus helps us to develop practical solutions to improve access to justice in a particular justice landscape.

The book provides a basis for positive change when engaging with customary systems. It avoids generalizations and eschews 'one size fits all' approaches. It also recognizes the possibilities of these systems as providers of justice by understanding them as a series of *political, social and economic institutions* embedded in local contexts that are called into question, reformulated and remade. By giving us the tools to understand their complexities, this manual is an invaluable addition to the knowledge base of any policy-maker or advocate for reform in the fields of justice and the rule of law.

Deborah H. Isser

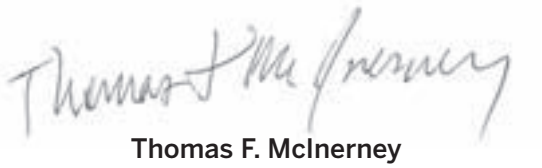
Message from the Director of Research, Policy & Strategic Initiatives

While engagement with customary justice systems is certainly not a new endeavor, the past decade has witnessed a seachange in the approaches of international organizations with respect to their level of involvement with the non-state legal sector. Without understating the challenges to be overcome, there is a growing case for development agencies to prioritize such engagement when implementing programs of justice sector reform.

In most respects, this more holistic approach to rule of law programming is to be welcomed; however, it also raises new questions. A principal concern is that the proliferation of customary justice programming is somewhat out of step with the knowledge base upon which such interventions are grafted, particularly with respect to the role that customary justice might play in post-conflict environments. Author, Erica Harper, draws attention to the fact that there have been few comprehensive or empirically driven efforts that evaluate the impact of past programming efforts. Moreover, without a clear consensus on the objectives of customary justice programming, development agencies have tended to re-apply programs and replicate so-called 'best practices' rather than craft interventions that respond to the specific exigencies of customary contexts.

This volume takes the first steps towards bridging these knowledge gaps and makes a substantial contribution to existing practical guidance on working with customary justice systems. It highlights the tremendous diversity in customary systems and the linkages between dominant norms and localized socio-economics, security conditions and cultural imperatives. Dr Harper argues convincingly that there are no single answers, nor quick fixes, when it comes to reforming customary practices. In this respect, the book presents a compelling case for more nuanced program design, and a transition to evidence-based programming grounded on an in-depth appreciation of local conditions and solid empirical research. Such approaches are perhaps not in line with the programming modalities, funding cycles and evaluation models of many agencies. However, it is presented that modifications in this regard will pay dividends in terms of programmatic impact, sustainability and heightened protections for the users of customary justice systems. We hope that this work complements other efforts to identify pragmatic lessons learned and effective approaches to engaging with non-state justice systems.

I wish to thank the IDLO staff who have dedicated their time and energy to this project over the past two years, particularly Erica Harper (Senior Rule of Law Advisor), Ilaria Bottigliero (Senior Researcher), Christopher Morris (Program Officer), Francesca Pispisa (Communications Officer), and Georgina Penman (Publications Consultant).



Thomas F. McInerney
International Development Law Organization

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Alternative Dispute Resolution	ADR
Badan Perencanaan dan Pembangunan Nasional	BAPPENAS
Badan Rehabilitasi dan Rekonstruksi	BRR
Community Centre for the Resolution of Conflict	CCRC
Convention on the Elimination of All Forms of Discrimination against Women 1979	CEDAW
Danish Refugee Council	DRC
Institut Agama Islam Negeri Ar-Raniry	IAIN Ar-Raniry
Internally Displaced Persons	IDPs
International Centre for Prison Studies	ICPS
International Council on Human Rights Policy	ICHRP
International Covenant on Civil and Political Rights 1966	ICCPR
International Criminal Tribunal for Rwanda	ICTR
International Development Law Organization	IDLO
International Labour Organization	ILO
Justice, Law and Order Sector	JLOS
New Zealand Law Commission	NZLC
Non-governmental Organizations	NGO
Non-State Justice and Security Systems	NSJS
Office of the High Commissioner for Human Rights	OHCHR
Organisation for Economic Co-operation and Development	OECD
Paralegal Advisory Service	PAS
Peace and Development Committees	PDCs
Penal Reform International	PRI
People and Community Empowerment Foundation Melanesia	PFM
Social Impact Assessment and Policy Analysis Coorporation (Pty) Ltd	SIAPAC
Short Messaging Service	SMS
Syiah Kuala University	UNSYIAH
United Kingdom Department for International Development	DFID
United Nations Children's Fund	UNICEF
United Nations Development Programme	UNDP
United Nations General Assembly	UNGA
United Nations University World Institute for Development Economics Research	UNU-WIDER
United Nations High Commissioner for Refugees	UNHCR
United Nations Security Council	UNSC
United Nations Transitional Administration in East Timor	UNTAET
United States Agency for International Development	USAID
United States Institute of Peace	USIP
Universal Declaration of Human Rights 1948	UDHR

Introduction

The international community has traditionally concentrated its legal development activities on the reform of formal justice sector institutions: the courts, legislature, police and correctional services. In addition, while legal assistance programs have expanded rapidly, support to customary dispute resolution processes has been largely neglected and resisted to some extent by United Nations agencies as well as under multilateral and bilateral development programs. There are several explanations for this. First, there is an argument that a strengthening of customary justice systems can encourage forum shopping, promote instability and ultimately impede access to justice. Second, certain development actors are mandated to work through state bodies, and engaging with customary actors raises difficult questions about state sovereignty and how best to promote the rule of law. Third, some find it unacceptable to engage with systems that tolerate discriminatory treatment or fail to uphold international justice standards.

As it has become clear that orthodox development approaches have been relatively unsuccessful in improving access to justice for poor and disadvantaged populations, attention has shifted to the role that customary justice systems might play in the programming of national governments, international organizations and non-governmental organizations (NGOs) operating in development, post-conflict or post-disaster contexts. Organizations such as the International Development Law Organization (IDLO) started to experiment by tweaking their access to justice programs to apply to customary fora. The finding that customary systems can serve as a critical component in efforts to advance access to justice and legal empowerment, support the development of state justice institutions and promote peace building was shared by many.

Such experimentation evolved into a rich policy debate where traditional ideas about the centrality of the formal justice system began to be questioned. A strong argument was put forward that in most developing countries, the state cannot provide justice services to its entire population and it might not be the most cost-effective provider of these services. It was also argued that part of the reason that customary systems exist is due to shortcomings in the formal system — sometimes these shortcomings are connected to issues of physical access or because of dysfunctionalities such as discrimination or corruption; they can also be because state justice fails to respond to the needs and social imperatives of disputants in the way that the customary system does. This discourse has influenced the access to justice and rule of law strategies of many organizations. A review of the current policy and programmatic landscape reveals a growing consensus that, despite some obvious challenges, excluding customary justice systems from reform strategies may not be the best approach for enhancing access to justice and protecting the rights of vulnerable groups. There is a growing appeal for strategies that aim to improve the quality of outcomes resolved at the community level by building on the positive aspects of customary systems, particularly their reach and popularity, and attempting to reform negative practices.

But while there is now greater consensus around the issue of whether or not to engage with the customary sector, programmatic guidance on how this should occur remains scant. Moreover, partnering with customary justice systems raises new and important concerns that have not been

fully resolved. Principally, how can a decentralization of legal services be supported while at the same time ensuring that this does not equate with a formalization of inequitable or rights-abrogating practices that occur at the customary level? A further concern relates to how programming objectives can best be achieved given the normative frameworks within which many international development organizations operate. United Nations agencies and others are obligated to uphold human rights in all aspects of their work. Some argue that such requirements inevitably skew programming towards technocratic 'fix it' approaches such as reforming customary laws to strengthen procedural or substantive protections, or modifying the state-customary interface with a view to regulating or harmonizing the two frameworks. At the same time, it is clear that where customary norms do not align with international human rights standards, there are often complex rationales in play, touching upon issues such as culture, socio-economics and security. In such contexts, approaches that concentrate on bringing customary systems into alignment with international norms might be, at best ineffective and at worst harmful.

Perhaps a larger concern is the yawning gap between the proliferation of customary justice programming and the evidence and knowledge base on which such programming is grafted. There have been few comprehensive or empirically driven efforts that reflect on or evaluate the impact of past programming efforts. Nor has there been sufficient critical analysis of the objectives of customary justice programming: is the aim to support or supplement state courts, to act as a venue for a decentralization of state legal services, or to form part of a broader spectrum approach to accessing justice? One result is that development practitioners have tended to re-apply programs designed for use at the state level rather than craft activities specifically for use in customary contexts, and replicate activities perceived to have been effective elsewhere without a proper understanding of what conditions facilitated such results.

In response, in 2009, IDLO commenced an ambitious work program examining the nature and effectiveness of customary justice programming. Over two years, IDLO undertook research on the various entry points for engaging with customary legal systems. It aimed to identify lessons learned from programming undertaken to date and develop responses to some of the more difficult questions left unanswered in the theoretical discourse. This knowledge was to be collated in a publication that might provide guidance to international and national actors on the potential role of customary justice systems in fostering the rule of law and access to justice in post-conflict, post-disaster and development contexts. A secondary aim was to provoke thought among practitioners about the objectives of customary law interventions, to encourage critical assessments of the criteria on which programming decisions are made, and to provide tools to assist in gauging the extent to which interventions are having a positive impact.

The information contained in this book was drawn from desk research; the outputs of other organizations engaged in researching and programming in the area of customary justice, principally the United States Institute for Peace (USIP), the World Bank Justice for the Poor Program, and the United Nations Development Programme (UNDP); IDLO's Legal Empowerment and Customary Law Research Grants — seven empirically grounded and evidence-based research programs designed to evaluate the impact of an empowerment-based initiative involving customary justice; and lessons learned from previous interventions undertaken by IDLO in countries such as Indonesia, southern Sudan and Afghanistan. The book forms part of a wider project on legal empowerment and customary justice, and is situated within a portfolio of legal empowerment research focusing on gender, community land titling, traditional knowledge and microfinance.

The volume starts with an introduction to customary justice systems and then discusses common features, constraints, opportunities and the relationship between the customary and state systems. The main body of the book is divided into three sections, each of which focuses on a different programming approach. The first explores ways that development activities can support the reform of customary systems from the inside with the aim of heightening procedural and substantive protections. The second looks at the creation of new institutions that offer alternative forms of

dispute resolution. Such institutions operate in parallel to customary justice systems, complementing or supplementing them, with a view to promoting access to equitable outcomes and improving the operation of the customary system through heightened competition. The third section considers the interface between the customary and formal legal systems, and how states can modify, regulate or utilize this interface to influence the manner in which justice is dispensed at the customary level. The book then examines specific strategies for enhancing the access to justice and legal empowerment of vulnerable marginalized groups, and how questions relating to human rights might be approached when developing customary justice programs. A short annex found at the end of the book describes the specific role that customary systems might play in post-conflict situations, both in re-establishing the rule of law and approaching issues relating to transitional justice.

A few caveats should be highlighted. The interventions described in the volume are by no means the only programming options for engaging with customary legal systems, and the grouping of these interventions into three clusters is not meant to suggest that any particular intervention or mix of interventions is likely to be more successful than another. Moreover, in some situations, the most effective approach may be to not engage with the customary sector. The purpose of the book, therefore, is not to offer prescriptive advice on how interventions should be structured, but rather, to provide the reader with insight into the variety of responses that have been trialed in other contexts, to draw attention to possible pitfalls and advantages, and to highlight certain enabling conditions. But what works in a given country context is situation-specific and contingent upon a variety of factors, including *inter alia*, social norms, the presence and strength of a rule of law culture, socio-economic realities, and national and geopolitics. In order to make strategic decisions on what is likely to yield sustainable and positive impact, development practitioners need to possess in-depth knowledge of the target country, its people and its customary legal systems, as well as the theories and practicalities pertaining to legal development and customary justice programming. This book is a tool in such a process in that it explores a range of interventions that might be adjusted to suit a given context. Such approaches are labor-intensive, make little use of economies of scale, and are therefore unlikely to sit comfortably with donor expectations and the programming approaches of many agencies. Limited budgets and pressure to implement quickly leaves little time for landscape research and encourages programmatic replication of best practices. It may be that a middle ground needs to be found between programming strategies that are most desirable and what is realistically achievable. Critical analyses of the various entry points for engaging with customary justice systems need to be included in the reformers' toolbox of knowledge resources as they design, pilot, adjust and implement more effective interventions; it is hoped that the information contained in this book can contribute positively to such a toolbox.

CHAPTER 1 | A Basic Introduction to Customary Justice Systems

1. Definitions and classifications

Informal or non-state justice systems are umbrella terms often used to describe mechanisms of justice and conflict resolution that operate outside the bounds of a formal, state-based legal system. These may include, but are not limited to, indigenous, customary and religious legal orders, alternative dispute resolution mechanisms and popular justice forums.

This book is concerned primarily with customary justice systems, sometimes also referred to as 'traditional justice systems'. While the diversity of such systems makes generalization difficult, for the purposes of this book, 'customary justice' refers to a system of customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory.[1] Customary systems tend to draw their authority from cultural, customary or religious beliefs and ideas, rather than the political or legal authority of the state. As such, provided that it has not been incorporated into state law, customary law is only law to the extent that the people who follow it, voluntarily or otherwise, consider it to have the status of law.[2]

Customary justice systems are as much social or political orders as they are legal orders; customary law generally comprises descriptions of what a community does as well as prescriptions as to what its members should do. These norms and rules are actively produced, enforced and recreated through processes of participation and contestation. Customary law can therefore be dynamic, adaptable and flexible, and any written version of it is likely to become quickly outdated. Factors as diverse as ecology, socio-economics, proximity to the state system, and religious beliefs all contribute to the development of customary law. These factors explain why the precepts of customary justice systems can differ greatly over small distances, and why there may be several versions of customary law co-existing in one place, in competition with each other as well as the state system.

Placing customary law under the banner of 'informal' or 'non-state' justice makes certain caveats necessary. First, distinguishing customary systems from the state's judicial apparatus does not mean that the relationship is necessarily one of exclusion. In many countries, customary systems are incorporated into and regulated by state law, regulations or jurisprudence. In Uganda, custom is a recognized source of law,[3] while in Malawi, the customary system has been integrated into the hierarchy of the formal justice system.[4]

Second, to classify customary law as 'informal' should not imply that it is simplistic or lacking in authority. In Afghanistan, for example, the *Pashtunwali* customary system comprises highly developed rules and procedures, and outcomes reached are broadly considered more legitimate and carry greater authority than those handed down by the state courts.[5]

Third, while the terms customary law and traditional law may create the impression that such law is outdated or antiquated, this is not necessarily the case. While generally time-honored and long-

established, customary justice systems can be modern institutions and receptive to contemporary influences.[6] In Somalia, for example, there is evidence that customary law is responding to forces of globalization, particularly in the urban economic sector where it has reinvented itself to accommodate modern crimes, business practices and trading patterns.[7]

Box 1
Distinguishing between different legal frameworks

Customary justice refers to a system of customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory.

The formal justice system refers to controls organized by the state and enforced by specific institutions that follow procedures determined by law. These include courts, the police, prosecution offices and correctional facilities.

Indigenous law can form the basis of a customary justice system. It refers to a set of norms, principles, values, authorities, procedures and methods used by indigenous peoples to control criminal events, regulate social life, organize public order and resolve their problems and conflicts.[8]

2. Characteristics of customary justice systems

It is impossible to comprehensively define the nature of customary legal systems. First, the governing principles and rules are not static but are constantly evolving in response to cultural interactions, socio-economic and demographic shifts, political processes and environmental change. Second, customary systems are unique to the communities in which they operate. In southern Sudan alone, there are at least 50 tribes each with their own customary law,[9] while in Indonesia, there may be as many as 300 distinct legal orders.[10] However, while customary law can vary between and within countries, provinces and communities, a number of common characteristics can be identified.

2.1 A focus on the restoration of social harmony

Customary justice systems generally exist in small, rural communities dominated by multiplex relationships — that is, "relationships which are based on past and future economic and social dependence, and which intersect ties of kinship".[11] Conflict threatens these relationships and therefore has the potential to disrupt social harmony. In this way, disputes are viewed not so much as matters between individuals, but as issues concerning entire communities.[12] Customary justice systems aim to restore intra-community harmony by repairing relationships between disputing parties and creating a framework for reintegration.[13] In Guatemala, for example, the universe, nature and the human community are all part of the integrated order: "Law is an expression of this order. Its primary purpose is therefore to maintain communal harmony and equilibrium and not to guarantee the enjoyment of individual rights and entitlements."[14]

A closely related feature is that, unlike in Western liberal democracies where the role of an independent judiciary is confined to the administration of justice, customary justice systems are often an integrated component of a broader governance mechanism.[15] A corollary of this is that, in contrast to a separation of powers doctrine, the political, executive, administrative and judicial functions of customary leaders are usually inseparable and intertwined. For this reason, some argue that "to view customary practices as 'law' is essentially a Western-centric

Unlike Western legal cultures, where the aim of dispute resolution is generally compensation or retribution, the primary goal of customary dispute resolution mechanisms is often to achieve reconciliation between parties divided by conflict.

approach", which does not facilitate a sound understanding of customary justice.[16] A more constructive approach, put forward by Faundez, may be to view these systems instead as governance mechanisms that dabble in dispute resolution, unconstrained by the procedural rules and guidelines characteristic of liberal legal systems.[17]

2.2 A hierarchy of problem-solving fora

Customary justice systems generally comprise a hierarchy of problem-solving fora. Small disputes may be adjudicated by the extended family, while more complicated disputes are likely to be referred to a village-level forum. At lower levels, respected elders within the family may be responsible for resolving disputes, whereas at higher levels, adjudicators might include traditional leaders, religious leaders, persons with specific expertise in customary law, and other persons with skills in conflict resolution. Such actors may be appointed on the basis of heredity or social status, or election, depending on the community and its traditions. Leaders are generally male, and enjoy high social standing and moral authority within their communities, characteristics that are needed to ensure that disputants participate in the dispute resolution process and abide by the outcome reached.

Commonly, disputes that cannot be resolved at one level will be referred up the hierarchy until a decision can be reached. If customary dispute resolution options are exhausted, there may in some cases be a direct line of appeal linking customary and formal courts. In other situations, only those disputes that cannot be resolved customarily or offenses considered most serious by a community will be referred to the state.[18]

Box 2
Appointing customary law leaders, Burundi

In Burundi, the selection and training of customary law leaders (*bashingantahe*) is a long and complicated process. First, *bashingantahe* must be seen as possessing certain qualities that community members discern over a period of time. These include: "maturity, experience and wisdom, a sense of justice and equity, concern for a common good, a sense of responsibility ... truthfulness, discretion, intelligence, a sense of dignity and honor and courage".[19] There are, then, several stages to becoming a *bashingantahe*. After a youth is identified as a potential leader, he is observed by his community over a number of years, and his character is tested. He undergoes "a gradual integration into the judicial functions with the help of a sponsor".[20] First, he would be an observer and take in the teachings of the *bashingantahe*; he then becomes an auxiliary in the resolution of conflicts before finally being allowed to attend deliberations. Following this initiation, the candidate is presented by his sponsor to the community. He takes an oath of commitment and fidelity, and must demonstrate material self-sufficiency. Once appointed, *bashingantahe* are held to strict standards of accountability. It is not uncommon for a leader to be relieved of his position for corruption, the violation of secrets or other forms of social misconduct.[21]

2.3 Dynamic and flexible operating modality

Customary justice systems generally apply flexible rules and procedures; norms are constantly being 'reinvented' in response to changing social circumstances, economic realities and intra-community politics. This dynamic structure allows leaders to craft pragmatic solutions that suit local conditions and respond to the issues at the crux of a dispute. On the other hand, such flexibility means that customary systems can lack coherency and predictability; where rules are applied differently to different groups in the same situation, resolutions reached may be viewed as arbitrary or discriminatory. The norms and rules of

> Because one of the principle objectives of customary justice systems is governance rather than dispute resolution, they "do not administer justice through a specialized system of rules, but as part of a process where politics, law and other factors blend in ways that would be unthinkable in a state court".[23]

customary systems are often unwritten, passed down orally through the generations. Likewise, proceedings are usually oral, and there is rarely systematic or accurate record-keeping relating to the outcomes of cases.[22]

2.4 Broad jurisdiction

Customary justice systems often do not distinguish between criminal and civil offenses in the same way as Western jurisprudence. Since wrongdoing is generally perceived principally in terms of its disruption to social cohesion rather than categorized as civil or criminal in nature, customary leaders often deal with both types of cases in the same manner.[24] Nevertheless, the bulk of cases adjudicated customarily involve personal matters such as marriage, divorce, adultery, child custody and succession, and matters deemed 'private' in nature or of small gravity according to customary norms, such as sexual assault or domestic violence. This can be explained at least to some extent by the number of jurisdictions that recognize the application of customary law to issues of personal status. But there can also be a connection between perceptions of customary jurisdiction and issues that have the potential to disrupt community stability, such as family disputes, theft, assault, rape and murder. In contrast, disputes concerning interactions with the central government, persons outside the community, and matters that cannot be dealt with customarily will often be referred to the state courts.

2.5 Participatory dispute resolution

In some customary justice systems, participation in dispute resolution is restricted based on gender, social status and/or ethnicity.[25] In other contexts, dispute resolution is public and participatory, with the disputants, witnesses and other persons seemingly removed from the conflict actively involved in providing evidence and offering their opinions as to possible outcomes. While this may appear laborious and inefficient to observers, this discourse (which may last for weeks or months) often forms an integral part of the dispute resolution process. It may satisfy the community's need to discuss the action, to show why it was unacceptable, and for the offending party to accept responsibility for his or her wrongdoing. Involving the community can also be important because conflict is understood as affecting the wider group; moreover, because compliance relies principally on social pressure, it is important that the outcome reached meets both the community's and the disputants' sense of justice.[26]

2.6 Consensus-based decision-making

As discussed above, the overall goal of customary dispute resolution is often to restore social harmony; integral to this is a solution that is acceptable both to the parties and to the wider community.[27] Outcomes are hence usually compromises based on consensus, made through a process of 'light arbitration' as opposed to voting or centralized decision-making. Even where customary systems have rules and structured procedures, therefore, outcomes usually relate more to local perceptions of fairness, equity and subjective notions of a sound outcome given the specific circumstances.[28] Customary law thus usually provides a framework for deliberations as opposed to being determinative of an outcome.[29]

A holistic approach is taken to dispute resolution, which focuses on resolving the causal issue and preventing recurrence. The centrality of the underlying problem means that the offending act may be regarded as inconsequential or even forgotten. Further, in finding a solution, a wide range of factors may be taken into consideration, such as interpersonal relations, previous transgressions, and the power, status and wealth of the disputants.[31]

The combination of these factors means that Western jurisprudential precepts, such as treating like cases alike or having pre-determined sanctions for wrongdoing, rarely feature in customary justice processes.[32] Disputes are resolved on a case-by-case basis and to the

> "[I]n most circumstances, non-state justice is actually a de-legalized environment. This can facilitate flexible mediated solutions, but in the absence of a mandated structure or agreed norms, much discretion lies in the hands of non-state justice actors."[30]

satisfaction, at least ostensibly, of all parties concerned, even if this entails a solution that is materially different to another factually identical case. Further, because the customary system is structured more around compromise and consensus than the strict application of rules, disputants are rarely represented by lawyers or advocates.[33]

2.7 Restorative solutions

Customary justice systems generally use restorative penalties as opposed to retributive punishments.[34] Such solutions can take the form of restitution (for example, the return of stolen goods, apologies or community service) or compensation (for example, fines or monetized damages). Retributive punishments do, however, occur and might include social sanctions (for example, banishment) or physical sanctions (for example, flogging or detention). The preference for restorative solutions often has a social or economic rationale. In developing country contexts, where insurance, unemployment benefits and/or state services may be unavailable, compensation provides a social and financial safety net for a victim or a victim's family. Compensation, for example, may replace the income-earning potential of a deceased or injured family member or, in cases of rape, provide for the fact that the victim may be unable to marry and may have to provide for her own upkeep (and that of any children resulting from the rape) for the rest of her life.[35]

2.8 Compliance and enforcement of decisions

Compliance with solutions resolved at the customary level usually relies on social pressure as opposed to formal coercion.[36] Most often, such pressure is linked to normative commitment to customary rules, the authority of the customary leader, and/or the shame associated with rejecting a fair decision or jeopardizing group harmony.[37] It should be noted that such reliance means that powerful community members, either economically or politically, who may not be responsive to such pressures, may ignore customary decisions with impunity.

Pressure may also manifest in anticipated social sanctions. For example, if a party to a dispute will not accept an agreement that is broadly considered to be fair, he or she may not be assisted by the customary leader in the event of a future dispute,[38] or community members may refuse to participate with him or her in economic and social transactions.[39] In some communities, particularly those that follow animist traditions such as in some parts of Timor-Leste and Indonesia, compliance may be encouraged by beliefs that disregarding a solution will result in disapproval by the community's ancestors, and hence bad luck for the entire community.[40] Finally, in plural situations, the threat of referring the matter to the formal justice system may encourage compliance.[41]

In other contexts, there will be specific penalties for non-enforcement. In Somalia, an individual who rejects a judgment might receive any of the following sanctions: the forced seizure of livestock; a doubling of the original punishment; denial of access to the clan's safety net and benefits; or being tied to a tree full of ants. Alternatively, the transgressor may be "stigmatized and given the nickname *Gardiid* — the one who rejected judgment".[42]

2.9 Reconciliation

Customary dispute resolution often incorporates rituals of reconciliation or reintegration.[43] The importance attached to reconciliation can be linked to the manner in which wrongs are conceptualized. In many traditional societies, wrongs are not only seen in terms of the actual injury or loss sustained, but also in terms of the offender's lack of respect for the social norms that ensure group harmony. Simply compensating a victim for his or her loss, or 'righting the wrong' may therefore be insufficient to resolve a conflict; the societal balance must also be restored.[44] Although reconciliation practices vary between societies, a typical arrangement is where the complainant, the respondent, their families, those responsible for adjudicating the dispute, others privy to the dispute and sometimes even the wider community come together and share food as a symbol of the restored relationship.[45] In many situations, perpetrators will host the reconciliation ceremony or provide an animal for consumption, a role that elevates them from dishonorable to honorable status. This ceremony represents a public apology by the perpetrator to both the victim and the community

as a whole for having disrupted community unity. Reconciliation ceremonies can also play important educative roles. By observing and being involved in the dispute resolution procedure, young people come to understand conflict resolution and acceptable and unacceptable behavior. Moreover, everyone in the community receives a message that certain types of behavior will not be tolerated, creating a deterrent to future offenders.

Box 3
Connecting with the ancestors through reconciliation ceremonies, Timor-Leste
In Timor-Leste, the reconciliation ceremony has immense religious significance. "It [is] believed that the ceremony [breaks] down the barriers separating the present life and the afterlife, providing the living with a unique opportunity to connect with their ancestors. The ceremony [is] thus a collective act of contrition, symbolizing the community's regret for displeasing the ancestors, a request for forgiveness and a rekindling of clan-ancestral unity."[46] It is also believed that the ancestors' spiritual presence endows the dispute resolution process and the outcome with legitimacy, providing certainty that the agreement will be abided by and that the dispute will not resurface.

3. Constraints of customary justice systems

Critics of customary justice systems posit that, broadly speaking, justice is rarely dispensed to a very high standard.[47] They argue that such processes lack safeguards, leaving society vulnerable to solutions that may be unjust, discriminatory and exclusionary, as well as punishments that are violent or barbaric.[48] While the core areas of criticism overlap to some extent, they converge around the rights and treatment of vulnerable groups, as discussed below.

3.1 Lack of predictability and coherency in decision-making

As noted above, customary justice systems generally employ flexible rules and procedures, with outcomes based on consensus rather than the strict application of rules. While this facilitates the crafting of pragmatic solutions, critics argue that such flexibility encourages outcomes that can be arbitrary and lack predictability and coherency.[49] Moreover, these factors, combined with the absence of procedural safeguards and the primacy of community harmony in decision-making, can lead to decisions that reinforce power hierarchies and discriminate against marginalized populations at the expense of justice and human rights.[50]

A critical point is that, although decisions are said to be consensual, disputants are often under significant pressure to agree to what is broadly understood to be fair and equitable. What is considered fair and equitable can be influenced by power, status and wealth differentials between disputants, discriminatory social norms, and perceptions of group cohesion. In particular, the notion of 'harmony' may be "abused and manipulated to suppress legitimate complaints of the weak", leaving them "prone to being 'consensused' into accepting decisions that they find unsatisfactory."[51] A good illustration of this is where crimes of rape are resolved by having the perpetrator marry the victim. As Wojkowska explains, while this may ostensibly be to protect the victim's honor and ensure the payment of a dowry, the solution may also be desirable to the community at large for at least two reasons. First, marriage will

> "[W]hile there are many 'paths to justice', informal dispute resolution is on the whole not a comprehensive and coherent system, but a set of processes run by a range of influential individuals. ... Whether norms are written, oral or based purely on common sense, in reality it is social norms and power which usually determine the outcome of dispute resolution at the local level. ... Neutrality is hard to find in the village and, as a result, the paths to justice are not equal for all. The powerful travel a smooth road; the weak face a bumpy ride." [53]

provide the victim with a measure of social and economic security (a burden that may otherwise have fallen to the community) and second, it creates bonds between families and communities, thereby reducing the risk of subsequent violence.[52]

3.2 Discrimination and exclusion of marginalized groups

A closely related criticism of customary justice systems is that they often discriminate against vulnerable groups such as women, minorities, children and the poor. In some contexts, participation in dispute resolution is restricted based on gender, social status and/or ethnicity.[54] In Somalia, for example, women can only be represented by male relatives.[55] In northern Kenya, some tribes allow women to present evidence, but only "while seated on the ground and while holding a grass reed above their heads"; men by contrast, present evidence "while standing and holding a long rod understood to be a symbol of respect".[56]

In many customary justice systems, women are routinely discriminated against with respect to their roles as guardians, their inheritance rights, and their right to freedom from sexual and domestic violence.[57] Further, sanctions may be exploitative and/or abrogate women's basic human rights; such sanctions include the practices of wife inheritance (where a widow is forced to marry a male relative of her deceased husband), ritual cleansing (where a widow is forced to have sexual intercourse with a male in-law or stranger),[58] forced marriage,[59] and the exchange of women or young girls as a resolution for a crime or as compensation.[60]

Box 4
Customary law and its compatibility with human rights and gender standards, Somalia

In Somalia, a number of *xeer* (customary) practices contravene women's basic human rights and standards of gender equality. Such practices include *dumaal* (where a widow is forced to marry a male relative of her deceased husband), *higsiian* (where a widower is given the right to marry his deceased wife's sister) and *godobtir* (the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement). Crimes of rape are commonly resolved through the marriage of the victim and the perpetrator. Although the *xeer* of many groups protects the right of a victim to refuse a marriage in cases of rape, victims face enormous societal pressure to acquiesce; marriage is widely believed to be the best option in such situations to 'preserve' the victim from a life of shame and as a means of stemming future retaliatory violence.[61]

3.3 Weak procedural safeguards, accountability and enforcement capacity

Customary justice systems, particularly when not recognized by the state, operate with little regulation and sometimes outside of any legal framework. They can lack procedural safeguards that protect the rights of disputants, such as the presumption of innocence or the rights to a defense and due process. Further, the methodology for ascertaining facts or assessing evidence may be arbitrary or violate human rights, such as the use of torture to obtain a confession.[62] In particular, where customary systems recognize practices such as witchcraft or black magic as crimes, unsound evidentiary practices not based on modern scientific rationalism often lead to equally unsound resolutions.[63] Customary proceedings also have few safeguards to protect the privacy of disputants and witnesses, particularly vulnerable groups such as women and children. In cases such as rape, this can have important social and economic consequences for victims.

Box 5
Unsound evidentiary practices, Indonesia and Timor-Leste
In Maluku, Indonesia, researchers from UNDP recounted a case where a dispute concerning the ownership of a fruit tree was resolved through a contest whereby the petitioners competed to determine who was able to hold their breath underwater for the longest period.[64] In Timor-Leste, where a woman becomes pregnant outside of marriage (including in cases of rape) and the alleged father denies responsibility, a common practice for determining paternity is to wait until the baby is born and then assess its physical features. "If the baby does not resemble the father in any way, then he will be absolved from any responsibility."[65]

In the context of a weak regulatory environment, customary justice systems vest significant responsibility in leaders who are rarely accountable either to their communities or a higher authority. Ineffective safeguards render such leaders more prone to corruption, politicization and nepotism. This is heightened in situations where decision-makers receive little or no remuneration and where customary dispute resolution has been proscribed and driven underground.

Finally, as noted previously, the enforcement of solutions resolved at the customary level usually relies on social pressure as opposed to formal coercion.[66] Weak enforcement capacity has been correlated to poor compliance, particularly when there are power differentials between the parties.[67] This diminishes the certainty of outcomes, encourages forum shopping, and weakens the integrity and authority of the customary system as well as its role in deterrence and safeguarding society.

3.4 Abrogation of human rights and criminal justice standards

Possibly the most salient criticism leveled at customary legal processes is that they fail to uphold international human rights and criminal justice standards. The sanctions imposed can include corporal punishment,[68] humiliation, banishment,[69] retaliatory murder,[70] the betrothal of children and forced marriage.[71] Such punishments violate, *inter alia*, the rights to life;[72] protection against cruel, inhumane or degrading treatment;[73] and protection from discriminatory treatment,[74] as enshrined in international law.

Customary norms can also promote violence and tolerate impunity for serious crimes. In Afghanistan, the right and expectation of revenge (*badal*) in response to wrongs perpetrated against an individual or group lie at the heart of the *Pashtunwali* legal tradition. This is manifested in tolerance of honor and revenge killings, both of which are considered legitimate and are not subject to sanction. In fact, not seeking revenge or referring such acts to the state system is a sign of moral weakness or cowardice.[75] Likewise, in Somalia, families of homicide victims may be permitted to choose between compensation and the execution of the perpetrator.[76]

Customary systems that are based on a doctrine of collective responsibility, such as those in parts of Somalia and Kenya,[77] do not make provision for the punishment of individual perpetrators of wrongdoing. This allows serious offenders to escape accountability and promotes a culture of impunity.

Finally, the compensatory nature of many customary systems can deny the rights to a remedy and equality before the law where outcomes are determined, not based on the nature of the crime, but on the gender and social status of the victim.[78] In Somalia, for example, for identical crimes, the level of compensation payable is highest where the victim is a married woman, followed by single woman, and then a widow. Similarly, the compensation payable when the victim is a man will always be higher than that for a woman.[79] In systems where customary systems are simultaneously collective and compensatory, the victims of crime may receive little or no compensation, for example, in cases such as honor killings and intra-family crimes, because the compensation-paying group and the

compensation-receiving group are one and the same.[80] Where compensation is payable in, for example, girls or young women, a range of fundamental rights are violated.[81]

3.5 Comparing the state and customary justice systems: clearing up ambiguities and misconceptions

As the above discussion sets out, critics of customary justice systems present many salient arguments. Inherent flexibility, a focus on consensus-based decision-making and the application of norms that may not reflect international standards mean that rules may be applied inconsistently and that outcomes may be unpredictable, arbitrary and/or discriminatory. Such characteristics place customary justice in sharp opposition to most state (and particularly Western) jurisprudence, which is structured around the even application of pre-determined rules and a separation of rule-setting, executive and judicial powers.

It is important to highlight, however, that customary systems vary enormously, and generalizations can sometimes be misleading. For example, in Liberia, some research has reported a general perception that customary justice is 'not for sale', that parties enjoy equality, and that cases are decided on their merits.[82] Similarly, in Afghanistan, despite clear problems of gender discrimination and with respect to collective responsibility, customary judges are perceived as neutral arbiters, and participants enjoy nominal equality. *Pashtun jirgas* usually require participants to sit in a circle — a symbolic gesture signifying that no single person should dominate proceedings, and that all enjoy the right to be heard.[83] Customary fora may even be more effective than state justice mechanisms in certain respects. In Liberia, a key criticism of the courts is that they fail to enforce judgments; customary enforcement, on the other hand, relies on moral authority and is widely regarded as more effective.[84] Likewise in Indonesia, many users of customary justice perceive this system to be less arbitrary, more predictable and less corrupt than the formal system.[85]

It is also important to understand that customary justice systems have culturally and context-specific aims and precepts; practices that may appear unjust from a Western perspective may be viewed as neutral or even imperative by users of customary justice. For example, as discussed above, the flexibility and negotiability inherent in many customary systems and its vesting of rule-setting and dispute resolution responsibilities in the same actors are widely cited as inhibiting access to justice. Proponents of customary justice systems would argue, however, that these factors are a necessary facet of processes that are designed to restore social harmony and that cannot be isolated from their social context. Impartiality may in fact be regarded as integral to the functioning of a customary system; it is the customary arbiter's intimate knowledge of the parties, the background to the dispute and local power-sharing arrangements that facilitates the crafting of a decision that will meet popular notions of equity and ensure compliance.[86]

Further, features of customary justice that are said to violate human rights and criminal justice standards may be grounded in context-specific rationales. Two practices illustrate this argument — customary solutions that violate the rights of women and collective responsibility. In relation to the rights of women, in many developing country contexts, rape and widowhood have specific social and economic implications for the women involved. Entrenched discriminatory attitudes may dictate that rape victims are unable to marry, forcing them to rely on their families or the wider community for social, livelihoods and financial protection. Such women, and any children involved, are more vulnerable to poverty and homelessness, and often suffer lifelong discrimination. In this context, a common solution to crimes of rape is for the victim to marry the perpetrator. Although this clearly abrogates the victim's right to a remedy and freedom to choose a marriage partner (and arguably to protection from treatment that is cruel, inhumane or degrading), marriage may provide her with a degree of social and economic security that she would not otherwise enjoy.[87] Similarly, in legal cultures where women are not entitled to inherit property, 'wife inheritance' may be viewed as a mechanism for providing widows with access to land and financial and social protection.[88] In situations of generalized discrimination, poverty and limited (or non-existent) social security, the importance of these basic safeguards cannot be understated.

Similar issues arise in the case of collective responsibility for wrongdoing, a practice that is often grounded in economic and security rationales. For example, political fragility and weak governance in Somalia means that the clan unit is the fundamental provider of security and protection. Since a clan's perceived strength and wealth are dependent on its size, the number of men in the clan must be protected. As Gundel explains, individuals may have too few resources to make a full compensation payment themselves, which can then set in place a cycle of revenge killing with the result that the clan loses an economically and militarily important member. It is thus deemed more beneficial for the group to collectively assume responsibility for compensation payments and protect its membership.[89]

Finally, it is important to view the criticisms of customary justice in context. While customary norms and practices may violate established human rights and criminal justice standards, they may not be so different from the norms and practices enforced by the state. In Somalia, reduced penalties when a homicide is an honor killing, and in southern Sudan, the customary right for the family of a victim to elect between execution of the perpetrator or the payment of blood money are not only customary norms, but also provided for in legislation.[90] Moreover, while customary processes may, for example, be gender discriminatory, this may reflect broadly embedded social attitudes as opposed to something unique to customary justice.

In sum, the evaluation of whether or not customary justice is broadly disadvantageous is not a black and white issue, but is context-specific and relative, and requires a nuanced and case-by-case analysis. Criticisms need to be understood as rooted to some extent in individual perceptions of justice, and inseparable from the broader social and economic context. Such disadvantages also need to be weighed against the advantages and benefits associated with customary justice systems discussed in the following section.

4. Reasons that customary justice systems might be preferred

One of the strongest arguments presented in support of customary justice systems as dispute resolution mechanisms is simply that they are the preferred means of resolving disputes for the majority of users. While there is a growing body of quantitative analysis in support of this contention, albeit country-specific, asserted preference is not a clear-cut indicator in itself, but one that is colored by factors such as limited alternatives and a restricted perspective outside of a respondent's social context. Perhaps most significantly, preference for customary justice can sometimes be more closely related to dissatisfaction with formal state-based justice than to actual satisfaction with customary norms. These factors are interconnected and mutually reinforcing, as shown below.

Box 6
Patterns of use and preference for customary justice systems

In a 2007 survey of 1,441 households in 63 sites in Somaliland and Puntland, respondents were asked to rate various justice 'options' on a scale where 1 corresponded to 'not very successful' and 5 corresponded to 'very successful'. On average, respondents rated the customary system at 4.156, the Islamic legal system at 4.186, and the state legal system at 3.086.[91]

A 1,114-person survey conducted by the Asia Foundation in Timor-Leste in 2004 found that 94 percent of respondents were confident in the customary system, and 63 percent were very confident; 77 percent stated that the customary system reflected their values; and 80 percent recognized their community leaders, as opposed to the police, as being responsible for maintaining law and order.[92]

Between 2008 and 2009, the Centre for the Study of African Economies (Oxford University) and the Carter Center conducted a baseline survey of approximately 2,300 households in 175 communities

in Liberia. Of 3,181 civil cases, 3 percent were referred to a formal court, while 38 percent were referred to a customary forum (59 percent were not referred to any forum). Of 1,877 criminal cases, 2 percent were referred to a formal court, while 45 percent were referred to a customary forum (53 percent were not referred to any forum).[93]

A 4,524-respondent survey conducted by UNDP in 2005 across five provinces in Indonesia found that while respondents overwhelmingly stated a preference for the customary justice system, actual patterns of use between the customary system and state courts did not vary considerably. Ten percent of respondents claimed to have used the formal system, while 12 percent claimed to have used the customary system. However, 28 percent were satisfied with the performance of the formal justice system (37 percent being dissatisfied), whereas 53 percent were satisfied with the performance of the customary system (17 percent were dissatisfied). Likewise, only 28 percent of respondents felt that the formal system treated all persons fairly, and 50 percent felt that it favored the rich and powerful, whereas with respect to the customary system, 69 percent of respondents felt that all persons were treated equally, and 15 percent felt that this system favored the rich and powerful.[94]

4.1 Financial accessibility

Resolving disputes at the customary level is generally affordable in terms of transaction costs; customary norms rarely impose dispute resolution fees, and the system is structured in such a way as to limit the costs that disputants would otherwise need to absorb. For example, customary fora are usually within walking distance of users' homes, and flexible operating procedures mean that dispute resolution can occur at times that do not interrupt income-earning activities. The financial accessibility of customary justice can in part be linked to its raison d'être; because customary resolution aims to restore social harmony, it would be somewhat self-defeating if it were to impose significant barriers to accessing the processes that re-establish intra-community social and economic ties. The cost-effectiveness of the customary system is often contrasted to the cost of accessing the state justice system. In weighing up the added value of referring a dispute to the courts, parties have to consider both direct costs, such as case filing fees and the costs of representation, and indirect costs, such as those associated with bribery, travel and the opportunity cost of being absent from employment.[95]

4.2 Geographic and linguistic accessibility

Customary justice systems are usually considered more accessible because they are situated in or close to the communities in which disputants live, and because adjudication takes place in local languages. Courts, by contrast, are usually located in district and state capitals, may operate only in national languages, and can impose administrative requirements that exclude those with little education or who are illiterate.

4.3 Familiarity

Customary adjudication processes are usually led by persons familiar to the disputants and who enjoy moral and social authority. These adjudicators generally know not only the disputants, but also the history to the dispute and other matters that may be regarded as important to its resolution, such as a transgressor's capacity to pay damages. In contrast, judges at state courts may be vested with ostensible authority but tend to be regarded as detached and foreign to disputants. Further, lack of familiarity with court proceedings, complex administrative requirements and the formal atmosphere of the courts can intimidate users and present disincentives to accessing the courts.

In India, Kenya and the Solomon Islands, state courts conduct proceedings in English, even though most of the population speak only local dialects. A similar situation exists in the Indonesian province of Aceh (where courts operate in Indonesian), in Timor-Leste and Mozambique (where courts operate in Portuguese) and in Niger (where the courts operate in French).[96]

In line with the above, preference for customary justice can be more of a reflection of a user's inability to see beyond their specific social and economic context — the absence of a valid reference point. As Boege explains, in situations where customary systems operate, people define themselves as "members of particular sub- or transnational social entities (kin group, tribe, village)" before citizens or nationals of the state. " 'The state' is perceived as an alien external force, far away not only physically, ... but also psychologically."[97]

4.4 Expedience

Customary justice processes are usually considered faster than those of formal courts. While this can be due to inefficient bureaucratic processes at the state level, as noted above, customary justice can be similarly time-consuming. This anomaly in user perception may be explained by the fact that the time taken to resolve a matter through the court may have more harmful implications than an equally long process at the customary level. Disputants may need to travel several times to the place where the court is sitting, each appearance generating travel, time and opportunity costs. Customary and court-room justice may consume similar amounts of time, therefore, but in a customary setting, the cost implications of this are less severe.

4.5 Cultural imperatives

In certain contexts, cultural imperatives influence users' preference for customary resolution. In some provinces of Indonesia, for example, the formal justice system is regarded as a place reserved for those who have committed wrongdoing.[98] Alternatively, referring a matter to the state system may be considered disrespectful to the notion of social cohesion and community harmony, or an affront to the decision-making abilities of the customary leader. In such situations, disputants may need to weigh the net benefit of referring a matter to court against the possibility of social sanctions or that the leader may not assist them when faced with a future problem, or even discriminate against them in subsequent decisions.[99]

4.6 Avoiding the state system

As alluded to above, preference for the customary system can say more about a user's dissatisfaction with the state alternative than their satisfaction with customary norms. First, the state system may be avoided because of real or perceived threats of mistreatment by justice sector actors, including intimidation, physical abuse or bribery. In particular, in pluralistic situations or where corruption is rife, the courts may be regarded as a mechanism through which the powerful exploit or perpetrate injustice against the weak, the poor or their enemies.

Second, there may be paradigmatic differences between the formal and customary justice systems in terms of core legal values, such as what constitutes misconduct, how crime is conceptualized and notions of responsibility. In Kenya, for example, gambling and brewing alcohol are criminalized through legislation, but are accepted practices by many pastoralist communities regulated by customary law.[100] When people are charged under such laws, the state system appears unjust, illogical and arbitrary. Similarly, in customary systems where conflict is regarded as involving groups as opposed to individuals, the notion of individual responsibility and punishment entrenched in many formal justice systems can be a source of confusion and angst that manifests itself in avoidance.[101]

The modalities of state justice may also contradict local perceptions of justice and fairness. Differences in the burden of proof in criminal and civil cases may appear illogical, and the dismissal of a case on the grounds of a technicality may be considered arbitrary.[103] Likewise, in legal cultures where justice is associated with speedy resolutions, the practice of granting bail is often viewed as equating to impunity.[104]

> "People don't see two legal codes at all. The 'customary' legal framework is not seen as law at all, but as a way of life, how people live — State Law on the other hand is something imposed and foreign. ... It is remote, in a foreign language and has little to do with most people's lives ... Legal pluralism isn't about different laws — it's about a different world view." [102]

Third, the solutions offered by the state justice system may not be sufficient to resolve a dispute, particularly where the common sanctions do not adequately respond to the important social and practical issues that the wrongdoing creates at the community level. For example, crimes of rape, homicide or physical assault that have a temporary or permanent impact on income-earning capacity can have important economic implications for those involved and their dependants.[105] The customary system generally accounts for the economic consequences of crime through compensation-based solutions. Compensation provides a social and financial safety net for the victim or the victim's family, hence safeguarding them from poverty, homelessness and exploitation. The formal justice system, however, rarely orders the payment of compensation in criminal cases, and as explained above, developing countries rarely provide social security benefits or other services for victims of crime.

When understood in this light, the state justice alternative — imprisonment of the perpetrator — is unattractive on many levels. First, it overlooks the needs of the victim who is "relegated to the status of witness".[106] Second, in many cultures, detention is not regarded as an appropriate punishment, or perhaps as punishment at all. In contexts of generalized poverty, the fact that the perpetrator is provided with cost-free accommodation, food and protection may be regarded as illogical, unjust and akin to impunity.[107] Third, the focus on the individual overlooks the reality that conflict usually impacts and hence involves whole families and sometimes entire communities. Finally, as the perpetrator is not regarded as having paid their debt to society through serving time in prison, the conflict often remains unresolved.[108]

A final reason for avoiding the state justice system is that the adversarial nature of court proceedings is said to pit neighbor against neighbor in a zero-sum contest where the 'winner takes all'. This creates tension and estrangement, and breeds revenge, threatening group harmony and cohesion. Proponents of customary justice might argue that the formal system's focus on individual responsibility and pre-determined rules fails to appreciate that disputes are often multi-faceted and have complex histories. Such prescription prevents adjudicators from isolating and responding to the underlying cause of the dispute, and limits the scope for finding a solution that fits popular perceptions of justice and equity. Customary justice, by contrast, is often viewed as a more effective approach for resolving disputes that take place in multiplex societies where members share mutually dependent social and economic links and need to continue living together.[109] The customary system's restorative and conciliatory approach facilitates this by focusing on the future relationship between the parties and situating dispute resolution in the broader social context of wrongdoing. Dispute resolution thus aims not only to punish and compensate, but also to reconcile the parties and reintegrate the perpetrator into society.[110]

Box 7
Examining preference for customary resolution, Afghanistan

The following recounts the story of customary leaders in Afghanistan who adjudicated the resolution of a physical assault case through restitution; the leaders argued that this means of resolution was a fairer approach than referring the problem to the state justice system. If the case went to the court, they explained:

> "[T]he offender would have been put in the custody of the police until his case went to trial. If the court convicted him, he would have [had] to pay for transportation to carry him and his guard from police custody to the main jail in the city. The defendant is the main income earner in his family, and therefore, putting him away would devastate his family and the consequences would be unpredictable. Moreover, no one could guarantee that he would not have been the target of revenge once he was out of jail, even if he had 'paid his debt to society'. A revenge attack could be fatal. ... [A]nd the bloodshed would not stop for generations to come. By the current arrangement, the injured victim, who was another economically disadvantaged farmer, was compensated fully for the assault ... ."[111]

4.7 Conclusion

As the above discussion sets out, the premise that customary justice systems are the preferred choice of users is grounded in salient practical and social rationale. Their speed, accessibility and cost-effectiveness make them a natural partner for disputants based in rural settings and isolated from the state system. Moreover, their focus on consensus-based decisions and the restoration of community harmony seems to respond to the needs of tightly knit communities whose members share close bonds of social and economic dependency. As Isser and Lubkemann note, the preference for restorative justice is not necessarily based on an abstract notion of tradition; "[q]uite the contrary, it represents a very rational calculation based on the socio-economic and cultural context".[112]

However, as demonstrated in previous sections, generalizations can rarely be made. The preference and demand for customary justice by user groups is by no means universal. The International Council on Human Rights Policy cites the example of Fiji where the judiciary's wavering application of criminal penalties for rape has given rise to a strong women's movement working to ensure that customary justice norms (specifically that of *bulubulu,* or ritual apology that absolves the perpetrator of any further legal responsibility) do not undermine the legal process.[113] Neither is customary justice always fast,[114] nor are speedy outcomes always just. Similarly, the customary system is not always cheaper[115] and may be equally affected by corruption.

In other cases, user preference for the customary system has more to do with the availability (or lack thereof) of viable alternatives. Customary justice may not be users' first choice, but rather the only option for resolving a dispute. State justice may be geographically inaccessible or too costly, or there may be cultural disincentives that dissuade users from approaching the courts. State courts may refuse to resolve matters of great significance to communities, either on the grounds of triviality (for example, cases involving disrespect) or because they do not recognize the nature of the wrongdoing (such as in cases of witchcraft or black magic). Alternatively, courts may be weak and unable to offer quality justice in a timely manner, or not be functioning at all, particularly in post-conflict situations or in the aftermath of natural disaster.

Finally, preference for the customary justice system may reveal more about a user's disapproval of the state system than his or her approval of customary norms. On the one hand, this can be mainly attributed to fundamental differences in the raison d'être between customary and state justice systems. The aim of customary justice is the restoration of intra-community harmony by repairing relationships and creating a framework for reintegration, whereas the aim of state justice is deterrence through individualized, retributive punishment. Given that these purposes are not completely aligned, it is not surprising that the state justice system is not always an effective means of addressing the demands of customary users.

On the other hand, this dichotomy reflects complex and political tensions that go far beyond a correlation of user needs to system modalities; it involves issues such as conceptions of justice and equity, as well as the rights of individuals within society. These factors are interwoven, mutually reinforcing, and inextricably bound up in tradition and socio-economic realities. Cultural relativists would be supportive of groups whose normative practices place community rights above individual rights and apply differing levels of protection based on gender and social status. In contrast, universalists would argue that culture is no defense to practices that violate human rights. These tensions are explored in greater detail in chapter 7.

In summary, although customary justice systems have many positive aspects, 'preference' alone should not be interpreted as a blanket endorsement of customary norms or precepts. Instead, such factors need to be considered alongside a nuanced analysis of factors that restrict access to justice at the state level, traditional mores and socio-economic realities. Frameworks for such analyses are presented in the following chapters.

footnotes

1 This definition was adapted from R. Yrigoyen Fajardo, K. Rady and P. Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples*, UNDP Cambodia and Ministry of Justice, Royal Government of Cambodia (2005) 34.

2 This description was adapted from International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 43.

3 See, for example, sections 1-3 the *Land Act 1998*; S Callaghan, 'Overview of Customary Justice and Legal Pluralism in Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 75).

4 See generally W. Schärf, C. Banda, R. Röntsch, D. Kaunda and R. Shapiro, *Access to Justice for the Poor of Malawi: An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts of the customary justice forums*, report prepared for the United Kingdom Department of International Development (DFID) (2002), Governance and Social Development Resource Centre <http://www.gsdrc.org/docs/open/SSAJ99.pdf> at 17 March 2011.

5 T. Barfield, N. Nojumi and J.A. Their, 'The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011), 165, 173.

6 ICHRP, above n 2, 43.

7 See for example, J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council (DRC) (2006) 27-28.

8 These definitions were adapted from UNDP, above n 1, 30, 34.

9 A. Akechak Jok, R. Leitch and C Vandewint, *A Study of Customary Law in Contemporary Southern Sudan*, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs (2004) 17.

10 E. Harper, *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh*, IDLO (2006) 14.

11 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 22.

12 Ibid 22.

13 Ibid 24, 33.

14 DRC, *Harmonization of Somali Legal Systems*, Final Report (2002) 10.

15 J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003) 1.

16 A. Danne, 'Customary and Indigenous Law in Transitional and Post-Conflict States: A South Sudanese Case Study' (2004) 30(2) *Monash University Law Review* 199, 202.

17 J. Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America' in C. Sage and M. Woolcock (eds), *World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006) 113, 130.

18 See examples from countries such as Somalia: Gundel, above n 7, 21; Afghanistan: United States Agency for International Development (USAID), *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies* (2005) 9; Timor-Leste: T. Chopra, C. Ranheim and R. Nixon, 'Local-Level Justice under Transitional Administration: Lessons from East Timor' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011), 131; and Guatemala: J.A. Hessbruegge and C Garcia, 'Mayan Law in Post-Conflict Guatemala' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011), 94.

19 T. Dexter, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi*, Centre for Humanitarian Dialogue (2005) 11.

20 Ibid 12.

21 Ibid.

22 See examples from countries such as Indonesia: UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with *Badan Rehabilitasi dan Rekonstruksi* (BRR) Agency for Rehabilitation and Reconstruction, *Badan Perencanaan dan Pembangunan Nasional* (BAPPENAS), Syiah Kuala University (UNSYIAH), *Institut Agama Islam Negeri Ar-Raniry* (IAIN Ar-Raniry), IDLO and the World Bank (2006) 62; Burundi: Dexter, above n 19, 21.

23 Faundez, above n 15, 1.

24 Danne, above n 16, 209; Penal Reform International, above n 11, 29.

25 See further Chapter 6, Section 3.1.

26 Penal Reform International, above n 11, 26.

27 Ibid.

28 Ibid 28.

29 Ibid 8. See examples from countries such as Malawi: E. Wojkowska, *Doing Justice: Informal systems can contribute*, UNDP, Oslo Governance Centre, The Democratic Governance Fellowship Programme (2006) 50; Guatemala: Hessbruegge and Garcia, above n 18, 94; Afghanistan: Barfield, Nojumi and Their, above n 5, 168; and Indonesia: World Bank Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, Social Development Unit, Justice for the Poor Program (2008) 27.

30 World Bank, above n 29, 27.

31 Penal Reform International, above n 11, 36.

32 Ibid.

33 Ibid 32.

34 Penal Reform International, above n 11, 33. However, restorative solutions are not a universal characteristic of customary justice systems (see, for example, ICHRP, above n 2, 52).

35 See further Chapter 6, Section 2.

36 Penal Reform International, above n 11, 33.

37 See examples from countries such as Afghanistan: USAID, above n 18, 29-30; and Burundi: Dexter, above n 19, 13.

38 For example, in areas of Guatemala: Hessbruegge and Garcia, above n 18, 93.

39 For example, in areas of Afghanistan: Barfield, Nojumi and Their, above n 5, 168.

40 E. Harper, 'Studying Post-Conflict Rule of Law: The Creation of an 'Ordinary Crimes Model' by the United Nations Transitional Administration in East Timor' (2006) 8 *Australian Journal of Asian Law* 12; similarly, in parts of Indonesia, locals believe that breaching customary sanctions can lead to death or illness (see Wojkowska, above n 29, 18). See further Penal Reform International, above n 11, 33-34.

41 For example, in areas of Afghanistan: Barfield, Nojumi and Their, above n 5, 43.

42 DRC, above n 14, 76.

43 Penal Reform International, above n 11, 34-35.

44 Harper, above n 40, 11-12.

45 For example in countries such as Burundi: Dexter, above n 19, 13; and Afghanistan: Barfield, Nojumi and Their, above n 5, 44-45.

46 Harper, above n 40, 12.

47 ICHRP, above n 2, 57-58.

48 See generally S. Engle Merry, 'Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)' (2003) 26(1) *Political and Legal Anthropology Review* 55, 63; M. Chanock, 'Neo-Traditionalism and the Customary Law in Malawi' (1978) 16 *African Law Studies* 80; M. Chanock, 'Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 72 *International Journal of Law and the Family*, 72.

49 See, for example, ICHRP, above n 2, 77-78.

50 UNDP A2J, *Programming for Justice: Access to All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 100-101; Penal Reform International, above n 11, 37.

51 World Bank, above n 29, 30; See further Penal Reform International, above n 11, 36-37; Wojkowska, above n 29, 20. For country examples see Burundi: Dexter, above n 19, 13; Afghanistan: Barfield, Nojumi and Their, above n 5, 168, USAID, above n 18, 5; Indonesia: UNDP, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 72; World Bank, above n 29, 62-63.

52 Wojkowska, above n 29, 21.

53 World Bank, above n 29, 27.

54 For example, in areas of India: UNDP, above n 50, 102 and Somalia: Gundel, above n 7, 56-57.

55 M.J. Simojoki, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia' in IDLO Working Paper Series, *Enhancing Legal Empowerment Through Engagement with Customary Justice Systems* (2011) 12, International Development Law Organization <http://www.idlo.int/download.aspx?id=251&LinkUrl=Publications/WP1So

malia.pdf&FileName=WP1Somalia.pdf> at 17 March 2011.

56 B. Ayuko and T. Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, World Bank Justice for the Poor research report (2008) 16 (note that this specifically relates to the Samburu community).

57 See further Chapter 6, Section 1-2.

58 As practiced in areas of Kenya: Wojkowska, above n 29, 21.

59 As practiced in areas of Afghanistan: USAID, above n 18, 49-50.

60 Ibid 49; as practiced in areas of Somalia: Simojoki, above n 55, 13.

61 Simojoki, above n 55, 13.

62 For example, in the case of trial by ordeal in Liberia: D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, United States Institute of Peace (USIP) Peaceworks No. 63 (2009) 57-65, United States Institute of Peace <http://www.usip.org/files/resources/liberian_justice_pw63.pdf> at 29 March 2011.

63 For example, in areas of Timor-Leste: D. Mearns, *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International (2002) 46-47; Chopra, Ranheim and Nixon, above n 18, 50; and Sierra Leone: Open Society Institute Justice Initiative, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (2006) 7. See also generally, J. Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case' (2001) 95(1) *American Journal of International Law* 64-75, 71.

64 UNDP, above n 50, 103.

65 A. Swaine, *Traditional Justice and Gender Based Violence*, International Rescue Committee Research Report (2003) 50.

66 See Section 2.8 of this chapter.

67 For example, in areas of Somalia: Wojkowska, above n 29, 20; Simojoki, above n 55, 8-9.

68 For example, in areas of Indonesia: World Bank, above n 29, 28-29 (although note that such practices are declining).

69 For example, in areas of Bangladesh: S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for the DFID (2003) 5; and Guatemala: Hessbruegge and Garcia, above n 18, 96.

70 For example, in areas of Somalia: Gundel, above n 7, 22-23.

71 For example, in areas of Afghanistan: USAID, above n 18, 49-50.

72 *Universal Declaration of Human Rights 1948* (hereinafter *UDHR*) art 3; *International Covenant on Civil and Political Rights 1966* (hereinafter *ICCPR*) art 6(1).

73 *ICCPR* art 7; *UDHR* art 5.

74 *ICCPR* arts 2-3; *UDHR* art 2.

75 T. Barfield, *Afghan Customary Law and Its Relationships to Formal Judicial Institutions*, Draft Report, USIP (2003) 5-6; Barfield, Nojumi and Their, above n 5, 166.

76 Gundel, above n 7, 22-23.

77 Kenya: T. Chopra, *Reconciling Society and the Judiciary in Northern Kenya*, World Bank Justice for the Poor (2008) 22-23; Somalia: Simojoki, above n 55, 8.

78 The right to a remedy is protected under *UDHR* art 8 and *ICCPR* art 2(3) (a)-(c); the right to equality before the law is protected under *UDHR* art 7 and *ICCPR* arts 14(1) and 26.

79 Gundel, above n 7, 55-56; D.J. Gerstle, *Under the Acacia Tree: Solving Legal Dillemas for Children in Somalia*, UNDP (2007) 43.

80 Gerstle, above n 79, 31.

81 As practiced in areas of Afghanistan: USAID, above n 18, 49-50.

82 P. Banks, 'Grappling with Legal Pluralism: The Liberian Experience' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 65, 67).

83 Barfield, Nojumi and Their, above n 5, 167.

84 Isser, Lubkemann and N'Tow, above n 62, 3.

85 UNDP, above n 50, 79.

86 Penal Reform International, above n 11, 25-26, 30.

87 The right to a remedy is protected under *UDHR* art 8, *ICCPR* art 2(3), the right to freedom of marriage is protected under *ICCPR* art 23(3), *UNHR* art 16(2), and the right to freedom from treatment that is cruel, inhumane or degrading is protected under *ICCPR* art 7 and *UDHR* art 5.

88 Wojkowska, above n 29, 21.

89 Gundel, above n 7, iii, 9.

90 Somalia: Gerstle, above n 79, 31; southern Sudan: Jok et al, above n 9, 41.

91 Gerstle, above n 79, 38-39.

92 Wojkowska, above n 29, 18; see also The Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (2004), The Asia Foundation <http://asiafoundation.org/pdf/easttimor_lawsurvey.pdf> at 17 March 2011.

93 Isser, Lubkemann and N'Tow, above n 62, 60; B Siddiqi, 'Customary Justice and Legal Pluralism Through the Lens of Development Economics' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 121, 124).

94 UNDP, above n 50, 64-76, 32-35.

95 For example, in a 4,524-respondent survey conducted by UNDP in 2005, it was found that "expense was the problem that survey respondents most frequently associated with the police and lawyers — bribes and other costs for the police (36 percent of respondents) and high fees and bribes for the lawyers (89 percent of respondents). In comparison, only 12 percent of respondents cited cost or bribes as a problem when dealing with the informal system..." (UNDP, above n 50, 78).

96 M.R. Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Institute of Development Studies Working Paper 178 (2003) 18; K Decker, C Sage and M. Stefanova, *Law or Justice: Building Equitable Legal Institutions*, World Bank (2005) 16, World Bank <http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law_or_Justice_Building_Equitable_Legal_Institutions.pdf> at 17 March 2011.

97 B. Baker, 'Hybrid Policing in Sub-Saharan Africa' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 167, 167).

98 UNDP, above n 50, 76.

99 For example, in areas of Zambia: W. Schärf, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003, 51), Governance and Social Development Resource Centre <http://www.gsdrc.org/docs/open/DS35.pdf> at 17 March 2011; and Indonesia: UNDP, above n 50, 81.

100 Chopra, above n 77, 19.

101 T. Chopra, *Building Informal Justice in Northern Kenya*, World Bank Justice for the Poor (2008) 11-12.

102 J. Adoko and S. Levine, 'How can we turn legal anarchy into harmonious pluralism? Why Integration is the Key to Legal Pluralism in Northern Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 80, 81-82).

103 Penal Reform International, above n 11, 10.

104 For example, in Guatemalan legal culture: Hessbruegge and Garcia, above n 18, 104.

105 See Section 2.7 of this chapter.

106 Penal Reform International, above n 11, 9.

107 For example, in areas of Timor-Leste: Chopra, Ranheim and Nixon, above n 18, 139.

108 See for example, Chapter 4, case study 5.

109 Penal Reform International, above n 11, 9; see for example in certain parts of Indonesia: World Bank, above n 29, 4; and Liberia: Isser, Lubkemann and N'Tow, above n 62, 3-4.

110 UNDP, above n 50, 101.

111 USAID, above n 18, 32-33.

112 Isser, Lubkemann and N'Tow, above n 62, 4.

113 ICHRP, above n 2, 79-80.

114 Ibid 53.

115 Ibid.

CHAPTER 2 | Engaging with Customary Justice Systems

Discussions on the features of, and the opportunities and constraints inherent in, customary justice models raise important questions about the role that they should play in the programming of national governments, international organizations and NGOs operating in development, post-conflict or post-natural disaster contexts. Principally, should agencies engage with customary justice systems when they operate outside the formal legal sector and may fail to uphold accepted international human rights and criminal justice standards, even though they may be the only functional or preferred mechanism for dispute resolution? If the answer is yes, what are the aims of and principles underpinning such engagement? Should attention focus on enhancing the protection of marginalized groups, either by eliminating the negative aspects of customary justice or strengthening the linkages between the formal and informal justice sectors? Alternatively, should the aim be to modify our thinking with respect to the customary justice sector; to approach it less as a problem that needs to be resolved and more as an integral part of the solution to providing access to fair and equitable justice for all — a system that needs to be supported and strengthened in all its aspects? Although such questions were first posed only in recent years,[1] a rich policy debate has evolved. The following sections provide insight into this discourse, taking into account policy and donor imperatives, the extent to which engagement with customary justice aligns with dominant models of justice sector reform, and the role that customary justice systems might play in the achievement of other development objectives. A thorough understanding of these factors should guide how the rule of law community approaches programming in plural contexts, including by identifying some of the challenges that need to be overcome and by situating customary law within a framework that takes into account the socio-economic, cultural and political context in which community-level dispute resolution takes place.

1. Mainstream development theory and 'rule of law orthodoxy'

Dubbed the 'rule of law orthodoxy', the international community has tended to concentrate its legal development activities on reforming formal justice sector institutions: the courts, legislature, the police and correctional services.[2] And while legal assistance programs are expanding rapidly, assistance to customary dispute resolution processes has been largely neglected by United Nations agencies as well as under other multilateral and bilateral programs.[3] There are four primary reasons for this, as discussed below.

1.1 Customary justice as an impediment to broader development goals

Some development theories find customary dispute resolution to be incompatible with the modern nation state and engaging with customary systems "a throwback to anti-development policies".[5] Programming consistent with such theories involves, at a minimum, ignoring these systems in justice sector programming —

> "[A]lthough informal systems are the main avenues through which the poor access justice (or injustice), such systems remain programmatic stepchildren to the judiciary and other official institutions."[4]

the rationale being that they will lose significance as the state system develops. More interventionist approaches advocate for the elimination of customary fora or their assimilation into the state system in order to hasten economic development and/or support the transition to liberal democracy.[6]

1.2 Institutionalizing poor justice for the poor

Strengthening customary justice systems may be deemed inconsistent with broader rule of law goals. Some argue that high usage of customary processes is symptomatic of poor access to the formal legal system as opposed to a normative or ethical preference for customary justice.[7] It follows that interventions should focus on expanding the reach of courts and enhancing their efficiency. Efforts to reform or strengthen customary justice systems, by contrast, will distract and divert limited resources away from the development of the state system, while at the same time institutionalizing sub-standard justice for the poor.[8] The result can be "a two-track system that reinforces ... unequal access to legal justice"[9] whereby courts are reserved for the wealthy and the victims of serious crime, while the poor and victims of minor cases are forced to accept 'secondary' forms of justice.

1.3 Incompatibility with the programming approaches of development agencies

Supporting or working through customary legal systems can be incompatible with the programming approaches of some development agencies. Such interventions may be considered antiquated, unprincipled or amateurish by lawyers schooled in more formalistic settings: work that falls more in the domain of anthropologists and social scientists than legal practitioners. Programs involving customary processes may even lie outside of some organizations' terms of reference. As Isser explains, "most multilateral and bilateral international actors are mandated to work through state bodies. Customary justice systems which function outside of, or as an alternative to, the state, are often seen as incompatible with this mission."[10] Moreover, programming for customary justice is 'messy'; such systems are difficult to understand and navigate, and are burdensomely voluminous when compared to state justice institutions; furthermore, stakeholders can be difficult to identify and access.

Other agencies find it unacceptable to engage with systems that tolerate discriminatory treatment or fail to uphold international legal standards. For example, the United Kingdom Department for International Development's (DFID's) Policy on Non-State Justice and Security Systems (NSJS) states that working with customary systems "is not applicable to situations where NSJS violate basic human rights such that donor engagement is both inappropriate and unlikely to achieve reform".[11] Beyond the question of whether to engage or not, the fact that aspects of customary justice processes may be inconsistent with international standards has implications for the question of 'how' to engage. As will be discussed, this presents a particular dilemma for United Nations agencies, which are required to operate within a normative framework of human rights, international law and internationally accepted criminal justice standards:

> The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. This includes the wealth of United Nations human rights and criminal justice standards developed over the last half-century.[12]

1.4 Enhanced opportunities for forum shopping

Finally, some argue that strengthening the customary system can result in a competing and overlapping set of laws, which, while giving choice, can "obstruct claim-holders' access to justice and impede effective handling of grievances".[13] This may create confusion or promote instability.[14] It can also encourage forum shopping and in turn facilitate manipulation of the system by more powerful, wealthy or more informed disputants.[15] Pluralism offers such individuals the option of ignoring customary norms and asserting their right to refer disputes to the formal legal system in an attempt

to avoid traditional responsibilities, to 'get a better deal' or when seeking revenge. Research conducted by the USIP in Liberia found that the formal system was regarded as "one of the most effective mechanisms through which powerful and wealthy social actors are able to perpetuate injustice in service of their own interests".[16] Cases were found where, in order to obtain leverage in the bargaining of a customary dispute, one party might make or threaten to make an accusation of statutory rape against the other party, relying on newly enacted legislation that sets the age for consensual sexual intercourse at 18 years (which conflicts with customary law that permits marriage at 16 years).[17] Another commonly cited example is where elites "enjoy the benefits of statutory property law for their urban, personal property, while simultaneously using customary law to grab ancestral lands in rural communities".[18] As noted by Odinkalu, this creates a credibility crisis for the entire justice system and reinforces the marginalization of the poor:

> Customary law gives the rich and powerful in contemporary Africa the freedom to choose between the law and legal forum they wish to use, based on situational convenience. When it suits them, they use the formal courts, the police and state paraphernalia; when they calculate it to be more favorable, they deploy the norms or institutions of the countryside from which they came.[19]

2. The case for engagement with customary justice systems

Despite the above-mentioned arguments cautioning against engagement with customary justice systems, there is growing support for the position that this is essential for ensuring access to justice to disadvantaged populations.

2.1 Lacking appropriate options in some contexts

In certain contexts, the customary justice system may be the only, or most strategic, entry point for enhancing access to justice. Particularly, in post-conflict and post-natural disaster situations, state courts may be non-operational, or the delivery of services stymied by a lack of resources, inefficiency and/or case backlogs. In the immediate aftermath of the 2004 Indian Ocean tsunami, for example, the only functioning dispute resolution system in Aceh, Indonesia, was customary *adat*. Even after courts re-opened, they were incapable of processing the huge number of inheritance, property and guardianship cases generated. As such, strengthening and utilizing customary fora were deemed the most cost-effective means of resolving small-scale disputes while not congesting the courts and correctional facilities.

In other situations, engagement with the formal justice system might be considered inappropriate, for example, where the state is a known conspirator in the perpetration of rights violations, or where engagement is unlikely to yield effective results, such as where corruption is endemic or there is little or no state support for reform. There may also be scope for reform at the customary level that does not exist within the formal justice sector. As will be discussed in chapter 3, the dynamic nature of customary justice systems allows them to grow and adapt to social and economic imperatives in interesting ways, opening up fertile ground for certain types of normative reforms. [21]

2.2 Increasing protections for marginalized groups

A further basis for engagement is that customary justice systems are simply too important to ignore. As the cornerstone of dispute resolution for the poor and disadvantaged in developing countries,[22] how these mechanisms operate has a critical impact on livelihoods, security and order. Moreover, the 'bread and butter' work of customary fora — disputes involving access to land and productive resources, property, marriage, succession, and criminal

> "Despite [the] fundamental human rights problems that arise out of customary adjudication, we cannot live without the customary courts. Given their cultural significance, practical impact on societal stability, and indispensability given the unavailability of viable alternatives, we

offenses such as rape — have important social and economic implications for those involved. Where customary justice is fair and rights respecting, it can support the marginalized and promote stability; where it is discriminatory and nepotistic, the results can be inequality, disenfranchisement and heightened potential for conflict.

A related rationale concerns the human rights protections offered to users of customary justice systems. Because customary fora operate outside of state regulation and without formal accountability mechanisms, users are indeed left more vulnerable to nepotism, discrimination and sanctions that violate accepted human rights standards. It is well established that women and minority groups are among those most disadvantaged and least protected under customary dispute resolution. Further, individuals whose livelihoods depend on customary land holdings or whose marital rights derive from a customary union, have little or no recourse to state protection. Ignoring these realities, or worse, using them as grounds for non-involvement, will not address the violations that can occur through customary legal systems. Rather, it is the number of people who have no choice but to rely on such systems that makes the case for engagement compelling.

Somewhat paradoxically, while some advocate for engagement with customary systems as a means of stemming human rights violations, others make a similar case but by presenting customary fora as potential custodians of human rights. In the absence of an effective and accessible state system, customary justice may be a mechanism for upholding the right to a remedy or from arbitrary arrest and detention.[23] Likewise, where pre-trial detention is unreasonably lengthy and/or prison conditions abhorrent, customary justice may be seen as offering protection against cruel, inhumane and degrading treatment.

2.3 Delivering access to justice for all

Perhaps the most salient argument presented in support of engagement is that if the objective is to make justice accessible for all, this is unlikely to be achieved in the short term without customary justice systems forming part of the solution.

In most developing countries, the state cannot provide accessible justice services to the entire population, nor is it the most efficient provider of such services. In the context of competing development imperatives, expanding the reach of state courts may have little economic appeal with respect to making the best use of grassroots mechanisms. Further, a decentralization of legal services to, *inter alia*, customary systems may be a cost-effective means of reaching more beneficiaries and heightening the efficiency of the formal sector.

The limitations of state justice systems can be contrasted to the scope of work that customary justice systems can and do handle.[24] While noting that precise calculations are difficult, Golub purports that "one can reasonably conclude that perhaps 90 percent or more of the law-orientated problems involving the poor are handled outside the courts in much of the developing world".[24] Whether this is voluntary or due to limited access to the state system is largely irrelevant. A large body of justice is being meted out through customary systems, with the implication that far-reaching reforms can be made through engagement with such fora. When seen in this light, enhanced access to the customary system becomes a tool for women, the poor and the marginalized to uphold their rights.

> "[I]nformal mechanisms and remedies favored by the excluded deserve closer examination by human rights practitioners, since, despite their deficiencies, they offer cheap, accessible and legitimate services to the communities that use them...".[26]

2.4 Contributing to other development outcomes

In terms of whether a pluralistic justice sector may inhibit economic growth, it is important to note that the causal connection between Western-style justice systems and economic development outcomes has been questioned by both scholars and development economists.[27] They cite market liberalization theories

that correlate enhanced state efficiency to deregulation; in the context of the formal justice sector, this might be achieved by decentralizing legal services and eliminating entry barriers, one potential interlocutor being the customary system.[28]

Moreover, a strong and operative customary system can contribute to other development objectives. For example, developing efficient and consensual means of resolving conflict at the local level may be critical, not only as a means of accessing justice, but because "land disputes threaten the social and economic stability of the country ... [or] where court delays or corruption inhibit foreign investment and economic restructuring".[29] Further, from a security perspective, customary legal systems can contribute significantly to the maintenance of order and control of violence at the community level.

2.5 Building the rule of law

Even if they are not the object of reform, widening approaches to include customary systems may have positive spillover effects. Effective formal justice sector reform, for example, may lie to some extent in understanding what occurs at the customary level. Customary justice systems exhibit remarkable resilience, outlasting changes in government, conflict, natural disaster and state-based attempts to abolish them.[30] They are also popular. Customary processes are often perceived as fair, cheap and efficient, they are steeped in local legitimacy and authority, and they can respond to the social, legal and material needs of the populace in a way that the formal system is unable to do. While neither resilience nor popularity is a valid ground for engagement *per se* (i.e. asserted preference does not necessarily indicate that customary outcomes are beneficial for all users), such features demonstrate a level of effectiveness and a connection to the people that use them. Understanding how and why this is so may provide some of the answers to developing a rule of law culture and making the formal justice system more attractive and effective.

3. A trend towards greater engagement with the customary justice sector

As the rule of law community of practice has increasingly distanced itself from state-centric, 'orthodox' approaches, there is growing acknowledgment that customary justice systems need to be included in any discussion on justice sector reform. The current policy discourse may even signal a seachange in the approaches of international organizations with respect to their level of involvement with the customary justice sector. Lead development agencies such as the World Bank[31] and the Centre for Humanitarian Dialogue[32] have released strong statements on the importance of customary systems in promoting access to justice, sustainable judicial reform and poverty alleviation. Such arguments are increasingly gaining traction at the United Nations policy level. For example, the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004) states that:

> Effective strategies for building domestic justice systems will give due attention to laws, processes (both formal and informal) and institutions (both official and unofficial).[33]

Debate at the policy level has quite rapidly translated into programmatic interventions supporting plurality and involving customary law. Chapters 3 to 5 provide an analysis of such interventions led by central government authorities, international organizations, NGOs and customary actors themselves. On the one hand, this more holistic and pragmatic approach to justice sector strengthening is welcomed; on the other, the analysis suggests that how we engage is redolent of the technocratic approaches of the past. At the strategy level, the topic continues to be approached from a dichotomous perspective — juxtaposing the formal and

> "[O]ur understanding of [customary justice] systems and their place in the overall justice sector is rudimentary and efforts to engage with them remain very much on the margins of the justice reform agenda."[35]

informal systems by highlighting their differences and evaluating customary systems in terms of how closely they align to state justice precepts.[34] As explained in chapter 1, this might not be the most constructive approach to understanding customary justice, which differs from its state counterpart in both structural and substantive ways. In programmatic terms, the result has been interventions that aim to 'fix' customary systems to make them more compatible with state models or align them with human rights and criminal justice standards. This may be partly the result of a carry-over of assumptions about how justice reform should be undertaken, but it is also indicative of the absence of a solid, empirical evidence base.

4. Conclusion

The above review of the policy and programmatic landscape reveals a growing consensus that, despite some obvious challenges, the exclusion of customary justice systems from reform strategies is not the best approach for enhancing access to justice and protecting the rights of vulnerable groups. As Isser notes, customary justice is no longer a peripheral issue on the margins of a 'real' justice system, nor a problem to be overcome — it is a critical part of the landscape.[36]

Engaging with customary justice systems is not, however, a panacea. Those most disadvantaged and least able to access justice at the state level are also on the margins of customary legal orders.[37] The limitations of state-based justice cannot therefore be overcome through a greater reliance on customary fora; root issues of exclusion, discrimination and poverty must also be addressed.

Partnering with customary justice systems also raises new and important concerns. Principally, how can a decentralization of legal services be supported while ensuring that this does not equate to a formalization of inequitable or rights-abrogating practices that occur at the customary level?[38] A further key concern relates to how programming objectives can best be achieved given the normative frameworks within which many international development organizations operate. As discussed previously, United Nations agencies (and others) are obligated to uphold human rights in all aspects of their work. Arguably, such modalities further skew programming towards 'fix it' approaches. At the same time, it is clear that where customary norms do not align with international human rights standards, there are often complex rationales in play, touching upon issues such as culture, socio-economics and security. In such contexts, approaches that concentrate on bringing customary systems into alignment with international norms might be, at best, ineffective and at worst, harmful.

The next three chapters look at the issue of engagement through a practical lens. Each examines a different approach to improving the access to justice of users of customary systems. Chapter 3 considers efforts to reform customary norms and processes; chapter 4 looks at interventions that aim to offer users of customary justice systems alternative paths to justice; and chapter 5 reviews the complex issue of state recognition of customary justice and mechanisms for bridging or linking customary and state systems.

footnotes

1 Although note that engagement with customary justice systems is certainly not a new phenomenon, perhaps reaching a high point during colonial periods in both Africa and Asia; see, for example, M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996); and M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985).

2 T. Thorne, *Rule of Law Through Imperfect Bodies? The Informal Justice Systems of Burundi and Somalia*, Centre for Humanitarian Dialogue Policy Paper (2005) 1.

3 E. Wojkowska, *Doing Justice: How informal systems can contribute*, UNDP, Oslo Governance Centre, The Democratic Governance Fellowship Programme (2006) 5.

4 S. Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Endowment for International Peace, Democracy and Rule of Law Project No. 41 (2003) 16.

5 M. Stephens, 'Local-level Dispute Resolution in Post-*reformasi* Indonesia: Lessons from the Philippines' (2003) 5(3) *Australian Journal of Asian Law* 214, 245–246.

6 H.M. Kyed, 'On the Politics of Legal Pluralism: The case of post-war Mozambique' (Conference Packet for the

United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 156, 158).

7 C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (2003) 6-7; ICHRP, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 51.

8 Wojkowska, above n 3, 14.

9 R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002) 37.

10 D. Isser, 'Re-Thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 13, 13).

11 DFID, *Non-State Justice and Security Systems (*2004) 4. Note that irrespective of the above, DFID's policy on safety, security and access to justice recognizes the importance of traditional and informal systems as complements to formal state systems. DFID notes that non-state justice and security systems address issues that are of deep concern to the poor, including personal security and local crime, protection of land, property and livestock, and resolution of family and community disputes, and that they need to be reformed in order to become fairer and more effective.

12 United Nations Security Council (UNSC), *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) UN Doc S/2004/616, 5[9].

13 UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with BRR Agency for Rehabilitation and Reconstruction, BAPPENAS National Planning and Development Agency, UNSYIAH, IAIN Ar-Raniry, IDLO and the World Bank (2006) 11.

14 T. Hohe and R. Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor*, paper prepared for the USIP (2006) 68.

15 ICHRP, above n 7, 82.

16 D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, USIP Peaceworks No. 63 (2009) 51, United States Institute of Peace <http://www.usip.org/files/resources/liberian_justice_pw63.pdf> at 29 March 2011.

17 Ibid 66-70; B. Siddiqi, 'Customary Justice and Legal Pluralism Through the Lens of Development Economics' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 121, 122).

18 C.A. Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' in C. Sage and M Woolcock (eds), *World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006) 141, 157.

19 Ibid 158.

20 D. Pimentel, 'Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 41, 44-45).

21 ICHRP, above n 7, 55; L. Chirayath, C. Sage and M. Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006: Equity and Development (2005) 2.

22 Wojkowska, above n 3, 5.

23 The right to a remedy is protected under the *UDHR* art 8 and *ICCPR* art 2(3); the right to protection from arbitrary arrest and detention is protected under *UDHR* art 9 and *ICCPR* art 9.

24 ICHRP, above n 7, 51-52.

25 Golub, above n 4, 16.

26 ICHRP, *Enhancing Access to Human Rights* (2004) 7, 77 (cited in L. Hasle, 'Too Poor for Rights: Access to Justice for Poor Women in Bangladesh — a case study' (2003) 29(3-4) *The Bangladesh Development Studies*, 6).

27 There is a body of literature discussing the links between the rule of law and economic development. Stromseth et al argue that "[i]n our globalized and interdependent world, no state is likely to prosper without a modern legal regime, because this is necessary both to comply with international legal obligations under various treaty regimes and to participate effectively in the global economy" (J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights: Building the Rule of Law After Military Interventions* (2006) 312). According to Carothers, however, arguments that elements such as predictability and enforcement of contracts and property rights are necessary for the functioning of a modern market economy and for a liberal democracy are "badly simplified and probably misleading" (T. Carothers, *Promoting the Rule of Law Abroad: The Knowledge* Problem, Rule of Law Series Working Papers, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Paper No. 34 (2003) 6-7). Likewise, Golub notes that the assumptions underpinning theories that connect the centrality of the judicial system to both the rule of law and economic development are "fatally flawed" and that "there are many non-judicial institutions and processes that affect economic progress" (Golub, above n 4, 15, 8-21). More recent work, for example by Siddiqi, suggests that while there is "some evidence that legal institutions matter for economic development outcomes", such evidence is ambiguous (Siddiqi, above n 17, 121).

28 See further ICHRP, above n 7, 116-117.

29 Centre for Democracy and Governance, *Alternative Dispute Resolution Practitioners' Guide* (1998) 7.

30 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 1; see further ICHRP, above n 7, 10.

31 See generally, World Bank, Justice for the Poor <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:21172686~menuPK:3296262~pagePK:148956~piPK:216618~theSitePK:3282787,00.html> at 9 March 2011.

32 See generally, Thorne, above n 2; A. Le Sage, *Stateless Justice in Somalia — Formal and Informal Rule of Law Initiatives*, Centre for Humanitarian Dialogue (2005); T. Dexter and P. Ntahombaye, *The role of informal justice systems in fostering the rule of law in post-conflict situations: The case of Burundi*, Centre for Humanitarian Dialogue (2005).

33 UNSC, above n 12, 12[35], see also 12[36].

34 T. Chopra, 'Women's Rights and Legal Pluralism in Post Conflict Societies: An Analytical Agenda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 112-113).

35 Isser, above n 10, 13.

36 Ibid 15; ICHRP, above n 7, 40

37 Ibid 59.

38 Ibid 78-79.

CHAPTER 3 | Programming Options for Reforming or Strengthening Customary Justice Systems

Key characteristics of many customary justice systems are their dynamism and flexibility. While this is often presented as an inroad for discrimination and abuse, such fluidity also makes customary systems capable of modernization and change, thus opening up inroads for progressive reforms.[1] From Bangladesh and Somalia to Namibia, there is evidence of customary systems adapting themselves quickly to changing conditions in positive and encouraging ways.[2] Building on this, the current chapter explores ways that development activities can support the reform of customary systems from the inside, by exploiting their advantages and curbing their flaws to transform them from barriers to justice, to vehicles of social change. The seven options discussed are:

- Expansion of participation in customary decision-making;
- Codifications of customary law;
- Introduction of procedural safeguards into customary processes;
- Skills-building for customary leaders;
- Elimination of harmful customary practices;
- Revision or reinterpretation of customary law; and
- Oversight of customary justice processes.

1. Expansion of participation in customary decision-making

One means of promoting downward accountability and enhancing the protection of marginalized groups is to promote their participation in dispute resolution processes. This might involve vesting such groups with leadership responsibilities, or expanding the dispute resolution 'circle' to include representatives of women, youth or other traditionally excluded groups. Proponents argue that female interpretation and application of customary law are likely to better factor in the needs of and protections required by *all* groups and that youth may be more inclined to challenge traditional norms and embrace modern notions of human rights and good governance. In Lesotho, for example, where there is a high proportion of women village chiefs, it has been demonstrated that their application of customary law has ameliorated some of its gender-prejudicial consequences.[3]

The principal obstacle to this approach is that power-holders are unlikely to give up their monopoly over dispute resolution easily; devolution of authority usually requires external intervention. To this end, some governments have introduced legislation requiring that community leaders be democratically elected. In certain cases, this has been seen as unwelcomed interference in local governance, and elections have been boycotted. Another potential outcome is that elections do not alter the profile of the leadership, either due to local level political interference in the election or the strength of support for the existing power hierarchy.[4] Elections may also "contradict local ideas that prescribe how legitimate authorities are selected".[5] In Kenya, using elections to form Peace Development Committees was an effective tool in some areas, but in others, the community would only support the work of persons selected jointly by the existing leadership.[6]

An alternate approach is the stipulation of quotas for participation by certain groups. In Uganda, Area Land Committees must have at least three women members; in the United Republic of Tanzania, women must make up three of the Village Land Council's seven members.[7] Such strategies have had equally mixed results. Appointment is not necessarily followed by meaningful participation; sometimes, those selected are chosen specifically because they are unlikely to question dominate norms, and in other cases, prevailing social attitudes constrain appointees' freedom to act independently.[8] Research conducted in Sierra Leone and Kenya revealed examples where female members of governance structures were only brought to meetings when visitors, often the donors sponsoring reform programs, were in attendance, and where they were actively excluded by calling sessions at times that made it impossible for them to participate. When they did attend, they were more likely to be 'informed' rather than consulted in decision-making.[9]

This should not be all that surprising. Customary justice systems function on the basis that decision-makers are regarded as legitimate; it is their social authority that ensures that disputants participate, enter into negotiated agreements and abide by outcomes reached. Where leaders lack legitimacy, the integrity of the system may be compromised.[10] In India, for example, student groups successfully lobbied for a new *panchayat* composed of younger males (married men in their forties) on the grounds that they needed to gain experience in village administration to eventually take over from the elders. After some time, this decision had to be reversed and the former leaders reinstated, since the new incumbents were found to be unable to exercise authority due to their perceived youth and inexperience.[11] This being said, there are certainly examples of where customary mechanisms have been expanded to better reflect the composition of society, as discussed in the case study below.

Case study 1
Women's participation in customary decision-making and appointment to leadership positions in Namibia

In pre-independent Namibia, women were largely excluded from active participation in political and judicial decision-making and from leadership positions. At a 1993 workshop of traditional authorities in Ongwediva, it was unanimously decided that women should be allowed to participate fully in the work of community courts. The community of Uukwambi took this resolution seriously. The Traditional Authority called a meeting of all Uukwambi headmen where they were told that a female representative and advisor had to be selected in each locality. These new female advisors were expected to participate actively in the hearings of customary courts and to act as deputies to the headmen. The Traditional Authority, and its chief in particular, actively promoted female leadership, both in public speeches and by appointing women at various levels of traditional leadership. As a result, Uukwambi has seen a significant rise in female traditional leaders. Currently, one of the five district senior councilors is a woman, and in one of those districts, Ogongo, 13 of the 67 villages are headed by a woman. Although still heavily outnumbered by headmen, this represents a significant change from a decade ago. It is now even becoming relatively common for a wife to take over the position of village leader following the death of her husband.[12]

Although it is difficult to make generalizations, it would appear that coercive change to leadership structures is rarely an effective means of promoting the substantive participation of marginalized groups. In Namibia, the only successful example presented, the distinguishing feature seemed to be that traditional leaders themselves were the catalysts behind the reforms. There may have also been other forces at work. Post-independence advances at the central political level seemed to have a trickle down impact. Within communities, men were aware that women had been elected and assigned to high-level government positions; the argument ran that "if women can become government ministers, there is no reason why they should not also become traditional leaders."[13]

Recreating such conditions is obviously not a strategy that can be applied to every development context. But it does demonstrate that where change is voluntary and has the support of the local leadership, inserting new decision-makers who are responsive to the needs of different user groups can help to transform the normative aspects of customary systems. How to get local leaders interested in diluting or devolving their authority will be a difficult task. Prompting open debate at the local level on issues of participation may be one entry point; when election or appointment is the strategy adopted, incremental reforms, such as installing women and youth in advisory roles rather than as decision-makers as a first step, may have greater impact over the longer term.[15] Participatory and inclusive processes in development initiatives more generally may also have positive spin-off effects. In Indonesia's Aceh Province, IDLO provided mediation and legal skills training to women, men and youth representatives in 95 tsunami-affected villages. It was never expected that such training would lead to the immediate inclusion of women or youth in customary decision-making fora. However, their presence in such training allowed them to try out their skills as mediators and compelled male leaders to observe them in such roles. The aim was that, over time, women and youth might feel more empowered, discuss their newfound knowledge in their homes, or become increasingly involved in mediating conflicts — not necessarily in customary fora, but perhaps between conflicting women or children. Any such results would be indicators of success.[16]

2. Codifications of customary law

The codification of customary law is proposed by some as a means of enhancing predictability in decision-making and reducing the flexibility and negotiability inherent in customary law. Codification is particularly appealing to proponents of harmonizing or linking formal and customary systems; if customary law cases are to be heard at or appealed to statutory courts, there is a strong argument that applicable norms need to be reduced to written form.

Projects of codification, however, have had limited success. Customary laws are less rule frameworks than sets of principles tailored to specific contexts and malleable in changing circumstances. As such, they do not lend themselves easily to codification. Moreover, the effectiveness of customary systems is premised upon their capacity to facilitate negotiated solutions, a feature that may be extinguished through codification.[19]

Codification also poses practical difficulties. Customary systems are dynamic and may exhibit wide variation over small areas. Written codes may quickly become obsolete and risk locking diverse groups into a single interpretation of norms. Even if codification could capture one system adequately, customary law is almost always internally contested. Codification thus raises the question of whose version of customary law is to be adopted. The obvious risk is that the norms presented discriminate against weaker groups and overlook important needs.[20]

Finally, codification may have less than the anticipated impact in areas where literacy is low. Codified rule sets may even be used as a tool to discriminate against those groups least likely to have literacy skills (who are also those with the highest vulnerability), namely women, the poor and the under-educated.

In east Nigeria, the Civil Resource Development and Documentation Centre was able to negotiate the appointment of women tribal chiefs by drawing on women's right to speak and to form interest groups in customary law, and the principles contained in the

.[14]

In Aceh Province, Indonesia,

empowers the (village) leadership to promulgate and codify customary law. These leaders must forward such codifications to the district head within 45 days, who then has 45 days to reject the pronouncement.[17] There is similar legislation in other provinces of Indonesia, and there are several areas where codification processes have been undertaken.[18]

An increasingly popular alternative to codification is self-statements or ascertainments of customary law. These are written documents that describe (but not prescribe) key customary law principles. They are produced and used by communities to guide dispute resolution; since rules are not fixed, such processes avoid a crystallization of laws and the associated loss in flexibility. While there is no set procedure for self-statements/ascertainments, main features are that processes are participatory and that principles are adopted with a level of group consensus.[21]

Case study 2
Self-statements of customary law, Namibia
In 1993, leaders from six communities in the region of Owambo came together at a Customary Law Workshop in Ongwediva with the aim of harmonizing their customary laws. One of the topics of discussion was the vulnerability of widows. Two issues were at stake. The first concerned the practice whereby relatives of the deceased would chase the wife back to her matrilineal family. The second was that when women remained on the land that they had occupied with their husbands, they were required to make a payment to the traditional leaders, essentially re-purchasing the land in question. At the workshop, the traditional leaders unanimously decided that widows should not be chased from their lands or out of their homes, and that they should not be asked to pay for such land. This commitment was documented in 'self-statements' of customary law: written accounts of the parts of the customary law that were deemed of particular importance. Following this process, the Council of Traditional Leaders resolved that all traditional communities should embark on a similar process of self-statement.[22]

In summary, codification may be a suitable means of enhancing predictability and protections in specific contexts, such as where there is a formal linkage between customary and statutory courts, where large population shifts have brought unfamiliar groups into close proximity, and where communities are no longer homogenous and traditional means of communicating knowledge have broken down. Codification may also be successful in contexts where customary rules lend themselves naturally to codification, for example, where rules are not disputed and have remained constant over long periods. In other situations, self-statements/ascertainments may be more appropriate. Under either method, the principal risk is that the version of customary law adopted — whether it is popularly accepted or contested — reflects discriminatory attitudes or power imbalances. In such circumstances, codification or self-statements/ascertainment may formalize such norms, entrenching poor quality justice for the weak and marginalized. However, where adequate safeguards are in place, such as participatory processes and mechanisms for endorsing the principles adopted, both can be simple ways for all community members to gain better knowledge about customary law and participate in its evolution.

3. Introduction of procedural safeguards into customary processes

Introducing procedural safeguards into customary justice processes can lessen the impact of power imbalances; level the playing field to account for asymmetries in wealth, influence and knowledge; and offer rights protections for weaker parties. Safeguards might include the adoption of clear jurisdictional boundaries, minimum standards of human rights protections, rules on admissibility of evidence, and sentencing guidelines. Another common intervention is encouraging leaders to record case outcomes, making them publicly available, and/or registering them with local courts or police. While this can strengthen transparency, certainty and the likelihood of enforcement, blanket approaches are not recommended. In some contexts, there are social or security factors in play that make the recording and publication of case outcomes inadvisable,[23] and measures should always be taken to ensure that the privacy of disputants, particularly vulnerable groups, is protected.[24]

Measures to stem corruption are particularly important. One entry point is to draw upon existing norms. Some customary systems, for example, have in-built mechanisms to guard against bribery. In south-eastern Bangladesh, custom prescribes and limits the offerings that disputants can provide to adjudicators,[25] and in Burundi, one of the selection qualities of *bashingantahe* is material self-sufficiency.[26]

An alternate approach is to respond to the factors that give rise to corruption. In many cases, community leaders rely on bribes because they have no other income sources. This could be counterbalanced through government stipends or salaries, small business opportunities or regulated community contributions. When evaluating such options, it should be kept in mind that customary leaders' principal strength is their legitimacy. If leaders are to be salaried, either by the government or through donor funding, safeguards should be adopted to ensure that their (actual or perceived) accountability to the community is not diluted or displaced. Direct assistance programs should also be accompanied by sustainability strategies, for example, by integrating stipends into government budgets or linking payments to income-generation schemes. Other programming options to guard against corruption include codes of conduct, complaints bodies, encouragement of transparency in decision-making (e.g. by making adjudication public or disseminating written decisions, but noting the caveats mentioned above), sentencing protocols and guidelines, widened access to alternate dispute resolution fora, and strict penalties for corruption.

4. Skills-building for customary leaders

Customary justice can be empowering and rights-protective, on the one hand, or discriminatory and abusive, on the other hand, depending on approach and the skills of those applying it. A logical means of improving the quality of customary adjudication is thus by targeting local decision-makers themselves. Although such leaders are often among those who benefit from discriminatory norms and maintenance of the status quo, they also have incentives to be responsive to changing community expectations because their ability to maintain order and social harmony is closely linked to their authority.[27] Whether this makes them the gatekeepers to rights protection or potential vehicles of social change, they are clearly important targets in any reform strategy.

Dispute resolution and legal skills training might include customary law principles, assessment of evidence, gender-sensitive approaches, corruption prevention, mediation techniques and leadership skills. Training should also include relevant statutory and constitutional law, particularly the place of customary law within the state legal system, how to access courts and matters of jurisdiction. Finally, training programs might cover associated skills that can assist leaders avoid or resolve conflict, negotiate fairly with other tribes, the state or investors, and more effectively manage their environmental and common pool resources. In the development of any training program, the literacy and education levels of the target audience must be considered, as well as the need to ensure culture-, gender- and conflict-sensitive approaches. Training tools should be tailored accordingly; examples include simplified versions of statutory codes and low literacy guides to accessing the courts. Active learning through role-playing and scenario reconstruction based on real-life community problems is likely to be more effective than instructive learning techniques such as lectures. Finally, literacy training and record-keeping may be precursors to, or heighten the impact of, training activities.

5. Elimination of harmful customary practices

A common approach to eliminate negative or harmful customary norms is using legislation to either proscribe certain practices or introduce specific rights for vulnerable groups. Liberia's *Inheritance Law (2003)*, for example, responds to failings in customary law by allowing widows to inherit from their late husbands, by giving them the option to remain in the home of their late husband, and by preventing them from being forced off their land or into marrying a relative in order to stay on such land.[28]

There are noteworthy cases where legislative pronouncements have impacted on norms at the customary level. Returning again to the Namibia case study, it appears that women did connect their empowerment to legal and political changes occurring at the central government level; many saw the gender equality requirements in the Namibian Constitution as the basis of their right to participate in customary decision-making.[31] However, where there are barriers to accessing the formal justice system, where customary norms are deeply entrenched, or where 'negative' customary practices have important social, economic or security rationales, legislation may have less than the desired impact. Similarly, when legislation is designed to suppress a practice that is attached to a widely held belief set, the only result may be to drive the norm underground (see box 2). It is also important to take into account the state's capacity to put rule changes into practice. Where access to the courts and enforcement capacity is low, introducing legislative reforms as a means of responding to real-life problems may have negative implications for popular perceptions regarding the protective capacity of the state and the rule of law.

Box 1
Legislative reform to enhance women's land tenure security, Mozambique
Mozambique's *Land Law (1997)* established women's equal right to land use and benefit, and to inherit.[29] The usefulness of such provisions to women in the context of joint matrimonial property was limited, however, because it only recognized marriages registered within the formal legal system, estimated to cover 10 percent of the Mozambican population. This was remedied by the *Family Law (2004)*, which defined three forms of marriage: civil, religious and traditional.[30] The law also established a rebuttable presumption that the wife has contributed (non-monetarily, generally) to the marriage, so that upon divorce, marital assets are equitably divided between the two parties. The combined effect of these provisions was to create a legal framework, both highly protective of and empowering for women, extending to the formal and customary levels.

Finally, it is important to highlight that attempts to eliminate certain customary practices can have unintended consequences. A commonly cited example relates to individual land titling laws, widely introduced in Africa and South America as a means of opening up opportunities for women to own land — rights that are generally not available under customary law. As will be explored in detail in chapter 6, such programs have more often resulted in dispossession and further inequality; registration not only failed to vest more ownership rights in women, but caused a redistribution or extinguishment of previously held access and use rights embedded in customary law.[32]

Box 2
Attempts to outlaw black magic and trial by ordeal, South Africa and Liberia
An examination of efforts to outlaw black magic and trial by ordeal demonstrates the difficulty in eradicating practices that are rooted in deeply entrenched beliefs. Black magic is still commonly practiced in both Africa and Asia. Accusations of witchcraft are a familiar technique to attack people perceived as marginalized, weak or troublemakers. Different countries have tried to curb these practices through laws designed to reduce the opportunistic use of witchcraft allegations, particularly fear of witchcraft as a defense to murder, and to prohibit trial by ordeal.[33]

South Africa's *Witchcraft Suppression Act (1957)* made it an offense to accuse someone of witchcraft, to indicate someone to be a witch, to ask a diviner to point out someone as a witch, or to pay someone to use witchcraft. Not only did the legislation not have a significant impact on the practice of black magic, but it led to a loss of confidence in the state (which was thought to be taking the side of witches) and transformed people's response to the phenomena towards

vigilante justice. Witchcraft trials thus continued, but without the procedural protections, albeit inadequate, offered under customary law.[34]

In Liberia, the state's ban on trial by ordeal did not discredit the practice or its "epistemological hold on the local Liberian mindset".[35] Instead, trials may simply have been driven underground, leaving them entirely unregulated. Of most concern is that Liberians blame the state for increases in lawlessness and insecurity that they consider a direct result of the ban and hence its reduced capacity to control witchcraft.[36]

6. Revision or reinterpretation of customary law

The limitations of using legislation as a means of reforming customary law have led development practitioners to experiment with a range of bottom-up strategies. A first programming option is promoting or facilitating an internal reinterpretation of customary law, as examined in the following case study.

Case study 3
Responding to widow-chasing and wife inheritance, Kenya
A growing problem in Africa is that widows are evicted from their marital homes by their late husband's relatives, or forced to marry their brothers-in-law in order to remain on the land. The reason for this is that, although statutory law may provide for gender equity in matters of inheritance, customary law requires that land remains within the male lineage. In an effort to address this problem in Kenya, in 2004, the Kenya National Human Rights Commission started a debate among chiefs in Nyanza Province on customary law's protection of women. When confronted with the number of cases where customary inheritance norms had pushed women into poverty and homelessness, the chiefs decided that instead of widows being forced off their land or being 'inherited', they could be installed as the legal trustees of this land. Critically, this solution provided widows with tenure security but kept land within the male lineage. Further, unlike the cases where women received legal support to defend their position in courts (which did not always result in a reinstatement of rights), these cases ended in reconciliation.[37]

There are several lessons that can be learned from the above example. First, change is most likely to be accepted and sustainable when solutions are devised by the community members themselves. The interventions with the greatest impact, therefore, can also be the most straightforward; in this case, encouraging or facilitating debate around certain topical issues or problems was all that was required on the part of the reformers. Second, drawing out internal contradictions within customary law can advance or facilitate a reinterpretation of norms. Here, that custom was intended to protect women was difficult to reconcile with rules that so obviously led to their harm. Modifying inheritance norms was thus a means of restoring the internal logic and coherency of customary law. Finally, gradual improvements in terms of harm reduction can be the most satisfactory outcome. While allowing women to inherit and exercise ownership rights over their husband's properties would have been the ideal solution, this may not have been realistic, at least in the near term. Trusteeship, on the other hand, solved the immediate problem, and is likely to be a more durable since it facilitated a continuation of dominant norms.

Revision processes can be also formalized, for example, through declarations of customary law, as shown in the case study below.

Case study 4
Working with elders to reform customary law through National Declarations, Somalia

In 2003, a small group of elders from the Somaliland region of Toghdeer approached the Danish Refugee Council (DRC) seeking support to explore how customary law (*xeer*) might be revised to align it more closely with both *shari'a* and human rights standards. In the ensuing discussions, weaknesses were identified within the operation of the *xeer* system, in particular, the phenomenon of revenge killing, which was deemed a threat to inter-clan peace and stability. Recognizing the importance of *xeer* as the dominant method of conflict resolution, DRC decided to support a pilot project aimed at strengthening the customary *xeer* system in order to enhance the security and protection of vulnerable groups.[38]

The first step was to facilitate a series of dialogues that brought together over 100 elders from five clans in Toghdeer. This resulted in the Declaration of the Togdheer House of Aquils, which the elders signed in September 2003, committing themselves to curbing the main causes of inter-clan conflicts and addressing specific aspects of *xeer* that violated *shari'a* and human rights. An awareness campaign followed, led by 54 elders and reaching over 100 villages in Toghdeer.[39] A further conference, attended by 92 elders, was held in Burao, Toghdeer Province, from 28 December 2003 to 1 January 2004. This conference produced a final resolution, a key feature of which was a commitment that, in the event of killing, clan members would refrain from immediately executing the alleged perpetrator and instead hand him or her over to the state authorities. In such cases, the compensation payment would be limited to 100 camels and would be paid directly to the family of the deceased, as opposed to being shared by the membership of the clan. Other points of agreement included, *inter alia*:

- the protection of the right of widows to inherit according to *shari'a* principles;
- the protection of the right of widows to marry men of their choice (eliminating the practice of *dumaal*);
- the increased protection for vulnerable groups such as orphans, street-children, persons with disabilities and internally displaced persons; and
- the formation of committees to resolve conflicts that were deemed threats to ongoing peace and security.[40]

Interest in the intervention led to parallel dialogue processes in other regions of Somaliland including Awdal, Maroodi Jeex, Sahel, Sool and Sanag. With support from the DRC, UNDP and the Office of the United Nations High Commissioner for Refugees (UNHCR), a further conference was held in 2006, where a National Declaration (a composite of smaller Regional Declarations) was signed, followed by a dissemination process that continued into 2009.[41]

Five months after the signing and dissemination of the Declaration of the Togdheer House of Aquils, the DRC conducted a monitoring study comprising 560 interviews covering 16 villages. The evaluation revealed a 90 percent reduction in murder cases, and in the two murder cases that did take place, the perpetrators were quickly turned over to authorities.[42] The Mayor of Burao reported that 250 inter-clan land conflicts had been resolved, and five cases where widows had freely married men of their choice were identified.[43] Follow-up research conducted by IDLO six years after the first dialogues commenced indicates that the Declarations can be linked to certain positive changes, including the abolition of harmful practices such as 'widow inheritance', advancements in women's inheritance rights, and a shift towards individual and away from collective responsibility for serious crimes. Other objectives, however, particularly in relation to enhancing access to justice for vulnerable groups such as displaced populations, minorities and victims of gender crimes do not seem to have met with the same level of success (the impact effectiveness of this intervention is more thoroughly examined in chapter 6, case study 5).

The approach applied in the above case study, structured around the notion of the elders as agents of change within their communities, is a strategy with great potential. These elders — who represented both the interface with the state justice system and the gatekeepers of access to justice at the customary level — were supported and empowered with the hope of improving the operation of *xeer* and offering better protection to vulnerable groups. Through this process, the elders committed themselves to referring serious criminal acts to the courts, thus breaking the cycle of impunity inherent in the functioning of *xeer* and group compensation mechanisms. Critically, the impetus for revising customary law came from within the *xeer* membership rather than external actors. Consequently, it was argued, the process of revision was more likely to be regarded as legitimate and hence sustainable.

While the longer-term impact of the intervention was not exclusively positive, it is noteworthy because it opens up new pathways within the context of customary justice programming. Critically, it demonstrates that the Somali customary system, although in many respects conservative and rights-abrogating, was capable of modernization and change, with fewer obstacles than might have been expected. Likewise, customary leaders were not uniformly traditional; some proved to be progressive and proponents of social change, while others were able to be persuaded to join or at least not obstruct the reforms.[44]

Other programming options include looking within customary law and drawing out positive norms. Again in Somalia, customary law contains basic behavioral prescriptions that apply to all Somalis (*xeer dhagan*) including the protection of certain social groups, women, children, the elderly and guests;[45] in Afghanistan, *Pashtunwali* custom mandates chivalry, hospitality and personal integrity.[46] Such norms could arguably be better exploited with a view to enhancing the protection of vulnerable groups. It may also be possible to draw on other sources of social influence to prevent harmful customary practices. In Afghanistan, the practice of forced marriage (including the customary practice of *bad*) has been condemned by some leaders as in violation of Islamic *shari'a*.[47] Likewise in Somalia, women's groups have grounded their resistance to female genital mutilation and to the denial of inheritance rights (both accepted under customary law) as inconsistent with Islamic law.[48]

The idea that the answer to stemming harmful practices may lie within customary law itself has salient programmatic appeal. Danne, for example, puts forward that, in southern Sudan, interventions should not focus on the elimination of customary practices themselves, but rather on the manipulation of norms in ways that "contravene their original and accepted purpose",[49] that is, the exploitation of marginalized groups through the misinterpretation or misapplication of custom. Examples might include where child betrothal is motivated by personal gain; the use of adultery laws as vehicles for wealth creation, and gender inequality being used as grounds for forced marriage. He argues that making the object of reform the application of the law rather than the law itself, may be a more realistic, sustainable and socially harmonious means of making rights advancements.[50]

7. Oversight of customary justice processes

Oversight of customary justice systems is undertaken with a view to improving their operation and monitoring compliance with minimum rights standards. There are two main programming options. At the state level, oversight might include a court review of cases resolved customarily, specialist bodies that receive and investigate complaints such as ombudspersons, or mechanisms that monitor the enforcement of outcomes. When assessing the types of mechanisms that are best suited to a particular country context, questions of access are particularly important. Where access is limited, court review of customary decisions, for example, on gender equality requirements, might be an effective means of enhancing the protection of women because they are less likely to approach courts or lodge complaints with authorities. Where information, knowledge and physical barriers are less of an issue, systems that place the onus on the disputants themselves can be more cost-effective interventions.

A second approach is monitoring dispute resolution *in situ*. This could be done by international staff, local human rights organizations or trained community-based paralegals. Monitoring can take a variety of forms, for example, by reference to international law, domestic law or customary law,[51] but it is important to monitor both laws and practices. The aim is not usually to identify specific cases of abuse, but problematic trends, practices and attitudes. Likewise, both substantive and procedural aspects of dispute resolution should be monitored: issues of independence, impartiality of decision-making, evidentiary standards and participation are particularly important. Finally, it is critical to monitor adjudication processes from their beginning (reporting of an incident) to their conclusion (including enforcement).[52]

Once data are collected, they must be validated to account for gratuitous concurrence and to eliminate the possibility that norms observed were not otherwise indicative of common practice. Methods include focus group discussions and stakeholder interviews, always ensuring that vulnerable groups are interviewed separately or in groups, but not in the presence of power-holders. Following validation, data can form the basis of programmatic interventions, education campaigns and strategic litigation, or where conditions are not conducive to any of these actions, be simply kept as a record.

There are several advantages to this type of monitoring. Information collected provides an evidence base on which to graft more targeted interventions. Monitoring also requires little lead time and, particularly when monitors are community-based, does not require large resource outlays. Further, in political or legally complex situations, monitoring can be an entry point where no other types of reforms are possible. The most significant challenge is gaining access to observe customary dispute resolution sessions. Such sessions can occur on an ad hoc basis, or be regarded as highly private to the communities in which they take place. Even where access is secured, ensuring that processes are indicative of ordinary practice can be difficult. To take this into account, monitoring should take place over the long term, and where possible, using trained community-based monitors. In terms of gaining community consent and support for monitoring, it is essential that the planners of the intervention are clear about why monitoring is taking place, with whom the information collected will be shared, and what the possible outcomes might be.[53]

8. Conclusion

This chapter has discussed a range of interventions that can support customary legal systems to operate more effectively and provide greater protection to marginalized groups. Once again, the examples brought to the surface some misassumptions about how customary justice systems operate. First, whereas the flexibility of customary law is often presented as an entry point for discrimination and abuse, the capacity of such systems to re-invent themselves opens up unique and fertile opportunities for reform. Likewise, although it is often stated that shifts in legal norms and values take years, and in some cases generations, the examples presented demonstrate that customary processes can adapt quickly in response to changing circumstances and user expectations.

In terms of facilitating the reform of customary justice systems, it is clear that interventions that are devised and led by customary actors themselves are most effective. It may be, then, that the role that development actors are best positioned to play is to create the conditions in which internal change is favorable. In this regard, it is also clear that progress must be balanced with outcomes that do not push social boundaries or alter the status quo too significantly. The Kenya intervention provides a salient example of a situation where a marginal but positive change in the protections offered to women, which was regarded as legitimate and reconcilable with customary norms, may have been a better outcome than pushing for a full realization of rights.

When developing strategies for the bottom-up reform of customary legal systems, it is critical to keep in mind that their existence is closely connected to shortcomings in the formal justice sector.[54] It is not difficult to prepare recommendations for bringing customary justice into alignment with formal legal and human rights standards, either through legislative reform, advocacy or training of grassroots decision-makers. But if recommendations are disconnected from a sound understanding of why customary justice departs from state norms, and how and where it fails to meet the needs and expectations of customary users, they are unlikely to result in changed behavior. Programmatic interventions should instead respond to the factors that drive injustice with a healthy appreciation of constraints and realities, rather than resting on human rights as an end in their own right.[55]

This chapter concentrated on the reform of customary processes and their leaders. While these are important entry points, perhaps an even more significant change agent is users themselves. Armed with knowledge about their rights and alternative paths to justice, users are critically positioned to motivate change in their leaders and thus in norms and outcomes. The next chapter considers this in more detail, looking specifically at how community members can be empowered through the provision of options other than customary justice for resolving their disputes.

MATRIX OF ENTRY POINTS AND GOOD PRACTICES

1. Expanding participation in customary decision-making

Entry points

Facilitation of the installment of women, youth and traditionally excluded groups in leadership positions, or expanding the dispute resolution 'circle' to include representatives of women, youth or other traditionally excluded groups.

Facilitation of open debate at the community level on issues of participation.

Good practices

Linking changes pursued at the community level to success stories (such as members of marginalized groups being appointed to leadership positions in other areas), political changes or legal developments (such as gender equality provisions in legislation) at the national or regional level.

Targeting women as well as men in gender equality advocacy and training, taking into account that in some situations, deeply entrenched discriminatory attitudes may have molded women's perceptions of their own ability to lead.

Developing strategies for encouraging community leaders to take ownership over processes for restructuring decision-making responsibility, or incentivizing devolution in authority and decision-making.

Providing mediation services, legal skills and dispute resolution training programs that include youth, women and other marginalized groups.

2. Codifications of customary law

Entry points

Codification of customary law: written accounts of customary law enumerating, *inter alia*, offenses, sanctions and procedural issues.

Self-statements or ascertainments of customary law: written documents that describe (but not prescribe) key customary law principles.

Participatory reassessments or alignment of existing codifications/self-statements to better respond to topical problems or accord with minimum rights standards.

Promotion of intra-community discussion on whether codification/self-statement could be a means of addressing topical problems or rights-violating practices.

Good practices

Promoting participatory processes and mechanisms to ensure a level of group consensus or endorsement of principles adopted.

Providing for regular (participatory) reassessments of codes to allow them to reflect and adapt to changing needs, circumstances and expectations.

Complementing processes of codification with literacy training, particularly targeting marginalized groups.

Complementing processes of codification with advocacy, using low-literacy forms of mass media to ensure that groups least likely to have literacy skills (women, the poor and the under-educated) are not excluded.

3. Introduction of procedural safeguards into customary practices

Entry points

Training in case recording and reporting complemented by literacy training.

Support for the development of codes of conduct, sentencing protocols, rules on admissibility of evidence, and guidance on jurisdictional boundaries and minimum standards of human rights protections.

Establishment or strengthening of complaints bodies.

Establishment of protocols for case recording and making case outcomes publicly available, and/or registering them with local courts or the police.

Development of training modules structured around real-life community problems and based on a participatory assessment of community needs and expectations, which take into account literacy levels and culture, gender and conflict sensitivities, and which use active learning techniques such as role playing and scenario reconstruction.

The creation of opportunities for customary leaders to meet with and discuss topical issues with formal justice sector representatives, including police, prison and court staff.

Evaluation of training conducted focusing on behavioral change.

Programs to respond to the needs-related factors giving rise to corruption such as government stipends/salaries, small business opportunities or regulated community contributions.

Good practices

Reviewing case recording and registration protocols to ensure that the privacy of disputants, particularly vulnerable groups, is protected.

Complementing direct financial assistance programs with sustainability strategies, such as integrating stipends into government budgets or linking payments to income-generation schemes.

Drawing on existing (or historic) interpretations of customary norms or other sources of social influence to provide grounding for rights protections or the denunciation of harmful practices.

Conducting training in local languages led by persons who are culturally acceptable to participants.

Including women, youth and other marginalized groups in training sessions.

Enlisting respected local figures, such as religious leaders, to endorse training.

4. Skills building for customary leaders

Entry points

Dispute resolution and legal skills training, including components on customary law principles, assessment of evidence, gender-sensitive approaches, corruption prevention, mediation techniques, leadership skills, relevant statutory and constitutional law, and how to access courts and legal aid.

Training to assist leaders in avoiding and resolving conflict; fair negotiation with other tribes, the state and investors; and more effective management of environmental and common pool resources.

Development of low literacy training tools such as simplified versions of statutory codes and guides to accessing the courts.

Good practices

Complementing training programs with literacy training and record-keeping skills.

Integrating legal skills components into training organized by other sectors.

5. Eliminating harmful customary practices

Entry points

Facilitation of open and participatory debate at the community level on harmful customary norms and their consequences, particularly drawing out internal contradictions within customary law.

Declarations (as seen in Somalia) or ascertainments of customary law (as seen in Namibia).

Revision or reinterpretation of customary norms (as seen in Kenya).

Legislation proscribing harmful customary practices or introducing specific rights for vulnerable groups.

Good practices

Complementing legislative reforms with programs aimed to enhance access to the formal justice system and advocacy measures (taking into account literacy levels).

Complementing reforms with programs that respond to the social, economic or security rationales driving harmful customary practices.

Performing risk assessments to safeguard against unintended consequences of reforms (such as the dilution of previously held customary rights or the driving of customary practices underground) including through participatory assessments.

Drawing on existing (or historic) interpretations of customary norms or other sources of social influence to provide grounding for rights protections or the denunciation of harmful practices.

Providing leaders with incentives to eliminate or modify certain practices.

6. Oversight of customary justice processes

Entry points
Court review of cases resolved customarily.
Specialist bodies that receive and investigate complaints such as ombudspersons.
Mechanisms that monitor the enforcement of outcomes.
Community-level monitoring of customary legal processes by international staff, local human rights organizations or trained community-based paralegals.

Good practices
Complementing the establishment of complaints mechanisms and appeal processes with programs aimed to enhance access to the formal justice system and advocacy measures (taking into account literacy levels).
Monitoring at the community level to cover both the substantive and procedural aspects of dispute resolution, and monitoring from the beginning of cases (reporting of an incident) to their conclusion (including enforcement).
Validating monitoring data to account for gratuitous concurrence and to eliminate the possibility that norms observed were otherwise not indicative of common practice. Methods include focus group discussions and stakeholder interviews. Stakeholder validation should be participatory and ensure that vulnerable groups are interviewed separately or in groups, but not in the presence of power-holders.
Monitoring over the long term, and where possible, using trained community-based monitors.
Clearly informing communities about why monitoring is being conducted, with whom the information collected will be shared, and what the possible outcomes might be. Monitoring should only be carried out where the community provides prior consent.

footnotes

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2 Somalia: see M.J. Simojoki, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia' in IDLO Working Paper Series, *Enhancing Legal Empowerment Through Engagement with Customary Justice Systems* (2011), IDLO <http://www.idlo.int/download.aspx?id=251&LinkUrl=Publications/WP1Somalia.pdf&FileName=WP1Somalia.pdf> at 21 March 2011; Namibia: see case study 1 and 2 (current chapter); Bangladesh: see R.D. Roy, 'Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh' (2004) 21(1) *Arizona Journal of International and Comparative Law*, 143-144.

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4 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 141.

5 T. Chopra, *Building Informal Justice in Northern Kenya*, World Bank Justice for the Poor (2008) 36.

6 Ibid 36-37.

7 C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (2003) 25 (note that both of these non-formal tribunals were established by the state).

8 Ibid 4, 26.

9 Sierra Leone: Manning, above n 3, 7; Kenya: B. Ayuko and T. Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, World Bank Justice for the Poor Research Report (2008) 37-39; Chopra, above n 5, 38-41.

10 Penal Reform International, above n 4, 141.

11 Ibid 142; see also Chopra who presents an example from northern Kenya (Chopra, above n 9, 39-41).

12 This case study is taken directly from J. Ubink, 'Gender Equality on the Horizon: The Case of Uukwambi Traditional Authority, Northern Northern Namibia' in E. Harper (ed) *Working with Customary Justice Systems: Post-Conflict and Fragile States*, IDLO 2011.

13 Penal Reform International, above n 4, 118.

14 ICHRP, above n 1, 55.

15 Penal Reform International, above n 4, 143.

16 E. Harper, *Post-Tsunami Legal Assistance Initiative for Indonesia: Monitoring and Evaluation Report*, IDLO (February 2006 — September 2007) 47-54.

17 UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with BRR Agency for Rehabilitation and Reconstruction, BAPPENAS, UNSYIAH, IAIN, IDLO and the World Bank (2006) 97-98.

18 UNDP Indonesia, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 26-27.

19 UNDP A2J, *Programming for Justice: Access to All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 103.

20 M. Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 143, 151); UNDP Indonesia, above n 18, 26-27.

21 D. Pimentel, 'Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 41, 44).

22 This case study is taken directly from Ubink, above n 12.

23 In Uganda, for example, it has been noted that in insecure areas, keeping records in the homes of decision-makers has posed a threat to such officials (Penal Reform International, above n 4, 71).

24 The obvious example is cases of gender crimes where victims may not want their cases publicized.

25 Roy, above n 2, 132.

26 T. Dexter and P. Ntahombaye, *The role of informal justice systems in fostering the Rule of Law in post-conflict situations: The case of Burundi*, Centre for Humanitarian Dialogue (2005) 12.

27 T. Mennen, 'Putting Theory into Practice: Improving Customary Justice' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 138, 140).

28 *An Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages 2003* (7 October 2003); P. Banks, 'Grappling with Legal Pluralism: The Liberian Experience' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 65, 70).

29 Articles 10 and 16, respectively.

30 Article 16.

31 Penal Reform International, above n 4, 117-118.

32 See Chapter 6, Box 3.

33 J. Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case' (2001) 95(64) *American Journal of International Law* 71.

34 ICHRP, above n 1, 17.

35 D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, USIP Peaceworks No. 63 (2009) 85, United States Institute of Peace <http://www.usip.org/files/resources/liberian_justice_pw63.pdf> at 29 March 2011.

36 Ibid.

37 T. Chopra, 'Promoting Women's Rights by Indigenous Means: An Innovative Project in Kenya' (2007) 1(2) *Justice for the Poor*, 2-3.

38 V. Justiniani, *The Toghdeer Experience*, DRC Final Report (2006).

39 Ibid 14-16, 23-5.

40 Ibid 21-22, 28-32; J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, DRC (2006) 22-23. The success of the project in Somaliland generated interest in extending its scope of operation to include Puntland. Accordingly, traditional leaders there followed a similar process and came together in regional meetings to discuss revisions of *xeer*. This culminated in the signing of a National Declaration in February 2009, followed by a process of dissemination and awareness-raising. Importantly, the National Declarations in both Somaliland and Puntland contain the key points from the final Declaration of the Togdheer House of Aquils set out above: Horn Peace, *State Conference for the Traditional Leaders of Puntland*, Final Report of Implementation (2009).

41 At the conference, specific elders were

tasked with lobbying the Parliament to ratify the National Declaration; however, this is still pending. See generally DRC, *Harmonization of Somali legal* systems, final report (2002); DRC, *Follow up and dissemination of the National Declaration*, Final Report (undated).

42 A. Le Sage, *Stateless Justice in Somalia — Formal and Informal Rule of Law* Initiatives, Centre for Humanitarian Dialogue (2005) 52.

43 See further Justiniani, above n 38, 4, 33-34; DRC, *Satisfaction and Awareness Survey on the Dissemination of the Elders' Declaration* (2009).

44 Gundel, above n 40, 20.

45 Simojoki, above n 2, 9.

46 USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies* (2005) 5.

47 T. Barfield, *Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan*, draft report, USIP Rule of Law Program (2006) 11.

48 Gundel, above n 40, 43-44.

49 A. Danne, 'Customary and Indigenous Law in Transitional and Post-Conflict States: A South Sudanese Case Study' (2004) 30(2) *Monash University Law Review* 199, 219.

50 Ibid 219-221.

51 Note that there are many limitations associated with monitoring adjudication processes *vis-à-vis* international standards; ideally, a framework should be developed where norms are placed within the context of local constraints and realities.

52 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule of Law Tools for Post-Conflict States: Monitoring Legal Systems* (2006) 11-12.

53 For further reading on monitoring legal processes, see ibid 15-19.

54 J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003) 61.

55 This theme is explored in greater detail in Chapter 7.

CHAPTER 4 | Alternative Forms of Dispute Resolution for Customary User Groups

In situations where state justice is not accessible or otherwise non-responsive to community needs, and there are impediments to accessing just outcomes through customary fora, one solution may be the creation of new institutions that offer alternative forms of dispute resolution. Such institutions operate in parallel to customary justice systems, complementing or supplementing them, with a view to promoting access to justice and improving their operation through heightened competition. A related approach is to expand the reach of the formal justice sector and to make it more accessible and attractive to users of customary justice, again creating indirect pressure for internal reform at the customary level. Such alternate mediating institutions might be established by communities themselves, NGOs or the state, as explored below.

1. Alternative Dispute Resolution (ADR)

ADR is an umbrella term that covers a variety of non-judicial mechanisms for resolving conflict including negotiation, mediation, conciliation and arbitration.

Box 1
Types of alternative dispute resolution

Negotiation facilitates direct problem-solving between disputants without the assistance of a third party; conciliation involves a third party assisting disputants in reaching a settlement based on their own ideas for a solution; mediation involves the selection of a third party to assist disputants in resolving a particular dispute or repair the relationship through a mutually agreeable solution; and arbitration is where parties authorize a third party to determine how a dispute will be resolved following an expedited adversarial hearing during which both parties are permitted to present arguments and evidence, but with less formal procedures and rules that can be set by the parties. Although ADR can be binding or non-binding, negotiation, conciliation and mediation are generally non-binding, whereas arbitration often is. Although some jurisdictions require that ADR be attempted prior to filing a case before the courts, this chapter is concerned only with voluntary ADR at the community level.[1]

Although ADR can take a wide variety of forms, its features often resemble those attributed to customary justice systems:

- ADR is more **informal** than court-based adjudication.
- Decision-making is often driven by principles of **fairness and equity** as opposed to a strict application of rules.
- ADR processes are usually **participatory,** with disputants directly involved in the formulation of settlement agreements.
- ADR is generally **inexpensive and expeditious** when compared to court proceedings.
- Parties at ADR proceedings are **not usually represented**, although they sometimes make use of advocates or support persons.[2]

It follows that ADR and customary dispute resolution share many of the same advantages and disadvantages. When compared to state courts, ADR tends to be a fast and cost-effective means of resolving disputes, which, when coupled with the informality and flexibility of these processes, can be a more inviting forum for resolving disputes and with fewer entry barriers for poor, illiterate and less educated populations. As ADR solutions are usually consensus-driven, they are thought to better promote reconciliation, preserve the relationship between parties and restore community harmony. On the other hand, inherent flexibility, negotiability and emphasis on consensus-based decisions risks outcomes that lack consistency or predictability, and that do not adequately protect the rights of weaker disputants.[3]

Despite these commonalities, ADR enjoys some unique advantages that are not available through customary systems or that may allow it to bypass some of the customary system's constraints. First, ADR can offer disputants more privacy or better preserve confidentiality when compared to customary fora. It may also be a better interlocutor with the formal justice system, opening up opportunities for more consistent enforcement and a closer alignment of negotiated settlements and human rights standards. Finally, ADR may be a more appropriate vehicle for legal empowerment than customary institutions because there are low entry barriers and because adjudicators may be less prone to bias or corrupt practices. In this way, ADR has the potential to increase access to justice, interrupt customary leaders' monopoly on power, and support court reform by reducing delays and clearing backlogs.

Such possibilities have led some to propose ADR as an alternative path to justice in situations where both the formal and customary justice system are inaccessible, unresponsive to the needs of users, and/or violate the rights of disputants. Most obviously, where ADR is available at the community level and is a viable alternative to customary law, enhanced user choice may create competition, thus improving the effectiveness and fairness of customary processes. The various forms that such ADR solutions might take are examined further in this chapter; community-driven efforts to resolve disputes or manage conflict through means other than customary justice are discussed first, followed by NGO-led ADR and paralegals, and finally, state efforts to expand access to the formal justice system as an alternate form of adjudication.

Box 2
"ADR may be appropriate and effective when:
- high cost, long delays and limited access undermine existing justice processes;
- cultural norms emphasize the importance of reconciliation and relationships over 'winning' in dispute resolution;
- considerations of equity indicate that creativity and flexibility are needed to produce outcomes that are satisfactory to the parties;
- low rates of compliance with court judgments (or a high rate of enforcement actions) indicate a need for systems that maximize the likelihood of voluntary compliance; or
- the legal system is not very responsive to local conditions or local conditions vary."[4]

2. Community-driven alternatives to customary justice

Where conflicts or criminality threaten peace, safety and/or livelihoods, some communities develop alternatives or complements to customary justice processes. These take a variety of forms; some are extensions of, or variations on, the existing customary system, while others are more aligned to formal legal processes. They also vary in effectiveness. As shown below, some have avoided flaws found in both customary and state systems to provide fair and equitable means of obtaining justice and reducing violence. In other cases, the alternatives developed are comparable to forms of vigilante justice where outcomes are violent and affected by corruption, without any of the safeguards or procedural guarantees found in the customary system.

Box 3
Examples of community-driven dispute resolution mechanisms, Peru and Kenya
Rondas Campesinas: *Rondas Campesinas* emerged in rural Peru in the 1970s in response to landowners' growing frustration with the formal justice sector's failure to adequately deal with problems of theft and cattle rustling. *Rondas* generally comprise a General Assembly made up of landowners within a particular hamlet. Men aged between 18 and 60 years serve on *Ronda* night patrols. Suspects are apprehended and passed to the General Assembly, which determines both whether the suspect is guilty and what punishment will be administered. In some areas, *Rondas* have expanded their jurisdiction to cover other offenses such as slander, assault and family disputes. Like Peruvian customary justice, processes are male-dominated, decisions are driven by popular notions of fairness and equity, outcomes lack consistency and may be prone to elite capture and power asymmetries, and the use of corporal punishment is not uncommon. However, *Rondas* are a highly effective, efficient and popular mechanism for administering justice; by 1991, they covered nearly 3,500 hamlets over an area of 150,000 square kilometers.[5]

Peace and Development Committees: In rural Kenya, protracted high levels of inter-community violence prompted local actors to launch a range of ad hoc peace interventions. The success of these initiatives attracted NGO and donor interest, and within a few years, Peace and Development Committees (PDCs) were established across the arid lands. Composed of a representation of community stakeholders, PDCs facilitate the resolution and negotiation of inter-district and inter-ethnic conflicts, employing a range of peace building and negotiation techniques that are consistent with customary norms. PDCs also facilitate inter-community agreements (Declarations) that set out the key issues threatening to disrupt the peace and establish modalities for resolving specific problems. PDCs have been credited with contributing to falling numbers of violent incidents and conflicts being more containable. PDC-negotiated Declarations, in particular, are seen as means of stemming the power of government-appointed community chiefs and promoting upwards accountability.[6]

Clearly, there are lessons to be learned from initiatives that evolve from within communities themselves. In particular, when they are successful, an examination of such ADR mechanisms raises the question of whether they should be formalized or regulated, or how they might be successfully replicated elsewhere. Some argue that formalization is a means of heightening legitimacy and a critical step towards being able to obtain funding and hence expand activities or become self-sustaining.[7] Others submit that the effectiveness and/or legitimacy of such initiatives may be grounded in their independence from the government or external development actors. Alternatively, regulation or formalization may require transformations in community processes, such as greater compliance with human rights standards, possibly rendering them less authoritative or responsive to community needs.

In Kenya, as the effectiveness of PDC-negotiated inter-community Declarations became widely known, the Government wanted to become more involved. On the one hand, this was a welcome development; Declarations were endorsed by the Office of the President, and their implementation involved the executive authorities at local, district and provincial levels. Certain provisions in the Declarations, however, contradicted statutory principles. This led to efforts to align Declarations with Kenyan law and introduce certain practices such as democratic elections for the selection of PDC members. In several cases, such modifications were not well received, and it became increasingly evident that the more PDCs resembled the state system, the less effective they were. Evaluations of PDC Declarations suggested that impact was contingent upon the participation of local stakeholders in their negotiation and finalization: where they were drafted through bottom-up processes, they were known and popular, whereas when they were driven by higher-level stakeholders, NGOs or donor agencies, they were less known or had been rejected.[8] While such experiences certainly should not dissuade cooperative community-state engagement on justice issues, they do provide a cautionary tale against the external 'hijacking' of grassroots processes, particularly where such initiatives respond to local needs in ways that the state is unable to.

Box 4
Formalizing community dispute resolution mechanisms
From 1994 to 1998, the Community Centre for the Resolution of Conflict (CCRC) in Colombia successfully resolved 3,287 disputes, including neighbor disputes, family disputes, and cases of domestic violence and rape. Such high levels of success led to calls for the CCRC to be legalized, in part as a means of obtaining donor funding to sustain its operations. Local stakeholders aggressively resisted such moves; they claimed that state recognition would weaken the organization, the strength of which was grounded in its community identity and legitimacy.[9]

A sounder approach may be to encourage or incentivize the self-regulation of community-based initiatives or organizations. This has occurred in the case of some Peruvian *Rondas*: in Cajamarca, a Federation of *Rondas* was formed that took steps such as defining its objectives, functions, structure, jurisdiction and relation with the state justice system in the form of regulations.[10] Other *Rondas* have sought out human rights training.[11] The conditions supporting or prompting such moves need to be better understood, as well as other steps that might encourage or provide incentives for self-regulation or the better observance of procedural and rights protections in adjudication processes.

3. NGO-led mediation

Dispute resolution services provided by NGOs are a recent but growing response to access to justice vacuums caused when formal and/or customary justice systems are unsatisfactory or ineffective. Such fora, sometimes labeled 'popular justice mechanisms', can take a variety of forms, but are often grafted upon customary dispute resolution methodologies and then adjusted to offer

enhanced procedural and rights guarantees. They are generally free, and decisions are usually non-binding.[12] Staff may be local or external to the communities in which they operate, but receive training, *inter alia*, in mediation, legal skills, human rights and gender equality. Services provided might include investigation, mediation, post-mediation monitoring of decisions as well as complementary functions such as community legal education and dispute resolution training for community leaders. Where most effective, NGOs are linked to legal aid services that can assist with disputes that are either unsuitable for, or cannot be resolved through, mediation.

Case Study 1
Maduripur, Bangladesh

In response to the difficulties faced by poor and marginalized groups accessing the formal legal system, Maduripur, a Bangladeshi NGO, established a multi-tiered structure of village mediation committees.[13] The methodology employed is an adaptation on Bangladeshi customary mediation, *shalish*, but modified to eliminate some of the negative practices characteristic of traditional *shalish,* and to better address the needs of users.[14]

In each village where the program operates, an 8-10 person Mediation Committee, reflecting the gender and ethnic composition of the community, is selected in consultation with local power-holders and elites (including elected officials, teachers and other socially influential persons). The Committees meet twice a month to mediate village disputes, free of charge. Oversight is provided by a mediation worker trained by Maduripur from the Union-level Central Mediation Committee.[15] Most disputes involve marital or property issues; domestic violence is the principal complaint of women clients. Criminal cases, including rape and murder, as well as complex land cases are not mediated, but are referred to the formal legal system, and Maduripur provides assistance through its legal aid division when required. Where mediation is successful, the agreement is recorded and signed by the parties. If mediation is not successful, the dispute is referred to a higher level in the Maduripur structure. Disputes that still cannot be resolved are referred to the courts, again with legal aid assistance if required.[16]

Maduripur mediates approximately 5,000 disputes annually across 487 committees. Of these disputes, between 66 and 88 percent are said to be successfully settled without going to court. Although mediation is voluntary, and decisions are not enforceable in a court, rates of compliance are also high. There may be several reasons for this, such as the perceptions of officialdom and authority attached to NGO-mediated and/or written decisions, post-agreement monitoring of the decision, or most likely, parties' knowledge that if an agreement is not reached or abided by, the complainant has a very real option of litigation: "[E]veryone knows that one can be sent to court if one does not obey the verdict of the *shalish*."[17]

Initiatives such as Maduripur represent an innovative model for resolving disputes in a way that is culturally appealing and offers better protection to vulnerable groups by reducing the corruption and discrimination they may be exposed to at both the customary and formal justice systems. This model, however, is not free from complication. NGO-facilitated mediation, unlike most customary systems, is rarely financially sustainable; operations require either financial support or a fee schedule.[18] NGO mediation also does not possess all of the tools of customary justice, such as the social authority of its leadership, participation and compliance driven by social pressure, and the facility to re-establish social harmony through its decision-making.

A further challenge is how to balance the need to distinguish the justice provided from that which is available through customary fora, with the need for the forum to establish itself as a legitimate and credible option for disputants. Phrased another way: while the objective of NGO-facilitated mediation is to better protect marginalized groups from discrimination and corruption, a forum that offers

solutions that are too dissimilar from social and gender norms risks being rejected or boycotted by the wider community.[19] The approach of Maduripur was a subtle and progressive realization of norm modification; modalities included providing education to local mediators and disputants, gradually introducing women mediators, and encouraging female participation in dispute resolution, both as committee members and as disputants. Processes were still male-dominated, but advancements were made. Women mediators mitigated some of the gender discrimination through their interpretation of customary law, and the presence of Maduripur provided women with more options for upholding their rights.[20] While this may seem like a logical approach, where this balance is struck is not always clear and may involve some trial and error; moreover, such change models are slow, and significant developments are unlikely to be seen for many years.

The NGO-mediation model also raises some questions. Mediation led by Maduripur appeared to enjoy high rates of both obtaining a solution and compliance. Given that mediation was voluntary and that respondent parties may have been able to get a more advantageous solution through traditional *shalish* (where they could have taken advantage of discriminatory gender norms, power biases and corrupt practices), it is reasonable to connect this to the threat of litigation. On the one hand, therefore, where the NGO offering the mediation service upholds human rights standards and provides procedural protections, and where processes are not affected by elite capture, it might be seen as an effective means of leveling the playing field. On the other, in contexts where the formal justice system is expensive, intimidating and/or corrupt — a place to be avoided by both the innocent and the guilty — the threat of litigation enjoyed by the NGO-assisted party may give them an unfair advantage over their opponent.[21]

Box 5
'Festivals of Justice', India
The People's Council for Social Justice was formed and is operated predominately by retired Indian judges who resolve disputes according to traditional notions of reconciliation and restoration. The Council has organized more than 217 Festivals of Justice — large dispute resolution meetings, which, to date, have led to the resolution of more than 37,000 disputes, as well as 645 legal literacy camps, and 24 community paralegal training courses from 15 days to three months' duration, some of which exclusively target groups such women or tribal leaders.[22]

4. Community-based paralegals

Paralegals are laypersons who have legal literacy skills, knowledge of substantive laws and skills in how to negotiate the court system. Their function is to provide a bridge between the formal legal system and society, thus demystifying the law and making justice more accessible.[23] Paralegals can offer a range of legal services that do not necessarily need to be provided by a lawyer, such as advice on: if a rights violation has occurred; an individual's legal rights in a particular situation; how to access government or NGO legal aid; and how to file a claim in court or at an administrative tribunal. In some contexts, they also provide quasi- or complementary legal services such as mediation, conduct community legal education, or undertake advocacy work.

Box 6
Useful skills for paralegals
Skills for paralegals might include knowledge of relevant statutory law, customary law and gender rights; mediation, negotiation and conciliation; case filing and investigation; advocacy; community education; and understanding of local government processes.

In most cases, paralegals operate out of city-based legal aid centers and thus are less accessible to community members in rural areas. Recently, however, the notion of community-based paralegals has increased in popularity. Community-based paralegals not only provide a means of accessing the formal justice system, but may also enhance the quality of justice at the customary level, either directly by working in partnership with customary leaders in the resolution of disputes, or indirectly by increasing competition in the provision of legal services.

There are many advantages to using paralegals in this manner. First, they are a cost-effective means of providing a variety of legal services to communities that cannot otherwise access the state system. Also, in contrast to lawyers, paralegals can be quickly and easily trained in large groups and do not need to have a pre-existing or specific skills set. The paralegal approach may be particularly suited to rural community contexts. First, paralegals operate between the customary and formal systems, using the advantages of both strategically and according to the situation; they are not limited to adversarial techniques, but can adopt a flexible and creative approach to solving problems using a range of tools including mediation, conciliation or facilitating court adjudication. They can also integrate reconciliation practices into dispute resolution and evoke the centrality of community harmony. Second, since they are community-based, they are familiar with community power dynamics, may be more accessible and approachable than non-local dispute resolution actors, and have a greater appreciation of the backgrounds to disputes. Such insights, combined with their flexibility, can make paralegals well placed to craft workable, socially legitimate and enforceable solutions. Third, where paralegals are connected to a legal aid service, they may be able to overcome problems of elite capture in the customary system because they have the option of litigation and high-level advocacy.[24]

Paralegalism is also appealing in programmatic terms. It is an approach that is often acceptable to both proponents of the state and the customary justice system. Paralegals can support the strengthening of the state by reducing court backlogs and forming bridges between the formal and customary systems. For advocates of the customary system, community-based paralegals represent a grassroots approach and one that may heighten the quality of customary justice.

The biggest challenge associated with paralegal models is how to obtain the support of customary justice leaders; to have impact, paralegals must represent a credible source of competition and threaten leaders' monopoly on judicial power; however, where this potential encroachment on power is too large, leaders may obstruct their work completely. One approach is to vest paralegals with wider functions. For example, it might be better to 'market' them as custodians of information on all issues concerned with state administration, such as benefits and services that communities might profit from, including those of a legal nature. An alternate approach is to bond paralegals to community leaders as assistants; paralegals might collect background information on a dispute, organize dispute resolution sessions, make records of proceedings, or provide advice to the customary leader on issues such as statutory law or the role of the police. Finally, where customary leaders are open to paralegals working independently, for example, undertaking mediation or advising community members about their rights, their work might be overseen by a board of community members or leaders.

Paralegal-driven dispute resolution again raises the issue of whether complainants receive an unfair advantage because of its associated threat of litigation. The case study below discusses Timap, a paralegal program in Sierra Leone. Timap openly acknowledges that, in the context of a dispute, it would be arbitrary to give the disputant who approached them first the benefit of their skills and experience. They see their duty as being to the overall community, and work with both parties to seek a mutually agreeable, negotiated solution through mediation.[25]

Case study 2
Timap for Justice, Sierra Leone

In Sierra Leone, access to the formal justice system is marred by a dearth of judges and geographic inaccessibility, while local courts (authorized to apply customary law) are prone to discrimination and corruption. In response, the Sierra Leone National Forum for Human Rights and Open Society Justice Initiative collaborated to develop a creative and versatile model to advance justice by delivering basic justice services through community-based paralegals. Thirteen paralegals, all of whom had secondary education, were recruited and trained in substantive law, the workings of the government and paralegal skills. They are supported and mentored by Timap attorneys, and supervised by Community Oversight Boards composed of local residents.[26]

Paralegals provide information on legal rights, mediate conflicts, assist clients interact with government authorities or chiefs, and undertake advocacy. For particularly serious cases of injustice, they may work with lawyers on the program to provide direct legal representation. The most common issues addressed by paralegals include domestic violence, corruption, child abandonment, police abuse, economic exploitation and abuse of traditional authority. Paralegals will not mediate rape cases, nor support a mediation agreement that tolerates domestic violence, even though this represents a departure from customary law. They follow strict protocols relating to record keeping, case tracking and confidentiality, and conduct follow-up and enforcement monitoring.[27]

Timap's dispute resolution services are popular within communities because the techniques used — principally mediation — resonate "with customary law's emphasis on reconciliation and community cohesion rather than punishment",[28] and unlike local court judges and the police, paralegals do not accept bribes. In this way, the program has raised a healthy competition with local 'big men' who previously held a monopoly over dispute resolution. Paralegals resolve approximately 80 percent of disputes that are brought before them, a success rate that is closely linked to the threat of litigation and to the perception of power and influence that locals associate with a human rights NGO. This rate of success must also be appreciated in terms of overall cost; paralegals work on around ten cases per month (2,208 per year), at a cost of US$117 per resolution.[29]

5. Enhancing access to the formal justice system

A final strategy for presenting communities with alternatives to customary justice is to enhance access to the formal justice system, either through legal aid services, expanding the reach of state justice services, modifying court processes to make them more appealing to customary disputants, or by creating new institutions that operate between the state and customary levels. While the principal objective is to enhance local communities' understanding of and access to state justice, a secondary benefit may again be improved customary processes as a result of enhanced competition, and in the case of some models, the state acting as a check and balance on customary leaders.

5.1 Decentralizing legal aid services

Programming options for reaching communities through expanded legal aid services include establishing branch offices of legal aid organizations in rural areas that offer legal advice, facilitate mediation and conduct legal advocacy. Alternatively, such organizations might run 'legal aid days' where staff travel to communities to undertake legal awareness raising and/or provide legal aid services.

Box 7
University legal aid clinics
University legal aid clinics are a mechanism whereby legal information, advice and assistance are provided by law students. Usually, students are linked to lawyers, but in certain jurisdictions, students may be permitted to appear on behalf of clients. Participation in such programs is often rewarded by course credits or is seen as a means of building skills to enhance future employment possibilities. In addition to enhancing the poor's access to the formal justice system, a further rationale is to build a cadre of legal professionals who are sensitive to pro-poor issues and who may commit to undertake legal aid work in the future, either as dedicated legal aid professionals or through pro bono work. While university legal aid clinics are not a principal means of providing services at the customary level, the model could be tweaked to do so by either organizing groups of students to participate in work placements in rural areas or providing incentives to students to commit to legal aid work following graduation for a period of time, for example, through fee waiver schemes.[30]

5.2 Expanding the reach of state justice services

The principal means of expanding state justice services to reach the community level is through the establishment of mobile courts. Mobile courts are staffed by court judges, often assisted by translators, who travel periodically to communities to overcome the cost and distance factors that otherwise make the court system inaccessible. Judges can deal with a range of issues including resolving criminal and civil cases or performing civil services such as marriages and the issuance of personal documentation. A closely related measure is to provide incentives to judges and magistrates to work in rural areas, including through financial and career advancement possibilities. A final programming option is to appoint Justices of the Peace within communities, or who serve a selection of communities. Justices of the Peace are usually lay magistrates who are authorized to mediate or conciliate disputes, and have limited jurisdiction to adjudicate minor criminal and civil matters.[31]

Box 8
Justice 'Houses', Guatemala
Piloted first in Guatemala, Justice Houses (*Centros de Administración de Justicia*) centrally locate a number of complementary justice services including a justice of the peace, a court of first instance, a prosecutor's office, a public defender's institute, a legal aid center, a mediation center and an office of the national police.[32]

Case study 3
Protecting the legal rights of tsunami orphans through mobile courts, Indonesia
In the Indonesian province of Aceh, the Indian Ocean tsunami left approximately 2,800 children orphaned or living in institutional care. Although the vast majority of these children were being cared for by a family member, fewer than 10 percent had been assigned a legal guardian by the courts. There was also low community awareness of the roles and responsibilities of guardians, inheritance laws, and the procedures for guardianship legalization. In response, IDLO in partnership with the United Nations Children's Fund (UNICEF) and the *Shari'a* Courts undertook a project aimed at improving the legal protection afforded to such children. IDLO facilitated the legalization of 173 guardianship appointments through a mobile *Shari'a* Court in a simple and cost-free procedure. As part of the legalization process, a judge would explain to the prospective guardian his/her responsibilities towards his/her ward under Indonesian and Islamic law, including that guardians must honor their commitment to a child's welfare by ensuring good education and health care, and that he/she was a trustee of their ward's inheritance and other assets, and could stand trial for the misuse of such wealth. Critically, the court service was

preceded by the dissemination of a practical and easy-to-understand guidebook covering issues such as inheritance, the procedures and benefits of legalizing guardianship and the obligations of guardians, as well as a one-day information and training session for 380 guardians, primary caregivers and village leaders.

An important outcome was that participants' interaction with judges in informal, community settings helped increase community confidence in the formal justice system: 97 percent of those surveyed after the project stated that they felt more confident in approaching the *Shari'a* Court for assistance in resolving their legal problems, and all 135 respondents surveyed believed that legalization had increased the protection afforded to orphans in their community.[33]

5.3 Making courts more appealing to customary users

Steps to make the formal justice sector more appealing to customary justice users might include reducing and simplifying filing procedures, streamlining case processing to reduce the number of times that disputants need to appear in court, eliminating or reducing case filing costs (particularly for indigent persons), providing free legal aid services, employing translators or multilingual court staff, and allowing cases to be heard in local dialects. Policy-makers might also explore importing modalities, principles or features of customary justice into the operation of state courts with a view to making them more user-friendly and to promote decision-making that is more likely to address the needs and perspectives of parties. Examples include:

- using conciliatory techniques aimed at mediated rather than adjudicated outcomes;
- facilitating greater participation of customary law actors in court proceedings such as by inviting them to provide their views on appropriate sanctions (particularly on punishments already or likely to be applied at the customary level), the background to the dispute, or customary law;
- promoting greater procedural flexibility, such as taking into account customary rules of evidence;
- promoting non-custodial and restorative sanctions consistent with customary law norms, such as compensation, restitution, community service work, and sentencing that takes into account the future relationship between the parties and punishments already or likely to be applied at the community level;[34] and
- training magistrates in customary law norms and principles to encourage judgments that better respond to community needs and conceptions of justice, and in laws that allow them to take customary or social context into account.

Box 9

Taking customary processes into account in court sentencing, Indonesia

In Indonesia, courts are legally obligated to take customary processes, local values and customs, as well as the outcomes of customary law tribunals into account during their deliberations, as shown in this example. Following a case of assault in Central Kalimantan, the formal and customary justice processes operated in parallel: the instigator was arrested by the police and an investigation started, while at the same time the matter was sent for a customary (*adat)* resolution at the community level. An agreement was reached in accordance with customary law and an amount of compensation was paid to the family of the victim. Once the case reached court, the judges took into account both the agreement reached and a letter from the victim's family to the court requesting the lightest possible sentence; a sentence of one-year imprisonment was handed down. The court judgment read: "[T]his matter has previously been peacefully resolved in the *adat* way between the families of the victim and the accused. The accused has fulfilled all the requirements of the *Dayak adat* resolution. The values which exist in the community should be observed and respected because besides the juridical and philosophical aspects of the case, this Judicial Panel must also look at the social [ones]…".[35]

Box 10
Non-custodial sentencing
Policy-makers and legislators should further explore sentencing guidelines that allow judges to consider alternatives to imprisonment. First, correctional facilities are expensive to operate and where they do not meet minimum standards, the rights of prisoners may not be upheld. Second, in contexts of generalized poverty and the absence of government social security such as state-run health services or unemployment benefits, custodial sentencing can have implications for both the families of perpetrators (for example, where the person incarcerated is a primary bread-winner) and the victim (who may be less able to negotiate compensation at the customary level to pay for medical bills, replace destroyed assets, or account for lost income). Third, in situations where, irrespective of incarceration, compensation is still payable under a negotiated customary agreement, responsibility for payment may fall on the perpetrator's family, thus collectivizing wrongdoing.[36]

5.4 The creation of new institutions that represent a better alignment of customary and state justice

Finally, the state might establish new mediating institutions that operate between the customary and the state system. These might include court-annexed mediation: a model that generally offers fast and inexpensive consensus-based decisions with the possibility of court-registered or enforceable decisions. Another option is justice centers, which bring a cross-section of society members including traditional leaders, the police, court representatives, government administrators and interest groups together to resolve disputes according to customary law. These centers may exhibit features of the formal system, such as case recording and procedural rules, as well as features of the customary system, such as user-friendly processes, streamlined case processing and mediation techniques.[37]

Box 11
Community justice courts, Guatemala
In Guatemala, in an attempt to integrate Mayan law into the state system, the Government created *Juzgados De Paz Comunitarios*. These courts are presided over by three members: two are elected by the community and do not have to have a legal education but need to be literate, bilingual and of good standing, and the third member is legally skilled and appointed by the *Organismo Judicial*. The courts handle mainly family and civil law matters but have limited jurisdiction over crimes carrying a maximum penalty of three years imprisonment. They apply Mayan customary law insofar as it does not contradict statute. While *Juzgados De Paz Comunitarios* are unpopular with Mayan communities, who view them as an example of state efforts to usurp Mayan law, they represent an interesting model that might, in certain circumstances, be a less intrusive means of linking the customary and state systems, and better respond to the needs and values of communities.[38]

6. Key challenges and lessons learned

6.1 The importance of providing and creating awareness of alternatives

A major impediment to the better protection of rights and responding to rights violations is that victims are often unaware of which acts are justiciable and/or how to enforce their rights. Raising legal awareness among users of customary justice systems, therefore, is an essential precondition to expanding justice options. Awareness-raising should target those rules most applicable to customary justice users, such as constitutional guarantees relating to equality and non-discrimination; laws that give formal recognition to customary institutions such as land ownership or marriage; modalities for accessing the state legal system and legal aid; laws that articulate how customary law fits into and is

recognized by the state legal framework; the jurisdiction of customary law actors; and minimum human rights standards or guarantees.

There are three main entry points for increasing legal rights awareness. The first is training, which may take a variety of forms, including community-based workshops, seminars or the integration of rights awareness into education curricula or other schemes. In addition, training may focus on specific groups such as customary law leaders, women or indigenous groups. The discourse on training methodologies is extensive; some key points that are relevant to training customary justice users are as follows:

- Training needs will generally be very basic; programs should focus on introducing fundamental legal principles such as minimum rights standards, non-discrimination and due process protocols;
- Training should emphasize practical skills, and methodologies should seek to operationalize and connect them to everyday life, as opposed to applying a theoretical or academic approach. For example, training on how to obtain a land registration document or register a customary marriage may have greater resonance than information on statutory legal principles or litigation;
- Adults respond best to active learning and training that employs pedagogical tools. Case studies and simulations where participants are required to solve everyday problems are preferable to academic-style lectures;
- The selection of trainers is very important; training teams should reflect the gender and ethnic composition of society, and issues such as conflict-sensitivity, language and literacy should be taken into account; and
- Follow-up or phased training is more effective than one-off events, as is joint training that links communities with different justice sector actors such as police, judges and legal aid lawyers.

A second entry point is through print media, such as brochures, newspapers or posters. When planning such programs it is again important to focus on the issues closest to the people and to present messages in non-formalistic language, free from legal jargon. Adult literacy levels must also be taken in account, particularly those of women and minority groups. Low literacy does not necessarily mean that print media is an unsuitable entry point, but simply that it must be complemented by other measures or innovatively marketed. Newspaper articles, for example, might be narrated and then discussed in dedicated radio programs focusing on justice issues.

A third entry point is through popular literacy media such as television, the performing arts, interactive plays and audio tapes. Such initiatives are often highly suited to rural and low literacy communities because they combine entertainment with an education function, have the capacity to reach large audiences, and are not constrained by literacy factors. A similar, but perhaps more cost-effective option is radio broadcasts; options include dramatizations, interviews with key legal actors or personalities, and facilities for listeners to send questions via SMS (text) and receive answers on air. [39]

Case study 4
Raising community legal awareness, Indonesia
In post-tsunami Aceh, IDLO launched a multi-faceted project designed to help communities, most of which operated according to customary law, to better understand and enforce their rights and access government assistance programs. The first component of the project involved the publication of a weekly column in the Serambi newspaper, *Anda dan Hukum dalam Keseharian* (The Law and You in Practice). Through such articles, IDLO profiled different judicial institutions (including customary institutions), examined topical legal issues and ran stories on individuals who had resolved cases through the state justice system — a move intended to eliminate common misconceptions and strengthen confidence in formal legal institutions. Articles were further disseminated through websites and e-mail list-serves, and the distribution of printed versions within communities and at training events.

A second component involved community-based information sessions and training, including the dissemination of low-literacy guides to understanding how to assert legal rights at both the customary and state legal systems. A third component targeted women, whose disproportionately poor legal awareness, low literacy and limited access to print media were restricting their capacity to protect their rights. The project involved the production and screening of a 30-minute educational film, "The Stories of Aisha, Rauda and Ainun: Protecting Women's Legal Rights Post-Tsunami". The film tracked the lives of three women, each struggling to overcome some of the most common legal issues affecting communities. The film was screened in 173 tsunami-affected villages, reaching approximately 5,650 women (at a cost of US$10 per beneficiary), followed by half-day information and training sessions.[40]

6.2 Unintended consequences of alternatives to customary justice

When assessing the value added of expanding the number of dispute resolution fora, the possible secondary implications for the effectiveness of customary law and broader issues of access to justice must be assessed and taken into account. Having multiple pathways to justice can weaken or corrupt the internal integrity of the customary justice system, the effectiveness of which is dependent on its social power to command user participation and respect.[41] When newly introduced options undermine the functionality of the customary system but are not strong enough or sufficiently accessible to replace it, access to justice may be reduced; if this creates a situation where no reliable justice options are available, the results can be increased vigilantism, violence and criminality. The case study below illustrates how efforts to enhance access to state justice can create a 'grey zone' where disputants, as well as justice providers, are divided on where and how different disputes should be addressed. The consequence is that customary dispute resolution can be rendered ineffective and conflicts remain unresolved.

Case study 5
Resolving a sexual assault case between two legal systems, Timor-Leste

In the aftermath of the conflict that engulfed Timor-Leste following the 1999 referendum, the United Nations Administration set about resurrecting key justice sector institutions and promoting a return to the rule of law. As a state of pluralism slowly evolved, disputants became aware of the advantages that could be garnered under each selected system. In one case of sexual assault, the father of the victim wanted the matter resolved in accordance with customary law. He stated that he did not trust the United Nations court system. The father of the accused, however, insisted that the matter be referred to the police in accordance with the law. The matter was referred to the police, and the accused was arrested under section 289 of the *Indonesian Penal Code (1982)* and transferred to Becora Prison in Dili. Despite confirmation of an assault by a medical practitioner, the court unofficially advised the families to attempt to resolve the matter at the community level. A customary hearing was convened, and it was decided that the perpetrator would provide the victim with 15 caribou (ox-like animals), and the victim's family with 15 caribou plus IDR 1,500,000 (approximately US$175). A reconciliation ceremony was held, and the victim's father declared the matter closed.

However, while a solution was found, the essential elements that made the customary system effective had not been met. The accused, knowing that he had avoided punishment at the judicial level, refused to show remorse. Because the perpetrator had not taken responsibility for his wrong, it was believed that the victim's respect was not restored. Most importantly, by failing to abide by the 'spirit' of the customary system, the perpetrator had shown disrespect for the ancestors. This, locals believed, had brought bad luck to the community as a whole. During the transitional period, the matter was never genuinely resolved, and the community continued to live in an uncomfortable state of unrest and antagonism.[42]

This case demonstrates that in some situations, the co-existence of the customary and formal legal systems can nullify the effectiveness of customary dispute resolution. Many argued that the father of the accused exercised his legal right to refer the matter to the court only to avoid what would, at the customary level, have amounted to a larger fine.[43] Further, the court's referral of the matter to the customary system provided the accused with what was perceived as a verdict of innocence. This apparent vindication made it easier for the accused to deny responsibility, destroying a cornerstone of the customary legal process.[44]

6.3 Alternate options will be slow and may not fully comply with human rights standards

The options described in this chapter for vesting customary justice users with more choice as to where they resolve disputes each require that they voluntarily step outside of the more familiar and culturally dominant customary sphere. As will be discussed below, while complainants often have incentives to make use of alternate fora (as they offer greater protections), they may confront various social barriers when doing so. Respondents, on the other hand, have few incentives to voluntarily submit themselves to such mechanisms, particularly where they may be less able to use their gender, power or wealth to engineer outcomes in their favor. In many cases, it is only the threat of litigation that makes such models workable.

Given these complex social and vested interests at play, the approaches adopted and outcomes delivered by alternate justice providers generally need to be measured and not too far removed from customary norms. As described in the Maduripur case study, in order to encourage disputants to reject traditional *shalish* and submit their disputes to village mediation committees, decisions and modalities needed to offer sufficiently better protections and yet not represent too radical a shift in social conventions that committees were 'pariahed'.

Outcomes also need to find an acceptable balance between enhanced rights protections and user satisfaction and associated social protections. In other case studies analyzed in the development of this book, mediating NGOs would not necessarily strive for outcomes that fully upheld women's rights as provided for in statute or international standards. In a case of domestic violence, for example, a 'successful' outcome might have been a significant reduction in violence, rather than no violence at all. Such a resolution recognizes that, for the victim, a satisfactory outcome in terms of gender equality might be unsatisfactory if it leads to divorce or the parties remain unreconciled — a situation that may have resulted in a higher overall level of vulnerability.[45]

The point to be emphasized is that for alternative dispute resolution fora to be voluntarily accepted and utilized, what they offer in terms of procedural protections and outcomes will generally be quite measured. Normative reforms will be slow, and in the near term, those applying or supporting them may need to accept that some level of harm will continue. Such a balancing of 'less harm' against 'no harm' may not be a strategy that all donors or policy-makers are willing to endorse.

6.4 Customary leaders may oppose interventions that reduce their monopoly on power

A final challenge to be addressed is the reality that customary leaders often hold a monopoly over dispute resolution and have strong vested interests in holding onto such power. The introduction of alternative pathways to justice may thus be strongly resisted; leaders may attempt to dissuade or obstruct users from referring matters to either NGOs or the formal legal system. While this is often for self-interested reasons, for example, for preserving their capacity to extort bribes, there may also be other social factors in play. In Indonesia, *adat* leaders actively discourage community members from approaching the formal justice system because this is perceived as a sign that they are unable to maintain order in their villages, weakening their credibility as leaders.[46] Resistance may also be for pragmatic reasons; in Somalia, *xeer* agreements formed through customary law are the key vehicle through which inter-clan security is maintained.[47]

Regardless of the underlying rationale, users of customary justice systems will generally need to weigh the benefit of approaching an alternate forum with the potential negative consequences, such

as the risk that an offended customary law leader might discriminate against them in a subsequent decision, or that they might receive a larger penalty if the dispute is ultimately resolved customarily. Disputants who leave the customary realm may also receive social sanctions from the community at large for disregarding norms relating to group harmony and cohesion.

Resistance by customary leaders and the ramifications or barriers disputants may face in accessing alternate fora must be thoroughly understood and integrated into any reform strategy. In particular, strategies aimed at gaining the acceptance or support of customary justice leaders should run in parallel with any intervention. Some programming options have already been discussed, such as bonding paralegals to customary leaders as assistants, or 'marketing' them as the holders of a range of useful skills and information about the state system, including legal information. Similar strategies could be applied to NGOs offering mediation services. In situations where resistance cannot be completely overcome, opposition may be mollified by involving leaders in decision-making or vesting them with oversight responsibilities.

7. Conclusion

This chapter discussed a new and scarcely analyzed approach for enhancing the empowerment and access to justice of customary justice users: the introduction of community-level alternatives to customary dispute resolution. Perhaps the most interesting aspect of this approach is that it has the potential to enhance access to justice in a number of different ways: disputants can take their disputes to mediating institutions that offer better procedural and rights protection; these new institutions can work to complement customary fora, particularly where there is an overflow of cases or customary leaders are badly placed or uninterested in resolving certain types of disputes; and the establishment of new fora might create a competition in the provision of dispute resolution services, hence motivating internal reforms in customary legal processes.

Any investigation into the utility of such approaches should pay due attention to grassroots mechanisms that evolve to complement or replace systems of customary justice. In particular, the conditions under which such mechanisms were established, how they were able to overcome customary leaders' monopoly on power to either replace or coexist with them, and how normative changes were facilitated need to be explored and better understood. The forces pushing or facilitating such transitions may provide the ground rules for how to best support such mechanisms without modifying or destroying them or good practices for how to establish ADR mechanisms.

The bulk of this chapter discussed NGOs and paralegals as alternate justice providers. As an 'honest broker', such models have great potential to ameliorate some of the problems associated with customary justice. They may also be the only entry point in situations where governments are not committed to justice sector reform. However, NGO-mediated justice is usually unregulated, can operate in a closed and private environment that is difficult to monitor, and ultimately, is only as good as the NGO or paralegal involved. Such initiatives require careful monitoring, ongoing training and incentives to self-regulate in accordance with minimum rights standards.

A final point is that when considering the utility of establishing alternate mechanisms for accessing justice, it should not be assumed that customary justice is preferable to state justice, even when the former conducts the bulk of dispute resolution. Sometimes users do want 'more state', but are obstructed by geographic inaccessibility, cost or lack of knowledge.[48] The options explored in this chapter for expanding the reach of the state offer the dual benefits of expanding user options and prompting competition, both of which may result in improved outcomes and rights protections. When state or donor policy is directed at the reform of the formal justice sector rather than engagement with the customary system, such entry points may be a means of integrating legal empowerment outcomes into an otherwise state-centric approach to reform.

Box 12

Supporting the establishment of a community-level ADR mechanism

Issues to consider when establishing an ADR mechanism:

- Composition of dispute caseload: civil or criminal cases, their nature, frequency, etc.?
- Who has knowledge of disputes occurring: local leaders, religious leaders, state officials, the police?
- Whom do citizens trust to discuss their problems openly?
- Who has the legal authority to facilitate dispute resolution?
- Who has the moral/social authority to facilitate dispute resolution?

Possible steps in mediating a dispute:

1. Investigation
- Provide each side with the opportunity to uninterruptedly explain their version of events.
- Locate witnesses and evidence.
- Obtain background information and the history of the dispute.
- Discuss the case with previous mediators and village leadership.

2. Facilitation and discussion
- Hold a meeting at a neutral location.
- Refer to the applicable law.
- Explain the different options and costs for dispute resolution.
- Discuss potential solutions.

3. Formalization of an agreement
- If an agreement is reached, it should be written down and signed/marked by parties, mediators and witnesses (information to be included: the date, location, summary of mediation process, the agreement reached, and sanctions for non-compliance).
- If no agreement can be reached, the dispute should be referred to a higher authority.

4. Reconciliation and follow-up
- Mediators should report back to community and village leadership, taking into consideration the privacy and confidentiality of disputants.
- Post-agreement monitoring of agreement.[49]

MATRIX OF ENTRY POINTS AND GOOD PRACTICES

NGO-led mediation services and community-based paralegals

Entry points

Training of mediators/paralegals in customary law, statutory law and associated skills such as mediation, investigation, negotiation, advocacy and community education; training might also cover the provision of other services such as information on government schemes and subsidies.

Development of protocols and procedural safeguards regarding issues such as which disputes can and cannot be mediated, representative participation, record-keeping, giving public notice that dispute resolution is taking place and of the result (taking into account the confidentiality of disputants), and rules preventing mediators/paralegals from receiving financial compensation from disputants (or where this is necessary for the viability of the model, such remuneration should be stipulated in advance).

Establishment of oversight programs to monitor the work of mediators/paralegals and provide ongoing or follow-up training.

Integration of mediation services into established community service organizations, or expansion of mediation services to offer additional services as a means of outreach and income generation.

Embedding paralegals in established community-based NGOs, or identifying trainee paralegals from established NGOs, such as women's advocacy groups.

Establishment of linkages between mediation/paralegal services, courts and the police, with clear referral protocols.

Establishment of linkages between mediators/paralegals and legal aid services that can undertake public interest litigation and assist with complex cases, cases that cannot be resolved, or cases where the agreement is breached.

Provision of orientation training to the police and other local justice providers on the role and services provided by mediation NGOs/paralegals, as well as periodic meetings with state judicial actors and the police to discuss ongoing matters of mutual concern.

Good practices

Consulting closely with community members and leadership in the establishment of mediation/paralegal services, as well as ongoing dialogue and information exchange.

Basing mediation/paralegal models on existing customary norms and processes insofar as they are rights-protective.

Forming mediation/paralegal committees that are representative and inclusive of society's different groups (e.g. women, youth, minorities, the poor, local leaders, religious leaders, the police, teachers, general community members).

As a general principle, giving priority to supporting local mediating NGOs over international NGOs since they are more likely to be considered locally legitimate and have a long-term presence.

As a general rule, parties participating in mediation should be informed of their right to refer their case to the state justice system at any stage of proceedings. Likewise, coercive measures should not be used to enforce mediated agreements.

Extending state legal services to communities

Entry points

Expansion of legal aid services including by establishing branch offices of legal aid organizations in rural areas.

'Legal aid days' where staff of legal aid services travel to communities to undertake legal awareness raising and/or provide legal services.

Establishment of mobile courts (particularly effective in conflict and post-conflict situations and where displaced persons may be unable to leave camps to access state services).

Establishment of court-annexed mediation services.

Provision of incentives to judges and magistrates to work in rural areas, including through financial and career advancement possibilities.

Establishment of 'Justice Houses', which centrally locate a number of complementary justice services such as a magistrates court, the police, legal aid services and mediation services.

Establishment of new mediating institutions that bring together a cross-section of officials including traditional leaders, police, court representatives, government administrators and interest groups to resolve disputes according to customary law.

Adjustment of University Legal Aid Clinic models to offer services to rural communities, for example, by organizing groups of students to take on work placements in rural areas or providing incentives to students to commit to legal aid work following graduation.

Training of magistrates in customary law norms and principles to encourage judgments that better respond to community needs and conceptions of justice, and in laws that allow them to take customary norms or social context into account.

Good practices

Making the formal justice sector more appealing to customary justice users such as by reducing and simplifying filing procedures, streamlining case processing, eliminating or reducing case filing costs (particularly for indigent persons), providing free legal aid services, employing translators or multilingual court staff, and allowing cases to be heard in local dialects.

Making the state justice system more representative of the population, such as by including language skills or a knowledge of customary law in recruitment criteria.

Importing modalities, principles or features of customary justice into the operation of state courts, for example:

- using conciliatory techniques aimed at mediated rather than adjudicated outcomes;
- facilitating the greater participation of customary law actors in court proceedings;
- promoting greater procedural flexibility, such as taking into account customary rules of evidence; and
- promoting non-custodial and restorative sanctions consistent with customary law norms such as compensation, restitution and community service work.

footnotes

1 Centre for Democracy and Governance, *Alternative Dispute Resolution Practitioners' Guide* (1998) 4, Appendix A 2-5.

2 Ibid 6.

3 Ibid 21-22; UNDP A2J, *Programming for Justice: Access to All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 98.

4 Taken from Centre for Democracy and Governance, above n 1, 12.

5 J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003) 19-23; J. Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America' in C. Sage and M. Woolcock (eds), *World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006) 113, 119-120. See also The Congress of Traditional Leaders of South Africa (Contralesa) <http://contralesa.org/> at 22 March 2011: formed in 1987, the key aim of Contralesa is the maintenance of community order, including through night patrols and dispute resolution. The Congress also actively lobbies the Government for job creation and the construction of community infrastructure such as schools and health clinics; B. Tshehla, 'Non-State Justice in the Post-Apartheid South Africa — a Scan of Khayelitsha' (2002) 6(2) *African Sociological Review* 9-13.

6 T. Chopra, *Building Informal Justice in Northern Kenya*, World Bank Justice for the Poor (2008) 14-46; See also S. Dinnen, 'Interfaces Between Formal and Informal Justice Systems to Strengthen Access to Justice by Disadvantaged People' (paper presented at UNDP's Asia-Pacific Rights and Justice Initiative *Practice in Action Workshop*, Sri Lanka 19-21 November 2003, 15-18).

7 Faundez, *Non-State Justice Systems in Latin America*, above n 5, 60.

8 Chopra, above n 6, 14-46; T. Chopra, *Reconciling Society and the Judiciary in Northern Kenya*, World Bank Justice for the Poor (2008) 3-4.

9 Faundez, *Should Justice Reform Projects Take Non-State Justice Systems Seriously?*, above n 5, 124-125.

10 Faundez, *Non-State Justice Systems in Latin America*, above n 5, 26-27.

11 Faundez, *Should Justice Reform Projects Take Non-State Justice Systems Seriously?*, above n 5, 120.

12 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 15.

13 In Bangladesh, court-based justice is not an attractive option, particularly for the poor; it is expensive and plagued by delays, corruption, sexism, poor enforcement and procedural bureaucracy. The preferred alternative, *shalish*, involves consent-based arbitration or mediation procedures. It has greater social legitimacy than the courts, but its norms are tainted by gender bias and elite capture (S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for the DFID (2003) 7-8; E. Wojkowska, *Doing Justice: How informal systems can contribute*, UNDP, Oslo Governance Centre, The Democratic Governance Fellowship Programme (2006) 47).

14 Centre for Democracy and Governance, above n 1, Annex 2, 1-3; Golub, above n 13, 10-11.

15 In each Union, Maduripur has established Central Mediation Committees of 10-12 members selected from the Village Mediation Committee. These members receive a three-day training in mediation and legal skills and one member (with a minimum of an 11th grade education) is selected to undergo a further ten days of training.

16 Centre for Democracy and Governance, above n 1, Annex 2, 3-4.

17 Ibid Annex 2, 1; Golub, above n 13, 12, 28; Monitoring and evaluation conducted by Maduripur found an 88 percent success rate from a sample of 2,699 cases (Penal Reform International, above n 12, 90-91). For further reading on similar programs, see generally, L. Hasle, 'Too Poor for Rights: Access to Justice for Poor Women in Bangladesh — a case study' (2003) 29(3-4) *The Bangladesh Development Studies*, 6; R. Diprose, P. Deeks and S. Invong, *Dispute Resolution and Commune Councils in Cambodia: A Study of Conflict and Best Practices for Peace*, USAID and the Asia Foundation (2005); R Yrigoyen Fajardo, K .Rady and P. Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples*, UNDP Cambodia and Ministry of Justice, Royal Government of Cambodia (2005).

18 Centre for Democracy and Governance, above n 1, Annex 2, 1.

19 The experience of NGOs that took a more aggressive approach was that where agreements promoted were too far out of line with social norms, they met with resistance; women mediators were harassed and labeled as immoral for assuming a role that did not comply with social gender stereotypes; and there was low compliance with agreements negotiated; Hasle, above n 17, 120-121.

20 Centre for Democracy and Governance, above n 1, Annex 2, 8; Hasle, above n 17, 128-129.

21 Hasle, above n 17, 118-119.

22 Penal Reform International, above n 12, 89-90.

23 Open Society Institute Justice Initiative, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (2006) 28-29.

24 Ibid 28-29.

25 Ibid 17.

26 Ibid 9-14.

27 Ibid 14-17.

28 Ibid 15.

29 Ibid 15-16, 23.

30 See generally M. McClymont and S. Golub (eds), *Many Roads to Justice: The Law Related Work of the Ford Foundation Grantees Around the World*, The Ford Foundation (2000) 267-282.

31 In Peru, for example, Justices of the Peace enjoy immense popular support; they are elected from within communities and many are community leaders. They adopt processes and techniques of state legal officers, but tweaked and influenced by customary law. The Peruvian model was used as a basis for similar initiatives in Colombia, Ecuador, Bolivia and the Bolivar Republic of Venezuela; Faundez, *Non-State Justice Systems in Latin America*, above n 5, 34-37.

32 J. Hessbruegge and C. Garcia, 'Mayan Law in Post-Conflict Guatemala' in D Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011) 106-107.

33 IDLO final evaluation report (2006) (on file with author). Another example is a 'floating court' in the form of a riverboat that provides services to remote communities in the Bailique Archipelago at the mouth of the Amazon River. The court services provided include the informal conciliation of disputes, performance of marriage ceremonies and provision of identity documents. These legal services are bundled with other mobile social services such as dental care; S. Blore, *Justice Aboard* (2006), BNET <http://findarticles.com/p/articles/mi_go2043/is_3_58/ai_n29265671/> accessed 13 March 2011.

34 Penal Reform International, above n 12, 150.

35 UNDP Indonesia, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 33, 55.

36 Penal Reform International, above n 12, 127.

37 For example, as seen in Guatemala: S Hendrix, *Guatemalan "Justice Centers": The Centrepiece for Advancing Transparency, Efficiency, Due Process and Access to Justice*, American University International Law Review 15 (2000) 813, 814, 820-822; see also Faundez, *Non-State Justice Systems in Latin America*, above n 5, 28-33.

38 Hessbruegge and Garcia, above n 32, 108-109.

39 For example, in Burundi: T. Dexter and P. Ntahombaye, *The role of informal justice systems in fostering the Rule of Law in post-conflict situations: The case of Burundi*, Centre for Humanitarian Dialogue (2005) 35. A similar entry point is television programs on legal rights using, for

example, mock trials, see for example, 'My right' television program in Armenia (World Bank, *TV Show Increases Awareness of Legal Rights in Armenia* (2005) World Bank <http://www.worldbank.org.am/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/ARMENIAEXTN/0,,contentMDK:20591687~menuPK:3950073~pagePK:1497618~piPK:217854~theSitePK:301579,00.html> at 21 March 2011).

40 E. Harper, *Post-Tsunami Legal Assistance Initiative for Indonesia Monitoring and Evaluation Report*, IDLO (February 2006 — September 2007) 39-47, 55-62.

41 J. Adoko and S. Levine, 'How can we turn legal anarchy into harmonious pluralism? Why Integration is the key to legal Pluralism in Northern Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 80, 83).

42 E. Harper, *(Re)constructing a Legal System in East Timor: Challenges to Introducing Legal Norms and Principles into Post-Conflict States Under UN Administration*, Doctor of Philosophy, University of Melbourne (2007) 115-117.

43 Had the perpetrator been found guilty, the fine imposed by the court would have been imprisonment, a punishment perceived as less severe than the material fine (money and animals) imposed at the customary level.

44 See T. Hohe and R. Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor*, paper prepared for USIP (2006) 60.

45 Hasle, above n 17, 124-126.

46 UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with BRR, BAPPENAS, UNSYIAH, IAIN Ar-Raniry, IDLO and the World Bank (2006) 70-71.

47 M.J. Simojoki, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia', in IDLO Working Paper Series, *Enhancing Legal Empowerment Through Engagement with Customary Justice Systems* (2011) 8-9, 12, International Development Law Organization <http://www.idlo.int/download.aspx?id=251&LinkUrl=Publications/WP1Somalia.pdf&FileName=WP1Somalia.pdf> at 21 March 2011.

48 ICHRP, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 49.

49 Adapted from Diprose, Deeks and Invong, above n 17, 63-74.

CHAPTER 5 | Models for a Customary-State Justice Interface

Any discussion on how to enhance the access to justice and legal empowerment of marginalized groups is incomplete without considering the interface between the customary and formal legal systems, and how states can regulate, modify or utilize this interface to influence the manner by which justice is dispensed at the customary level.

The relationship between the customary and the state justice systems can take a variety of forms. In some countries, customary dispute resolution is proscribed, while in others, customary law is recognized through legislation and its fora integrated into the state court hierarchy. In between these two extremes, some states grant limited jurisdiction to specific groups, or customary law is recognized insofar as it does not abrogate constitutional or other statutory provisions. The relationship between the state and a customary justice system can also be unclear or poorly defined. In Botswana, customary leaders sometimes employ state law, while in eastern Tibet and Pakistan, it can be difficult to differentiate between state and customary fora because the principal actors are often the same.[1]

The nature of the interface between the state and customary system will often reflect the organization and distribution of political, social and economic power in a particular country context. Customary legal systems — to the extent that they redefine authority and appropriate state sovereignty — can "challenge the state's monopoly on violence".[2] Likewise, jurisdiction over the use and control of commodities such as land, water and natural resources can have important economic implications. Communities that rely on customary law also represent important political constituencies, and to the extent that recognition of their laws is based on their right to culture, the way in which the customary system fits into the state framework can be a political or human rights flashpoint.[3] In such contexts, control over the customary system insofar as it represents a tool of social ordering, mitigation of violence and resource distribution may be contested, manipulated or exploited to the advantage of the state, elites or customary power-holders themselves.

The relationship between the state and customary justice systems, however, is not always one of competition or opposition. The state may support, facilitate or encourage customary justice systems be it for benign or harmful reasons. Most commonly, the state relies on a customary system as a low or no-cost means of reducing the workload of the courts. In Indonesia and Afghanistan, for example, the courts may refer cases back to the customary system, particularly in civil and family law matters, for a quick and expedient outcome.[4] State courts may also rely on customary mechanisms for evidentiary purposes, to assist in the enforcement of decisions, or to carry out other aspects of state business, for example, registration of marriages or births.[5] In particular, in conflict and post-conflict situations, the customary system can be instrumental in maintaining law and order, and promoting political stability. During the civil war in Somalia, customary structures gained elevated importance due to their ability to provide a minimum level of security and their role in facilitating peaceful relations between and within clans. Today, in the areas where the Somali Government is functional, it relies heavily on support from customary authorities and interacts extensively with them. The traditional elders are regarded as the guarantors of peace and stability, and customary law as "the glue that prevents a collapse into anarchy".[6]

1. Approaches to regulating the customary-state justice interface: From prohibition to partnership

In terms of how states have approached questions of legal pluralism and defined the customary-state interface, some have tried to abolish customary fora, hence vesting the state with a monopoly over the administration of justice, while others have chosen to work with customary justice systems with a view to regulating their operation. Attempts to proscribe customary adjudication, for example, through legislation nullifying customary law or removing jurisdiction from traditional leaders, have generally had poor records of success. In Sierra Leone, reforms stripping chiefs of dispute resolution responsibilities have had little impact and many, if not the majority, of disputes in rural communities continue to be resolved customarily.[7] In Burundi, reforms were more successful; however, many believe that in the context of poor access to state justice, preventing chiefs from resolving criminal cases has promoted a culture of impunity.[8] Similarly, in Liberia, jurisdictional limitations that prevent chiefs from mediating serious crimes, while for the most part respected, have arguably had more benefit for the wealthy and powerful who are able to use the courts to their advantage, hence deepening the justice vacuum at the community level.[9]

Limiting customary adjudication, particularly where state courts are weak, may have further harmful impacts; accumulated unresolved disputes can manifest in increased criminality and violence, and the imposition of one system may result in conflict and instability. Alternatively, as discussed in chapter 3, proscribing customary resolution may simply push it underground where less regulation leaves marginalized groups even more vulnerable to exploitation and unsatisfactory outcomes.[10]

In part due to low levels of effectiveness in preventing customary dispute resolution, but also due to better recognition of the important role played by customary justice, the last two decades have seen a trend toward governments partnering with customary systems with a view to closing the gap between state law and local practices.[11] Three principal approaches are reviewed in this chapter. First, states may recognize customary laws or institutions, usually with some measures of conditionality, such as consistency with constitutional or statutory provisions. Second, customary rules may be recognized in such a way as to allow state courts to adjudicate customary cases and apply customary norms. Third, governments may introduce policies of decentralization whereby customary legal fora are integrated into the state justice system.

Box 1
Modalities of state-customary law interface:

Recognition
- unqualified recognition: a specific group is granted an autonomous legal space, usually in the form of special jurisdiction, insulated from state interference;
- conditional recognition: customary law is recognized insofar as it is consistent with statute, human rights standards and/or constitutional provisions; and
- qualified recognition through specific legislation, regulations or instructions.

Incorporation
- customary law is recognized as a source of law, and courts (usually at the bottom rung of the state hierarchy) are vested with the authority to adjudicate customary cases and apply customary law.

Decentralization
- customary courts are integrated into the state court hierarchy, usually as the bottom tier of the court structure.

2. Recognition of customary law or actors

States may recognize customary law or customary jurisdiction with varying conditions or levels of qualification. The most liberal approach is where a specific group is granted an autonomous legal space, usually in the form of special jurisdiction, insulated from state interference.[12] In Kenya,[13] Zimbabwe,[14] Lesotho[15] and Sierra Leone,[16] for example, certain customary laws are exempted from constitutional guarantees relating to gender equality.

A more common situation is where customary law is recognized insofar as it is consistent with statute and/or constitutional provisions. In Peru, for example, *comunidades campesinas* and *comunidades nativas* (farmer communities and indigenous communities) are authorized to administer justice according to customary law provided that fundamental human rights are respected;[17] in South Africa, customary law is recognized subject to constitutional and statutory conformity;[18] and in Namibia, customary law can deviate from common law, but will only be sustained where consistent with the Constitution.[19]

Finally, states may recognize customary law as regulated by legislation. In Indonesia, customary law forms part of the legal framework, but is further delineated at the provincial level.[20] In Aceh Province, for example, local instructions describe, *inter alia*, *adat* rules, the different *adat* institutions and their responsibilities, and the types of cases that can be heard.[21]

Box 2
The situation of indigenous and tribal peoples, International Labour Organization (ILO) Convention 169 (1989)

Article 8 of *ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (1989)* vests indigenous peoples with the right to retain their own customs and institutions insofar as they are compatible with fundamental rights as defined by the national legal system and internationally recognized human rights. Article 9 extends this right to cover dispute resolution, and further requires that courts take into account customary principles and methods when adjudicating penal matters.

In Guatemala, the state's non-recognition of Mayan law, as applied by indigenous authorities, is coming under increasing challenge.[22] This can be attributed to some extent to cultural sensitization programs targeting the justice sector; since 1998, judges and other rule of law actors have participated in training activities aimed at raising awareness on the needs and expectations of Mayan communities. At the same time, indigenous organizations have subtly adjusted their agenda to make Mayan law more attractive to the state by adopting more of a rights-based approach to Mayan law centered around ILO Convention 169.[23] In response, the Government is advancing a dual strategy whereby state institutions have been brought closer to the people and certain aspects of Mayan law have been integrated into the state justice system. Reforms to the *Code of Criminal Procedure (1994)* now allow the prosecutor, with the consent of the judge and victim, to refrain from prosecuting an offender provided that the crime did not involve drugs and was not carried out by a person acting in an official capacity; the offender must compensate the victim and in doing so, the "practices and customs of the various [indigenous] communities" can be applied.[24]

Further, in 2002, decentralization laws recognized the competence of *alcalde communal* to mediate conflicts brought to his or her attention by community members.[25] Tacit arrangements of co-existence are also emerging; some judges will only hear cases that cannot be resolved through customary fora, while others treat customary outcomes as valid contractual settlements that cannot be further pursued in a state court.[26] These developments reached a high-water mark in 2003 when a judge, a prosecutor and the local indigenous authorities agreed that a burglary case would be handled customarily. In a subsequent state court trial, the judge invoked the right of indigenous peoples to resolve their own criminal matters under ILO Convention 169 and, on the principle of *ne bis in idem*, ordered the defendants' release.[27]

3. Incorporation of customary law into state court jurisdiction

A slight variation on the model above is where customary law is recognized, but responsibility for its application is vested in state judicial apparatus as opposed to customary fora. The most common modality is where state courts (usually at the bottom rung of the state hierarchy) are given the authority to adjudicate customary cases and apply customary law. In Uganda, for example, state courts can apply customary law where it is consistent with statute and not repugnant to nature, justice, equity and good conscience;[28] in southern Sudan, courts are permitted to "consider existing customary laws and practice prevailing in each area" in their adjudication of disputes.[29] Where such models are introduced, there will often be some attempt to abolish customary courts, as described in case study 1.

In situations of integration, modalities for ascertaining applicable customary law norms must be developed. In Nigeria, if a party wishes to evoke customary law in a court proceeding, section 14(1) of the *Evidence Act 1990* requires that he or she establish the existence and content of such law by way of appropriate evidence such as expert testimony or manuscripts.[30] This raises important questions about the criteria that should be applied when identifying experts or when assessing codified versions of customary law. As previously discussed, customary legal systems may exhibit wide variation over small areas; written codes may quickly become obsolete and risk locking diverse groups into a single interpretation of norms. Customary law is also often internally contested. Who is deemed representative of a particular community, therefore, is a complex issue, and safeguards need to be set in place to ensure that the norms presented do not discriminate against weaker groups.

A further issue is that, being unwritten and dynamic, customary law is prone to misinterpretation and/or misapplication. When this occurs, judges empowered to apply customary law may (advertently or inadvertently) cause modifications. Through this process they may craft a jurisprudence that is more responsive and rights protective, but there is also the risk that discriminatory norms may become formalized or frozen.

Case study 1
Integration of customary courts into the state court system, Malawi

In a series of reforms between 1994 and 1995, the Malawian Government abolished Traditional Courts and National Traditional Appeal Courts and integrated all lower-level Traditional Courts into the state system.[31] The shortcomings inherent in the reform process manifested in weakened access to justice, higher court and prison backlogs, and increased violence within communities.

A first difficulty was that there was no legislation or process to harmonize the integration process; this created uncertainty for litigants as to which court had jurisdiction over cases formerly handled by the Traditional Courts. At the beginning, a justice vacuum was created at the community level because most cases previously dealt with by the Traditional Courts (including those involving title and ownership of land, guardianship and divorce) did not fall within the jurisdiction of the Magistrate Court. Unable to find relief at the state court closest to them, disputants needed to file claims at the Malawi High Court, which was both geographically inaccessible and expensive. Although laws were subsequently amended to allow Magistrates to hear guardianship and customary marriage cases, confusion over jurisdiction persisted.[32] There was particular uncertainty as to whether magistrates were restricted to applying only the customary law applicable in the court's location or whether they were able to apply customary laws from multiple areas. Different judges adopted different approaches with the consequence of uncertainty as to the version of laws that would be applied to a particular case, the risk that disputants might be locked into a version of customary law that was not their own, or that they might be left without a remedy at all.[33]

A second problem was the wholesale incorporation of untrained Traditional Court chairpersons into the Magistrate Courts. These judges would hear cases unsupervised and in languages that they were unfamiliar with.[34] Exacerbating this, magistrates, who require little training to qualify for appointment, arguably did not have the skills to develop customary law jurisprudence. Not only did they receive little or no training in customary law, but they were also usually working in locations where the applicable customary law was not their own. As a result, the law applied tended to be a mix of customary norms and common law; rarely was the applied customary law deemed authentic.[35]

As a result of the combination of these problems, the Magistrate Courts were not popular or effective in rural areas; disputants were deterred by their inaccessibility and procedural complexity; magistrates lacked the trust of the community; and enforcement was slow, and orders were often flaunted.[36] Hungry for alternatives, some disputants turned to vigilantism. Moreover, despite being stripped of their powers, customary law actors continued to adjudicate both criminal and civil disputes; these actors were deemed more accessible and better placed to respond to community problems.[37]

A concomitant result was the impact that the reforms had on the relationship between customary and state justice sector actors. Chiefs became frustrated that Magistrates were not referring petty disputes to them for resolution and that there was an inadequate information flow regarding matters concerning village life, making it more difficult for them to govern. For example, when the police granted bail without consulting or informing village leaders, the result was confusion, diminished trust in the justice system, and in some cases, vigilantism.[38] While some magistrates refused to cooperate with customary actors, most police, prison officials and judges agreed that chiefs should be reinstated as the locus of dispute resolution, at least insofar as civil and minor criminal cases were concerned. The aim would be to reduce their caseloads and deal with the unsustainable rise in persons in correctional facilities, a large proportion of whom, they felt, could have been dealt with through customary processes.[39]

4. Decentralization of state court authority to customary courts

A final option for modifying the customary-state law interface is to decentralize state judicial authority to customary dispute fora operating at the community level. As described in the example below, the most common model is for existing customary courts to be integrated into the state court hierarchy (usually as the bottom tier of the court structure), generally with some degree of reform or regulation.

Case study 2
Customary courts, Botswana

In Botswana, customary courts (*kgotla*) are organized in a four-level tiered structure and have jurisdiction over a wide range of criminal and civil matters. At the apex of this structure is the Customary Court of Appeal, which is empowered to apply the Penal Code as well as customary law, and has a direct reporting line to the High Courts.[40] Lower-level Customary Courts are empowered to enforce customary law provided that this is not inconsistent with statutory provisions. Disputants appearing before Customary Courts are not represented, but can exercise their right to refer a case to the Magistrate Court at any time.[41] Customary Court Chiefs are government-salaried and most have established links to, and positive relationships with, the police, on whom they rely to enforce their decisions. Chiefs also have good relations with Magistrate Courts; they increasingly incorporate aspects of state law into their decision-making, and referrals of cases between Magistrate and Customary Courts are common.[42]

If a decision is made to formalize the power of customary law actors to adjudicate disputes, the most difficult issue generally relates to jurisdiction. Unlike the Botswana model above, the most common balance achieved is that the state maintains its monopoly over serious matters, and customary actors are given jurisdiction over only non-serious criminal and civil matters. The argument runs that only the state possesses the coercive measures required to adjudicate such disputes. Customary fora, by contrast, rely on voluntariness, and decisions are unenforceable. As a result, if a perpetrator refuses to submit him or herself to customary resolution, an agreement cannot be reached, or an agreement is broken, serious crimes may be left unaddressed, perpetuating a culture of impunity.[43]

The other side of the argument is that where the state system is inaccessible or dysfunctional, preventing customary actors from resolving criminal or serious disputes can result in a justice vacuum at the community level[44] or push the resolution of serious crimes underground, leaving vulnerable groups with less protections and fewer options for resolving their disputes. Further, where the resolution of serious criminal matters is vested in the state, and the resolution of less serious criminal and civil matters is vested in the customary system, the implication may be that the rich, informed and powerful, who are better able to negotiate (or manipulate) the formal justice system, are given an added advantage over marginalized groups in the resolution of the most serious of disputes, thus reinforcing socio-economic power imbalances and promoting discrimination.

Another common approach to the issue of jurisdiction is recognizing customary law actors to mediate disputes only insofar as they relate to issues of personal status. This situation, however, can have a disproportionately discriminatory impact on women, mainly due to gender biases inherent in many cultures' norms on marriage, succession and guardianship.[45]

All of these factors should be taken into consideration during a model's development, with decisions made within the context of a risk analysis that balances states' commitment to the rule of law against access to justice considerations.

5. Establishing new dispute resolution apparatus at the community level

While it cannot be strictly classified as a modality for a state-customary justice interface, a final model that should be discussed is where the state creates a new dispute resolution apparatus that operates at the community level. Often, this occurs in concert with efforts to eliminate or curtail customary dispute resolution, although in other contexts, such fora may operate (either officially or unofficially) in parallel with the customary justice system. The rationale behind such interventions is to encourage the resolution of disputes within the scope of the state's jurisdiction by eliminating some of the common entry barriers and disincentives associated with the courts. Examples might include fora that operate in local languages, are less formal, impose fewer costs (financial and opportunity) on disputants, are not bound by strict procedural rules, and that offer mediation rather than an immediate application of statutory law.

Case study 3
Local Council Committee Courts, Uganda

In Uganda, Local Council Committee Courts (Community Courts) were created under statute. They operate at the village, parish and sub-county level with jurisdiction over petty criminal and civil matters in their geographical area.[46] Remedies include compensation (limited to Ush5,000, approximately US$2.1), restitution, apology, reconciliation and cautions.[47] Proceedings are conducted in local languages and parties are generally not represented. These courts have close institutional linkages with the state because the enforcement of Community Court decisions can be referred to the Chief Magistrate, and all parties have a right of appeal to the Chief Magistrate Court.

Village-level Community Courts (of which there are approximately 4,000) hear approximately two cases per week,[48] with some experts suggesting that they are used by up to 80 percent of population. The reasons for their popularity include: their geographic proximity; the fact that they are faster and cheaper than Magistrate Courts; the fact that proceedings are open and participatory; the familiarity of the judges; their use of local languages; the emphasis on reconciliation as opposed to punishment; and the fact that they adjudicate small disputes that could not be referred to state courts for reasons of cost-effectiveness.[49] Community Courts also — at least according to regulation — offer certain procedural protections; for example, translators are provided where necessary, rules of due process are applied, and records of proceedings are kept.[50]

Community Courts are not free from criticism, however: judges lack awareness of disputant rights under customary and state law; courts routinely overstep their jurisdiction, leading to fallouts with police and other state law actors; procedural safeguards (especially the presumption of innocence) can be poorly or inconsistently upheld; decision-making can be influenced by bias and corruption (although to a lesser extent than at Magistrate Courts); and there is no effective separation of executive and judicial powers.[51]

The Uganda experience yields several lessons that extend to models of interface more generally. In terms of their overall effectiveness, the Community Courts have delivered with respect to reducing the workload of the formal courts and providing communities with a quick and accessible means of resolving their disputes. However, the impact of having strong institutional links between the state and the community-level jurisdiction in terms of the quality and type of justice dispensed may have had less than the desired result. Some report that mechanisms of enforcement are rarely used and appeals are often obstructed or discouraged.[52] Further, the benefits one would expect from formalization, such as reduced gender discrimination, enhanced knowledge and application of constitutional rights, and improved case management and record-keeping, have not been realized. One reason for this may be that the Ugandan Government did not make a sufficient investment to realize such ends: little community-level human rights or gender-awareness training was provided, quotas prescribing women's participation in Community Courts were not enforced, and there has been little monitoring of decision-making by the state courts.[53] The lessons learned are that, in order to be effective, institutional linkages must exist beyond legislation. Monitoring, oversight, training and initiatives designed to promote dialogue and the building of mutually beneficial relationships and cooperation between state and community-level actors are essential. Second, modifying customary processes so that they better resemble or replicate formal justice norms may not be the most desirable end state. Many opine that the effectiveness of the Community Courts in expanding access to justice was precisely because the reforms were less successful than envisaged; the courts better resembled the customary system and were thus able to continue responding to the needs of disputants in a way that the state was unable to.[54]

6. Debating the advantages and disadvantages of a customary-state law interface

This chapter has discussed the various ways that a customary-state interface can be developed as a means of enhancing access to justice or better regulating customary law in order to improve the quality

of processes and outcomes. Whether this interface is defined through recognition, incorporation or decentralization, the basic premise in each case is that customary justice is brought, to a greater or lesser extent, into the folds of the state. There are both proponents and critics of this approach.

6.1 Arguments in support of a strong customary-state law interface

Proponents of a strong relationship between the customary and state justice systems argue that plurality in the legal order is a better means of facilitating access to justice and upholding the rights of all groups, particularly in the context of weak or developing state structures. Where the state does not have the resources or capacity to extend justice services to the rural poor, capitalizing on existing dispute resolution mechanisms may be the most pragmatic and cost-effective way for the state to fulfill its law and order mandate.

Moreover, it is argued that acknowledging the centrality of customary dispute resolution in the lives of the poor and working with such fora to promote internal reform is a more effective and sustainable means of enhancing rights protection. This is because once linkages are established, whether through oversight, routine review or appellant mechanisms, there are more programming options for reforming customary legal processes. Links to the formal legal system may also promote a better functioning customary system. As Stephens and Clark explain, one of the functions of the formal justice sector is to establish a "benchmark of rule-based legal certainty against which informal dispute resolution can occur".[55] The threat of referring a dispute to the formal justice system, as both a shaming device as well as a means of accessing justice, can be a powerful incentive to settle disputes fairly. Where access is meaningful, therefore, the formal justice system casts a "shadow of the law" over customary processes, lessening the impact of power imbalances and increasing the likelihood of a fair outcome and compliance with decisions reached.[56]

Finally, bringing customary law into the folds of the state system allows some of the complications associated with proscription to be circumvented. Where customary mechanisms are effective but their use is prohibited, formal justice sector actors may be dissuaded from engaging with them, leaving them with fewer tools by which to manage conflict and deepening the divisions between the state and customary systems. Conversely, where proscribed customary mechanisms are used by authorities, either tacitly or openly, this can lead to confusion and offset efforts to promote the rule of law. In Peru, such incongruence resulted in innovative legislative backtracking. The 1994 Constitution prevents *Rondas Campesinas* established by independent farmers from engaging in the administration of justice; many members of *Rondas* have been imprisoned for usurping the functions of the police and the judiciary.[57] Such restrictions were problematic for rural landowners and law enforcement agents, both of which recognized *Rondas* as a highly effective organ of local governance and tool for controlling crime. In an effort to bring law and practice into alignment, a law on *Rondas Campesinas* was passed that, although falling short of vesting them with powers of judicial administration, was sufficiently ambiguous to protect members from sanction.[58]

6.2 Arguments against a strong customary-state law interface

Critics of a strong customary-state law interface can be divided into two groups; some argue that any formalization of customary law will have negative consequences for both the rule of law and access to justice, whereas others are more concerned with the impact that formalization may have on customary law as the primary vehicle of the poor and rural communities for resolving disputes.

For the former group, the principal argument against recognizing customary institutions, applying customary law in courts, or bringing customary institutions into the state court hierarchy is that it provides a legal cloak for injustices that occur within the context of customary dispute resolution. Such formalization can reinforce hegemonic interpretations of custom, discriminatory norms and/or power hierarchies, contributing to an overall weakening of the protective framework for marginalized groups.[59] Similarly, recognizing customary law may entail vesting different groups with different rights, which can have serious material consequences. In Zimbabwe, for example, where customary law is recognized for matters of personal status, black populations die intestate

according to customary law, whereas other groups inherit according to statutory law, "with the result that black women have fewer rights than white women".[60] In such situations, the consequences of the resultant discrimination can be to extend social segregation, ethnic or religious domination and/or unequal resource distributions, each of which is a precursor to instability and conflict.[61]

A second argument is that forms of recognition can weaken democratic practices, particularly where authority is vested in non-elected leaders,[62] as well as undermine efforts to strengthen the rule of law. Most obviously, rule systems based on group membership are fundamentally incompatible with the rule of law; moreover, many of the principles underpinning the operation of customary systems — such as the flexible application of norms and associated lack of predictability — are inconsistent with strict interpretations of the rule of law.

A final argument is that any state of endorsed pluralism opens inroads for forum shopping, which can limit rather than enhance access to justice. Particularly in situations where the state justice system is dysfunctional, links between customary and state courts (such as avenues for referring or appealing disputes to state courts) can be exploited to pressure parties into accepting outcomes that are not perceived as fair or equitable. Moreover, in contexts of pluralism, two categories of people tend to emerge: the rich and informed who straddle the customary and statutory systems using both opportunistically, and the poor and marginalized who are locked into adjudicating their disputes at the customary level with little outward mobility.[63] Women, the poor and other disadvantaged groups are in particularly and disproportionately vulnerable positions since, although their rights are usually better protected under statutory law, their capacity to access the courts is highly restricted. In situations where customary law enjoys some type of formal standing within the justice system, such obstacles are more likely to be overlooked and left unaddressed.

On the same side of the debate, but for different reasons, are critics opposed to a strong customary-state law interface because this may weaken the customary system's ability to function as a justice provider. First, they argue that where customary structures are recognized or integrated into the formal legal system, this can erode their legitimacy, hence impacting the effectiveness of customary apparatus.[64] Such risks are heightened where customary leaders receive government stipends or other benefits, or where they are appointed by the state.

Similarly, a state of affairs where customary law can be applied by the courts or cases appealed to the courts might result in a distortion of customary law and a loss of indigenous ownership, hence weakening its overall effectiveness and/or legitimacy. There are also practical problems of how to accurately ascertain the many different versions of customary laws applying to different groups and ensure their consistent and accurate application by formal justice sector actors. Where the response to such difficulties is codification, additional risks are created including locking groups into contested or discriminatory norm sets, or stripping customary law of its capacity to reinvent itself in the context of changing conditions, both of which are a bar to internal reform and enhanced rights protection.[65] In Zimbabwe, for example, courts applying customary law draw heavily on outdated codes that fail to take into account that customary laws differ between groups, with the result that decisions have become increasingly detached from reality. The rather ironic result is greater uncertainty in outcomes and estrangement from the courts.[66]

A final argument is that merging two systems that are fundamentally different will not, as the rationale flows, combine the positive aspects of both,[67] but instead undermine the customary system in a "marriage of inconvenience" that will serve only to further limit access to justice.[68] Indeed, the formal and customary systems are very different; each has a different set of aims, operating rules and internal logic. The formal system relies on coercion to ensure participation, compliance and reform, and because it applies such coercive measures, it requires procedural rules, independent, rule-based adjudication and representation. The customary system, by contrast, relies on social pressure and voluntary compliance. As such, it must develop solutions that are acceptable to both parties and the wider community, which requires public participation and flexibility in

procedures and outcomes.[69] Given these fundamental differences, it is possible that modifying one component (for example, formalizing a voluntary structure) will affect the integrity of the system as a whole, with the consequence that formal linking cannot be achieved without dysfunctional consequences.[70] The differences between state and customary courts should hence be recognized and embraced; customary courts should not be seen as a means of extending the reach of the state, but rather as a separate player fulfilling a different but equally important function.

7. Conclusion

The question of how to define the customary-state law interface and the modalities for doing so should only be answered *in situ*. Whether the models presented in this work (or others not considered here) will be appropriate for any given society will depend on a range of country-specific factors such as the distribution of political power, security and socio-economic realities. Moreover, such decisions will ultimately rest with national or local governments; the role of development actors is generally to provide technical assistance. This concluding section thus provides a discussion of some of the questions that should precede decision-making, the limitations of different models and lessons learned.

Framing this discussion, it is important to recognize that the issue of how customary law fits into the formal legal system is usually highly politicized, and the motivations of different interest groups will often extend beyond questions of access to justice and legal empowerment. Both the state and customary user groups may have benign and harmful reasons for advocating the recognition of customary law, and it is important for external development actors to understand the dynamics shaping these positions.[71] For example, customary groups may lobby for the recognition of their laws or institutions in order to realize their right to diversity and identity, or as a means of addressing discrimination inherent in the formal justice system. On the other hand, claims may be driven by the reality that the interests of proponents are served better under customary law or a state of pluralism.[72] Similarly, at the state level, recognition, incorporation or decentralization may form part of a broader access to justice strategy designed to enhance the protections afforded to marginalized groups. However, such strategies can also be a means of defining or consolidating state power,[73] or be bound up in other military and political objectives.[74]

Box 3
The recognition of legal pluralism, Mozambique
In 2004, the Government of Mozambique gave legal recognition to pluralism, ostensibly in response to the inaccessibility of and lack of popular confidence in the state courts, but also as a means of addressing certain political imperatives. The relevant provision in the Mozambican Constitution was, in some instances, used to "(re)expand the reach and authority of the state in areas where that authority [was] contested and the state's legitimacy [was] weak."[75] This was achieved by strengthening the position of customary actors who were sympathetic to state interests, and obtaining the support of those who were not, through promises of recognition, development benefits and state subsidies. Such allegiances facilitated an institutional expansion of the state whereby chiefs were tasked with collecting taxes, producing population registrars and assisting the police in their law and order functions. On a political level, chiefs were drawn into election campaigns by mobilizing voters and publicly demonstrating their support for the ruling party.[76]

Separating out the benign from the harmful reasons for which groups may lobby for, and states might endorse, a particular interface model, however, is not a reliable formula for determining whether reforms should be supported. Even where states are motivated by political or military objectives, recognition, incorporation or decentralization may still contribute positively to the

empowerment of marginalized groups and vice versa. A preferred lens through which to assess questions of interface, it is posed, is access to justice; most simply, will reforms enhance the capacity of disadvantaged groups to have their disputes heard and resolved in a manner that upholds their rights?

It is also important to appreciate that whatever form the interface takes, this is not a solution in and of itself; simply because customary leaders are authorized to exercise judicial power, for example, does not necessarily mean that access to justice has improved. Similarly, expanding state jurisdiction to adjudicate customary cases may have little impact if the obstacles dissuading disputants from approaching the courts in the first place are not addressed. Models of recognition, integration or decentralization are simply frameworks within which other substantive reforms must take place, such as building working relationships between the customary and formal justice systems, or promoting reforms within customary practice. The experiences of other countries do, however, offer some lessons in terms of how the question of interface might be approached.

First, while the aim of state-customary legal models is to harness the positive aspects of both systems through mutually beneficial linkages, how to do so without threatening the effectiveness, integrity or legitimacy of either system is fraught with difficulty. It is important to bear in mind that comparing state and customary systems, or viewing them as alternatives, may not be the most useful framework when developing strategies for enhancing access to justice. As discussed in chapter 1, in many contexts, customary justice systems function more like governance mechanisms, with the dispute resolution function situated in a broader social, cultural and economic context. Differences in purpose and precepts distinguish customary systems from state notions of a legal order, making comparisons unhelpful and potentially misleading.[77]

Second, whichever type of model is adopted, the interface between the customary and state justice systems needs to be clearly defined and adequate safeguards set in place. As a result of vague jurisdictional boundaries and wide discretion on the part of state actors, serious matters may be referred back to the customary system. In such situations, access to justice can be curtailed rather than enhanced; for example if victims are unable to obtain a satisfactory resolution at the customary level but their option to refer the matter to a higher judicial body has been stymied.[78] Moreover, where high discretion is vested in decision-makers — whether they be judges, police or customary leaders — regarding where a certain case should be adjudicated, and there is material variation in the outcomes available from these different fora, inroads for corruption and abuse are created. On the other hand, where the interface is strong, predictable and reliable, customary negotiation "can take place against a backdrop of legal certainty" with the possibility that injustices can be reviewed, strengthening the position of the weak and enhancing their capacity to assert their rights.[79] At the same time, the interface model adopted must be realistic; if the objective is to divert cases resolved customarily to state courts, access to state institutions must be viable and the legitimate concerns of users addressed. Without this, customary dispute resolution may be pushed underground or a justice vacuum created, and the population receives a negative message regarding the state's capacity to promote the rule of law.

Finally, modifications to the customary-state law interface will always involve redistributions of social and political power, and sometimes control over resources. Steps should be thus taken to minimize power struggles and promote cooperation and confidence between state and customary legal actors, as well as between the different user groups of the customary justice system who may be advantaged or disadvantaged through such changes. Chapter 4 discussed ways that the perspectives, needs and interests of customary groups may be better incorporated into state adjudication.[80] Other programming options might include training or periodic meetings that bring customary and state law actors (such as magistrates, the police, customary decision-makers and/or community representatives) together to discuss issues of mutual concern, such as violence control, case referrals and the enforcement of dispute outcomes.

MATRIX OF ENTRY POINTS AND GOOD PRACTICES

Where dispute resolution power is devolved to customary law actors or customary institutions are recognized as part of a state's formal judicial machinery, entry points may include:	Provision of training to customary law actors, for example, in the substantive aspects of the applicable law, constitutional and human rights guarantees, procedural safeguards, case processing and due process benchmarks.
	Development of training tools including legal texts translated into local languages, popular versions of constitutions, codes of conduct, as well as adjudication guidelines defining jurisdiction, and when and how cases should be referred to the state courts.
	Development of procedural safeguards or minimum practice standards. These might include systems for the recording of dispute resolutions, marriages and divorces, or land transactions; protocols regarding which disputes can and cannot be adjudicated; guidelines on evidence, witnesses and participation; protocols for appealing disputes to a higher body; and minimum due process and human rights guarantees.
	Establishment of oversight programs to monitor the work of customary law actors, for example, compulsory or randomized review of decisions, monitoring of proceedings (either by state actors, NGOs that provide legal services or community-based paralegals), or complaints mechanisms where a decision issued by a customary court can be reviewed by an independent tribunal or body.
	Establishment of linkages between customary courts, state courts and the police, with clear referral protocols.
	Provision of orientation training to the police and other local justice providers on the role of and services provided by customary courts, as well as periodic meetings between customary law actors, state judicial actors and the police to discuss matters of mutual concern.
Where state court judges are empowered to apply customary law or their jurisdiction is widened to adjudicate customary law cases, entry points may include:	Provision of training in the substantive aspects of the applicable customary law(s), in customary norms and principles to encourage judgments that better respond to community needs and conceptions of justice, and in laws that allow them to take customary or social context into account.
	Development of modalities for ascertaining or verifying the accuracy of customary norms. Generally, tests of compatibility with national constitutions, statute or human rights norms are superior to subjective tests of repugnancy.[81] Where other tests of ascertainment are applied, such as the use of codified versions of customary law or evidence by customary law actors, safeguards should be developed to ensure that the version of customary law presented reflects current norms and is broadly accepted.
	Establishment of oversight and monitoring programs, for example, compulsory or randomized review of decisions, monitoring of proceedings (either by state actors, NGOs providing legal services or community-based paralegals), or complaints mechanisms where a decision issued by a court can be reviewed by an independent tribunal or body.
	Establishment of dialogue processes such as periodic meetings between customary law actors, state judicial actors and the police to discuss matters of mutual concern to enhance confidence and cooperation.

Good practices

Decisions relating to interface models should be preceded by participatory consultations with community members and customary leaders as well as other stakeholders such as women's groups, legal aid services and community services NGOs.

When customary institutions are recognized as part of a state's formal judicial machinery, states will usually seek to introduce procedural safeguards or minimum practice standards. In most cases, rather than using the interface as a platform for regulating or reforming customary justice processes, a more impactful approach may be to incentivize self-regulation. For example, customary actors might be better encouraged to integrate protections within the context of dispute resolution or adopt rights-based approaches in order to gain formal recognition, particularly where such recognition is connected to certain benefits, such as better community access to state services, training, or assistance schemes.

Where customary law actors are recognized by the state, either as dispute resolvers within their communities or as agents within the court structure, decisions on remuneration need to be fully evaluated. On the one hand, payment may be a necessary bridge to certain reforms, as well as a means of eliminating corruption where leaders rely on adjudication as a source of income. Remunerating customary leaders, however, can erode their legitimacy, weakening an essential pillar in customary system's effectiveness.

Where customary jurisdiction is removed from local actors and state courts are vested with the power to adjudicate customary law cases, or new courts are established at the community level, it is essential that the relevant court is accessible to customary disputants. This involves courts that are not only sufficient in number, but also geographically, financially and linguistically accessible, and established with procedures and modalities that make accessing the state system easier and less intimidating for customary users.

Where the power to adjudicate cases is removed from customary leaders and vested in state courts, or new measures are introduced whereby cases previously dealt with at the community level are to be referred to courts, measures for bottom-up accountability should be considered; for example, community representatives might be permitted to oversee and monitor state court proceedings, or be vested with a right to be informed on the progress of a case or prior to enforcement measures being taken, such as arrest, imprisonment or the granting of bail.[82]

Where the power to adjudicate cases is removed from customary leaders, steps should be taken to vest such leaders with new skills and provide them with new income-earning opportunities; examples might include micro-credit programs, small business training or opportunities, or literacy training.

footnotes

1 ICHRP, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 47-48.

2 Ibid 47.

3 V. Nagaraj, 'Human Rights, Legal Pluralism and Conflict: Challenges and Possibilities — Some Reflections' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 19, 19).

4 Afghanistan: USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies* (2005) 13-14; Indonesia: M. Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 143, 152).

5 Reciprocally, customary actors may rely on the state to enhance the effectiveness of its operations. Customary leaders or disputants sometimes use the threat of referral to state court as a bargaining chip in reaching a solution at the customary level. In other situations, customary institutions try to enhance their authority by recreating 'court-like' conditions. In Kyrgyzstan and Mozambique, for example, leaders dress like state court judges and/or make reference to legal texts in adjudication processes (ICHRP, above n 1, 47-48).

6 J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council (2006) vi, see also 53.

7 *Local Court Act 1963*; E. Wojkowska, *Doing Justice: How informal systems can contribute*, UNDP, Oslo Governance Centre, The Democratic Governance Fellowship Programme (2006) 25.

8 T. Dexter, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi*, Centre for Humanitarian Dialogue (2005) 17-18.

9 D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, USIP Peaceworks No. 63 (2009) 5, United States Institute of Peace <http://www.usip.org/files/resources/liberian_justice_pw63.pdf> at 29 March 2011.

10 See Chapter 3, Section 5.

11 R. Yrigoyen Fajardo, K. Rady and P. Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples*, UNDP Cambodia (2005) 28.

12 ICHRP, above n 1, 90-91.

13 *Constitution of the Republic of Kenya 1963* (as amended to 2008) art 82(4); C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (2003) 7.

14 *Constitution of Zimbabwe 1980* (as amended to 2007) art 23(3)(b) (Note that this only relates to the application of customary law in cases involving Africans where such persons have consented to the application of customary law); C.A. Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' in C. Sage and M. Woolcock (eds), *World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006) 147.

15 *Constitution of Lesotho 1993*, article 18(4)(c); W. Schärf, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at the Workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003, 19).

16 *Constitution of Sierra Leone 1991*, chapter III s 27(4)(d) and (e) (note that this only relates to matters involving, *inter alia*, adoption, marriage, divorce, burial and property inheritance or other interests of personal or customary law); ICHRP, above n 1, 92-93.

17 *Constitution of Peru 1993*, art 149; J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003) 12-13.

18 *Constitution of South Africa 1996*, art 211(1) and (2); Odinkalu, above n 14, 155. Likewise, the *Constitution of Colombia 1991*, art 246 states; "[T]he authorities of indigenous peoples may exercise jurisdictional functions within their territories in accordance with their norms and procedures, provided they are not inconsistent with the Constitution and the laws of the Republic"; Faundez, above n 17, 9.

19 *Constitution of the Republic of Namibia 1990*, art 66(1)-(2), 19; J. Miles, *Customary and Islamic Law and its Development in Africa*, Law for Development Review, African Development Bank (undated) 149. In a slight variation, in some jurisdictions, customary law is neither recognized nor prohibited, but constitutions prohibit laws, customs or traditions that are discriminatory or harmful. For example, the *Constitution of Uganda 1995* art 33(6) prohibits laws, cultures, customs or traditions that are against the dignity, welfare or interest of women or which undermine their status; Nyamu-Musembi, above n 13, 28.

20 *Constitution of Indonesia 1945*, art 18B(1) states that "the state acknowledges and honors traditional legal community units and its *adat* rights as long as this is still living and in accordance with community development and the principle of the unitary state of the republic of Indonesia, regulated by law". See also art II of the transitional provisions attached to the Constitution, which provide that all institutions and regulations valid at the date of independence would continue, pending the enactment of new legislation and institutions and provided that they were consistent with the Constitution; UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with BRR Agency for Rehabilitation and Reconstruction, BAPPENAS, UNSYIAH, IAIN Ar-Raniry, IDLO and the World Bank (2006) 50; E. Harper, *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh*, IDLO (2006) 15-16.

21 UNDP, above n 20, 49-51; Harper, above n 20, 14-16.

22 *Constitution of Guatemala 1985*, art 66 recognizes, respects and promotes indigenous styles of living, customs, traditions and forms of social organization; however, art 203 vests judicial authority exclusively in the Supreme Court of Justice and other tribunals established by law; J. Hessbruegge and C. Garcia, 'Mayan Law in Post-Conflict Guatemala' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011) 109-111.

23 Ibid 33.

24 Ibid 30-31.

25 Ibid 29-33.

26 Ibid 29-31.

27 Ibid 33.

28 S. Callaghan, 'Overview of Customary Justice and Legal Pluralism in Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 72, 75).

29 Article 3(2) of the *Penal Code Act 2003*; A. Danne, 'Customary and Indigenous Law in Transitional and Post-Conflict States: A South Sudanese Case Study' (2004) 30(2) *Monash University Law Review* 199, 217.

30 The only exemption is where a customary rule has been recognized and applied by a superior or coordinate jurisdiction. Courts can also refuse to apply a rule if it is decided that it is contrary to public policy, natural justice, equity or good conscience; Miles, above n 19, 106-107.

31 W. Schärf, C. Banda, R. Röntsch, D. Kaunda and R. Shapiro, *Access to Justice for the Poor of Malawi: An appraisal of access to justice provided to the poor of Malawi by the*

lower subordinate courts of the customary justice forums, report prepared for DFID (2002) 5, Governance and Social Development Resource Centre <http://www.gsdrc.org/docs/open/SSAJ99.pdf> at 23 March 2011.

32 Ibid 6.
33 Ibid 6-7.
34 Ibid 7-8.
35 Ibid 11-12.
36 Ibid 17.
37 Ibid 39-40.
38 Ibid 44.
39 However such actors also acknowledged the risks of corruption, nepotism and politically influenced decision-making at the customary level (ibid 45). For an additional example, see the discussion on the integration of community courts into the formal justice system in Zimbabwe: Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 51-55.
40 W. Schärf, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003, 63) Governance and Social Development Resource Centre <http://www.gsdrc.org/docs/open/DS35.pdf> at 23 March 2011.
41 Ibid 64.
42 Ibid 66.
43 Penal Reform International, above n 39, 138-139. Further, "the more a justice forum relies on formal coercion to enforce a decision, as opposed to voluntary agreement based on social pressure, the more important procedural safeguards become", which are not usually present at the customary system (Penal Reform International, above n 39, 68).
44 Ibid 137-138.
45 See further ICHRP, above n 1, 68-69.
46 Courts have jurisdiction over civil cases relating to: debts, assaults where subject matter not exceeds Ush5,000; any case relating to conversion and/or damage to property; customary law disputes relating to land, women's marital status, paternity of children, succession, etc; petty crime by children; all civil cases concerning children and scheduled criminal offenses such as common assault, theft, trespassing, malicious damage to property (Penal Reform International, above n 39, 60-61, 63).
47 Ibid 62-63.
48 Ibid 71.
49 Ibid 64.
50 Ibid 60-61.
51 Ibid 64-69.
52 Ibid 34-70.
53 Ibid 71.
54 Ibid 71-72.
55 UNDP Indonesia, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 34.
56 Ibid 34-35.
57 Faundez, above n 17, 21, 25.
58 Ibid 25-26.
59 ICHRP, above n 1, 106-107; Nagaraj, above n 3, 21.
60 ICHRP, above n 1, 74, see further 65-66.
61 Ibid 84.
62 As Kennedy states, where this occurs, it can "limit rather than foster the emergence of liberal civil society with active groups participating" (Ibid 85).
63 See for example, Odinkalu, above n 14, 155.
64 Le Sage gives the example of clan elders in Somalia whose role was undermined and perceived as corrupted when the Government started remunerating them for certain duties (A. Le Sage, *Stateless Justice in Somalia — Formal and Informal Rule of Law Initiatives*, Centre for Humanitarian Dialogue (2005) 36). Likewise in Burundi, where community leaders are chosen by political authorities rather than through customary processes, they are considered less representative of traditional values and less trusted by community members (Dexter, above n 8, 6).
65 ICHRP, above n 1, 103.
66 Penal Reform International, above n 39, 133-134.
67 Typically, the accessibility, informality, speed, cost-effectiveness and familiarity of legal values of the customary system, with the impartiality, uniformity of law and procedures of the formal justice system (Ibid 129).
68 Ibid 135, see further 129-132, 134-135.
69 Ibid 126.
70 Ibid 125-126, 72.
71 ICHRP, above n 1, 106-107, 96.
72 Ibid 82.
73 Ibid 96.
74 Faundez, above n 17, 57-58; H.M. Kyed, 'On the Politics of Legal Pluralism: The Case of Post-War Mozambique' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 156, 156-7, 165-166).
75 Ibid 161.
76 Ibid 158-163.
77 See Chapter 1, Section 2.1.
78 As explained by Stephens, in Indonesia, the authority and jurisdiction of customary actors are poorly defined and "[t]he discretion of formal justice sector actors to prosecute, mediate or refer cases back to villages institutions is wide." This can result in situations where, for example, sexual assaults are referred back to customary leaders and then not dealt with or dealt with unsatisfactorily (Stephens, above n 4, 152).
79 UNDP, above n 55, 32.
80 See Chapter 4, Section 5.3-5.4.
81 Odinkalu, above n 14, 160.
82 In some areas of the United Republic of Tanzania, for example, agreements have been formed whereby communities agree to hand over suspects of crime to authorities, but community representatives are permitted to monitor police and court handling of the dispute to ensure that it is not compromised by bribery or incompetency (Nyamu-Musembi, above n 13, 21).

CHAPTER 6 | Heightening the Protection of Vulnerable Groups in the Context of Customary Justice

This chapter focuses on the particular challenges faced by vulnerable and marginalized groups accessing justice through customary legal systems. It considers the difficulties encountered by these groups in terms of the substantive protections they may be offered under customary law, as well as how procedural norms may impact their capacity to access equitable solutions to their grievances. As will be discussed, customary rules and procedures can be discriminatory, violations against certain groups may be viewed less seriously than those against others, and these groups can be excluded from participating in the presentation or resolution of their disputes. At the same time, vulnerable groups may find it especially difficult to access the formal justice system — both a cause and an effect of their marginalization at the customary level.

Such shortcomings arguably have a disproportionate impact on women because the bulk of cases adjudicated customarily involve family law matters, such as marriage, divorce, adultery, child custody and succession, and crimes deemed of low gravity according to customary norms, such as domestic violence. Further, the resolution of these matters has direct implications for women's security and livelihoods.[1] However, while the majority of the case studies referred to in this chapter relate to women and girls, it is important to note that the difficulties highlighted affect a range of vulnerable groups, including ethnic and religious minorities, lower status clans or castes, refugees, internally displaced persons (IDPs) and the poor. Some face discrimination on multiple levels, for example, ethnic or religious minority women. Children also face unique challenges under customary legal systems. As an accused party, children may not be offered age-appropriate procedural protections[2] and can be exposed to inhumane dispute resolutions such as early or forced marriage;[3] as victims, crimes committed against them may not be viewed with the requisite level of seriousness due to the operation of social norms, for example, on violence against minors, sexual assault, household burden-sharing, or the appropriate age for marriage.

1. Challenges faced by vulnerable groups under customary legal frameworks

As discussed in chapter 2, customary justice is often the principal mechanism for resolving disputes in developing countries.[4] Such systems, however, fail to adequately uphold the rights of vulnerable groups in two main ways.

First, the normative framework of many customary justice systems does not sufficiently protect the rights of vulnerable groups. Customary law may tolerate or reinforce practices that are in violation of international human rights law such as female genital mutilation, bride sales and widow inheritance, or sanctions such as forced marriage or the exchange of women or young girls as a resolution for a crime or as compensation.[5] Gender-specific crimes, including rape (both within and outside of marriage) and domestic violence, or crimes directed at specific groups, such as lower status clans, refugees or IDPs, may not be recognized as offences or may be viewed as minor offences.[6] Other rules and practices may be discriminatory. Women, for example, may face unequal treatment with respect to inheritance, the dissolution of assets upon divorce, land ownership or

child custody. The penalties for crimes that specifically affect vulnerable groups may also discriminate, for example, when compensation is determined, not based on the nature of the crime, but on the gender and/or social status of the victim.[7]

Box 1
Responding to domestic violence under customary law
Domestic violence is a serious issue that is largely unaddressed in the normative frameworks of many customary legal systems. Such violence is often not regarded as a serious complaint either at all, or unless the incident is of a severity that it is socially disruptive. An underlying issue is the tension between the purpose of customary dispute resolution and the incentives for protecting women under such systems: while the objective of customary dispute resolution is usually to restore community harmony, women's relatively low social status and weak voice, means that abuses against them are unlikely to directly threaten community stability and cohesion. A further factor is women's heightened vulnerability when attempting to assert their rights. Women who report incidents of domestic violence, either to the formal or customary legal system, can risk abandonment, retaliatory abuse or social stigmatization. In the context of limited access to social welfare assistance or protections such as pensions or refuge shelters, battered women have strong disincentives not to report abuses.[8]

Second, where a recognized rights violation does occur, vulnerable groups can face significant barriers to upholding their rights, mainly rooted in social inequality, attitudes towards violence and power imbalances. As previously discussed, customary systems generally have flexible rules and procedures, with consensus-driven outcomes based on local perceptions of fairness and subjective notions of a sound outcome. Vulnerable groups' marginalized social status, reduced access to resources, and relatively weak influence on overall community harmony can shape perceptions on the relative seriousness of violations against them. What constitutes fair and equitable is thus often a function of power, status and wealth differentials, discriminatory social norms, and perceptions relating to group cohesion.[9] This marginal social or political return for protecting vulnerable groups,[10] combined with the absence of procedural safeguards, often leads to decisions that reinforce power hierarchies and that discriminate.[11]

Adding to these challenges, vulnerable groups are disproportionately confined to the customary justice system. Customary systems may be the only accessible means of dispute resolution for vulnerable user groups due to their low (or no) cost, because they are situated in or close to the communities in which disputants live and because adjudication is conducted in local languages. Similarly, vulnerable groups may prefer customary processes for their norm familiarity and because they are led by recognized figures. This is particularly the case when compared to state courts, where marginalized groups may be deterred by complex administrative procedures and the formal courtroom atmosphere.

Vulnerable groups are also more susceptible to pressure to resolve disputes at the local level and more likely to be influenced by the potential social sanctions that may follow attempts to access the courts. This is because families and community leaders are vulnerable groups' principal source of social and economic protection. These groups are unlikely to jeopardize these relationships or expose themselves to additional discrimination through actions that may be considered disrespectful to notions of community harmony or an affront to the decision-making abilities of the customary leader, or that may cause public embarrassment to the perpetrator.[12]

Finally, the customary system may be regarded as the most viable option for resolving a dispute. Vulnerable groups may wish to avoid the state system because of real or perceived threats of mistreatment by justice sector actors, including discrimination, intimidation, physical abuse or

bribery. It may also be anticipated that the court will refer the matter back to the community level, particularly where there is a widely held view about the relative seriousness of a dispute.[13] Vulnerable groups may also regard the likely court solution as inadequate for resolving the problem at hand. As will be discussed in detail below, in contexts where state or private safety nets such as insurance or unemployment benefits are unavailable, crime can have important economic implications for victims of crime and their dependents. The customary system generally accounts for this through compensation-based solutions. The commonly imposed state justice solution — imprisonment — is unlikely to be viewed as an attractive solution in such situations.

2. Constraints to increasing the protection of vulnerable groups

Prefacing any discussion on the specific ways in which vulnerable groups might be better protected under customary law, it is important to highlight that while some customary practices are directly linked to discriminatory mind-sets and the maintenance of power hierarchies, other practices can be explained, at least partially, by the social, economic and security context within which customary rules operate, as opposed to the architecture of the customary system itself.

For example, some practices can be connected to discriminatory attitudes embedded within the wider social fabric.[14] Dexter et al argue that customary law's unequal treatment of women in Burundi is principally a product of the gender discrimination inherent in Burundian culture, something that permeates the prescriptions, actions and decisions of institutions at all levels. As customary leaders are representative of the general population, it is not surprising that they do not recognize, *inter alia*, gender equality in matters of inheritance.[15] In such contexts, efforts to reform the customary system will have limited impact unless they are undertaken in concert with a broader social reform package aimed at modifying discriminatory belief sets and addressing the root causes of societal inequalities. As discussed in the case study below, such change is difficult to manufacture. Not only do normative changes take generations to unfold, but it is unclear how such change occurs, or whether international development assistance is the appropriate vehicle to advance such an agenda.

Other customary practices have context-specific rationales linked to social, economic or security factors. Two practices commonly cited as examples of how customary law violates vulnerable groups' rights can be used to illustrate this argument.

As discussed in previous chapters, crimes such as rape and sexual assault often have wider implications for victims than the obvious physical and emotional violation. Gendered attitudes towards pre-marital sex may prevent victims from marrying, forcing them to rely on their families or the wider community for social, livelihoods and financial protection. In such contexts, customary norms are often geared more towards responding to the victim's vulnerabilities (generally viewed as a composite of her marital status, reputation and economic dependence) and restoring relations between the families involved (with a view to maintaining community harmony), than punishing the perpetrator. Common solutions are either having the victim marry the perpetrator, or fining the perpetrator's family or having it otherwise compensate the victim's family.[16] Both solutions respond to the possibility that the victim may need to provide for her own upkeep (and that of any resultant children) for the rest of her life. Marriage may further be regarded as a means of preserving the victim's 'honor', providing her with social protection from discrimination, and reducing her vulnerability to further violence and exploitation; marriage also creates bonds between families and communities, stemming the possibility of subsequent disharmony or violence.[17]

However, while such solutions abrogate a victim's basic most rights,[18] they may respond to other unmet needs such as social and economic security. In situations of generalized discrimination, poverty and limited (or non-existent) social security, the importance attached to these basic safeguards cannot be understated. Moreover, the alternative court-based solution can be highly

unappealing. If a case of rape is referred to a state court, the likely punishment is imprisonment. Parties are unable to negotiate the most practical solution, and the immediate and material needs of the victim can be overlooked; she most likely remains unmarried, must rely on her extended family for support, and is at heightened risk of homelessness, exploitation and discrimination. Likewise, in cases of domestic violence, in the absence of state social services, the incarceration of a male breadwinner can place the victim in an even more vulnerable position; not only is he unable to provide for his family for the period of incarceration, but an aggrieved husband may divorce or abandon his wife following his release.[19] These difficulties are examined in case study 1 below.

A further example relates to the limited inheritance and property ownership rights granted to women under some customary systems.[20] While such rules are clearly discriminatory, there may be security-related or social rationale for keeping land within male lineages. As discussed in case study 4, in Somalia, the size and strength of the clan is the basic unit of security. Key to the clan's strength is its wealth, including property holdings. As women may marry outside of their own tribe (or may be traded as part of compensation agreements), it is considered contrary to clan interests to permit them to own or inherit property, because to do so would dilute the group's collective strength and defensive power.[21]

In other situations, it is important to interpret such rules within the broader social context. In customary systems based on Islamic law, women may be entitled to inherit, but not on an equal basis as men. Some Islamic scholars argue, however, that such practices are not gender discriminatory because Islam entitles women to certain protections, including maintenance by inheriting brothers or other male relatives, neutralizing any apparent fiscal inequalities. Alternatively, customary legal cultures may have evolved to ameliorate the gender discriminatory aspects of certain practices. In the Indonesian province of Aceh, customary law provides for inheritance based on Islamic prescripts, but in certain areas, it also recognizes a form of private property named *hareuta peunulang*. *Hareuta peunulang* is a bequest of non-movable property (either a house or land) to daughters by their parents upon marriage. This norm evolved specifically to compensate for the fact that inheritance distributions are weighted heavily towards male heirs. Importantly, while *peunulang* property may be considered inheritance, it does not form part of the parents' estate, nor does it displace a daughter's normal inheritance rights. In practice, this means that *peunulang* property remains under the daughter's complete and exclusive control, and should not be shared with other heirs, with the result that daughters can end up majority inheritors.[22]

Another widely criticized customary practice that can also be viewed (in very particular circumstances) as remedying the norm of agnatic primogeniture is wife inheritance. Wife inheritance occurs where a widow is forced to marry her late husband's relative, usually a brother. While clearly a rights-violating practice, in contexts where women are not entitled to inherit property and the marriage is largely symbolic in nature, it can be seen as a means of providing widows with access to land as well as financial and social protection where they might otherwise be forced off the property or chased back to their matrilineal families.[23]

What these examples demonstrate is that, when planning interventions aimed at heightening protections for vulnerable groups, it is critical to place the practices that are the subject of the reforms within their broader economic, social and security context. Further, insofar as the practices in question have social and economic explanations, the solutions required will need to go beyond modifying legal rules and practices to encompass a broader range of development objectives.

The remainder of this chapter discusses specific interventions commonly undertaken with a view to increasing the protection of vulnerable groups. Many of these build on entry points and case studies discussed in previous chapters, but provide a critique sensitized to the specific needs of and constraints faced by vulnerable groups. As reiterated throughout this book, none of the entry points presented can be viewed as a panacea; the type of intervention or combination of interventions that will have greatest impact will depend on a variety of situation-specific factors.

Case study 1
The difficulty of prohibiting the customary resolution of sexual assault and domestic violence cases in transitional Timor-Leste[24]

In 1999, the United Nations Transitional Administration in East Timor (UNTAET) was mandated with powers of legislation and judicial administration.[25] UNTAET quickly set about reconstructing a justice system modeled largely on Indonesian jurisprudence but adjusted to reflect international norms and standards. Certain aspects of the introduced legal model conflicted with widely held conceptions about justice and economic and social realities. The law's requirement that sexual assault and domestic violence cases be resolved judicially, for example, became a major point of conflict between the people of Timor-Leste and UNTAET, as explained below.

When UNTAET assumed governance control, most people from Timor-Leste viewed domestic violence and sexual assault as offenses falling within the jurisdiction of customary law. The way in which these cases were processed failed to reflect modern attitudes towards how gender crimes should be resolved. In some cases, what would be regarded as a serious issue in developed countries was seen as part of everyday life by the local population. When sanctions were applied, they were mild and seemed to be unduly supportive of male perpetrators.[26] This situation attracted criticism from human rights and women's advocacy organizations throughout and well beyond the transitional period. Such groups argued that the customary resolution of such crimes violated basic human rights and that UNTAET had a responsibility to remedy the situation.[27] In response, UNTAET undertook to ensure that gender crimes were resolved according to law. Such measures included education campaigns and intervention in known cases by district human rights officers and civilian police. These efforts were largely ineffective. Police believed that the more they intervened and tried to encourage formal resolution, the more likely communities were to cover up such crimes. Officers recalled cases where they would attempt to investigate a reported crime, but on arrival would be told that the issue had been resolved and that external assistance was no longer required.[28] As a result, the law continued to be ignored, and the reality of the transitional period was that many, perhaps the majority of, rape and domestic violence cases were resolved in accordance with customary law.

There were several factors contributing to this. First, the formal legal system was difficult to access, slow, time-consuming and costly. Second, the courts, unlike the customary system, failed to accommodate the important social and practical issues that gender crimes created. For example, in the case of a rape, prosecution did not take into account that the woman may not be able to marry because she had lost her virginity. Customary law, by contrast, did provide for such consequences, either through financial compensation or by requiring that the perpetrator wed the victim. Prosecuting perpetrators of domestic violence often had similar unintended ramifications. As one village leader explained, when the perpetrator of such crimes is arrested and removed from the village, there are "serious consequences that the police just do not see".[29] In the short term, the victim suffers because her husband has been arrested or is in jail. In the long term, she will have no one to support her or her family because when the perpetrator returns to the village, he will most likely take another wife. With no operational welfare system, the victim and her children become the communal responsibility of the village. The result is resentment of, and hostility towards, the victim and her children, social disunity and widespread confusion regarding the logic of the formal legal process. Clearly then, post-conflict Timor-Leste — a society with no welfare state, where women had little social and financial independence, and where 'used women' (to use local phraseology) suffered serious discrimination — had neither the social nor the material infrastructure to support strict gender crimes laws. The legal system, developed by UNTAET lawyers who were not privy to the social and material problems that gender crimes created, was thus considered by locals to be an untenable alternative to customary law.

Looking back more than ten years after UNTAET was created, it is important to consider how the transitional administration might have approached this problem in a more constructive manner. A first point is that the difficulties that prevented gender crimes from being resolved through the

courts, as articulated above, were largely not appreciated by UNTAET, which operated in the belief that simply introducing the right laws would be sufficient to cause a change in social practice.

In fact, what was needed to modify the situation would have involved UNTAET responding to each of the issues that discouraged victims from utilizing the courts. First, UNTAET would have had to build a relatively well functioning legal system that was fast, easy to access and inexpensive. Second, UNTAET would have had to resolve the socio-economic realities that rendered formal adjudication so inappropriate. Phrased another way, if the transitional administration expected the population to deal with gender crimes in the same way as Western legal cultures, UNTAET might have considered the socio-economic conditions that support the formal processing of such crimes in the West. The diversion of gender crimes from customary fora to the courts would certainly have been much easier had Timor-Leste boasted a modern welfare state and an environment in which gender-neutral employment opportunities ensured that women were not financially dependent on a male breadwinner. Third, UNTAET would have had to modify the way in which the people from Timor-Leste conceptualized gender crimes. Such an exercise would have been complicated from an operational perspective. UNTAET would have had to address the gender disparities within community power structures that facilitated such practices: the customary resolution of gender crimes benefited certain sections of the population who would have strongly resisted any changes to the male-dominated power hierarchy.

Given the gap between what was required and UNTAET's capacity to respond to such requirements, it is not surprising that attempts to divert gender crimes away from customary dispute resolution forums — in abrogation of customary legal norms and in the absence of the necessary social and economic infrastructure — were largely unsuccessful. Further, given the complexity of the problem, it is unlikely that, even with a better appreciation of the critical issues, UNTAET could have generated meaningful change during its mere 32 months in power. As will be discussed in more detail in chapter 7, these issues have proven to be major impediments in subsequent state-building exercises, and are difficult to deal with for an array of political and programmatic reasons.

3. Programming options for increasing the protection of vulnerable groups

Chapters 3 to 5 of this book sought to provide insight into the different types of entry points for heightening access to justice and equitable outcomes for users of customary justice systems. While many of the interventions discussed may equally assist vulnerable groups, this chapter examines strategies that specifically aim to address norms and practices that operate to discriminate against these groups or prevent them from upholding their rights.

3.1 Expanding participation in customary decision-making

A major challenge for improving the outcomes received by vulnerable groups is that they are largely excluded from participating in the resolution of disputes or wider processes of community decision-making and norm-setting. These groups may only be able to participate through representatives, for example, by a male relative in the case of women disputants or by a higher-status clan or caste in the case of minority or internally displaced groups. Where rights of participation are granted, they may be limited to the presentation of evidence rather than negotiations over potential outcomes.[30]

Such exclusion has prompted thinking about ways to promote participation in dispute resolution as a means of limiting some of the discriminatory aspects of customary law. The rationale behind such thinking is supported by the experiences of communities where rates of leadership among women and other traditionally marginalized groups are relatively high. The experience in Bougainville, Papua New Guinea examined in case study 3, for example, suggests that women's interpretation and

application of customary law is likely to better factor in the needs of and protections required by all groups in the community.[31]

The principal challenge is that power-holders are unlikely to devolve their decision-making authority voluntarily, and external interventions aimed at accelerating such change, such as quotas for the participation of certain groups, may be actively resisted or otherwise ineffective. Chapter 3 provided examples of where women appointed to dispute resolution bodies were chosen specifically because they were unlikely to question dominant norms as well as examples of where prevailing social attitudes constrained their freedom to act independently.[32] A further issue is that artificial changes to leadership structures may interrupt the internal logic and overall effectiveness of the customary system, which depend on decision-makers being widely accepted as legitimate and wielding of social authority.

Box 2
The challenge of vesting women with dispute resolution powers in Timor-Leste
Research conducted by the International Rescue Committee in Timor-Leste provides keen insight into the complexity of installing women as leaders with dispute resolution responsibilities. It found that it is only specific 'chosen' people who can make decisions on resolving problems in the community, particularly the '*Lian Nain*' — male leaders that have hereditary and apparent spiritual links to the ancestors. Female community representatives, not having such powers, can therefore only participate in dispute resolution as victims and users, and cannot make decisions. As such, "[i]t is evident that regardless of how many women might sit on a council or a decision making panel, in the end it is only those who have been given the power to make decisions by the ancestors that can do so. And these are all men."[33] This translates into a "lack of confidence from both community leaders and women themselves in women's decision making abilities, which has serious implications for participation of women in society as a whole."[34]

The quandary, therefore, is that while decision-makers have few incentives (and many disincentives) to share their powers, coercive change to leadership structures is rarely an effective means of promoting substantive participation by marginalized groups. In situations where leadership roles have evolved to better reflect the composition of society, such as in Uukwambi, Namibia, and in Bougainville, Papua New Guinea (see case studies 2 and 3), there have been several context-specific factors in play. As will be discussed, in Uukwambi, it is impossible to separate the installation of women representatives and their active participation in community dispute resolution from post-independence advances in gender relations at the central political level, and from the fact that traditional leaders themselves were the catalysts of the reforms. In Bougainville, the combined impacts of colonization, copper mining and the civil conflict destabilized traditional power structures and eroded the authority of customary leaders, creating inroads for women and other community members to join the ranks of decision-makers and leaders. This is not to say that efforts to enhance parity in participation will never be effective, but simply that transforming the normative aspects of customary systems is a highly complex task that is unlikely to be achieved through the installation of new leaders alone and that may somewhat depend on the presence of factors that cannot be 'imported'.

Creating the conditions where different groups are better able to participate in decision-making should perhaps start with questions about how to get local leaders interested in or open to devolving their authority. Prompting open debate within communities on issues of participation may be one entry point. Another may be dispute resolution training, such as that described in Bougainville, where women, men and youth representatives were brought together to participate in role-playing exercises, including simulating dispute resolution. While this cannot be expected to immediately translate into an opening of the dispute resolution 'circle' to accommodate such groups, the simple

act of observing different players in traditionally vested roles may have empowering spinoff effects. Where direct appointment or representation through quotas is the strategy adopted, incremental reforms, such as installing women and youth in advisory roles rather than as decision-makers as a first step, may be more sustainable and have greater impact over the longer term.[35]

Case study 2
The successful installation of women leaders and dispute resolvers in Namibia[36]

In pre-independent Namibia, women were largely excluded from active participation in political and judicial decision-making and from leadership positions. However, at a 1993 workshop of Traditional Authorities in Ongwediva, it was unanimously decided that women should be allowed to participate fully in the work of community courts. In the locality of Uukwambi, the Traditional Authority called a meeting of all headmen where they were told that a female representative and advisor had to be selected in each locality. These new female advisors were expected to participate actively in hearings of customary courts and to act as deputies to the headmen.[37]

Following these actions, Uukwambi has seen a significant rise in female traditional leaders.[38] These women are generally assessed as good leaders, and resistance by the population to their new roles has decreased steadily over time. Empirical research conducted in 2010 indicates that a large majority of villagers believed that their headwoman was doing her job well, with no significant difference between male and female respondents. In the same vein, respondents in villages with female leaders described the relationship with their village leader almost identically to respondents in villages with male leaders. Although *in abstracto* both men and women still regard men as most qualified for traditional leadership — either due to tradition or the possession of certain character traits — the data collected suggest that women traditional leaders are assessed positively by both men and women, and that men living in villages led by a woman leader are significantly more positive about female leadership than are men living in villages led by a male traditional leader. This is important for legal development activities aimed at heightening participation because it suggests that exposure to relatively successful female leadership can modify men's opinions about female leadership, not just in their own locales, but generally.

The scene of traditional dispute resolution in Uukwambi has also changed dramatically. Today, an increasing number of women traditional leaders and representatives are present at court cases at the village, regional and Traditional Authority levels. These women are active in the representation and discussion of cases, in questioning parties and witnesses, and in deliberating the actions and decisions of the court. Ordinary women are also present in large numbers and even outnumber the men in many villages. Women are encouraged to actively participate in the proceedings, and observations indicate that many do so: women as parties and as witnesses speak plainly, seemingly unafraid to vent their anger and irritation with the opposing party, and occasionally refuse to accept a settlement that involves them compromising on an important point. There is not an easily discernable difference of style in behavior and speech between men and women both as parties and as witnesses.

These observations were supported by survey data collected; when respondents were asked whether they felt that they could actively participate in proceedings, 72 percent of female respondents and 92 percent of male respondents answered positively (sample size: 162). When asked whether men or women were more influential in the traditional court in their village, 56 percent of female respondents and 60 percent of male respondents believed that power was equally divided. The gender of the village leader had no effect on the opinion of male respondents, whereas female respondents believed that there was more power-sharing in villages with headwomen. When all respondents — including those who had never attended a traditional court meeting — were asked their opinion about the statement "men and women are treated equally in traditional courts", only 8.6 percent did not agree.

Three important factors can be identified in the above case study that set it apart from many other attempts to enhance the position of women regulated by customary law. The first was the simultaneous change undertaken in three interconnected domains of traditional rule: women's participation in leadership, women's participation in dispute settlement, and efforts to alter the normative content of customary law to make it more protective of women. These three domains are related in such a way as to suggest that any effort to promote change needs to be holistic: progress in one field stimulates progress in another, and lack of development in one field may inhibit positive change in others. The second factor was the complementarity of national, regional and local efforts. The change processes formed part of a broader effort to harmonize customary laws and align them with the new national Constitution. This harmonization process was encouraged, legitimated and, at least in part, promoted by the Namibian Government. While officials were careful not to impose direct normative change, they made their ideas and views on some topics well known. At the same time, in a bid to assert their relevance in independent Namibia, regional Traditional Authorities took heed of these 'suggestions', which in turn legitimized change processes in villages in Uukwambi. The active engagement and the personal involvement of Chief Iipumbu of the Uukwambi Traditional Authority also greatly influenced the success and vigor of the reforms. The third factor was the momentum for change in Namibia following its independence. In particular, in Owambo, where the liberation struggle had created an intense identification with the new independent Namibia, the inclusion of women in national and regional government as well as the gender equality discourse in nationalist politics opened up new possibilities for women in traditional life.[39]

3.2 Targeting local leaders for training

Another entry point is to encourage community and customary law leaders to act as protection agents of vulnerable groups. This might be facilitated through skills-building, such as training in gender-sensitive approaches, human rights, statutory and constitutional law, and in how to access courts and matters of jurisdiction. Leaders may also be encouraged or assisted to introduce procedural safeguards to lessen the impact of power imbalances and heighten protections for marginalized community members. These might include the adoption of clear jurisdictional boundaries, minimum standards of human rights protections, sanction guidelines, record-keeping procedures and specific protections for minors.

A key challenge is that those with decision-making responsibilities are often among those who benefit from discriminatory norms and have much to gain through the maintenance of the status quo. Leaders, however, also have incentives to be responsive to external developments that may impact their authority and ability to govern, and to changing community expectations.[40] They may therefore be more inclined to promote reform in certain contexts such as where there are increased options with respect to available judicial services (for example, when NGOs offer dispute resolution services or the state attempts to expand access to the formal justice system), where oversight of the customary justice system is heightened (such as through external monitoring), or where there is broad-based normative change (for example, concerning a momentum towards greater gender equality).

Case study 3
Community dispute resolution training, Bougainville, Papua New Guinea[41]

In 1994, in an effort to address some of the social consequences of the civil conflict, the Bougainville Interim Government invited the Papua New Guinean NGO People and Community Empowerment Foundation Melanesia (PFM) to conduct a series of community-level dispute resolution trainings. The Community Justice Course targeted a cross-section of community members including chiefs, women, youth, civil society leaders and church leaders of different denominations. The principal objective was to build conflict resolution skills in local communities, and in turn promote intra- and inter-community social harmony and local ownership over justice processes. The 'empowerment of women as equal partners' was an important and recurrent theme; the aim of the training was to provide women with the information and skills to assert themselves and speak up among men and chiefs, while in parallel

promoting a community-wide appreciation of women's rights and contributions. A related goal was to facilitate greater participation in decision-making, including by women and vulnerable groups, so that outcomes would represent the perspectives, needs and expectations of the wider community, as opposed to only those of the 'big men'. The modalities of the training were structured towards these ends. By bringing men and women together in small working groups — a situation that pushed cultural boundaries — women were given a forum to try out their skills as mediators and decision-makers, while chiefs and other men were compelled to observe them in these roles. This facilitative space was tightly controlled through established guidelines on issues such as mutual respect that were communicated at the beginning of the training and monitored by the facilitator.

With a view to discovering whether and to what extent the training enhanced justice outcomes for women, research was conducted in 2010 in nine rural villages and one urban location in Bougainville. The data collected supported the hypothesis that PFM training improved female disputants' experience of dispute resolution, but had a neutral effect on the gender gap between the experiences of men and women. The PFM training also had a positive impact on people's attitudes relating to gender. The survey results suggested that respondents who had participated in PFM training were significantly more likely (regardless of gender) to agree that men and women should have equal opportunities to participate in dispute resolution. Trained mediators were also significantly more likely than untrained chiefs to recognize domestic violence as an issue worthy of being addressed through customary processes (as opposed to a private issue to be resolved within families).

The most substantive change occurred where women trained as mediators took up customary dispute resolution roles; it was observed that these women addressed issues such as domestic violence and rape in alternative and more empowering ways than their male counterparts, re-examining discriminatory norms and modifying them through their decision-making. Female mediators were more likely to recognize substantive legal rights, especially in relation to violence against women, and had little hesitation in drawing normative and legal boundaries with respect to acceptable decision-making by the parties involved. They were also more inclined to refer cases to the formal justice system where they believed that they could not guarantee an equitable outcome for the victim, and (almost exclusively) would disallow a solution that involved the marriage of a victim to her rapist. Likewise, in cases of domestic violence, the approach of female mediators differed from male mediators and untrained chiefs. Women mediators would commonly threaten the perpetrator with action at the state court if the violence did not stop, and simultaneously inform the victim of her right to refer the case to court and explain to her how to do so. They would also counsel women on their options if they decided to leave their husbands, including by providing referrals to NGOs that offered support to victims of domestic violence and arranging for trauma counseling. Female mediators also tended to have a greater awareness of gender-based power imbalances and would apply tools to address them. Where such disparities threatened a fair and equitable outcome, they were more likely to refer the case to the formal justice system; they were also more likely to obtain the consent of the victim before arranging a meeting where both parties would have to meet face-to-face.

Together, the above results indicate that female mediators in Bougainville were slowly but successfully challenging the interpretation and application of customary legal norms in such a way as to offer greater protections to women. These mediators appeared to be largely accepted and supported by trained male mediators and chiefs, who both expressed a desire for more female mediators. This is somewhat surprising given the experiences of other countries where moves to displace traditional power-holders, and more generally to interrupt male interpretations and application of custom, have been strongly resisted. Two factors are tentatively posited as an explanation for the lack of resistance in the Bougainville context. First, the PFM training engaged a broad range of stakeholders, including men, women, youth, religious actors and chiefs. This approach may have facilitated attitudinal changes towards the contribution and roles of women.

Second, the specific circumstances of Bougainville — the impact of colonization, copper mining and the civil conflict — were such that traditional power structures were already uncertain and in upheaval. When PFM commenced their training program, chiefs had lost their previously strong power base. It is likely that this contributed significantly to them being supportive, or at least open, to women and other community members becoming decision-makers.[42]

3.3 Eliminating harmful customary practices

One approach to eliminating harmful customary norms is through the introduction of legislation that either proscribes certain practices or introduces specific rights for vulnerable groups. Laws might, for example, recognize customary practices only insofar as they are consistent with constitutional guarantees relating to gender equality; give legal status to marriages performed according to customary law, thereby providing parties with the rights and protections available under statutory law; or prohibit practices such as widow chasing, wife inheritance or widow cleansing.[43]

The case studies examined in this book suggest that, while in certain circumstances legislative pronouncements may facilitate normative change at the customary level, legislation is unlikely to have significant impact where there are barriers to accessing the formal justice system; customary norms are deeply entrenched, or attached to a widely held belief set; or practices have important social, economic or security rationales. Reform is also unlikely to have significant impact when such moves are both inconsistent with the interests of key decision-makers and the state's enforcement capacity is weak.

As discussed in case study 6, although community leaders in Mozambique were aware of the formal law's requirements regarding women's right to land ownership and inheritance, they failed to apply such provisions in their decision-making at the customary level. This was, at least in part, due to the fact that more equitable land ownership practices contradicted their own priorities. But there were also few incentives to encourage leaders to integrate state legal provisions into the operation of the customary model; the state had little normative relevance or authority within communities, and little capacity to monitor customary decision-making or enforce legal requirements. Finally, attempts to proscribe negative practices can have unintended negative consequences; restrictions can drive behaviors underground where vulnerable groups lose the limited protections they may have enjoyed at the customary level.

Box 3
Examining the unintended consequences of individual land titling legislation for women[44]

A variation on legislative reforms eliminating negative practices is to replace customary law with a revised or hybrid set of rules. A common example relates to individual land titling schemes, widely introduced in Africa and South America as a means of increasing tenure security, optimizing land use, promoting economic growth and opening up opportunities for women to own land — rights that are generally not available under customary law.[45]

While individual land titling has been largely successful in facilitating high levels of tenure security in developed countries, it has proved less suitable in contexts where land is held communally under customary land administration and management systems. These systems generally comprise a complex mesh of overlapping rights that can be held by individuals, families, clans and entire communities, or be reserved for future generations and changing community needs.[46] Such land holdings are also not always geographically fixed: in rural areas, for example, it is common for users to employ dynamic cultivation patterns that change by season and year. Finally, members of these communities often rely on common resources such as forests, grazing lands and water sources for their livelihoods and daily needs. Community members are generally considered the 'co-owners' or rightful users of such land.[47]

These particularities mean that schemes transferring such land to individualized title have not adequately protected the full range of usufruct rights typical of customary land management systems. In many cases, efforts have led to increased inequity, dispossession and disenfranchisement of vulnerable groups.[48] First, the customary rules governing land rights are often complex, fluid and unwritten, and may vary significantly over short distances. Without a clear understanding of how such rules operate in society, there is the potential for registration to result in a redistribution or extinguishment of previously held rights. Second, it may be impossible to convert customary rights to modern statutory title. Individual customary land rights, for example, may be inseparable from or intermixed with communal rights, such as agricultural use rights or sharecropping. The key issue is that individual titling is not designed to take into account communal or secondary rights over land, such as rights of way, common pool resource claims, or the migratory routes of nomadic groups and hunter-gatherers. As a result, these rights remain unrecorded and may be lost. Third, according to Fitzpatrick, under customary systems "women are less likely to own land and are more likely to hold usufructuary and access rights ... [e.g.] rights to graze livestock and access common property resources."[49] Since land rights formalization programs "elevate a land owners' ability to exclude outsiders without establishing legal rights of access (easements) that reflect traditional use and access rights", women can be deprived of the rights they previously relied on.[50] Women's land rights can also be lost where formal title documents are issued only in the name of (usually male) household heads.

3.4 Reinterpretations of customary law

An alternate approach to statutory reform for influencing practice at the community level is to exploit the contested, dynamic and flexible nature of customary law and encourage actors to re-examine existing norms through recognized and approved processes.[51] Such approaches might include looking within customary law and utilizing internal values to develop cultural legitimacy around the notion of vulnerable groups' rights.[52] In some Pacific customary systems, for example, many argue that the failure of the customary system to protect women from violence marks a departure from the past.[53] They argue that protective norms previously embedded in custom have been eroded, possibly through processes of colonization and civil conflict, both of which have contributed to a breakdown of customary governance mechanisms.[54] They suggest that dominant male interpretations of custom can be challenged by evoking traditional practices where women had equal status, participated in their own ceremonies and held leadership roles.[55]

A related approach is to encourage a review of customary practices in light of underlying customary values. The argument runs that, although practices may vary over time, customary values remain constant.[56] Where such values align with substantive or procedural human rights, the latter can be weaved into the cultural and customary law fabric, and hence introduced in new, relevant and legitimate ways. It may also be possible to draw upon other sources of social influence to modify harmful practices, for example, in Muslim areas drawing attention to customary practices that are inconsistent with Islamic law, such as forced marriage, female genital mutilation and denials of women's inheritance rights.

Case study 4
National Declarations of customary law, Somalia[57]

As described in case study 4, chapter 3, in 2003, elders from Somaliland undertook a process of revising their customary law (*xeer*) with a view to aligning it more closely with both *shari'a* and human rights standards. Under the revisions, the elders committed to the better protection and enhanced access to justice of certain marginalized groups, including women, IDPs, minorities and children, as well as to refer serious criminal cases, including murder and rape, to the formal legal system for resolution. These commitments were enshrined in Regional and National Declarations, followed by a process of dissemination.

In 2010, research was conducted in Somaliland and Puntland into the longer-term impact of this intervention. It found that there has been significant progress in the elders referring cases of murder to courts and a decrease in the practice of clans shielding perpetrators from criminal investigation. In terms of rape cases, however, while the elders are, in principle, prepared to refer such cases to court, victims remain under significant social pressure to resolve them customarily. In other cases, complicated evidence requirements prevent judges from delivering a verdict and the matter is referred back for resolution under *xeer*.

At *xeer*, the outcome of rape cases is determined by the victim's male relatives and/or the elders through negotiation on the level of compensation payable, the amount of which is a function of the relative size of the clans, the relationship between the clans, and the age and marital status of the victim. Such compensation is typically distributed among the members of the group, and rarely delivered to the family of the victim as required under the Declarations. Moreover, the traditional practice of marriage of the victim to the perpetrator continues to be seen as a legitimate means of resolving gender crimes.

The legal protection afforded to IDP and minority victims of gender-based crimes remains particularly limited. For crimes of rape perpetrated by majority clan members on such victims, there is often no access to justice. If referred to court, the elders of majority[58] clans will usually withdraw the case; however, the solutions offered at *xeer* are unattractive because marriage between a majority and minority member is not permitted, and the power of a minority clan to exact compensation from a majority clan is weak.

Case study 5
Restatements of customary law, Namibia[59]

At the May 1993 Customary Law Workshop of the Owambo Traditional Authorities (described in case study 2), the leaders decided that certain rights abrogating norms should be proscribed. The first concerned the customary practice whereby a deceased husbands' estate would be inherited by his matrilineal family. This left the widow dependent on her husband's relatives, unless she chose to return to her own matrilineal family. Despite a customary obligation on the husband's family to support needy widows and children, the result was often that widows and their children were chased out of the family home. A second, related norm was that when women remained on the land they had occupied with their husbands, they would be required to make a payment to the traditional leaders, essentially purchasing the land in question.

The leaders' commitment to eradicating these practices was enshrined in a self-statement of customary law — a written account of those parts of the customary law deemed of particular importance. A provision was incorporated into the written *Laws of Uukwambi (1950–1995)*, and then repeated in the draft version of the *Laws of Uukwambi Traditional Authority (1950–2008)*. These Laws also physically complicated property grabbing by stipulating in clause 9.4 that "[t]he widow or any other member of the bereaved family should feel free to walk around the house during the mourning period as it was before [the husband had died]".

Research conducted in 2010 suggests that the changed norms have become widely known and enforced in Uukwambi. A vast majority was familiar with the new rules, and it was generally stated that cases of property grabbing had reduced, both in traditional courts and at Communal Land Boards. Of 162 respondents, 82 percent were aware of the norm prohibiting property grabbing, and 81 percent were aware of the norm prohibiting payment to the headman/woman. Of the 132 respondents who were aware of the norm prohibiting property grabbing, 92 percent stated they were unaware of any case of property grabbing in their village in the past three years.

The difference in impact between the interventions described above illustrates the complexity and situation-specific nature of what is required to modify local norms. A key factor in Namibia was the holistic approach adopted: efforts to amend the normative content of customary law were undertaken simultaneously with efforts to enhance women's participation in leadership and in dispute settlement (case study 2). Change was also pursued concurrently at the national, regional and local levels. At the national level, the post-independence struggle for a national identity became largely tied up in the notion of gender equality, embodied in the appointment of senior female figures in the central government. At the local level, the changes to customary rules reflected a widely felt need among society members to enhance the position of widows. Research carried out in Uukwambi immediately prior to the reforms found that when respondents were asked whether they agreed or disagreed with the statement "the husband's family should inherit all the property when the husband dies", 96 percent disagreed;[60] when asked whether "women should be allowed to inherit land without having to pay", 97 percent agreed.[61] As a reflection of this, in 1993, more than 100 women demonstrated against discriminatory inheritance laws at the highest court of the Traditional Authority.[62] This combination of horizontal and vertical action, and the synergies it created were almost certainly important factors in translating pressure for normative change into practice.

The intervention in Somalia, by contrast, enjoyed neither this level of coordination nor a shared commitment on the part of the population for change. Instead, the program rested on the assumption that the goodwill of the elders would be adequate to overcome broader issues of gender and social discrimination deeply entrenched in Somali culture. Intention alone, it turned out, was not sufficient to modify such belief patterns, and correspondingly, the structure of the *xeer* system, which failed to provide equal access to disadvantaged groups. Social attitudes preventing women who had had pre-marital sex (whether consensually or through rape) from marrying could not change overnight, nor be disassociated from longer processes of social and economic development. While such attitudes remain, the practice of marrying victims to perpetrators and exacting compensation under *xeer* will continue, because this represents the only forms of societal and financial protection available to women victims.

There were also other inhibiting factors in the Somalia case. The intervention did not respond to the underlying issues that prompted the elders to remove cases from the state justice system in the first place. As a result of the weak security and governance conditions in Somalia, the clan is the fundamental provider of security and protection,[63] with the result that preserving clan strength is viewed as paramount by all. Until this situation changes, the transition from a collective to an individualized system of justice will prove difficult.

Finally, the intervention sought to create a bridge between formal and customary judicial fora, without responding to the inherent problems that made the courts unattractive to both users and elders. Principally, the courts remain weak *vis-à-vis* the elders and only rarely would a decision taken by them be challenged by the courts, even when complainants actively asserted a preference for formal adjudication. Further, since the elders are not accountable to the courts, they cannot be penalized if they withdraw a criminal case for improper reasons, and there are no legal mechanisms to protect victims whose cases are removed from the courts against their will.[64] A related problem is the formal laws in place. Unrealistic evidentiary requirements that discriminate against rape victims make prosecution extremely difficult. Where such requirements cannot be fulfilled, returning the case to *xeer* is the victim's only means of obtaining some measure of redress. In the case of IDPs and minorities, however, access to any form of justice may remain beyond reach.

This is not to say that the success factors outlined in Namibia are *sine qua non*, or that the success inhibitors identified in Somalia are all that needs to be avoided. Clearly, change that is both broad and deep will often be a precursor to lasting change, while failing to respond to underlying social, security and access to justice issues is likely to be a stumbling block; likewise, modifications are most likely to be accepted and sustainable when reform evolves from within communities themselves. However, outlining the conditions under which social norms change is an inexact and

poorly understood science, contingent upon many situation-specific factors that cannot be generated from the outside. This raises the question of what, if any, role external actors should play in these types of interventions, and particularly, how can they best support interventions that evolve from the grassroots without slowing down or interrupting their natural momentum.

In most cases, the appropriate role will be to facilitate community-level debate on the protections offered through the customary system aimed at drawing out internal contradictions or practices that are difficult to justify. In Namibia, for example, customary practice was difficult to reconcile with the norm that widows should be protected by their deceased husband's family. There may also be additional roles. In Somalia, customary leaders did not have the skills in advocacy, logistics or strategic networking required to properly disseminate the reforms in a way that might have better galvanized the population. External assistance in this area might have been complemented by facilitating dialogue between the different stakeholder groups, and establishing links between civil society, the courts and/or customary actors.

3.5 Increasing access to justice options for vulnerable groups

A further entry point for improving the quality of the justice outcomes received by vulnerable groups can be to enhance their options for how disputes will be resolved, either through state or alternate dispute resolution fora. While the principal objective is to make fair and equitable solutions more accessible, a secondary benefit may be that heightened competition for judicial services leads to modifications in customary processes. Entry points were discussed in detail in chapter 4 and might include:

- NGO-provided legal services targeting vulnerable groups: NGOs may provide legal counseling, mediation, paralegal services and/or assistance in accessing courts, or conduct monitoring of decisions reached. Where most effective, NGOs are linked to legal aid services and can thereby use the threat of litigation to encourage participation or a more equitable settlement aligned with statutory provisions. NGO-provided legal services also appear to be more effective where they are embedded within a broader mandated organization, such as women's health clinics, micro-finance organizations or training centers. Where this facilitates multi-faceted interventions such as legal aid accompanied by awareness-raising and advocacy, NGOs can be a potent tool in facilitating social and attitudinal changes, enhancing the likelihood that expanded choice and negotiating power will translate into improved rights protections.
- Expanding the reach of state justice services: Some examples may be mobile courts, expanded or decentralized state legal aid services, or the appointment of justices of the peace authorized to mediate or adjudicate minor civil and criminal law matters. Such services could be made more appealing to vulnerable groups by using a staffing pool that reflects the gender, status and ethnic composition of the target population, through training in the common problems faced by such groups, and by ensuring that the services provided are not financially prohibitive.
- Modifying state justice processes to respond to the factors that make courts unappealing to vulnerable groups: Some examples may be reducing costs and physical access barriers; simplifying procedures; employing translators or allowing cases to be heard in local dialects; employing dedicated staff to assist with claims filing, particularly for illiterate and less educated persons; and promoting outcomes that are more likely to address the needs and perspectives of vulnerable parties, such as non-custodial sentencing and restorative sanctions.[65]

Case study 6

NGO-provided legal aid and paralegal services for women, Mozambique[66]

In Mozambique, the limited impact of statutory reforms vesting women with improved rights to own and control land has led to a burgeoning community of domestic NGOs undertaking to enhance women's access to justice and land tenure security. These NGOs deliver a range of legal services including education on statutory law, training community-based paralegals and the set-up of paralegal offices to assist women claim their land rights in court. Their principal interest group is widowed and divorced women: those found to be most vulnerable to being dispossessed of their land in accordance with customary law. In contrast to statutory provisions, customary law regulating land use and ownership provides that women's access depends on their relationship by kin or marriage to male relatives. As a result, when a married woman's relationship with her husband ends through death or divorce, male relatives acquire control over land, and women are precluded from inheriting any property assets.

Research undertaken in 2010 enquired as to whether such NGO initiatives were leading to changed practices with respect to women's land tenure security; specifically, whether laws protecting women's land rights were more effective when combined with the provision of community legal education and legal services. The research involved comparing the outcomes of cases involving widowed or divorced women in: i) control communities where there were no NGOs active; ii) communities where paralegals had been trained in mediation and land rights; and iii) communities where NGOs had established a legal aid office with trained paralegals working under the supervision of a qualified lawyer.

The research found that NGO-provided legal aid was a highly effective means of obtaining improved outcomes for women. In the villages observed, it was found that customary leaders, despite being aware of statutory law provisions relating to women's land entitlements, routinely applied customary norms that operated to dispossess women of their land following widowhood or divorce. In the villages where there was an established legal aid office, however, every dispossessed woman challenged her situation: a preliminary appeal was made to the community leadership (which generally failed); women then unanimously turned from community leaders to the paralegal service, and without exception, courts upheld their land rights in accordance with statute. In villages that had only community paralegals, women also generally challenged their dispossession in some way; however, only a few sought legal advice after their community leader failed to resolve their case equitably, and even fewer women took their case to court — even though those who did were usually successful. In control communities, the results were very different. Few women were aware of their statutory rights, and almost no women challenged their dispossession with customary leaders.

The findings of the above case study support the proposition that, when conditions are right, community paralegals and legal aid services can play an important role in improving women's land tenure security. In contexts such as Mozambique, where courts consistently uphold women's statutory rights, but community leaders, regardless of their knowledge of the law in place, fail to apply such law, it is clear that formal courts are the preferred venue for claims. Paralegals and legal aid services were an effective and efficient means of facilitating this in a situation where there was no established culture of, or capacity for, self-represented litigation, and a weak state infrastructure meant that courts were highly inaccessible.

This is not to say that NGO-provided legal aid and community paralegals are a panacea. For results to be effective, as they were in Mozambique, a number of conditions need to be met: statutory laws that are sufficiently protective of women's land tenure rights; courts that consistently uphold such laws; access to legal advice and courts (potentially through NGOs and paralegals); and community awareness of the services available. A final prerequisite is social conditions where women are prepared to defy social convention and question the authority of their village leader by seeking an independent legal opinion and taking a case to court. International development actors are well

placed to respond to the former only: support for legislative reform can lead to improved protections at the statutory level, judges can be trained to consistently uphold the law, and paralegals can be installed to undertake community legal education and provide legal aid services. By contrast, the unique circumstances in Mozambique that facilitated women rejecting the dominance of customary law and taking their claims to the formal justice sector, were perhaps the most important element of this intervention's success and the most difficult to understand and replicate.[67]

What the case study demonstrates, therefore, is that in specific circumstances, having additional paths to justice can result in better outcomes for vulnerable groups. But success is very much contingent on certain local conditions, some of them not well understood and often out of the development practitioner's control. There are also hidden dangers and complications inherent in such approaches. It is therefore essential to assess the secondary implications that a more open playing field might have for the effectiveness of customary law and broader questions of access to justice. For example, having multiple pathways to justice can weaken or corrupt the internal integrity of the customary justice system, whose effectiveness depends on its social power to command user participation and respect. When new options undermine the functionality of the customary system, but are not strong enough or sufficiently accessible to replace it, access to justice may actually be reduced.[68]

A further problem relates to the wider difficulties in getting vulnerable groups to reject the customary sphere in favor of the formal justice system. Complainants face a host of impediments: social norms that require that disputes be mediated locally; sanctions by customary leaders who have vested interests maintaining their monopoly over dispute resolution; and non-cooperation by respondents who prefer the more lenient treatment they will receive under the customary system *vis-à-vis* the courts. Legal service NGOs often attempt to overcome such pressures through the threat of litigation. Local leaders, complainants and respondents realize, however, that due to practical and financial constraints, prosecuting every case is not realistic. NGOs thus need to position themselves in such a way that they are voluntarily accepted and utilized. As described in chapter 4, the result is that a balance is often struck between securing more acceptable outcomes for vulnerable groups and solutions that do not depart too radically from dominant norms. Such policies of subtle and progressive norm modification allow advances to be made, but change is slow, and some level of harm continues in the near term. Whether this is an acceptable compromise or whether it simply creates another layer of rights-abrogating behavior that solidifies rather than weakens the status quo is often a matter for debate.

3.6 Awareness-raising and advocacy

A major impediment to the better protection of vulnerable groups' rights is that victims are often unaware when a rights violation has occurred or how to take preventative or remedial action. Raising legal awareness among customary users, therefore, is an essential precondition to many of the interventions discussed in this chapter.[69] Awareness-raising should target rules that have high relevance and practical value, such as: the jurisdiction of customary law actors; minimum rights standards and provisions relating to topics such as equality, non-discrimination, land ownership, marriage, inheritance and guardianship; and modalities for accessing the state legal system and legal aid. Chapter 4 discussed three main entry points for increasing legal rights awareness: training, print media, and popular literacy mediums. For each of these approaches, it is critical to take into account the special needs and constraints of vulnerable groups.

Principally, the medium chosen should be accessible and appropriate for the audience. Women may have constraints on when they are able to attend training sessions due to family responsibilities, or it may be socially unacceptable for them to participate in public training together with men or that requires them to travel; likewise, the gender and ethnicity of trainers should be carefully selected, as should the composition of training groups. Awareness-raising should also take into account the literacy, linguistic and educational constraints of vulnerable groups, and that such groups may be less able to access forms of mass media that need to be purchased such as newspapers, television

or film. Finally, when awareness-raising seeks to modify deeply entrenched social attitudes, such as perceptions of women as land owners, the rights of children of single parents or the seriousness of violations against minority status groups, it is important to target both groups involved in the power struggle. The Overseas Development Institute has highlighted the importance of directing efforts, not only towards those who face discrimination, but "especially to those who benefit from systems of dominance and injustice — men, the wealthy, and 'upper caste' groups."[70] It may be then, for example, that awareness-raising campaigns concerning gender discrimination are more effective when they are led by and target men.[71]

As repeatedly highlighted in this book, it is always important to consider how programmatic interventions can have negative implications on vulnerability or for normative change. Particular attention should be paid to whether and to what extent awareness-raising activities should promote engagement with the formal legal system when it is not fully functional in terms of reasonable accessibility, impartiality in decision-making, corruption, and gender or other forms of social discrimination. Development practitioners should evaluate the possible consequences if, for example, individuals approach a court expecting to receive certain services but find that there is still a large gap between what the formal justice sector should and what it does actually provide. Might such an experience exacerbate existing feelings of disenfranchisement and cynicism regarding the possibility of having a just and effective formal legal system? Might vulnerable groups find themselves in an even more disadvantaged position if, having sought but not received an equitable solution from the courts, they then face recriminations or social sanctions at the customary level? Where such risks are high, awareness-raising might best be limited to stimulating dialogue processes at the community level on rights-based issues.

Case study 7
Awareness-raising in post-tsunami Aceh[72]

Following the 2004 Indian Ocean tsunami, consultations revealed that women were at heightened risk of legal violations given the tenuous rule of law situation and because they had little access to information regarding their rights. Particular concerns included that women were often denied their entitlements under Islamic inheritance law, were rarely recognized as land owners, and were caring for orphans without the protection of legalized guardian status. In response, IDLO produced a 30-minute Indonesian language educational film, "The Stories of Aisha, Rauda and Ainun: Protecting Women's Legal Rights in Aceh Post-Tsunami". The film tracked the lives of three women, each struggling to overcome some of the most common legal issues affecting communities in the aftermath of the tsunami. Through these narratives, the film examined the law relevant to each of the main topic areas of land, inheritance and guardianship, and the possible solutions that might be found. A team comprised of Acehnese experts in Islamic Law and Islamic philosophy (*Aqidah*) screened the film in 102 tsunami-affected villages followed by half-day information training sessions, reaching a total of 3,003 beneficiaries.

The film proved popular among communities and other development organizations, which integrated the film into their programming. This perhaps reflects the appropriateness of film as an educational tool for women in Aceh given the province's strong culture of oral and visual communication, women's lower levels of access to mass media and literacy levels, and the fact that women have fewer opportunities to participate in civil society activities. A further factor contributing to the acceptance and legitimacy of the film was that the Chief Justice of the *Shari'a* Court provided a two-minute endorsement at the film's commencement where he noted its compatibility with both Islamic and Indonesian law, and encouraged the audience to listen carefully and discuss the messages with their families.

A post-program evaluation, involving questionnaires with basic questions on women's legal rights administered to 1,522 participants two months following the screening and to a control group of

240 persons who had not viewed the film, suggested that beneficiaries had a higher knowledge of women's legal rights than the general public. Women who had seen the film had an average of 74 percent correct answers, compared to 47 percent who had not seen the film. Further, interviews with participants conducted two months after the film screening found that 25 percent were able to identify someone who had taken action based on the information supplied through the film program in an effort to resolve a legal issue.[73] Finally, it is important to note the cost-effectiveness of using this medium of communication, at approximately US$10 per beneficiary.

4. Conclusion

This chapter has discussed a range of strategies that might be used to enhance the protection of vulnerable and marginalized groups in the context of customary dispute resolution. Such groups merit special consideration for two reasons. First, they encounter obstacles accessing justice at both the formal and customary levels. Normative frameworks fail to offer adequate protection against rights violations, and where disputes are adjudicated, discrimination, elite capture and corruption can operate to prevent equitable outcomes. This lack of substantive and normative protection leaves the poor and marginalized more susceptible to having crimes committed against them, perpetuating the cycle of vulnerability. Second, vulnerable groups suffer disproportionately from the impact of criminal and civil wrongs. One reason for this is that they do not possess the tools required to insulate themselves against the harmful effects of rights violations: they are less likely to be insured against loss of income, physical injury or the destruction of property; they are less likely to have access to state social services; and they are less likely to have accumulated capital to serve as a buffer against loss of livelihoods or assets.[74] Moreover, where existing vulnerability is exacerbated, they become more exposed to exploitation, abuse and violence.[75]

The principal message of this chapter is that any analysis of how to improve vulnerable groups' access to justice needs to be grounded in the context of the social, economic and security environment where dispute resolution takes place. The case studies illustrate that there can be a level of disconnect between the rights discourse and the practicality of upholding rights in developing country and post-conflict environments. A strict application of gender protection measures, for example, may be frustrated where state or NGO-provided social services do not exist, the formal justice sector is inaccessible or discrimination and perceptions about group cohesion mean that there is little social or political return for protecting women. In such situations, women depend on their husbands, extended families or wider communities as their ultimate providers of social, material and physical protection, leaving them with few options other than to play according to the customary 'rules of the game', which rarely operate in their favor.

In these contexts, model outcomes, such as the consistent resolution of gender crimes by the courts, realizing women's equal right to inherit land, or ensuring that women participate in customary dispute resolution, may be unrealistic in the absence of broader social, economic and security changes. Instead, working to improve the level of protection and quality of outcomes received — whether that be at the customary or state level, or through alternate fora — may have a more tangible and beneficial impact. Moreover, it may be that interventions that aim for small and sustainable wins and that allow for gradual improvements in terms of harm reduction are preferable to those that demand full normative compliance, at least in the short term. Compromises such as vesting widows with trusteeship over land (but not full ownership) in Kenya solved the immediate protection problems associated with widow inheritance, and because it facilitated a continuation of dominant norms, it is arguably more likely to be a durable solution.[76] Likewise, efforts in Timor-Leste to have compensation payments given directly to women victims as opposed to her wider family or community are small steps towards increasing victims' economic and social negotiating power.[77]

In assessing the types of interventions that are most suited to a given context, women's perspectives should play a pivotal role. The most likely cause of difficulty is when such perspectives do not reflect modern notions of equality and fairness. Long-term, entrenched discrimination can impact the thinking of all groups; women themselves may view domestic violence as a relatively minor issue and one that should be addressed within the context of customary law, or that decision-making should be left to male elders. Gender scholars would argue that such responses reflect indoctrination in certain belief sets. They may be correct. But at the same time, users of any adjudicative process need to feel that the outcomes on offer respond to their conception of justice; substituting modern ideas about gender rights may be as harmful as allowing discriminatory, but genuinely held beliefs to justify rights-abrogating practices. A further point is that women's perspectives on a satisfactory outcome take into consideration the social and economic context within which they live their lives. Battered or raped women may not be in favor of returning to their husbands or marrying their rapist, but they may also have good reasons for avoiding the social, economic and security implications that follow being divorced or unable to marry. Where women have sound and pragmatic reasons for wanting to manage their disputes within the context of customary law, again, interventions aimed at harm reduction — as opposed to full rights realization — may be most likely to yield tangible benefit.

Finally, because these problems are not solely legal, but inextricably tied to economic, social and security-related imperatives, interventions are most likely to be successful when they take place in the context of broader development reform. Legal development practitioners do not usually have control over the strategic direction of such programming, but they can capitalize on relevant initiatives taking place in other sectors. Bundling legal responses with interventions aimed at increasing the education, empowerment and economic potential of vulnerable groups is a good example. Likewise, where positive change evolves naturally, it is important to explore the conditions that allowed this to occur, as discussed with respect to the Mozambique case study.[78] The forces driving or facilitating such changes may provide insight into how gender norms evolve, and hence are extremely relevant to programmatic strategy-making both in-country and more broadly.

footnotes

1 C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (2003) 27.

2 In Somalia, for example, the age of majority for most crimes is 15 years (D.J. Gerstle, *Under the Acacia Tree: Solving Legal Dillemas for Children in Somalia*, UNDP (2007) 34).

3 For example, in some areas of Afghanistan: USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies* (2005) 49-50; and Peru: J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003) 17-18.

4 See Chapter 2, Section 2.2.

5 For example, in some areas of Somalia: Gerstle, above n 2, 88, 59; J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, DRC (2006) 55-56; and Afghanistan: USAID, above n 3, 49-50.

6 For example, in Somalia, the concept of rape within marriage is poorly understood and scarcely acknowledged (Gerstle, above n 2, 32-33).

7 See Chapter 1, Section 3.4; likewise in some areas of northern Kenya, the customary penalty for rape is usually a fine and this will differ depending on whether the victim is married or single (B. Ayuko and T. Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, Research Report, World Bank Justice for the Poor (2008) 19).

8 Swaine explains that in Timor-Leste, customary decision-makers focus on the (subjective) events that preceded the violence (particularly on who was responsible for precipitating the violence), as opposed to the (objective) violent act itself. The result is that the victim, often found to have 'provoked' the attack, will be apportioned partial responsibility. The harm that occurred through the violence is therefore not addressed, nor the need for the perpetrator to reform or stop such behavior (A. Swaine, *Traditional Justice and Gender Based Violence*, Research Report, International Rescue Committee (2003) 27-30, 3). It is also important to note that in a number of Africa and Asian countries, domestic violence is not criminalized under statutory law; it is thus misleading to suggest that lack of responsiveness to this issue is limited to customary justice systems (Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 3).

9 UNDP Indonesia, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 30-31; see further Penal Reform International, above n 8, 36-37; E Wojkowska, *Doing Justice: How informal systems can contribute*, UNDP, Oslo Governance Centre, The Democratic Governance Fellowship Programme (2006) 20.

10 UNDP, above n 9, 45.

11 UNDP A2J, *Programming for Justice: Access to All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 100-101; UNDP, above n 9, 62.

12 See Chapter 4, Section 6.4. See also examples from northern Kenya: Ayuko et al, above n 7, 2; and Timor-Leste: Swaine, above n 8, 18-19.

13 See examples from Timor-Leste: Swaine, above n 8, 43-44; and Kenya: Ayuko et al, above n 7, 12-14.

14 A particular challenge is that such attitudes may be held by a range of stakeholders i.e. not only by power-holders and decision-makers, but also by affected women, the educated and elites, see, for example, D. Mearns, *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International (2002) 50-51.

15 T. Dexter and P. Ntahombaye, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi*, Centre for Humanitarian Dialogue (2005) 20.

16 See for example, in some areas of Kenya: Ayuko et al, above n 7, 19; southern Sudan: D.B. Mijak, *The Traditional Systems of Justice and Peace in Abyei*, UNDP (2004) 26; and Somalia: Gerstle, above n 2, 43. Note that often the level of the fine/compensation will be determined by reference to factors such as the age of the victim, her marital status, and whether or not a child has been conceived.

17 Wojkowska, above n 9, 21; A. Le Sage, *Stateless Justice in Somalia — Formal and Informal Rule of Law* Initiatives, Centre for Humanitarian Dialogue (2005) 38.

18 The right to a remedy is protected under the *UDHR* art 8 and the *ICCPR* art 2(3) (a)-(c), the right to freedom of marriage is protected under *ICCPR* 23(3) *UDHR* art 16(2), and the right to freedom from treatment that is cruel, inhumane or degrading under *ICCPR* art 7 art *UDHR* art 5.

19 See for example, in some areas of Kenya: Ayuko et al, above n 7, 1-3; and Timor-Leste: T. Chopra, C. Ranheim and R. Nixon, 'Local-Level Justice under Transitional Administration: Lessons from East Timor' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011) 144-145.

20 See for example, in some areas of southern Sudan: A. Akechak Jok, R. Leitch and C. Vandewint, *A Study of Customary Law in Contemporary Southern Sudan*, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs (2004) 37; Burundi: Dexter and Ntahombaye, above n 15, 13; and Kenya: Ayuko et al, above n 7, 28-30.

21 Restrictions on freedom of marriage may have similar rationale. In Peru, for example, women can be punished for marrying outside of the clan, while men are permitted to do so. These rules aim to retain land holdings in male lineages (Faundez, above n 3, 17). See also in southeastern Bangladesh: R.D. Roy, 'Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh' (2004) 21(1) *Arizona Journal of International and Comparative Law*, 145.

22 E. Harper, *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh*, IDLO (2006) 47, 84.

23 Wojkowska, above n 9, 21.

24 This case study was adapted and reproduced, with permission from the Australian Journal of Asian Law from the following article: E. Harper, 'Studying Post-Conflict Rule of Law: The Creation of an 'Ordinary Crimes Model' by the United Nations Transitional Administration in East Timor' (2006) 8 *Australian Journal of Asian Law* 17, 22-25.

25 UNSC, *Resolution 1272* (1999), UN Doc S/RES/1272, paras [1]-[3].

26 UNTAET Human Rights Unit Report (20 June 2001) 8.

27 Amnesty International, *East Timor: Justice Past, Present and Future*, (2001) 40-1, Amnesty International <http://www.amnesty.org/en/library/info/ASA57/001/2001/en> at 25 March 2011.

28 Ibid 41.

29 E. Harper, interview with traditional leader of East Timor (Covalima, 12 August 2003).

30 For example, in some areas of Afghanistan: USAID, above n 3, 42; Somalia: M. Simojoki, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia' in IDLO Working Paper Series, *Enhancing Legal Empowerment: Customary Justice Programming in Post-Conflict and Fragile States* (2011) 12, International Development Law Organization <http://www.idlo.org/Publications/WP1Somalia.pdf> at 24 March 2011; and Burundi: Dexter and Ntahombaye, above n 15, 10.

31 See also in Bangladesh: S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for the DFID (2003) 9; and Lethoso: W. Schärf 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at the Institute of Development Studies workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003, 17-18).

32 See Chapter 3, Section 1.

33 Swaine, above n 8, 26.

34 Ibid 24.

35 Penal Reform International, above n 9, 143.

36 This case study is taken directly from J. Ubink, 'Gender Equality on the Horizon: The Case of Uukwambi Traditional Authority, Northern Namibia' E. Harper (ed) *Working with Customary Justice Systems: Post-Conflict and Fragile States*, IDLO 2011.

37 H. Becker, *Community Legal Activator Programme*, Evaluation Report, CASS Papers No. 35 (1995) 271.

38 Currently, one of the five district senior councilors is a woman, and in the three districts where interviews were conducted, the proportion of women ranged from approximately one of four (in Onamega District) and one of five (in Ogongo District), to a mere one of 19 (in Otuwala District).

39 Adapted from Ubink, above n 36, 29.

40 Penal Reform International, above n 9, 142.

41 This case study is taken directly from N. Johnstone, 'Bush Justice in Bougainville: Mediating Change by Challenging the Custodianship of Custom', in IDLO Working Paper Series, *Enhancing Legal Empowerment: Customary Justice Programming in Post-Conflict and Fragile States* (2011), International Development Law Organization <http://www.idlo.org/Publications/Johnstone.pdf> at 24 March 2011.

42 This paragraph is adapted from Johnstone, above n 41, 21-22.

43 Wojkowska defines wife inheritance as the long-term union of a widow and a male relative of the deceased, and widow cleansing as a short term or one-time sexual encounter with a man paid to have intercourse with the widow (Wojkowska, above n 9, 21). Widow chasing refers to a widow having been forced to leave her home following the death of her husband, usually by relatives of her husband.

44 This case study is taken directly from R. Knight, *Community Land Titling Initiative: Concept Note*, IDLO (2010) 3-4; and E. Harper, *International Law and Standards Applicable in Natural Disaster Situations*, IDLO (2009) 219.

45 Proponents hold that state recognition and protection of individual property rights, for example, encourages owners to make long-term investments in land, increasing its productivity and promoting economic growth.

46 See generally: B. Cousins, 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy' (2007) 7(3) *Journal of Agrarian Change* 281.

47 C. Tanner, *Law Making in an African Context: the 1997 Mozambican Land Law*, FAO Legal Papers Online No. 26 (2002).

48 A. Whitehead and D. Tsikata, 'Policy Discourses On Women's Land Rights In Sub-Saharan Africa: The Implications Of The Re-Turn To The Customary' (2003) 3(1)-(2) *Journal of Agrarian Change*; D Atwood, 'Land Registration in Africa: The Impact on Agricultural Production' (1990) 18(5) *World Development*; R. Barrows and M. Roth, *Land Tenure and Investment in African Agriculture: Theory and Evidence*, Land Tenure Center Paper (1989) 136; J. Bruce, *Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Saharan Africa*, Land Tenure Center Paper (1986) 128; A. Haugerud, *The Consequences of Land Tenure Reform among Small Holders in the Kenya Highlands*, Rural Africana (1983); R. Williams, *Implementation of the Guiding Principles on Internal Displacement in*

Domestic Law and Policy: Study on Remedies for Violation of Rights to Housing, Land and Property (undated) 37 (on file with author).

49 D. Fitzpatrick, *Women's Rights to Land and Housing in Tsunami-Affected Indonesia*, Oxfam International (2007) 22-23.

50 Ibid.

51 A.A. An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in A. A. An-Na'im and F.M. Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (1992) 331, 339; C Graydon, 'Local Justice Systems in Timor Leste: Washed up, or Watch This Space?' (2005) 28 *Development Bulletin* 66, 70.

52 An-Na'im, above n 51, 331.

53 P. Martin, 'Implementing Women's and Children's Rights: The Case of Domestic Violence in Samoa' (2002) 27 *Alternative Law Journal* 230; L. Behrendt, 'Human Rights Trump Customary Law Every Time' (2006) *National Indigenous Times*.

54 Ibid.

55 G.J. Zorn, *Women, Custom and International Law in the Pacific* (2000) 12.

56 New Zealand Law Commission (NZLC), *Custom and Human Rights in the Pacific* (2006) 12.

57 This case study is taken directly from Simojoki, above n 30.

58 In each geographic area, clans are divided into "majority" and "minority" units based on their size and social status. Minority clans can also be labeled as such due to the dominant trade practiced by their members. The Gaboye clan, for example, is classified as a minority clan not only due to its size, but also because its members are mainly leatherworkers and blacksmiths (Ibid 8).

59 This case study is taken directly from Ubink, above n 36.

60 Namibia Development Trust (with assistance from SIAPAC Namibia and CASS), *Improving the Legal and Social-Economic Situation of Women in Namibia: Uukwambi, Ombalantu and Uutwanyama* (1994) ES 63.

61 Ibid.

62 H. Becker, ''New Things after Independence': Gender and Traditional Authorities in Postcolonial Namibia' (2006) 32(1) *Journal of Southern African Studies* 34, 48.

63 Gundle, above n 5, iii.

64 Information presented at Prosecutor Workshop, Mansoor Hotel, Hargeisa, Somaliland, 7 March 2010 (referred to in Simojoki, above n 30, 28).

65 Ayuko et al, above n 7, 43-46.

66 This case study is taken directly from A. Kapur, 'Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems' in IDLO Working Paper Series, *Enhancing Legal Empowerment: Customary Justice Programming in Post-Conflict and Fragile States* (2011) International Development Law Organization <http://www.idlo.org/Publications/WP2Mozambique.pdf> at 24 March 2011.

67 See also Siddiqi's discussion of the 'selection effect' and how this relates to choice of judicial fora by vulnerable groups: B Siddiqi, 'Customary Justice and Legal Pluralism Through the Lens of Development Economics' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 121, 125).

68 J. Adoko and S. Levine, 'How can we turn legal anarchy into harmonious pluralism? Why Integration is the Key to Legal Pluralism in Northern Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 80, 83-84, 81).

69 There is some evidence, albeit country-specific and project-isolated, that awareness-raising of human rights principles through training and media can impact the views and behavior of both users and leaders of customary systems; see for example in Sierra Leone: R.E. Manning, 'The Landscape of Local Authority in Sierra Leone: How 'Traditional' and 'Modern' Justice Systems Interact' (2009) 1(1) *World Bank Justice and Development Working Paper Series*, 12; and Timor-Leste: Swaine, above n 8, 27.

70 N. Jones, *Governance and Citizenship from Below: Views of Poor and Excluded Groups and Their Vision for a New Nepal*, Overseas Development Institute (2009) ix. Likewise, Travedi notes that "raising the awareness of government officials in relation to legal empowerment is more important than raising awareness among poor people" (J. Cunningham, E. Wojkowska and R. Sudarshan, 'Making Everyone Work for Legal Empowerment of the Poor' (report of the Regional Dialogue on Legal Empowerment of the Poor, Bangkok, 3-5 March 2009, 17).

71 See further Ayuko et al, above n 7, 46-47.

72 Case study taken from E. Harper, *Post-Tsunami Legal Assistance Initiative for Indonesia: Monitoring and Evaluation Report*, IDLO (February 2006 – September 2007) 55-63.

73 Action taken included: women seeking further legal information; having a conflict resolved by village leaders; formalizing a guardianship arrangement; registering property in the women's own name or jointly with her husband; and approaching a legal aid organization for assistance.

74 DFID, *Justice and Poverty Reduction: Safety, Security and Access to Justice* (2000) 3.

75 For a discussion of the link between lawlessness and poverty and between inequality and injustice, see generally: M.R. Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Institute of Development Studies Working Paper No. 178 (2003) 2-4; K. Decker, C. Sage and M. Stefanova, *Law or Justice: Building Equitable Legal Institutions*, World Bank (2005) 4-6, World Bank <http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law_or_Justice_Building_Equitable_Legal_Institutions.pdf> at 24 March 2011.

76 See Chapter 3, case study 3.

77 Chopra, Ranheim and Nixon, above n 19, 145.

78 Another example can be drawn from Peru where women seem to have found ways to weaken the patriarchal hegemony of local dispute resolution mechanisms (*Rondas Caspinas*), evidenced by outcomes of domestic violence cases better reflecting women's right to be protected against violence (see Faundez, above n 3, 23-4).

CHAPTER 7 | The Role of Human Rights in the Development of Customary Justice Engagement Strategies

A key tension running throughout this book has been the relationship between customary justice systems and international human rights standards. The fact that some customary systems tolerate sanctions that violate basic protections enshrined in international law, and that norms may fail to uphold due process guarantees such as the right to a remedy or to equality before the law, raises important concerns with respect to programmatic engagement. A first question is whether such institutions are appropriate recipients of international development assistance; in the past, some agencies and donors found it unacceptable to engage with processes that, by their nature, failed to correspond with basic justice principles. This issue, however, has been largely overcome, even if not fully resolved. Most development theorists accept that the customary system is the locus of dispute resolution for the majority of poor and disadvantaged persons in developing countries; today, the fact that such systems can abrogate rights tends to be presented as a justification for engagement rather than as a pretext for excluding customary fora from rule of law strategies. The extent to which customary systems fail to uphold human rights must also be placed in the context of available alternatives. State justice systems may similarly expose users to rights violations, such as discriminatory treatment, inhumane detention conditions or sanctions that violate basic rights standards.

If a decision to engage is made, a second question is how and where do human rights-related objectives form part of the strategy? Should the aim be to stamp out violating practices and align customary systems with international human rights and justice standards, or should the focus be on policies of progressive realization and harm reduction? Where the balance is set is a particularly important question for organizations such as United Nations agencies that are required to operate within a normative framework of human rights, international law and internationally accepted criminal justice standards. This chapter discusses some of these issues in the context of dominant models of justice sector reform and offers insight into how strategies might be adjusted to yield more sustainable outcomes that better respond to the environments in which customary decision-making takes place.

Box 1
The normative framework for United Nations rule of law programming

"The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. This includes the wealth of United Nations human rights and criminal justice standards developed over the last half-century."[1]

Report of the United Nations Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004)

1. Key challenges inherent in orthodox programming approaches

A review of the programmatic landscape over the past decade suggests that the combination of concerns over engaging with customary institutions and questions of how to support them without formalizing or legitimating rights-abrogating practices has skewed programming towards interventions that aim to align customary systems with international standards and/or state models of justice. Such approaches might include efforts to enhance participation in customary decision-making, eliminate harmful customary practices, harmonize customary and statutory laws, and/or link customary and state adjudicatory fora.

The extent to which modern programming reflects a position that human rights and international justice standards have a self-evident value and should underpin programmatic work raises some important questions about the legitimacy of external intervention and the assumptions on which they are premised. While this book does not question the importance of human rights or their role in enhancing access to justice, it must be acknowledged that such approaches are not uncontested. There is an ongoing debate between human rights universalists and those who believe that human rights are not necessarily applicable to, or should not be enforced on traditional communities. Others feel that human rights-based approaches are not the most effective or pragmatic means of advancing goals such as access to justice or normative change. Some of these positions are discussed briefly below.

1.1 Cultural relativism versus anti-relativism

Cultural relativists believe that there is no single basis for interpreting and understanding subjective concepts such as human rights and justice.[2] They argue that authorities (national and local) should be free to regulate their citizens in ways that vary from international human rights provisions where they are inconsistent with local traditions.[3] They would further argue that legal development actors have no special power to introduce rights-based norms or enforce public opinion, and that such interventions might be regarded as a form of Western imperialism.[4]

The anti-relativist position is that human rights are incontestable; they transcend cultural boundaries and should be guaranteed and enforced for the betterment of all society. The argument runs that relativism is used as an excuse by certain groups to avoid their international obligations and deflect criticism regarding human rights abuses,[5] as illustrated in many of the examples presented in this volume.[6]

Some scholars propose a compromise version of relativism which may be more in tune with the current discussion. These theorists understand relativism as being concerned "about the desire of external reform movements ... to change cultural practices without sufficient respect for difference".[7] They do not say that all cultural differences must be tolerated or that all customary practices must be defended, but simply that "tolerance is a value along with others such as freedom."[8] Engle Merry supports such a vision, arguing that under this interpretation of relativism, human rights can be embraced primarily in terms of the protection of culture.[9]

1.2 The unique raison d'être of customary justice systems

Another way of approaching the human rights issue is by analyzing incompatibilities *vis-à-vis* fundamental differences in the raison d'être between customary and other justice systems. As discussed in chapter 1, the principal objective of most customary justice systems is to restore intra-community harmony by repairing relationships and creating a framework for reintegration, whereas the aim of Western (and often state) justice is the enjoyment of individual rights and entitlements, restitution, and deterrence through retributive punishment.[10] The objective of the former gives rise to characteristics that further distinguish it from Western law, and that may contradict ideas about human rights. For example, the flexibility and negotiability inherent in many customary systems and their vesting of rule-setting and dispute resolution responsibilities in the same duty-bearers, although widely criticized as inconsistent with international criminal justice standards, may be necessary

facets of processes that are designed to re-establish social harmony and where outcomes cannot be isolated from social context. Likewise, partiality may be integral to the functioning of some customary systems; it is the customary arbiter's intimate knowledge of the parties, the background to the dispute and local power-sharing arrangements that facilitates the crafting of a decision that will meet popular notions of equity and ensure compliance.[11] Efforts to purge customary systems of such features may threaten their effectiveness, legitimacy or internal logic.

The counterargument is that while peace and local order are undeniable social goods, they should not be pursued without regard to other rights at stake. In other words, although the modalities of customary justice are often an effective and efficient means of restoring community harmony, justice is not served if conflicts are settled in ways that violate the basic rights of users.[12]

What these positions illustrate is that differences in purpose and precepts distinguish customary systems from Western notions of a legal order, making comparisons unhelpful and potentially misleading. It follows that approaches that evaluate customary justice systems for their compatibility with internationally accepted standards and close gaps between them may not be the most useful strategies for enhancing the access to justice of customary users.

1.3 Social, economic and security realities

A final issue, and one that has been discussed throughout this work, is that features of customary justice that are said to violate human rights and criminal justice standards may be grounded in context-specific rationale. Practices such as marrying rape victims to their perpetrators and having male relatives inherit widows, while contrary to international human rights standards, may respond to other, equally rights-violating issues that can be related or unrelated to the customary legal framework. For example, gender discrimination, poverty and limited (or non-existent) social security such as pensions or legal aid all combine to leave rape victims and their children highly vulnerable to homelessness and further sexual violence. Marriage to the perpetrator, although it violates other rights, may provide a degree of social and economic security. Similarly, in situations where the customary (and perhaps the state) legal framework prevents women from owning or inheriting property, widow inheritance may provide such groups with access to land and a safeguard against homelessness, and with this, protection from associated problems such as a heightened likelihood of engaging in illegal and dangerous forms of employment that may expose them to violence, disease and HIV/AIDs transmission.

The point being made is not that such practices are intractable or in any way justifiable, but that when planning interventions aimed at heightening protections for vulnerable groups, it is critical to place the practices that are the subject of the reforms within their broader economic, social and security context. Insofar as the practices in question have social and economic explanations, the solutions required will need to go beyond modifying legal rules and practices to encompass a broader range of development objectives. Moreover, adherence to a strict doctrine of human rights may be somewhat contingent upon a level of service and infrastructure that does not exist in certain developing country contexts, such as access to the formal justice system, an operative social welfare system and an environment free from gender and other forms of discrimination. As Danne notes, "for a legal right to be reified and move beyond the abstract, there must exist a plethora of social, legal and political institutions capable of crystallizing those rights and giving them enforceable and tangible substance."[13] Where such institutions are underdeveloped or the state does not otherwise have the capacity to give such rights substance, pushing for compliance with international standards or trying to replace norms that abrogate rights can be at best ineffective and at worst destabilizing or harmful for victims.

1.4 Summary

The above discussion provides insight into why dominant 'fix it' approaches may have limited impact in eliminating contentious practices and modifying norm sets, as well as some clues to how strategies might be tweaked to better enhance protections in a more effective and sustainable manner.

Setting aside the ethical question of whether making reforms aimed at increasing compliance with international standards is an appropriate activity for development actors to be engaged in, trying to reconcile two divergent systems may overlook the important contributions made by customary systems. At the same time, it is clear that where customary norms do not align with human rights standards, there are often complex rationales in play, touching on issues such as culture, socio-economics and security.

The arguments raised by relativist and communitarian lawyers may explain some of the resistance to unadulterated human rights mainstreaming by customary leaders and users. The reasons for such resistance can be both benign and non-benign. In Melanesia, there is considerable opposition to the idea of human rights, which are regarded by many as foreign and imposed concepts.[14] In Liberia, resistance to interventions concerning children's rights has an economic dimension. Some see such rights as operating to prevent children from working, with serious economic implications for families.[15] In other situations, customary power-holders obstruct efforts to modify violating norms because these practices operate to maintain power hierarchies and wealth holdings in their favor. Where reforms threaten to interrupt the logic or effectiveness of the customary system, they can be similarly resisted or unsuccessful. Chapter 3 considered efforts to increase participation in customary dispute resolution and norm-setting by appointing members of certain groups to leadership positions or setting quotas for their participation. In some cases, artificial changes to the authority and leadership structure displaced the internal coherency and overall effectiveness of the customary system, which depended on decision-makers being accepted as legitimate and wielding social authority.[16]

Likewise, where they are out-of-step with local conceptions of justice and fairness, reforms have generally had less than the desired impact or operated to drive the norm underground. As discussed in previous chapters, there can be paradigmatic differences between human rights doctrines and customary justice systems in terms of core legal values, such as what constitutes misconduct, how crime is conceptualized, and notions of responsibility. For example, in customary systems where conflict is regarded as involving groups as opposed to individuals, the notion of individual responsibility and punishment can be seen as illogical and arbitrary. The modalities of state justice may also contradict local ideas about equitable conflict resolution. Reforms that require the adjudication of serious criminal cases by state courts may be resisted where the result is that a perpetrator is imprisoned and thus avoids his or her traditional responsibilities of paying compensation to the victim. On the one hand, the perpetrator is housed and fed by the state, and relieved of his or her income-generation responsibilities, while on the other, the victim suffers the consequences of a physical assault or sexual crime (which may have serious economic implications for them and their dependents) with a reduced possibility of compensation through the customary system.

It is also important to highlight that mainstreaming-type interventions can have unintended negative consequences. Particularly in post-conflict situations, efforts to eradicate long-standing customary practices or suddenly imposing human rights can jeopardize social stability or weaken the effectiveness of the customary justice system. When this system is the most accessible or only available fora for resolving disputes, the result can be increased lawlessness or greater human rights abuses.[17] As Isser describes, in Iraq, Afghanistan and Sudan, prohibiting the customary resolution of homicide may have had the effect of perpetuating violent blood feuds, while in Liberia, Guatemala and Mozambique, the consequence is a justice vacuum: "The population often blames this vacuum on the state, undermining any legitimacy it may be trying to build up, and ... [increasing] incidents of mob justice."[18]

Box 2
'Universalist' rule of law programming approaches
Writing on southern Sudan, Danne argues that most United Nations and NGO interventions have adopted a universalistic approach to human rights that prescribes a complete rewrite and imposition of laws.[19] He likens NGO and government development bodies flaunting the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to a new wave of Christian missionaries "motivated by faith in a divine message and a corresponding conversion mandate".[20] While their message is secular in nature, its non-negotiable character is often impractical and can have serious negative consequences including cultural denigration, increased social instability and identity infraction.[21]

2. Alternate approaches for incorporating rights protections into customary practice

Better awareness of the above-mentioned normative and practical challenges has prompted debate on new approaches that take into account customary law's fluidity, the reality that it might be the only access point, and in some cases, that the rights abuses occurring are multi-dimensional.[22] This has led to calls for a more nuanced understanding of culture in the development and enforcement of human rights where customary law is understood not as a monolithic practice, but as diverse, contested and dynamic.[23]

2.1 'Balancing' approaches

One solution proffered has been to adopt approaches that balance customary law's positive features, notably its accessibility and utility, with user rights.[24] The idea is to shift away from a sole focus on eliminating the negative practice and towards adjusting both the state and customary system to better accommodate human rights, cultural and pragmatic concerns. Examples might include integrating customary norms into formal justice processes, such as allowing compensation sanctions in criminal cases to make courts more attractive to customary users. The main complication with balancing approaches is that in practice, balancing is difficult and for fundamental incompatibilities, can be impossible.[25] A further issue is that international standards and guidance tend to not accommodate concerns arising out of the human rights-customary dichotomy, nor provide tools to identify and prevent violations due to the structure of plural legal orders.[26]

2.2 Progressive realization

Other scholars advocate a more flexible approach to human rights that focuses on meeting minimum standards rather than requiring full compliance.[27] They argue that donors, policy-makers and practitioners 'unpack' the concept of the human rights into manageable and realistic end goals, and adopt less flamboyant expectations of what reform can achieve given the evidence available.[28] The approach involves setting modest benchmarks to be obtained over the long term through incremental change. Mani, who dubs this approach 'incremental maximalism', emphasizes that such strategies do not involve a scaling down of effort, but rather a focus on priorities.[29] Also, a more flexible approach is not to suggest that programmers should turn a blind eye to legal practices that are overtly discriminatory or that breach human rights, but simply that universal standards should be translated into achievable goals, taking into account resource endowments, levels of economic development, local expectations and entrenched cultural mores.

Incremental maximalism is appealing to scholars who see the rule of law as composed of separate social goods, each existing on a continuum.[30] They accept that human rights such as protection from arbitrary detention, gender equality and timely trials are all desirable ends, but may not be achievable at once or in equal priority. Some are seen as long-term processes of social transformation where the aim is to build on existing cultural commitments rather than create new ones.[31]

Integral to incremental maximalism is that strategies should be based on the length of time it takes to establish a changed behavior (usually 10-15 years, if not longer), rather than the length of budget cycles or a mission's mandate (usually 1-3 years).[32] Extended timeframes necessarily require longer-term commitment from donors and mandatory organs such as the Security Council, as well as a move away from short-term evaluation and funding mechanisms.[33] Second, strategies should focus on reforms that are sustainable over the long term. A guiding principle is that systems, procedures and institutions should only be introduced if they can remain unchanged after the departure of the international community and can be supported by projected domestic funding lines. Technologically dependent processes, such as electronic case tracking or telecommunication systems linking customary law actors to legal aid advisors, should be carefully considered. One way to enhance the likelihood of sustainability is to build on existing frameworks, skills and cultural foundations. Nuanced 'tinkering' with customary institutions and procedures is also more likely to be perceived as legitimate when compared to complete overhauls or transplantation.[34]

As discussed in chapter 4, the main difficulty encountered is that development actors (and their donors) must accept that such approaches necessarily compromise on human rights in the beginning of an intervention and that a degree of harm will continue in the near term. An outcome that improves a victim's position or level of protection, but that is not fully rights-compliant, may not be regarded as successful or acceptable by all. However, as several examples in this volume illustrate, such 'better but not perfect' outcomes may be the price that needs to be paid for sustainability and normative acceptance. The experience of legal services NGO Madaripur in Bangladesh was that dispute outcomes mediated by their staff, while they offered women better access to justice than what they received at traditional *shalish*, could not be too far removed from local norms and expectations. A strict rights-based approach would have risked non-participation by respondents and community leaders withdrawing their support for the operation.[35]

2.3 Moderate cultural relativism

A final approach is one of internal development or reinterpretation of customary norms. It is well established that grafting ideas and processes borrowed from foreign legal cultures onto customary frameworks is unlikely to result in sustainable normative change.[36] Instead, if customary legal systems are to uphold rights and users empowered to assert them, processes must be locally driven and owned, and change must come at a pace that does not threaten to destabilize society.[37] For advocates of such approaches, cultural sensitivity is not just a matter of ethics, but also of pragmatic success of an intervention.

How such change can be best facilitated is not clear. An-Na'im asserts that the monopoly of powerful groups over cultural norms should be challenged through internal cultural discourse that allows alternative interpretations to be proffered.[38] Others believe that leaving customary systems to evolve naturally will not necessarily bring about the changes that marginalized groups such as women require.[39] Interventions to initiate or accelerate this process are needed, principally, injections of new ideas, skills and knowledge.[40]

One entry point discussed in this work is to encourage or facilitate debate around certain topical issues or problems aimed at drawing out internal contradictions within customary law. As shown in the Kenya and Namibia case studies (chapter 3 and chapter 6, respectively), where norms are difficult to justify, their modification can be a means of giving customary law back its internal logic and coherency. Other examples involve looking within customary law (or other sources of social influence such as religion) to develop cultural legitimacy around the idea of human and individual rights or to eradicate certain customary practices.[41]

The danger in moderate cultural relativist approaches is that they are slow, unpredictable and again, involve compromising on human rights, at least in the beginning. Supporters of such approaches also need to accept that the end product of such processes may be a version of rights that differs from international doctrines. For some, widening notions of human rights and local adaptations is

something to be encouraged. Danne, for example, advocates 'indigenized' versions of human rights that accommodate both individual and communitarian rights, as well as a right to cultural integrity "in balances [that are] appropriate to the society in question."[42] For others, such accommodations constitute a dilution of guaranteed standards, which stands in antithesis to the notion of universal rights.

2.4 Incentive-driven approaches

In evaluating the approaches set out above, it is important to highlight the centrality of customary leaders in any effort to modify dispute resolution practices. As the examples discussed in this volume illustrate, states generally do not have the reach or capacity to enforce a reform agenda, and the norms that are the subject of reforms often operate to serve leaders' interests or the interests of their constituents. Power-holders are thus unlikely to facilitate changes without a behavioral incentive in place. Whichever approach is adopted, therefore, it must be structured in such a way as to include positive incentives to promote change and address those incentives that operate to deter change. Incentives can be positive or negative, empowerment-based or top-down in nature. As discussed, while customary leaders can be among those who benefit from harmful norms, they also need to be responsive to changing community expectations. Change can hence be driven by empowering users of the customary system either through a better knowledge of their rights or by enhancing their access to alternate dispute resolution fora. Alternatively, where the state is strong enough, it can try to enforce or monitor introduced reforms, for example, through the compulsory review of customary decisions or models that incorporate customary systems into the state justice apparatus. Top-down incentives can also be positive in nature, such as policies of recognizing customary leaders or by providing them with stipends or remuneration in return for the introduction of practices that meet certain standards (note that there is the risk, however, that greater association or alignment with the state can sometimes impact the legitimacy of customary actors).

2.5 The role of the international development actor

Near consensus on the importance of normative change evolving from the community level raises the question of what role, if any, is to be played by international development assistance programs. It is posited that international actors clearly do have a role, but that it is one of promoting and supporting internal reform, rather than imposing prescriptive change. How development practitioners can best offer such support can be seen in terms of both what they can do and what they should not do. In terms of what they can do, many programming options have been discussed in this book. These include empowering key change agents such as progressive community, religious or youth leaders; promoting or facilitating community dialogue and debate;[43] disseminating information and building knowledge; supporting alternate dispute resolution fora such as NGO-delivered mediation; and facilitating better access to state justice.

In terms of what the international actor can contribute by 'not doing', a first principle is to do no harm. Approaches that may destabilize or warp the efficiency of an (albeit imperfect) customary system without replacing it with a viable and sustainable alternate structure should be avoided. Justice vacuums can push harmful practices underground and/or lead to increased lawlessness, violence and rights abuses. A second principle is to avoid approaches that try to 'fix' customary justice systems to make them better resemble Western or state justice systems. In this regard, practitioners might support a move away from strategies that problematize the customary system as an entity, and towards viewing access to justice or the protection of vulnerable groups as the key issues to be dealt with. How such a transition might be managed is discussed in the final chapter of this work.

Case study 1
Importing and implementing a United Nations legal model, Timor-Leste

In October 1999, UNTAET was endowed with the authority "to exercise all legislative and executive authority, including the administration of justice".[44] How the Administration was to execute this task was not defined, but "[e]xpectations were high that UNTAET would show itself to be the model international citizen, instilling a culture of human rights observance and setting legislative precedents for other developing countries".[45] In line with this, most of the rules and procedures retained from the Indonesian legal regime were either repealed (as they were inconsistent with international law) or replaced by regulations created by the Administration.[46] These regulations, as well as the institutions created to support the interim legal system, were taken directly from international law or drew heavily on associated doctrines.[47]

Importantly, this was not the model that UNTAET had planned. At the beginning of the mission, it envisaged a legal system based on the pre-existing Indonesian model. Providing familiarity to the population and local legal practitioners was a stated objective.[48] UNTAET quickly discovered, however, that in developing a judicial framework, it was compelled to respond to the politico-legal climate dictating modern peacekeeping operations. As a United Nations body largely funded by donor governments, it would have been politically untenable and perhaps even illegal[49] to conduct operations in a way that was inconsistent with international law and the various United Nations instruments.

A key problem encountered during the transitional period was that certain customary beliefs and rituals were perceived by UNTAET to be discriminatory or inconsistent with basic standards of human rights. The outlawing of such practices had serious ramifications, a salient example being the administration's attempts to prevent traditional reconciliation ceremonies, a key element of the customary dispute resolution procedure.[50] Reconciliation ceremonies were problematic for some of the lawyers within the Transitional Administration because they were seen as amounting to 'double jeopardy'. The double jeopardy issue arose because of the animals and/or alcohol that the perpetrator was compelled to provide for consumption during the ceremony. UNTAET lawyers believed that this 'fine' constituted a punishment in addition to that imposed at the judicial level, and hence violated the principle of *ne bis in idem*. Steps were hence taken to ensure that such practices either did not take place, or were conducted in a way that did not abrogate international legal standards.[51]

Moves to prevent reconciliation ceremonies were aggressively opposed. For the local population, their need for reconciliation outweighed the injustice of double punishment. It was not even clear that the people of Timor-Leste saw this as an injustice. Most importantly, the power of reconciliation ceremonies was so great that any steps taken by UNTAET to eliminate or regulate them proved largely ineffective. Not only did the authorities then fail to mainstream international standards into the legal culture, but by taking a bold stance on human rights that they then were forced to ignore, they sent a signal that the law was not enforceable.

As this example illustrates, a major stumbling block for UNTAET was the lack of compatibility between the legal values and norms inherent in the legal culture of Timor-Leste and those that the United Nations was required to apply. A further important observation is that where problems were rooted in value and norm incompatibility, they were difficult to either avoid or resolve. Many believed that the administration was legally compelled to uphold international law, and feared the political repercussions that a tolerance of domestic norms might have attracted. Others felt that creating a legal culture based on democratic ideals and human rights was more important than a culturally sensitive approach to judicial rehabilitation, even if this was inconsistent with local desires. "The alternate option — modifying the values of the people of [Timor-Leste] so as to correspond more closely with those imported — was equally problematic. Active attempts to displace a population's beliefs with those from another legal culture would have generated a multitude of ethical and [hence] political ramifications. Not the least of these would have been accusations of paternalism and cultural

imperialism."[52] Further, as noted, many such values were so deeply entrenched and played such important social and spiritual roles in their society that any attempt to displace them would have probably been ineffective.

The critical point is that regardless of UNTAET's intention, constructing a justice system that reflected local aspirations and concerns was not a legal or political possibility. This is likely to be the case in other peace building operations. It is improbable that the United Nations will relax its approach and tolerate practices and behaviors that are inconsistent with the very standards it is mandated to protect. At the same time, the societies in which judicial rehabilitation is most likely to be necessary will continue to have legal cultures, belief structures and/or economic realities that make a United Nations-style legal model inappropriate or ineffective.

3. Conclusion

This chapter has discussed the challenges that may be encountered when implementing activities aimed at bringing customary legal systems into alignment with international justice norms when such norms are incompatible with local legal cultures, social customs, or resource endowments. As examined in the Timor-Leste case study, this was a primary cause of problems for UNTAET where an eclectic legal framework largely informed by international legal standards was introduced into an impoverished society with a legacy of colonization, foreign occupation and conflict. This society did not have the human resources or institutional capacity to operate a sophisticated legal system and resisted the introduction of unfamiliar concepts such as the rule of law and human rights. These difficulties are precisely the ones that cultural relativists and communitarian lawyers might have anticipated, and there is considerable scope for scholars in these fields (as well as anthropology and sociology) to assist in devising strategies that might better advance rights protections in a manner that is legitimate, viable and sustainable.

But the language of human rights is not the language of relativism. The rule of law strategies and programming approaches implemented in recent years, for the most part, are not compatible with communitarian or relativist positions. International engagement is premised on concepts such as democracy, human rights and the rule of law being universally applicable and having a self-evident value. Policies and programs promote such rights on the grounds that they benefit not only the target society, but also the entire international community by promoting equality, encouraging trade, diminishing poverty, and reducing the likelihood of war.

This chapter has advanced the idea that human rights and customary practices are not necessarily mutually exclusive, but that inherent tensions between them do need to be recognized.[53] It has also suggested that the most effective means of promoting enhanced rights protections may be through small wins and incremental normative change. A major challenge is that the available policy instruction and guidance fails to provide a clear way forward for how practitioners should find an appropriate balance between minimum standards, tolerance of cultural difference, and socio-economic realities. The discourse falls short in its examination of ways in which problems of incompatibility have played out in the context of programmatic interventions; as a result, these experiences have not shaped the policy framework surrounding the applicability of human rights and international standards in localized settings. The *Report of the Secretary-General on the Rule of Law in Conflict and Post-Conflict Societies* (2004), for example, prioritizes strategies that are driven by local needs, aspirations and realities, but at the same time insists that they be compatible with international legal norms and human rights standards.[54] Until such tensions are resolved, it is unclear how programmers should respond to inadequacies in a customary legal framework and the role that human rights might play in this process. Moreover, until the debate opens up to acknowledge the difficulties associated with implementing a strict doctrine of human rights in developing country contexts and the practical impediments of applying widely accepted tools such as the human rights-based approach, 'fix it' solutions will continue and harm reduction will be remain difficult.

footnotes

1 UNSC, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) UN Doc S/2004/616 [9].

2 G. Rana, 'And Justice For All? Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators' (1997) 30 *Vanderbilt Journal of Transnational Law* 349, 365–366. See also F.R. Teson, 'International Human Rights and Cultural Relativism' (1985) 25 *Vanderbilt Journal of International Law* 869, 869-70; J S Watson, 'Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law' (1979) *University of Illinois Law Review* 609, 609-615.

3 Rana, above n 2, 366.

4 Ibid 366-367. See also R. Mani *Beyond Retribution: Seeking Justice in the Shadows of War* (Blackwell 2002) 48-49; A. Hurwitz, *Towards the Enhanced Legitimacy of Rule of Law Programs in Multi-Dimensional Peace Operations: Global Trends*, Local Concerns (paper presented at the European Society of International Law Research Forum, May 2005) 10; K. Samuels and S. Von Einsiedel, *The Future of UN State-Building: Strategic and Operational Challenges and the Legacy of Iraq*, International Peace Academy Policy Report (2003) 3; B. Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) 22 *Human Rights Quarterly* 838, 838-839, 843; A. Garapon, 'Three Challenges for International Criminal Justice' (2004) 2 Journal of International Criminal Law 716, 721-722; S. Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 *Human Rights Quarterly* 44, 44; F Fukuyama *State-Building: Governance and World Order in the Twenty-First Century* (2004) 3.

5 N.A. Englehart, 'Rights and Culture in the Asian Values Argument: The Rise and Falls of Confusion Ethics in Singapore' (2000) 22 *Human Rights Quarterly* 548, 566, 568; Rana, above n 2, 366-367). While also relevant, space restrictions prevent a discussion of individualist and collective rights theories; see generally P Jones, 'Human Rights, Groups Rights, and Peoples' Rights' (1999) 21 *Human Rights Quarterly* 80; C.L. Holder and J.J. Corntassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 *Human Rights Quarterly* 126.

6 M Chanock, 'Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 72 *International Journal of Law and the Family* 76 and 85; Ibhawoh, above n 4, 838; U. Eweluka, 'Post-Colonialism, Gender, Customary Injustice: Widows in African Societies' (2002) 24 *Human Rights Quarterly* 424. Some argue that these criticisms of relativist theory would dissipate if anti-relativists adopted a more accurate understanding of culture. According to Engle Merry, anti-relativists regard culture as a "homogenous, integrated and consensual system ... that must be accepted or criticized as a whole" (S. Engle Merry, 'Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)' (2003) 26(1) *Political and Legal Anthropology Review* 55, 56). 'Culture' is also equated with harmful practices, the violent oppression of women and human rights abuse. Such an interpretation makes it easy to reject culture and arguments of cultural relativism. Culture, however, is neither static nor unchanging. It is a fluid, contested and dynamic set of values. Culture is also not singular or unitary. While many communities have discriminatory practices and oppressive laws, there are also customs that protect women and promote human rights. Engle Merry argues that when understood in these terms, anti-relativists do not have to wholly reject culture or relativist theories. They might even view culture as a foundation that can be built on to promote universal values (Engle Merry, above n 6, 60-73).

7 Engle Merry, above n 6, 57.

8 Ibid 58.

9 Ibid 55. Closely related to the relativism debate is the discourse on cosmopolitan and communitarian legal theory. Cosmopolitanism places an emphasis on individual rights and is thus somewhat at odds with cultural relativism. Cosmopolitan theorists conceptualize justice as being premised upon universal concepts such as democracy, human rights and liberty (Mani, above n 4, 48-49). See also J. Rawls, *A Theory of Justice* (1971); J. Rawls, *Political Liberalism* (1996); R. Dworkin, *Law's Empire* (1986); R. Dworkin, *A Matter of Principle* (1987); B. Barry, *Liberty and Justice: Essays in Political Theory* (1991); and B. Barry, *A Treatise on Social Justice Volume 1: Theories of Justice* (1989). These principles can be applied across cultures and are independent of ethnic, religious or political heritage. They also constitute a safeguard against crimes and violations which might be justified using communitarian arguments of 'culture' or 'tradition' (Mani, above n 4, 48-9). Communitarianism emphasizes the importance of community or tribal decision-making. Individual rights and central government policy-making are eschewed. So defined, communitarianism has much in common with cultural relativism. Proponents of communitarian theories of justice understand justice to be socially constructed and specific to individual cultures. A McIntyre, *Whose Justice? Which Rationality* (1988); M. Waltzer, 'Justice Here and Now' in F.S. Lucash (ed), *Justice and Equality Here and Now* (1986); M. Waltzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983). Because laws develop to reflect each society's unique conditions and beliefs, fundamental concepts such as the role of law in society and the purpose of punishment will vary across states and between cultural groups. R. Teitel, *Transitional Justice* (2000) 225; see also R.I. Rotberg and D. Thompson (eds), *Truth v. Justice* (2000) 49. They reject cosmopolitan theories as products of Western individualism that quickly lose applicability when applied to societies with non-Western conditions, beliefs and needs.

10 See Chapter 1, Section 2.1.

11 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 25-26.

12 R. Yrigoyen Fajardo, K. Rady and P. Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples*, UNDP Cambodia and Ministry of Justice, Royal Government of Cambodia (2005) 21, 24.

13 A. Danne, 'Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study' (2004) 30(2) *Melbourne University Law Review* 199, 225. Note that Danne is speaking of southern Sudan, yet his arguments are equally applicable more generally.

14 NZLC, *Converging Currents: Custom and Human Rights in the Pacific* (2006) 84. Likewise, Danne explains that in Islamic communitarian societies, rights are "viewed as corollaries of duties owed to God and other individuals ... [whereas] 'rights' in Western states and multilateral instruments are viewed as individualistic, inalienable and, by implication, universal. It is this universalism which alienates millions of people when 'human rights' rhetoric is sought to be applied to a society by external actors." (Danne, above n 13, 222-223).

15 D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, USIP Peaceworks No. 63 (2009) 5, United States Institute of Peace <http://www.usip.org/files/resources/liberian_justice_pw63.pdf> at 29 March 2011.

16 See Chapter 3, Section 1.

17 Danne, above n 13, 223; T. Hohe and R. Nixon, *Reconciling Justice: Traditional Law and State Judiciary in East Timor*, paper prepared for USIP (2006) 65.

18 D. Isser, 'Re-Thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and

Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 13, 16).

19 Danne, above n 13, 218.

20 Ibid 221.

21 Ibid 221-222.

22 A. Swaine, *Traditional Justice and Gender Based Violence*, Research Report, International Rescue Committee (2003) 15.

23 ICHRP, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 136-136.

24 Ibid 23-24.

25 Ibid 36-37.

26 Ibid 32-33.

27 Such an approach might be politically tenable if wedded with the notion of local ownership, particularly if it can be shown to have a greater chance of long-term success (see Samuels et al, above n 4, 1; Harvard University, 'Initiative Report' (Conference packet of the *Establishing Rule of Law and Governance in Post-Conflict Societies* Conference on the Justice in Times of Transition project, Koç University Turkey, July 11-14 2002, 13); C. Stahn, 'Justice Under Transitional Administration: Contours and Critique of a Paradigm' (2005) 27(2) *Houston Journal of International Law* 311, 338-340).

28 A. Hurwitz, 'Civil War and the Rule of Law: Toward Security, Development, and Human Rights' in A. Hurwitz (ed), *Civil War and the Rule of Law, Security, Development and Human Rights* (2008) 40.

29 Mani, above n 4, 170-172; C Bull, *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration* (2008) 263. There is growing policy support for such approaches, the *Report of the Secretary-General on Strengthening and Coordinating United Nations Rule of Law Activities* (2008) noting that past programming has been too ambitious and employed unrealistic timeframes (UNGA, *Report of the Secretary-General on Strengthening and Coordinating United Nations Rule of Law Activities* (2008) UN Doc A/63/226 [16]).

30 R. Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, Working Paper, Carnegie Endowment for International Peace Rule of Law Series (2005).

31 J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) 81-82, 182-183; K. Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learned*, World Bank Societal Development Paper No. 37 (2006).

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CHAPTER 8 | Conclusion

This book was developed to provide insight into the various entry points for engaging with customary justice systems, the rationale behind these entry points, possible pitfalls and advantages, as well as certain enabling conditions. It is important to distinguish this purpose from the underlying problem being examined: the level and quality of access to justice enjoyed by customary user groups, particularly vulnerable and marginalized users. Clearly articulating the problem is essential because without understanding the objective of engagement, it is difficult to determine which entry point(s) will best meet the desired end.[1] It should also be highlighted that the motivation for engaging with customary justice systems can vary enormously and may or may not be connected to access to justice aims. In Afghanistan, United States and Coalition Forces have attempted to strengthen customary fora and empower their leaders as part of a wider counter-insurgency program. In Mozambique, the central government reformed, and gave legal recognition to, customary dispute resolution mechanisms as a means of addressing certain political imperatives, including voter mobilization and the decentralization of certain state functions.

Access to justice is of particular concern because it responds to a wide set of social needs extending beyond conflict resolution to include the protection of basic rights, control of the abuse of power, and more broadly, its contributions to democratic governance, access to services and resources, and poverty reduction. The extent to which such aims are addressed in the context of customary justice systems is of particular interest. As the locus of dispute resolution for the poor and disadvantaged in developing countries, how these mechanisms operate has a critical impact on livelihoods, security and order. Moreover, since customary fora often operate outside of state regulation or accountability mechanisms, users are left more vulnerable to nepotism, discrimination and sanctions that violate accepted human rights standards. In short, where customary justice is fair and rights-respecting, it can support the marginalized and promote stability; where it is discriminatory and nepotistic, the results can be inequality, disenfranchisement and heightened potential for conflict.

The case studies reviewed and the scholarship analyzed in this work illustrate that understanding relating to the role that customary justice systems might play in improving access to justice has changed markedly during the last decade. There is a growing consensus that despite some obvious challenges, excluding customary justice systems from reform strategies is not the best approach for enhancing access to justice and protecting the rights of vulnerable groups. There is growing appeal for strategies that aim to improve the quality of outcomes resolved at the community level by building on the positive aspects of customary systems — particularly their reach and popularity — and attempting to reform negative practices.

While this sounds sensible in theory, a review of the programmatic landscape reveals that this mantra of 'enhancing the good and fixing the bad' has translated into programming that is largely skewed towards top-down and technocratic modalities of reform. Such interventions aim to 'fix' customary systems so that they reflect human rights and criminal justice standards and/or make them better resemble the state system. Examples discussed in this work include introducing quotas

to enhance the participation of marginalized groups in customary dispute resolution and transferring customary jurisdiction to decentralized state courts operating at the community level.

The popularity of such approaches can largely be explained by the normative frameworks within which programmatic strategizing takes place. As discussed in chapter 7, most international development assistance takes place against a backdrop where mainstreaming human rights and criminal justice standards is a key objective. This is not necessarily a bad thing. Development theorists and practitioners *should* be concerned with rights-violating practices at the customary level and should also be concerned about whether assistance delivered might have the effect of legitimizing or solidifying such practices. This is also not to say that these types of interventions cannot be effective. This work has discussed examples of where legislative or state court reform has been a precursor to normative change within customary law.

But what the case studies and analysis suggest is that, generally speaking, 'fix it' type engagement does not reflect a broad and deep understanding of how customary systems function, and hence is unlikely to yield sustainable impact. Such approaches tend to assume that customary fora operate in a similar way to state justice systems and that the problems inherent in customary processes are purely legal in nature.[2] While customary and state justice systems are both set up to respond to conflict, their raison d'être is profoundly different. The principal objective of most customary justice systems is to restore intra-community harmony and repair relationships, whereas state justice processes are usually structured around notions of individual rights and deterrence through retributive punishment. It is this purpose of the customary justice system, and the social, economic and security context in which it operates that give rise to many of the features and practices that 'fix-it' type approaches seek to address. One example will be used to illustrate this point.

Customary justice systems continue to exist because state courts are inaccessible, dysfunctional or unable to respond to the justice imperatives of customary users. They operate largely in isolation from the regulatory influence or enforcement capacity of the state; communities where customary law is strong also do not usually benefit from state services such as pensions, community services, and sometimes security provision. Such isolation means that these communities function according to relationships of mutual interdependency and within a framework where maintaining social cohesion is imperative. It follows that customary dispute resolution is geared towards restoring community harmony and that the principal means of ensuring that outcomes will be respected is through consensus and wider community approval. The resulting features of customary systems, such as outcomes based on community perceptions of fairness and equity, and flexible and negotiable rule processes, while problematic from a human rights perspective, cannot be separated from the overall logic of the system and the aims it is designed to fulfill. Efforts to purge customary systems of such features fail to appreciate these contextual and structural obstacles and are therefore unlikely to result in far-reaching behavioral changes.

A related issue is that the features of customary justice systems criticized as not meeting international criminal justice standards are usually not purely legal problems. Norms such as collective responsibility for wrongdoing or outcomes that abrogate basic rights standards can have complex social and economic and/or security-related dimensions not immediately discernable to the legal eye. Reforms that respond to the legal problem in isolation, such as legislation prohibiting certain customary practices, address the symptoms rather than the cause, again with dubious likely impact.

In response to these challenges, this book has aimed to provide a framework within which governments, national and international NGOs, international development agencies, as well as customary actors or groups can conceptualize how they might engage with customary justice systems as a means of promoting access to justice and creating better protections for users. Drawing attention to some of the complications mentioned above encourages the reader to move

beyond 'fix it' approaches by examining alternate strategies that have been trialed in other locations. Three main groups of programming options were discussed. The first explored the ways that development activities can support the reform of customary systems from the inside with the aim of increasing procedural and substantive protections. The second looked at the creation of new institutions that offer alternative forms of dispute resolution. Such institutions operate in parallel to customary justice systems, complementing or supplementing them, with a view to promoting access to equitable outcomes and improving the operation of the customary system through heightened competition. The third considered the interface between the customary and formal legal systems, and how states can modify, regulate or use this interface to influence the manner by which justice is dispensed at the customary level.

This book does not offer prescriptive advice on how interventions should be structured. The programming options discussed are by no means the only ones available, nor is there a suggestion that certain entry points are more likely to be effective than others. Most probably, the most effective interventions will be ones that are not listed here but that are crafted to situation-specific circumstances. Sometimes, the best strategy will be not to engage with the customary justice system at all, such as when there is a low likelihood of positive results or the possibility of harmful consequences.

A key message is that approaches need to be grounded on a broad and deep understanding of the customary system and adapted to the goal of heightening access to justice. Such approaches might be facilitated by a better articulation of the problem(s) that interveners are seeking to address. It is posited that the real issue should not be that customary justice systems tolerate or encourage certain rights-abrogating practices, or that features of customary justice processes do not align with accepted criminal justice standards, but rather, how to enhance access to just and equitable solutions for the users of these systems. Restating the problem in this manner arguably opens up new avenues for addressing the rights-based and protection challenges that concern practitioners, scholars and donors, and steers the discourse towards interventions that better correspond to the realities and features of localized justice processes.

Such ideas share parallels with arguments presented by proponents of legal pluralism. As discussed, in most developing countries, the state cannot provide justice services to the entire population, nor is this the most desired solution. Obstacles in terms of physical access, cost and literacy, as well as dysfunction such as corruption or discrimination all operate to steer users away from the state and towards alternate justice providers. It is also clear that state justice does not always respond to the needs and social imperatives of disputants in the way that alternate mechanisms, particularly customary systems, allow. This gives rise to pluralistic environments where various justice providers resolve disputes, regulate communities and undertake other governance responsibilities.

For advocates of pluralism, the fact that justice delivery does not lie within the exclusive purview of the state may not only be a reality, it might also be the preferable end state.[3] They maintain that coalition approaches that harness the potential of multiple justice sector providers, including the formal and customary justice systems, and ADR mechanisms such as NGOs as canvassed in this work, may be the most cost-effective and pragmatic approach to enhancing access to justice. Within such a paradigm, the customary system is not seen as a problem to be rectified or an interim solution to eventually be replaced, but rather, as a viable, permanent and necessary component of the justice landscape.[4] The aim of engaging with such systems is, then, to bolster their capacity with a view to promoting the range of alternatives that rights holders can choose from as they navigate their way to a fair and equitable solution.

Legal pluralism, of course, is not a panacea. Multiple, largely unregulated justice providers create risks of opportunistic forum shopping and may result in a playing field that is even more complex and confusing for users to navigate. 'More options' therefore, cannot be the end goal; these options

need to be strengthened, safeguards developed and protections introduced. But in an imperfect environment, where the state cannot extend justice services to the entire population and the civic services that make rights-based approaches viable are not available, access to justice might be best accommodated by building the capacities of the fora that dispense most of the solutions — just or otherwise — to the poor, the marginalized and the vulnerable: the customary justice system.

footnotes

1 The author is indebted to Deborah Isser (Senior Counsel, World Bank Justice for the Poor Program) for sharing her insights on this topic and for her recommendations on developing the ideas presented in this chapter.

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ANNEX 1 | Engaging with Customary Justice Systems in Post-Conflict Situations

This book has focused on engaging with customary justice systems in development contexts generally; while much may be applicable, it did not discuss the specific role that these systems might play in post-conflict environments, both in re-establishing the rule of law and approaching questions of transitional justice. It is beyond the scope of this work to provide an exhaustive account of the potential modalities for such engagement. Instead, this Annex seeks to highlight the unique conditions, opportunities and threats for judicial rehabilitation posed in fragile states. Impacting factors include, *inter alia*, the fact that state judicial staff may have been killed or have fled, severe case backlogs, widespread mistrust of the formal justice system and the perpetration of serious crimes. These issues must be considered when evaluating the entry points for increasing access to justice in the aftermath of conflict and how customary law interventions might be tailored to such exigencies.

During periods of conflict, access to formal justice sector institutions can be limited or non-existent; courts and administrative fora may not be operating, may have lost legitimacy, or may be rendered inaccessible due to a lack of security. In such situations, it is often assumed that a justice vacuum has been created. This is rarely the case, however; even in situations where government institutions have collapsed, commercial businesses are not operating and schools have closed, community members still require the means for resolving everyday criminal and civil disputes. In response, and as demonstrated in recent conflicts such as in Liberia,[1] Timor-Leste[2] and Afghanistan,[3] customary justice systems often re-emerge or become strengthened. Following a cessation of hostilities, access to formal justice sector institutions may be equally limited. Courts are often slow to rebuild and unable to resume operations expeditiously; new judicial staff may need to be trained to replace those who were killed or fled the violence; and it can take even longer for the government to regain the trust of the population. As a result, the customary system can remain the principal provider of justice, crime control and inter-community security well into the peace-building period.

Box 1
When conflict weakens or modifies a customary justice system
It is important to highlight that while customary justice systems usually strengthen during conflict periods, they can also be modified or weakened, or lose legitimacy. Examples include where:

- conflict-induced displacement dislocates community members from their leaders or leads to a more heterogenic population, thus weakening the strength and effectiveness of customary law;[4]
- communities are hesitant to utilize customary fora for fear of sanction;[5]
- traditional leaders are replaced, killed or their functions taken over, with the result that customary law is distorted or modified; this is particularly the case for oral customary traditions where interruptions in the transfer of information can lead to loss of knowledge;[6] and
- certain groups within a community (such as returning refugees or youth) reject the authority of customary law in favor of statutory rights,[7] or the customary system is not strong enough to regulate or influence the criminal behavior of groups external to the community (such as warlords or vigilante groups).[8]

It is well understood that in post-conflict situations, establishing an operational, accessible and rights-upholding system for resolving disputes is critical. The bundle of legal issues to address grows to include, not only everyday criminal and civil matters, but also the replacement of lost identity documents, conflict-related issues involving land ownership, occupation and expropriation, and serious crimes perpetrated during the conflict. The longer such issues are left unaddressed, the more likely it is that a backlog of cases will hinder the efficiency and responsiveness of courts, that frustration and impatience for legal remedies will mount, and that citizens will resort to violence or vigilante justice to resolve their disputes. Moreover, the initial period (usually weeks) following a conflict is generally a critical moment for establishing new norm sets; a rule of law vacuum during this time can have long-term consequences for efforts to build trust in state judicial apparatus and confidence that past practices such as impunity and corruption have been stamped out.

To respond to such imperatives, post-conflict development assistance has tended to focus on re-establishing a functioning criminal justice system, often with the result that the important role that customary systems do and can play is overlooked.[9] This is not to suggest that resources should necessarily be diverted away from the formal justice sector and into a strengthening of customary systems. Generally, resurrecting the formal legal system will be critical component of post-conflict rehabilitation, and it is not always the case that programmatic engagement with customary systems is the best means of enhancing access to justice. It is important, however, to view customary justice systems as another potential avenue for accessing justice, resolving disputes and limiting criminality. In situations where it may be years before the courts are fully operational or have sufficient reach, where they are overwhelmed with case backlogs, or where they do not enjoy the trust of users, coalition approaches that harness the reach and legitimacy of the customary system may be an effective and expedient means of restoring law and order, and supporting a return to the rule of law. Specifically, customary systems might:

- provide a forum for the non-violent resolution of disputes at the community level;[10]
- provide a forum for addressing serious crimes perpetrated during the conflict;
- promote societal reconciliation or community reintegration; and
- assist state courts, for example, by collecting evidence, conducting investigations or assisting in the enforcement of decisions, in order to promote efficient and expeditious case resolution.

The case study below examines efforts by the Government of Rwanda to devolve adjudicative powers to customary (*Gacaca*) tribunals as a means of processing the mass of unresolved criminal cases following the genocide that took place in 1994. While the lessons that can be learned from this

study are limited and context-specific, the review provides some insights into potential modalities for engaging with customary systems in the context of transitional justice. The second case study relates to efforts by international authorities in transitional Timor-Leste to utilize customary dispute resolution in response to overburdened and inaccessible courts that lacked the confidence of the population.

Case study 1
Processing cases involving serious crime through the *Gacaca* courts, Rwanda

In 1994, a long-standing conflict between Rwanda's two principal ethnic groups culminated in the murder of approximately 800,000 people, mostly Tutsi and moderate Hutu. Following the genocide, the national courts system was unable to process the more than 130,000 individuals being detained on accusations of genocide.

In November 1994, the United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law.[11] This court was quickly criticized for the slow pace of trials; as at 31 December 2004, the trials of 23 persons had been completed (resulting in 20 convictions and 3 acquittals); cases involving 25 accused were in progress; and 18 persons were awaiting trial.[12] A perhaps more significant problem was that, being based in the United Republic of Tanzania, the court was removed from the Rwandan people and carried little legitimacy. A particular cause of angst was that the maximum penalty that the ICTR was authorized to apply was life imprisonment, compared with Rwandan courts, which could invoke capital punishment. As a result, not only were the architects of the genocide perceived as being held in luxurious conditions *vis-à-vis* Rwandan prisons, but they were protected from a penalty that was being meted out to perpetrators of less serious acts.[13]

On 20 August 1996, the *Organic Law on the Organization of Prosecutions for Offences Constituting Genocide or Crimes Against Humanity Committed Since October 1 1992* was enacted by the Rwandan Parliament. These cases were heard in special courts presided over by three magistrates. However, plagued by a shortage of judicial professionals, poor administrative support, and instances of witness and staff intimidation, the courts became congested and case processing was delayed. Trials were also criticized for failing to meet international standards of procedural fairness. By 1999, over 900 people had been tried on charges of genocide; however, more than 123,000 were still awaiting trial in overcrowded prisons and inhumane conditions.[14]

Growing concerns over the slow pace of justice and the failure of communities to reconcile provoked thought on the role that the customary justice system, *gacaca*, might play in the administration of transitional justice. A Commission was formed in October 1998 to formulate proposals for a system of participatory justice that would meet the objectives of, *inter alia*, expediting genocide trials; reforming criminals and reintegrating them into society; and promoting unity, tolerance and reconciliation among Rwandans.[15]

Based on the Commission's proposals, more than 10,000 *Gacaca* Tribunals were established in a hierarchy reaching from the community (cell) level, to the sector level, to the *Gacaca* Court of Appeal. At the community level, *Gacaca* Tribunals were composed of *inyangamugayo* (persons of integrity) elected by local residents; members at higher levels were elected by members of the Tribunal directly below. Tribunals were vested with the power to investigate, prosecute, try and impose penalties under the 1996 Law.[16] Trials were to take place without prosecution or defense attorneys, and the judgments made by a majority of two-thirds of the members present. Where in

the hierarchy of *Gacaca* Tribunals suspects were to be tried coincided with their classification under the 1996 Law:

- Category 1: leaders of the genocide, those with command responsibility, and those accused of acts of torture, sexual offences or de-humanizing acts to cadavers;
- Category 2: those whose criminal acts resulted in death or serious injury;
- Category 3: those who committed property offenses.[17]

Gacaca Tribunals were empowered to process cases involving category 2 and 3 suspects, with category 1 suspects transferred to the Public Prosecution Department and tried within the formal court system. If found guilty, the maximum penalties that could be handed down included death (category 1), 5-30 years' imprisonment (category 2), and an amount of reparation settled between the parties (category 3). These penalties could be reduced in accordance with the law if the defendant made a full disclosure of offences and sought repentance and forgiveness.[18]

Since the *Gacaca* Tribunals commenced operation, there has been strong criticism that trials have failed to meet international criminal justice standards. Key arguments include that leaders lacking legal training should not be empowered to determine complex cases where the outcome may be a lengthy prison sentence, that *gacaca*'s focus on consensus-based decision-making is contrary to the rights of both defendants and victims, and that the institutional structure of the tribunals and modalities for processing cases create inroads for false testimony and corruption.[19]

Such concerns must be balanced against the effectiveness of the *gacaca* system in turning over a large number of cases expeditiously and without onerous resource injections. This considerably alleviated the problem of having more than 100,000 suspects languishing in prisons awaiting trial for unreasonably long periods and in inhumane conditions (in abrogation of international law). *Gacaca* also appears to have contributed to broader societal goals; a survey conducted by the National Unity and Reconciliation Commission found that the system had a positive impact as a tool for justice, unity and reconciliation.[20] A key finding was the social importance attached to perpetrators being tried in the villages where they committed crimes and in front of the community, and the fact that they were given the opportunity to ask for forgiveness and be reintegrated into society.[21] It may be, then, that the restorative approach underpinning *gacaca* offered a more satisfactory form of justice, and one that was more conducive to reconciliation, than the retributive solutions offered at the ICTR and national courts.

Case study 2

Supplementing the state courts through the Oecusse Diversionary Justice Program, Timor-Leste

In transitional Timor-Leste, inadequately resourced courts, case backlogs and a lack of experienced legal professionals made it impossible to resolve crime in an efficient and expedient manner. The method of dealing with disputes was quickly modified according to what could realistically be achieved. Increasingly, crimes deemed less serious were referred back to communities, which resolved them according to customary law. To the extent that this facilitated a continuation of traditional practices, communities were satisfied. However, customary practices were not always consistent with the introduced legal model or the United Nations Administration's normative obligation to uphold human rights. In response to the widening void in judicial authority, the United Nations District Administration in Oecusse initiated the Oecusse Diversionary Justice Program.

This program was based on customary methodology but modified to align it with human rights and criminal justice standards. For example, the model's jurisdiction was limited to minor disputes involving theft, assault and land. Crimes such as murder, rape or serious assault were

compulsorily referred to the formal justice system. The model also contained procedural safeguards, such as the victim and the accused providing written consent that they agreed to participate in the process. Finally, monetary forms of compensation (for example, the exchange of cattle) were replaced with restorative labor, and the tradition of consuming *tuasabu* (distilled wine) at the reconciliation ceremony was curbed. During its operation, the diversionary model was used to resolve 23 land disputes and 3 criminal disputes.[22]

It is clear that, in the aftermath of conflict, utilizing customary fora may be an important tool for facilitating the resolution of disputes, controlling crime and promoting reconciliation and social stability. The advantages of engaging with customary justice systems discussed in this book each apply to post-conflict situations: when compared to state courts, customary justice systems are often more cost-effective, have fewer financial, geographic and linguistic accessibility constraints, may better respond to the key justice needs of the community, and may be regarded as more legitimate. The dangers associated with customary dispute resolution likewise apply: customary justice systems often lack predictability and coherency in decision-making, discriminate against marginalized groups, and offer weak procedural safeguards; further, processes and sanctions can abrogate human rights and criminal justice standards. But there are additional dangers specific to post-conflict situations that need to be considered. These include more limited access to the state courts and possibly fewer checks and balances in the operation of customary legal fora due to weakened capacity of state apparatus to conduct oversight and monitoring. Customary justice may also be unable to assert authority or control violence where armed groups are still operating, such as militia or warlords. Such lack of regulation and oversight becomes more risk-burdened in contexts where long-term violence, criminality and impunity have contributed to a weakened rule of law culture.

When customary mechanisms are empowered to assist in the resolution of serious crimes, additional dangers arise. On the one hand, the outcome of these processes will have a profound impact on future stability. As such, they need to exact fair and law-based decisions, and be perceived as legitimate and expedient if the goals of justice, reconciliation and building faith in the rule of law are to be achieved. Crimes perpetrated in the context of conflict usually require punitive sentencing, in which case, safeguards need to be in place that cannot usually be delivered by customary fora, such as adjudicators trained in fair trial principles, defense and prosecution lawyers, and evidence-based investigations. On the other hand, and as the Rwanda case study illustrates, these dangers need to be balanced against the various injustices that may arise when alternate mechanisms are not used, such as impunity or large populations of detainees being kept in pre-trial detention for unreasonably long periods. The economies of post-conflict governments and the imperative of restoring law and order also need to be taken into account during decision-making processes. Conducting trials and maintaining prisons are costly exercises, and governments face both limited resources and equally legitimate, competing imperatives such as re-establishing security, food provision, health care and schooling. Likewise, restoring law and order, and stability is crucial for post-conflict peace building; when engaging with the customary system is a means of supporting or accelerating this process, it needs to taken seriously.

Box 2
Non-custodial sentencing in the aftermath of conflict

In post-conflict situations, policy-makers should explore the appropriateness and advantages of non-custodial (as opposed to punitive) sentencing, and how linkages with the customary system might facilitate this. Post-conflict economies generally cannot sustain large prison populations, and local economies require able-bodied men (the largest social group reflected in prison statistics) to rebuild communities and undertake income-generating activities. Victims may also have a preference for restorative solutions in certain contexts. Their justice needs may best be served by having their destroyed home rebuilt or being financially compensated for the death of a principal income earner. In other cases, learning the location of a relative's remains may better promote reconciliation than a prison sentence.

footnotes

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14 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 75; Widner, above n 10, 67-70. Against this backdrop, in January 2003, the Government released 40,000 prisoners; those who were old or sick were sent back to their villages, while the others were sent to re-education camps (G. Khadiagala, 'Governance in Post-Conflict Situations: The Case of Rwanda' (paper presented at the UNDP and Chr. Michelsen Institute, Bergen Seminar Series, Norway 5-7 May 2004, 14-15)). Then, in August 2005, 20,000 detainees who had confessed to their crimes and who had already served the sentence of their alleged crime in pre-trial detention were released by Presidential Decree (IRIN News, *In-Depth: Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law* (2006) IRIN <http://www.irinnews.org/IndepthMain.aspx?reportid=59464&indepthid=7> at 24 March 2011).

15 Penal Reform International, above n 14, 76.

16 J. Busingye, 'The Role of Gacaca Courts in National Reconciliation and Lessons for Other Post-Conflict Countries' Draft Evaluation Report by UNDP (undated) 9.

17 Article 51 Organic Law No.16/2004 of 19/6/2004, *Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994*, Kigali, 19 June 2004.

18 Ibid article 72-73, 54, 62; see also Organic Law No.28/2006 of 27/06/2006, Modifying and Complementing Organic Law No.16/2004 of 19/06/2004; and Penal Reform International, above n 14, 78-80.

19 Busingye, above n 16, 11-12; Rwigamba, above n 13, 130.

20 Busingye, above n 16, 15.

21 Ibid 6.

22 T. Chopra, C. Ranheim and R. Nixon, 'Local-Level Justice under Transitional Administration: Lessons from East Timor in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011) 142-143.

ANNEX 2 | Good Programming Practices for Engaging with Customary Justice Systems

It seems a cliché to assert that a coherent and informed strategy is a precondition to a successful intervention. However, a review of past operations reveals strong linkages between the absence of a holistic action plan and the limited impact of justice sector reform programming. In 2008, the United Nations Secretary-General described engagement efforts to date as "piecemeal and donor-driven, resulting in contradictory development of justice and security institutions and short-term, superficial gains at the cost of longer-term, sustainable reform".[1] Such statements brought the complementary issues of planning, strategy and coordination to the fore and led to a growing body of policy and scholarship on the subject. This literature suggests that justice sector reform is more effective when strategies embody certain characteristics, such as a demand-driven and locally owned orientation, attention to country context and an integrated approach. It is unclear, however, whether and how such recommendations change when applied to customary justice strategy development and programming. At the same time, it is posited that questions of how customary law fits into broader rule of law or justice reform strategies have not been fully considered or addressed. To shed light on this subject, this Annex discusses six characteristics that may enhance the effectiveness of interventions aimed at customary justice systems: programming that is grounded on an adequate research base, a holistic and balanced approach, a focus on sustainability, local ownership, strategies that are context-specific, and evaluation of programming. While each of these programming approaches can be applied to rule of law interventions more generally, the Annex attempts to draw out some of the challenges inherent — and obstacles specific — to customary justice programming, as well as some good practices on how they might be overcome.

1. Research and justice sector assessments

As illustrated throughout this book, there are many contradictions and false assumptions with respect to customary justice systems. Customary justice systems are also diverse and dynamic, and successful interventions can be crafted only with a strong understanding of their aims, their relationships with cultural, economic and security imperatives, and the viability of alternative paths to justice. For these reasons, program strategy should be grafted on a solid understanding — obtained through in-depth qualitative and quantitative research — of the customary justice system as well as the access to justice conditions in a given environment. The most common modality for gathering the required information is through justice sector assessments.

A bottom-up, participatory approach to assessments is critical to understanding the operation of customary mechanisms, how they affect the lives of the users, and through this process, identifying the strengths to focus on and weaknesses to address. To achieve this, direct contact with user groups is imperative. Communication through village leaders, government or legal service providers alone risks misrepresentation. By failing to speak with marginalized groups or allowing powerful elites to 'represent them', the disempowerment status quo can be maintained. Assessments also

provide a valuable means of starting a rights and justice dialogue within communities themselves, asking people, perhaps for the first time, to think about the meaning of individual and community rights as well as responsibilities.

To date, studies of customary justice systems have tended to be conceptual rather than empirical, and take an anthropological rather than a pragmatic approach, each of which is important. Combining such approaches could involve: sociological research into customary institutions and practices; the identification of the justice issues faced by individuals and communities and the steps taken to resolve such issues; and tracking of the most common categories of cases (such as land conflict, domestic violence, petty crime) through the customary and formal systems. This would serve to identify commonalities as well as conflicts between the two justice systems, highlight obstacles to accessing justice, and would possibly result in a clearer framework for action.

Assessments, when undertaken thoroughly and in a participatory manner, are expensive. One means of minimizing costs while maximizing effectiveness is to combine access to justice, legal empowerment, justice sector needs assessments and customary justice surveys. Such approaches provide a more cohesive picture of the context in which justice reform should take place. The Asia Foundation, the World Bank and UNDP, for example, conduct various forms of justice assessments around the world and might be able to collaborate to provide a broader picture of the justice challenges in a particular context, and at a lower cost. Another option is including justice perception questions in existing government-led data collection processes, such as state-wide national household surveys.

The practical challenges to the study of customary justice systems are significant. They are rarely stand-alone justice systems, but usually processes embedded in broader belief paradigms. The proceedings are often oral, and written records are rarely kept. Differences in cross-cultural understandings and translation issues can obfuscate clear communication and understanding. Customary justice hearings are often constituted and conducted at short notice, hence in time-bound studies it is difficult to directly observe proceedings. In the process of constructing accounts of how customary justice systems operate (as opposed to observing them directly), researchers need to take care to avoid arriving at reductionist understandings of the processes. Leaders' accounts of what they do are often quite different from what occurs in practice. Important nuances can be lost, and uncritical reproduction of dominant accounts of customary 'rules' can become self-fulfilling prophecies and ride roughshod over possible tools or clues for opening up dialogue on reform issues.[2]

1.1 Objectives of justice sector assessments

The objective of justice sector assessments is to collect the necessary data for conceptualizing and designing an integrated strategy and related programs. Well-executed assessments are instrumental in identifying the types of interventions that are needed and that will be effective in a given context. By contrast, where assessments are not carried out or are narrow in scope, this often translates into flawed planning, unrealistic timeframes and strategies, and ultimately poor programmatic impact. Specifically, assessments aim to:

- establish a comprehensive understanding of the political, social and cultural context for justice;
- identify key areas of need;
- identify potential risks;
- prioritize actions; and
- build consensus among key actors and agencies to facilitate coordinated and integrated programs, maximize synergies and avoid programmatic duplication.

1.2 Methodologies

While assessment methodologies should be context-specific, there are seven main issues that should be addressed in order to obtain a comprehensive overview of the customary justice context:

- the depth of commitment to reform (both at the government and community levels);

- key actors (catalytic drivers of change as well as those who may resist reform);
- how poor and marginalized groups experience justice, together with their most urgent needs and the corresponding obligations of duty bearers (and their capacity deficits);
- root causes of key problems (physical, legal, institutional, political, cultural, and economic);
- extent of linkages between components of the customary and state justice sectors;
- entry points including opportunities for change, constraints and potential obstacles; and
- current reform initiatives and relevant actors (national and international).

The methodology should adopt a diagnostic approach that goes beyond the identification of key problems to also establish their cause. Moreover, methodologies should situate justice within the broader social, political and economic environment and identify intra- and inter-sector influences.

1.3 Participation in assessments

Assessments and research should usually be led by national authorities in partnership with the programming agency and other key stakeholders. There are several reasons for this. As justice sector reform is an inherently political process, building trust with local power-holders from the outset will be imperative to the success of any subsequent intervention. Experience demonstrates that where national stakeholders are involved in the assessment and can see a logical link between problems, causes and solutions, they are more likely to feel ownership over and commit to a reform process.

The composition of assessment teams should represent the multi-dimensional nature of rule of law assistance. They should be of mixed gender and include national and international experts, representatives of courts, police, correctional and human rights agencies (as appropriate), and country specialists working in the following areas: rule of law, anthropology, and customary law. A key role should be afforded to civil society organizations and community representatives.[3]

Finally, in accordance with the Paris Declaration on Aid Effectiveness (2005), assessments should be undertaken jointly with key international actors and donors wherever possible. The rationale is to encourage a more coherent and coordinated approach to justice sector reform by identifying opportunities for cooperation in program design and implementation.[4]

1.4 Good practices

- Nationally-led assessment processes: Assessments should be owned and led by national actors in partnership with implementing agencies and other key stakeholders, including implementing partners, civil society representatives, beneficiaries and donors.
- Specific and widely disseminated: Experience suggests that donors prefer to fund assessments at the early stages of an operation and once. Assessments should be terse and relevant, and the results widely disseminated, so that action plans are predicated on clear and consistent information.
- Non-duplication: Assessments should draw upon existing research in order to avoid duplication and facilitate the early identification of key issues.
- Temporal relevance: Assessments provide only a snapshot of a dynamic and complex environment. The findings of assessments should always be regarded as time-bound, and provisions for follow-up assessments should be made to ensure that assumptions remain valid and programming relevant.
- Participatory approaches: It is important that the information gathered during an assessment is based on balanced views and triangulated to ensure accuracy. Failure to consult with key actors can unwittingly create spoilers and political challenges for implementation. In this regard, a participatory approach to data collection is critical whereby the needs and priorities of all stakeholders are accounted for, particularly those of vulnerable and marginalized groups.
- Managing expectations: Assessment processes, particularly information-gathering processes, can create expectations about the type and level of assistance that a program aims to provide. If these expectations are not realized, the results can be disillusionment, hostility towards those

agencies leading the assessment, and lack of support for any resulting intervention. Those conducting an assessment must clearly communicate to all participants its purpose and the parameters of support that may be forthcoming. It may also be necessary to conduct follow-up meetings or otherwise communicate the outcome of the assessment and the resulting strategy.

- Scope: Pressure to quickly design and implement projects means that assessments are often too short and insufficiently comprehensive. In such situations, time and resources should be earmarked to facilitate follow-up assessments on key issues, ideally during the inception phase.
- Sector wide approaches: Where assessments are narrow in scope, they can overlook key issues that may impact on success. To counter this, assessments should adopt a sectoral rather than an institutional approach, whereby the entire sector is the subject of analysis in the identification of key problems and possible responses. Such an approach allows problems to be situated within a broader framework taking into account the governance, capacity, political and social context. This will help identify linkages between or within sectors that might influence an intervention's effectiveness, potential drivers of change and spoilers, and the underlying causes of problems.[5]

Good practice example 1, Timor-Leste
In transitional Timor-Leste, the United Nations administration commissioned field research on the 'Traditional Power Structures and the Community Empowerment and Local Governance Project'. The research, led by two anthropologists, highlighted the critical role played by customary dispute resolution mechanisms and their diversity as well as the population's reliance on them in resolving conflicts of both a serious and less serious nature.[6]

2. Holistic programming approaches

As demonstrated in this book, modifications to customary practices rarely occur in isolation; they are more often bound up in economic, social and security developments, and/or tied to other justice sector reforms. Interventions directed at customary justice systems should therefore aim to influence behaviours in a manner that is both deep and broad.

First, programming should take into account how outcomes at the customary level are linked to access to justice at the state level. Strategies to integrate customary and state justice fora, or encourage use of the state system by customary user groups, for example, should be accompanied by interventions aimed at addressing the challenges that prevent users from availing of courts in the first instance. This is not to say that one program needs to address all of these aims, but simply that customary justice strategies are more likely to have impact where they complement interventions at the state level. Such approaches are consistent with the broader trend towards complementary development and balanced strengthening of the component elements of the justice sector including customary fora, courts, prosecutors, public defenders, police, correctional facilities, legislative bodies and legal education institutes.[7] Integrated approaches recognize the mutually dependant and reinforcing nature of the justice chain. They can be contrasted to sectoral approaches which focus on the reform of a single institution. These approaches are rarely conducive to long-term change, since progress in one area is often constrained by weakness in others.[8]

Good practice example 2, Uganda
One of the most successful examples of a sector wide approach can be found in Uganda where core justice institutions are brought together under a Justice, Law and Order Sector (JLOS). JLOS sets out a comprehensive approach to reform, focusing on five key result areas: "promoting the rule of law; fostering a human rights culture; enhancing access to justice for all (particularly poor and marginalized groups; reducing crime and promoting safety and security; and contributing to economic development."[9]

Second, holistic approaches recognize that justice sector reform forms part of the wider development and/or peace building process, specifically that customary reform is integrally related to and must be undertaken in tandem with security, economic, civil society and governance reform.[10] As demonstrated in the Somalia case study, weak security and governance conditions can prevent the transition from a collective to an individualized system of justice. Likewise, rights-abrogating customary practices such as marrying rapists to victims are unlikely to be eradicated until complementary issues related to gender discrimination and community-level socio-economics are addressed. Such approaches may involve a shift in priorities away from eliminating rights-abrogating practices in the near term towards a greater focus on harm reduction.

Good practice example 3, Colombia
In Supachua, Colombia, staff from the local *Casa de Justicia* (Justice House) identified a link between male unemployment and high levels of family disputes and resultant domestic violence. "They also discovered that businesses in the area were reluctant to employ local people since people from outside the area could be paid lower wages."[11] To respond to this, they established an affirmative action program with assistance from the local Chamber of Commerce. Perhaps the most interesting aspect of this intervention is that, since the *Casa de Justicia* was staffed by lawyers and non-lawyers, they were better positioned to "take a broad approach ... to tackle its root rather than concentrating exclusively on its [legal] symptoms".[12]

2.1 Good practices

- Ensuring complementarity between key justice sector components and processes: Interveners should ensure that prerequisite enabling conditions are in place before a program commences, for example, by addressing the access to justice obstacles that prevent customary users from availing of the courts prior to reforms that seek to divert the resolution of certain cases to the formal justice system.
- Attention to sequencing: Certain interventions, such as revisions of customary laws or processes of self-statement, should not be implemented until full and active participation by all groups is realized.
- Bundling legal services with social services: A key challenge in enhancing marginalized groups' access to justice is that victims rarely have the means or knowledge to access legal services with a view to reclaiming their rights. A key entry point for women's legal assistance, therefore, is through pre-existing social services such as gender civil society organizations, medical and midwifery services and women-focused vocational training programs. Bundling legal services within social services or developing linkages between the two is more likely to be effective because women are already familiar with such services, trust has already been established, and women may face fewer social barriers accessing such services than approaching a legal service provider directly.
- Complementing justice programs with non-legal initiatives: Engagement with customary justice mechanisms should be complemented by non-legal initiatives that target community attitudes towards vulnerable groups such as women, children, minority groups or the disabled. Several examples were provided in the case studies of legal service providers (such as women

community leaders) teaming up with non-legal service providers (such as NGOs operating women's shelters or offering domestic violence counseling) to provide a more integrated response to victims.[13] Other examples include complementing statutory reforms with the provision of training for customary law actors, community paralegals and other key change agents on the logic behind, and benefits stemming from, the changes.

- Embedding justice outcomes into non-traditional sectors: In certain contexts, 'backdoor approaches' can produce more effective justice outcomes than direct programming. These include where there is little political support for justice sector interventions, or where the target group has priorities apart from enhanced access to justice, such as livelihoods, access to food or security. In such situations, it might be possible to introduce justice elements or outcomes through other sectors or initiatives, for example, sustainable livelihoods programs or programs aimed at facilitating land tenure security as a means of better protecting communities from exploitation from investors.[14] Likewise, education and employment for women might alter power dynamics in ways that influence customary justice processes and outcomes far more significantly than, for example, technical training.[15]
- Enhanced coordination: A key to more integrated approaches is enhanced coordination within the legal development sector, between the justice community and other development sectors, and between international and national actors. A principal difficulty is that the international development community is not homogenous; it is composed of various actors, each with different philosophies and approaches to development. As a result of political rivalry, turf battles and differences in mandates and funding sources, gaining consensus is likely to be time-consuming.[16] This might be somewhat alleviated through joint assessments and enhanced dialogue to identify potential synergies and complementarities.

Good practice example 4, Colombia
In Ciudad Bolivár, Colombia, a child care centre took the initiative to expand its services to include training in human rights and conflict management. This was prompted by a growing awareness of staff "of the prevalence of child abuse and domestic violence in the community".[17] Recognizing that it did not have the skills or resources to meet the demands for counseling, they teamed up with a local NGO that "provided the centre with training on human relations, sexuality, and general sociopolitical topics".[18]

3. A focus on sustainability

One of the key challenges identified in this book is the difficulty of crafting interventions that lead to change that is both impactful and sustainable. Normative change within customary justice systems is bound up in social and economic transition and in building the capacity of and trust in the formal justice sector, all of which are long-term and usually inter-generational processes.

3.1 Good practices

- Setting modest and achievable benchmarks: Interveners should approach programming with a view to setting manageable and realistic end goals, and adopt less ambitious expectations of what interventions can achieve in a specific time limit.[19]
- Adopt a longer-term approach: Programs should be based on the length of time it takes to influence normative change (usually 10-15 years, if not longer), rather than the length of budget cycles or a mission's mandate (usually 1-3 years).[20] To facilitate this, interveners should lobby for longer-term commitments from donors and a move away from short-term evaluation and funding mechanisms.[21]
- Reforms specifically geared towards sustainability: A guiding principle is that systems, procedures and institutions should only be introduced if they can be maintained without ongoing support. Technologically dependant systems, such as electronic data management, or those that

require telecommunication systems such as cellular telephones or Internet should be carefully considered.[22] One way to enhance the likelihood of sustainability is to build on existing frameworks, skills and cultural foundations and take steps to enhance the local ownership of reform processes.

- Key change agents: Interveners should identify and build the capacity of program 'champions' who can take project activities forward after the conclusion of the intervention.
- Programming for small wins and incremental change: This might involve interveners adopting a more flexible approach to the integration of human rights and criminal justice standards into customary processes. Such standards should be translated into realistic and achievable goals, taking into account resource endowments, the level of economic development, local expectations and entrenched cultural mores. Under this conceptualization it is accepted that such benchmarks are all desirable ends, but may not be achievable at once and are part of a long-term process of social transformation.[23]
- Integrate capacity development: A common shortcoming in many interventions is that programs are either not long enough and/or not intensive enough to achieve the critical mass of capacity that will enable the benefits to last. It is therefore important to integrate capacity development into program implementation.

4. Local ownership

The past decade has seen a trend towards locally owned action plans that respond to local needs, aspirations and perceptions of justice.[24] One rationale is that only locals have the intimate knowledge of the domestic legal framework, customs and social realities necessary to ensure that reforms will be workable, sustainable and accepted by the population.[25] Another is that approaches based on the principles of inclusion, participation and transparency are more likely to be perceived as legitimate and facilitate a sense of local control.[26] This is supported by the case studies that illustrate that interventions that evolve from the grassroots are more likely to have an impact than those spearheaded by government or external development actors.

While it is difficult to question these rationales, the concept of local ownership presents challenges in the context of customary justice systems.

First, it can be difficult to identify key customary justice actors, particularly those who represent the entire community. In customary systems, there is rarely a democratically elected or genuinely representative body with whom to consult. Even if a genuinely representative body could be assembled, this would not be a panacea. Different groups have different priorities and interests that may not be easily reconciled. Likewise, broad consultation does not guarantee a clear way forward. Just because voices are local, it does not automatically mean that they should inform strategy development. Individuals from tightly-knit and mutually dependant social groups may find it difficult to see beyond their immediate needs and circumstances, and be poorly placed to offer opinions on wider matters of legal governance. Also, local voices may not be benign, and vesting ownership in customary authorities may yield unexpected or undesirable results, for example, when local preference is incompatible with human rights and other international standards.

A further challenge is that where the will for reform is lacking, placing control over programs in the hands of local power-holders can obstruct meaningful change. In such cases, engagement may be ineffective or even counterproductive, and alternate entry points, such as through community legal empowerment, should be considered.

A better understanding of these tensions has resulted in a number of commentators advocating a more balanced and pragmatic approach to local ownership. Certainly, locally owned and driven strategies are more likely to respond to felt needs, be perceived as legitimate and hence have greater impact and sustainability. In situations where there is political will for reform combined with adequate local capacity, the natural role for interveners is to facilitate rather than lead.[27] At the same

time, the concept of local ownership should not be overstated for the sake of political correctness. Interveners should not shy away from the technical expertise they can offer, for example, in logistics, resource mobilization or training, where this can enhance the effectiveness of an operation. It is also important that interveners establish clear and articulated normative boundaries relating to acceptable and unacceptable practices that apply to interventions they are prepared to support.

4.1 Good practices

- Consultations should focus on both the supply and demand sides of justice delivery. This is because supply actors such as customary justice or community leaders do not always have good insight into the legal needs and aspirations of disadvantaged and marginalized groups and may not be powerful or willing agents of change. Similarly, gauging the views of the community through consultations with civil society leaders and household representatives is not a guarantee of valid results. The perspectives of such actors may not be representative of or encapsulate the interests and priorities of all user groups, particularly vulnerable groups. Participatory assessment methodologies — ones that involve communities in the collection of data on how justice and security is actually experienced at the individual level — are hence required to ensure that the needs of all groups are captured.
- Interventions should be based on immediate needs rather than institutional mandates or assumptions on what a society needs.
- Where a strategy of local ownership is being pursued, a rigorous assessment of local authorities' and power-holders' commitment to the proposed interventions should be undertaken.
- Rights-aware and progressive project 'champions', including community leaders, religious figures or civil society activists should be identified, supported and their capacity strengthened.
- Just as interventions can owe their effectiveness to key change agents, they can also be stymied or their effectiveness weakened by spoilers. Spoilers and other players who may resist or obstruct reform need to be identified and plans devised to mollify such behaviors.
- Strategies of local ownership should be complemented with capacity building at both leadership and community levels.
- Where complete local ownership and control over programs are not possible or advisable, programs should include a schedule for the handover of control and responsibility with clear timeframes and benchmarks.

5. Context specific strategies

Heightened awareness that justice needs vary between communities and are influenced by a range of factors including legal cultures, political history, socio-economics and religion has advanced the notion of tailor-made, context-specific strategies.[28] This trend is supported by the case studies presented in this book, which illustrate that effective interventions are context-specific and contingent upon a variety of factors including, among others, social norms, the presence and strength of a rule of law culture, socio-economic realities and national and geo-politics. Programmers thus need in-depth knowledge of a community, its customary legal systems, as well as the theories and practicalities pertaining to legal empowerment and customary justice programming. They need to be able to take this information and craft out a strategy that suits the conditions of a given situation and responds to the key justice problems facing community members.

The development of context-specific strategies does not mean that past experience is not useful or relevant. Nuanced comparative analyses — particularly those involving states with similar histories or that have faced similar challenges — can provide inspiration, good practices and lessons learned. Models, however, should rarely be exported without modification.[29] Factors that should be taken into account include:

- Governance context: Do central state actors want more or less autonomy for customary actors and are the reasons for this benign or harmful? Does the state have control of security and reach

into communities to enforce change? At the customary level, do principal customary decision-makers have the necessary influence to enforce change, particularly where this is incompatible with the interests of other community power-holders?

- Capacity: The capacity within both the customary and state justice systems should be factored into strategy design. In the aftermath of conflict or natural disasters, either or both the state and customary systems may have weakened or non-existent capacity; leaders may have been killed or fled, and communities may be displaced from their leaders. It may be that the customary legal system is the dominant mechanism for dispute resolution well into the recovery period. In such situations, it is desirable to have a balanced approach to legal development that addresses the important role played by both state and customary actors and institutions.
- Political context: Lack of political will is a key but regularly overlooked impediment to effective justice sector strategies. Reform may also be actively resisted by judges, lawyers or customary leaders if it is seen as reducing the degree of power they are able to wield or the amount of supplementary income they are able to exact.
- Social, economic and security context: Hostilities between the state and customary user groups or between different customary user groups, gender and other forms of social discrimination, and the prevalence of harmful customary practices are all likely to impact the design and effectiveness of customary justice engagement strategies. Likewise, the economic and security situation of communities where interventions are to be implemented have a determinative role, particularly where practices that are the subject of the reform have specific and important functions.
- Legal cultures: Commitment to rule of law values will influence the nature and effectiveness of engagements strategies. Where concepts such as impartiality in dispute resolution, gender equality, and equality before the law are foreign to customary user groups, strategies that focus on strengthening such values may be less effective than anticipated. By contrast, where there is broad-based normative movement towards, for example, gender equality, new space may open for complementary justice-related reforms.

6. Evaluation

Evaluation is an integral element of program design and management.[30] Its purpose is to understand whether an intervention achieved its objectives and ensure that lessons learned are fed into the design and implementation of future programs. Evaluating customary justice sector interventions are particularly challenging and complicated for the following reasons:

- Change in normative practices is usually a multi-generation process, the results of which will only be observable in the long term.
- The fluid nature of customary justice processes and external influences at the customary level make it difficult to isolate one program's contribution.
- The complex cause and effect relations involved in modifying normative practices at the customary level are often intangible and difficult to measure.
- Monitoring and evaluating customary justice processes are difficult because they are less visible and formal.

Such challenges have resulted in a resistance to, or neglect of, rigorous program evaluation. This, in turn, has contributed to a dearth of empirical evidence on the effectiveness of assistance, weak inter-country comparative analysis, and a poverty of knowledge regarding what works and what does not.

6.1 Developing an evaluation methodology

Evaluations gather evidence to determine whether or not a program achieved its goals and make recommendations on how a subsequent phase or future program can be improved. To

make such a determination, a program will typically be assessed according to some or all of the following criteria:

- How relevant were the program's objectives? This analysis involves a retrospective critique of the program's design. However, it will also consider the extent to which the objectives changed (or should have changed) during implementation. The key point of reference is the extent to which the objectives addressed the needs of the targeted beneficiaries.
- To what extent were objectives achieved? An evaluation will consider the extent to which the program produced its intended results. It is important to consider the effectiveness of both a specific program and also the impact of the intervention on the wider judicial development process.
- What impact was achieved? This question will consider the higher-level outcomes that have been achieved. Whereas effectiveness relates to the immediate results (for example, improved outcomes within the customary context), outcome impact relates to the subsequent benefits (direct and indirect) to target beneficiaries and others, intended or unintended (for example, improved access to justice for disadvantaged communities). It is important to highlight that 'impact' does not necessarily relate to whether or not the program has achieved its overall goal. Measuring goal-level impact usually requires sophisticated data collection and analysis methodologies from multiple sources over long time periods (often ten or more years).[31]
- How efficient was program delivery? This question relates to the extent to which the project made good use of its resources within the available budget and time frame for implementation.
- How sustainable are the program's benefits? This question considers the extent to which the positive outcomes from the program have been or can be sustained beyond the funding period, and the extent to which the government and/or beneficiaries are willing to assume responsibility for achieving program outcomes.

6.2 Good practices

- While accountability is an important element of evaluation, it is essential that it is not perceived as a tool to review individual performance or apportion blame. For this reason, managers need to approach evaluations in a sensitive and inclusive manner, and widely communicate the purpose and methodology of the evaluation at the outset of the program.
- A narrow focus on pre-determined indicators can miss valuable information; evaluations should always consider what *unintended* positive or negative outcomes have been achieved.
- Evaluations should seek to measure *impact* rather than *outputs* (as is common practice). Assessing the impact of a specific intervention requires a more targeted approach — this could include 'before' and 'after' surveys of populations where interventions have been undertaken, control group surveys or qualitative focus group discussions.
- Conflict sensitivity and 'do no harm' principles should inform all evaluation and information gathering processes. Where processes are perceived as favoring one group over another, or engaging with powerful individuals, there are risks, which include skewed results, that may contribute to heightened tensions.
- Evaluations can be led by the program team, an implementing partner or an independent expert. Wherever possible, however, evaluations should be undertaken collectively by a team comprising the program manager and selected staff, key stakeholders, implementing partners, beneficiaries, governing authorities and donors. Whatever decision is taken, the evaluation team should be gender-balanced, multi-disciplinary and inclusive. Participation by experts from cross-cutting thematic areas such as governance, economics and gender, and representatives from partner organizations may provide important insights and enhance the objectivity of findings.[32]
- Special measures should be taken to ensure the participation of women and other vulnerable groups, taking into account cultural norms and literacy constraints. Participatory data collection methods should be employed, including the use of multi-ethnic and mixed-gender teams, and disaggregating data for age, gender and other relevant factors.

Useful resources for developing evaluation models

Penal Reform International provides an example of a baseline survey that might be adapted and used to evaluate a customary justice mechanism[33] as well as a list of basic data required for comparative research into customary justice systems.[34]

footnotes

1 United Nations General Assembly (UNGA), *Report of the Secretary-General on Strengthening and Coordinating United Nations Rule of Law Activities* (2008) UN Doc A/63/226, para 67.

2 This section was taken from E Wojkowska and J. Cunningham, *Enhancing Legal Empowerment through Engagement with Customary Legal Systems*, IDLO inception paper (2010) 16-17.

3 UNGA, above n 1, paras 71-72.

4 The Paris Declaration commits donors and international organizations to ensure that two-thirds of country analytic work is conducted jointly by 2010.

5 The above section is an extract from *a draft UNDP Guidance Note on Rule of Law Programming in Conflict and Post-Conflict Situations (specifically, Chapter IV: Programme Design, Monitoring and Evaluation), on file with author*. See also, Organisation for Economic Co-operation and Development (OECD), OECD DAC Handbook on Security Sector Reform: Support security and Justice (2007) 42.

6 D. Mearns, *Looking Both Ways: Models for Justice in East Timor,* Australian Legal Resources International (2002) 28.

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15 S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for DFID (2003) 28-29

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26 United Nations, *Guidance Note of the Secretary General: UN Approach to Rule of Law Assistance* (2008) 3-4.

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32 OECD, above n 5, 242.

33 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 104-109.

34 Ibid 158-159.

ANNEX 3 | Framework for considering when customary decision-making may or may not be effective

1. Customary dispute resolution is usually most effective where:

- disputants live in closely-knit, multiplex communities with strong socio-economic ties;
- disputes are localized and of minor importance;
- disputants have a strong motivation to reconcile, for example, where they have to live and work together in the future; and
- customary dispute resolution actors enjoy high levels of respect and authority.

2. Customary dispute resolution is often less effective where:

- disputants are strangers or have little incentive to negotiate or cooperate;
- disputants do not share a common understanding of what is a just and fair outcome; for example, disputes between different communities, ethnic groups or where there is no impartial adjudicator;
- a serious rights violation has occurred and there is an associated need for public sanctioning, or where the associated penalty requires legal and procedural safeguards to protect the accused;
- the dispute involves parties with different levels of power and authority, which prevents them from negotiating on equal terms; examples include disputes between indigenous groups and external investors, the government and rural communities, and marginalized groups and other community members;
- the dispute involves: government service delivery; companies; complex cases involving, for example, land or the perpetration of a serious crime; and inter-community or third party cases;[1]
- the customary system is not strong enough to correct or overcome power imbalances in play, such as disputes involving third parties or investors;
- conflict-induced displacement dislocates community members from their leaders or leads to a more heterogenic population, thus weakening the strength and effectiveness of customary law;
- there is a lack of trust between leaders/decision-makers and disputants, for example, in the aftermath of conflict or natural disaster, where customary leaders may have been replaced, killed or fled;
- communities are hesitant to utilize customary fora for fear of sanction;
- certain groups within a community (such as returning refugees or youth) reject the authority of customary law in favor of statutory rights, or the customary system is not strong enough to regulate or influence the criminal behavior of groups external to the community (such as warlords or vigilante groups);
- the dispute involves land or the ownership, use or control of other types of economically productive or valuable assets;

- urbanization, changes to the economy, improved communications such as Internet access and/or modernization have led to a weakening of customary norms and the enforcement capacity of leaders; and
- the dispute involves new types of offences that are not envisaged within the framework of customary law such as drug-related crime or premarital sexual relations.

footnotes

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ANNEX 4 | Additional examples of alternate dispute resolution mechanisms to customary justice

1. Community-driven alternatives to customary justice

1.1 Saraga Peace and Good Order and Community Development Committee, Papua New Guinea

The Saraga Peace and Good Order and Community Development Committee was established in 2001 in response to increased lawlessness and criminality in Saraga Settlement, Papua New Guinea. The Committee is made up of chairpersons from 34 Peace and Good Order sub-committees, each of which represents the settlement's various ethnic groups. While the sub-committees attempt to resolve disputes within individual ethnic groups, the larger committee focuses on resolving inter-group clashes, using both mediation and restorative justice techniques. By facilitating a reduction in violence, the Committee has received support from local businesses (which were also being adversely affected by the high crime levels) and been able to negotiate the provision of water and electricity services for the community.[1]

1.2 KUP Women for Peace, Papua New Guinea

In Simbu Province, Papua New Guinea, increased levels criminality in the form of rape, murder and armed assault had caused the periodic withdrawal of government services, both of which had a disproportionate impact on women and children. In response, in 2000, a group of local women formed the KUP Women for Peace, a community organization mandated to reduce conflict, protect women's rights and promote sustainable livelihoods. KUP employs an integrated strategy consisting of activities including awareness-raising on the consequences of violence, conflict resolution training, law and policy reform advocacy, and income-generation initiatives. In 2003, for example, KUP organized a 'surrender ceremony' where local criminals turned themselves in during a public ceremony involving police, court and government officials.[2]

2. Community-driven alternative dispute resolution mechanisms in urban areas

In poor urban communities, state justice can be largely out of reach. Such communities are also often heterogeneous and dissociated from their traditional leaders, with the result that they are unlikely to be united under an organized customary system. Doubly disadvantaged when accessing justice, inter-personal and inter-group conflicts are often flashpoints for violence because there are no other dispute resolution services. It is not surprising, therefore, that in such communities, ad hoc or community-driven dispute resolution services have evolved, including:

2.1 Street Committees, South Africa

In South Africa, Street Committees, led by 7-11 elected members (usually male elders) serve between 50-200 households in urban and squatter areas. Disputes are resolved according to simple and flexible procedures and in the form of restitution or compensation-based negotiated solutions. Street committees are linked into a tiered network of civic associations, which facilitates sanctions for non-compliance through the denial of access to social services such as banking, insurance and childcare.[3]

2.2 *Juntas de Action* Communal, Colombia

Juntas de Action Communal have been established in poor, urban areas of Bogota, Colombia, affected by high levels of criminality and violence. They protect community members from eviction campaigns, lobby the state to provide essential services, and resolve intra-community property disputes that cannot be referred to state courts due to the illegality of disputants' tenure.[39]

3. NGO-led mediation and paralegal models

3.1 Dispute Resolution Committees, Cambodia

Cambodian law vests Commune Councils with the power to conciliate (but not adjudicate) civil disputes, such as small land disputes, non-violent domestic conflicts and neighborhood disputes.[5] Commune Councils are disputants' preferred means of conflict resolution because they are deemed accessible and employ reconciliatory techniques. They also serve the important function of resolving small disputes that would otherwise not be able to be taken to court for costs reasons (for example, where court fees outweigh the monetary amount being contested).[6] Commune Councils are not, however, free from problems: decision-makers lack knowledge of the applicable law; corruption and nepotism lead to unfair and unpredictable decisions; enforcement is problematic; and Commune Councils do not have the resources to conduct proper investigations.[7] In response, the Buddhist for Development Program has assisted Commune Councils to develop Dispute Resolution Committees composed of both community representatives (for example, monks, elders, teachers and women) and Commune Council members.[8] Dispute Resolution Committees also benefit from training in dispute resolution, law and human rights. Evaluations suggest that Dispute Resolution Committees are more effective at resolving disputes and lead to fewer cases being referred to the courts. The key elements of their success appear to be the training administered and the involvement of civil society in dispute resolution, which seems to have had the effect of depoliticizing dispute resolution, hence reducing the risk of process domination, and associated delays and lack of trust.[9]

3.2 Paralegal Advisory Service, Malawi[10]

In 1996, a meeting was held in Kampala, Uganda, at which 133 delegates from 47 countries gathered to discuss the state of prisons in Africa. There was no blame attributed: state and non-state actors, who were at loggerheads in their own countries, had grasped the enormity of the problems facing prison administrations across the continent. There was almost instant recognition that no one could 'go it alone' and that all needed to work together to find common solutions. The meeting produced the Kampala Declaration on Prison Conditions in Africa, which set out an agenda for prison and penal reform, including through the use of 'accredited paralegals'.

Drawing on the Kampala Declaration, Penal Reform International (PRI) in Malawi realized that unless persons in conflict with the law were afforded some type of legal advice and assistance, they would remain highly vulnerable. It was recognized that lawyers could not fill such a role: there were not enough of them; they would prove too costly; and their expertise was not required. Trained paralegals, however, could provide the necessary services and at an affordable rate.

From this, the Paralegal Advisory Service (PAS) was established in May 2000 with the modest goals of assisting young persons in conflict with the law and helping to clear the homicide backlog in Malawi prisons. PAS was predicated on the openness of the prison service to allow eight paralegals inside the four main regional prisons for a period of 12 months; they were regulated by a clear and firmly worded Code of Conduct signed by each paralegal that proscribed any whistleblowing to the media and required that every act carried out by the paralegal had to be within the sight and earshot of a prison officer. At the end of 2002, following an invitation from the Malawi Prison Service, PAS expanded its services to 13 more prisons, thereby catering for 84 percent of the country's prison population, and recruited a further 12 paralegals, bringing the total to 38, of whom 15 were women.

Between November 2002 and June 2007, PAS ran over 500 legal awareness clinics, assisting approximately 150,000 prisoners to access the justice system. Participatory learning techniques and forum theatre empowered prisoners to argue for bail, enter a plea, conduct their own defense and cross-examine witnesses. Attendance levels at the clinics increased dramatically, not so much because they were thought to be entertaining but because prisoners noticed that their friends were not coming back from court; they were being sent home, because they were either on bail or because they were found to have already served their sentence on remand.

The impact was striking. From about 40 percent before PAS started, the paralegals directly contributed to a reduction of the remand population to 17.3 percent by 2007, where it has remained.[11] The introduction of a similar scheme in Kenya in 2004 and Uganda in 2005 demonstrated a similar pattern. In each of these countries, justice sector actors attributed the drop in the prison population to interventions by paralegals and their ability to engage the participation of the criminal justice agencies in processing cases. Across the board, what attracted the interest of the prison administrations was the drop in the number of inmates and the resulting cost savings. Across Africa, high remand populations were placing considerable pressure on available space inside prisons and on their management capacities; PAS was able to reduce such pressures both in consistency with the law and with tangible human rights outcomes, creating benefits for prisoner's themselves, their communities, prison management bodies as well as the central government.

4. Community-level dispute resolution mechanisms established by the state

4.1 The Philippine *Baranguy* Justice System, Philippines

The *Baranguy* Justice System (*Katarungang Pambarangay*) is a mechanism of compulsory dispute resolution at the village level aimed at promoting speedy and accessible settlements without necessarily involving the state courts. Since civil disputes cannot be referred to courts unless the *Barangay* Captain certifies that resolution was attempted, the system also contributes to the related goal of decongesting the courts.

Disputes are mediated by three-person Conciliation Panels selected by disputants in an informal setting and without representation; Panels are supervised by a Council of Mediators selected by community members. *Baranguys* have civil and criminal jurisdiction, but can only hear disputes involving persons within or in neighbouring *baranguys*, and any criminal matter heard must not attract a penalty in excess of a one-year imprisonment or a fine of 5,000 pesos (approximately US$115); *baranguys* are also not permitted to mediate agrarian disputes or matters that involve government personnel acting in an official capacity. Mediation proceedings are recorded and submitted to the Municipal Court, and where a settlement is reached, it has the legal effect of a court judgment.[12]

The popularity of *Barangay* dispute resolution is linked to its speed, cost-effectiveness and its basis in Philippine traditional norms. The program is also successful; evaluations have estimated settlement rates at between 65-89 percent and compliance rates as high as 91 percent.[13] Drawbacks include: bias in the context of dispute resolution and elite capture; poor understanding among leaders and the public regarding the system's operation; poor reporting and supervision; and budget constraints to address these shortcomings.[14]

footnotes

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8 Yrigoyen Fajardo, Rady and Sin, above n 40, 123-124; Diprose, Deeks and Invong, above n 39, 13-14, 54-55.

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